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W. Pearson
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[Weekly Reporter, Oct. 27, 1888.]

THE

WEEKLY REPORTER,

1887-88

(THIRTY-SIXTH YEAR),

CONTAINING

CASES DECIDED IN THE SUPREME COURT OF JUDICATURE

WITH

APPEALS TO THE HOUSE OF LORDS AND THE PRIVY COUNCIL,

FROM THE 24TH OF OCTOBER, 1887, TO THE 11TH OF AUGUST, 1888.

TOGETHER ALSO WITH SOME CASES DECIDED PREVIOUSLY TO THAT PERIOD.

TO WHICH ARE ADDED

DIGESTED INDEX AND A TABLE OF THE NAMES OF ALL CASES

REPORTED DURING THAT PERIOD, AND ALSO THOSE THAT ARE COMMENTED ON IN THE 32ND VOLUME OF THE SOLICITORS' JOURNAL,

WITH

REFERENCES TO CONTEMPORANEOUS REPORTS AND PUBLICATIONS.

VOL. XXXVI.

EDITED BY

MARTIN JOSEPH BLAKE,

OF LINCOLN'S INN, BARRISTER-AT-LAW.

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PREFACE.

In the thirty-sixth volume of the WEEKLY REPORTER the characteristics of the publication will be found unaltered. Every endeavour has been made to render the reports succinct and accurate, and they have been published as soon as possible after the decisions have been pronounced. It is believed that the cases in this volume may be cited with the confidence which the Profession has always placed in the WEEKLY REPORTER.

The Annual Digest contains, as usual, a summary of all the cases published during the past year in the WEEKLY REPORTER and in the Law Reports, the Law Journal Reports, and the Law Times Reports, besides those given in the Irish Reports.

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[Weekly Reporter, Oct. 27, 1888.]

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WITH REFERENCES TO THE CONTEMPORANEOUS REPORTS.

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Court of Appeal.

From Chan. Div. Oct. 24.

BIRD *v.* ANDREW. (*a.*)

Practice—Appeals—Case in the general list—Application for postponement—Sufficient reason.

An application to postpone the hearing of an appeal which is in the general list, though made with the consent of all parties, will not be granted as a matter of course. The court requires some sufficient reason for the postponement to be shown. The fact that negotiations with a view to settlement of the appeal are pending is such sufficient reason.

Motion.

This case stood third in the general list of appeals for these sittings, but was not in the cause list of the day (the 24th of October).

F. T. Procter, with the consent of all parties to the action, moved on the first day of the sittings (24th of October) that the appeal might be postponed for three weeks, on the ground that certain witnesses, whose examination would probably have to be taken orally, would have to come up from Wales, and that the solicitor of one of the parties was at present abroad.

COTTON, L.J.—It is a great mistake to suppose that an application for the postponement of the hearing of an appeal in the list, made with the consent of all parties, will be granted as a matter of course. Parties cannot be allowed to settle the list for themselves. Appeals must come on for hearing in their due course unless a sufficient reason is shown to the court for postponing them. If parties desire that their cases should not come on in their regular turn they must apply to the court and show the court sufficient reason for granting the application. No sufficient cause has been shown here, and the application must, therefore, be refused.

LINDLEY and LOPES, L.JJ., concurred.

Solicitors, *H. P. Cobb; H. Thomas.*

NOTE.—Subsequently an application made in another cause for the postponement of an appeal appearing in the general list, though not in the cause list of the day, was granted, counsel stating that the postponement was sought with a view to enable the parties to complete terms of arrangement then in progress for the purpose of settling the matter in dispute.

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

From Chan. Div. June 25, 27, 28.

SHEPPARD *v.* SCINDE, PUNJAUB, AND DELHI RAILWAY CO. (*a.*)

Railway company—Purchase of undertaking by Government—Fully paid-up stock—Shares partly paid up—Division of purchase-money.

The capital of the Scinde, Punjaub, and Delhi Railway Co. comprised stock consisting of £20 shares which had been fully paid up, and of £20 shares upon which £5 only had been paid. The company had, under the Act incorporating it, power to call up the amount unpaid on the shares, but had never done so.

The Government of India purchased the undertaking of the company under statutory provisions, and this action was brought to determine the manner in which the purchase-money was to be distributed amongst the stockholders and shareholders respectively.

Dividends were payable to the shareholders in accordance with the provisions of the 120th section of the Companies Clauses Consolidation Act, which was incorporated in the Acts governing the company.

Held, that the holders of partly-paid shares and holders of stock were entitled to have the purchase-money divided between them rateably in proportion to the amounts paid by them respectively, so that each holder of £20 stock would receive four times as much as each holder of a £20 share on which £5 had been paid.

Somes *v.* Currie, 1 *K. & J.* 605, *considered.*

Decision of Kekewich, J. (35 *W. R.* 516), *affirmed.*

Appeal from a decision of Kekewich, J., reported 35 W. R. 516.

The facts fully appear from the report in the court below.

Rigby, Q.C., R. S. Wright, and *C. A. Reeve*, for the appellant.

Sir Horace Davey, Q.C., Barber, Q.C., and *Ingle Joyce*, for the respondents.

The arguments and cases referred to were the same as in the court below.

June 28.—COTTON, L.J.—The question has been argued at great length, but its determination does not depend on what ought to be done in the case of the winding up of a company. The only winding up here is under the Scinde, Punjaub, and Delhi Railway Purchase Act, 1886, and that Act cannot be used by the appellant in

(*a.*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

support of his contention that the same rules are to apply here as in the case of an ordinary winding up.

The only question we have to consider is whether the directors are right in the division they propose of the purchase-money received from the Secretary of State for India. The plaintiff claims that, as between the holders of the partly paid-up shares (£20 shares with £5 per share paid up) and the holders of stock of the defendant company, the purchase-money ought to be distributed upon the principle that the holders of stock were first entitled to receive seventy-five per cent. of the amount of their stock, and that the balance of the purchase-money was then distributable amongst the holders of partly-paid up shares and the holders of the stock equally, upon the footing that five shares of £20 each were equivalent to £100 stock.

In the present case the fund which is to be divided is more than enough to provide for the payment of the subscribed capital, and the plaintiff asks that £15 paid by each stockholder in respect of each sum of £20 stock held by him in excess of the £5 paid up by each shareholder in respect of each £20 share should be repaid to each stockholder, and that after such payment the residue should be divided equally between the stockholders and shareholders. The question is whether that contention is right. There is no contract here expressly and directly dealing with the division of this fund. If there was we should have to consider it. And although it is material to consider section 120 of the Companies Clauses Consolidation Act, 1845, that section applies to declaration of dividends, and does not apply to dealings with surplus capital.

Is there any decision which helps the plaintiff in his contention? No case was cited on his behalf which helps him. Cases were cited arising in the winding up of companies, but they were cases in which a loss had been incurred, and different considerations apply in such cases from those which apply here, because there the parties who had not paid up were liable to pay up in order to make the losses of the shareholders equal.

In the present case, at the time when the Secretary of State gave notice of his intention to purchase the undertaking and at the time when that notice expired no calls could have been made. It is obvious that the Secretary of State had power to regulate the making of calls, and it is obvious that when he gave notice to purchase the undertaking he would not have allowed further calls to be made so as to increase the amount of the purchase-money which would have to be paid. As to the case of *Somes* v. *Currie*, 1 K. & J. 605, 3 W. R. Dig. 76, which has been referred to, I would rather not rely upon it in the present case, as the decision turned so much upon the facts of the case, but it certainly is a decision which in no way assists the plaintiff's contention.

In dealing with the case before us it may be well to know what would be the rule in the case of an ordinary partnership. In my opinion the rule is not that which is contended for on behalf of the plaintiff. I think the general rule is that, after providing for the capital at the credit of each partner, the surplus assets should be distributed in the proportions in which the capital has been contributed by the partners. That view is supported by *Binney* v. *Mutrie*, 12 App. Cas. 160, 35 W. R. Dig. 143, and is in accordance with the proposition laid down in Lindley on Partnership, 4th ed., p. 679.

Now, as there is no express contract here we must consider what, in accordance with the true principles of equity, the division of this fund ought to be. The directors say that the division ought to be in proportion to the capital paid up. The plaintiff says that after the stockholders have been paid the excess of payments made by them over the amounts paid by the shareholders the surplus ought to be divided in proportion to the nominal capital. Which of these contentions is right? I think the plaintiff's contention is wrong. We must look at the particular circumstances of this particular case to see under what circumstances the plaintiff and the other shareholders took the shares and what is right to be done with the surplus moneys. The shares were issued in October, 1870. Previously to that by the Scinde Railway Co.'s Amalgamation Act, 1869, which also incorporated the Companies Clauses Consolidation Act, provision was made for amalgamating various undertakings of the company and enabling the company to issue consolidated stock in lieu of shares, and to contract with the Government of India for the sale to them of the company's property.

Before the plaintiff entered into or became a member of the company there was a contract for amalgamation, which contained a provision as to the purchase of the company's property by the Secretary of State. It has been contended that if that affected the rights of shareholders it was *ultrà vires*. In my opinion that contention is wrong. There being no express contract here the plaintiff must be taken to have come in with notice of this agreement that the Secretary of State might purchase the property. And when new shares were issued in October, 1870, an option was given to subscribers to pay in full and take stock or to pay only £5 on each share and remain liable for the remaining £15 when called up. And this option remained open until February in the following year. The plaintiff did not think right to avail himself of this option; he only paid £5 per share, but he knew his liability and also that calls only could be made if sanctioned by the Secretary of State. Ought we, then, in the special circumstances of this case, to say that the liability is to stand as if the money had been fully paid up? In my opinion we have sufficient here to show that the proper rule in equity is not that contended for by the plaintiff and that liability does not equal payment. The payment of dividends was not to be in accordance with the nominal liability, but on the amount actually paid, as the plaintiff knew, and the liability was not to be considered as equivalent to payment. The payment on the shares and not the liability on them was what was to be regarded in ascertaining the price to be paid by the Secretary of State for the property of the company.

If an estate is sold and the purchase-money is divided, any person who has advanced money for the original purchase of it would obviously be entitled to a share of profits proportionate to the amount he advanced.

In my opinion the division proposed by the directors is right, and the appeal must be dismissed.

BOWEN, L.J.—I am of the same opinion. The question seems to me to turn on a simple ground, though the case is not an easy one. We must first take care to see out of what the rights of the parties spring, and as soon as we have seen from what the rights arise we must then apply the rules of equity. The great part of the plaintiff's argument was based on the assumption that this was a case of a winding up of a company; but when we examine the law we find that it is not a case of winding up in its strict sense. The rights of the parties were settled by the Act of 1886. Neither is this a case of a dissolution of partnership. There is no right arising out of any contract at all, and the plaintiff does not come here to claim the distribution of the fund under any contract. The distribution does not arise out of any contract, and the equity we have to apply is not the consequence of any contract. The plaintiff seeks to prevent the distribution of the fund in a particular way. This is a case of the distribution of a fund, not because of any contract for distribution, but because under the circumstances, everyone is interested in having it distributed, and what we have to consider is whether the proposed method of distribution is equitable

or not. We have first to consider what is the situation. Here we have a company which has been turned into a special kind of thing, and which has made arrangements to sell itself bodily. By the Act of 1869, s. 21, and the agreement made thereunder in 1870 with the Secretary of State, he was to have the option of taking over the whole concern upon payment of a sum equal to the value in the market of its stocks and shares. At the time when the plaintiff took these shares he had full notice of this agreement, and he knew that if the Secretary of State gave notice that he would purchase the concern the purchase-money would be assessed in a particular way. Under these circumstances what value is to be attached to the liability to pay calls?

Under these particular circumstances the provisions of section 120 of the Companies Clauses Act as to the division of profits have to be considered. Is there anything inequitable in the way the directors propose to divide this fund? That can be answered in one way only according to common sense. If the fund be produced by unequal contributions there can be nothing inequitable in the division being on the same footing. Was the sum produced in any way by the liability to pay calls? That is a question of fact, and I am satisfied that the liability to pay calls was in no way an element in the production of this purchase-money. It in no way entered into the production of the profits of the company. It was not so treated in the agreement. It is said we must not look at the agreement. I do not agree with that; the plaintiff had notice of it when he purchased the shares.

Since 1870 it is admitted that there was no substantial chance of further calls being made, and after March, 1885, when the Secretary of State gave notice to purchase, no calls could be made. That being so, as a matter of fact this purchase-money was not the result of the liability to pay calls, but was produced by the money actually paid. I do not rely on *Somes* v. *Currie*, because I think that case probably turns on the view which the Vice-Chancellor took of the facts.

Fry, L.J.—I am of the same opinion. The question arises on the sale of a whole undertaking. At the time of the sale the property of the company consisted of contributions by stockholders and shareholders; the capital consisted of £11,010,160 stock and 14,832 shares of £20 each, on which £5 only had been paid. There was no money owing on debentures or loans. After the sale the produce must be distributed, because there was no reason for keeping the money together. I think there was no express agreement as to the distribution, and no statutory provision exists. It seems to me that we have a simple case of property resulting from unequal contributions, and the question is, What principle applies? Now it is obvious that the distribution must be an equal one. But equality according to what? It cannot be by counting the heads of the stockholders and shareholders. It can only be according to contributions of those who have produced the property. It seems to me that, in this case, distribution must be proportionate to contribution. But it is said, suppose the property to have been produced not by unequal contributions but by unequal liabilities to pay, the proceeds must therefore be distributed according to the unequal liabilities. I agree that in that case the distribution must be guided by the amount of liabilities. I conclude that in this case the assumption of liability by shareholders has not in any way produced the property, and that it cannot be said that capital has, in the least, been increased by the liability. But if it were otherwise, and the property was produced partly by contributions and partly by liability, how would distribution have to be made? I say that renders it necessary to look at the constitution of the company. That, I think, necessitates the introduction into the constitution of the company of the mode in which the company had agreed to sell to the Secretary of State. The constitution of the company says that everything in the way of good things is to go according to the money paid, and not according to the money subscribed but not paid. By the Act payment goes for everything, liability for nothing. The moment that notice was given by the Secretary of State of his intention to purchase no further calls could be made, and, therefore, the liability to pay was of no moment.

Then another objection was raised. It was said that it was reasonable and proper that the property should be distributed in the way that losses are to be borne. I think that would be unjust here, because profit and loss according to my view do not run together.

In my judgment the surplus must be regarded as a sum paid in the expectation of future profit and therefore it should follow the same line as profits. Here the profit was estimated on the amount paid, and not on the amount subscribed.

I agree with the other Lords Justices that the cases cited do not decide this case.

Appeal dismissed.

Solicitors for the appellant, *Trinders & Romer.*

Solicitors for the respondents, *Hollams, Son, & Coward.*

From Chan. Div. March 8.

Helmore v. Smith. (No. 2) (a.)

Partnership—Judgment against one partner—Execution by sheriff—Dissolution—Purchase of interest by other partner—Payment out of partnership assets—Setting aside sale.

Under a judgment against one of two partners, the sheriff at a sale by auction sold his interest in the partnership to the other partner, and executed an assignment of it to him. The purchase-money was paid by the partner out of the partnership assets.

Held, that the sale must be set aside.

Held, also, that, under these circumstances, there was no dissolution of the partnership.

Whether there would have been a dissolution of the partnership if the partner had paid the purchase-money out of his own money, quære.

A sheriff under a fi. fa. *can only sell such assets of a firm as are seizable, not book debts or goodwill.*

Decision of Bacon, V.C., *affirmed.*

Appeal from a decision of Bacon, V.C.

The case has been reported on another point, 35 W. R. 157, 35 Ch. D. 449.

In December 1881, the plaintiff, who carried on business in co-partnership with the defendant as coal merchants, in the name of Helmore & Smith, became temporarily deranged in mind, and was confined in Bethlehem Hospital. In April, 1882, he was discharged from the hospital.

The plaintiff at the time of his confinement in the hospital was plaintiff in three actions then pending, but owing to his state of health they were abandoned and judgment was allowed to go against him by default. About £86 was required to satisfy the judgments.

On the 15th of March the sheriff levied execution on the judgments upon the plaintiff's "chattel interest" in the goodwill and effects of the partnership business.

On the 24th of March this interest was sold by the sheriff by auction to the defendant for £125, and on the

(a.) Reported by W. Ivimey Cook, Esq., Barrister-at-Law.

30th of March, 1882, an assignment thereof to the defendant was executed by the sheriff. The defendant thereupon changed the name of the firm, maintaining that the partnership had been dissolved and that the plaintiff had no further interest in it.

The plaintiff, on the other hand, alleged that the purchase was void on the ground that the £125 paid by the defendant for the plaintiff's interest in the partnership was a totally inadequate sum, and that it was in fact worth £2,500, and that the defendant had taken advantage of the plaintiff's illness and absence to purchase the interest at an inadequate price and to secure it for his own benefit.

This action was accordingly brought by the plaintiff claiming (1) a declaration that the purchase by the defendant of the plaintiff's share and interest in the partnership business was a purchase by him as trustee for the plaintiff; or (in the alternative) a declaration that the purchase was fraudulent and void as against the plaintiff and ought to be set aside, and the deed of the 30th of March, 1882, delivered up to be cancelled; or a declaration that in any event the plaintiff's share did not pass by the sale and assignment by the sheriff; (2) a declaration that, notwithstanding the said transaction, the defendant remained and was partner with the plaintiff in the business; a dissolution of the partnership as from the date of the writ; and the usual accounts and other relief incidental to a partnership action.

It was admitted by the defendant in evidence that the £125 was paid to the sheriff out of money standing to the credit of the partnership.

On the 8th of November, 1886, Bacon, V.C., held that the sale by the sheriff was inoperative, and must be set aside; and that, notwithstanding the purchase, the defendant remained a partner with the plaintiff, and that the partnership must be dissolved as from the date of the judgment, and the ordinary partnership accounts taken.

The defendant appealed.

Rigby, Q.C., and *G. Henderson*, for the appellant.—The partnership was dissolved by the seizure and sale by the sheriff of the plaintiff's interest. [COTTON, L.J.—I suppose, beyond doubt, a sale to a stranger would operate as a dissolution.] Yes, that would be so: *Skipp* v. *Harwood*, 2 Swans. 586, n.; *Aspinall* v. *London and North-Western Railway Co.*, 1 W. R. 518, 11 Hare, 325; *Habershon* v. *Blurton*, 1 De G. & Sm. 121. As to payment by the defendant out of the partnership assets, the defendant intended to purchase the plaintiff's interest with his own money, and after the sale he might well have supposed himself to be owner of the whole business, including the money at the bank. [LINDLEY, L.J.—The sheriff obviously purported to seize more than he could under a *fi. fa.*] That may be so. He can only convey what he has a right to seize.

Millar, Q.C., *Oswald*, and *Emanuel*, for the plaintiff, were not called upon.

COTTON, L.J.—This is an appeal from a judgment of Bacon, V.C. The plaintiff and the defendant were carrying on business in partnership together, when unfortunate circumstances connected with the health of the plaintiff necessitated his being under confinement for a time. He seems to have brought various actions, which were not prosecuted by him, and the defendants in these actions obtained judgment against him for the costs of these actions. On these judgments the defendants issued writs of execution; the writs were placed in the hands of the sheriff, and the sheriff seized chattels belonging to the partnership. That being so, the defendant bought from the sheriff the interest of the plaintiff in a great deal more than the chattels seized, for he bought the share and interest of the plaintiff in the partnership; and this was assigned to him as well as the interest of the plaintiff in the chattels which were seized.

Now I do not think that it would be right in this case—certainly not without hearing further argument—to lay down general principles or rules as to the rights of the solvent partner, or as to the right of a stranger purchasing from the sheriff under such circumstances. To my mind the case is to be decided against the defendant, on the ground that he did not buy these goods with his own money. I will assume—and it is only assuming, for we have not heard the plaintiff here—that the defendant, when he paid for what he bought from the sheriff, thought he would become entitled to the whole of the partnership property, including the balance at the bankers; but, in fact, he paid the purchase-money out of the banking account of the partnership; therefore, notwithstanding the seizure by the sheriff, the plaintiff would be entitled to have an account. The defendant bought with part of the partnership property, subject to such rights of account as there might be between the plaintiff and the defendant; and, in my opinion, that being so, he cannot insist that he bought for himself so as to prevent the plaintiff from being considered as still a partner in the business, on the ground that the purchase from the sheriff was of that which the sheriff had a right to seize. It was said that the defendant intended to buy for himself, and that he thought what he was paying was his own money. I will assume that he did: but did not he do so under a mistake of fact? He knew this was a partnership banking account; and the mere fact that an opinion was entertained by him (if it was) that the assignment by the sheriff had given him a right to consider the banking account as his own will not make the money his if in fact it was not. The mere mistake in law will not excuse or alter the effect of what he has done. Undoubtedly, if there is a seizure of partnership effects by the sheriff under an execution against one of the partners, and a purchase by a stranger, that is a dissolution of the partnership.

I give no opinion as to what would have been the result if the co-partner, the defendant, had in fact bought with his own money; but, as a fact, that which he took was not his own money, but the money of himself and his partner, subject to the partnership account. In my opinion it would be wrong to say that by the seizure and purchase by him he had made himself owner of the plaintiff's interest in the partnership, so that after that time he could carry on this business treating himself as solely and absolutely entitled to the partnership business. The account must be taken, and in the account the sum paid will have to be charged to the plaintiff. That is a very different thing from the contention urged by Mr. Rigby, that from the time of the sale by the sheriff and purchase by the defendant the defendant was the sole owner of the business, subject to any rights of taking the accounts which the plaintiff might have. In my opinion, although it would be right to correct the mere date in the Vice-Chancellor's judgment by saying that the dissolution and end of the partnership took place on the 1st of April, 1886, according to the provision in the articles, that is no material alteration. The decree of the Vice-Chancellor must be affirmed, and the appeal must be dismissed, with costs.

LINDLEY, L.J.—I am of the same opinion. In giving my reasons I may say that the subject involved is one which I have frequently studied for more than twenty years, and I know the difficulties surrounding it. But in this case no difficulty arises. A writ of *fi. fa.* was issued against one of two partners in the business of coal merchants. Let us consider what the sheriff could do under that *fi. fa.* He could seize all such of the assets of the firm as are seizable under a *fi. fa.*, but he

could not seize book debts or goodwill. The *fi. fa.* does not touch such things; and it is a mistake, and a very serious mistake, to suppose that when the sheriff, under a separate execution against one of several partners, seizes the partnership goods, and sells the share and interest of the execution debtor in these goods, the sheriff can, or does, in practice sell the whole of the execution debtor's interest in the partnership. Such a case is conceivable, but in practice it never arises, because there are always in practice assets which cannot be reached by *fi. fa.* What the sheriff has got to sell is not the share and interest of the execution debtor in the partnership, but the share and interest of the execution debtor in such of the chattels of the partnership as are saleable under a *fi. fa.* The unfortunate purchaser from the sheriff has to find out what he has really had assigned to him, and that he can only do by a partnership account; there is no other method of proceeding. That does involve practically a dissolution of the whole concern. Now, what makes this particular case easy is this: When the sheriff sold under the *fi. fa.* he sold to the continuing partner, the solvent partner, who did not pay the purchase-money to the sheriff out of his own money, but paid for what he purchased out of the assets of the partnership. In point of law, the necessary result of buying this share with the funds of the concern is that there was no dissolution at all. The purchase was made on behalf of the firm, and the Vice-Chancellor was quite right in treating such a seizure and such a sale as not amounting to a dissolution. We must correct the date, as suggested by Cotton, L.J., but the appeal ought to be dismissed, with costs.

Lopes, L.J.—If the defendant in this case had bought from the sheriff what he did buy with his own money very difficult questions would have arisen, which would have required time and consideration to determine. But it is clear in this case that the defendant did not buy with his own money, but with the partnership assets. Under these circumstances he cannot, in my opinion, successfully contend that he bought for himself, nor can he contend that he is entitled to exclude the plaintiff from the benefit of the purchase made with the money belonging to the partnership. I think the Vice-Chancellor was right in holding in this particular case that there was no dissolution.

Solicitors for the plaintiff, *Joel, Emanuel, & Co.*

Solicitor for the defendant, *R. Furber.*

High Court of Justice.

Chan. Div. Kay, J. — Oct. 29.

In re Cameron and Wells. (*a.*)

Voluntary conveyance—Marriage settlement of widower—Limitation to his children by first wife—Consideration—Subsequent mortgagee—27 Eliz. c. 4.

The principle of Newstead *v.* Searles, 1 *Atk.* 265, *West temp. Hardw.* 287, 9 *App. Cas.* 320 *note, that the children of a widow by a former marriage taking under a settlement made on her second marriage are not to be treated as volunteers, does not extend to the case of the children of a widower.*

By a settlement made on the second marriage of a widower land belonging to him was conveyed in trust for his children by a first marriage absolutely, and personally belonging to the wife was settled on her absolutely. The husband afterwards mortgaged the land.

Held, that the settlement was voluntary as regards the children of the husband, and that, by 27 Eliz. c. 4, the limitation in their favour was void as against the mortgagee.

Adjourned summons.

This was a summons under the Vendor and Purchaser Act, 1874. The contract was for the sale of certain freehold property situate at Holyhead, which the vendor sold as mortgagee under his power of sale. The mortgage of the property to the vendor by John Ellis was dated the 10th of July, 1880, but the abstract of the title disclosed an indenture of the 24th of December, 1879, made between John Ellis of the first part, Jane Owen of the second part, and trustees of the third part, whereby, after reciting that a marriage was intended between John Ellis and Jane Owen, that John Ellis was seised of the freehold hereditaments intended to be thereby granted (which included the property now contracted to be sold) in fee simple, and that Jane Owen was possessed of personal estate, and that it had been agreed to assign the respective properties and premises in manner thereinafter appearing "in order to provide for the children of the said John Ellis by his first wife," in consideration of the premises and of the intended marriage the freehold hereditaments were conveyed by John Ellis and Jane Owen, and the personal estate was conveyed by Jane Owen to the trustees in trust, with respect to the property of John Ellis, "for the children of the said John Ellis by his first wife, share and share alike as tenants in common"; and, with respect to the property of Jane Owen, in trust for her absolutely. The marriage was afterwards solemnized. In the requisitions on the title the purchaser declined to admit that the deed of the 24th of December, 1879, was voluntary as regards the children of the first marriage of John Ellis. The vendor insisted that the consideration of marriage did not extend to those children, and that the deed, being, therefore, voluntary as regards them, was invalid as against the mortgagee. The summons was taken out by the purchaser asking a declaration that his objection to the title had not been sufficiently answered, and that he might be discharged from the contract.

Renshaw, Q.C., and *J. Maurice Lloyd*, for the purchaser.—The settlement of the 24th of December, 1879, is not void, under 27 Eliz. c. 4, against the mortgagee as being without consideration and voluntary, for the children of John Ellis by his first wife were within the marriage consideration and not volunteers. A limitation in favour of existing children of the settlor is an exception to the rule that the consideration of marriage does not extend to relatives other than the issue of the marriage: *Newstead* v. *Searles*, 1 Atk. 265; *Gale* v. *Gale*, 25 W. R. 772, 6 Ch. D. 144; *Mackie* v. *Herberteon*, 9 App. Cas. 303, 32 W. R. Dig. 176. [Kay, J.—Those were cases of the children of the wife by a former marriage.] In *Clarke* v. *Wright*, 9 W. R. 571, 6 H. & N. 849, Blackburn, J., treats *Newstead* v. *Searles* as deciding that the owner of property may, on making a settlement on marriage, make a binding provision for his existing children, thus including the case of a husband's children.

They referred to Dav. Conv., vol. iii., pt. 2 (2nd ed.), p. 833, where the cases are collected.

Bardswell, for the vendor.—In *Price* v. *Jenkins*, 25 W. R. 427, 4 Ch. D. 483, Hall, V.C., held that a limitation in a marriage settlement in favour of a son of the intended husband was void as against a subsequent purchaser from the husband, and, although the decision was reversed on another ground, the Court of Appeal said they gave no opinion on this point: s. c., 5 Ch. D. 619, 25 W. R. Dig. 253. The case of the children of a widow is an exception to the general rule, and Dart says

(*a.*) Reported by H. F. Ameron, Esq., Barrister-at-Law.

(V. & P., 5th ed., p. 897) that a settlement by a husband on his second marriage in favour of issue by a former wife is not within the exception, and this statement of the law is expressly left untouched by Fry, J., in *Gale* v. *Gale*.

Renshaw replied.

Kay, J.—In this case the question, which is one of very considerable interest, arises in this way. On the marriage of John Ellis to a lady who had some property of her own, a settlement was made which is in a very short form. [His lordship read the material parts of the settlement, and continued:—] After that the husband mortgaged the property which he had so settled upon the children of the first marriage, and the question is whether, under the statute 27 Eliz. c. 4, that mortgage can prevail against the children of the first marriage.

Undoubtedly the ordinary rule is that a settlement of that kind is voluntary as to every one who does not come, as it is phrased, within the marriage consideration, and the only persons who come within the marriage consideration—that is, the only persons from whom it is assumed that consideration moves—are the husband, the wife, and the children of the marriage. The phrase that they come within the marriage consideration means that they must be all treated as persons from whom consideration moves for the settlement. If there is in the settlement a limitation in favour of collaterals, of course no consideration moves from those collaterals, if, that is, they settle no property of their own. Therefore collaterals, generally speaking, are not within the consideration for a marriage settlement, and when it is said that collaterals are not within the marriage consideration, this is, in truth, an expansion of the phrase that no consideration moves from the collaterals, and, therefore, so far as collaterals are concerned, the interest given by the settlement to them is by way of voluntary gift. As between the husband and wife it is not a voluntary gift; there is ample consideration as between the husband and wife for every provision contained in the settlement, but that does not make the collateral any the less a volunteer. According to the case of *Davenport* v. *Bishopp*, 1 Ph. 698, the settlement is a contract between the husband and wife; they can enforce it, and, when it is enforced, the collaterals get the benefit of it. So, also, if there be an executed settlement, as this was, the volunteer can assert and enforce the trust in his favour; but, still, he is only a volunteer, and if the settlement is impugned, either under 13 Eliz. c. 5, by creditors of the settlor who are creditors at the date of the settlement, or under 27 Eliz. c. 4, by a purchaser for value in the case of lands, then the collateral is treated, for the purposes of those statutes, as being only a volunteer, and the ordinary principle, which has been adopted rather by addition to the words of the statute than otherwise, that every voluntary settlement shall be deemed to be fraudulent and void, applies. But it is said that there is an exception to this principle when a widow provides by such a settlement for her children by a former marriage. How those children are any the less volunteers than any other stranger to the marriage consideration I confess I am entirely unable to see. No consideration moves from them. It is impossible to say that they are within the consideration of the second marriage of the widow. But, undoubtedly, in the case of *Newstead* v. *Searles*, a decision pronounced very long ago by a great judge—Lord Hardwicke—some kind of exception was made in favour of the children of a widow who are included in the limitations under a settlement made on her subsequent marriage. I do not profess to understand it, and I may say so without much reluctance, because, observing the decisions which have been based upon that one I do not find that the reasons given in explanation of it have always been consistent. Lord Selborne, in the recent case in the House of Lords—*Mackie* v. *Herbertson*—gave a very ingenious reason—namely, that in *Newstead* v. *Searles* the children were to take *pari passu* with the children of the marriage which was then being contracted, and, therefore, were so complicated and mixed up with those children that their number determined the shares of those children. That is a very ingenious reason, but whether that was the reason which Lord Hardwicke had in his mind may be doubted. In *Clarke* v. *Wright* no such reason seems to have been given, but the case of *Newstead* v. *Searles* was treated as an absolute authority for the proposition that the children of a widow, at all events, taking under a marriage settlement, were not to be considered volunteers, although every other collateral might be. I confess myself unable to understand that. It seems to me that whatever bargain may be made between the husband and wife in favour of the children of the former marriage of the wife has no more to do with the matter than in the case of any other collateral whatever. When any collateral takes an interest under a marriage settlement it may be the bargain between the husband and wife that the collateral should so take; but that does not make him any the less a volunteer, because no consideration moves from him, which is the test whether the interest of the collateral is or is not that of a volunteer. But then it is said that that exception has never been extended to the case of the children of the husband, and that there is a distinction between the children of a widower by his former marriage and the children of a widow by her former marriage. I confess I do not see why there should be any such distinction. There might, of course, be a distinction in a case where the widower takes nothing whatever from the intended wife, but if a settlement on his children be a part of the bargain by which property both of the intended husband and of the intended wife is settled, why should not that be a bargain for value between the husband and wife? I confess I do not see why it should not. Suppose that only property of the intended husband was settled, and that it was settled upon his children, by a marriage settlement reciting that, in consideration of the marriage, the husband and wife agreed that the husband's property should be settled on his children, why should not that be a valuable consideration as between those two? No one could doubt that it was so, because the marriage proceeds on the faith of the contract being carried out. But then how does that make the children of the husband anything but volunteers? As between them and the husband and wife no consideration moves from them. I see no distinction in the world in this particular case between the children of the husband and those of the wife. But I confess myself unable to understand any intelligible principle under which the children of the intended wife by a former marriage, taking under a settlement such as this, could be anything but volunteers. There has been this exception introduced in their favour very long ago, and by a great judge; though as Williams, J., in his judgment in *Clarke* v. *Wright*, at p. 880, said, when the decree in *Newstead* v. *Searles* was made the law had not been yet settled. Still, that decision has been adopted and followed, so far as I know, ever since, but only in the case of children of the intended wife. I am asked to apply it to children of the intended husband, but I find that in the case of *Price* v. *Jenkins* Hall, V.C., distinctly refused to apply the doctrine to children of the intended husband, and in *Gale* v. *Gale* Fry, J., following *Newstead* v. *Searles*, and applying the doctrine to children of the intended wife, says: "My decision has nothing to do with the case of the husband making a provision for his children by a former wife, as to whom Mr. Dart suggests that the same considerations do not apply." Therefore I presume

that other judges were in the same mental condition upon the point as I am; they did not thoroughly understand how the exception in the case of the children of the wife came to be introduced, and, not so understanding, they declined to carry it further by applying it to the children of the husband. That is a state of authority which, though I think it a lamentable one, I am bound to regard. I therefore hold that this settlement is voluntary as regards the children of the husband by his former marriage, and that the mortgage is good as against them.

Solicitors, *Peacock & Goddard*, for *J. Lloyd Griffith*, Holyhead; *Jaques & Co.*, for *Glynne, Jones, & Jones*, Bangor.

Chan. Div. } Chitty, J. } Feb. 4, 11.

In re ROYAL LIVER FRIENDLY SOCIETY. (*a.*)

Friendly society—County Court—Certiorari—*Jurisdiction—Friendly Societies Act*, 1875 (38 & 39 *Vict. c.* 60), ss. 22 (*sub-section* d.), 30 (*sub-section* 10).

Under sections 22 (*sub-section* d.) *and* 30 (*sub-section* 10) *of the Friendly Societies Act*, 1875, *the jurisdiction conferred on the county court is not exclusive, but permissive only.*

Motion.

This case raised a question whether the provisions in the Friendly Societies Act, 1875, ss. 22 and 30, for the reference of all disputes between the society and its members to the county court are permissive or peremptory.

The Royal Liver Friendly Society was established in 1850 under the Act then in force with reference to friendly societies.

At a meeting of the society held in 1886 new rules were certified, of which rule 7 provided as follows:—"The provisions of section 30 of the Friendly Societies Act, 1875, apply to this society, and are hereby incorporated with the rules of this society, and whenever the words 'the society,' 'a society,' or 'any society,' occur, they shall be held to include the Royal Liver Friendly Society." The provisions of the said section are as follows:—"(10) In all disputes between a society and any member or person insured, or any person claiming through a member or person insured or under the rules, such member or person may, notwithstanding any provision of the rules of such society to the contrary, apply to the county court or to the court of summary jurisdiction for the place where such member or other person resides, and such court may settle such dispute in manner herein provided." At the same meeting a resolution was passed for the payment of a sum of about £1,600 in respect of certain costs.

Two members of the society applied to the county court for a declaration that the proposed payment was *ultra vires*, and a rule *nisi* was obtained for a *certiorari*.

Cause was now shown against making the rule absolute.

R. Neville showed cause, citing *The Municipal Permanent Investment Building Society* v. *Kent*, 32 W. R. 681, 9 App. Cas. 260.

Romer, Q.C., and *Rutherford, contrd.*—That case was decided on a different Act.

CHITTY, J.—It was admitted on behalf of the plaintiffs in the county court action that the case was a fit one to be removed into the High Court if the High Court had any jurisdiction in the matter. The question of jurisdiction depends upon sections 22 and 30 of the Friendly Societies Act, 1875. Section 22 renders it necessary to refer to the rules of the particular society in order to see whether the rules do provide the manner in which disputes of this nature are to be settled. The dispute in this case is certainly a dispute of the nature mentioned in section 22. Sub-section *d.* is permissive only so far as the person aggrieved is concerned, and so far as the county court and the court of summary jurisdiction are concerned confers jurisdiction on them. But it does not exclude the jurisdiction of the High Court.

I now turn to section 30, which has been slightly amended by 42 & 43 Vict. c. 9; but the amendment is immaterial for the present purpose, it being admitted that this is a society within the scope of the first part of the section—*i.e.*, a society which receives contributions by means of collectors at a greater distance than ten miles from the registered office. As the society was in existence at the commencement of the Act, all the provisions of section 30 are, by sub-section 13, made applicable. Sub-section 10 is, again, a permissive section, giving the member the right to resort to the county court or to the court of summary jurisdiction, but not conferring exclusive jurisdiction on those courts. The statutory enactment overrides any rule which provides that the member may not go to the county court or may not go to the court of summary jurisdiction. The effect of section 30, therefore, is that the provisions of this section do, and from the enactment itself must, apply to this society.

Rule 7 is the only rule of this society which is material to be considered. It correctly states that the society is governed by section 30, and in stating what the provisions of that section are it mentions sub-section 10, the effect of which I have already stated. For the purpose of answering the question whether the rules of this society do contain any direction as to the manner in which disputes shall be decided, I turn again to section 22, and the answer appears to be they do not. Sub-section 10 of section 30 merely enacts that the member aggrieved may go to the county court or court of summary jurisdiction notwithstanding any provision to the contrary to be found in the rules. Here there is no provision to the contrary; but, with the exception of rule 7, there is no rule whatever on the subject of how disputes are to be settled. There are no such provisions in the Act before me as were to be found in the Building Societies Act, 1874, on which the decision of the House of Lords in *The Municipal Permanent Investment Building Society* v. *Kent* turned. The county court has jurisdiction, but not exclusive jurisdiction. The rule will be made absolute.

Solicitors, *Gregory, Rowcliffes, & Co.; Brabner & Court*, Liverpool.

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

Q. B. Div. (A. L. Smith and Charles, JJ.) Oct. 24.

HILLYARD *v.* SMYTH. (*a.*)

Practice—Substituted service—Domicile out of jurisdiction—Rules of 1883, *ord.* 9, *r.* 2; *ord.* 10 *r* 1; *ord.* 11, *r.* 2.

Where effectual personal service cannot be made upon a person "domiciled or ordinarily resident in Ireland" owing to ord. 11, *r.* 1 (e.), *the court will not allow substituted service to be made.*

Motion to set aside order of master for substituted service of writ.

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

The defendant, up to the 3rd of November, 1886, resided in London. On that date she married a Mr. Smyth, who resided in Ireland. The defendant left for Ireland on the 8th of November, and with the exception of two visits to her house in town had resided there ever since. The house in London was settled upon her by her first marriage settlement, and was still in her possession. The plaintiff took out a writ against the defendant on the 9th of November, of which previous notice had been given her. By an order of the master substituted service of the writ was allowed upon the defendant's sister, who had been left in charge of the defendant's London house. Against this service the defendant now appealed.

Robson, for the defendant.—The defendant's domicile is that of her present husband, and that is in Ireland. The application to the master was *ex parte*.

Munday, for the plaintiff.—The defendant retains possession of the house in London, and has visited it when she chose. She was ordinarily resident there at the time of the claim. She had notice of the claim, and may have left on purpose to avoid service of the writ.

A. L. SMITH, J.—This is an appeal against an order for the substituted service of a writ. The motion for the order was heard *ex parte*, and I have no doubt that the master, upon the materials before him, exercised a sound discretion. But the defendant now appears before us on appeal against the order. The orders for substituted service are regulated under ord. 9, r. 2, and ord. 10, r. 1, but what we really have first to consider in this case is whether service out of the jurisdiction could have been allowed against the defendant. Now it is an express rule under order 11, r. (*e.*), that service out of the jurisdiction is not to apply to persons "domiciled or ordinarily resident in Scotland or Ireland" in order to prevent inhabitants of those countries being brought within the jurisdiction, assumimg them to have been domiciled in Scotland or Ireland at the time; and I have often heard it said by the Lord Chief Justice that this was expressly added by the framers of the new rule to deal with the difficulty which had arisen in those cases. If personal service can be effected upon any Scotchman or Irishman in this country, that would be good; but substituted service for persons domiciled in those countries is expressly excepted; and, clearly, being once so domiciled, a person is not to be brought within the English jurisdiction unless voluntarily submitting to such jurisdiction by allowing personal service of the writ. This is clear from the judgments of James and Mellish, L.JJ., in *Sloman* v. *Government of New Zealand*, 25 W. R. 86, 1 C. P. D. 565. Well, then, could direct service have been effected on the defendant? It could not if she was "domiciled or ordinarily resident in Ireland." Undoubtedly she was ordinarily resident in England up to the 3rd of November, 1886, but upon her second marriage she voluntarily adopts her husband's domicile, and that is in Ireland. The fact that she has property and separate estate of her own in England does not alter her domicile or ordinary residence; nor does the fact of her having been over here for short periods in April and May since that time, or the assumption that she left England earlier to avoid service of the writ, prove in any way that she was not, and is not, now ordinarily resident in Ireland. Her ordinary residence is with her husband, and that residence is admitted to be in Ireland. I think the service of this writ must be set aside, and the plaintiff must pay the costs of this application.

CHARLES, J.—I am of the same opinion. The affidavits prove satisfactorily that the defendant is now "domiciled or ordinarily resident in Ireland." The first question for us, under these circumstances, is whether she could be served personally? Clearly not, as the new rule forbids service of a writ out of the jurisdiction upon persons "domiciled or ordinarily resident in Scotland or Ireland." That, to my mind, disposes of the case at once, for it cannot be supposed that it was intended that substituted service could be allowed upon a defendant who was not legally liable to personal service.

Appeal allowed.

Solicitors for the plaintiff, *Hillyard & Co.*

Solicitor for the defendant, *J. Mills.*

Q. B. Div. (Lord Coleridge, C.J., and A. L. Smith, J.) } May 12, 13, 19.

COURTNEY v. COLE. (*a.*)

Shipping — Compulsory pilotage — Ship trading to Boulogne or place in Europe north of Boulogne—Merchant Shipping Act, 1854 17 & 18 *Vict.* c. 104), *s.* 379, *sub-section* 3.

A ship which is continually engaged in voyaging from London to the East, and back to London, and then to the North of Europe, and back to London, is, while passing down the Thames on her way to a port in the North of Europe, a ship trading to a place in Europe north of Brest within the meaning of section 379, *sub-section* 3, *of the Merchant Shipping Act*, 1854, *as modified by an Order in Council of the* 21*st of December*, 1871, *and is therefore exempt from compulsory pilotage.*

Case stated by justices under 20 & 21 Vict. c. 43 and 42 & 43 Vict. c. 49, s. 33.

The appellant, who was the master of the ship *Cardiganshire*, was convicted by the justices of Gravesend under section 353 of the Merchant Shipping Act, 1854, of unlawfully piloting his ship within the London district without possessing a pilotage certificate enabling him so to do. The ship was one of a line of steamers which sailed regularly from London to Japan, China, and the Straits Settlements and back to London, and thence to Amsterdam and Hamburg, and back to London. In April, 1886, she arrived in London with a cargo from the East, and discharged that part of the cargo which was destined for London. The crew were then discharged; and having shipped runners on coasting articles for the voyage to the Continent and back, she left London for Amsterdam with the rest of the cargo. When she was off Gravesend, the informant, who was a duly licensed pilot, offered to take charge of the ship for the purpose of piloting her to the seaward limits of the London district. The appellant refused the offer, and continued to pilot the ship himself, without possessing a pilotage certificate enabling him so to do. The ship proceeded to Amsterdam and Hamburg; and, after discharging her cargo, took in a fresh part cargo for the East, with which she returned to London, and then, after making up a complete cargo, she proceeded on her next voyage to the East. She had been engaged in making similar voyages for some years.

By section 379, sub-section 3, of the Merchant Shipping Act, 1854, ships trading to Boulogne or to any place in Europe north of Boulogne, are, when not carrying passengers, exempted from compulsory pilotage. An Order in Council of the 21st of December, 1871, has the effect of substituting Brest for Boulogne in this sub-section.

The question was whether, under the above circumstances, the ship was exempt from compulsory pilotage.

Gainsford Bruce, Q.C. (*Fox* with him), for the

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

appellant.—The ship was exempt. She was not less a ship trading to the north of Europe, because she also voyaged to China and Japan. It is clear historically that the policy of the Legislature has been to encourage trading to the northern ports. This ship was trading between London and Amsterdam. And if it is necessary, in order that she should be exempt, that she should be constantly trading between London and the northern ports, the facts show that she was constantly so trading.

Bucknill, Q.C. (*J. P. Aspinall* with him) for the respondent.—Trading in sub-section 3 of section 379 means constantly trading: *The Sea Queen*, B. & L. 359; *The Agricola*, 2 W. Rob. Adm. 10. Here the vessel was a foreign trader, London being only her calling port. It was not the intention of the Legislature to exempt ships voyaging from a place outside a pilotage district to another place outside it and calling at a place inside it: see sub-section 6.

He also cited *The Moselle*, 2 Aspinall, 586.

Gainsford Bruce, Q.C., in reply.—*The Agricola* and *The Sea Queen* are not in point. *The Agricola* was under an earlier statute; and *The Sea Queen* was under a different sub-section.

He also cited *The Wesley*, Lushington, 268, 10 W. R. Adm. Dig. 29.

Cur. adv. vult.

Lord Coleridge, C.J.—It is obvious that this case comes directly within the words of the exemption given by sub-section 3. This vessel was a ship trading to a place in Europe north of Brest. It has, however, been argued that compulsory pilotage has been imposed by the Legislature solely for the benefit of ships themselves and the protection of human life, and that the section ought to be construed with reference to that principle. But I think it is impossible to say, looking at all the exemptions, that the legislation was designed solely with that purpose, and without any idea of favouring particular trades. For instance, sub-section 1 exempts ships employed in the coasting trade in the United Kingdom. Sub-section 2 has the effect of favouring trades carried on by small vessels. Again, the effect of sub-section 4 is that ships from Guernsey, Jersey, &c., laden with stone are exempt, but if laden with fruit are not exempt. It is clear that there must have been an intention to favour the stone trade between those islands and England. It is, however, not necessary to say whether the Legislature intended to favour trading between London and the north of Europe. Mr. Gainsford Bruce may be right; but it would be unsafe to ground our construction of this section on a historical basis which may be untrue. It is enough to say that this vessel was a ship trading between London and Amsterdam, a place in Europe north of Brest, and doing that habitually; for it is stated that she has been making similar voyages for some years. Not that I think it is necessary, in order to be exempt, that she should be habitually so trading. That question, however, I do not decide; there is no necessity for me to decide it, as I think in fact she was habitually so trading. She comes within sub-section 3, and is therefore exempt.

A. L. Smith, J.—The question is, whether this vessel was a ship trading to Boulogne or to a port north of it, within the meaning of the section. It has been pointed out that Dr. Lushington decided that by a ship "employed in the coasting trade," exempted in sub-section 1, was meant a ship continually so employed, and not a ship ordinarily engaged in the foreign trade, though at the time *de facto* engaged in the coasting trade: see *The Sea Queen* and *The Agricola*. But does that decision govern sub-section 3? I think not. The reasons given for it, however they may apply to the first sub-section, cannot apply to others. If it is necessary to give a reason for the exemption granted by sub-section 3, that reason may be found in the desire to favour trade in the North Sea and the Baltic. I think that the sub-section means what it says, and that a vessel, when it is trading to Boulogne or any port to the north of it, is exempt. If I am wrong in this view, I think that the facts here show that this vessel was constantly trading from London to Amsterdam and back. For I think it is impossible that the sub-section can mean ships that are confined to trading to Boulogne and the northern ports. The judgment was erroneous, and must be reversed.

Conviction set aside.

Solicitors for the appellant, *Parker, Garrett, & Parker.*

Solicitors for the respondent, *Sandilands, Humphry, & Co.*

Q. B. Div. (Lord Coleridge, C.J., and Mathew, Cave, and A. L. Smith, JJ.) — March 10, 30.

Reg. v. Cuming.
Ex parte Hall. (*a.*)

Royal Navy—Deserter—Resignation against the will of Admiralty—Arrest without warrant—Naval Discipline Act, 1866 (29 & 30 *Vict. c.* 109), *ss.* 19, 50, 51, 86, 87—"*Queen's Regulations and Admiralty Instructions*" *of* 1879, *art.* 160.

A commissioned officer of the Royal Navy, appointed to one of her Majesty's ships, and who has joined the ship, may not resign his commission without the assent of the Admiralty. Until such assent be given he is "a person belonging to her Majesty's Navy" within the Naval Discipline Act, 1866, *s.* 87. *Section* 50 *of that Act does not prohibit a naval officer from making an arrest without a warrant under section* 51 *of the same Act.*

This was a rule calling on the captain of the flagship *Royal Adelaide* (William H. Cuming), and the master at arms of the same ship, to show cause why a writ of *habeas corpus* should not issue directing them to bring up the body of Lieutenant Edward Brace Turville Hall, in order that he might be discharged from their custody.

A. Staveley Hill, Q.C. (Judge Advocate of the Fleet), and *A. T. Lawrence*, for the Lords of the Admiralty, showed cause.

Sir Henry James, Q.C. (*A. Charles, Q.C.*, and *R. H. Simonds* with him), for Lieutenant Hall, in support of the rule.

Cur. adv. vult.

March 30.—The judgment of the court was delivered by

A. L. Smith, J.—In this case a rule *nisi* for a *habeas corpus* has been obtained on behalf of Lieutenant Edward Brace Turville Hall, calling upon the defendants to show cause why he should not be brought up before this court and discharged from custody; and on the 10th inst. cause was shown against this rule by the Judge Advocate of the Fleet, Mr. Staveley Hill, Q.C., for the defendants. The facts are as follows:—

On the 15th of July, 1870, the applicant (Lieutenant Hall) entered her Majesty's Royal Navy as a cadet; and, having passed through the grade of mishipman, received his commission as sub-lieutenant on the 17th of January, 1878, and, on the 30th of June, 1882, was promoted to the rank of lieutenant. Subsequently thereto Lieutenant Hall was appointed to and joined her Majesty's ship *Orontes*. In September, 1886,

(*a.*) Reported by Sir Sherston Baker, Barrister-at-Law.

Lieutenant Hall applied for an appointment in the London Salvage Corps. His application was successful; but as *The Orontes*, upon which he was serving, was then on a cruise, and was not expected to return to England till April, 1887, the committee of the Salvage Corps agreed to wait until that time for him to take up the appointment. On the 29th of October, 1886, Lieutenant Hall, by letter to the Admiralty, requested to be allowed to retire, or resign his appointment or his commission, and offered also to pay the passage-money for a lieutenant to Gibraltar should he be relieved there. This application was refused. Shortly after this Lieutenant Hall learned that the cruise of *The Orontes* was extended, and that she would not return to this country till the month of July, 1887; and he thereupon forwarded, through his commanding officer, a telegram to the Admiralty requesting leave to retire, with which request the Admiralty refused to comply. Mr. Hall then determined to resign his commission; and on the 1st of Februsry, 1887, *The Orontes* being then at Simon's Bay, in South Africa, he asked permission of his captain to go to Cape Town till the following afternoon. At this time a notice was standing in the saloon and officers' ward-room intimating that all leave expired at midnight on the 2nd of Febuary; and it was generally known that the captain of *The Orontes* intended sailing from Simon's Bay as soon after daylight on the 3rd of February as possible. The requested permission to go ashore was granted, and Lieutenant Hall thereupon left the ship; but, instead of returning the following afternoon, pursuant to his leave, he, from the shore, wrote to his captain on the 2nd of February, as follows:—"I have the honour to inform you that, in accordance with the conditions laid down in article 160 of the Admiralty Regulations, I retire from the service; and I beg to hand you my commission." This he did. Lieutenant Hall thereupon took his passage home in the mail steamer *Grantully Castle*, which left Table Bay for Plymouth at four p.m. on the 2nd of February. The letter which Lieutenant Hall wrote to his captain had not been delivered when *The Orontes* left Simon's Bay on the 3rd of February. On the morning of that day the captain of *The Orontes*, finding that Lieutenant Hall had sailed for England, telegraphed to the Admiralty, and on the arrival of *The Grantully Castle* in the Sound Lieutenant Hall was arrested by a naval officer, and was taken in his custody to Devonport, where he was detained as a prisoner on board *The Royal Adelaide*, under the command of Captain Cuming, with a view to his being brought to trial before a court-martial under section 19 of the Naval Discipline Act, 1866 for having absented himself from his ship with an intention of not returning.

The question raised for our determination is one of great importance—viz., whether a commissioned officer in the Royal Navy who has accepted an appointment to serve on board one of her Majesty's ships is entitled without permission from the Admiralty to resign his commission and to leave his ship. The Judge Advocate of the Fleet, who showed cause against the rule, contended that the officer's commission bound him to serve in the navy so long as he remained fit to perform his duty and the State required his services. On the other hand it was contended for the applicant that the commission might be resigned at any time, like an ordinary mandate to one required to act as agent, and that the Crown had no right in time of peace to control the liberty of the subject, or insist upon the performance of duties from which the officer desired to escape.

We are unable to agree with either contention.

The cases of *Parker* v. *Lord Clive*, 4 Burr. 2419, and *Vertue* v. *Lord Clive*, 4 Burr. 2472, would seem to contain a complete condemnation of both propositions. Lord Mansfield, in delivering the considered judgment of the court, said (4 Burr., at p. 2422): "Upon the general abstract question we are all of opinion that a military officer in the service of the East India Co. has not a right to resign his commission at all times and under any circumstances whatsoever whenever he pleases"; and, *à fortiori*, we would add, an officer holding a commission in her Majesty's navy. But the learned counsel for Lieutenant Hall presented an alternative view of the matter, and insisted that, even though the commission could not be resigned under all circumstances and at the pleasure of the officer, still his obligation went no further than to bind him to serve for a reasonable time and upon reasonable terms, and thus that he was free, upon due notice, and for such causes and under such circumstances as existed in this case, to leave his ship and surrender his commission. The cases relied upon in support of this view were *Parker* v. *Lord Clive* and *Vertue* v. *Lord Clive* above mentioned. These were actions in which officers of the East India Co. sought to recover damages for having been wrongfully arrested and brought to court-martial upon a charge of having thrown up their commissions while on active service in the company's army. The court was called upon to determine what was the nature of the engagement between the company and their officers, and would seem to have rightly come to the conclusion that their acceptance of their commissions imposed upon them the obligation to serve as officers in the Indian Army in a reasonable manner, so as not to defeat the purposes of their employment, and to submit themselves to the ordinary military tribunal for any alleged breach of discipline. In each case the court-martial had acquitted the officer. In the actions for false imprisonment the question whether the plaintiffs had been guilty of a breach of duty was treated as one for the jury, and, upon a finding against the plaintiffs, the judgment was entered in each case for the defendants. These authorities have no direct bearing upon this application.

It is not necessary to deal with the case of Lieutenant Hall upon any suggestion of an express or implied contract between him and the Crown. His position seems clearly defined by the terms of the Naval Discipline Act, 1866. Section 19 provides that "every person subject to this Act who shall absent himself from his ship or from the place where his duty requires him to be, with an intention of not returning to such ship or place, or who shall at any time and under any circumstances, when absent from his ship or place of duty, do any act which shows that he has an intention of not returning to such ship or place, shall be deemed to have deserted, and shall be punished accordingly." Section 86 defines the word "officer" to mean "an officer belonging to one of her Majesty's ships"; and section 87 describes the persons liable to the Act—"Every person in or belonging to her Majesty's navy, and borne on the books of any one of her Majesty's ships in commission, shall be subject to this Act."

Lieutenant Hall seems to us, at the time when he left his ship without any intention to return, to come clearly within these sections. He was an officer of *The Orontes*, whose name was borne on the ship's books while the ship was in commission. But it was said that when he left for England he was not a person in or belonging to her Majesty's navy within section 87, because he had sent his commission to his captain; and it was urged that every section of the Act which in terms applies to "persons subject to the Act" must be read as applying only to those who had not so resigned their commissions. If this were so, every officer of one of the Queen's ships might with impunity abandon the ship whenever he pleased. It is obvious that such a construction would be fatal to the spirit and object of the Act.

It was further contended that the persons "liable to

the Act" did not include those officers who, after reasonable notice and under reasonable circumstances, had resigned their commissions; and that the Act, as regards such persons, was inoperative. But this mode of interpreting the statute would lead to this consequence, that it would be always matter of doubt whether an officer who had gone through the form of resigning his commission was still in the navy or not. If his reasons were sufficient and he was entitled to leave the service, he would not be in the navy; if he were not in a position to resign his commission, he would still be an officer. His superior officer would have no means of judging as to the sufficiency of the grounds upon which he claimed to resign. If the officer were right, he would be entitled to resist his detention by force or to bring an action subsequently for false imprisonment. And so, if he were brought to a court-martial and imprisoned, he might, in an action against the officers of the court, question their jurisdiction, and submit to the jury that, when placed under arrest, he had ceased to be an officer in the navy. The difficulty and confusion that this mode of interpretation would give rise to may be illustrated by reference to the sections of the Act with respect to neglect of duty, mutiny, and insubordination. An officer on board one of her Majesty's ships in commission might be guilty of the misconduct at which those sections are aimed and be free from punishment if he could afterwards satisfy a jury that at the time when he was alleged to have done wrong he had taken all reasonable steps for resigning his commission. Reference was made to article 160 of the *Admiralty* Regulations of 1879, under which *Lieutenant Hall* had acted. The regulation is in the following terms:—"If any officer shall retire from his employment without the sanction of the Admiralty, except on good and sufficient reasons to be judged of by the Admiralty, or shall refuse or avoid service if found capable of serving, he shall not be allowed to receive half-pay; and his name shall be removed from the list of officers of the Royal Navy."

The learned counsel for Lieutenant Hall did not rely upon this regulation as a justification of or authority for the resignation of Lieutenant Hall, but pointed to it in support of his contention as to the meaning of the statute. We are clearly of opinion that the regulation must be construed with the statute, and that it was not intended to control its operation. The regulation points out what may follow upon an officer resigning his commission without such sufficient cause as shall satisfy the Admiralty, or where he refuses employment offered him by the Admiralty, and his doing so is not otherwise punishable.

It is not necessary for us to decide the very grave question whether the mere acceptance of a commision would of itself and under all circumstances suffice to bring an officer within the jurisdiction of a court-martial for refusing to enter upon any particular service. Some of us, as at present advised, are of opinion with Yates, J., in the case cited (*Vertue* v. *Lord Clive*) that it would not. We leave the question, however, distinctly open to be argued and decided if in any case hereafter it shall be necessary to decide it. But we are clearly of opinion that, where a commissioned officer accepts an appointment to serve in one of her Majesty's ships in commission, and enters upon the performance of his duties, he subjects himself to the provisions of the Naval Discipline Act, and at his own will and pleasure cannot resign his appointment, and may be tried by court-martial for any of the offences specified in the Act. We are urged to depart from the plain meaning of the statute because of the consequences which, it was said, would otherwise result. It was argued that, if the Act applied to everyone in the Royal Navy whose name was borne on the books of one of her Majesty's ships in commission, the result would be that the Lords of the Admiralty might impose upon an officer perpetual servitude by directing his name for life to remain on the ship's books. But this difficulty seems to us remote and far-fetched. The Legislature cannot have contemplated a proceeding so unreasonable and entirely unlikely to be adopted. We are not disposed, in order to escape from a peril so remote and improbable, to adopt an interpretation which would entail the consequences above pointed out—*i.e.*, of her Majesty's ships in commission being left unofficered and uncommanded, at the sole will and pleasure of the officers.

A further point was made by Sir Henry James for Lieutenant Hall, that the arrest of Lieutenant Hall on board *The Grantully Castle* was illegal. According to Lieutenant Hall's affidavit, which is not contradicted, he was arrested by a naval officer who exhibited no warrant, and who, it must be taken, had none. By section 50 of the Naval Discipline Act, 1866, "Every officer in command of a fleet or squadron of her Majesty's ships, or one of her Majesty's ships, or the senior officer present at a port, may by warrant under his hand authorize any person to arrest any offender subject to this Act for any offence against this Act mentioned in such warrant . . . and any person named in any such warrant may forthwith on his apprehension, if the warrant so directs, be taken on board the ship to which he belongs or some other of her Majesty's ships."

The contention on the part of Lieutenant Hall is, that he could only be arrested under such a warrant, and that there was no such warrant in this case. It is to be observed, however, that, under such a warrant, not merely a person in her Majesty's navy, but any person may make the arrest; and, further, that, although the section authorizes the person named in the warrant to be taken on board one of her Majesty's ships, it does not authorize his detention on board. Such an authority, if it stood alone, would be a very imperfect instrument for the bringing to punishment of offenders against the Act. There is, however, another section of the Act, the 51st, of a far more effectual character. By that section "every person subject to this Act who shall not use his utmost endeavours to detect, apprehend, and bring to punishment all offenders against this Act, and shall not assist the officers appointed for that purpose, shall suffer imprisonment or such other punishment as is hereinafter mentioned." The words are not "every person to whom a warrant is directed," but "every person subject to this Act;" and we think that the necessary inference is that such a person has power to apprehend and bring to punishment any offender against the Act, for it would be manifestly unjust to punish a man with imprisonment for not doing that which he had no power to do. Moreover, it seems to us, looking at the nature and number of the offences dealt with in the first forty-five sections of the Act, that it would be quite impossible to maintain discipline on board amongst a ship's crew if no offender could be arrested until a warrant had been obtained from the officer in command of the ship. In this case the arrest was effected by a naval officer. It is not stated that he was not a person subject to the Naval Discipline Act; and we think we ought not, upon the facts stated to us, to infer that he was not so subject, and we infer that he was. Even if we considered the arrest to have been irregular, it is by no means clear that it would have been our duty, under the circumstances, to decree the discharge of the applicant before he had been brought to trial by the proper tribunal—viz., a court-martial: see *Reg.* v. *Mount*, 23 W. R. 572, L. R. 6 P. C. 283. In holding, as we do, that Lieutenant Hall is subject to the jurisdiction of a court-martial, we think it right to add that he has acted, as it seems to us, in good faith and in the honest belief that the terms of the regulations

referred to entitled him, without permission from the Admiralty, to retire from the service. In dealing with this case, should it be brought to trial, we have no doubt that it will be borne in mind that the regulation in question has unfortunately been so framed as to leave considerable doubt as to its meaning. It seems to us that even a lawyer of some learning and experience might be excused if he failed to interpret it correctly; and this being so we are of opinion that, though the rule should be discharged, it should be discharged without costs. We accordingly discharge it without costs.

Rule discharged.

Solicitors for the applicant, *Crowder & Vizard*, for *Shelly*, Plymouth.

Solicitors for the defendants, *The Solicitor to the Admiralty.*

Prob. Div. & Adm. Div. Divorce. } Feb. 22.

Hetherington *v.* Hetherington. (*a.*)

Divorce—Matrimonial Causes Act, 1878 (41 *Vict. c.* 19), *s.* 4—*Separation order by justices—Application to discharge on ground of adultery—No original jurisdiction to hear in High Court—Appeal—Admissibility of evidence—Child born more than nine months after separation order—Admission by wife—Presumption of illegitimacy.*

Section 4 *of the Matrimonial Causes Act,* 1878, *which empowers the court or magistrate before whom a husband is convicted of an aggravated assault upon his wife to make an order in the nature of a decree for judicial separation on the ground of cruelty, and to order maintenance, and deal with the custody of children under ten, contains a proviso that "no order for payment of money by the husband, or for the custody of children by the wife, shall be made in favour of a wife who shall be proved to have committed adultery, unless such adultery has been condoned; and that any order for payment of money or for the custody of children may be discharged by the court or magistrate by whom such order was made upon proof that the wife has, since the making thereof, been guilty of adultery; and provided also that all orders made under this section shall be subject to appeal to the Probate and Admiralty Division of the High Court of Justice."*

In sections 2 *and* 3 *of the same Act, dealing with costs in cases of intervention by the Queen's Proctor and the power to vary settlements, the words "the court" were used for the Probate and Admiralty Division.*

Held, that the words "the court" in section 4 *do not mean the Probate and Admiralty Division, but the court before whom the husband is convicted, and that court alone can vary or discharge the order; but there is a right of appeal to the Probate and Admiralty Division even from the refusal of such court to vary or discharge any such order, and that right exists notwithstanding that the justices may have stated a case for the consideration of the Queen's Bench Division; but the Probate and Admiralty Division, as a matter of discretion, will not hear the appeal while there is a special case pending in the Queen's Bench Division.*

There is a legal presumption that any child born more than nine months after the date of a separation order made under section 4 *of the Matrimonial Causes Act,* 1878, *is illegitimate. An admission made by the wife that she has had a child born more than nine months after a separation order of which the husband was not the father is admissible as evidence of her adultery.*

Application under section 4 of the Matrimonial Causes Act, 1878, to discharge an order made on January 1, 1883, under the same section by the justices of the Chester Ward Division of the county of Durham, whereby it was ordered that William George Hetherington, having been convicted before the said justices of an aggravated assault on his wife, Elizabeth Hetherington, she should be no longer bound to cohabit with him, that he should pay her ten shillings weekly, and that she should have the custody of the children.

The ground of the application was that since the date of the order the wife had been guilty of adultery. The evidence relied on was the admission of the wife that she had recently given birth to a child of which the husband was not the father, made in cross-examination on a proceeding in the police court against her husband on September 16, 1886, to enforce the payment of arrears of her allowance. After this proceeding the husband took out a summons to vary the order, which was heard at the Consett Police Court on October 9 and 16, 1886. The justices refused to allow the husband to give evidence of non-access or to compel the wife to give evidence as to the parentage of the child or to receive evidence of her admissions made on the previous proceedings, on the ground that such evidence was inadmissible against her as affecting the *status* of a child born in wedlock. The justices at the hearing, being of opinion that the appeal from their decision was to the Queen's Bench Division, stated a special case; the special case was entered in that division, and at the same time the husband appealed to this division against the justices' decision. That appeal was heard on January 18 and 25, 1887, when Hannen, P., being informed of the special case before the Queen's Bench Division, expressed his opinion that as the question raised was one relating to admissibility of evidence, that division had concurrent jurisdiction, and as a matter of comity it would not be right for this division to decide a case which was actually before another division, and ordered the application to stand over. That appeal and the special case were then withdrawn, and the present application was substituted.

H. D. Pritchard, for the husband, in support of the application.—Since this application was made one of the magistrates who made the original order is dead, and, therefore, we must come here, as it is only the magistrates who made the order who can rescind it. It was so held on a similar clause in *Ex parte Sharpe*, 12 W. R. 756, 33 L. J. M. C. 152, which was the case of a protection order made under 20 & 21 Vict. c. 85, s. 21; and a statute (27 & 28 Vict. c. 44) was passed to remedy that defect. The magistrates were wrong in refusing to receive the evidence. A child begotten after a divorce *à mensa et thoro* was held a bastard: 1 Salkeld, 123; see also Taylor on Evidence, 8th ed., p. 817. The sole issue was whether the wife had committed adultery, not the legitimacy of the child. That being so, we are right in coming to this court. In the Matrimonial Causes Act, 1878, the court means this court, and we are not barred by having applied to the magistrates. The remedy is concurrent, or we can treat that application as a nullity: *Reg.* v. *The Justices of Middlesex*, 9 Dowl. Pr. 163.

Back (*Walton* with him), for the respondent, the wife.—The applicant has already elected to appeal to another court. There is no double appeal. But, beyond that, this is an original application, which can only be made in the first instance to the court which made the original order; the court, on section 4, can only have that meaning. The evidence here was inadmissible; it was obtained in an entirely different proceeding: *Babbage* v. *Babbage*, L. R. 2 P. & D. 222.

(*a.*) Reported by J. Gerard Laing, Esq., Barrister-at-Law.

Section 4 of the Matrimonial Causes Act, 1878, is sufficiently set out in the head-note.

Hannen, P.—I regret very much that this litigation has reached the present pitch, and I hope the opinion I am about to express will bring the case to an end. I mean my opinion on the point whether there was evidence on which the magistrates might have acted for the purpose of discharging the original order. It appears that on January 1, 1883, an order equivalent to a judicial separation was made by the justices, and from the time of that order the parties are authorized to live apart, and the husband is bound not to molest his wife. From that moment all the presumption which ordinarily exists in the case of married persons as to access and legitimacy of children is reversed, and from that moment if a child is born more than nine months afterwards it is presumed, unless it is shown to be otherwise, that the child is illegitimate. That point was lost sight of before the magistrates, but it is well established by the case cited in 1 Salkeld, 123. How, then, does this case stand as to the facts. The woman appears to have admitted that she had a child born about eight weeks before the hearing of the summons in September, 1886. A woman, although married, may always prove the date of the birth of her child, and in this case there was a legal presumption that the child was illegitimate. Unfortunately, in refusing to act on the evidence, the magistrates were persuaded that the issue was one of bastardy, which it was not. Then as to the proceedings. In the first place, an application was made to the magistrates to discharge the order of January 1, 1883, and it turned out that one of the magistrates who made the order was dead, the magistrates refused the application, but stated a case for the consideration of the Queen's Bench Division. Then an application was made to me under section 4 of the Matrimonial Causes Act, 1878, by way of appeal from that refusal. I said then that I did not doubt (and I adhere to that opinion) that I have the power, by way of appeal, to consider a refusal by the magistrates to make an order where they improperly refuse. The question whether the appeal should be to the Divisional Court was not raised, but, as a matter of discretion, I did not think it right to hear this case while there was a special case pending in the Queen's Bench Division, and I allowed the case to stand over.

But now the case comes before me in the form of a substantive application to discharge the original order, on the ground that under section 4 of the Matrimonial Causes Act, 1878, I have the power on fresh evidence to discharge the original order of the magistrates. I have come to the conclusion that I have not the power. Undoubtedly the word "court" is used in some sections of the Act as applying to the Divorce Court—viz., in section 2, relating to costs of the Queen's Proctor, and in section 3, relating to settlements. But then in section 4 we come to a totally different enactment, in which the word "court" is used in a different collocation. The words are, then, that in a case of aggravated assault "the court or magistrate before whom he shall be so convicted may" rule that the wife be no longer bound to cohabit. I think the words must be read distributively. The same words "court or magistrate" occur in the first sub-section, and it is inconceivable that the Legislature meant to refer to this court the question dealt with in that sub-section—viz., the husband's means for the purpose of determining the allowance to the wife. That would be a most unnatural construction. The whole collocation of the governing sentence and the sub-section show that the Legislature intended that the husband should be convicted and subsequently dealt with entirely by the same court, I am not sure what court, whether quarter sessions, assizes, or justices, but certainly not this court. The only natural construction is that the section means that the court or magistrate before whom the husband is convicted is to consider his means and make the order for payment by him. Further light is thrown on it by the language of the proviso, which provides for the discharge of the order by the court or magistrate "by whom" such order was made, and this construction is strengthened by the concluding words by which all orders are made subject to appeal to the Probate and Admiralty Division. I, therefore, think that I have no power to discharge this order. That can only be done by the court or magistrate by whom the order was made, but that from their order, whether discharging or refusing to discharge the original order, there is an appeal to this court. This application must be dismissed, with costs, and the costs in this court of the abandoned motion.

Solicitors for the applicant, *Pritchard & Sons*, for *T. W. Welford*, Consett.

Solicitor for the respondent, *T. Cray*, for *Dix & Warlow*, Newcastle-on-Tyne.

Prob. Div. & Adm. Div. } Admiralty. } May 23.

"The Sutherland." (*a*.)

Damage — Exemptions from compulsory pilotage — London District—"Ships trading to Boulogne or a port in Europe north of Boulogne" — Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 379.

The S., *a British vessel, on a voyage from Liverpool, not carrying passengers, but bound to and having on board a cargo consigned to Hamburg, to which port she was in the habit of trading, came into collision with a barque in the English Channel outside the boundary of the London Pilotage District, and received serious damage. In order to repair this damage, her master, when he arrived off the mouth of the Thames, shaped his course for London, and, off Gravesend, took on board a duly licensed Trinity pilot. Whilst this pilot was acting in charge of* The S., *she came into collision in Half Way Reach with a brig, but was able to proceed to London, where nearly all her cargo was discharged. Of the cargo so discharged a portion was sent to Hamburg in another vessel, and the remainder, after a delay of about three weeks, was re-shipped in* The S. *and taken in her to Hamburg.*

An action of damage having been instituted in the City of London Court on behalf of the owners of the brig against The S., *the owners of* The S. *raised therein the defence of compulsory pilotage. The judge of the City of London Court sustained this defence and dismissed the action, and the owners of the brig appealed to this court.*

Held, on appeal, that, at the time of the collision in Half Way Reach, The S. *was trading to a port north of Boulogne within the meaning of section* 379 *of the Merchant Shipping Act,* 1854, *and was exempt from compulsory pilotage under the provisions of that section.*

This was an appeal from the decision of the judge of the City of London Court in an action of damages instituted on behalf of the owners of the brig *Kate* against the British steamship *Sutherland* to recover the damages sustained in a collision between the two vessels in Half Way Reach of the River Thames on the 23rd of December last, when *The Sutherland* was in charge of a licensed Trinity House pilot. By the decision appealed against the judge of the City of London Court had dismissed the action on the ground that the defence of compulsory pilotage raised by the owners of *The Sutherland* had been established, inasmuch as, although *The Sutherland* before

(*a*.) Reported by C. F. Jemmett, Esq., Barrister-at-Law.

she entered the Thames previously to the collision had been bound on a voyage from Liverpool to Hamburg, and was laden with a cargo consigned to that port, she had at the time of the collision abandoned that voyage and was at such time proceeding from Liverpool to London for the purpose of being repaired.

May 23.—The appeal was now heard before the President and Butt, J., sitting as a divisional court of the Admiralty Division.

Myburgh, Q.C., and *Pike*, for the appellants, the owners of *The Kate*.

Gainsford Bruce, Q.C., and *Raikes*, for the respondents, the owners of *The Sutherland*.

It appeared from the process containing the shorthand notes of the evidence taken in the court below that *The Sutherland*, which was one of a line of steamers regularly trading between Liverpool and Hamburg, had, on the 31st of December, as she was proceeding from Liverpool towards Hamburg, come into collision in the English Channel, west of Dungeness, with the barque *Sereca*, and received serious damage; that in order to repair this damage the master of *The Sutherland* determined to make for the Thames, and accordingly took on board, off Dungeness, a Trinity pilot, and was piloted by him as far as Gravesend; that at Gravesend he took another Trinity House pilot on board, who was acting in charge of *The Sutherland* at the time of the collision with *The Kate;* and that, after that collision, *The Sutherland* went on to London, where nearly all her cargo was discharged, and that of the cargo so discharged a portion was transhipped on board another steamer belonging to the same owners as *The Sutherland*, and so carried to Hamburg, whilst the remainder of the cargo of *The Sutherland*, after the completion of her repairs, which took about three weeks, was re-shipped on *The Sutherland* and taken in her to the same port.

For the appellants it was contended that *The Sutherland* was exempt from compulsory pilotage, both as being a vessel in distress within section 362 of the Merchant Shipping Act, 1854, and section 63 of 6 Geo. 4, c. 125, and as being a vessel "trading to a port north of Boulogne" within section 379 of the Merchant Shipping Act, 1854.

The counsel for the respondents argued that *The Sutherland* had at the time of the collision with the brig been bound by compulsion of law to employ a Trinity House pilot by virtue of sections 353 and 376 of the Merchant Shipping Act, 1854.

The following authority was referred to: *Courtney* v. *Cole*, *ante*, p. 8, 19 Q. B. D. 447.

HANNEN, P.—In deciding this case we have nothing to do with the policy of the law, we have only to see what intention is expressed by the words which the Legislature has employed. The first question we have to consider is, whether or not the exemption in the 3rd sub-section of section 379 of the Merchant Shipping Act, 1854, applies to any other vessels than those which start from or are proceeding to the London district or one of the Trinity House outport districts. In considering this question no one section of the Merchant Shipping Act, 1854, has been referred to which leads to the conclusion that any limit is to be put on the general words of the 379th section of that Act, and when the language of the several sub-sections of that section is considered it is impossible that the construction Mr. Gainsford Bruce has suggested can be the right one. The material words in the section in question are "the following ships, when not carrying passengers, shall be exempted from compulsory pilotage in the London district and in the Trinity House outport districts." The reference to the London district and the Trinity House ports is for the purpose of stating what compulsory pilotage the vessels are not to be subjected to. When we have to determine what vessels are to be exempt from compulsory pilotage we have certain vessels thus described in sub-section 1 of the section, "Ships employed in the coasting trade of the United Kingdom," that obviously means ships from any ports in the United Kingdom proceeding on a coasting voyage from one port of the United Kingdom to another. These words cannot be restricted to vessels coming out of or going into the London district or the Trinity House outport districts. Then in the 3rd sub-section are these words: "Ships trading to Boulogne or any place in Europe north of Boulogne." We see no reason for putting a restriction on these general words which we cannot put on the preceding sub-section. Now it is unnecessary to determine whether or not this 3rd sub-section applies to foreign vessels. We are dealing with an English vessel which was proceeding from a port in England to a port in Europe north of Boulogne, and so far such a vessel seems to me to come directly within those words. If we speculate on the object which it is to be supposed the Legislature had in view, it would appear that the idea was to give certain privileges to vessels engaged in particular ways, such as those engaged in the coasting trade. Vessels trading to certain places in the north of Europe were intended to be exempted, in the same way as in the next sub-section an advantage is given to those bringing stone, the produce of the Channel Islands. The question then arises, Was this vessel trading to a place north of Boulogne? That she was doing so originally is beyond dispute, and, therefore, we have to consider if she had ceased to be a vessel trading to Boulogne, or to a port north of Boulogne. *The Sutherland* met with an accident off Dungeness. Can it be said that the moment the captain saw it was necessary that some repairs should be done to his ship his vessel ceased to be a vessel trading to Hamburg. It appears, then, that no accident which could happen to her could cause her to lose her particular trading character. That is the only essential character which the Legislature requires that the vessel should have. I agree that it is not because a vessel is generally engaged in trading to a port north of Boulogne that she would be exempt if she were not at the material time engaged on a voyage to Boulogne or a port north of Boulogne; but if a vessel trading to a port north of Boulogne is obliged for temporary purposes to put into a port, she does not on that account cease to be engaged in trading to the port to which she was trading at the commencement of her voyage. Nor can it make any difference whether the port or harbour in which she may take refuge is a long one, as the harbour of London, or one of a very limited area. Suppose the vessel had put into Ramsgate for the purpose of repairs and had gone out again immediately, could it be said that that vessel lost its character of trading to the place which was originally its place of destination? I base my decision on the generality of the language of the Act, and hold that, as *The Sutherland* was trading to a place north of Boulogne, she was not bound to take a pilot. The decision of the court below must be reversed.

BUTT, J.—I am of the same opinion. In dealing with a penal enactment we must take the words of the enactment and apply them strictly. I have no doubt whatever that this ship, at the time in question, was a ship trading to a port of Europe north of Boulogne, and that her voyage was only temporarily interrupted by her going into the Thames. I agree, therefore, in thinking that this appeal must be allowed.

Bruce asked for leave to appeal.

HANNEN, P.—If the consent of the court is necessary for a further appeal we grant that leave.

Solicitors for the plaintiffs, *Lowless & Co.*

Solicitors for the defendants, *Parker, Garrett, & Parker.*

Prob. Div. & Adm. Div. Admiralty. } April 1, 2.

"THE FIRE QUEEN." (a.)

Damage—Order in Council of June 24, 1885, relating to the navigation of the River Mersey—Construction of the Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85), s. 17—Infringement by no possibility contributing to collision.

A barque which had come up the River Mersey from sea in tow of a steam tug on the last of the flood was, in the early morning of January, before sunrise, and when nearly abreast of the Canada Basin and in the act of being turned in order to bring her head to tide, run into almost amidships on the starboard side by a steamship proceeding down the river. To recover for the damage sustained in this collision the owners of the barque instituted an action of damage against the steamship.

From the evidence at the hearing it appeared that the green light required to be carried by the barque under the Order in Council of June 24, 1885, relating to the navigation of the River Mersey, was so placed as to be obscured by the starboard cathead of the barque from right ahead to considerably less than one-third of a point on the starboard bow; and that the stern light required by the same Order in Council to be shown from her sternrail had been placed on the deck aft in such a position as not to be properly visible astern.

The court found that there had been a reasonable compliance with the Order in Council with respect to the extent of the visibility of the green light of the barque, and that the obscuration of it had nothing to do with the collision; that the neglect to properly show a stern light from the sternrail of the barque could not by any possibility have contributed to the collision, and that the steamship ought to have slackened speed sooner than the evidence proved she did.

Held, that there had been no such infringement of the Order in Council of June 24, 1885, as brought the case within the 17th section of the Merchant Shipping Act, 1873, and that the barque could not be deemed to blame under that section.

This was an action of damage instituted on behalf of the owners of the barque *Nordens Dronning* against the steamship *Fire Queen* to recover the damage sustained in a collision between the two vessels in the early morning of the 13th of last January before sunrise, when *The Nordens Dronning* having come up the River Mersey in tow of a steam tug on the last of the flood, when in the act of being turned by the tug in order to be brought head to tide and anchor about abreast of the Canada Basin was run into by *The Fire Queen* as that vessel was proceeding down the river. The plaintiffs pleaded (*inter alia*), and in substance proved by the evidence called on their behalf, that *The Nordens Dronning* had her regulation side lights up and a bright globe light on deck aft, and the tug towing *The Nordens Dronning* the proper lights for a tug towing in the Mersey duly exhibited and all burning brightly; that as *The Nordens Dronning* began to swing and her head had come round to about S.E. under a starboard helm the masthead and red light of *The Fire Queen* had been seen from *The Nordens Dronning* about two points on the starboard bow of *The Nordens Dronning* and about a mile off, and that when the head of *The Nordens Dronning* had been swung round to nearly N.E. and *The Fire Queen* was about on the starboard beam of *The Nordens Dronning* *The Fire Queen* opened her green light and came into collision with *The Nordens Dronning* striking the starboard side of *The Nordens Dronning* between the fore and main rigging.

(a.) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

The action was now heard before Butt, J., assisted by two of the Elder Brethren of the Trinity House.

Sir W. Phillimore and *Stubbs*, for the plaintiffs.

Kennedy, Q.C., and *Pickford*, for the defendants, the owners of *The Fire Queen*.

BUTT, J.—In this case the plaintiff's vessel, the barque *Nordens Dronning*, was in tow of a steam tug called *The Great Western*. She had come into the River Mersey, and was about to be rounded to by the tug to bring her head upon tide. The tug and the vessel in tow came up on the western or Cheshire side of the river; and when those whose duty it was to direct the navigation thought the time had come to turn the ship the proper measures were taken for so doing, and the barque and tug began to come round. At that time the steamer *Fire Queen*, the defendants' ship, was coming down somewhere about half-way between mid-river and the eastern shore, navigating in that which was her own water. I see no reason to suppose that in the state of things existing the tug and her tow were not justified in putting their helms to starboard, and going round when, and where, and as they did.

The case set up on behalf of the steamship *Fire Queen* is this: Those on board say, As we come down on the eastern side of the river, we first became aware of the existence of some vessel ahead, or nearly ahead of us, by seeing what afterwards proved to be the single white light at the masthead of the steam tug; that was not more than 400 or 500 yards distant. It has been contended on the part of *The Fire Queen* that those on board of her could not see the tug's light, which they admit to have been a good one—I am speaking of only one light at present—at a greater distance on account of the thickness of the weather. The master of *The Fire Queen* says:—"I thought that was the light of a vessel at anchor; it was slightly on my port bow, and I intended to go down inside of it, leaving it on my port hand, when suddenly, not long after that light was seen, a second light—namely, a green light, apparently on board the same ship, was also seen on the quarter, whereupon I assumed that they were the lights of a steamer standing in across the river towards the eastern shore. I gave the order at once to starboard the helm. I cleared the vessel with the lights, and, then, if there had been nothing behind her, there would have been no danger; but it turned out that the tug had a barque in tow, and I ran into the starboard broadside of that barque. I should not have done so if the proper indications had been given me of there being a vessel in tow of the tug."

What indications had the officer in charge of *The Fire Queen* a right to have? He had a right in the first instance to have a warning that there was a vessel in tow given him by two lights at the masthead of the tug, and he had a right to have another warning given him by the green light of the ship in tow. Possibly—although that, I do not think, can be successfully maintained—he may say, "I had the right also to have a third warning by a white stern light." Now, he says, "I had none of these warnings. I had a right, on the assumption that the white light I saw and this green light of the same vessel were the lights of a steamer not towing to act as I did." The most important matter to determine in this case is, had that tug one or two good lights at her masthead, an inefficent light is practically no better than no light at all. Now there is a strong body of evidence to the effect that the tug had had, up to the time of the collision, and at the time of collision, and continued to have after the collision, two perfectly good lights at her masthead. There is a strong body of evidence on the other side that the tug never had after she got into the Mersey any good light save one at her masthead; and that at the time of collision and the time just preceding it she had only one light

of any sort at her masthead. I have to determine that, but before I advert further to that question of fact there are other matters to be dealt with. First of all, I have to consider whether the barque carried a good green light? I have no hesitation in finding at once that she did. I am speaking of the carriage of the light, and not of its position. Secondly, was it a light properly fixed? that is, was the carrying of that light where, and as it was, carried a compliance with, or a departure from, the Regulations for Preventing Collisions at Sea, which by Order in Council are applicable to the Mersey.

Now *The Nordens Dronning*, like other vessels, has a cathead, and in one sense, no doubt, the cathead was in the way of the light. I think both sides have given fair and honest evidence as to the amount of the obstruction of that light. The result comes to this that the cathead obscured the side light for some two and a half or possibly three degrees—that is considerably less than the third of a point—on the vessel's bow. And that save for that third of a point her side lights showed an unbroken light over ten points of the horizon. Is it a breach of the Regulations for a vessel to have her lights obscured to the extent I have described? It is certain that a literal compliance with these Regulations is not intended. A literal compliance with these Regulations is an impossiblity. I will take an instance, a vessel at anchor is to carry, not more than twenty feet above the hull, a light which shall show an unbroken light all round the horizon. If a vessel has any mast or rope which runs to a greater height than the prescribed twenty feet above the water, it is utterly impossible that any lantern hung at that height could show an unbroken light all round the horizon. A number of other instances might be given, I am only pointing out that the letter of the Regulations cannot be complied with. What we must look to is, whether there is a reasonable compliance with the Regulations.

Several surveyors have been called, and amongst others a gentleman whose evidence is entitled to be treated with every respect—Mr. Laslett, the Board of Trade surveyor. What does his evidence come to? He says: "I should not have passed these lights in the position in which they were placed, and having regard to the position of the cathead." And he described to what extent on either bow the light would be obscured. But he was asked what the Board of Trade would do, and he produced his instructions. The result of following them is, that he gets out of one difficulty into another. The Board of Trade is careful not to have any obscuration of the light on either bow from right ahead, but in obtaining that desideratum it causes a departure from the rule, which to my mind is a far more serious matter. It turns out that Mr. Laslett would have passed this vessel if her cathead had been removed, although there would be a greater degree of error, in the sense that each side light would then be seen across the bow of the vessel. I do not know how these regulations are to be worked out. There cannot be a strict compliance with their letter.

I am strongly inclined to believe that the right thing to aim at would be to adhere to the arc of ten points, starting from two points abaft the beam, and to carry the light so as to allow it to be seen no further forward than an arc of ten points would allow. That would leave, if it were exactly carried out and the ship were motionless, a space in darkness right ahead equivalent to the beam of the ship but the lights would not then be visible across the stem. The question here is whether the departure from the strict requirements of this rule is a departure which is, under the circumstances, unreasonable; whether, because this cathead obscured the light of the vessel to the extent I have described, two and a half degrees or three degrees on the vessel's bows, it is a breach of the Regulations which is to entail the very severe penalty enacted by the 17th section of the Merchant Shipping Act of 1873. I am not inclined to say it is; I have asked the Elder Brethren and they agree with me in thinking that there was a reasonable compliance with the Regulation regarding lights. *The Nordens Dronning* is, therefore, not to blame for having the green light carried where it was, having regard to the position of the cathead. I asked Mr. Laslett this question, how he would fix the lights, and he said they should be carried farther forward, and he would place them some three feet higher, and that would be a way of obviating the difficulty. But he obviates one difficulty by running into another; the Elder Brethren tell me that if that suggestion were complied with there would probably be a serious obscuration of the light by the headsails of the vessel.

I have been dealing with this merely as a question under the statute. When I come to the merits of the case I have not the slightest doubt, as a matter of fact, that the obscuration, as far as it was an obscuration, of the green light by this cathead, had nothing to do with this collision, because I have no doubt that the two vessels, *The Fire Queen* and *The Nordens Dronning*, were in such positions that that cathead never could have obscured the light of the barque from those on board *The Fire Queen*, and that it ought to have been seen earlier by them. They did not see it, and they starboarded into *The Nordens Dronning*. I come now to the stern light. I have already intimated in the course of the case, after consulting with the Elder Brethren, that the stern light was improperly placed, and that its position constituted a breach of article 5 of the Regulations for Preventing Collisions applicable to the River Mersey—regulations having statutory effect, and the breach of which entails the statutory penalty imposed by section 17 of the Act of 1873. Had the improper position of that light any effect on the collision? I have no hesitation in saying it had not, but then it was said that is not the question. Could it have any effect on this collision? It appears to me it would be a proper compliance with article 5 of the Mersey Regulations to hang a white globe lantern from the centre of the taffrail of the vessel, so that it would hang a foot or eighteen inches below the taffrail. The Elder Brethren agree with me in this, that the real intention in prescribing these stern lights, as they are called, is to have them so placed that they should not be seen in front of the stern. However, taking it that that would have been a compliance, what follows? Why, that had it been there, by no possibility could those on board *The Fire Queen* have seen it before the collision. I know that one or two of the plaintiffs' witnesses, when asked to place models on the paper or on the table, from which diagrams were drawn, put the vessels in the position in which the stern light, carried as I have suggested it should be, would have been seen from *The Fire Queen*. But I do not accept that as the correct view of things. The vessels were never, and never could have been, in the position indicated by these diagrams. But, taking it that the collision between *The Fire Queen* and *The Nordens Dronning* was either a right-angle blow, delivered by the stem of *The Fire Queen*, or a blow, as the captain of *The Fire Queen* put it, leading aft on *The Nordens Dronning*, it follows, having regard to the fact that both vessels were under a starboard helm at the time and before the collision, that *The Fire Queen* never could have been in a position to have seen a light over *The Nordens Dronning's* stern. Therefore, although I say there was an infringement of this regulation with regard to what is called the stern light, it is an infringement which could not have any effect upon the question of collision. Neither in respect of the green light nor of the stern light can I find *The Nordens Dronning* to blame.

Now let me consider the other matters. I am asked

to believe, and, as I have said, this is an important point, that the tug had only one masthead light. [The learned judge examined the evidence as to this point, and came to the conclusion that the tug had two sufficient mastheads lights at the time, and that they ought to have been seen by those on *The Fire Queen*.] There is one other matter on which I desire to say a word. The night was hazy; had it not been hazy the steamer *Fire Queen* certainly might have seen the one masthead light, which she admits was on the tug, at a very much greater distance than 400 or 500 yards. It was hazy, and it may be that that justifies the look out; but the weather being hazy and going down, as the captain must have been aware he was, at something like seven knots an hour, he saw a light, one point only on his port bow and 500 or 600 hundred yards off. He could not have told for a minute what that light was; he came to the conclusion that it was a vessel at anchor and acted accordingly. It turned out to be a vessel under way—namely, the tug. I must say that, having regard to the state of weather and the pace he was going and to the uncertainty there was with regard to that light, in common prudence he should at once have eased his engines. He did not stop at all, but he went on until he got other indications, and he got into the difficulty with which we have to deal. On the whole I come to the conclusion that there must be a decree that *The Fire Queen* is alone to blame.

Solicitors for the plaintiffs, *Bateson, Bright, & Warr.*

Solicitors for the defendants, *Duncan & Son.*

House of Lords.

From C. A. (England) Nov. 25, 26, 1886; June 13.

WRIGHT *v.* HORTON. (*a.*)

Company—Register of mortgages—Mortgage to director not registered—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 43.

Debentures in a company incorporated under the Companies Acts were issued to a director. The debentures were not registered within the meaning of section 43 *of the Companies Act,* 1862. *Upon the company going into liquidation the validity of the debentures was contested both by unsecured creditors and by other debenture-holders.*

Held, that the mere omission to register did not invalidate the debentures.

Quære, whether a creditor who had been induced to give credit by the concealment, through non-registration, of debentures held by directors might be entitled to plead their personal disability in competition with himself.

Decision of the Court of Appeal *reversed.*

In re Native Iron Ore Co., 24 *W. R.* 503, 2 *Ch. D.* 345, and cases *prior to it overruled.*

Reasoning of Jessel, M.R., *in* In re Globe New Patent Iron Co., 27 *W. R.* 424, *approved.*

This was an appeal from a judgment of the Court of Appeal, affirming a decision of Chitty, J.

The appellant was a director in Joseph Wright & Co. (*Limited*), a company incorporated under the Companies Acts, which went into liquidation in 1881. By its articles of association the directors had power to raise money on debentures, and in October, 1878, they issued two debentures to the appellant, who was at that time a director. The debentures were not registered in accordance with the requirements of section 43 of the Companies Act, 1862. In the winding up the validity of these two debentures was contested by the respondents, including both creditors and other debenture-holders.

Chitty, J., and the Court of Appeal considered themselves bound by *In re Native Iron Ore Co.*, and held that the debentures were invalid.

The appellant appealed to the House of Lords.

Nov. 25, 26, 1886.—*Macnaghten, Q.C.*, and *Phipson Beale*, for the appellant.—The whole question is as to the correct construction of section 43 of 25 & 26 Vict. c. 89. This case is clearly covered by *In re Wynn Hall Coal Co.*, 18 W. R. 1128, L. R. 10 Eq. 515; *Ex parte Valpy & Chaplin*, 20 W. R. 347, L. R. 7 Ch. 289; and *In re Native Iron Ore Co.*, 24 W. R. 503, 2 Ch. D. 345; but those cases were wrongly decided, and have been disapproved: *In re Borough of Hackney Newspaper Co.*, 3 Ch. D. 669, 25 W. R. Dig. 60; *In re International Pulp and Paper Co.*, 25 W. R. 822, 6 Ch. D. 556; *In re South Durham Iron Co.*, 27 W. R. 845, 11 Ch. D. 579; and *In re Globe New Patent Iron Co.*, 27 W. R. 424. Mere omission to register cannot create a forfeiture; there must be some fraudulent concealment. *In re Great Western Forest of Dean Coal Consumers' Co.*, 34 W. R. 516, 31 Ch. D. 496, and *In re Underbank Mills Cotton Spinning and Manufacturing Co.*, 34 W. R. 181, 31 Ch. D. 226, were also referred to.

Ince, Q.C., and *J. G. Laing*, for the respondents.—A director is in a fiduciary position as regards the register, and may not take advantage of his own wrong. An officer must make known his own charges, and if he does not do so there is an equity to estop him from setting them up: *Savage* v. *Foster*, 9 Mod. 35; *Boyd* v. *Belton*, 1 Jo. & Lat. 730, 2 White & Tudor's Cas., 6th ed., 84; *Govett* v. *Richmond*, 7 Simons, 1. *Ex parte Harper*, 30 W. R. 650, 20 Ch. D. 685; *Shropshire Union Canal and Railway Co.* v. *Reg.*, 23 W. R. 709, L. R. 7 H. L. 496; *Forbes* v. *Moffat*, 18 Ves. 384; *Calisher* v. *Forbes*, 20 W. R. 160, L. R. 7 Ch. 109, were also referred to.

Macnaghten, Q.C., in reply.—The non-registration did not act in any way as an inducement to the respondents to advance money.

June 13.—Lord HALSBURY, C.—I believe the only question which your lordships have to determine upon this appeal is the true construction of the 43rd section of 25 & 26 Vict. c. 89. I do not think that any materials are before us upon which we could properly pronounce an opinion upon the question of fact referred to at your lordships' bar. If a director who has a fiduciary duty towards his shareholders omits that duty, and thereby gains an advantage for himself, it is clear he cannot retain it; and even without the fiduciary relation, if one man induces another to advance money upon a property which is alleged to be unincumbered, and which the borrower (either a borrower for himself or for a company of which he is director or agent) knows to be incumbered, such a transaction cannot stand if the borrower either himself makes or knowingly permits others to make such a representation. Whether any facts are susceptible of proof which could call upon your lordships to decide upon the validity of Mr. Joseph Wright's debentures upon any such grounds as I have glanced at I do not know; and I desire expressly to guard myself against expressing any opinion upon the subject. Neither Chitty, J., nor the Court of Appeal have determined, or professed to determine, the question upon any such ground, but solely upon the ground that Mr. Joseph Wright's debentures were not registered, and that he was a director and manager of the company. It is therefore apparent that the true construction of the section I have quoted must

(*a.*) Reported by C. G. NAPIER TROLLOPE, Esq., Barrister-at-Law.

determine the question in debate. The language of that section is as follows:—"Every limited company under this Act shall keep a register of all mortgages and charges specifically affecting property of the company, and shall enter in such register in respect of each mortgage or charge a short description of the property mortgaged or charged, the amount of charge created, and the names of the mortgagees or persons entitled to such charge. If any property of the company is mortgaged or charged without such entry as aforesaid being made, every director, manager, or other officer of the company who knowingly and wilfully authorizes or permits the omission of such entry shall incur a penalty not exceeding £50. The register of mortgages required by this section shall be open to inspection by any creditor or member of the company at all reasonable times; and if such inspection is refused, any officer of the company refusing the same, and every director and manager of the company authorizing or knowingly and wilfully permitting such refusal, shall incur a penalty not exceeding £5, and a further penalty not exceeding £2 for every day during which such refusal continues; and in addition to the above penalty, as respects companies registered in England and Ireland, any judge sitting in chambers, or the Vice-Warden of the Stannaries in the case of companies subject to his jurisdiction, may by order compel an immediate inspection of the register."

The first observation that arises upon the section is that the validity of the mortgage or charge is not, in express terms at all events, made to depend upon its registration; nor do I understand that any court has ever decided that that is its effect; and if it is once granted that a charge may be effectual, notwithstanding its non-registration, it is difficult to see how the exhibition of the register can be a representation that the mortgages registered are the only ones in existence. The second observation is that the register of mortgages required by the Act can only be inspected by a creditor or a member of the company; and in considering the decisions which your lordships are called upon to review, it is most important to bear these two propositions in mind. Eight years after the passing of the Act Malins, V.C., appears to have put a construction upon the section which certainly was founded upon a misapprehension of its terms. He appears to have thought a person hesitating whether he should deal with the company or not was intended by the Legislature to have the opportunity of consulting the register to guide his judgment as to whether he should trust the company or not; but, as I have already pointed out, it is only persons who are already members, or already creditors, who have a right to see the register at all. The error is important, because Malins, V.C., treats this as the key to the meaning of the section, which it is clear it is not, though, of course, a creditor already a creditor might be misled if he were advancing further money upon the property of the company, and the register was made a condition to the validity of a debenture. Notwithstanding the high authority of James, Mellish, and Baggallay, L.JJ., it is impossible to acquiesce in the bald statement that there is a "rule" or an "equitable principle" that an unregistered mortgage or debenture is invalid as against a director without some further exposition of what the "rule" or the "principle" is by which it is rendered invalid. The statute, for very obvious reasons, in constituting a code for the regulation of trading companies, has enacted that they shall keep an account of mortgages or charges specifically affecting their property. Had the Legislature thought right it might have rendered all mortgages or charges invalid unless they had been entered in this account. It has not done so. It might further have enacted that no director or officer of the company should take any benefit from any charge or mortgage whereof he was the owner if he were a party to its non-registration. This it has not done. It has simply enacted a pecuniary penalty for the non-performance of the statutory duty when that statutory duty is knowingly and wilfully omitted.

If the principle is supposed to be that no director can be allowed to derive any benefit from a debenture which he has obtained by lending money to the company of which he is a director, because he has in any respect disobeyed, or permitted to be disobeyed, the provisions of the Companies Act in some respect or another, the proposition is so wide as to become, on the face of it, absurd. If, on the other hand, it amounts to this, that the non-registration of his debenture by a director is a continuous representation to every other shareholder and creditor that such a debenture does not exist, it assumes a construction of the section to which I cannot assent; and I know of no authority which this or any other court has to add additional penalties to that which the Legislature has specifically enacted.

For these reasons I am of opinion that the order appealed from should be reversed, with costs, and I move your lordships accordingly.

Lord Watson.—Joseph Wright & Co. (Limited) was in 1875 incorporated under the Companies Act, 1862, and in August, 1881, went into liquidation. By its articles of association the directors had power to raise money upon debentures; and on the 22nd of October, 1878, two debentures for £500 each were issued to the appellant Joseph Wright. On the 18th of July, 1881, Mr. Wright executed a voluntary deed, which was duly intimated to the company, declaring that he held these documents of debt in trust for his wife, the other appellant; but, notwithstanding that circumstance, Mr. Wright must, for the purposes of the present case, be regarded as the holder of the debentures.

In 1878, when the debentures were issued, and also at the time of the liquidation, Mr. Wright was one of the directors of the company. A book was kept by the company, which contained a list of its debentures; but it is conceded that the entries in that book do not fully comply with the requirements of section 43 of the Companies Act, 1862, and that the appellants' debentures are not registered within the meaning of the clause. In these circumstances, Chitty, J., and the Court of Appeal have found, first, in a question between the appellants and the unsecured creditors of the company, and, secondly, in a question between them and a debenture-holder, who was not a director or official of the company, that the appellants' debentures are invalid, in so far as they purport to charge the undertaking and property of the company.

The principle affirmed by the judgments appealed from appears to be this, that a director or other official who lends to his company on the security of its property, and then fails to make an entry of the charge in terms of section 43, not only incurs the statutory penalty enacted by that section, but, in addition, loses the benefit of his mortgage. There has been no expression of judicial opinion in this case with respect to the soundness or unsoundness of the principle, it having been conceded, on all hands, that the courts below were bound by two previous decisions of the Court of Appeal.

The rule in question was first laid down by Malins, V.C., in *In re Wynn Hall Coal Co.*, and was thus explained by that learned judge:—"In this case the mortgagees are the directors who have committed an illegal act by not registering the mortgage, and upon the strict construction of the language of the Act, I think they are precluded from setting up the mortgage. But, independently of the language of the Act, I am of opinion that, upon general principles, it cannot be permitted that directors who get a charge on the property of the company, and omit to register it, but keep it as a pocket security concealed from the creditors, should set it up against the general creditors." A decision of Lord

Bomilly, M.R., to the same effect in *Ex parte Valpy & Chaplin*, was upheld by James, L.J., sitting alone. "Everyone," the Lord Justice said, "standing in a fiduciary position to the company, is bound to see that the company obeys the directions of the Legislature; and I am of opinion that the failure of the appellant to do so is fatal to his case." Next followed *In re Native Iron Ore Co.*, in which a similar decision of the Vice-Warden of the Stannaries was affirmed by the Court of Appeal, consisting of James, Mellish, and Baggallay, L.JJ., all of whom were of the opinion expressed by Mellish, L.J., that the rule established by the two preceding cases was "founded on a perfectly good equitable principle."

These are the decisions upon which the rule at present rests. In several subsequent cases the late Master of the Rolls (Sir George Jessel) expressed very strong disapproval of it. He did so in *In re Borough of Hackney Newspaper Co.* and also in *In re International Pulp and Paper Co.* In the first of these cases he held that directors who had realized their security before the commencement of the winding up could not be compelled to refund the proceeds, inasmuch as they had not "knowingly and wilfully authorized or permitted the omission" to enter their mortgage on the register; and, in the second, he decided that the sub-mortgagee of a director was not affected by the want of registration. In *In re South Durham Iron Co.* Hall, V.C., decided that the rule in *In re Native Iron Ore Co.* did not apply to a mortgage made to partners, of whom one only was a director of the company; and his decision was affirmed in the Court of Appeal by the Master of the Rolls and Bramwell, L.J. (Baggallay, L.J., dissenting). Bramwell, L.J., whilst recognizing the authority of *Ex parte Valpy & Chaplin* and *In re Native Iron Ore Co.* as binding on the Court of Appeal, did not conceal his disapproval of the principle laid down in these cases. In *In re Globe New Patent Steel and Iron Co.* the late Master of the Rolls again took the opportunity of reviewing the previous decisions, and of delivering an elaborate argument against the rule which they established.

I do not think any one of the learned judges who have supported the rule adopts the first reason assigned by Malins, V.C., in *In re Wynn Hall Coal Co.* I do not think it can be reasonably affirmed that the rule has been enacted, either expressly or impliedly, by the Legislature in section 43 of the Companies Act, 1862, or that it could be sustained in equity apart from the provisions of that section. The clause provides that all mortgages and charges specifically affecting the property of the company, whether held by its directors or shareholders, or third parties, shall be entered in a register, to be kept for that purpose by the company; and that "every director, manager, or other officer of the company who knowingly and wilfully authorizes or permits the omission of such entry shall incur a penalty not exceeding £50." That is the sole penalty which the statute imposes upon the failure of these persons to perform their statutory duty. If section 43 had been left out of the Act there would, in my opinion, have been no reasonable ground for holding that a director who had lent his money on a mortgage authorized by the memorandum and articles of association could not enforce his rights as mortgagee in a question with other creditors of the company. As I understand the decisions of the Court of Appeal, the foundation of the rule is the neglect of the director or other official to discharge his statutory duty, which raises, or is supposed to raise, in equity a personal disability which precludes him from enforcing his charge upon the property of the company in competition with any creditor who is not in the same position with himself.

I have come to the conclusion that the effect of the rule is to inflict upon persons who may fail to perform the duty imposed upon them by section 43 severe penal consequences which the Legislature has not enacted and cannot be held to have contemplated. The creation of such penalties, in addition to the pecuniary mulct which the Legislature has thought fit to attach to the wilful neglect of the statutory duty of registration, is, in my opinion, altogether beyond the functions of a court of equity. I do not think it necessary to explain in detail the reasons which have led me to that conclusion. They are all to be found in the judgment delivered by the late Master of the Rolls in *In re Globe New Patent Steel and Iron Co.*, in which I entirely concur, subject to the observation that it appears to me to be, in some passages, expressed in terms more forcible than the occasion required.

Whether a creditor who, after careful inquiry into the indebtedness of the company, has been induced to give it credit by the concealment, through non-registration, of mortgage or debenture debts held by directors or other officials, may be entitled to plead their personal disability in competition with himself, is a matter in regard to which I express no opinion. No such question occurs here. By the orders appealed from a charge upon the assets of the company, which was validly constituted by the appellant's debentures, is made void, through a subsequent failure to register, as against persons who, so far as appears, became and continued creditors of the company without making any inquiry as to the charges on its property, or as to the existence of a statutory register.

I accordingly concur in the judgment which has been moved.

LORD FITZGERALD.—The debenture book of the company, on the counterfoils of which was kept a full list of the debentures issued by the company, and which probably contained adequate information for all reasonable purposes, was nevertheless not a register of mortgages, as it did not comply with all the requisites of the 43rd section of the Act of 1862; but it is not alleged that in this neglect to comply with the provisions of the section there was any fraudulent omission on the part of the company or its office bearers, or that there was any concealment or any intention to deceive or mislead, or that any debenture-holder or creditor was deceived or misled or injured thereby.

In one of the affidavits filed on behalf of the appellants, Mr. Joseph Wright states that "the debenture book from which all the debentures of the company were issued was supplied for the use of the said company as being a proper debenture book, and was always regarded by us as constituting a true and sufficient register of debentures, and we were unaware that any other book was essential for such purpose. The said debenture book contained 200 lithographed forms of debentures. Each of these forms was attached to a counterfoil, and contained a description of the property mortgaged or charged, the amount of, and the nature of, the charge created, and the name of the mortgagee or person entitled to such charge. The printed paper now produced and shown to us marked 'A' is one of the said counterfoils with form of debenture attached." It would seem, too, that the debenture-holders and creditors had within their reach means of information as full for all reasonable purposes as if a proper register existed. I allude to these matters to clear the front, and reduce the question to one of law on the construction of the 43rd section. The appellant Wright being a director of the company, Chitty, J., held that his debentures were, for want of due registry, invalid as against creditors, so far as they charged the property of the company. We now proceed on the admission that the appellant's debenture were not duly registered, and that he was all the time a director of the company.

Chitty, J., in his decision properly yielded to prior authority binding on him. The hearing in the Court of

Appeal was formal only to enable the parties to come to this House for a final decision. The respondents have the considerable advantage of a series of decisions in their favour commencing with *In re the Wynn Hall Coal Co.*; but on the other hand a great judge, Jessel, M.R., whenever the opportunity fairly presented itself, never failed to express his dissent, and we can easily read in the judgment of Bramwell, L.J., in *In re South Durham Iron Co.* that he too was dissatisfied. In that case Baggallay, L.J., says: "They (that is Jessel, M.R., and Bramwell, L.J.) are both of opinion that the decisions in *Ex parte Valpy* and *The Native Iron Ore Co. case*, should have been different." Although section 43 imposes a mandatory obligation on the company to keep a register, and to enter in it certain particulars of each charge, it does not declare that the absence of registry, or a defective registry, shall either avoid the charge or in any respect invalidate it. There is no word in the 43rd section importing any such result. In the second branch of the section, imposing penalties for wilful omission "if any property of the company is mortgaged or charged without such entry," the statute seems to concede that the security is complete on the grant of the mortgage or charge and is not invalidated by non-registry. It was not denied that even if the mortgage or debenture had been originally granted to a director or officer of the company, and had been subsequently *bonâ fide* transferred to the third party, it was good in the hands of the transferees though it had never been registered. The statute imposes penalties on directors, managers, and officers of the company for knowingly and wilfully permitting the omission to enter on the register the particulars required by the 43rd section, and if it was intended in addition to invalidate the unregistered mortgage or charge, if in the hands of a director, manager, or officer to whom it had been granted, the statute has not said so.

It seems to me that the decision of Malins, V.C., in the case of *The Wynn Hall Coal Co.*, so far as it purports to rest on the construction of the language of section 43, cannot be sustained. Mellish, L.J., says in *The Native Iron Ore Co.'s case* that the rule established by the preceding cases "is founded on a perfectly good equitable principle," but what that principle is I have been unable to discover. In the preceding part of his judgment in the same case he puts it thus: "It is an established rule that where a director or other officer of a limited company advances money on the security of a debenture or mortgage of the company and omits to register it in accordance with the Act, the consequence is he has no charge against the creditors." Is it, then, a personal equity against the director or officer? It may thus be put: If the director knowingly and wilfully omits to register he is subject to a penalty of £50, and if the omission relates to a security of his own, he in addition loses his security. If there is no wilful omission, if it is innocent as in the present instance, he nevertheless loses his security on some "perfectly good equitable principle."

Baggallay, L.J., took part in the decision of *The Native Iron Ore Co.'s case*; and in the subsequent case, *In re South Durham Iron Co.*, in an elaborate judgment he states what he considers to be the principle of the prior cases thus: "If a director of a company advances money to the company, and takes as security for such advance a charge on the property of the company, and omits to register such charge, he is not at liberty to avail himself of such security against the other creditors of the company." But on what foundation does this forfeiture rest if not on the language of the statute? And there it is not to be found. It seems to me that the effect of these prior decisions has been to inflict a forfeiture which the statute does not impose in addition to the penalty which it does. I quite concur with my noble and learned friend that we cannot add to the weighty reasons of Sir George Jessel in the case of *The Globe New Patent Steel and Iron Co.*, which with him I adopt. The prior decisions may have been wholesome, but they are not warranted by the statute, and I know of no equitable principle on which they can be sustained.

Orders appealed from reversed, the respondents to pay to the appellants the costs of the appeal and the costs in the courts below.

Solicitors for the appellants, *Burton, Yeates, Hart, & Burton*, for *Johnson, Barclay, Johnson, & Rogers*, Birmingham.

Solicitor for respondents, *J. J. Keily.*

From C. A. (England). } Feb. 28; March 1, 3, 4, 7, 8; April 1.

Drummond v. Van Ingen. (a.)

Sale of goods by sample—Latent defect—Implied warranty of merchantableness—Caveat emptor.

Cloth merchants ordered from cloth manufacturers worsted coatings, which were to be equal in quality and weight to certain samples previously sent by the manufacturers, who were aware that the goods were to be sold to tailors. The samples and the goods supplied were similar in every respect, and in both a latent defect existed which rendered the coatings unmerchantable for the purpose of making up into coats in the usual manner.

Held, that in such a contract there is an implied warranty that the goods shall not, by reason of the mode of manufacture, be unfit for use in the manner in which goods of the same quality of material and the same general character and designation ordinarily would be used.

Decision of the Court of Appeal *affirmed.*

Mody *v.* Gregson, 17 *W. R.* 176, *L. R.* 4 *Ex.* 49, *approved.*

This was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., and Fry, L.J.) affirming certain findings of Day, J.

The facts and pleadings are set out in the speech delivered by the Earl of Selborne.

An order was made for the trial of certain issues of fact, and Day, J., sitting without a jury, found (*inter alia*) as follows:—That there was an implied warranty on the sale of the goods that the cloth should be merchantable generally as worsted coatings, and should be properly manufactured, and should be suitable to be made up into coats in the ordinary course of tailors' work."

The Court of Appeal affirmed these decisions, on the grounds that there was a conflict of evidence, and that the court ought not in such a case to overrule the findings.

The appellants appealed to the House of Lords.

Feb. 28; Mar. 1, 3, 4, 7, 8.—*Sir R. E. Webster, A.G.*, and *R. O. B. Lane*, for the appellants.

Waddy, Q.C., and *E. Tindal Atkinson, Q.C.* (*Wilberforce* with them), for the respondents.

April 1.—Earl of Selborne.—It does not appear to me to be necessary for the decision of this case to consider whether the ground on which the findings of Day, J., on the principal questions in it were affirmed by the Court of Appeal is one on which it would have been satisfactory to rest your lordships' judgment; because

(a.) Reported by C. G. Napier Trollope, Esq., Barrister-at-Law.

I believe that, after full argument, and after considering the effect of all the material parts of the evidence, your lordships are of opinion that those findings are substantially right.

The respondents, in July, 1883, ordered from the appellants, who are worsted cloth manufacturers at Bradford, certain goods described in the contracts as "mixt worsted coatings," which were to be in "quality and weight" equal to certain numbered samples which the appellants had previously furnished to the respondents. The goods were of a class well known in the trade under the denomination of "corkscrew twills." They were delivered to the respondents, whose object (known to the appellants) was to sell them to clothiers or tailors in the United States of America. All, or great part of them, were, in fact, disposed of to various customers of the respondents in the United States; but they were returned upon the respondents' hands as not being suitable for the purposes of that trade. They were afterwards sold by auction at a loss; and the counter-claim in this action was brought by the respondents to recover damages against the appellants on the ground that the goods were not merchantable, as they ought to have been.

The goods were, in point of fact, made exactly in the same manner as the samples; and the defect alleged to exist in them—viz., that of "slipperiness" (or want of such cohesion in the texture of the cloth between the warp and weft as was requisite to prevent them from giving way under the strain or ordinary wear when made up into coats in the usual manner) existed equally in those samples.

The defence was, in substance, that the goods were exactly what had been ordered; that there was no implied warranty that they should be merchantable for any purpose for which goods of such a make and texture would not be fit; that goods of that particular make and texture were not wholly unsaleable or incapable of being made up (if the tailor did his work in a manner suitable to their quality) into coats which might endure reasonable wear; that the defect, such as it was, was one of degree only, and was so far patent that, by such an examination of the sample as the manufacturer had a right, under the circumstances, to assume the merchant to have made, it might, and ought to have been, known.

As to so much of this defence to the counter-claim as turns on the question of fact, whether the alleged defect in the cloth existed or not (by which I mean existed as a defect, causing coats made of it in the manner usual among clothiers and tailors to give way under a strain which goods of the same class, such as were generally known and used in the trade, ought to resist), I think your lordships must, on the principle on which the Court of Appeal acted, take the existence of the defect, in a degree sufficient to render the cloth unmerchantable for the purposes for which goods of the same general class had previously been used in the trade, to have been sufficiently established. That question depended in part on practical demonstration by skilled witnesses in the presence of the court, followed up and further verified by the judge himself. Of all possible kinds of evidence this appears to me to be the most unfit for review by a court of appeal. So far, therefore, I think the fact must be assumed in the respondents' favour, on whom the burden of proof, upon that point, undoubtedly lay.

It remains to be considered whether this was a defect of quality against which there was an implied warranty by the appellants under all the circumstances of the case. That it was a defect of quality seems to me indisputable; and if it was known to the respondents when they gave the order, or if (as between themselves and the appellants) they ought to be taken as having discovered, or as having had means which they ought to have used of discovering it from the samples, I should hold that it was covered by the word "quality" as used in the contracts, and that there was no implied warranty against it; but if it was a latent defect, of which knowledge, or means of knowledge, which ought to have been used, could not, under the circumstances, be imputed to the respondents, then I think that the word "quality," as used in the contracts, ought to be restricted to those qualities which were patent, or discoverable from such examination and inspection of the samples as, under the circumstances, the respondents might reasonably be expected to make, and that it cannot be extended to defects in the texture of the samples, rendering the cloth so manufactured unmerchantable for the purposes for which the order was given, of which such examination and inspection would give the merchants, practically, no notice.

I do not think it necessary to go into any of the cases which have been decided upon questions of this kind. I think it sufficient to say that while the doctrine of implied warranty ought not to be unreasonably extended, so as to require manufacturers to be conversant with all the specialties of all trades and businesses which they do not carry on, but for the purposes of which goods may be ordered from them, yet I think it does extend to such a case as the present, if the goods, being of a class known and understood between merchant and manufacturer as in demand for a particular trade or business, and being ordered with a view to that market, are found to have in them, when supplied, a defect practically new, not disclosed by the samples, but depending on the method of manufacture, which renders them unfit for the market for which they were intended. If it would be unreasonable, on the one hand, to expect from the manufacturer a more exact knowledge than in the ordinary course of business would be likely to reach him of the processes and modes of treatment through which manufactured goods may pass, in the hands of the merchant or his customers, before being adapted to their ultimate uses, it would be not less unreasonable to expect from the merchant an exact knowledge, not only of the sort of article which he wants, but also of the processes by which it is to be manufactured. He has a right to presume that the manufacturer understands his own business, and will use such methods as may be proper to produce a good article of the kind ordered. The burden of ascertaining beforehand that this can be done, or how it is to be done, does not rest upon him.

In the present case the defect arose out of the want of sufficient connection or cohesion in the texture of the cloth between the warp and the weft. In all goods of the class called corkscrew twills the weft lies hidden inside, the surface on both sides being warp. Without the application of some kind of test, by pressure or otherwise, to discover whether the defect of "slipperiness" existed or not, or else unravelling the threads from the edges of the sample, there was nothing outwardly observable in the samples furnished by the appellants from which the defect could have been discovered. The appellants attempted, but in my opinion failed, to show that it was customary, as to this class of goods, and in such a business as that of the respondents, to apply a test or tests for the purpose of detecting slipperiness; or that the respondents, as reasonable men of business, ought to have done so. There was, in point of fact, nothing to put the respondents on their guard against any such defect; and they had, in my opinion, a right to assume that the appellants, accepting the order, could and would produce and deliver a good article, having the weight and all the other apparent qualities of the samples, which would be as merchantable for coatings as other articles of the same class previously known in the trade. The evidence leads me to the conclusion that this might have been done by the use of proper means. No such defect had been found before in any cloth of the same class previously manufactured; certainly not of such a kind and degree as to affect in the same or in any other practical way its merchantable

character; and it appears that these particular samples, and the goods manufactured from them, were made with that particular arrangement and texture of warp and weft from which the defect arose, according to a design furnished by a very young man then in the employment of the appellants, who was at that time little more than a beginner fresh from his apprenticeship, who did not himself discover the defect, and who admitted that, at that time, he knew nothing of any such danger as that of the cloth slipping.

The respondents had previously dealt with the appellants for cloth of the same general class, and had been supplied by them with goods in which there was no similar defect. When they gave the orders embodied in those particular contracts it is apparent that they wanted, not a worse, but in some respects (particularly as to what is called "handle," which I understand to be a certain softness to the touch) a better article than they had before. All the communications which passed between the parties were addressed to that point, as the result to be produced in the samples and in the manufacture; not to the manner of texture, or of uniting and connecting the warp and the weft, by which it was to be produced. At one time a sample was sent with a thicker weft, which would have cost more money, and was probably for that reason rejected. The same defect existed in that sample also; and the result ultimately arrived at was that the desired softness of "handle" depended on the finish, and could be obtained in cloth of the thickness originally contemplated.

I do not think it necessary, in this state of circumstances, to express any opinion upon the question which might have arisen, if cloth with the requisite softness of "handle" could not have been manufactured without having the defect in question. This was part of the contention of the learned counsel for the appellants; but, if the findings of the learned judge at the trial depended upon the result of the evidence on that point, I am unable to differ from them.

As to colour, your lordships stopped the respondents' counsel, and I think it enough to say that the finding of the learned judge on that point also is, in my judgment, one which ought not to be disturbed.

I move your lordships to affirm the judgment of the court below, and to dismiss this appeal, with costs.

Lord HERSCHELL.—I think that the general principles of law which have to be applied to the facts of this case are well settled and beyond question. It was laid down in *Jones* v. *Bright*, 5 Bing. 533, that where goods are ordered of a manufacturer for a particular purpose, he impliedly warrants that the goods he supplies are fit for that purpose. This view of the law has been constantly acted upon from the time of that decision, and was not impeached by the learned counsel for the appellants. It is equally well settled that upon a sale of goods of a specified description which the purchaser has no opportunity of examining before the sale, the goods must not only answer that specific description, but must be merchantable under that description. This doctrine was laid down in *Jones* v. *Just*, 16 W. R. 646, L. R. 3 Q. B. 197, where all the previous authorities on the point were reviewed. In the case of *Mody* v. *Gregson*, 17 W. R. 176, L. R. 4 Ex. 49, in the Exchequer Chamber, the decision in *Jones* v. *Just* was approved of and acted upon, and it was further held that the implied warranty that the goods supplied are merchantable was not absolutely excluded by the fact that the goods were sold by sample, and that the bulk precisely corresponded with it, but was only excluded as regards those matters which the purchaser might, by due diligence in the use of all ordinary and usual means, have ascertained from an examination of the sample. I think that the law enunciated in these cases is sound and not open to doubt. I proceed to consider its application to the facts of the case before us.

The plaintiffs were manufacturers at Bradford; the defendants were merchants dealing in woollen and worsted cloths, carrying on business in Huddersfield and New York.

The order for the goods in respect of which the present litigation has arisen was given by the defendants to the plaintiffs in 1883. The goods ordered were described as "worsted coatings," and they were to correspond in quality and weight with patterns which had been supplied by the plaintiffs. They were of a description known in the trade as "corkscrew," having the warp on either side and the weft not exposed to view. The goods, when delivered, were shipped to the United States, and sold by the defendants to various purchasers there. It turned out, as I think the evidence establishes, that, owing to the mode of manufacture, there was a great tendency in the warp to slip, and this to so serious an extent that when made into garments in the ordinary manner the seams gave way with no more than ordinary tension, and the braid became detached from the cloth. In consequence of this defect many purchasers from the defendants returned the goods to them, or compelled them to make allowances, for which they sought compensation by counter-claim in the present action. It is important to observe that the contract for 1883 was not the first dealing between the parties. The defendants had purchased of the plaintiffs a quantity of "corkscrew" worsted coatings in the previous year, and I cannot see any evidence in the correspondence which passed or in the oral communications to show that it was intended by either of the parties to the contract of 1883 that the goods should be of a different character from those of the previous year in any particular material to the controversy which has to be determined in this action. It is true that the purchasers desired goods of a somewhat softer "handle"; but I think it is abundantly clear on the evidence that this was a matter of "finish," and that it was not the endeavour to give a softer "handle" which led to the defect of excessive slipping.

I have said that the goods were, by the order, to conform to certain patterns supplied by the plaintiffs to the defendants, and approved of by them. There is no doubt that the bulk of the goods corresponded in every particular with these patterns; and this, the plaintiffs allege, is a complete answer to the defendants' claim. The tendency to slip is not, they insist, properly to be called a defect, but a characteristic of the manufactured article which existed in the sample just as much as in the bulk of the goods. I do not think it is very material what name is given to it, but I confess it strikes me that a characteristic arising from a particular mode of manufacture which renders the manufactured article less useful for the purpose for which such an article is ordinarily used, without, so far as appears, any counterbalancing advantage, may well be called a defect.

I think it is proved by the evidence that this defect existed to such an extent that the worsted coatings could not be used for the purpose of being made into coats in the manner usual with goods of the same general description and quality, and that they could only be made into garments capable of resisting ordinary tension by the adoption of special precautions both in regard to breadth of seam and method of sewing. The question arises whether in these circumstances the plaintiffs have complied with their contract by delivering coatings precisely corresponding in quality and weight with the patterns, or whether they are liable to the defendants.

Let me consider first how the case would have stood if no samples had been supplied. Suppose the defendants had simply ordered worsted coatings similar to those they had purchased in the previous year, but with difference of colour, design, and handle, could the plaintiffs have justified supplying under such an or

coatings such as those which have given rise to this litigation? It is true that the purpose for which the goods were required was not, as in *Jones* v. *Bright*, stated in express terms, but it was indicated by the very designation of the goods, "coatings." I think that upon such an order the merchant trusts to the skill of the manufacturer, and is entitled to trust to it, and that there is an implied warranty that the manufactured article shall not, by reason of the mode of manufacture, be unfit for use in the manner in which goods of the same quality of material, and the same general character and designation, ordinarily would be used. I think, too, that where the article does not comply with such a warranty it may properly be said to be unmerchantable in the sense in which that word is used in relation to transactions of this nature.

It was urged for the appellants by the Attorney-General, in his able argument at the bar, that it would be unreasonable to require that a manufacturer should be cognizant of all the purposes to which the article he manufactures might be applied, and that he should be acquainted with all the trades in which it may be used. I agree. Where the article may be used as one of the elements in a variety of other manufactures, I think it may be too much to impute to the maker of this common article a knowledge of the details of every manufacture into which it may enter in combination with other materials. But no such question arises here. There seems nothing unreasonable in expecting that the maker of "coatings" should know that they are to be turned into coats and other garments, and that he should further know what coatings will and what will not be capable of use for this purpose in the ordinary methods.

It seems to me not open to doubt that in the case which I have supposed the manufacturer would be liable. Does it, then, make any difference that the plaintiffs furnished patterns which were approved of by the defendants, and that the goods delivered were in complete conformity with their patterns? Except upon the assumption (with which I will deal presently) that the patterns ought to have conveyed to the defendants knowledge of the defect of which they complain, I cannot think that it does.

When a purchaser states generally the nature of the article he requires, and asks the manufacturer to supply specimens of the mode in which he proposes to carry out the order, he trusts to the skill of the manufacturer just as much as if he asked for no such specimens. And I think he has a right to rely on the samples supplied representing a manufactured article which will be fit for the purposes for which such an article is ordinarily used, just as much as he has a right to rely on manufactured goods supplied on an order without samples complying with such a warranty.

I adopt what was said by Willes, J., in *Mody* v. *Gregson*: "The object and use of such inspection of bulk or sample alike are to give information disclosing directly through the senses what any amount of circumlocution might fail to express. It seems difficult, therefore, to attribute any greater effect to a sample in excluding implication than would be ascribed to express words in the contract giving, as far as words could give, the same amount of information; and as to such words, the doctrine that an express provision excludes implication does not affect cases in which the express provision appears on the true construction of the contract to have been superadded for the benefit of the buyer."

There is no doubt that the implied warranty will be excluded as regards any defects which the sample would disclose to a buyer of ordinary diligence and experience. The inquiry therefore arises whether the defendants by "due diligence in the use of all ordinary and usual means" would have detected in the patterns the defects of which they now complain. I think not. What is "due diligence" must depend upon the circumstances. Having regard to the order given in the previous year, and the mode in which that order was fulfilled, I think that when the defendants made the contract there was nothing which could reasonably lead them to anticipate that the patterns represented goods possessing the defect which was, in fact, inherent in them. And I am satisfied upon the evidence that the defendants, who undoubtedly did not discern the defect, did not fail to do so from neglecting to use the means usually adopted by buyers under like circumstances.

I have, therefore, arrived at the conclusion that the learned judge who tried the case took a correct view of the facts on this part of it, and that his decision was properly affirmed by the Court of Appeal.

As regards the other complaint—viz., that the goods were not woaded according to contract—I have nothing to add to what has been said by the noble earl on the woolsack. It depended entirely upon disputed questions of fact, and I am not satisfied that they have been erroneously determined.

I therefore concur in the motion that has been made

Lord Macnaghten.—I venture to think that the case under review may well be decided on the broad principle that a manufacturer who agrees to supply goods to order, knowing the purpose for which they are required, thereby impliedly undertakes to supply goods fit for the purpose in view.

The real question, as it seems to me, is whether there is anything in the special circumstances of this case to exclude or qualify that implied undertaking.

The goods in question belong to a class of wearing material known in the trade as "corkscrews." They are described in the order as "worsted coatings." Messrs. Van Ingen ordered these coatings for the purpose of sale in the course of their business as woollen merchants. This much, at any rate, was known to Messrs. Drummond. Knowing this, they accepted the order, and supplied the goods. It turns out that the goods, when made up in the ordinary way, give a result which was not foreseen or suspected by either party. Where the cloth is cut, and stitched in the direction of the warp, the warp readily slips over the weft, and under a moderate strain the clothes part at the seams, and where braiding is used the braid peels off the edges.

It was said that this peculiarity is to be found in all corkscrews of a low or medium quality. Defect was not the proper word. It was a "characteristic" of these corkscrews; a somewhat bold euphemism when we know that the actual result was as much a surprise to Messrs. Drummond, who made the cloth, as it was to Messrs. Van Ingen, who bought it. It was said that this characteristic would need extra care in making up, but nothing beyond the resources of the tailors' art. The evidence on this point was not altogether satisfactory, and I am not convinced that with a material of this sort even an ingenious tailor could produce a coat that might be safely worn in public, except, perhaps, by a very careful person. But be that as it may, still the objection remains that no woollen merchant could venture to distribute patterns of such a material, or to recommend it to his customers, without at the same time giving special directions which would amount to a warning against its use. I cannot think that a material which requires such exceptional treatment is reasonably fit for sale by a woollen merchant in the course of his business.

It was argued that, after all, the goods delivered were coatings of a sort and saleable at a price. Indeed, one of the witnesses for the appellants said that at the date of the order, with the defect known, they would have been readily saleable at the price actually given for them. But the question is not were they saleable, but were they fit for the purpose for which they were known to have been ordered. And I observe that this very,

witness says that he "would not sell them to a person in the position of Mr. Van Ingen," and that he "should have known that Mr. Van Ingen could not use this class of stuff satisfactorily to himself."

Then it was argued, defect or no defect, the sale was a sale by sample. The goods delivered correspond with the sample, and there is an end to the matter. The seller has fulfilled his bargain. I think the sale was strictly a sale by sample. Certainly, the goods corresponded with the sample only too well. But does this exact correspondence, when it is found to involve an unforeseen and unsuspected defect, relieve the seller from his obligation to supply goods fit for the purpose for which they were intended? After all, the office of a sample is to present to the eye the real meaning and intention of the parties with regard to the subject-matter of the contract which, owing to the imperfection of language, it may be difficult or impossible to express in words. The sample speaks for itself. But it cannot be treated as saying more than such a sample would tell a merchant of the class to which the buyer belongs, using due care and diligence, and appealing to it in the ordinary way and with the knowledge possessed by merchants of that class at the time. No doubt the sample might be made to say a great deal more. Pulled to pieces and examined by unusual tests which curiosity or suspicion might suggest, it would doubtless reveal every secret of its construction. But that is not the way in which business is done in this country. Some confidence there must be between merchant and manufacturer. In matters exclusively within the province of the manufacturer the merchant relies on the manufacturer's skill, and he does so all the more readily when, as in this case, he has had the benefit of that skill before.

Now I think it is plain upon the evidence that at the date of the transaction in question merchants possessed of ordinary skill would not have thought of the existence of the particular defect which has given rise to this action, and would not have discovered its existence from the sample. It appears to me, therefore, that the sample must be treated as wholly silent in regard to this defect, and I come to the conclusion that if every scrap of information which the sample can fairly be taken to have disclosed were written out at length, and embodied in writing in the order itself, nothing would be found there which could relieve the manufacturer from the obligation implied by the transaction.

I prefer to rest my view on this broad principle. But it seems to me that the obligation of the manufacturer may be put in another way with the same result. When a manufacturer proposes to carry out the ideas of his customer, and furnishes a sample to show what he can do, surely in effect he says, "This is the sort of thing you want, the rest is my business, you may depend upon it that there is no defect in the manufacture which would prevent goods made according to that sample from answering the purpose for which they are required." As against the manufacturer, I think it must be taken that the sample is free from all hidden defects of manufacture which would interfere with the proper use of the manufactured article. If the manufacturer supplies goods corresponding with the sample, but free from all such defects, he fulfils his bargain. If that is beyond his power, he must be responsible for undertaking more than he is able to perform.

There was one argument used on behalf of the appellants which it is difficult to state with perfect gravity. It was contended that somehow the merchants were themselves to blame. They gave their "ideas" as it was called to the manufacturers, and they put a limit on the price. They wanted something cheap, with the look of a high-priced article. They ought to be satisfied. Their limit was not exceeded. Their ideas were carried out to the letter. As for the result, however disastrous that may be, it was the natural consequence of aiming too high and paying too low. It was conceded that it would have been the duty of the manufacturers to warn the merchants if they had only known what the result would be. But as they did not know it they claim to shelter themselves under their ignorance—ignorance, be it observed, of their own business—and to throw the blame on the merchants who relied on their skill. It would be just as reasonable for an architect who is employed to build a house, and who builds one unsafe for habitation, to turn round on his employer and say: "You must remember you pressed your ideas upon me; you wanted this and you wanted that; you were all for show, and you objected to expense; you have got exactly what you told me you wanted; and if you had been a little more liberal I should have made provision for a more solid foundation. Of course, I should have told you if I had known the house would be likely to tumble down, but, really, I did not think about it, and so I am not answerable for the instability of the structure."

Your lordships were told that if you uphold the decision of the courts below you will be going further than any decided case has gone. I am not so sure of that. True, no case was cited in which the facts are precisely similar. There is no fraud here as there was in *Heilbutt* v. *Hickson*, 20 W. R. 1035, L. R. 7 C. P. 438. If adulteration be something different from fraud, there is no case of adulteration, as there was in *Mody* v. *Gregson*. But the governing principle in all the cases is the same. And, indeed, so far as I can see, there is no substantial distinction between the facts in the present case and the facts in *Jones* v. *Bright*. There the defendants were manufacturers of copper. The plaintiff wanted copper to sheath a vessel. The defendant knew for what purpose he wanted it. The plaintiff's shipwright went to the defendant's warehouse and selected what he thought would suit, and he sheathed the vessel with the copper he selected himself. The sheathing was found to be decayed at the end of four or five months while it ought to have lasted four or five years. The plaintiff sued for damages. The jury found that the decay of the sheathing was occasioned by some intrinsic defect in the copper, but they could not tell what the cause of that defect was. There was no trace of fraud there. The defect was unknown and unsuspected. The Chief Justice stated that the conduct of the defendants was "most upright." But still he held them liable, and though some members of the court took a narrower ground, he based his judgment on the broad principle that manufacturers were bound to supply an article fit for the purpose for which they knew it was required. I can see no distinction between a sale by sample where the sample gives incomplete and, consequently, misleading information, and a case where the purchaser selects the goods in bulk and those goods have an intrinsic defect not discoverable on inspection.

Your lordships were warned that if the appeal should be dismissed the effect would be to hamper trade, and to cast on manufacturers a burden which has not been cast on them hitherto. That is the stock argument in all these cases. It was urged and rejected in *Mody* v. *Gregson*. It met the same fate in *Jones* v. *Bright*. It has never yet availed to relieve manufacturers from the liability which they assume by inviting customers to rely on their skill, or to excuse persons from fulfilling their contracts according to the real intention and true meaning of the bargain.

For these reasons I concur in the motion which has been proposed.

Order appealed from affirmed; and appeal dismissed with costs.

Solicitors for the appellants, *Jaques, Layton, Jaques*, for *Watson & Dickons*, Bradford.

Solicitors for the respondents, *S. Learoyd & Jan*, for *Learoyd & Piercy*, Huddersfield.

From C.A. (England). Dec. 3, 6; Jan. 31.

LOWE v. FOX. (a.)

Lunatic—Order for reception—Statement of particulars—Alteration of statement—16 & 17 Vict. c. 96, s. 4—Order for discharge—8 & 9 Vict. c. 100, s. 72.

By section 4 of 16 & 17 Vict. c. 96 the statement of particulars required to be given with an order for the reception of a lunatic is made part of the order, and if the order, properly understood by a reasonable mind, gives all the particulars which it is required that a medical man should have upon receiving the order, it is in accordance with the statute.

The alteration of such an order in a material particular, at all events if made with the privity of the person who relies upon it, will make it invalid, and preclude him from legally relying upon it; but it is not so where the alteration is immaterial.

A letter directing the keeper of an asylum to discharge a patient "as soon as you may think it advisable" is not an order of discharge within 8 & 9 Vict. c. 100, s. 72.

Decision of the Court of Appeal (34 *W. R.* 144, 15 *Q. B. D.* 667), *affirmed.*

This was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., and Bowen, L.J.), reported 34 W. R. 144, 15 Q. B. D. 667.

The appellant brought an action against the respondent, who was the licensee of a private lunatic asylum near Bristol, for false imprisonment. The defendant relied on 8 & 9 Vict. c. 100, ss. 99, 105, and 21 Jac. 1, c. 16, s. 3.

The plaintiff, who was the wife of the vicar of Up Ottery, Devon, was admitted as a patient into the defendant's house in September, 1870, under an order signed by her husband and certificates signed by two medical men. The statement accompanying the order in the form given in schedule A. (No. 1) of 16 & 17 Vict. c. 96, was, so far as is material, as follows:—"Age of the patient, fifty." "Whether first attack"; "For the last twenty years has been subject to what is termed hysteria." "Age (if known) on first attack"; "Thirty." "When and where previously under care and treatment"; "During this period of twenty years has been constantly under treatment." This order was, on the 1st of October, altered by the plaintiff's husband, who added to the last answer the words, "for hysteria by Dr. Conolly, Hanwell; Dr. Macintosh, Torquay; Dr. Manier, Geneva, etc." This addition was not sanctioned by the Commissioners in Lunacy, as required by section 11 of 16 & 17 Vict. c. 96.

On the 19th of January, 1871, the plaintiff's husband received a letter from the commissioners stating that the plaintiff ought to be discharged. On the 20th of January the plaintiff's husband wrote to the defendant enclosing a copy of the letter from the commissioners, and saying, "After the commissioners' letter I suppose I must consent to Mrs. Lowe's discharge, and beg you will carry out their suggestion as soon as you may think advisable. Mrs. Lowe will require £10 to take her to London. I enclose a cheque, and should feel greatly obliged by your cashing it for her." The plaintiff was, however, detained at the asylum till February.

Pollock, B., at the trial directed a verdict for the defendant. The Divisional Court (Grove and Denman, JJ.), being of opinion that the case ought to have gone to the jury, directed a new trial. The Court of Appeal restored the judgment of Pollock, B., and the appellant appealed to the House of Lords.

Dec. 3, 6; Jan. 31.—The appellant in person.—The case ought to have been left to the jury, and there should be a fresh trial. First, the answers in the statement are ambiguous, and not categorical. Secondly, the instrument could not be set up as a defence as it had been altered, and was consequently invalid: *Pigot's case*, 11 Rep. 26: *Master* v. *Miller*, 1 Sm. Lead. Cas., 9th ed., 825; *Powell* v. *Divett*, 15 East, 29; *Davidson* v. *Cooper*, 13 M. & W. 343; *Croockewit* v. *Fletcher*, 5 W. R. 348, 1 H. & N. 893; *Suffell* v. *Bank of England*, 30 W. R. 932, 9 Q. B. D. 555. Thirdly, the letter of the 20th of January, 1871, was a letter of discharge. These points should all have been left to the jury as evidence of malice.

She also cited *Hall* v. *Semple*, 3 F. & F. 337, and *Reg.* v. *Pinder*, 24 L. J. Q. B. 148, 3 W. R. C. L. Dig. 184.

Sir E. Clarke, S.G., and *R. O. B. Lane*, for the respondent, were not called upon.

Lord HALSBURY, C.—In this case the plaintiff has argued her appeal not only with great ability but with great propriety, and I think has established beyond all question that, whatever the state of her mind was in the year 1871, she is, at all events, now in full possession of her faculties.

In order to detain the plaintiff in the asylum, the gentleman who received her there was bound to receive with her an order justifying that detention, and I think it would be a misfortune if any doubt could be thrown upon the question whether or not that order comprehended not only the mandatory part to keep her under detention, but the particulars which the statute requires as an essential part of the order. So much the plaintiff has established. But the question here is whether in truth (I speak of it now in its original condition, I will deal with the question of its alteration presently) the order was not a compliance with the statute, and I think it is impossible to deal with this order, or indeed with any other written instrument, in the way in which the plaintiff has sought to deal with it—namely, to dissociate it from its contents, and to dissect it into its parts and to read each of those parts as if it had no relation to or dependence upon the rest. The order must be treated as a whole. The question here is whether this order, properly understood by a reasonable mind, does not give all the particulars which it was required that a medical man should have upon receiving the order. Each part of the order has reference to the rest, and after giving the name and the age and the condition, whether married or single, and the condition of life and the religious persuasion, the first statement is that her previous residence was "Vicarage, Up Ottery." I think one cannot dissociate even that statement from the fact that the person signing the order and responsible for its accuracy is a person who lived there also—namely, her husband, and the question which arises upon the following answer would appear to arise upon a hypothesis which I for one do not accept, that each question in this form is intended to be answered "Yes," or "No." No doubt when one requires a categorical reply, the answer "Yes" or "No" is the appropriate answer; but I can conceive cases (and I think this case itself affords an illustration) of a condition of things in which an answer "Yes" or "No" would not give full information and would be liable to mislead.

As the appellant herself has very appropriately observed, we have nothing to do with the truth or falsehood of the statements herein. The certificates of the doctors and the allegations made are made upon their respective responsibilities; but all that which the keeper of the asylum has to regard is whether the statements which are made in the form are such as to justify him in exercising the powers given him under the statute of detaining in confinement the person committed to his charge; and he is made acquainted with these facts by the statement of the husband of the lady, whose previous

(a.) Reported by C. G. NAPIER TROLLOPE, Esq., Barrister-at-Law.

place of abode had been the vicarage of Up Ottery, where this lady lived. The husband is asked "whether first attack." I agree with the appellant's argument that if you are to take that question by itself and the answer to it by itself, and not associate it with the context, "first attack" must mean the first attack with reference to that which alone the keeper of the house has to consider—namely, the state of her mind. Under ordinary circumstances the answer would be either "Yes" or "No"; but supposing the person is endeavouring to give information and is endeavouring to inform the medical man of the true state of the facts, would it be an adequate answer to say, "Yes, the first attack," without further explanation? If he had said, "Yes, it is the first attack of that which I consider to be absolute insanity, but the fact is that for the last twenty years the lady has been in the borderland between insanity and hysteria," no one can doubt that, besides giving the answer he was bound to give, he would have given valuable and important information. What does he say? He says, "For the last twenty years has been subject to what is termed hysteria." Upon the most ordinary construction of language, surely the person who is pledging his veracity to that statement means, "She has not been suffering from anything I am entitled to call insanity, but I tell you as a fact that for twenty years I have had experience of this, that she has been suffering from what is termed hysteria." No one can doubt that that will not make the information given as part of the order inaccurate, or the order itself invalid. But what is contended apparently is that this is an implied allegation that for twenty years this lady has been insane. It seems to me no rational person could come to such a conclusion. The obvious and natural meaning of it is that she has not been for that time insane, but has for twenty years suffered from hysteria.

That being the language of the original answer to this question, the next is, "Age (if known) on first attack," and the answer is, "Thirty." Here, again, I agree that the hypothesis of the question is first attack of insanity; and if that had stood alone and without being associated with the answers and questions with which it is associated I think the natural conclusion from it would have been that it meant the first attack of insanity. But (and that has been the fallacy of the appellant's argument throughout) you cannot dissociate that answer from the others with which it is associated; and when one sees that the person has been suffering for twenty years from what is described as hysteria, the previous part of the order having shown that the lady's age was now fifty, I should have thought no one could have doubted that the "Age on first attack," "Thirty," pointed to the fact that the first attack was an attack of that from which she had been suffering for twenty years—namely, hysteria. Twenty from fifty leaves thirty; and that is the accurate description of her age at the time of the first attack.

Then there comes "When and where previously under care and treatment?" It is necessary to observe here the form of the question, because it is clear that what that form of question means is that if a person has been previously insane and previously under care as an insane patient, the when and where should be stated. It is to be observed that in the answer the word "care" is designedly omitted, because that would be applicable to patients under the care of persons who would restrain their liberty. Accordingly, that is not answered; but the answer is, "During this period of twenty years has been constantly under treatment;" "care and treatment" being respectively, as I think, intended to point to where under care, and what periods of treatment. The answer upon the facts as we now know them appears to be perfectly accurate. She never was under any care as an insane person, but the writer of this document says:—"As I have already told you in effect that for twenty years she has been suffering from hysteria, so in answer to this question I tell you that during that period of twenty years she has been constantly under treatment. Under treatment for what? Why for that which I have been previously describing in this document." The next question is, "Duration of existing attack," and the answer is "About a fortnight since." Then follow questions and answers which are immaterial for this purpose.

It seems to me that no one with a knowledge of the facts as we are now possessed of them could have answered those questions with a more apparent scrupulous regard to giving the whole state of the facts. I construe this document, and I think the keeper of the house would construe this document, to mean that there has been no previous insanity, that there has been no previous detention under "care." That is how, I think, the keeper of this asylum construed this document. If so, it appears to me that the whole foundation of the argument fails; because it is not a question of a mistake or an irregularity which might be cured so far as the liability of the person is concerned by a *bonâ fide* belief in the statement and an intention to carry out the provisions of the statute; but, in the view which I take of this case, the statute has been obeyed, for it nowhere requires that the language of this instrument shall be categorical in its character, but requires that it shall truly, on the face of it, give answers to the questions propounded as part of the order which is to justify the detention.

I pass on to the question whether or not the alteration which was made in this order deprives it of any validity; and upon that question I wish to guard myself. I should entirely concur with the appellant that in an order of this description, which, as she truly says, is the foundation upon which the person keeping the asylum is entitled to detain persons, and restrain them from the liberty to which they otherwise have a right, if a material part of it was altered, so that the document no longer spoke the language which it did speak when it was originally received, and upon which the detention was authorized, that vitiated the document. And I think it would be in that case a very calamitous view of the state of the law if any doubt could be entertained as to whether such a misuse of the authority given by the statute could be made with impunity. It is as well, I think, that it should be generally known and understood that any tampering with a document of that sort would impair its validity, and deprive any person professing to act under it of any protection from it. But in all the cases which the appellant has quoted, and in accordance with the principles upon which those cases were decided, it may be clearly perceived that in each and every one of them materiality was an essential condition to make the instrument void.

Now, what is the addition which is said to make this document invalid? "During this period of twenty years has been constantly under treatment"; that was how the document originally stood. Then come the words, "for hysteria." It is to be observed that in the last preceding answer but one the allegation as to the twenty years was that she was subject to hysteria for that time; so that the hysteria, the supposed complaint, which is so far the only thing added, is a mere addition of something which has already appeared upon the face of the instrument. Then comes a statement of various persons by whom the lady has been treated, and it is stated that she has been treated by "Dr. Conolly," or "Hanwell." I introduce the word "of" because it seems to me that that is the necessary and obvious interpretation of the language. The words actually are, "Dr. Conolly, Hanwell; Dr. Macintosh, Torquay; Dr. Monier, Geneva," &c. I do not think that any rational person reading those words would entertain the smallest doubt that the allegation intended to be made by them was that the lady had been under treatment by

those various doctors, identifying them by their different residences, and that she had been under treatment by those doctors for the hysteria which had been previously stated to be the complaint under which she had been suffering for the last twenty years.

I now come to the last point, which turns upon the language of the statute; and it is not unimportant to observe what the statute provides (8 & 9 Vict. c. 100, s. 72):—"If and when any person who signed the order on which any patient was received into any licensed house shall, by writing under his hand, direct" (I am leaving out the words which are not appropriate to the present purpose) "that such patient shall be discharged or removed, then and in such case such patient shall forthwith be discharged or removed as the person who signed the order for his reception shall direct." The question is whether the letter of the 20th of January complied with the conditions of that statute. That point appears to me to be beyond all doubt. No doubt the appellant is right in saying that the person who signed the order had no right to appeal to the discretion of the keeper of the asylum. I think she has made out that it is a question of acting under the authority of the statute, and that the person who had her under lawful detention already was bound, if he received an order, not to exercise a discretion, but to comply with the order if it was such as is prescribed in the language of the section. But the question for your lordships is whether it was an order; and when it is relied upon as an order or authority one must see what is the language of the instrument itself, so as to ascertain whether there was an order, a peremptory order, to discharge absolutely, giving no authority or discretion to the person who had the lady under detention not to act upon it. It is impossible to read the language of the instrument and not to see (indeed, the lady herself seems to be conscious of the fact) that the person sending that letter shrank from the responsibility of giving an absolute order, and intended to leave it to the discretion of the person who was to receive that which she describes as an order. The question, then, is whether the person who acted in pursuance of that direction and fulfilled strictly the authority which he got—namely, to exercise a discretion to retain the lady for the period of a fortnight, disobeyed an "order" within the language of the statute. It seems to me that it is impossible to maintain for one moment that he did; and I am therefore of opinion, and so move your lordships, that the judgment of the Court of Appeal should be affirmed, and that this appeal should be dismissed, with costs.

Lord Watson.—I am of the same opinion. I am quite satisfied with the reasons which have been assigned by the Lord Chancellor, and I also agree with the reasons which have been given in the Court of Appeal. It appears to me that, so far as concerns the order of admission, the Divisional Court erred in reading each of these answers separately in connection with the question to which they are severally appended, without taking into account the plain connection, both in grammar and in substance, which subsists between them all.

Lord Fitzgerald.—I also concur in the judgment which has been delivered by the Lord Chancellor, affirming the judgment of the Court of Appeal and adopting its reasons.

Lord Herschell.—I am entirely of the same opinion, and I only desire to add that I entirely concur with what my noble and learned friend has said as to the alteration of such a document as this. I think it is important that it should be understood that the judgment we are delivering rests upon the fact that the alteration was an alteration wholly immaterial, and that it is not intended to cast any doubt upon the proposition that the alteration of a document of this description in a material particular, if made, at all events, with the privity and knowledge of the person who is relying upon it, would make it invalid, and would preclude him from legally relying upon it. I say that because certain expressions have been cited which would seem to indicate that in some cases, at all events, of a somewhat similar description, a document is invalidated even if the alteration be made against the will and in fraud of the person who has charge of it and who has to rely upon it. For my own part, I desire entirely to reserve my opinion upon that point until it arises, because I do not feel at present prepared to say that in every case an alteration which would invalidate the document when made with the privity and knowledge of the person having th custody of it and relying upon it would invalidate made in fraud of him and against his will.

Lord Macnaghten.—I am of the same opinion.

Order appealed from affirmed; and appeal dismissed, with costs.

Solicitors for the appellant, *T. White & Sons.*

Solicitors for the respondent, *Mead & Daubeny*, for *Fox & Whittuck*, Bristol.

Lunacy.

May 2.

In re Harwood. (*a.*)

Practice—Lunacy—Lunatic mortgagee—Power of sale—Lunacy Regulation Act, 1853 (16 & 17 *Vict. c.* 70), *ss.* 116, 136—*Trustee Act*, 1850 (13 & 14 *Vict. c.* 60), *s.* 3.

Where a mortgagee becomes lunatic it is doubtful whether the court has jurisdiction, under section 136 *of the Lunacy Regulation Act*, 1853, *by one order to authorize the committee to sell and also to convey the mortgaged estate.*

The usual practice, which is to direct the property to be sold, and then by a subsequent order to vest it in the purchaser under section 3 *of the Trustee Act*, 1850, *should be adhered to.*

The question raised in this case was whether the court had jurisdiction, under section 136 of the Lunacy Regulation Act, 1853, by one order to direct the committee to sell and also to convey the property of a lunatic.

The property of the lunatic in the present case consisted (*inter alia*) of a legal mortgage by underlease of four freehold houses, and contained the usual power of sale. The interest on the mortgage being heavily in arrear, the committee was desirous of selling the property under the power.

The usual practice in such cases was for the court to give leave to sell, and then, on a subsequent occasion, to make a vesting order under section 3 of the Trustee Act, 1850.

On the 7th of April, 1886, the committee took out a summons for liberty to "forthwith put up for sale the property" comprised in the mortgage, pursuant to the power of sale therein contained, "and to convey such property when sold to the purchaser thereof, or as he shall direct."

The Master in Lunacy, by his certificate dated the 24th of March, 1887, certified that he approved of the sale, and stated that, having regard to the doubts which

(*a.*) Reported by W. Ivimey Cook, Esq., Barrister-at-Law.

had been expressed before him as to whether such a sale of mortgaged premises could be duly carried into effect under the provisions of section 136 of the Lunacy Regulation Act, 1853, in conjunction with section 3 of the Trustee Act, 1850, or whether such sale could be effected under one or other of such sections alone, and which of them, or in what other mode such sale should be made, and the requisite conveyance or assignment to a purchaser executed, he submitted the matter to the consideration of the Lords Justices.

H. M. Humphry, in support of the application, submitted that the court had jurisdiction, either under section 136 or section 116, to make the order asked for.

COTTON, L.J.—The question is whether, when a mortgage is vested in a lunatic as part of his estate, the directions to sell and also to convey may be made in one and the same order. It is said that we can do this under section 136 of the Lunacy Regulation Act, 1853, and the question turns on the equivocal use which is made of the word "power." The object is to transfer the legal estate from the committee to the purchaser, and in my opinion there is not a power within the meaning of section 136. A power of sale in a mortgage is simply this. Having the legal estate, the mortgagee may convey the absolute interest to the purchaser, the power only giving him the ability to cut off the equitable interest of the mortgagor in the property. The power sought to be exercised is a power which the lunatic, if he had been sane, could have exercised by assignment of the legal estate, thereby barring the equitable. It is more doubtful whether what is asked for could be done under section 116; but it would be dangerous to introduce a new practice, and the fact that some small expense would be saved is not sufficient to induce us to do something which may be a ground for somebody taking an objection to the title.

LINDLEY, L.J.—I am of the same opinion. I think we ought not to try an experiment the effect of which may hereafter be that someone may hereafter object that we had no power to do what we are now asked to do. I think we had better keep to the old practice, which probably the doubts suggested. The order will only authorize a sale.

Application refused.

Solicitors, *Torr, Janeways, & Co.*

Court of Appeal.

From Q. B. Div. July 8.

STOKES *v.* STOKES. (*a.*)

Practice—Transfer of actions to county court for trial—Action for slander—County Courts Act, 1867 (30 & 31 *Vict.* c. 142), *s.* 10—*Judicature Act*, 1873 (36 & 37 *Vict.* c. 66), *s.* 67.

Section 67 *of the Judicature Act*, 1873, *does not limit section* 10 *of the County Courts Act*, 1867, *and the High Court has power to send down an action of slander to be tried in the county court.*

Appeal from a judgment of the Divisional Court (Field and Manisty, JJ.) affirming an order made in chambers that in the event of the plaintiff failing to give security for costs the action should be remitted to trial before a county court, under section 10 of the County Courts Act, 1867.

(*a.*) Reported by A. H. TODD, Esq., Barrister-at-Law.

By the Judicature Act, 1873, s. 67, section 10 of the County Courts Act, 1867, is to apply to all actions commenced or pending in the High Court of Justice in which any relief is sought which can be given in a county court.

By the County Courts Act, 1867, s. 10, power is given to the court or a judge in the superior court in actions for "malicious prosecution . . . slander . . . or other actions of tort," when the plaintiff has no visible means of paying costs, to make an order that unless the plaintiff give security for costs or show that he has a cause of action fit to be tried in the superior courts, the cause be sent down for trial before a county court.

By the County Courts Act, 1846 (9 & 10 Vict. c. 95), s. 58, the county court is not to have cognizance of actions for slander.

Cock, Q.C., and *Ellis*, for the plaintiff.—Section 67 of the Judicature Act, 1873, limits section 10 of the County Courts Act, 1867, as regards such an action as an action for slander, in which relief could not be given by the county court: *Garnett* v. *Bradley*, 26 W. R. 698, 3 App. Cas. 944.

Rose-Innes, for the defendant, was not heard.

Lord ESHER, M.R.—I am of opinion that the decision in *Garnett* v. *Bradley* has nothing to do with the present case. That was a question of costs, and depended on whether certain powers given by the Judicature Acts were inconsistent with other Acts as to costs. It was there held that the new legislation was inconsistent with the earlier enactments, and that these had been repealed. Everybody is agreed as to the principle involved in that decision, but it has nothing to do with a case where two different enactments are involved. I think that Lord Blackburn, in *Garnett* v. *Bradley*, was dealing with the question whether an action for slander could be "entertained" by a county court—that is, whether an action for slander can be brought as a county court action in a county court. The only question here is whether two enactments—section 10 of the Act of 1867 and section 67 of the Act of 1873—are so inconsistent that the earlier must be held to be repealed by the later. Section 10 of the Act of 1867 dealt with certain definite cases, and gave power to the superior courts to use the judge of the county court as their instrument—that is to say, to send a case to the county courts to be tried. When that had been done the judgment would be carried out as a judgment of the superior court. The provisions of section 67 of the Judicature Act do not contain an enumeration of cases, but give power to the High Court to send all actions pending in the High Court to the county court to be tried, with this limitation to the word "all"—viz., actions "in which any relief is sought which can be given in a county court." Section 10 is intended to remain in force with regard to all the cases mentioned in it, and additional power is given to the superior court to deal with other cases in which any relief is sought which can be given in the county court. The two sections are not inconsistent, and stand together.

LINDLEY, L.J.—I am of the same opinion. It would be astonishing if it were now to be discovered that this Act of 1873, which has now been for so many years in operation, had been misunderstood by judges of the High Court as to their power to remit actions to the county court. Section 67 of the Judicature Act applies to all actions in the High Court. When that court was created there was a doubt felt whether section 10 of the earlier enactment would work at all. Therefore, this section was introduced, and it is very wide in its terms. The words in section 67 which have been commented on restrict the meaning of the word "all," and do not apply to the classes of actions mentioned in section 10.

Section 67 was intended to extend the power conferred by the earlier statute.

LOPES, L.J., concurred.

Solicitor for the plaintiff, *R. Chapman.*

Solicitors for the defendant, *Lumley & Lumley.*

From Q. B. Div. Jan. 22; May 21.

HENDERSON BROS. *v.* MERSEY DOCKS AND HARBOUR BOARD. (*a.*)

Ship—Dock rates—"Trading inwards"—Mersey Dock Acts Consolidation Act, 1858 (21 & 22 *Vict. c. xcii.*), *s.* 230.

By section 230 *of the Mersey Dock Acts Consolidation Act,* 1858, "*all vessels entering into or leaving the docks shall be liable, according to the tonnage burthen thereof, to pay dock tonnage rates according to the respective class of voyages—that is to say, vessels trading inwards shall be liable to the rates payable in respect of the most distant of all the ports from which such vessels shall have traded to Liverpool; vessels arriving in ballast, but trading outwards, and also vessels built within the port of Liverpool, or trading outwards, shall be liable to the rates payable in respect of the most distant of all the ports to which they shall trade outwards. . . . One arrival with one departure shall be considered as one voyage, whether such vessel shall have traded both inwards and outwards, without regard to any intermediate ports to which she may have traded, but such vessel shall be liable to the rates payable in respect of the most distant of all the ports to which such vessel shall have traded.*"

Certain vessels of the plaintiffs carrying cargo from Glasgow to Bombay, called at Liverpool to load cargo, but did not unload any cargo until they reached Bombay. On the return voyage part of the cargo was unloaded at Liverpool, but no fresh cargo was taken in, and the vessels proceeded to Glasgow. Dock rates having been charged by the defendants on the basis of their being vessels trading outwards to Bombay and trading inwards from Bombay,

Mathew, J., *held that the voyage from Liverpool to Glasgow and back constituted one voyage, on which proportionate dock rates could be charged, and that the voyage from Liverpool to Bombay and back also constituted one voyage, on which proportionate dock rates could be charged.*

Held (by Bowen and Fry, L.JJ., Lord Esher, M.R., *dissenting*), *that the dock rates should be charged on the vessels as trading inwards from Glasgow to Liverpool on the voyage out to Bombay, and as trading inwards from Bombay to Liverpool on the voyage home to Glasgow; and that the arrival from Glasgow and departure for Bombay and the arrival from Bombay and departure for Glasgow each constituted one voyage.*

Appeal from the decision of Mathew, J.

The plaintiffs were shipowners at Glasgow, whose vessels were in the habit of starting from Glasgow with cargo, calling at Liverpool to fill up with cargo, and then proceeding to Bombay and unloading there. No cargo was unloaded at Liverpool. On the return voyage from Bombay to Glasgow the vessel sometimes called at Liverpool to land cargo there, and sometimes proceeded direct to Glasgow without calling at Liverpool at all.

By the Mersey Dock Acts Consolidation Act, 1858, s. 230, "all vessels entering into or leaving the docks shall be liable, according to the tonnage burden thereof, to pay to the board the rates called dock tonnage rates according to the respective classes of voyages—that is, vessels trading inwards shall be liable to the rates payable in respect of the most distant of all the ports from which such vessel shall have traded to Liverpool; vessels arriving in ballast but trading outwards, and also vessels built within the port of Liverpool, or trading outwards, shall be liable to the rates payable in respect of the most distant of all the ports to which they shall trade outwards; vessels arriving in ballast at and departing in ballast from the said port shall be liable to one moiety only of the rates payable to the most distant of all the ports for which such vessels shall clear out or depart; one arrival with one departure of a vessel shall be considered as one voyage, whether such vessel shall have traded both inwards and outwards, or arrived and departed in ballast and without regard to any intermediate ports to which she may have traded while absent from Liverpool, but such vessel shall be liable to the rates payable in respect of the most distant of all the ports to which such vessel shall have traded. Vessels arriving in ballast, and trading outwards, and having paid the rates payable on such trading outwards shall afterwards, on trading inwards, be liable to the rates payable on vessels trading inwards."

The rates were specified in a table of rates, and varied according to the distance of the place to or from which the vessel traded.

Vessels trading between Liverpool and any Scotch port were charged at the rate of 4½d. per ton. Vessels trading to any port in Asia were charged at the rate of 1s. 5d. per ton. The defendants charged the plaintiffs 1s. 5d. per ton on vessels entering and departing from Liverpool on the voyage from Glasgow to Bombay, and also 1s. 5d. per ton on vessels entering and departing from Liverpool on the voyage from Bombay to Glasgow. The plaintiffs paid these rates under protest, and brought this action to recover the sums overcharged.

Mathew, J., held that the defendants were entitled to charge at the rate of 4½d. per ton in respect of the voyage from Glasgow to Liverpool and back (counting that as one voyage), and 1s. 5d. per ton in respect of the voyage from Liverpool to Bombay and back (counting that as one voyage), and gave judgment for the plaintiffs on this basis.

The defendants appealed.

Finlay, Q.C., French, Q.C., and *Squarey,* for the appellants.

Sir R. E. Webster, A.G., Cohen, Q.C., and *Joseph Walton,* for the respondents.

Cur. adv. vult.

May 21.—The following judgment was read by

Lord ESHER, M.R.—The Liverpool Dock Acts are a long series of statutes dealing with a complicated and technical business, a business which has been developing enormously from period to period. The statutes are therefore necessarily complicated, probably wanting in consistency, and therefore obscure, certainly full of terms and phrases usual in the business and unusual in ordinary colloquial language. The great canon of construction of such documents is to learn the business, and the language of the business with regard to which they are written, and then to construe the documents by applying them to that business and to that language. The business in the present case is that of a great sea-port and harbour with docks, the whole adapted, constructed, and managed for the importation and exportation of goods by sea. In order to carry on such a business the principal elements are deep channels, beacons, buoys, lights, quays, dock entrances, docks, and warehouses. The staff of persons employed must be various, including pilots, harbour masters, dock masters, labourers, police, clerks, &c. The income necessary to maintain so vast a business must be

(*a*) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

collected from those who use the harbour and docks. They are used by ships which come to and use them for the purpose of carrying goods. In such a seaport both ships and goods must be subject to the Customs. The terms and phrases used in the statutes and documents applied to such a business will therefore be those commonly used by merchants and shipowners in regard to ships and to the import and export of goods, and by Revenue officers with regard to the business of the Customs relating to ships and goods. The income in such cases is collected by a system of rates, and the chief rates are almost necessarily, from the nature of things, harbour rates, light dues, pilotage dues, dock rates, crane and quay rates. "The harbour rates" and "light and pilotage dues" are applicable to ships coming into and going out of the port or harbour; they are payments for facilities given to the ships, which facilities are equally necessary for the ships, whether they are loaded or unloaded, whether they do or do not enter the docks. The "dock rates" are the payments for the use of the docks as distinguished from the rest of the port or harbour. The docks give facilities to trading ships with regard to their trade, which is the trade of carrying imported and exported goods, and to the goods with regard to the trade of importing and exporting them as articles of commerce. This case deals more with the docks and the dock rates than with the harbour and the harbour rates. It is right, therefore, to consider with the greater attention the course of business as to the docks. There is considerable skill and labour in moving a ship in a dock to or from the dock gates; but no one who has not seen it can realize the skill and labour exercised by the servants of the dock-board in the conduct and superintendence of the entry or exit of a large ship through the gates of a Liverpool dock from or into the fierce tideway of the Mersey. So far as the ship is concerned, the chief anxiety and labour with regard to the use by her of the docks is the anxiety and labour of her entry and exit. The use of the docks for the goods imported and exported is a use of warehouses, quays, cranes, and the labour of putting the goods into or taking them out of the ship.

There is, of course, a payment, as of rent, for the time during which ships and goods are in the dock, and there is an immense expense incurred in providing for the safety of ships and goods whilst in the docks. It is obvious that the mode of imposing payment for the various services and facilities thus described required ingenuity, and it was certain to be, and it is the case, that in order to understand correctly the schemes of those who have imposed the different rates one must understand the business with which they were dealing. The light and pilotage dues, and other harbour dues payable for ships, are easily understood. They are payable in respect of the use of the entrances to the Mersey and of the use of the Mersey. They are, therefore, obviously payable equally by ships which do, and ships which do not, enter the docks. The dock rates are necessarily extra to these, and are, moreover, the higher rates. It is clear, therefore, that no ship will enter a dock unless for repairs or for carrying on its trade—namely, the trade of carrying goods to or from the port of Liverpool. The scheme of payment for the use of the docks by the ship and by the goods, a scheme of payment according to the distance of a port to or from which a ship trades to Liverpool, is based, no doubt, upon good business principles; but it is not easy, and it is unnecessary, to explain the grounds of it. Inasmuch as the dock is, as a matter of fact, used only by a ship carrying on its trade (except in the case of repairs), the payment for the ship would be sure to be confined to a trading ship. The trading of a ship consists in her business of carrying goods. The goods which she is thus carrying, as part of her trade, are at Liverpool goods which she carries to or from Liverpool as a terminus of carriage. The business phrases for the business of the ship in carrying goods to or from such an import and export port as Liverpool are, in Customs phraseology, "vessels clearing inwards or outwards," in mercantile or business phraseology, "vessels trading inwards or outwards." They are corresponding phrases used to describe the same transaction. Ships which do not carry goods into Liverpool to be there delivered are not by the Customs "cleared inwards" to Liverpool, or in business said to be ships "trading inwards" to Liverpool. No business man would, in my opinion, think of saying that a ship which came into Liverpool with a declared intention of not delivering any goods there, and which delivered no goods there, was a ship "trading inwards." They are, in Customs and business phraseology, said to be ships "entering into Liverpool." Ships which do not carry goods by taking them in at Liverpool to be carried elsewhere are not by the Customs "cleared outwards" from Liverpool, or in business said to be ships "trading outwards" from Liverpool. They are, in Customs and business phraseology, said to be "ships sailing," or "outward bound." The "clearing inwards" is the authority from the Customs to "trade inwards," the "clearance outwards" is the authority of the Customs to "trade outwards." So far as the use of the docks is concerned, the trading of the ships means taking goods on board in a dock to be carried elsewhere, or bringing goods into a dock to be delivered to the consignees from that dock. Either of these transactions may happen under different circumstances. First, a ship may come into the dock empty in order to take goods on board and leave the dock loaded; or, secondly, she may come into dock loaded in order to discharge her goods there and to leave the dock empty; or, thirdly, she may come into dock loaded in order to discharge her goods there, and then to load another cargo and leave the dock loaded. There was, I will venture to say, no other state of circumstances (unless she was to come or stay in for repairs) in which, as matter of business and fact, it was, when the original Liverpool Dock Acts were passed, contemplated that a ship would be in a Liverpool dock. The exceptional mode of dealing adopted by the plaintiffs must have arisen at a later period. The statutes should be first construed according to the usual business which existed when they were enacted; then it will be necessary to determine how they apply to the exceptional and more novel work.

The main point is to see whether the statutes have adopted, as to old existing business, the business phraseology. If they have, we must apply that phraseology to the case under discussion. Having read all the statutes brought before us, it appears that all of them deal with the different rates in, as nearly as possible, the same terms. Attention and examination may, therefore, be confined to the Statute 21 & 22 Vict. c. xcii., passed in 1858. The title divides the subject as I have stated that business must divide it—namely, into a dealing with the docks and a dealing with the port and harbour. The rates are, in the first part of the Act, described to be dock rates, tonnage rates, graving dock rates, harbour rates, wharf rates, warehouse rents, town dues, anchorage dues. The fourth part deals with the management of the docks and quays, and with the absolute control given to the harbour masters and dock masters over the entry and exit of ships into and from the docks.

The fifth part deals with the management of the port and harbour. The sixth part deals with the pilotage. The pilotage rates are dealt with in section 133, and are imposed in respect of piloting "a vessel to the port" or "out of the port." No limitation of the vessel being a trading ship, no mention of going into dock. They are payable by every vessel "coming to" or "going out" of the port. The seventh part deals with transit-sheds, warehouses, and goods. The

eleventh part deals with rates and duties. This part divides "the tonnage rates," which is a general nomenclature, into "dock tonnage rates" and "harbour rates," following the business division. By section 238 "all" vessels "coming into" or "going out of" "the port" of Liverpool, and not entering the docks, shall be liable to the tonnage rates, hereinafter called "harbour rates," &c. It must be observed that these are to be paid by all vessels, and they are said to be vessels "coming into" and "going out" of, not trading into or trading out of the port. By section 239 "The objects for which such harbour rates shall be levied, &c., are," maintenance of the lighthouses, lightships, buoys, beacons, seamarks, landmarks, telegraphs, lifeboats, &c., and the improvement of the port and harbour in any other respect than in the construction and maintenance of the docks, &c. The division, the natural division, as a matter of business, is exactly followed in the statute, and the statute imposes the incidence of payment exactly as business would. Bearing this in mind, we must endeavour to construe section 230. In it vessels are described as, first, vessels "trading inwards"; secondly, vessels arriving in ballast, but "trading outwards"; thirdly, the statement is "vessels built within the port of Liverpool or trading outwards"—these, it is said, "shall be liable to the rates payable in respect of the most distant of all the ports to which they shall trade outwards." The section continues: "One arrival with one departure of a vessel shall be considered as one voyage, whether such vessel shall have traded both inwards and outwards, or arrived or departed in ballast, &c., but such vessel shall be liable to the rates payable in respect of the most distant of all the ports to which such vessel shall have traded." The first of these divisions corresponds with the second of the business divisions above set forth; the second of these corresponds with the ordinary mode of conducting the first business division. The third division in the statute certainly corresponds with the third business division. The question is whether the third division in the statute does not also describe that which I have called the exceptional mode of conducting the first business division.

It is urged that it does not, because it is said that, in order to make a grammatical conclusion to the phrase "and also vessels built within the port of Liverpool," you must read "and" instead of "or" as the following word, and that then the exceptional mode is not described. But let us dissect the sentence, and it may be read thus: Vessels arriving in ballast, but trading outwards, shall be liable to the rates payable in respect of the most distant of all the ports to which they shall trade outwards. Vessels built within the port of Liverpool shall be liable to the rates payable in respect of the most distant of all the ports to which they shall trade outwards. Vessels trading outwards shall be liable to the rates payable in respect of the most distant of all the ports to which they shall trade outwards. If the section be so read, it covers all modes of trading outwards. If it is true to say that, in order to make good grammar, "or" must be read "and," it follows that the circumstances of the trade described as exceptional are not found by the statute at all. In such a case the ship most clearly, in my opinion, does not "trade inwards"; she "enters into" the dock, but does not "trade" inwards. If she is not within the description of a vessel "trading outwards," although, in fact, she does trade outwards, and uses the dock solely for the purpose of trading outwards, she will pay nothing in Liverpool at that time for the use of the docks. If she should not return to Liverpool, she would have used the Liverpool Docks, and would never pay anything for the use of the docks. I cannot think that it is a real business view, and, therefore, I think it is not the legal interpretation to say that for the sake of grammar the word "or" should be changed into "and" so as thereby to produce so unbusinesslike a result. The court cannot properly read one word for another used in a statute, unless it is clear beyond doubt that there is a mere error in the record of the word. If there is any reasonable doubt, the word actually used must remain.

It seems to me that a ship that goes into a Liverpool dock solely for the purpose of taking goods on board to carry them away from Liverpool is a vessel "trading outwards" within the words of the statute, and must, under and by the virtue of the statute, pay the rates as on a vessel "trading outwards," and is not a vessel "trading inwards."

Another part of the contention between the parties raised the question of the construction of the latter part of section 230 as to one arrival and one departure to be considered as one voyage. Here, again, let us examine the business in order to see whether it will not teach us the true construction of the statute. If a ship goes into a dock to unload, does unload, and then loads a new cargo before she goes out, she is moved through the dock twice, comes into the gates once, and goes out once. If a ship comes into the dock, and unloads, and goes out empty, and afterwards comes in empty, and loads, and goes out, she is moved through the dock four times, comes into the gates twice, and goes out twice. One would expect that the payment in the first case would be less than in the second, considering the difference, before explained, of the skill, labour, and anxiety necessarily bestowed on the two operations.

To which, then, of the two cases does the enactment in the statute apply? As matter of business to the first, stipulating for one payment for the performance of one operation. It would seem to be bad business to stipulate for the same payment for the performance of two operations as is charged if one only of the two operations is performed. The words of the section are rather more adapted to the first view than to the second. The words are "one arrival with one departure"; they are not "one arrival and one departure"; not "one departure and one arrival." If the words are ambiguous, the business view should prevail.

It was suggested, in answer to this reasoning and the view, that ships enter a dock and discharge in it, and are then moved to another dock, and there load. If that is so, which is not proved, the removal is made by order of the Dock Board for its convenience, the removal giving no advantage to the ship, and the board has, in the later Acts, taken that burden without additional payment rather than alter the incidents of rating, which have been preserved intact through all the Acts. When the mode of rating was first established there were not many docks in Liverpool, and this suggested removal from one place to another in all probability did not take place. I am of opinion that the statute deals with the first case in the limitation it confers, and not with the second. In applying these views to the present case we must notice the contentions raised between the parties. The contention on behalf of the plaintiffs, raised in the correspondence, was that their ships traded inwards into Liverpool from India, and afterwards traded outwards from Liverpool to India, and that these two voyages made one arrival and one departure to be considered as one voyage. It must be observed that, in order to make this point, the Glasgow ship was represented as commencing her carrying business in India to Glasgow instead of as commencing in Glasgow to carry to India. The reason is obvious; without so doing the Indian trade would not commence by an arrival at Liverpool but by a departure from Liverpool. And in this contention the voyages from Glasgow to Liverpool and from Liverpool to Glasgow were dropped out. The view of the learned judge, as I understand it, is that the entry into the docks from

Glasgow is a trading inwards, leastwise by the ship, and she must pay rates accordingly; that the ship there trades outwards to India, and afterwards trades inwards from India, these two making one arrival and one departure to be considered as one voyage; and that the voyage to Glasgow is also a part of the voyage from India. As to these views I cannot agree that, as a matter of fact, the ship trades inwards from Glasgow, or that she is to be considered as doing so within the meaning of the statute. Neither, for the reasons I have given, can I agree that the two Indian voyages are one arrival and one departure to be considered as one voyage within the meaning of the statute. I do not agree that the voyage from Liverpool to Glasgow, whether carrying cargo or not, is to be considered as one voyage with the voyage to India. I have read all the ship's papers furnished to us at our request. The ships are not "cleared out" from Glasgow to Liverpool, but from "Glasgow to India, viâ Liverpool." The ships, on arrival at Liverpool from Glasgow, are not "cleared inwards." They are not treated as trading coastwise under a "transire" or under a "special coasting order." The captain's report shows that the Glasgow goods are exported to India, and are not to be landed at Liverpool.

The ships are at Liverpool "cleared outwards" for India. On their return they are "cleared inwards" from India. All this mode of dealing with the ships by the Customs seems to me to tend to the same conclusion. I am of opinion that the ships, on arrival from Glasgow, do not trade "inwards to Liverpool." A ship cannot, therefore, in respect of that entry, when she goes into a dock, be liable to "dock dues." By her entry into the Mersey she has "entered into the port of Liverpool," and is liable to "harbour dues." When the ship enters into the docks and loads therein for India she is "trading outwards to Liverpoal from India" and must pay the dock dues on such a trading outwards. When she returns to Liverpool, and enters the docks to discharge, she is "trading inwards to Liverpool from India," and must pay the dock dues accordingly. This voyage cannot, within the statute, be considered as one with the voyage out to India. The voyage to Glasgow is to be considered as one with the voyage from India. I am, therefore, of opinion that the charges imposed by the defendants were correct, and that the judgment should be entered for them. The appeal, in my opinion, should be allowed.

FRY, L.J.—The judgment which I am about to read is the judgment of my brother Bowen and myself.

The question in the present case turns entirely on the true construction of the 230th section of the Liverpool Dock Acts Consolidation Act, 1858, which imposes dock tonnage rates in the port of Liverpool. These rates, it may be at once observed, apply to all vessels entering into or leaving the docks, whilst the harbour rates apply to all vessels coming into or going out of the port and not entering into the docks.

The plaintiffs are the owners of a line of steamers, and the course of business is that each of these vessels starts from Glasgow with a part of her cargo, then goes to Liverpool, enters the docks, unloads no part of her cargo, takes in more cargo, sails for India, and thence returns sometimes to Liverpool, and thence to Glasgow, and sometimes to Glasgow direct.

When one of these steamers reaches Liverpool from Glasgow and enters the docks, is she trading inwards within the meaning of that expression as used in the section in question?

No evidence was adduced as to the meaning of the phrase, if it be a technical one which admits of such evidence. The course of business pursued by the plaintiffs' steamers was, at the passing of the Act, less common than it is now, but it is not shown to us either by evidence or admission whether such a course of business was existing or non-existing at that time.

We are therefore constrained to ascertain the meaning of the words in question from our knowledge of the English language, aided by the light which the section of the statute throws on them, and by the course of business which we know to be pursued in ports and docks.

The words "trading inwards" would, we think, most naturally, and, therefore, primarily apply to the case of a vessel entering the docks for the purpose of discharging her cargo; but we think that the words may, without violence, describe also any vessel laden with goods in the course of trade entering the docks for the purposes of her trade, whether loading or unloading; and this includes one of the plaintiffs' vessels arriving from Glasgow, for she is a vessel on a trading voyage—she is a trader, and she enters inwards.

Are the words used in the statute in the first of these significations only or in both?

The section is far from clear, but a study of it convinces us that the following propositions may be evolved from it:—

(1.) That all vessels entering into the docks, as well as all vessels leaving the docks, are made liable.

(2.) That vessels entering the docks are sub-divided into two classes, and two classes only—namely, those described as trading inwards, and those described as arriving in ballast.

(3.) That vessels leaving the docks are capable of sub-division into six classes—

1. Those trading inwards and trading outwards;
2. Those trading inwards and leaving in ballast;
3. Those arriving in ballast and trading outwards;
4. Those arriving in ballast and leaving in ballast;
5. Those built within the port and trading outwards;
6. Those built within the port and going out in ballast;

And that all these classes except the last are referred to in the section and are the subject of express charges.

(4.) That no vessel is to pay both inward and outward rates.

(5.) That inward rates are to be paid preferentially, as is shown, amongst other things, by the provision that one arrival followed by one departure is treated as one voyage, and not one departure followed by one arrival; and further, by the enactment of section 247, that the rates in question shall be paid on the arrival of the vessel.

We have thus stated the conclusions at which we have arrived from a study of the section in question. It is not easy to explain every word in it in accordance with any one of the interpretations suggested to us; nor should we usefully occupy time in a minute criticism of every expression of a somewhat clumsily-drawn clause. It may, however, be well to observe that a strong argument was raised on the word "or" in the expression "vessels built within the port of Liverpool or trading outwards" in the third paragraph of the section in question. But in our opinion the word "or" must be read "and," for the general drift of the clause requires this, and in the description of what must be the same class of vessels at the end of the clause, and is therefore, strictly speaking, a parallel passage, we find the word "and" substituted for "or," and the class of vessels described as "vessels built in the port of Liverpool and trading outwards."

If the view of the section above stated be correct, the plaintiffs' steamer, when she enters the dock, must be either (1) a vessel in ballast, or (2) a vessel trading inwards, or (3) her case is omitted. But she is plainly not a vessel in ballast, for her contents are goods, not ballast; no *casus omissus* can be admitted where the section declares that all vessels entering the port are charged; therefore she is a vessel trading inwards.

This conclusion, to which we are driven by the section itself, appears to us, for the reasons already given,

to do no violence to the words trading inwards, and to be in accordance with the general scheme of the enactment, which prefers in every case an entering to a leaving charge.

It was contended that the dock company are at liberty to charge the plaintiffs' vessels as if the course began in India, and as if one departure with one subsequent arrival constituted one voyage. In our opinion this contention cannot prevail, for in fact each of the vessels has first arrived from Glasgow and not from India, and she is required to pay on that arrival; and, secondly, the statute declares one arrival with (*i.e.*, followed by) one departure to be one voyage, but contains no declaration in favour of one departure with, or followed by, one arrival.

In our opinion the declaration of the learned judge should be varied by declaring that the defendants are entitled to charge in respect of every ship of the plaintiffs' arriving from Glasgow and sailing for India as mentioned in paragraph 2 of the statement of claim, the dock tonnage rate as on a ship trading inwards from Glasgow, or in respect of every ship of the plaintiffs' arriving from India and sailing for Glasgow, as also mentioned in the said paragraph of the statement of claim, the dock tonnage rate as on a ship trading inwards from India.

In our opinion this variation in the judgment ought not to affect the costs of the appeal, which should be borne by the appellants.

Order varied. Costs against the appellants.

Solicitors for the plaintiffs, Gregory, Rowcliffes, & Co., for Hill, Dickenson, Lightbound, & Dickenson, Liverpool.

Solicitors for the defendants, Gregory, Rowcliffes, & Co., for T. A. Squarey, Liverpool.

From Prob. Div. & Adm. Div. Nov. 4, 5.

WOOD v. WOOD. (a.)

Separation deed—Covenant not to molest—Allowance under deed—Subsequent adultery—Alimony pendente lite.

By a separation deed the husband covenanted to make an allowance to the wife, determinable upon her molesting him. The husband subsequently discontinued the allowance, on the ground that the wife had broken her covenant not to molest him.

The wife afterwards instituted a suit for judicial separation, and applied for an allowance of alimony pendente lite.

Held, that she was entitled to such allowance.

Decision of Kekewich, J., *affirmed.*

Appeal from a decision of Kekewich, J., sitting as Vacation Judge.

Mr. and Mrs. Wood executed a separation deed, dated the 3rd of December, 1886, which (*inter alia*) contained clauses providing (clause 8) that Mr. Wood should pay a sum of £9 per month for the maintenance of Mrs. Wood, and (clause 9) that Mrs. Wood should maintain herself out of that sum.

Clause 12 was as follows:—

"The said M. A. Wood will from henceforth live separate from the said E. Wood, and shall not and will not seek for restitution of conjugal rights, or in any way, either directly or indirectly, molest, annoy, or interfere with the said E. Wood, and in particular shall and will not visit the said E. Wood, or hold any communication with him other than by letter."

The payments under this deed had recently been discontinued by Mr. Wood on the ground, as he alleged, that Mrs. Wood had broken the above covenant not to molest him.

On the 18th of July, 1887, Mrs. Wood presented a petition for judicial separation on the ground of Mr. Wood's adultery before and after the execution of the deed.

On the 28th of July, 1887, Mrs. Wood presented a petition for alimony *pendente lite*, and on the 25th of August, 1887, the Registrar of the Divorce Division made an order allotting her a sum of £9 per month.

On the 31st of August, 1887, an application was made to Kekewich, J., to rescind the order of the registrar, but this was refused.

From this refusal Mr. Wood appealed.

By the Matrimonial Causes Act, 1857, s. 17, "Application for restitution of conjugal rights or for judicial separation on any one of the grounds aforesaid may be made by either husband or wife by petition to the court . . . and where the application is by the wife [the court or judge] may make any order for alimony which shall be deemed just."

Middleton and *Bargrave Deane*, for the appellant.—The order of the registrar was wrong. No order for alimony ought to have been made under the circumstances. As the order stands, the husband may have to pay the sum of £9 a month twice over—under the deed and under the order. In ordinary cases it makes no difference to a husband whether he makes the payments under a deed or under an order of the court. But in the present case the husband alleges that the wife has broken her covenant not to molest him, and he contends that his obligation to make these payments has therefore ceased.

He referred to *George* v. *George*, 16 W. R. 112, L. R. 1 P. & M. 554; *Powell* v. *Powell*, 22 W. R. 62, L. R. 3 P. & M. 55, 186; *Gandy* v. *Gandy*, 30 W. R. 673, 7 P. D. 77, 168; *Rose* v. *Rose*, 30 W. R. 736, 31 W. R. 573, 7 P. D. 225, 8 P. D. 98; *Rowley* v. *Rowley*, L. R. 1 H. L. (Sc.) 63, 15 W. R. H. L. Dig. 6. [LOPES, L.J., referred to the Matrimonial Causes Act, 1857, s. 17.]

Barnard, for the respondent, was not called upon.

LINDLEY, L.J. [after stating the facts and reading clauses 8, 9, and 12 of the separation deed and section 17 of the Matrimonial Causes Act, 1857, continued:—].—The question we have to consider is whether the order made by the registrar is just. In my opinion it is. In the first place it is to be observed that the court is not in any way enforcing or acting contrary to the deed. If it had been suggested, and the evidence showed, that the lady was in receipt of £9 a month, the court would have come to the conclusion that she was not entitled to further alimony; but it is quite obvious that it has been stopped, whether upon good or bad ground, upon the ground that she has broken her covenant not to molest her husband. The husband has chosen to put his own construction on the deed. Is it not just that this allowance should be made? It is said that he might be bound to pay twice over. Practically that is not so. The court has control over its own order and he is not practically in such danger. On the other hand, if the alimony is not given the wife will practically get nothing. In my opinion there is really nothing in this point. In all the cases cited—*Powell* v. *Powell*, *Gandy* v. *Gandy*, *Rose* v. *Rose*, *Rowley* v. *Rowley*, and *George* v. *George*—the alimony was being paid under the deed.

In the present case we are not deciding whether the suit can be sustained, and I purposely abstain from saying whether the institution of the suit is a breach of the covenant not to molest. In my opinion the order was quite right and must be upheld.

(a.) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

LOPES, L.J.—It appears to me that unless counsel for the appellant are able to maintain that the separation deed would be a good answer to a suit for judicial separation they fail. They were compelled to admit that the separation deed would not be a good answer to the suit which the wife is now instituting. It follows, therefore, that she is taking proceedings which she has a right to take, and in respect of which there is nothing in the separation deed to prevent. If that be so, is she not entitled to all the incidents which belong to such suit? One of those incidents is that the wife is entitled to alimony *pendente lite;* and, except for the separation deed, it could not for a moment be contended that this was not an order of course. It is said that the order ought not to have been made because of the existence of this deed. I can quite understand that, if the payment under the deed was being made, the court would say that £9 was sufficient. But the court has to proceed upon certain words contained in the Matrimonial Causes Act, 1857. [His lordship referred to section 17 of the Act of 1857, and continued :—] Therefore, bearing in mind that, while taking these proceedings, she was doing what she was entitled to do, the only question is whether it is just that this alimony should be ordered to be paid. The £9 a month covenanted to be paid was not, and was not intended to be, paid; therefore the wife is deprived of all means of subsistence. Under these circumstances it is impossible to say that it is just to leave the wife unprovided for. I think all the cases cited before us obviously distinct, because under those cases the alimony provided for by the deed was being paid. I think, therefore, that the order was right, and that the appeal must be dismissed, with costs.

Solicitor for the appellant, *Montague Hawkins.*

Solicitor for the respondent, *S. C. Hadley.*

High Court of Justice.

Chan. Div. North, J. — July 27, 28.

In re WILLIAMS.
JONES *v.* WILLIAMS. (*a.*)

Administration—Insolvent estate—Officer of savings bank—Debt due to bank—Priority of bank—Transfer of proceedings to Bankruptcy Court—Savings Bank Act, 1863 (26 & 27 *Vict.* c. 87), *s.* 14—*Judicature Act,* 1875 (38 & 39 *Vict.* c. 77), *s.* 10—*Bankruptcy Act,* 1883 (46 & 47 *Vict.* c. 52), *ss.* 40, 125.

The provision of section 14 *of the Savings Bank Act,* 1863, *by which a savings bank is enabled to obtain payment of a debt due to it from an officer of the bank in preference to the other creditors of the officer, is repealed by section* 40 *of the Bankruptcy Act,* 1883, *so far as regards administration in bankruptcy, but not as regards the administration of an estate in the Chancery Division; and section* 10 *of the Judicature Act,* 1875, *does not incorporate the provisions of section* 40 *of the Bankruptcy Act,* 1883, *into the rules of administration of an estate in the Chancery Division so as to take away such right of preference of a savings bank.*

Therefore, in the administration in the Chancery Division of the insolvent estate of an officer of a savings bank, the bank is entitled to payment of a debt due to it in preference to the other creditors. But the court may, under the 125*th section of the Bankruptcy Act,* 1883, *on the application of a creditor, order a transfer of the proceedings to the Court of Bankruptcy.*

(*a.*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

Adjourned summons.

This was a summons taken out by David Jones and Peter Davis, two of the trustees of the Cardiff Savings Bank, on behalf of themselves and all other the trustees of the bank as plaintiffs, against Joseph Lloyd Williams, the legal personal representative of James Emerson Williams, deceased, as defendant, asking for a decree for administration of the estate of James Emerson Williams, and for a declaration that, by virtue of the 14th section of the Savings Bank Act, 1863, the plaintiffs were entitled to a first charge on the estate of J. E. Williams, to the amount of all moneys due to the bank by J. E. Williams and received by him by virtue of his employment.

James Emerson Williams was actuary to the Cardiff Savings Bank, and misappropriated moneys belonging to the bank to the amount of £30,000 received by him as officer of the bank.

He died intestate, leaving assets of the value of about £300, and having debts amounting to about £200 in addition to the sum due to the bank.

The question to be decided was whether, by virtue of section 14 of the Savings Bank Act, 1863, the bank was entitled to priority over the other creditors in respect of the sum due to it.

Upjohn, for the trustees of the savings bank.—The bank is entitled to priority in respect of the debt due to it by virtue of section 14 of the Savings Bank Act, 1863. That section is not repealed by section 40 of the Bankruptcy Act, 1883. The provision of the special Act is not repealed by the general Act without express words or some strong indication of intention: *The London and Blackwall Railway Co.* v. *The Board of Works for the Limehouse District,* 5 W. R. 64, 3 K. & J. 123; *Fitzgerald* v. *Champneys,* 9 W. R. 850, 2 J. & H. 31. [NORTH, J., referred to *Ex parte Bailey, In re Barrell,* 2 W. R. 401, 5 De G. M. & G. 380.] That was decided upon the wording of the Bankruptcy Act, 1849: *Conservators of the River Thames* v. *Hall,* L. R. 3 C. P. 415; *Garnett* v. *Bradley,* 26 W. R. 698, 3 App. Cas. 944. Section 40 of the Bankruptcy Act, 1883, only deals with bankruptcy, and the present proceedings are not in bankruptcy. The 10th section of the Judicature Act, 1875, does not import into administration proceedings the provisions of section 40 of the Bankruptcy Act, 1883. [NORTH, J., referred to *In re Maggi, Winehouse* v. *Winehouse,* 30 W. R. 729, 20 Ch. D. 545.]

Vernon Smith, for Joseph Lloyd Williams.—The priority of the bank under section 14 of the Savings Bank Act is taken away by section 40 of the Bankruptcy Act, 1883. That section expressly excepts from its operation section 5 of Bovill's Act (28 & 29 Vict. c. 86) and the provisions of the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60). This raises a presumption that section 14 of the Savings Bank Act is repealed. The 10th section of the Judicature Act, 1875, imports section 40 of the Bankruptcy Act, 1883, into administration proceedings. If not, the rights of the creditors of a deceased insolvent would depend upon the accidental circumstance whether his estate is being administered in the Chancery Division or in the Court of Bankruptcy under the 125th section of the Bankruptcy Act, 1883: *Mersey Steel and Iron Co.* v. *Naylor,* 31 W. R. 80, 32 *Ib.* 989, 9 Q. B. D. 648, 9 App. Cas. 434. The case of *Ex parte Bailey, In re Barrell,* is in my favour.

Upjohn replied.

NORTH, J.—This application is based on section 14 of the Savings Bank Act, 1863, which enacts:—"If any person already appointed, or who may hereafter be appointed, to any office in a savings bank, and being intrusted with the keeping of the accounts, or having in his hands or possession, by virtue of his office or em-

ployment, any moneys or effects belonging to such savings bank, or any deeds or securities relating to the same, shall die, or become bankrupt or insolvent, or have any execution or attachment or other process issued against his lands, goods, chattels, or effects, or make any assignment thereof for the benefit of his creditors, his executors, administrators, or assignees, or other persons having legal right, or the sheriff or other officer executing such process, shall, within forty days after demand made by two of the trustees of the said savings bank as aforesaid, deliver and pay over all moneys and other things belonging to such savings bank to such person as the said trustees shall appoint." That is the part of the section which relates to the property of the savings bank. Then it proceeds:—"And shall pay out of the estates, assets, or effects of such person all sums of money remaining due which such person received by virtue of his said office or employment, before any other of his debts are paid or satisfied, or before the money directed to be levied by such process as aforesaid is paid over to the party issuing such process, and all such assets, lands, goods, chattels, estates, and effects shall be bound to the payment and discharge thereof accordingly." Now that section contemplates the handing over to the savings bank of what is their property, or, what, as it may be called, becomes their property by an attachment having issued against it, and, more than that, the payment out of the assets of the officer of the amount of the debt to the savings bank; and then there is a provision that the assets shall be bound to the payment.

Now, no Act has been referred to which repeals that section, which is the law at the present day; but the question raised is whether there is not subsequent legislation which has rendered that section inapplicable to cases where the estate of the officer is being distributed in bankruptcy or is being administered by the High Court of Justice in a suit to administer the estate.

The cases which were referred to as to the effect of a subsequent statute in repealing the provisions of an earlier statute, although not exactly *in pari materia*, are not entirely inapplicable. It is sufficient for the present purpose to refer to the observations of Lord Hatherley in *Garnett* v. *Bradley*. He says:—"When an Act of Parliament repeals a preceding Act which relates to a certain definite subject-matter distinctly laid down for the guidance of those who are to be operated upon by the Act of Parliament in that special matter, as to a particular class of persons who are to be either protected, or, it may be, affected adversely by a particular clause of the enactment, then the Legislature is presumed to have had that very special subject-matter and that very special class of persons in contemplation when the subsequent statute was passed; and if there was a general Act subsequently passed, the generality of which was large enough, as far as words go, to comprehend the particular matter dealt with in the previous enactment, it will be considered whether or not, as regards the persons who are to be affected or protected by the Act, persons who are not in any way mentioned or specified by the subsequent general Act are to be injuriously affected by an adverse enactment, or deprived of a benefit they are entitled to under a previous enactment. And in that case the court, in construing the subsequent general Act of Parliament, would expect to find something or other pointing out that the attention of the Legislature had been turned towards the former special enactment, and, in passing the general Act, that it had made the new enactment with the view of embracing every case (including that special case) embraced within the provisions of the previous Act. Now, my lords, considering the question in that point of view, let us see, in the first place, what the special Act of James did. That Act can hardly be said to have contemplated a special class of persons; it only says that anybody bringing an action of slander who does not recover more damages than forty shillings shall not recover more costs than damages. It can hardly be said that persons disposed to bring actions for damages for slander can be held to be a class of persons who are to be struck at on the one hand, or, on the other hand, to be regarded, and who must be held as not to be within the generality of another Act which would embrace all classes of persons whatsoever. It is simply a general Act striking generally at all persons who bring this class of action, but they do not form any particular class of the community who are entitled to any special observance, care, or regard in the framing of a subsequent Act." That is to say, it does not necessarily follow that the previous Act is to remain standing, notwithstanding the general provisions of the subsequent Act, unless it is to be considered on the consideration of the Act or Acts that it is the intention of the Legislature.

Now it is clear that the provisions of an earlier Act may be revoked or they may be abrogated in particular cases by a subsequent Act, either from the express language used being addressed to that particular point or from implication or inference from the language used. In the case of the *Conservators of the Thames* v. *Hall*, Byles, J., speaking of the two Acts then before the court, puts it in this way, "There is no express repeal of that provision" (that is the provision in the earlier Act) "by the Thames Conservancy Act, 1857," (which was the later one); "but we are asked to imply a repeal of it. The court must be satisfied that the two enactments are inconsistent before they can, from the language of the later, imply a repeal of an express prior enactment." Now I have already said that I do not think that the section which I have read is repealed, and, therefore, that language is too extensive for this particular case, but the principle is the same in considering whether you can imply a repeal of a prior enactment, or whether you can imply that the earlier enactment is not to be applicable to the particular case dealt with by the subsequent Act. Then Keating, J., says:—"It is said that the 388th section of that Act is impliedly repealed by the 96th section of the Thames Conservancy Act, 1857. I entirely agree with my brother Byles that before we come to that conclusion we are bound to satisfy ourselves that it is a necessary implication," and Montague Smith, J., says:—"Upon the whole it seems to me that a pilot does not come within the words of the 96th section of the Thames Conservancy Act, and that that section does not, by implication, repeal the 388th section of the Merchant's Shipping Act, 1854," which is the earlier Act.

Now, in the present case, what is the operation of the Bankruptcy Act on the 14th section of the Savings Bank Act? The intent of the Bankruptcy Act is to deal with the estates of bankrupts only, but the object is to provide a fair division of the assets of the bankrupt between the creditors. Section 37 of the Act describes the debts provable in bankruptcy. Then section 40 deals with the property of the bankrupt, and provides:—"In the distribution of the property of a bankrupt, these shall be paid in priority to all other debts," and certain debts are mentioned in sub-section 1, including rates, taxes, wages of clerks or servants, and of workmen for a limited period, and then it provides by sub-section 2, "the foregoing debts shall rank equally between themselves, and shall be paid in full, unless the property of the bankrupt is insufficient to meet them, in which case they shall abate in equal proportions between themselves." Then sub-section 3 prescribes the mode of application of joint and separate estates respectively, and then sub-section 4 enacts:—"Subject to the provisions of this Act, all debts proved in the bankruptcy shall be paid *pari passu*." It seems to me that this is

the repeal of the former Bankruptcy Acts, the consolidation of those Acts so far as they are consolidated, and the enactment of a new code by which the administration in bankruptcy is to be regulated from that time forward, and which provides that all debts proved in the bankruptcy are to be paid *pari passu*. Then sub-section 5 provides that if there is any surplus after paying the debts, interest may be paid, and then sub-section 6 enacts:—"Nothing in this section shall alter the effect of section 5 of the Act (28 & 29 Vict. c. 86) 'to amend the Law of Partnership,' or shall prejudice the provisions of the Friendly Societies Act, 1875."

The Act referred to as having been passed to amend the law of partnership is known as Bovill's Act, and this is a case in which a preference is not being given to a particular person, but that particular person is being postponed. That Act provides that a loan to a trader, upon a contract in writing that the lender shall share in the profits, is not in itself sufficient to render the lender a partner, but the 5th section provides that, in the case of the bankruptcy of the trader, a person who has lent money on those terms is not to be entitled to be paid in the bankruptcy until all the creditors have been paid. Therefore, it is in that case a postponement of the particular creditor. Then the other exception referred to is the provision of the Friendly Societies Act, 1875, and that is a provision which corresponds almost *verbatim* and substantially with the first portion of the clause I have read from the Savings Bank Act, and which enables friendly societies to recover the money belonging to them in the hands of an officer or his representative, or money on which they have got a charge by having an execution issued against it, but which does not contain any provision like that contained in the second portion of the clause of the Savings Bank Act, that not only shall any money in the hands of the officer belonging to the society be paid over, but that the society shall have a preferential charge over all his assets for the amount due. Why this preference is given to the Friendly Societies Act I do not know, but I find it here; and, finding it here, effect must be given to it. But it seems to me that, subject to the two exceptions mentioned in the 6th sub-section of section 40 of the Bankruptcy Act, the general scheme for the administration of an estate in bankruptcy laid down in that section is the law, and excludes the right of any other person not included in the two exceptions to be paid in preference to the other creditors.

Then the case of *Ex parte Bailey, In re Barrell*, seems to me very much in point. There the trustees of a building society sought to recover from the bankrupt moneys received by him as treasurer of the society. The Friendly Societies Amendment Act (4 & 5 Will. 4, c. 40), s. 12, contained a provision very similar to section 14 of the Savings Bank Act, and relates to friendly societies, and not building societies. Then the Building Societies Act (6 & 7 Will. 4, c. 32), s. 4, incorporated the provisions of the Friendly Societies Act in terms which should make the 12th section of the Friendly Societies Act apply to the case of building societies. Then came the Bankruptcy Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), which was the Act in operation at the time this case was decided. The 1st section of that Act provided that "from and after the commencement of this Act the several Acts and parts of Acts set forth in the schedule (A.) to this Act annexed, to the extent to which such Acts and parts of Acts are by such schedule expressed to be repealed, and every other Act or Acts, and such parts of every other Act or Acts, as shall be inconsistent with this Act shall be repealed except so far as" they repeal former Acts.

Then the 167th section of the same Act introduced a new provision relating to officers of friendly societies, and giving a certain preference with respect to friendly societies; and then the 187th section provided for the general distribution of the bankrupt's estate between the creditors in proportion to their debts. The case being one relating to building societies, the benefit of the 167th section of the Bankruptcy Law Consolidation Act, which only applies to friendly societies, did not apply to building societies; and the clause which applied to building societies, if any, was section 12 of the previous Friendly Societies Act; and the question was whether that applied to this case. Lord Justice Knight Bruce held that it did not, and Lord Justice Turner says this: "I am of opinion, however, that the petitioners are not entitled under any of these enactments to the relief which they ask. The 167th section of the Consolidation Act is in terms confined to societies established under the Acts relating to friendly societies, and this society is established, not under any of those Acts, but under the Benefit Building Societies Act. The Legislature, when it passed the Consolidation Act, must be presumed to have had, and no doubt had, under its view the provisions both of the Acts relating to friendly societies and of those relating to benefit building societies. It has thought proper to limit the particular relief granted by this section to societies of the former description, and the courts have no power to extend that relief to other societies. If, therefore, the petitioners have any claim to this relief their right must be founded upon the combined operation of the other Acts; but the Consolidation Act has, by the first section, repealed not only the particular Acts which are specified, but all other Acts and parts of Acts which are inconsistent with that Act; and it has by its other provisions appropriated the whole of the estate of the bankrupt to the payment of certain descriptions of creditors, who, according to that Act, are entitled to be paid in full, and, subject thereto, to the payment of other creditors in proportion to their respective debts; and it would clearly be inconsistent with those provisions that payment in full should be made to any creditor whose debt is not by the Act directed to be so paid. I am of opinion, therefore, that the fourth section of 6 & 7 Will. 4, c. 32" (that is, the Building Societies Act) "is repealed by the Consolidation Act; and consequently this petition must be dismissed."

These observations seem to me to apply exactly to the present case. In the Bankruptcy Act the court has thought fit to introduce an express reservation of rights arising out of the provisions of the Friendly Societies Act, 1875. The provisions of that Act and the provisions of the 14th section of the Savings Bank Act are *in pari materia*; and I cannot at all understand why the one should be specially reserved and the other not mentioned. It seems to me there are only two reasons which can account for it. Either it was deliberately left out because it was not intended to be kept in operation in case of bankruptcy, or the Savings Bank Act was overlooked when the Bankruptcy Act of 1883 was passed. But I cannot deal with it on any such footing as that the Act was forgotten. If it would have been put in if thought of, but has been left out because it was forgotten, the persons who claim under it cannot get any benefit under it. I cannot proceed on any such theory as that it has been passed over *per incuriam*, or that the whole matter was not before the Legislature when they passed the 40th section of the Act of 1883, and only excepted out of the operation of that section the Friendly Societies Act. It seems to me, therefore, that if this were a case of administration of an estate in bankruptcy the preference created in favour of savings banks by the 14th section of the Savings Banks Act would not apply in cases of bankruptcy; and to that extent the section is avoided, so far as bankruptcy is concerned, by the express provisions of the Bankruptcy Act, 1883, which are entirely inconsistent with that section. But then it is said that this is not a case of bankruptcy, but of administration of the estate of a deceased debtor in the

Chancery Division, and therefore the 40th section of the Bankruptcy Act does not apply, unless it is made to apply by the 10th section of the Judicature Act, 1875, which provides that, "In the administration by the court of the assets of any deceased person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, . . . the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being with respect to the estates of persons adjudged bankrupt. Now the law of bankruptcy at the time being in force is, of course, the Act of 1883. But it does not say that in such cases all the provisions of the law of bankruptcy shall apply, but only that the same rules shall prevail and be observed as to particular things.

Now the question is whether the priority of the creditors *inter se* is one of those things which is reserved. In my opinion that point is settled by the decision of Fry, L.J., in the case of *Winehouse* v. *Winehouse*, 30 W. R. 729, 20 Ch. D. 545, where it seems to have been fully argued before him. The various cases relating to the construction of that section were cited, and he says: "The question is whether, by force of section 10, the provision of section 32 of the Bankruptcy Act, that, with the exceptions mentioned in it, all debts shall be paid *pari passu* is imported into the administration of insolvent estates of deceased persons." That is the very point which I have to deal with. He refers to the cases and he comes to the conclusion that that is not one of the matters in which the administration in chancery is assimilated to that in the Court of Bankruptcy, and, therefore, in the administration of the estate here, the rule in the Court of Bankruptcy does not apply.

The result will be this, the plaintiffs are creditors of their actuary and cashier's estate for upwards of £30,000. The other debts amount to something like £200, and the assets, I think, were somewhere about £200 or £300—something, at all events, very small. The result will be that, in any case, the claim of the creditors must exhaust the assets, but it seems to me that, in the present case, the right of priority of the savings bank is not to be excluded.

There is one argument which I ought to notice, and that is that in the Bankruptcy Act, 1883, new provisions altogether are contained in the 125th section. That enables the Court of Bankruptcy to deal with the estate of a person who has not become bankrupt, but who, without having been adjudicated bankrupt, dies insolvent, and it is provided by sub-section 1 "That any creditor of a deceased debtor whose debt would have been sufficient to support a bankruptcy petition against such debtor had he been alive, may present to the court a petition in the prescribed form, praying for an order for the administration of the estate of the deceased debtor according to the law of bankruptcy." Then the 2nd sub-section provides that, on proof of the debt the court may, unless it is satisfied that there is a reasonable probability that there will be sufficient to pay all the debts in full, which is clearly not the case here, make an order for the administration in bankruptcy of the deceased debtor's estate, or may, upon cause shown, dismiss such petition with or without costs. Then the 5th sub-section provides that "upon an order being made for the administration of the deceased debtor's estate, the property of the debtor shall vest in the official receiver of the court as trustee thereof, and he shall forthwith proceed to realize and distribute the same in accordance with the provisions of this Act"—that is to say, the estate of the deceased debtor is to be administered in the same way as if he had become bankrupt, and the argument was that unless the Bankruptcy Act is imported into the administration of the estates of insolvents in the Chancery Division this result would follow, that the interests of the creditors are to depend entirely upon the question whether proceedings are commenced in bankruptcy or in the Chancery Division; because if commenced in bankruptcy there is no priority in favour of the savings bank, but if commenced in the Chancery Division such priority will exist.

It seems to me that there is such inconsistency, but that the way of getting over it is this—the 4th sub-section of the 125th section of the Act provides:—"A petition for administration under this section shall not be presented to the court after the proceedings have been commenced in any court of justice for the administration of the deceased debtor's estate, but such court may" (that is, the court where the administration is commenced), "in such case on the application of any creditor, and on proof that the estate is insufficient to pay its debts, transfer the proceedings to the court exercising jurisdiction in bankruptcy, and thereupon such last mentioned court may, in the prescribed manner, make an order for the administration of the estate of the deceased debtor, and the like consequences shall ensue as under an administration order made on the petition of a creditor." Therefore, in the case of a deceased debtor whose estate is insolvent, any creditor may apply to the court which is asked to administer the estate not in bankruptcy, to direct a transfer to bankruptcy where the assets will be divided equally between them. It seems to me, therefore, that although there is an inconsistency in the provisions of the two Acts as to the mode in which the assets are to be divided, the way out of that difficulty is provided by the provisions of the Bankruptcy Act, 1883, by which the administration of the assets, according to the law of bankruptcy, is secured to the creditors who desire it.

Under those circumstances I come to the conclusion that the plaintiffs are entitled to the decree they ask. I have expressed my opinion on this point because, in case any appplication is made to the court for such a transfer, the mode in which the estate would be dealt with would be according to the view I have indicated, but there are other creditors interested in the matter, and it is not the practice, on the hearing of a summons for administration at the instance of creditors, to decide behind the backs of those creditors that the plaintiff has a right in priority to them. Therefore I cannot insert the declaration which I am asked to do in the decree, because it seems to me that such a declaration at the present time would prejudicially affect the rights of absent parties, and, therefore, ought not to be inserted in that form.

Solicitors, *Bell, Broderick, & Gray*; *Smiles, Binyon, & Ollard.*

Chan. Div. North, J. — March 5, 12, 14.

Williamson v. Farwell. (a.)

Power of appointment—Delegation of power—Validity of appointment in default of exercise of delegated power.

The donee of a power of appointment among his own children appointed to his son for life, with remainder to his son's children as he should appoint, and, in default of such appointment, to the son absolutely. The son died without having exercised the power of appointment delegated to him.

Held, that the ultimate limitation to the son was valid and took effect.

(a.) Reported by G. E. Jeffery, Esq., Barrister-at-Law

Petition.

By a post-nuptial settlement, dated the 25th of May, 1816, certain real and personal estate was vested in a trustee upon trust to pay the rents and annual produce thereof to Richard Lane and his assigns for his life, and after his decease upon trust for all and every or such one or more exclusively of the other or others of the child or children of Richard Lane by Sarah Louisa, his wife, then born or to be born in his lifetime or in due time after his death, or of the issue of any of the same child or children who should depart this life in the lifetime of Richard Lane leaving issue then living at such age or respective ages, and, if more than one, in such shares and proportions as Richard Lane by deed or will should direct and appoint; and, for want of such direction or appointment, in trust for all and every the children and child of Richard Lane by Sarah Louisa, his wife, who, being sons, should attain twenty-one, or, being daughters, should attain twenty-one or marry under that age.

Richard Lane, by his will dated the 22nd of August, 1828, after stating that he was desirous of exercising the power of appointment contained in the settlement, directed and appointed that the trustees thereof should stand possessed of the rents, issues, and profits of the premises in the settlement mentioned upon trust to pay the same unto, between, and amongst his four daughters —Ellen, Louisa, Catherine, and Fanny—in equal shares as tenants in common for their respective lives, and, after the decease of any or either of his four daughters leaving lawful issue, upon trust for such issue in such shares and proportions as such daughter or daughters so dying and leaving issue as aforesaid shall by deed or will appoint; and, for want of such appointment, in trust for such issue respectively, their heirs, executors, administrators, and assigns, for ever. But, in case of the death of any or either of his said daughters without issue, or such issue should not live to attain twenty-one, then that the share or shares of her or them so dying as aforesaid should go and be paid to the survivor or survivors of his said daughters for the term of their respective lives in equal shares as tenants in common, and, if only one such daughter, then to such daughter for her life; and, after the death of the survivor of his said four daughters or such of them as should die without issue as aforesaid, upon trust to pay as well the accruing as the original shares of such daughters to his son R. K. Lane for his life, and after his decease in trust for the child and children of R. K. Lane as he should by deed or will appoint, and, in default of such appointment, to the use of R. K. Lane, his heirs, executors, administrators, and assigns.

Richard Lane died in 1838, having had by his wife Sarah Louisa six children—viz., the five children named in the will and a son Charles, who died in 1823 intestate and without having been married. All the children were living at the date of the settlement, and they all attained twenty-one years. The daughters, Louisa, Catherine, and Fanny respectively married; the daughter Ellen did not. Louisa and Fanny both died without issue, the latter in September, 1885. Catherine married a Mr. Williamson, and died in December, 1862, leaving issue.

In June, 1855, R. K. Lane was adjudicated a bankrupt, and obtained his certificate in June, 1857. He died on the 26th of March, 1862, having by his will given all his property to his son. He did not attempt to exercise the power of appointment given him by the will of his father Robert Lane.

In May, 1846, a suit was commenced by Mrs. Williamson against the trustees of the settlement for an account of the trust estate received by the trustees and for other relief.

This petition was presented in the suit by some of the children of Mrs. Williamson to obtain the decision of the court as to the persons entitled to the trust estate.

Giffard, Q.C., and *Follett*, for the petitioners.—The limitation of Catherine's share to her issue is invalid, because they are not objects of the power, and therefore the subsequent limitation over is invalid, although the gift over is in favour of an object of the power. If the donee of a power appoints to persons who are not objects of the power, and, subject to such appointment, appoints to persons who are objects of the power, the limitations in favour of the persons who are objects of the power will fail, because it was only intended to take effect after the prior invalid limitation should be exhausted: Sugden on Powers, 8th ed., pp. 508—511; *Alexander* v. *Alexander*, 2 Ves. sen. 640; *Robinson* v. *Hardcastle*, 2 T. R. 241; *Reid* v. *Reid*, 25 Beav. 469, 7 W. R. Ch. Dig. 104; *Brudenell* v. *Elwes*, 1 East, 442. In *Ingram* v. *Ingram*, 2 Atk. 88, the delegated power was to appoint to persons who were objects of the original power. That makes all the difference, and this was clearly the opinion of Lord St. Leonards: Sugden on Powers, 8th ed., p. 515. *Webb* v. *Sadler*, 21 W. R. 394, L. R. 8 Ch. 419, may be cited against us, but there the delegated power was given only in name, not in substance and in fact.

Humber, for persons in the same interest.

Cookson, Q.C., and *Kingdon*, for the assignee in bankruptcy of R. K. Lane.—The ultimate limitation to R. K. Lane absolutely is good, and can take effect as to the shares of the daughters who have died without leaving issue. The words "without issue" in the gift over in the will mean "without leaving issue": *Thickness* v. *Liege*, 3 Bro. P. C. 365. *Ingram* v. *Ingram* applies. The principle of the decisions, that an appointment in remainder, after an appointment to strangers to the power is void, is that it is the intention of the donee that the ultimate limitation shall not take effect until after the prior limitation has been exhausted by failure of the persons in whose favour it has been created. The delegated power being swept away, there is no reason why the ultimate limitation to an object of the power should not take effect: *Crozier* v. *Crozier*, 3 D. & War. 353; *Crompe* v. *Barrow*, 4 Ves. 681; *Webb* v. *Sadler*; *Carr* v. *Atkinson*, 20 W. R. 620, L. R. 14 Eq. 397; *In re Warren's Trusts*, 32 W. R. 641, 26 Ch. D. 208.

Giffard replied.

NORTH, J. (after stating the provisions of the settlement of 1816, and the appointment made by the will of Richard Lane in favour of his daughters and their issue), continued:—The appointment in favour of the daughters is good, but the appointment in favour of their issue is not. Then there are limitations over of the income in case of the death of any of the daughters without issue, or in case such issue should not live to attain twenty-one. The word "issue" there clearly refers to issue to whom a gift has already been made, issue living at the deaths of the daughters respectively. Then the testator goes on to direct that after the death of the survivor of the daughters, or such of them as should die without issue as aforesaid (that, again, must mean without issue who take under the previous limitations, an event which happened in the case of three of the daughters), the property is to be held on trust to pay the income to his son R. K. Lane for his life. That limitation is perfectly good under the power. But the testator goes on to direct that after the death of the son the property is to be in trust for his children as he shall by deed or will appoint, and, in default of such appointment, to the use of the son absolutely. That attempt to delegate to the son a power to appoint to his children was in excess of the power given to the testator by the settlement, and therefore it

is bad. But the appointment to the son himself is perfectly good, unless it is made bad by reason of the introduction of the delegated power to the son. In my opinion the ultimate limitation to the son is good, and I think this is perfectly clear upon the authorities.

I will first refer to *Crompe* v. *Barrow*, in which there was an invalid appointment, not a delegation of the power. In that case, by a settlement made upon the second marriage of a widow, a power was given to her to appoint the settled property by will among her children by her former husband and her children by her then intended husband. At the time of her second marriage she had six children living by her first husband, but only two of them—Charles Barrow and Frances James, the wife of Robert James—were living when she made her will in February, 1796. She had no children by her second marriage, and she died in June, 1798. By her will she directed that a moiety of the settled property should be held in trust for her daughter Frances James, and that the other moiety should be held in trust to permit the income to be received by her son Charles for his life, and, after his death, upon trust for such wife and children or child of the said Charles Barrow as he might leave behind him, in such shares as he should by deed or will appoint; and, for want of such appointment, in trust to assign, transfer, and pay the same unto such wife and children equally, if more than one; and, if but one of them should be then living, then to assign the whole to such only one; but, in case the said Charles Barrow should die without leaving a wife or child him surviving, then, after his decease, in trust to assign the same unto the daughter absolutely. The wife and children of the son were clearly outside the power, and the Master of the Rolls decided that, "as to so much of the property as is not distributed among the objects of the power, it is to be considered as unappointed." The question was then raised whether the ultimate limitation to the daughter depended upon the preceding estates given to the wife and children of Charles, and must fall with them; and it was said that the will must receive its general construction from the death of the testatrix. The Master of the Rolls said: "I do construe the will at the death of testatrix, and I think the ultimate appointment is good. If there is no wife or child of Charles Barrow, the manner in which she has affected to execute the power never takes effect at all. I have determined in *Routledge* v. *Dorril*, 2 Ves. jun. 357, according to *Robinson* v. *Hardcastle*, that, if you give for life to a child who is an object of the power, and then to the children of that child, and, in failure of issue, to a person who is an object of the power, that is void. But the distinction of this case from that is, that this limitation over to Frances James is if Charles Barrow should die without leaving a wife or child surviving. It fails as far as it affects to give interests to the children; but is there any occasion to make it fail upon the other point, the gift over to a person who is an object of the power? Why am I to exclude the person taking over, who has a right to take? There are two alternatives. If Charles Barrow leaves no wife or children at his death, then the limitation over, being to a good object, shall take effect: if he does leave a wife or children, then it cannot take effect." There are several other cases to the same effect, but I only wish to refer to one of them, *Long* v. *Ovenden*, 29 W. R. 709, 16 Ch. D. 691. In that case, by a settlement made upon the second marriage of a widow, a fund was vested in a trustee upon trust, after the deaths of herself and her second husband, for her three children (by name) by her first marriage and the children of the intended marriage, in such shares as she should by deed or will appoint, and, in default of such appointment, in trust for the said three children, and also the children of the intended marriage, in equal shares. There was no issue of the second marriage. The wife survived her second husband and died in 1878. By her will, made in 1876, she appointed that the trustee of the settlement should stand possessed of one third part of the trust funds upon trust to pay the income to her son Charles Long during his life, and after his death upon trust to pay the said one third part to Arthur Long, the son of her son Charles, as and when he should attain twenty-one, and, in case he should die before he should attain twenty-one, upon trust to pay the said third part to her daughter, the defendant, Sarah Ovenden. Jessel, M.R., said:—"Of course the appointment to the grandson is void, he not being an object of the power; but the appointment, if he dies under twenty-one, in favour of an object of the power will take effect as being within the limits of the rule as to remoteness." That is, it was an executory gift, not a gift in remainder, and, as it was to take effect within the proper period of time, it was valid.

But it is said that in the present case there is a distinction, because it is not a limitation to persons not objects of the power, but a delegated power to appoint to such persons, which is bad, and it is said that certain observations of Lord St. Leonards in his book on Powers, are in favour of the petitioners. The important passage is in plac. 36, p. 515, of the 8th ed., and I confess that I have felt a good deal of difficulty in understanding precisely what that passage means, but I think I do understand it at last.

In plac. 34, the learned author (referring to limitations as distinguished from powers) says: "where no question of perpetuity arises, and the power authorizes a gift in remainder, a devise under a power to a stranger for life, with remainder to an object of the power, is void only as to the life estate, and valid as to the remainder, and the estate during the life of the stranger will go as in default of appointment."

Then, in plac. 35, he says: "So where actual estates are not attempted to be given, but a mere power is limited to a stranger to appoint the fund, and in default of appointment the fund is given amongst proper objects, the power being merely void on the ground that *delegatus non potest delegare*, the ultimate limitation will take effect in possession. This was decided by Lord Hardwicke in *Ingram* v. *Ingram*, where, however, the delegated power was to appoint the fund amongst the objects of the original power, and in default of appointment the fund was given to the same objects." He then proceeds to point out that to the general rule previously stated there may be exceptions, and that, although that rule may apply to such a case as *Ingram* v. *Ingram*, there are other cases to which it does not apply. He says in plac. 36: "It should seem that the rule would not prevail (that rule being, as I understand it, that the ultimate limitation would take effect in possession where the donee of the original power had attempted to create a power of appointment which was void merely on the ground that the power could not be delegated) "where a power is affected to be given to appoint the fund amongst strangers." That is the proposition. What is the reason for it? "Because in that case it would be the intention of the donee of the original power that the object should not take unless in default of execution of the delegated power in favour of the strangers. The intention of the donee of the power is the express ground upon which limitations over to good objects, after limitations to strangers, are held to be void; and the principle applies as forcibly to a power to appoint to strangers as to a direct gift to them."

Now one of the passages in which Lord St. Leonards points out the reason why the intention of the donee of the power is the ruling principle in the case of limitations will be found in plac. 22 of the same chapter:—"Although a limitation be void, as not authorised by the power, yet it is not considered absolutely void, so as

to accelerate the remainders dependent on it, which, if given immediately, would have been good; but, notwithstanding that it be void itself, yet it prevents the limitations over from taking effect; for, as Lord Alvanley observed, it would be monstrous to contend that though it was appointed to the remainderman in failure of the existence of persons incapable of taking, yet notwithstanding they exist he should take it as if it was well appointed to them and they had failed. It is given upon a contingency upon which there is no right to give it." He points out, then, that the intention of the person who is exercising the power is to be attended to; and in plac. 36 he points out that the reason why the ultimate limitation does not take effect in possession where a power is affected to be given to appoint the fund amongst strangers is because that would be contrary to the intention of the donee of the original power. He says, to read the passage again, "because in that case it would be the intention of the donee of the original power that the object should not take unless in default of execution of the delegated power in favour of the strangers." The reason why the ultimate limitation is not good is because the intention of the donee could not take effect if it were. But his intention can take effect in case of default of exercise of the delegated power, and Lord St. Leonards is only dealing with a case in which the donee's intention cannot take effect; that is, where there has not been default in the exercise of the delegated power. When the donee of a power delegates it his intention is that the persons who are to take in default of an exercise of the power shall only take subject to the preference previously given to other persons, and that they shall take only if there are no preferred persons who can take, and that state of things cannot arise when the delegated power has been actually exercised in favour of persons who are only unable to take because not within the power. I think the subsequent part of plac. 36, which is not very easy to understand, really comes to the same thing: "Nor would the rule, for the same reason, apply to a case where the delegated power is to appoint to some of the objects, and the fund in default of appointment is given to others, although objects of the original power." To make that clear let me take the objects to be A., B., C., and D., and read the sentence again, putting it with reference to them: "Nor would the rule, for the same reason, apply to a case where the delegated power is to appoint to A. and B., and the fund in default of appointment is given to C. and D., although C. and D. were objects of the original power." Why? "For the same reason"—viz., that the intention of the donee would be defeated, because he intended that A. and B. should be preferred to C. and D., and it would be going entirely contrary to his intention to give the fund, in default of exercise of the power, to C. and D. while A. and B. are in existence, whom he intended to prefer. Lord St. Leonards goes on to say: "But in this last case it might be otherwise if, in default of appointment under the delegated power" (to A. and B.), "the fund was given amongst all the objects," A., B., C., and D. And for this reason, that, though it would be clear in that case that there was an intention, if possible, to prefer A. and B., it would not at all follow that the donee's secondary intention in favour of A., B., C., and D. should be disappointed, if they all could take and A. and B. alone could not. There would be the remaining intention in favour of all the objects, and it would not be preferring persons who were intended to be postponed in favour of those who were designated, but it would be merely saying that, if the preferred objects could not take, all the persons who were to take, in default of an exercise of the delegated power, should take. This, to my mind, explains the whole passage, and shows that the learned author is dealing with a case where the delegated power of appointment, although invalid, has been exercised, and cannot, therefore, be ignored, and in such a case the gift in default of appointment cannot take effect, because it was intended by the donee that the persons to take in default should take only if the persons whom he intended to prefer did not exist, and therefore could not take.

I have thought it right to make these remarks on the observations of Lord St. Leonards in that passage, but the matter seems to me to be really settled by the authority of two cases decided since the last edition of his book was published. The first of these cases is *Carr v. Atkinson*. In that case George Smith, by his will, devised land to trustees, in trust for his niece, Hannah Carr, during her life, and after her death in trust for her children or remoter issue as she should appoint, and, in default of such appointment, in trust for her children equally. Hannah Carr, by her will, in exercise of the power, appointed that the trustees of George Smith's will should stand seised of the land upon trust to convey the same to trustees therein named, upon trust as to one-fifth part thereof for her daughter, Mary Hartley Atkinson, during her life, for her separate use, and after her death upon such trusts for the benefit of any surviving husband of Mary Hartley Atkinson, for the term of his life, or for any shorter period, as she should by will appoint, and, subject thereto, in trust for such child or children of Mary Hartley Atkinson as had attained or should thereafter attain twenty-one, or die under that age leaving issue, and, if more than one, in equal shares. Mary Hartley Atkinson was alive at the date of the will of George Smith, as appears from the date of her marriage, which is stated in the report. The question was raised whether the appointment of the one-fifth in favour of Mary Hartley Atkinson, her husband and children, was not wholly void except as to the life estate appointed to her. Lord Romilly, M.R., said:—"The share is given in trust for Mary Hartley Atkinson, for her life, which is a good appointment, as she is an object of the power, and for such of her children as should attain twenty-one, who are also objects of the power; but then there is interposed, not a gift to a person who is not an object of the power, but a power for Mary Hartley Atkinson to appoint by will in favour of a person who is not an object of the power. It is important to look at the exact words, 'In trust for Mary Hartley Atkinson during her life, and after her decease upon such trusts for the benefit of any surviving husband of the said Mary Hartley Atkinson, for the term of his life, or for any shorter period, as she should, notwithstanding coverture, by her will appoint, and, subject thereto, in trust for' her child or children as in the will mentioned. This is an attempt to create a new power, which cannot be created, in a person who was merely an object of the power. This is a case arising in respect of real property. Supposing it had been given upon such trusts and in favour of such charities as Mary Hartley Atkinson should by will appoint, and, subject thereto, to her children, could it be said that the gifts to the children were destroyed because of the insertion of a power which the court would not allow to be exercised? The result is that the power to appoint in favour of the husband fails, being a delegated power which could not be given by the person who was entitled to exercise the first power, and the will is to be read as if the words which relate to it formed no part of the will, and the construction of the rest of the will is not affected by it."

The other case is *Webb v. Sadler*. In that case a husband and wife having, under their marriage settlement, a joint power of appointment over personalty in favour of the children of the marriage, of whom there were three survivors, appointed one-third of the fund to trustees upon such trusts as Henry Robert Sadler (one of the sons) by deed, executed with the consent of the father during his life, and after his death with the consent of the acting trustees or trustee of his will, or by

will should appoint, and in default of such appointment upon trust for Henry Robert Sadler for life or until bankruptcy or assignment (such bankruptcy or assignment being limited to twenty-one years after the death of his surviving parent); and after the death of Henry Robert Sadler upon trust for his executors or administrators, as part of his personal estate, but if his interest should have previously determined, then upon other trusts. The Court of Appeal held that the appointment to such uses as Henry Robert Sadler should appoint with the consent of the trustees was void, but that the limitation over in default of appointment by him was valid. Lord Selborne, C., said:—"Here it appears to us quite clear that no power of appointment whatever is given to Henry Robert Sadler by the first clause of the deed poll and the corresponding clause in the other instrument, excepting the power to be exercised, with the consent in writing, after the death of the parents, of the acting trustees or trustee, who were persons to whom no such authority could be delegated, independently of any question of remoteness. If, therefore, that is an inseparable condition of the exercise of the power, the power altogether fails. We all think it is an inseparable condition of the exercise of the power. There is no analogy between the effect of such a clause and the cases where there is a separate and superadded condition after the gift of an estate. Here there is no power except with consent. Then the next question is, whether the subsequent appointments, 'in default of and subject to any such limitation or appointment,' containing dispositions in favour of the son, are so connected with the void power that, the void power failing, they fail also. It seems to me that such a construction would be expressly contrary to the declared intention. The declared intention is, that unless estates that would displace this gift to the son are created in favour of other persons by means of the power, then the son is to take under this part of the instrument, and, if the power is void, then no such estate could be created, and the event never could arise which alone was meant to prevent the gift in favour of the son taking effect."

Applying those observations to the present case, the declared intention of the testator is that, unless his son, R. K. Lane, exercises the power of appointment given to him in favour of his children, the trust in default of appointment is to take effect, and, inasmuch as the son could not validly exercise the power, no such limitation in favour of his children could be created, and, therefore, the ultimate trust in favour of the son takes effect. It is said that in the cases to which I have referred the objects contemplated by the delegated power were within the original power; whereas in *Carr* v. *Harrison* the husband of the daughter was not an object of the original power. But it seems to me that the result must be the same, whether the invalidity of the power depends upon the person by whom, or the objects in whose favour, it is to be exercised.

Solicitors, *Gregory, Rowcliffes, & Co.*; *Fulvoye, Field, & Baker*; *Sewell & Edwards.*

Chan. Div. } May 7, 10, 14.
Stirling, J. }

Locke v. Dunlop. (a.)

Will—Construction—"Other sons or son"—Eldest son not included—Procreatis *and* procreandis.

Real estate was limited by will to the use of a testator's second son for life; remainder to the use of his sons successively in tail male; remainder in similar terms to the use of the testator's third son for life and his sons in tail male; remainder to the use of the testator's fourth, fifth, and all and every other his son and sons. The testator left three sons, of whom the second and third had died without issue.

Held, upon the construction of the will, that the eldest son was not entitled to take under the words "other son."

The rule that procreatis *and* procreandis *are to be construed in the same way will yield to the expression of a contrary intention on the part of the testator.*

Wadham Locke, by his will, dated the 8th of October, 1829, devised his mansion house, called Rowdeford, with the appurtenances and other the lands and hereditaments therein mentioned, to two trustees and their heirs to the use of his wife during her widowhood, and after her decease or second marriage to the use of his second son, Francis Alexander Sydenham Locke, and his assigns for his life without impeachment of waste, with remainder to the use of the trustees to preserve contingent remainders, and after the death of his said son Francis to the use of the first, second, third, fourth, fifth, sixth, and all and every other the son and sons of the body of his said son in tail male, with remainder to similar uses in favour of the testator's third son, John Locke, for his life and after his death to his first and other sons successively in tail male, with remainder in the words following:—"To the use of my fourth, fifth, and all and every other the son and sons of my body on the body of my said wife to be begotten, born, or *en ventre sa mère* at the time of my decease severally, successively, and in remainder one after another as they and every of them shall be in seniority of age and priority of birth and of the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such son and sons and the heirs male of his body to be always preferred and to take before the younger of such son and sons and the heirs male of his and their body and bodies issuing." Then followed a remainder to the use of the testator's daughter and daughters "begotten or to be begotten born or *en ventre sa mère*" at the time of his decease equally as tenants in common in tail, and if any of them should die without issue, then, as to her share or shares, to the use of the survivors or survivor in equal shares as tenants in common in tail, and there was an ultimate remainder to the use of the testator's right heirs. And the will contained a specific devise of certain freehold and leasehold hereditaments to the testator's said son Francis absolutely. And the testator devised all other his lands and hereditaments not thereinbefore devised to his trustees and their heirs to the use of certain other trustees therein named for a term of 500 years, and subject thereto to the like uses in favour of his son Francis for life, and after his death his first and other sons successively in tail male, and in default of such issue upon the same uses as were thereinbefore declared concerning the mansion house of Rowdeford and the lands devised therewith. And the trusts of the term of 500 years were to raise such sums as, with the residue of the testator's personal estate, would be sufficient to pay each of his children, whether born or *en ventre sa mère* at his decease other than and except his eldest son, Wadham Locke, and his other sons, Francis and John, whom the testator stated to be all otherwise provided for, the sum of £6,000 apiece, to be paid to such of them as should be sons (should he have any other son thereafter born, he having at present only the three sons above excepted) at twenty-three and to such of them as should be daughters at twenty-one.

And after divers provisions, including a specific bequest to his said son John, the testator bequeathed his residuary personal estate to his trustees upon trust for conversion and payment of debts and legacies, and then upon the same trusts as the moneys thereinbefore directed to be raised under the term of 500 years.

The testator died on the 21st of October, 1835, and

(a.) Reported by L. S. Bristowe, Esq., Barrister-at-Law.

his will was proved on the 4th of December, 1835, by the executors therein named. The testator's wife, Anna Maria Selina Locke, survived him.

There were eight children of the testator by his said wife, three sons—namely, Wadham Locke, the eldest (the plaintiff in this action), the said Francis Alexander Sydenham Locke, and John Locke, and five daughters, all of whom were living at the date of the will, and all of whom survived the testator.

The testator's widow died on the 6th of July, 1838.

Francis Alexander Sydenham Locke died on the 7th of January, 1885, without issue male, and John Locke died on the 13th of February, 1886, also without issue male.

Two of the daughters had died, one of them leaving issue, who were surviving. The other three daughters of the testator were still living.

The writ in this action was issued on the 23rd of March, 1886, and the plaintiff, by his statement of claim, claimed a declaration that he was entitled for an estate in tail male in possession to the said mansion house at Rowdeford and other the hereditaments directed by the will to be held therewith. The defendants were the persons claiming under the testator's daughters.

Pearson, Q.C., and *Waggett*, for the plaintiff, contended that the plaintiff was entitled to take under the limitation to other sons, and that the words "to be begotten" did not import futurity, the rule being that *procreatis* and *procreandis* were to be construed in the same way.

They cited *Langston* v. *Langston*, 2 Cl. & Fin. 194; *Galley* v. *Barrington*, 2 Bing. 387; *Doe* v. *Taylor*, 10 Q. B. 718; *Doe* v. *Hallett*, 1 M. & S. 124; *Almack* v. *Horn*, 11 W. R. 505, 1 H. & M. 630; *Hewet* v. *Ireland*, 1 P. Wms. 426; *Hibblethwaite* v. *Cartwright*, Cas. t. Talb. 31; *Taverner* v. *Grindley*, 32 L. T. N. S. 424; *In re Blake*, 19 W. R. 765; *Anon.*, 3 Leon. 87.

Hastings, Q.C., and *Vernon R. Smith*, for the defendants, argued that the only question was as to the construction of the will.

They referred to *Clements* v. *Paske*, cited 1 M. & S., at p. 130.

Pearson, Q.C., replied.

STIRLING, J.—The question in this case is whether the plaintiff, who was the eldest son of Wadham Locke, is entitled under the limitations contained in his father's will to certain real estate thereby devised, or whether, in the events which have happened, the defendants are so entitled. [His lordship then stated the will and the facts above set forth, and proceeded:—] I confess that if, without regard to the authorities, I had simply to construe this will as a document in the English language, I should say that its meaning was tolerably plain. The testator takes notice of the state of his family. In speaking of the children for whom he provides by the 500 years' term, he states expressly that he had then only three sons, who were otherwise provided for, and he contemplated the possibility of future sons. The language in which he there speaks of his sons is unmistakably language importing futurity. Then, when we turn to the limitations in question, we find that the words "to be begotten," when used in the limitations to the sons of Francis and John, are not used inconsistently, at least, with their importing futurity, for Francis and John were then unmarried. We find also that in the case of daughters the testator limits the estate "to the use of all and every my daughter and daughters on the body of my said wife begotten or to be begotten." But in the case of the fourth, fifth, and other sons we find the words "to be begotten" only. It seems to me, therefore, that upon the will itself, without regard to the authorities, one must come to the conclusion that the words "to be begotten" in the limitation to the fourth and fifth and all and every other sons of the body import futurity, and that the testator meant, under that limitation, to limit to future sons only, and not to include the eldest son at all.

It is contended on behalf of the plaintiffs that the words "to be begotten" have a strict legal signification, and that, as it is put in the old books, the words *procreatis* and *procreandis* mean the same thing—that the plaintiff is another son of the testator, and therefore entitled under the limitation.

That construction appears to me to be open to this observation. The limitation which I have read is followed by this direction: "The elder of such son and sons and the heirs male of his body to be always preferred and to take before the younger of such son and sons and the heirs male of his and their body." So that if, under the limitation in favour of all and every other son, the eldest son comes in, it seems to me that the logical consequence is that he and his issue must come in before the fourth. The fourth son, if there were one, would, under the will, be provided for in the same way as the third son is; and he is unquestionably preferred to the eldest. There is no intelligible reason why the eldest son should be brought in between the third and the fourth. Upon that ground also I should say that, if the law permits, the construction which would give the estate to the plaintiff is less natural and intelligible than that which would give it to the defendants.

But, of course, I cannot deal with the case apart from authority, more especially as I am treating limitations of real estate, and to them I must now turn. But before I deal with the cases which were cited I should like to refer to a rule laid down by Lord Cranworth in *Abbott* v. *Middleton*, 7 H. L. Cas., at p. 89, and repeated by Lord Cairns in *Bathurst* v. *Errington*, 25 W. R., at p. 909, 2 App. Cas., at p. 709—"When, by acting on one interpretation of the words used, we are driven to the conclusion that the person using them is acting capriciously, without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, then, if the language admits of two constructions, we may reasonably and properly adopt that which avoids these anomalies, even though the construction adopted is not the most obvious or the most grammatically accurate. But, if the words used are unambiguous, they cannot be departed from merely because they lead to consequences which we consider capricious, or even harsh and unreasonable." The rule of the court is therefore this: If we find language in a will capable of being used in what I may call a primary and a secondary sense, and the primary meaning would give a construction which would lead to the conclusion that the person using it is acting capriciously and contrary to the way in which men generally act in similar cases, then we may adopt the secondary meaning. And, *à fortiori*, it is the duty of the court to adhere to the primary meaning if it gives a construction which is intelligible and devoid of caprice.

The first case cited, and the one most relied on, was *Langston* v. *Langston*. In that case there was a limitation to the second, third, fourth, fifth, and all and every other sons in tail male. There was no remainder in terms to the use of the first son, but it was held that he took under the limitation to other sons. The Lord Chancellor, in giving judgment, said, "'Other' then *ex vi termini* includes the first, because the first is literally the one who answers the description of something other than the second, third, and fourth." The Lord Chancellor certainly found in other parts of the will grounds for saying that there was an intention that the eldest son should take, still the case is undoubtedly a strong authority in the plaintiff's favour, for the Lord Chancellor, although he did not decide, I think rather implied, that, if there was nothing in the will to the

contrary, the same would be the result. I think, also, the conclusion to be drawn from the cases of *In re Blake* and *Tavernor* v. *Grindley*, which were cited, is that the rule is that if you find the words "other son" used, the eldest son, not being previously mentioned, may take under that description if you find nothing in the will to the contrary. But it is nowhere laid down that the court must give that meaning to the word "other" if you find a contrary intention indicated in the will.

In *Clements* v. *Paske*, given in a note, 2 Cl. & F., at p. 230, the court held that, under the words, "every other son," the eldest son took an estate tail. There, too, there were indications in other parts of the will that such was the intention of the testator. These are all the cases which directly bear on the force to be given to the word "other."

[His lordship then dealt with the cases of *Galley* v. *Barrington* and *Doe* v. *Taylor*, and continued:—] I now come to the cases dealing with the rule of law with reference to the meaning of the words "to be begotten." The rule is stated in Coke upon Littleton: "*As procreatis* shall extend to the issues begotten afterwards, so *procreandis* shall extend to the issue begotten before." In the note of the editor it is said:—"But it is held that where the words were *in posterum procreandis*, sons born before shall be excluded on account of the peculiar force of *in posterum*," and reference is made to an anonymous case in 2 Leonard, which is commented upon in a case in the Queen's Bench, to which I shall presently refer. In *Hibblethwaite* v. *Cartwright* it was held that the words "hereafter to be begotten" were not confined to issue born after, but would take in those born *before*, "the words *procreatis* and *procreandis* being of the same import." *Hewet* v. *Ireland* was a case of a similar kind. But *Doe* v. *Hallett* is the leading authority. There there was a devise "to the use of A., only surviving son of J. S., for life, and to his first and other sons, &c., and for default of such issue to the use of the first, second, and of all and every other son and sons of J. S. lawfully to be begotten, and the heirs male of the body of such first and other sons." In that case there was an error in the will, A. not being the only surviving son, and the court held, in order to avoid a capricious disposition, that the second son was entitled to take. Lord Ellenborough, in giving judgment, discusses the case in 3 Leon. He says:—"There the feoffor made a feoffment to the use of his younger son in tail, and after to the use of the heirs of his body *in posterum procreandis*. The case, therefore, did not turn entirely upon the effect of the words '*in posterum*,' for the feoffor's passing by the eldest son in the first instance was a very important circumstance to indicate an intention to exclude that son altogether." It was the fact that in the case from Leon. the eldest son was passed by in the first instance, which, in the opinion of Lord Ellenborough, distinguished that case from *Hibblethwaite* v. *Cartwright*. It is obvious, therefore, that it was Lord Ellenborough's opinion that the rule as to *procreatis* and *procreandis* was not so absolute but that it would give way upon indication of intention to be found in other parts of the will. Similar opinions were expressed by Le Blanc and Bayley, JJ. In *Almack* v. Lord Wood, V.C., came to the conclusion that the will contained nothing which required him to depart from the settled legal meaning of the words "to be begotten." He, however, cited *Doe* v. *Hallett*, and did not express dissent from the doctrine laid down that what may be called the primary legal meaning of the words "to be begotten" will not be adopted if there are indications of a contrary intention to be gathered from other parts of the testator's will.

Now, in this case, looking at the whole will, and observing that the plaintiff, the eldest son, is passed by in the limitation of these estates, I think there is enough to justify me in coming to the conclusion that the testator meant to use the words "to be begotten" as importing futurity.

Then last of all, if it is necessary—I do not think it is—I should say that the words "to be begotten" are capable of a primary legal and a secondary legal signification; that if they are used in a secondary sense we find a plain and intelligible disposition made by the testator, whereas, if they are used in the primary sense, the will is, to a certain extent, capricious and unintelligible as regards the provision for the third and future fourth son.

Therefore it appears to me that I am justified in adhering to the construction which, upon a simple perusal of the will, I should have given to it, and I hold that the plaintiff is not entitled, but that the persons claiming under the daughters are entitled. The action must therefore be dismissed.

Solicitors, *Clarke, Rawlins, & Co.*, for *D. B. Locke*, Mitcham; *Lempriere & Brown*.

Q. B. Div. (Mathew and Cave, JJ.) June 16.

Darenth Valley Sewerage Board v. Dartford Union. (a.)

Local government—Expenses of joint board—Apportionment—"Special expenses"—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss* 230, 283, 284.

A provisional order of the Local Government Board, confirmed by a local Act, provided that the expenses incurred by a district joint board were to be defrayed out of a common fund contributed by the component districts, as provided by section 283 *of the Public Health Act*, 1875; *and that certain districts should contribute as if they were required to meet "special expenses" within the meaning of the Public Health Act*, 1875.

Held, that the board was bound to apportion the amount of the expenses among the different districts in proportion to the rateable value of the properties in those districts, to be ascertained according to the valuation list.

This was a special case stated for the opinion of the court under order 34.

The special case set forth the following facts:—

1. The plaintiffs were constituted a joint board within the meaning of the Public Health Act, 1875, by the Local Government Board's Provisional Order Confirmation (Darenth Valley) Act, 1878, for the Darenth Valley main sewerage district with the powers and authority therein mentioned.

2. The expenses incurred by the plaintiffs in carrying out their duties are required to be defrayed out of a common fund, to be contributed by the component districts of the said Darenth Valley main sewerage district in the manner provided by article 16 of the said provisional order and section 283 of the Public Health Act, 1875, and no part of the said districts has been exempted from assessment under section 7 of the above-mentioned Confirmation Act of 1878.

3. In pursuance of section 284 of the Public Health Act, 1875, for the purpose of obtaining payment from the said component districts of the sums to be contributed by them towards the expenses incurred by the plaintiffs as aforesaid, the plaintiffs have from time to time issued their precept to the respective local authorities of such component district requiring payment of the sums therein mentioned, and such sums have been paid accordingly with the exception of certain sums required to be paid by the defendants.

5. In apportioning the amount of the said expenses

(a.) Reported by A. H. Todd, Esq., Barrister-at-Law.

of the plaintiffs among the said component districts for the purpose of issuing a precept, the rateable values of the properties in such districts were not all taken upon the same basis, and in no case was the full rateable value of all the property in the district, as appearing in the valuation list for the time being, taken as a rateable value for the purpose aforesaid.

6. The question for the opinion of the court was whether the plaintiffs, in apportioning the amounts of their said expenses among the said component districts, should do so according to the rateable value of the properties in such districts, such values to be ascertained according to the valuation list in force for the time being, or whether the rateable value of tithes, tithe commutation rent charges, and lands used as arable meadow or pasture ground only, or as woodlands, market gardens, or nursery grounds, or covered with water or used as a canal or towing path for the same, or as a railway constructed under any Act of Parliament, should be taken at one-fourth of the rateable values thereof appearing in the said valuation lists, or in what other way and upon what other basis should the said apportionment be made?

7. It was agreed that, upon the judgment of the court being given, a sum of money, to be ascertained as the court should direct, should be paid by the defendants to the plaintiffs.

By section 16 of the provisional order set forth in the schedule to 41 & 42 Vict. c. ccxi., being the Darenth Valley Provisional Order Confirmation Act, 1878, it is provided that "the expenses incurred by the joint board in carrying out the duties prescribed by this order, including all establishment charges, . . . shall be defrayed out of a common fund, to be contributed by the urban sanitary district and the several contributory places mentioned in the schedule hereto in manner provided by section 283 of the Public Health Act, 1875, and for the purposes of this order any person appointed by the joint board may inspect, take copies of, or make extracts from, any valuation list or rate for the relief of the poor within the united district, or any part thereof, or any book relating to the same."

By section 17 of the provisional order it is provided that "the contributions of the rural sanitary authorities of the Dartford and Sevenoaks Unions respectively towards the common fund of the united district shall be contributed and raised in the same manner in every respect as if such contributions were required to defray 'special expenses' within the meaning of the Public Health Act, 1875."

F. M. White, Q.C., and *A. Glen*, for the plaintiffs.

Channell, Q.C., and *H. F. Dickens*, for the defendants.

MATHEW, J.—It appears to me in this case that the board is bound to apportion the amount of the expenses among the different districts and to do so in proportion to the rateable value of the properties in those districts. The values are to be ascertained according to the valuation list. It seems to me that when we look at the provisional order and the Public Health Act the matter is perfectly clear. Under section 16 of the provisional order it is directed as follows:—[His lordship read it]. Section 283 of the Public Health Act provides that any expenses incurred by a joint board shall be defrayed out of a common fund to be contributed to by the component districts in proportion to the rateable value of the property in each district. What does that mean? It appears to me that the meaning is made perfectly plain by the words that follow "such value to be ascertained according to the valuation list in force for the time being," and section 16 of the provisional order gives power to examine the valuation lists. What the valuation list contains, as a general rule, we know. The meaning of section 283 is rendered clear by section 230; but in this case there does not appear to me to be any room for doubt. The next clause of the provisional order directs how the contributions are to be provided. The clause of the Public Health Act as to special expenses therein referred to directs that the deductions shall be made which are referred to in the case.

It appears to me, therefore, that the contention of Mr. White fails, and that our judgment must be for the defendants.

CAVE, J.—I am of the same opinion. It was contended that the construction we are putting upon the clauses of the provisional order might lead to a different rate being levied upon one portion of the district from that levied upon another. If, of course, the provisional order, instead of dealing with one single joint board, were dealing with a great number, there would be a great deal to be said for that contention, and we should have to struggle against any construction which might lead to what would apparently be so unfair; but the provisional order does not deal with any board except the particular Darenth Valley Board. That being so, it was open, of course, to consideration what was the best mode of ascertaining the proportion which each of the three contributory bodies should bring into the common fund. We have heard nothing to show that the construction which we have adopted will lead to any injustice whatever, and it may be, having regard to the peculiar nature of this district, all of it being more or less of a suburban character, there may be really no such disproportion as would make it worth while to go to the trouble of distinguishing, for the purposes of the proportion which each is to pay, between the land which ultimately will be assessed at one-fourth of its rateable value and the land which will be assessed at the full rateable value. I agree with my brother Mathew in the construction he has put upon the Act.

Judgment for the defendants.

Solicitors for the plaintiffs, *Kingsford, Dorman, & Co.*, for *Carnell & Sons*, Sevenoaks.

Solicitors for the defendants, *Pyke & Parrott*, for *T. & T. C. Hayward*, Dartford.

Q. B. Div. (Denman and Mathew, JJ.) } Feb. 22; April 6.

In re SOUTH-EASTERN DIVISION OF ESSEX ELECTION. (*a*.)

Election law—Parliament—Returning officer's charges—Ballot Act, 1872 (35 & 36 *Vict. c.* 33), *s.* 8; *Parliamentary Elections (Returning Officers) Act*, 187 (38 & 39 *Vict. c.* 84), *ss.* 2, 4, 5.

By 38 & 39 *Vict. c.* 84, *s.* 2, *the right of the returnin officer to be paid for expenses reasonably incurred durin a Parliamentary election is not limited to such charg only as have been vouched under sections* 4 *and* 5. *E is entitled to be indemnified for such kinds of servic and expenses as are of the kinds enumerated in t schedule, and are also both reasonable and within t maximum, although such charges have been made und wrong headings and are not actually mentioned in t schedule.*

If detailed particulars of items comprising char within the description of expenses allowed as given the schedule to the Act have been sent in to the unde sheriff and paid by him within fourteen days, and t sheriff has paid the total amount of such charges to t under-sheriff, and charged such amounts to the cand

(*a*.) Reported by A. H. TODD, Esq., Barrister-at-Law.

date within twenty-one days, informing them where the vouchers may be inspected, the provisions of section 5 have been complied with, and the returning officer is entitled to be indemnified.

Appeal from a review by the master of the taxation by the county court judge of Essex of the sheriff's charges as returning officer in respect of a Parliamentary election for the South-Eastern Division of that county. A member of the firm of Messrs. Geppe & Son acted as under-sheriff, the high sheriff being the returning officer.

The items in question were:—

1. For preparing and publishing the notice of election, £2 2s.

The county court judge allowed only 17s. of this charge, on the ground that vouchers had not been produced in respect of the balance.

2. For preparing and supplying the nomination papers, £1 1s.

On the same ground 2s. only of this charge had been allowed.

5. Storage for ballot boxes, £1 10s.

Disallowed on the ground that it was not a claim authorized in the schedule to the Act of 1875.

12. For the preparation and publication of notices (other than the notice of election), £26.

Disallowed on the ground that there had been no transmission to the returning officer by the under-sheriff as the person claiming for work, labour, &c., against the returning officer of the detailed particulars in writing of this claim within 14 days in compliance with the terms of section 5 of the Act.

13. For professional and other assistance in and about the conduct of the election, £46.

Disallowed; the county court judge holding that it fell within the same class of claims as No. 12, and that it was governed by section 5 of the Act.

68. For time and expenses in bringing, &c., ballot boxes, stamping instruments, and papers from Southend to Chelmsford after the election, £4 4s.

Disallowed as not coming within the schedule to the Act.

76. (Classed under the head "all other expenses.") Shaw & Son's bill for forms and printing, £25 1s.

Of this charge only £2 16s. 11d. had been allowed, on the ground that otherwise £18 which was the maximum for "all other expenses" given in the schedule would have to be exceeded.

Channell, Q.C., and *W. Wightman Wood*, for the *returning officer.*

Harris Lea, for the unsuccessful candidate, and

Edward Pollock, for the sitting member.

Cur. adv. vult.

April 26.—The judgment of the court (Denman and Mathew, JJ.) was delivered by

Denman, J.—This was an appeal, under 49 & 50 Vict. c. 57, s. 7, from the master's review of the taxation by the county court judge of Essex of the sheriff's charges as returning officer in respect of a Parliamentary election for the South-Eastern Division of Essex.

The sheriff objects to the disallowance of certain charges.

The two candidates insist upon the correctness of the master's decision, which confirmed the taxation of the county court judge in all respects, but did not go into any details or give any reasons.

The county court judge delivered a judgment in which he gave his reasons for the various disallowances complained of. It is not necessary to enter into these in detail. The principal ground of his decision appears to have been that several of the items charged in the returning officer's account sent to the candidates were charges for services rendered by the under-sheriff for the sheriff, the returning officer, and not vouched in detail or dissected in the account sent in, so as to enable the candidates or their election agents, by inspection of the accounts and subsequently of the vouchers, to see whether the charges were reasonable or otherwise. The total amount charged to the candidates—viz. £547 6s. 8d.—was within the limit allowed by the statute, but from this amount the sum of £240 14s. 2d. was disallowed by the county court judge, part, as was admitted, rightly; part, as was contended, improperly. Before dealing with the particular items in dispute it will be desirable to refer to the enactments bearing on the case.

The duties of the returning officer are now prescribed in various clauses of the Ballot Act, 1872. Among other things he is, by section 8, to provide nomination papers, polling stations (with the right, by section 6, of using schoolrooms, &c., making good any damage or expense on account of their being so used), ballot-boxes, ballot-papers, &c., and to pay such officers and do such other things as may be necessary for effectually conducting the election. By the same section it is provided that all expenses properly incurred in carrying into effect the provisions of that Act should be payable in the same manner as expenses incurred in the erection of polling booths were then by law payable (that is to say, ultimately by the candidates in equal proportions), and a power is given to the sheriff to appoint in writing a deputy (which was not done in this case), and it is provided that every such deputy and also any under-sheriff shall, in so far as he acts as a returning officer, be deemed to be included in the term "returning officer." In the present case there was no appointment of under-sheriff in writing so as to make him a deputy-sheriff, but he did a great part of the work for which the sheriff charges the candidate in the account sent in. In the rules contained in the schedule to the Ballot Act the duties of the returning officer are prescribed in considerable detail. He is by rule 1 to give notice of the time and place of proceeding to the election; he is also to give notice of the poll by rule 9; by rule 11 he is to placard the building in which the election is to take place with the names of those nominated; by rule 15 he is to provide polling stations; by rule 16 to furnish them with a certain number of compartments; and by rule 19 to give public notice of the situation of the polling stations and the description of the voters who are to vote at each and of the mode in which they are to vote. The above enumeration is sufficient to illustrate the nature of those duties of the returning officer which necessarily involve some expenditure on his part beyond the merely personal duties which he is called upon to perform by himself or others. By rule 46 it is provided that where he is required by the Act to give any public notice he may do so by advertisements, or placards, or handbills, or such other means as he thinks best calculated to afford information to the electors. These being the duties of the returning officer since 1872, the Legislature in 1875 passed the Act upon which the questions discussed before us mainly depend. It is the 38 & 39 Vict. c. 84, and is called in the preamble "An Act to regulate the expenses and control the charges of returning officers at Parliamentary elections."

By section 2 it provides that the returning officer shall be entitled to his reasonable charges, not exceeding the sums mentioned in the first schedule to the Act, in respect of services and expenses of the several kinds mentioned in the schedule which have been properly rendered or incurred by him for the purposes of the election. This section does not limit the right of the returning officer to be paid to such charges only as have been vouched under section 4 or section 5, afterwards referred to. The section further enacts that "a returning officer shall not be entitled to payment for any other

services or expenses, or at any greater rates than as in the schedule mentioned." The schedule which follows contains twenty-two different headings, with the maximum charge to be allowed for each. Among these are the following, which bear upon the charges now in dispute:—For constructing a polling station, with its fittings and compartments, £7 7s.; for each ballot box required to be purchased, £1 1s.; for the use of each ballot box when hired, 5s. Then follows certain specified maximum charges for stationery at the polling stations, for printing and providing ballot papers per thousand, for stamping instruments (to make the official mark on the ballot papers), and for copies of the register. Then follow the two headings in which the two most important items in question in this case are described as follows:—First, for the preparation and publication of notices other than the notice of election (for which last-mentioned notice two guineas had already been allowed in the schedule as the maximum charge), not exceeding for the whole of such notices £20, and £1 for every additional 1,000 electors above 3,000; secondly, for professional and other assistance in and about the conduct of the election, in a contested election, not exceeding £25, and an additional £3 for every 1,000 electors above 3,000, &c. The last item in the schedule is "for all other expenses, in a contested election, not exceeding £10, and an additional £1 for every 1,000 electors above 1,000," and in an uncontested election, *nil*. A perusal of the above enactments leads to the conclusion that whereas, on the one hand, the Legislature intended to protect candidates from unreasonable demands of returning officers, on the other hand, it had a regard to the increased duties which the Ballot Act had thrown upon these officers, and intended that for all actual expenditure reasonably necessary for the conduct of the election (to be ascertained in case of objection by taxation) the returning officer should be indemnified, subject only to this—that a maximum charge was specified in the schedule beyond which the candidates should not be liable, even though such maximum charge might not be sufficient to reimburse the returning officer for his expenses in respect of the particular class of expenditure in respect of which the maximum charge was specified in the schedule. For example, supposing the returning officer, however reasonably, owing to the difficulty of deciding questions of law raised during the election, were to render himself liable to hundreds of pounds beyond the sum mentioned in the schedule as the maximum for "professional and other assistance in and about the conduct of the election," he would be limited to the maximum in any claim he would have against the candidates, and each candidate would only be liable to his aliquot portion of the maximum charge. But as long as the returning officer only makes his claim for such kinds of services and expenses as are of the kinds enumerated in the schedule, and are also both reasonable and within the maximum, and have been properly rendered or incurred by him for the purposes of the election, he is, by the very terms of section 2 of the Act of 1875, entitled to such charges, to be paid by the candidates in equal shares. He is "not entitled to payment for any other services or expenses, or at any greater rates than as in the schedule mentioned." That is to say, he is not entitled to any unreasonable charge or to any charge in respect of services or expenses different in kind from those mentioned in the schedule; nor for services or expenses which have not been properly rendered or incurred for the purposes of the election. We do not think that the Legislature intended to enact that no possible service or expense rendered or incurred by the sheriff should be payable by the candidates merely because it does not come *verbatim et literatim* within the several descriptions in the schedule, provided it be a service or expense of one of the kinds mentioned. This appears to us to be sufficient to show that, at least as regards one of the disputed items, the county court judge was wrong in disallowing the charge. The facts relating to that item were these. In order to save expense at future elections in purchasing new ballot boxes or hiring them for the election (for which the maximum charges in the schedule are respectively one guinea and five shillings), the under-sheriff, who is a solicitor, charged the sheriff a much less sum for keeping the old ballot boxes from one election to another. The amount was disallowed on the ground that the item was one not contained in the schedule. It is not so *eo nomine*, but we think it was a service or expense of the kind for which a reasonable sum might have been allowed; and that the master, having the above facts before him—assuming them to be made out to his satisfaction—ought to have allowed the claim. But much more serious claims or charges, as regards the amounts, were disallowed on the ground that, though claimed in the very words of the schedule, they were not payable by the candidates, because no detailed account of the items composing them had been sent in to the returning officer within fourteen days of the return according to the 5th section of the Act of 1875. These were items 12 and 13 in the account.

The first of these was described, as in the schedule, "preparation and publication of notices (other than the notice of election), £26." The other was "professional and other assistance in and about the conduct of the election, £46." It was not disputed that both these sums were sums for which the sheriff was or might be responsible to the under-sheriff, who was a solicitor. But no account had been sent in to the sheriff by the under-sheriff within the fourteen days for either sum. Whether any specific claim had been sent in to the returning officer within the twenty-one days specified or not does not very clearly appear from the judgment of the county court judge, but it is clear from the judgment of the county court judge that he decided on a ground which makes it impossible to ascertain this, because in his judgment he gave the exact ground upon which he disallowed the charges, as follows:—"As to item 12, I decide that there having been no transmission to the returning officer of the detailed particulars in writing of this claim within the fourteen days specified (*i.e.*, in section 5), by Messrs. Gepp & Sons, as the persons claiming for work and labour, &c., against the returning officer, in compliance with the terms of section 5 of 38 & 39 Vict. c. 84, this item must be disallowed." It may be assumed for the present purpose in the absence of anything to the contrary in the learned judge's decision, that this £26 may have been actually paid by the under-sheriff to the several persons entitled, and that it may have been an expenditure within the maximum allowed for the purposes to which it relates, and that the under-sheriff, having paid that amount on behalf of the sheriff, had in his possession vouchers for all the bills going to make up the £26. Still we understand the learned judge's decision to be that the returning officer must himself have received detailed particulars from the under-sheriff charging him in detail within the fourteen days, and in default must lose any resort as against the candidate, though he might have paid the amount to the under-sheriff before sending in his claim against the candidates. We do not so read section 5 of the Act, nor do we think that the joint effect of sections 4 and 5 is such. Section 5 is *primâ facie* for the protection of the returning officer. It is no doubt also for the protection of the candidates, for the returning officer is not liable to pay for any work, labour, services, or expenses in respect of any contract not duly stated in such detailed particulars. But if detailed particulars have been sent in to the under-sheriff, and paid by him for the sheriff within the fourteen days, or even afterwards within the twenty-one days, we find nothing to prevent this from being a compliance with section 5, inasmuch as the under-sheriff is

notoriously the agent of the sheriff for such matters bills for services rendered that a sending the particulars to him must be looked upon, in the absence of any proof to the contrary, as being a sending of them to the sheriff. Therefore we do not think that the objection on which the learned judge acted is by any means conclusive against the sheriff's right to recover the £26 question.

It was said that if the sheriff does not himself receive particulars in detail under section 5, he cannot, under section 4, transmit the account to the candidates in the shape required by that section. We do not assent to this. The words in section 4 differ from those in section 5. The latter requires every person having a claim in respect of work, &c., to send in detailed particulars of such claim (*i.e.*, an account with dates and items and sub-divisions of different kinds of work); the latter speaks only of "a detailed account showing the items of all the charges claimed" (a very different statement, and one not necessarily required to be in the minute detail than by separately charging the various kinds of services and expenses contained under separate headings in the schedule to the Act). This account is to have annexed to it a notice of the place where the vouchers may be seen. We think that it would be a perfect compliance with these two sections if the under-sheriff were to pay on behalf of the sheriff all the bills in a detailed account, with particulars, sent in to him within the fourteen days for the matters included in item 12 of the account now in question, and a perfect compliance with the requirements of section 4 if the sheriff within the twenty-one days, having paid the under-sheriff £26 for all such items in the lump, were to charge that £26 in the lump to the candidates under the proper head, informing them that the vouchers might be inspected at the under-sheriff's office or elsewhere.

We are therefore of opinion that the master ought to inquire into the facts relating to the charge, receiving evidence, if necessary, under section 1 of 49 & 50 Vict. c. 57.

With regard to the other item, 13, the learned county court judge appears to have decided it entirely on the ground that there could be no claim by the sheriff or the candidates for any payment made by or to the under-sheriff, unless within fourteen days a detailed account were sent in to the sheriff himself. We have not enough before us to enable us to say to what, if any, extent the charge of £46 is allowable; but we think that the master ought to inquire further into the matter, and if there is any further appeal from his decision, that it ought to come before the court in the usual form, with the objections and the master's reasons stated, as in an ordinary taxation of costs, and not as now brought before us, with a mere affirmance of the county court judge's decision and a copy of his notes.

Other objections were raised before the county court and allowed by him which were, in our opinion, based upon a too rigid construction of the requirements of the Act. He appears to have considered that, if a particular amount is charged under a wrong head, it was beyond his power to allow it, even if it might be clearly shown that it was a legitimate charge and duly vouched, and within the maximum to be added to the charges for similar expenditure under the proper heading. For instance, there is question whether under the heading "for constructing polling stations, with fittings, compartments," the sum of £25 was properly charged for furnishing a polling station with the necessary placards and other articles required by the Act to be provided at each polling station. The county court judge's note does not enable us to see clearly what these articles are, but the ground of his decision appears to have been that they were improperly classed as "fittings" in the account. Assuming that they ought to have been classed otherwise, we do not think that it necessarily follows that they are to be disallowed. If within the description of expenses to be allowed as given in the schedule, and if the whole supply of expenses of the kind was within the maximum, and not unreasonable, we think it was within the competency of the county court judge to allow them, even though they were claimed under a wrong heading, and we think the master ought now to look into the account on this footing, allowing only so much for each kind of expense or service as is both within the maximum and reasonable, but not disallowing any particular item if the total of such items is within those limits merely because it may have been misdescribed and so appear under a different head. On these principles we think that the taxation must be reviewed.

Order for review of taxation.

Solicitors for the candidates, *Kingsford, Dorman, & Co.*, for *Gregson*, Southend; *Brighten & Co.*, for *W. G. Brighten*, Southend.

Solicitors for the returning officer, *Paterson, Snow, & Co.*, for *Gepp & Sons*, Chelmsford.

Q. B. Div. (Grove, J., and Huddleston, B.) — Aug. 6, 8.

Crofts *v.* Taylor. (*a.*)

Revenue — Excise — Dilution of beer by publican — Customs and Inland Revenue Act, 1885 (48 & 49 *Vict. c.* 51), *s.* 8.

A publican had in his cellar a cask of strong beer and also a cask of much weaker beer. He drew off a certain quantity of the stronger beer and filled the cask again with some of the weaker beer, thereby reducing the specific gravity of the cask of stronger beer from 10 *to* 8.

Held, that he was liable to conviction for diluting the stronger beer, under section 8, *sub-section* 2, *of the Customs and Inland Revenue Act*, 1885.

Case stated by one of the police magistrates for the metropolis.

The facts set forth in the special case were as follows:—

The appellant, a licensed occupier of a public-house and retailer of beer, was summoned to answer an information exhibited by the respondent, an officer of Inland Revenue, for diluting beer contrary to 48 & 49 Vict. c. 51, s. 8.

On the 16th of February he had in his cellar a puncheon of beer purchased of Messrs. Barclay & Co., brewers, containing seventy-two gallons of beer. He had also in his cellar thirty-six gallons of small beer, purchased of Mr. Bishop, a dealer in beer. The beer purchased of Messrs. Barclay was of the density of 1013·00 and of the original gravity of 1056·27, and contained 10·30 of proof spirit. The beer purchased of Bishop was of the density of 1002·52 and of the original gravity of 1021·79, and contained 4·62 of proof spirit. The difference in gravity is equivalent to four gallons of water.

On the 16th of February the appellant took about nineteen and a-half gallons of Messrs. Barclay's beer out of the 72-gallon cask, and took eighteen gallons out of a cask of Bishop's beer, and poured the latter into the cask of Messrs. Barclay's beer, and added thereto one gallon of finings. The two beers showed on analysis a density of 1010·42 and an original gravity of 1045·84 and proof spirit 8·56.

(*a.*) Reported by A. H. Todd, Esq., Barrister-at-Law.

Neither water nor any other matter except the finings was added to the beer, and the effect of mixing the two beers was to lower the strength of Messrs. Barclay's beer to the extent above mentioned.

The magistrate, being of opinion that the word "dilute" being defined in the Imperial Dictionary as "to weaken or reduce the strength of," the stronger beer had been diluted by adding the weaker beer, and convicted the appellant.

The question for the opinion of the court was whether such mixing of the beers was a dilution within the meaning of the statute.

By the Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), s. 8, it is enacted as follows :—

(2.) A dealer in or retailer of beer shall not adulterate or dilute beer or add any matter or thing thereto (except finings for the purpose of clarification), and any beer found to be adulterated or diluted or mixed with any other matter or thing (except finings) in the possession of a dealer in or retailer of beer, shall be forfeited, and he shall incur a fine of fifty pounds."

By section 4, "The term beer in the Inland Revenue Act, 1880, shall be construed to extend to any liquor which is made or sold as a description of beer or as a substitute for beer, and which on analysis of a sample thereof at any time shall be found to contain more than two per centum of proof spirit."

Reid, Q.C., and *Bodkin*, for the appellant.—The Customs and Revenue Act, 1885, is a revenue Act, and intended only to prevent the publican from increasing the quantity of beer by adding matters which had not paid duty. In this case both beers had paid duty. Mixing cannot be dilution or adulteration.

Sir E. Clarke, S.G., and *R. S. Wright*, for the respondent.—The Act was intended to protect the public against fraud, and the effect in this case of the mixing was the same as if water had been poured in.

Reid, Q.C., replied.

Cur. adv. vult.

Aug. 8.—GROVE, J.—I have come to the conclusion that the conviction was right. The question turns mainly on section 8 of the Act. The two sub-sections there are different. The first sub-section deals with the brewer who is not to "adulterate or add anything" to the beer except finings. The second sub-section deals with the publican or retailer who is forbidden to "adulterate, dilute, or add anything" to the beer. Brewers who brew beer of different strengths may always dilute it either by adding water to or mixing weaker beer with stronger beer, provided they do it so as not to cheat the Excise or their customers. The retailer, on the other hand, sells the beer as it is furnished to him, and the intention of the Act is that after he has purchased it for retailing it shall remain undiluted so that the purchaser may know what he is drinking. Here the defendant undoubtedly did dilute the beer, for he mixed weaker beer with stronger so as to reduce its specific gravity from 10 to 8, and that certainly seems to me to be dilution within the meaning of the Act. Counsel for the appellant argued that the Act meant to prohibit only a dilution with water, but if that argument were correct the retailer might pour into stronger beer weak beer which was only a very little stronger than water provided he did not reduce the strength of the mixture below two per cent.

It is said that this Act is only a revenue Act, and therefore was not meant to protect customers of publicans; but there is no doubt that the revenue would suffer if publicans were allowed as much freedom as has been contended for them in mixing beers provided by the brewers. But that does not affect the question, for the words of the Act are clear, and we must give the ordinary interpretation to the language of the Act which is before us, whether it is what is called a "money Bi or not. It has been suggested that this decision prevent a publican from selling what is called "half-a half" to his customers, but the retailer might furn the two kinds of beer for his customer to mix, or, e if he mixed them for him, provided it was done with consent and in the presence of the customer, the publi would be the customer's agent, and would be entitle do so. But even if the Act had that effect, the ar ment to be drawn from the inconvenience of the ena ment could not be allowed to prevail, and the pl language of the statute would have to be followed.

HUDDLESTON, B.—I am of the same opinion, thoug had some doubts during the progress of the argume I thought at first that, as this was only a revenue no loss could befall the Excise by the publican mix two kinds of beer that had paid duty. But though object of the enactment may be in the first place to p tect the Excise, the words are plain, and we cannot en into the question whether they deal with, or do not d with, the primary object of the statute. Further, I now satisfied that the Act does not prevent the sale the publican to a customer of a glass of what is cal "half-and-half"; it is intended to prevent the mix of large quantities of beer in the publican's cellar, not of small quantities at the desire of the custom and in his presence. There can be no doubt that t ordinary meaning of "dilute" is to "weaken, reduce strength of," and that this was done in the present ca is clear.

Judgment for the respondent.

Solicitors for the appellant, *Peckham, Maitland, Peckham.*

Solicitor for the respondent, *Solicitor for Inlan Revenue.*

Q. B. Div. (Field and Manisty, JJ.) June 20

TONSLEY v. HEFFER. (*a*.)

Practice—Notice of trial—Application for trial by ju —Ord. 36, rr. 6, 16.

A notice of trial of an action being no longer in fo by reason of the cause not having been entered for tr by either party within the time required by ord. 36 16, the plaintiff gave a second notice of trial and appl for a trial by jury.

Held, by Field, J. (Manisty, J., *dissenting*), th *application, not having been made within ten days first notice of trial, was too late under ord. 36, r. 6.*

Appeal from an order of A. L. Smith, J., at cham refusing a trial with a jury under ord. 36, r. 6.

Action brought for the balance of purchase-mon

The plaintiff gave notice of trial on April 21, but the cause was not entered for trial within the fo ing six days, as required by ord. 36, r. 16, whe place of trial is London or Middlesex. The pla gave a second notice of trial on May 14, and applie a trial by jury on May 19. The application was re by the master and by A. L. Smith, J., at chambers.

R. Wallace, for the plaintiff.—The first notice o is no longer in force. The application is, therefo time if made within ten days of the second noti e.

Blake Odgers, for the defendant.—The parties h longer an absolute right to a trial by jury aft expiration of ten days after notice of trial has given. A second notice of trial is nowhere contem by the rules.

(*a*.) Reported by G. K. PALEY, Esq., Barrister-at-

FIELD, J.—I think the order appealed from was right. There could be no doubt, if rule 6 stood alone, that notice of trial having been given on April 21 and ten days having expired at the date of the application for a jury, it was out of time under rule 6. I think it safer to isolate rule 6 and construe it by itself according to its plain and literal meaning. I give no opinion as to the effect of rule 16.

MANNIFY, J.—I am unable to adopt this view. Unless the effect of the two rules is absolutely to prohibit the plaintiff from having the case tried by a jury, he ought not, in my opinion, to lose his rights. It cannot have been intended that if notice of trial is given one day and countermanded the next for the purposes of an attempt at settlement, the effect of the notice being "no longer in force" (rule 16) shall be to prevent the parties from obtaining a trial by jury in the simple manner provided by rule 6. As neither party set down the case for trial under the first notice given, that notice became, in my opinion, countermanded by consent, and thereupon the plaintiff acquired a right to give, and did give, a second notice of trial, which was perfectly valid. Having entered the case within six days and applied for a jury within ten days of a valid notice of trial the plaintiff has complied with both rule 6 and rule 16, and is, in my opinion, entitled as of right to a jury. But as the court is divided in opinion the order of my brother Smith will be confirmed.

Appeal dismissed.

Solicitor for the plaintiff, *E. Freeman.*

Solicitors for the defendant, *Boulton, Son, & Sandeman.*

Court of Appeal.

From Chan. Div. Nov. 9.

PRESTON v. ETHERINGTON. (a.)

Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 4, *sub-section* (3)—*Trustee ordered to pay money under his control —Default—Absence of fraud—Attachment—R. S. C.*, 1883, *ord.* 42, *r.* 3; *ord.* 44, *r.* 2—*Discretion of judge —Debtors Act*, 1878 (41 & 42 *Vict. c.* 54), *s.* 1.

Section 4, *sub-section* (3), *of the Debtors Act*, 1869, *only applies when default is made in payment, not of a mere ordinary debt, but of a trust sum.*

On an application, under ord. 44, *r.* 2, *of the R. S. C.*, 1883, *for leave to issue a writ of attachment against a trustee, to enforce a judgment for the payment of money, it is not necessary, in order to bring the case within section* 4, *sub-section* (3), *of the Debtors Act*, 1869, *to show that the trustee has been guilty of any fraud. Any default, even without fraud, made by a trustee in payment of any sum in his possession or under his control, which he has been ordered to pay, is sufficient to justify the court in making an order for attachment.*

When a judge, on an application for leave to issue a writ of attachment against a trustee, makes an order for attachment in the exercise of the discretion given to him by the Debtors Act, 1878, *the* Court of Appeal *will not interfere on the merits.*

Crowther v. Elgood, 35 *W. R.* 369, 34 *Ch. D.* 691, *followed.*

Order of Kekewich, J., *affirmed.*

Appeal from Kekewich, J., sitting as Vacation Judge. In 1859 the defendant, the present appellant, was indebted to his brother, and the brother afterwards assigned the debt to the trustee of a voluntary settlement for the benefit of his wife and children. Actions were subsequently brought against the defendant both by the trustee of the voluntary settlement and the brother to recover the debt. On the 7th of June, 1878, Hall, V.C., made an order sanctioning the compromise of these actions (some of the parties being infants). The order recited an admission by the defendant that "the principal sum in his hands claimed by the plaintiffs in the first action amounts to £4,147 6s. 1d.," and went on to direct that the defendant should, out of the sum "so in his hands," pay certain costs and "should stand possessed of one moiety of the residue upon trust to pay interest at the rate of five per cent. per annum" to the brother's wife for life, with remainder as to the *corpus* for the brother's children; and it was further ordered that the tenant for life or the children should have liberty to apply to the court for payment of the principal and interest of their moiety in case default was made in payment of the interest. Default was made in payment of the interest of this moiety, and on the 8th of July, 1887, Stirling, J., made an order directing the defendant, within one month, to pay the principal of the moiety into court. The defendant failed to comply with this order, and on the 24th of August Kekewich, J., on the application of the tenant for life, gave leave to issue a writ of attachment against the defendant, but directed that the order giving leave to issue the writ should not be drawn up for a fortnight.

The order of Kekewich, J., stated that it appeared to the satisfaction of the court that the defendant had made default in payment of the sum directed to be paid into court by the order of the 8th of July, 1887, and that such default was made by the defendant as trustee or person acting in a fiduciary capacity within the meaning of sub-section (3), section 4, of the Debtors Act, 1869.

The defendant appealed.

Cozens-Hardy, Q.C., and *Lyttelton Chubb*, for the appellant.—This money was never in the hands or under the control of the appellant as trustee. It came into his hands and was held by him as an ordinary debtor, and when the order of the 7th of June, 1878, was made he had not the money in his possession or under his control at all. The admission recited in that order was merely an admission of the amount of the debt he owed. Section 4, sub-section (3), of the Debtors Act therefore does not apply: *Ferguson* v. *Ferguson*, L. R. 10 Ch. 661, 24 W. R. Dig. 184. The appellant has not been guilty of any fraudulent act, and section 4 of the Debtors Act, 1869, only applies to fraudulent debtors: *Middleton* v. *Chichester*, 19 W. R. 369, L. R. 6 Ch. 152. The order of the 7th of June, 1878, expressly authorized the appellant to retain this money. Even if the case comes within sub-section (3) of section 4 of the Debtors Act, 1869, the court has discretion, under the Debtors Act, 1878, to refuse to commit the debtor. [COTTON, L.J.—If the case is within sub-section (3) of section 4 of the Debtors Act, 1869, and the judge below has exercised his discretion under the Act of 1878, we ought not to interfere: *Crowther* v. *Elgood*, 35 W. R. 369, 34 Ch. D. 691.] We say the judge below did not exercise any discretion under the Act of 1878, but has proceeded merely under the Act of 1869.

E. Cutler, Q.C., and *Whiteway*, for the respondent.—This case comes within both the letter and the spirit of sub-section (3) of section 4 of the Debtors Act, 1869. *Middleton* v. *Chichester* does not support the contention that fraud or moral delinquency must be shown in order to bring the debtor within sub-section (3) of section 4. *Marris* v. *Ingram*, 28 W. R. 434, 13 Ch. D. 338, is an authority against that contention. The affidavit filed by the debtor himself shows that he had sufficient money in his hands to meet this sum at the time the order of

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law

June 7, 1878, was made, and there is a distinct admission contained in the order to that effect.

They referred to *Evans* v. *Bear*, 23 W. R. 67, L. R. 10 Ch. 76; *Re Strong*, 34 W. R. 614, 32 Ch. D. 342.

Cozens-Hardy, Q.C., replied.

Cotton, L.J.—This is an appeal from Kekewich, J., who made an order to commit to prison the appellant. It is contended on behalf of the appellant that, even if the case is within section 4, sub-section (3), of the Debtors Act, 1869, we ought not, in the exercise of our discretion, to send him to prison. But we cannot enter into that now, as, in my opinion, Kekewich, J., in making the order, exercised his discretion under the Act of 1878—though, no doubt, he exercised it unfavourably to the appellant—and we cannot interfere. The only question we have to consider is, does the Act of 1869 apply? [The Lord Justice then stated the facts, and continued:—] No doubt the existence of the ordinary relation of debtor and creditor does not bring the case within the exception contained in the Act. But was this particular sum a sum at the time under the appellant's control as trustee? for that, I think, must be shown in order to bring it within sub-section (3) of section 4 of the Act of 1869. Now was this so? In my opinion we must hold that it was. The order of June 7, 1878, was a special order sanctioning the compromise of the actions brought against the debtor, and was made upon an admission of the debtor, recited in the order, that "he has in his hands" this sum of money, and the order directed that he should stand possessed of it upon certain trusts; there was also a direction that if he made default in payment any of the parties might apply to the court for payment. At the time the order was made the debtor (the present appellant) was a trustee; but it is said that at the time the order was made he had not, in fact, this money in his hands or under his control as trustee. I am of opinion that the court would never have made this order sanctioning a compromise unless there was some evidence to satisfy the court that he had at the time in his possession property or means sufficient to satisfy this sum, and if so, then he had this sum under his control as trustee. I do not find it stated in the appellant's affidavit that he had not the means of paying this sum, either at the time the order was made or afterwards, and therefore we must take it that he had the means to satisfy this sum of money under his control at the time the order was made constituting him a trustee with respect to it.

Then it was said that the appellant was allowed to retain this sum of money by the court; but that was only on his representation that he could make it good, and until the court should otherwise order. He failed to pay the interest, and the court has otherwise ordered. Therefore we cannot consider this as a sum of money in his power and control which the court authorizes him to retain. I am of opinion, therefore, the appellant is a debtor within the scope of sub-section (3) of section 4 of the Debtors Act, 1869. It is not necessary in order to commit a debtor under that section that there should be any fraud proved against him. No doubt the preamble of the Act describes it as an "Act for the abolition of imprisonment for debt and for the punishment of fraudulent debtors"; but the words of the exception contained in sub-section (3) of section 4 are "default by a trustee . . . ordered to pay any sum in his possession or under his control," and therefore any default, even without fraud, made by a trustee in payment of any sum in his possession or under his control which he is ordered to pay is sufficient to justify the court in making an order to commit.

Lopes, L.J.—The question we have to consider is whether this case comes within sub-section (3), section 4, of the Debtors Act, 1869. As to sub-section (3) I think it clear that it operates only as between trustee and *cestui que trust*, and not as between mere debtor and creditor. Has the appellant at any time had this money impressed with a trust in his hands? That depends on the evidence. The order of the court, already referred to, contains a distinct admission that he had this sum in his hands. To my view, the whole basis of the order and compromise was that there was that money or its equivalent in the hands of the appellant at the time the order was made which declared the trusts with respect to it, and that the appellant had then the means to satisfy it. Sub-section (3) of section 4 therefore applies. A discretion to commit is given to the judge under the Act of 1878; the judge has exercised his discretion, and therefore this court will not interfere. I agree with Cotton, L.J., in holding that it is not necessary to show fraud; mere default in payment by a trustee of money in his possession or under his control as trustee is sufficient to bring the case within sub-section (3) of section 4.

Appeal dismissed.

Solicitors, *A. B. Chubb; Boxall & Boxall.*

From Q. B. Div. Nov. 11.

Bonella v. Twickenham Local Board.
Holmes v. Twickenham Local Board. (*a.*)

Local government—Sewering—Change of system—Liability of frontagers—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 13, 15, 18, 150, 207.

A piece of land having been laid out for building purposes, a system of sewerage was laid down. A local board for the district was subsequently formed, and, sixteen years after its formation, an alteration in the sewerage system having become necessary, the board sought to charge the frontagers with the expense of such alteration under section 150 *of the Public Health Act*, 1875.

Held (*affirming the decision of the* Divisional Court, 35 *W. R.* 578, 18 *Q. B. D.* 577), *that the powers given by section* 150 *could only be exercised once for all within a reasonable time after the vesting of the sewer in the local board under section* 13, *and that, therefore, the alteration had been made under section* 18, *and was chargeable on the general rates under section* 207, *and not on the frontagers.*

Appeals by the Twickenham Local Board from the decision of a divisional court (Huddleston, B., and A. L. Smith, J.) upon a special case, reported 35 W. R. 578, 18 Q. B. D. 577.

Bonella and Holmes were the respective owners of two pieces of land fronting and adjoining and abutting upon a road called The Avenue upon the St. Margaret's Estate at Twickenham. This estate was purchased and laid out for building purposes by the Conservative Land Society prior to the year 1868, and a system of sewerage, with an outlet into the Thames, was laid down by them. At that time no local board existed at Twickenham, but in 1868 the Twickenham Local Board was constituted as the urban sanitary authority for that district.

In 1884 the Thames Conservators gave notice to the local board to discontinue the flow or passage of any sewage into the Thames within their district, and the board accordingly gave notice to these frontagers, among others, to alter the sewer, and, on their refusal to do so, themselves executed the works, and charged the respective proportions of the expenses upon the frontagers. Bonella and Holmes appealed, and the Divisional Court held that the alterations could not be charged upon the

(*a.*) Reported by A. P. Percival Kebp, Esq., Barrister-at-Law.

frontagers, but must be defrayed out of the general district rate.

By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 13, "All existing and future sewers within the district of a local authority, together with all buildings, works, materials, and things belonging thereto, except sewers made by any person for his own profit or by any company for the profit of the shareholders . . . shall vest in and be under the control of such local authority."

By section 15, "Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act."

Section 18 gives power to any local authority to alter, enlarge, improve, or close any sewer belonging to them.

By section 150, if a street is not sewered to their satisfaction, they may give notice to the owners or occupiers of premises adjoining or abutting on the street to sewer it, and if such notice is disregarded, the local authority may themselves execute the works and recover the expenses from the frontagers.

By section 207, "All expenses incurred or payable by an urban authority in the execution of this Act, and not otherwise provided for, shall be charged on, and defrayed out of, the district fund and general rate leviable by them under this Act."

Lumley Smith, Q.C. (*J. P. Grain* with him), for the local board.—The sewer was made by the Conservative Land Co. for profit, and therefore falls within the exception in section 13, and did not vest in the local board. They are entitled, therefore, to use the powers given by section 150 and to make a new sewer. Until they have expressed satisfaction with a sewer they may alter the system under that section.

Bosanquet, Q.C. (*Edwyn Jones* with him), for Bonella.—If the board were dissatisfied with the existing system of sewerage when it vested in them they might alter it under section 150, but could only do so once for all.

He cited *Fulham Board* v. *Goodwin*, 1 Ex. D. 400, 25 W. R. Dig. 156.

Arthur Powell, for Holmes.

Lord ESHER, M.R.—In this case, at the time when the statutes with regard to local authorities became applicable, there was a sewer in existence for the purpose of draining the road which had been made by the Conservative Land Co. when they laid out the estate. We are clearly of opinion that that sewer was not a sewer made for profit within the exception given by section 13. That being so, the sewer, when the local board was constituted, vested in it, and it became the duty of the local board to see that the sewer was sufficient for the drainage of the road which at that time drained into it. If it was insufficient they had powers given them by section 150 to call on the frontagers to remedy its defects, and those powers they ought to have exercised. Obviously they must have a reasonably sufficient time to make up their minds whether the sewer was sufficient or not, but if they did nothing and expressed no opinion as to its sufficiency or insufficiency within a reasonable time, in my opinion that is conclusive evidence that they were satisfied with the existing sewer. When once they are satisfied with it they cannot again make use of section 150. That section was only meant to be used once for all at the time the local authority were dissatisfied with the existing sewer. After the lapse of a reasonable time, therefore, this sewer vested in them, and under section 15 they were bound to keep it in repair, and if at any time it became insufficient they had power under section 18 to alter or enlarge or even close it. It was, therefore, their duty to do so if the sewer became inefficient. That has happened, and it has become necessary to make a new system of sewerage. It is impossible for them now to use the powers given them by section 150, and they must therefore use the powers conferred by section 18, and must defray the payment out of the general rate under section 207, and cannot impose it upon the frontagers. That is, in my opinion, the true construction of the statute, and it follows the reasoning both of A. L. Smith, J., in the court below, and also that applied to another statute of similar character in the case of *Fulham Board of Works* v. *Goodwin*. The opposite construction would, in my opinion, be unreasonable, for it would confer upon the local board powers which would be alike unjust and oppressive. It follows, therefore, that we agree with the view expressed in the court below, and that this appeal must be dismissed.

BOWEN and FRY, L.JJ., concurred.

Solicitor for Bonella, *Spaull*.

Solicitors for Holmes, *Miller, Smith, & Bell*.

Solicitors for the local board, *Ruston, Clark, & Ruston*.

From Q. B. Div. Nov. 7.

In re JOHNSON. (*a*.)

Contempt of court—Abusive language—Interference with the administration of justice—Judge in chambers.

After the hearing of an application before the judge in chambers, a solicitor who was engaged in the case, after the parties had left the judge's chambers and gone into the adjoining hall, began to call the solicitor for the other side foul and offensive names in connection with the proceedings before the judge, and continued doing so while going downstairs until they reached the entrance to the building, when he shook his fist in the other solicitor's face, though he did not actually strike him.

Held, that this conduct was an interference with the administration of justice in connection with the proceedings at chambers; and that as the judge in chambers was engaged in the exercise of his judicial functions as a judge of the High Court the conduct was a contempt of the court of which the judge was the representative, and the court had power to commit for contempt.

Appeal from an order of Kekewich, J., sitting as Vacation Judge, committing one Johnson, a solicitor, to prison for contempt of court.

Upon an application on the 16th of August to Kekewich, J., sitting as Vacation Judge in chambers, in reference to an action in the Lambeth County Court, one Charles Robinson appeared as solicitor for the plaintiff, and Johnson as solicitor for the defendant. After the application was disposed of, and when the solicitors had gone into the hall adjoining the judge's chambers, Johnson began to call Robinson foul and offensive names, calling him a "liar" and a "damned perjured scoundrel," and continued doing so down the stairs until they came to the east entrance to the building leading to the Strand, when Johnson several times put his hand to Robinson's face in a threatening attitude.

The matter was thereupon, by leave, brought before Kekewich, J., sitting in court as Vacation Judge, upon a notice of motion to commit, and Johnson not appearing, Kekewich, J., made an order of committal, of which the following is the material part:—"No one appearing for the said George Johnson, and it appearing by the evidence that the said George Johnson did, within the precincts of the court, threaten, assault, and intimidate the said Charles Robinson, and the court being of opinion, upon consideration of the facts disclosed by

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

such evidence, that the said George Johnson has been guilty of contempt of court, it is ordered that the said George Johnson" be committed to prison.

Johnson appealed, and filed an affidavit denying some of the language attributed to him, and saying that he was at the time suffering from personal trouble, and that he regretted his language and acts.

Oswald and *F. Watt*, for Johnson.—A judge sitting in chambers is not a "court." There can therefore be no contempt of court in connection with proceedings at chambers. A judge at chambers has no power to fine or imprison for contempt: *Rex* v. *Faulkner*, 2 C. M. & R. 525, at p. 533; and section 39 of the Judicature Act, 1873, has not enlarged the power of a judge at chambers: *Baker* v. *Oakes*, 25 W. R. 220, 2 Q. B. D. 171. They also contended that no contempt had been committed within the court or the precincts of the court, the language being mere vulgar abuse, and cited 2 Hawkins' Pleas of the Crown, 8th ed., p. 221; *Ex parte Wilton*, 1 Dowl. N. S. 805; *Republic of Costa Rica* v. *Erlanger*, 46 L. J. Ch. 375.

Johnston Watson, for the respondent, was not called upon.

Lord ESHER, M.R.—This case is a very simple one, though the arguments have lasted a considerable time. The judge in chambers came to a certain conclusion upon an application made to him, whereupon one of the solicitors, who had been before the judge, when the parties left the judge's chambers, began to misconduct himself, and continued to do so till he came to the door of the building. His disgraceful conduct consisted in using vile language of the lowest description to the solicitor who was against him in connection with the proceedings before the judge. I have no doubt that he intended that language to be an insult to the administration of justice and to bring it into contempt. There can be no doubt that it was an insult to the administration of justice. The matter was accordingly brought before the judge in court, and the judge, on the 31st of August, made an order of committal against the offending solicitor. It was argued on his behalf that there was no contempt in court, and that therefore the judge had no jurisdiction to commit him. It does not follow, however, that there was no contempt of court. It was further argued that the judge sitting in chambers was not sitting in court, and that a person while in judge's chambers could not be guilty of a contempt of court, even though he struck the judge a blow in the face. The answer to that is that it is not necessary that the occurrence should take place in court, nor that it should be a contempt of a judge sitting in court. All that is necessary is that it should be a contemptuous interference with a judicial proceeding, the judge acting in his judicial capacity. That is laid down in the prepared, but undelivered, judgment of Wilmot, C.J., in *Rex* v. *Almon*, a full report of which appears in "Notes of Opinions and Judgments by Lord Chief Justice Wilmot," p. 243, where, at p. 265, he says:—"Therefore the question resolves itself at last into this single point—whether a judge, making an order at his house or chambers, is not acting in his judicial capacity as a judge of this court, and both his person and character under the same protection as if he was sitting by himself in court. It is conceded that an act of violence upon his person, when he was making such an order, would be a contempt punishable by attachment. Upon what principle? for striking a judge in walking along the streets would not be a contempt of the court. The reason, therefore, must be that he is in the exercise of his office, and discharging the function of a judge of this court; and if his person is under this protection, why should not his character be under the same protection? It is not for the sake of the individual, but for the sake of the public, that his person is under such protection." It was only necessary in that judgment to speak of the person and character of the judge, but the doctrine there enunciated is applicable to any proceedings before a judge, if the judge is acting judicially in his office of judge of the High Court, whether the judge is sitting in court or in his private room; the proceedings before him are judicial proceedings; and anyone who interferes with those judicial proceedings so as to bring them into contempt is guilty of a contempt, not of the judge, but of the court of which that judge is a member. That judgment of Wilmot, C.J., has, as my brother Fry has discovered, been approved of by Lord Lyndhurst in *Ex parte Van Sandau*, 1 Phill. 445. The doctrine, therefore, is applicable to what is done by a judge, wherever sitting, provided that he is engaged in the exercise of his judicial functions. I do not confine that doctrine to a judge, but I apply it equally to a master of the court. Anyone doing, in the case of a master, what this solicitor has done here, would be guilty of a contempt of the court of which the master is an officer. In this I am confirmed by the judgment of Coleridge, J., in *Ex parte Wilton*, the true view of that decision being that the learned judge declined, in that particular case, to exercise his jurisdiction. It may be that there is no limit of time or of space in such a matter, provided that there is an interference with the administration of justice. I cannot lay down or define any such limit; but those circumstances must be taken into account in considering whether what happened was mere abuse or an interference with justice. The acts here took place immediately upon the decision of the judge in chambers, and they were intended to place contumely and insult upon what the judge had done, and to interfere with justice. I am not prepared to say whether or not the judge sitting in chambers constituted a court, and could have ordered a committal for the contempt. I am inclined to think not, but I do not decide it; but, assuming that the judge in chambers was not a court, he was acting for the court, and the insult was an insult to the court of which the judge was the representative, and was a contempt of court. The matter was accordingly brought before the court, and the judge sitting in court had power to commit for the contempt, and his order, therefore, is perfectly right. The appeal must be dismissed.

BOWEN, L.J.—I am of the same opinion. The law has armed courts of record with the power *brevi manu* of preventing and punishing attempts to interfere with the administration of justice. Upon that ground it is that insults to judges, to witnesses, and to jurors are not permitted. And it is upon that ground that persons engaged in judicial proceedings in courts of justice are protected both in going to and returning from the courts. Has that principle been broken in this case? At the entrance to the building the solicitor insulted, and all but assaulted, if he did not actually assault, the solicitor for the opposite side. Is not that a gross interference with the administration of justice? A discussion has taken place as to whether this was a contempt committed in the face of the court; but in my opinion that question is immaterial, if the conduct is such as amounts to an interference with the administration of justice. The discussion as to the power of a judge at chambers to commit is also irrelevant, as the judge was sitting in court when he made the order of committal, though the offence occurred at chambers. The true principle is that stated by the Master of the Rolls, and laid down by Wilmot, C.J., more than one hundred years ago, in *Rex* v. *Almon*, and which has received the sanction of Lord Lyndhurst. This protection which is given to persons attending the judge at chambers will be extended to those attending the officers of the court when exercising their functions as officers of the court, the case of *Ex parte Wilton* showing that those attending the masters will be equally protected. The judg-

ment of the court below was, therefore, right, and must be affirmed.

FRY, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitor for the appellant, *J. Grove.*

Solicitors for the respondent, *C. Robinson & Co.*

From Q. B. Div. Aug. 11.

COUNSELL v. LONDON AND WESTMINSTER LOAN AND DISCOUNT CO. (*a.*)

Bill of sale—Promissory note given at the same time—Defeasance—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-section* 3—*Bills of Sale Act* (1878) *Amendment Act,* 1882 (45 & 46 *Vict. c.* 43), *s.* 8.

By a bill of sale given as security for an advance the grantor covenanted to repay the principal sum with interest by equal monthly instalments until the whole sum advanced, together with the interest thereon, should be fully paid. The bill of sale was drawn in accordance with the form in the schedule to the Bills of Sale Act, 1882, *and was duly registered. At the same time, and as part of the same transaction, the grantor gave to the grantee a separate promissory note for the same amount as that in respect of which the bill of sale was given, payable by the same instalments at the same dates, with a stipulation that in case of default in payment of any one instalment the whole sum remaining unpaid should become due and payable.*

Held, that the promissory note operated as a "defeasance" of the bill of sale, as, in the event of the full amount of the promissory note becoming payable and being paid, the bill of sale would be defeated; and therefore the registration of the bill of sale was void under section 10, *sub-section* 3, *of the Bills of Sale Act,* 1878, *and the bill of sale was void.*

Appeal from the judgment of the Queen's Bench Division in favour of the plaintiff.

By a bill of sale, dated the 30th of September, 1885, given by the plaintiff to the defendants as security for the repayment of an advance of £80 and interest thereon at the rate of thirty per cent. per annum, the plaintiff covenanted that he would duly pay the principal sum aforesaid with the interest then due by equal monthly payments of £5 6s. until the whole sum and interest should be fully paid, and that on default in payment of any instalment he would pay interest thereon at the rate aforesaid from the date when such instalment became due until full payment thereof. This bill of sale was duly registered. At the same time the plaintiff gave the defendants a promissory note for the same amount as that in respect of which the bill of sale was given, the amount being made payable by the same instalments at the same dates, with a stipulation that in case of default in payment of any one instalment the whole sum remaining unpaid should become due and payable. This document was not registered.

The defendants having seized and sold certain of the goods under the bill of sale, the plaintiff brought an action against them to recover damages for trespass and conversion, alleging that the bill of sale was void. Denman, J., at the trial, gave judgment for the plaintiff upon the authority of *Simpson* v. *Charing Cross Bank,* 34 W. R. 568. The Divisional Court (Mathew and Grantham, JJ.) having refused a new trial, the defendants appealed.

Channell, Q.C., and *Melsheimer,* for the defendants.—The promissory note was given as collateral security. The two documents are distinct securities, the bill of sale alone affecting the goods. The non-payment of the instalments in the promissory note would not enable the defendants to seize the goods. The Bills of Sale Acts were only intended to deal with securities affecting the chattels assigned. No provision in those Acts touches this case. The note is not a "defeasance" within section 10, sub-section 3, of the Bills of Sale Act, 1878.

They referred to *Simpson* v. *Charing Cross Bank; Ex parte Collins,* 23 W. R. 862, L. R. 10 Ch. 367; *Ex parte Odell,* 27 W. R. 274, 10 Ch. D. 76; *Carlon* v. *Kenealy,* 12 M. & W. 139.

Crispe and *McIntyre,* for the plaintiff.—An additional obligation has been imposed upon the grantor by the promissory note, and so the whole bargain has not been expressed in the bill of sale. No doubt the note does not affect the goods, but it might be indorsed away to a stranger, and still the defendants could seize under the bill of sale.

They referred to *Ex parte Southam,* 22 W. R. 456, L. R. 17 Eq. 578.

Channell, Q.C., replied.

Cur. adv. vult.

August 11.—Lord ESHER, M.R.—In this case the question was as to the validity of a bill of sale. The bill of sale itself purports to be drawn in the scheduled form. If that document stood alone no defect could be alleged in it. But at the same time, and in my opinion as part of the same transaction, the grantee took a promissory note for the same sum as that in respect of which the bill of sale was given. The dates of payment in the two documents were the same, the sums were the same, and both documents had reference to the same loan. Now a bill of sale is the contract between the parties reduced into writing; and the question for us to consider is whether there was one contract or two, whether there was only one transaction or two. That is entirely a question of fact; and considering the identity of the figures, of the terms, and of the dates, I have no doubt that here there was only one contract, though embodied in two documents. One of those documents has been registered. Will the unregistered document, which is part of the same contract, have any effect upon the registered document? If the sum secured by the promissory note were to become payable at once and were paid, whether by discount or otherwise, it would be impossible to suppose that the registered bill of sale could have any further effect at all. The registered bill of sale would be defeated if the promissory note, whether in the hands of the grantee or of anyone else, were paid. The security on the goods would be defeated. Therefore, in my opinion, the case comes within section 10, sub-section 3, of the Bills of Sale Act, 1878, and the promissory note operates as a defeasance of the bill of sale; and as the promissory note is not contained in the same document and registered the bill of sale is bad.

LINDLEY, L.J.—It seems to me that the necessary effect of this promissory note, which is a negotiable instrument, is that the bill of sale would be redeemed by payment of the amount of the note, whether in the hands of the grantee or of a third person. Therefore the bill of sale would be defeated by a document not contained in the registered bill of sale. Section 10, sub-section 3, of the Bills of Sale Act, 1878, is applicable, and the appeal must be dismissed.

LOPES, L.J., concurred.

Appeal dismissed.

Solicitor for the plaintiff, *Thomas Young.*

Solicitors for the defendants, *G. J. Vanderpump & Son.*

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

From Q. B. Div. [& Cave, J.] July 29, 1886.

CRAWFORD v. NEWTON.

Landlord and tenant—Dwelling-house—Tenantable repair.

Under an agreement for a lease for five years of a dwelling-house, the tenant was to leave the house in tenantable repair. In an action by the landlord at the end of the tenancy (which continued for seventeen years) for damages, upon the footing that the tenant was liable to paper and paint and leave the house in the same condition as when he took it,

Held, by Cave, J., *that the landlord was not entitled to damages on that footing, but that he was entitled to compensation for waste, the tenant being liable to paint sufficiently to preserve the woodwork, but not to do papering or decorative painting.*

Held, by the Court of Appeal, *that the decision of* Cave, J., *must be affirmed.*

On the 29th of October, 1867, Bond, whose executrix was the defendant in this action, became tenant under an agreement for a lease of a dwelling-house called Burley House, near Leeds, for a term of five years to Croft, whose executors were the plaintiffs. The agreement contained a provision that the lessee should keep the inside of the premises in tenantable repair, and so deliver up the same at the end of the term.

The tenancy was continued upon the terms of the agreement till the 1st of December, 1884, when the tenant gave up the house. The plaintiffs sued for a breach of the provision to deliver up the premises in tenantable repair.

The action was tried before Cave, J., without a jury, at the Leeds Assizes, on the 10th of February, 1886. The evidence showed that the tenant had not painted or papered the house during the tenancy, that parts of the woodwork were worn away or decayed, and that holes were left in the walls from which tenant's fixtures had been removed. The plaintiffs delivered particulars, and claimed upwards of £300.

Forbes, Q.C., and *Edge*, for the plaintiffs, cited *Monk* v. *Noyes*, 1 C. & P. 265.

Waddy, Q.C., and *C. M. Atkinson*, for the defendant.

The following is the material part of the judgment.

CAVE, J.—This is an action for breach of an agreement to repair. The agreement is a memorandum for the term of five years, by which the lessee undertakes to keep the inside of the house in tenantable repair, and so to deliver it up at the end of the term. Looking at the fact that this was a tenancy for five years, it seems to me impossible to say that the tenant could have been called upon under that lease either to paint or to paper. Ordinarily speaking, paper lasts for seven years, and painting too. This term is only to run for five years. When a tenant is intended to paper and paint, it is usual and proper to put in a covenant that he will paper and paint. Either that he will paper and paint once in so many years, or that he will paper and paint in the seventh, fourteenth, or twenty-first years, or something of that kind. If you put in a covenant that he is to do it once in seven years it is quite possible for him to do it in the first of the last seven years of his term. He then complies with his covenant, and the landlord has to put up new paper and do new painting. The ordinary way of preventing that is by requiring him to paint and paper in the last year, or at the end of the term, whichever you please. Then the landlord gets the benefit of the new paper and the new painting. Otherwise, by any other mode of covenanting, the landlord does not get the benefit of it; because, if the tenant may do it at any time within the seven years, it is not necessary that he should do it in the last. He may do it in the first, second, or third year. In this case there is absolutely no requirement that the tenant should either paper or paint; and, looking at the term which was first stipulated for—five years—it is impossible to conceive that the landlord had a right to either. The tenant is to keep the inside in tenantable repair. It so happened that the occupation lasted longer than five years; but the covenant as to repairing cannot be extended. It must mean the same as it meant before. It does not mean anything in the way of decorative repair at all. That is the first step. Paper is decorative repair. No doubt if a man takes a house which is papered new for him for three years, he must return the house with the paper, not stripped off, or torn off, or anything of that kind, but subject only to the fair wear and tear of the paper. Where he takes a house for a term of years, and there is nothing to do but to keep the inside in tenantable repair, and he remains there so long that the paper, in the natural course of things, becomes useless for a future tenant, he is not bound to put on a new paper, although he may do it if he likes to please himself. It is not one of those things necessary to keep the house in repair. The house is just as much in repair whether it has paper on the walls, or whether it has not. The house is none the less fit for being papered afterwards, none the less fit for being dealt with by the landlord afterwards, if the tenant thinks fit to strip the paper off the walls, and to have the simple walls uncovered by paper at all. In the absence of a covenant that he shall paper and paint, I do not see what is to prevent him doing that, provided his term is not so short a term that it amounts to an absolute destruction of the paper he found there.

The case with regard to the paint is somewhat different, because the object of painting is not solely for decorative purposes. It is not as in the case of plaster. The inside of a house is quite as good, although not so pleasant, and as sound whether it is papered or not. That is not the case with regard to the painting. Painting is partly for decoration, but it is also for the protection of the woodwork. If the tenant does not paint as an ordinary tenant would do, and under those circumstances the woodwork becomes destroyed, or the painting which was on was left in such a condition as to require more than ordinary repair and expense in renewing it, that seems to me to be a defect, and is a want of tenantable repair. If the woodwork is perished, the woodwork ought to be repaired by taking the old pieces out and putting in new pieces and things of that kind. So, again, if it has been so treated as to cause extra expense in painting again, as I have said, that is another thing for which the tenant is liable. So, again, if he has allowed the plaster on the walls to come off, or the boards to decay, or to get broken, or the mantelpieces to get broken, all those are breaches of the agreement to keep in tenantable repair.

Now it appears that this house was in the possession of Mr. Bond for something like seventeen years, and, during that time, undoubtedly, very little was done to it in the way of decorative repair. At the close of his tenancy, or, rather, some little time afterwards, a question arose as to the amount of repairs which ought to be done, and, ultimately, this action is instituted.

Now, when one comes to look at the particulars, it is clear this action is brought on the wrong footing. It is brought upon the footing that there was a covenant to paint, and a covenant to paper at the end of the tenancy. Nothing of the kind is to be found here. It proceeds entirely on that footing, and, consequently, the amount is made up altogether wrong.

Now the evidence given here to-day has taken quite a different turn in consequence of the view I expressed. It is somewhat remarkable that none of the damage, of which evidence has been given to-day, is to be found in the particulars, with the exception simply of the woodwork. To take, for instance, the bedroom. Here is the statement of what is required:—"Ceilings and cornices washed off, prepared, and distempered." That is the ordinary thing that requires to be done when you want to renew your ceiling. There is nothing in that which points to any want of tenantable repair at all. "Walls stripped, stopped, prepared, and papered." All that must be done when you desire, in the ordinary course of things, to take off an old paper and put a new one on. There is nothing there which indicates a want of tenantable repair. "Woodwork prepared and painted, three coats shades." The same remark applies to that. Then comes "Parts stripped and painted, one coat additional." Now that, undoubtedly, does seem to point to some want of repair which renders necessary an additional cost, which otherwise would not have been required, and, when you come to the room over the storeroom, there is this: "Old paint stripped off woodwork where bad." That seems to point to the old paint having been left in a state which caused additional cost and expense But, with the exception of those two items out of the four pages of the particulars, I cannot find any on which the plaintiff is entitled to recover on the principle that I have laid down. Then there comes a further claim in the original particulars, of which further particulars were not required, of £30 5s. 5d., "the cost of replacing damaged venetian blinds"—I have had no evidence of any damage done to any venetian blinds at all—"and making good damaged ornamental ceiling centres." There was no evidence given me of any damage having been done to any ornamental ceilings and centres. Therefore that item of £30 5s. 5d. is entirely unsupported. Then the £34 5s. there are further particulars of, and they are these: "To painting and whitewashing the inside of the conservatory, and also all the stables, coach-house, and outbuildings." There is nothing there that indicates any want of tenantable repair. Then the next item is: "To painting and whitewashing the attics, two upper bedrooms, and staircase to same, and the whole of the basement." There is nothing there which indicates any want of tenantable repair. In fact, except with regard to what I have already referred to as to the condition of the paint, I do not find anything proved here to-day stated at all in the particulars. The ceilings I do not find stated. I have not read all through the particulars, but, as far as I can see, I do not find the letting down of the ceiling stated. I do not find anything said about the decayed and rotten woodwork in the cellar, nor in the butler's pantry and the passages, nor do I find anything about the stalls that were said to have been destroyed in the stables.

That is the general nature of the case. The first point taken was, that there was no liability at all. I cannot adopt that view of the case. It seems to me there was a continuation of the term from year to year, and that consequently the liability, which is a very slight liability be it observed, to keep the house in tenantable repair, did continue, and that Mr. Bond was liable to that much.

Now, that being so, what damages ought I to give? The amount has been variously estimated. The one or two witnesses who were called first gave nothing but general evidence, and could not give any figures at all. On the whole I come to the conclusion that I ought to give a sum of £20. Owing to the fact that the witnesses have not had their attention specifically directed to the matter, I have found a considerable difficulty in coming to that amount. One witness put it at £10 and another as high as £30, and adopting a common course in such cases, and adding a little to one and taking a little from the other, I think £20 represents the sum which I ought to give.

Then comes the question of costs. I cannot shut my eyes to the fact that of that £20 certainly the bulk of it is not included in the particulars. It is not to be found there at all. I have very grave doubts as to whether the plaintiffs are entitled at all to the damage done in the cellar, because the statement there is that the whole of the woodwork is gone. If the whole of the woodwork is gone and decayed, the defendants are not bound to put new woodwork up. The tenant was bound to keep the house in repair. When that can be done by repairing a piece of a door or anything of that sort, he is bound to do it; but when the whole flooring is rotten he is not bound to put in a new flooring, and when the whole of the inside has gone he is not bound to put up a new inside to the house. Probably in a case of this kind the tenant's proper course would be to have taken down all this decayed stuff, and if he did not choose to go to the expense of putting up this woodwork (which appears to have been unnecessary as far as I can gather—you do not want doors to your bins) he could have left the bins without doors. I have not entered into that in detail; I give the plaintiffs credit for what I think they ought to have in respect of that. I have not endeavoured to separate it from the other amounts spoken to by the witnesses, but I have taken it altogether. Looking to the fact that the plaintiffs claim a sum of over £300, and that they have established their right to only £20, and, as to that, half is not to be found in the particulars at all, I think the proper course is to give my judgment for the plaintiffs for £20, without costs.

I am reminded that the plaintiffs would only get county court costs on these findings, but I think they ought not to have any.

The plaintiffs appealed.

July 29, 1886.—*Forbes, Q.C.*, and *W. Wills*, for the plaintiffs.

Gainsford Bruce, Q.C., and *C. M. Atkinson*, for the defendants.

Lord ESHER, M.R.—This was in effect an action by a landlord against his tenant for breach of an agreement to deliver up the house in tenantable repair. The case put forward at the trial was that under that provision the landlord was entitled to have the house papered and painted in such a way that it should be left in the same condition as when it was let, and that the damages were to be assessed on that footing. In this particular case the learned judge came to the conclusion upon the facts that the plaintiffs were not entitled to that extent. He came to the conclusion that where any waste had been committed the plaintiffs would be entitled to compensation for that. The learned judge found that some paint would be necessary to prevent the house from going to decay, and he held the defendant bound to paint to that extent, any further painting being decorative painting. So as to the paper. The question before us is whether the judge ought to have gone further and allowed the cost of painting and papering the house in all cases where it had been previously painted and papered. If we could determine the proper meaning of the agreement it would be very desirable; but upon the argument it is not necessary to do so. It seems to me to be sufficient for the purposes of this case to say that we cannot disagree with the finding of the learned judge that the defendant is not bound to do this decorative painting and papering, which are only required for the purposes of mere ornamentation. It is not necessary, therefore, to say what is the meaning of the words "tenantable repair."

The appeal must, therefore, be dismissed.

BOWEN and FRY, L.JJ., concurred.

Appeal dismissed.

Solicitors for the plaintiffs, *R. Vincent*, for *North & Sons*, Leeds.

Solicitors for the defendant, *Bond, Barwick, & Peake*, Leeds.

From Q. B. Div. June 8; July 9.

JOHNSTON *v.* SALVAGE ASSOCIATION. (*a.*)

Practice—Ord. 16, *r.* 48—*Contract to indemnify—Policy of marine insurance—Suing and labouring clause.*

The usual suing and labouring clause in a policy of marine insurance does not amount to a contract by the underwriters to indemnify the shipowner in respect of contracts made by him for the purpose of attempting to save the ship.

Therefore, where an action was brought against the shipowner for work done under such a contract,

Held, that the defendant was not entitled to bring in the underwriters as third parties under ord. 16, *r.* 48.

Appeal from the decision of a divisional court (Lord Coleridge, C.J., and A. L. Smith, J.).

The action was brought first against the Salvage Association alone for work done, services rendered, and expenses incurred by the plaintiffs for the defendants at their request in respect of attempting to save the ship *Maggie Robertson* and her cargo, but the plaintiffs afterwards obtained an order joining McKiver as a defendant.

The defendant McKiver was the owner of the ship which was chartered to carry a cargo to South America, and was insured by several policies of insurance containing the usual suing and labouring clause. During the voyage the ship became a total loss, and before this action was brought the underwriters had paid McKiver as for a total loss.

Upon being made a defendant, McKiver obtained at chambers an order giving him leave to serve the underwriters with a third party notice under ord. 16, r. 48, claiming to be indemnified by them under the policies of insurance against any liability in respect of any moneys the plaintiffs might recover against him in the action.

The Divisional Court rescinded this order, and McKiver appealed.

Bigham, Q.C., and *Joseph Walton*, for the appellant.

Cohen, Q.C., and *Hollams*, for the respondents, cited *Birmingham and District Land Co.* v. *London and North-Western Railway Co.*, 35 W. R. 173, 34 Ch. D. 261.

Cur. adv. vult.

July 9.—LINDLEY, L.J. (after stating the nature of the action).—The claim of the plaintiffs, Johnston & Co., against McKiver is twofold—viz., (1) for work and labour and expenses done and incurred by the plaintiffs for the defendant at his request; (2) for damages for misrepresentation, or breach of warranty, by the defendant of his authority to act for other people in employing the plaintiffs to do what they did.

The work and labour and the expenses sued for were done and incurred by the plaintiffs in saving, or attempting to save, a ship and cargo. The ship was insured by the defendant with the persons sought to be introduced as third parties. The misrepresentation alleged is as to McKiver's authority to employ the plaintiffs for the underwriters.

The ship was totally lost, and was abandoned to the underwriters, and they long since paid McKiver as for a total loss. His claim against them now is based on the suing and labouring clauses in the policies, and is resisted by the underwriters.

The nature and effect of the suing and labouring clause are fully explained in *Kidston* v. *Empire Marine Insurance Co.*, 15 W. R. 63, L. R. 1 C. P. 535, 2 *Ibid.* 357, and *Lohre* v. *Aitchison*, 28 W. R. 1, 4 App. Cas. 755. It is, in substance, a contract by which the underwriter agrees to pay the assured the expense he may reasonably and properly incur in preventing a loss which, if it occurred, would fall on the underwriter under the other clauses in the policy. Such a contract is not a contract of indemnity in any proper sense; it is a contract to pay the assured expenses which he may incur, but not to indemnify him against any claims made by other people against him.

In equity a contract to indemnify can be specifically enforced before there has been any such breach of the contract as would sustain an action at law. In equity the plaintiff need not pay and perhaps ruin himself before seeking relief. He is entitled to be relieved from liability. But in this case McKiver would have no *locus standi* in equity against the underwriters if he were to seek specific performance of a contract to indemnify him against Johnston & Co.'s demand. Assuming, therefore, that the underwriters are liable to pay McKiver for services and expenses under the suing and labouring clause, and assuming that these services and expenses are included in those in respect of which Johnston is suing McKiver, I am of opinion that this case is not within ord. 16, r. 48, and that the underwriters cannot be brought in as third parties under that rule. The effect of the rule was fully considered by the Court of Appeal in *Birmingham and District Land Co.* v. *London and North-Western Railway Co.*, and the court there laid down that the rule only applies to cases where the third party was under some obligation, by contract or otherwise, to indemnify the defendant against the demand of the plaintiff. This construction is, in my opinion, warranted by the history of the rule, by its language, and by the forms referred to in it. Whatever obligation the underwriters may be under to McKiver, they are under no obligation to indemnify him against the claims of the plaintiffs, or any of them, or any part thereof.

There is clearly no obligation on the part of the underwriters to indemnify McKiver against the consequences of any representations he may have made as to his authority to employ the plaintiffs on their behalf or on behalf of any other person.

The appeal ought to be dismissed.

The Master of the Rolls agrees on the ground that the suing and labouring clause does not apply.

LOPES, L.J.—This case raises the question as to what is the meaning and scope of ord. 16, r. 48. Does it apply to cases other than those when the third party has contracted to indemnify the defendant against a claim made by the plaintiff? Under the old rules, before the recent amendment, the defendant had a much larger power than under the present rule to bring in third parties against whom he might claim some relief or remedy over.

The present rule was intended to curtail the old rule. Under the present rule the defendant must make out a *primâ facie* case showing that he is entitled to contribution or indemnity against the third party. The defendant here is not entitled to contribution. He must therefore make out a *primâ facie* case that he is entitled to indemnity. I am of opinion that he does not make out such a case. I agree with what was laid down in the

(*a.*) Reported by A. P. PERCEVAL KERR, Esq., Barrister-at-Law.

case of *Birmingham and District Land Co.* v. *London and North-Western Railway Co.*—viz., that, to bring a case within the rule, there must be a direct right to indemnity as such; a right which can be enforced either at law or in equity.

Lindley, L.J., has fully stated the nature of the claim of the plaintiff against the defendants and the other facts of the case which are material. It seems to me that, whatever may be the liability of the underwriters to McKiver, the underwriters are in no way bound, either at law or in equity, to indemnify him against the claim of the plaintiff in this action or any part of it. There is no contract by them, either express or implied, to undertake such a liability. This case is covered by the case I have cited, and the appeal must be dismissed.

Appeal dismissed.

Solicitor for the appellant, *Clements.*

Solicitors for the respondent, *Waltons, Bubb, & Johnson.*

High Court of Justice.

Chan. Div. Kay, J. } Oct. 28, 29; Nov. 5, 9.

In re Addlestone Linoleum Co. Benson's Claim. (*a.*)

Company—Shares—Contract to issue as fully paid up—Non-registration of contract—Winding up—Right of contributory to prove for damages—Companies Act, 1862, s. 38 (7)—*Companies Act,* 1867, *s.* 25.

A company, acting under a power in its articles, issued preference shares at a discount, the certificates declaring the shares to be fully paid up; but, owing to no contract being registered as required by section 25 *of the Companies Act,* 1867, *on the company being wound up the holders of the shares were placed on the list of contributories for the amount remaining unpaid thereon. They claimed to prove against the company for damages for the breach of contract or otherwise in relation to the issue of the shares.*

Held, that, assuming the company had power to issue fully paid-up shares at a discount if they had duly registered a contract with each allottee of such shares, the holders were, nevertheless, not entitled to maintain the claim, as they were, in effect, claiming in competition with the creditors of the company for debts due to them in the character of shareholders, which is prohibited by section 38, *sub-section* 7, *of the Companies Act,* 1862.

Held, also, that, even if the company were not being wound up, the claim could not be supported (1) *because by section* 25 *of the Companies Act,* 1867, *the creditors of the company are entitled to rely on the amount unpaid on the shares; and* (2) *because the shareholder, by thus claiming to retain his shares, is, in effect, claiming what he has contracted to contribute to the debts and liabilities of the company, which is inconsistent with his position as a shareholder.*

Houldsworth *v.* City of Glasgow Bank, 28 *W. R.* 677, 5 *App. Cas.* 317, *followed.*

Mudford's claim, 28 *W. R.* 670, 14 *Ch. D.* 634, *and* Ex parte Appleyard, 30 *W. R.* 147, 18 *Ch. D.* 587, *considered.*

Adjourned summons.

The company was incorporated in 1877 with a nominal capital of £25,000 in 2,500 shares of £10 each. Article 15 of the articles of association empowered the directors from time to time to issue such portion of the capital as should not have been subscribed for and allotted, with such special privileges with reference to preferential, guaranteed, fixed, fluctuating, redeemable, or other dividend or interest, or otherwise, as should from time to time be determined by a general meeting.

At a general meeting of the company held on the 8th of February, 1881, a resolution was passed authorizing the directors to issue part of the nominal capital of the company in the form of 750 five per cent. preference shares of £10 each, every existing shareholder to be entitled to one such share at twenty-five per cent. discount for each ordinary share held by him. In pursuance of that resolution several of the original shareholders applied for preference shares, and the same were allotted to them at the twenty-five per cent. discount, £7 10s. being paid by the allottees on each share. To each allottee was handed a certificate declaring him to be the holder of so many "preference shares of £10 fully paid up." No agreement for the issue of shares at a discount was registered under section 25 of the Companies Act, 1867.

On the 9th of May, 1885, an order was made for the compulsory winding up of the company. Eventually the ordinary shareholders who held preference shares were settled on the list of contributories in respect of such preference shares, and on the 20th of May, 1887, an order was made on the preference shareholders for a call of £2 10s. per share, being the balance unpaid in respect of each £10 preference share.

This was a summons by certain of the preference shareholders for leave to prove in the winding up against the company in damages to the amount of the call "for alleged breach of contract, or otherwise, in relation to the issue of the preference shares."

Farwell, in support of the summons, relied on *Mudford's claim*, 28 W. R. 670, 14 Ch. D. 634, and *Ex parte Appleyard*, 30 W. R. 147, 18 Ch. D. 587.

Marten, Q.C., and *F. B. Palmer*, for the liquidator.—This claim is made by the applicants in their capacity of shareholders, and by the Companies Act, 1862, s. 38 (7), any sum due to a shareholder "in his character of a member by way of dividends, profits, or otherwise," is to be postponed to the claims of the creditors. This has been held to include debts to members for advances (*Grissell's case*, 14 W. R. 1015, L. R. 1 Ch. 528) and fees to directors (*In re Leicester Club and County Race Course Co., Ex parte Cannon*, 34 W. R. 14, 30 Ch. D. 629). A contract to take shares cannot be rescinded after a winding up has commenced (*Oakes* v. *Turquand*, L. R. 2 H. L. 325, 16 W. R. H. L. Dig. 15; *Burgess's case*, 28 W. R. 792, 15 Ch. D. 507); and if the shares are retained there is no right to sue the company for damages in respect of their issue: *Houldsworth* v. *City of Glasgow Bank*, 28 W. R. 677, 5 App. Cas. 317. Therefore, owing to the failure to register under section 25 of the Companies Act, 1867, the shares are held subject to the payment of the whole amount thereof in cash. Moreover, the want of registration makes the issue of the shares at a discount *ultrâ vires* and void (*In re Ince Hall Rolling Mills Co.*, 30 W. R. 945, 23 Ch. D. 545 n.), and a claim against a company founded on an *ultrâ vires* act cannot be sustained: *Trevor* v. *Whitworth*, 12 App. Cas. 409. This distinguishes the present claim from those in *Mudford's case* and *Ex parte Appleyard*, where good consideration was given for the issue of the shares. In such a case the proof for damages is made, not for the value of the shares, but for the price of the consideration given, which, owing to the failure to register, has not been paid by the company.

Farwell, in reply.—The failure by the company to register the contract would have entitled the applicants to repudiate the shares, so he does not stand in the

(*a.*) Reported by H. F. Ambros, Esq., Barrister-at-Law.

position of a shareholder. [Kay, J., referred to *Gompertz* v. *Bartlett*, 2 W. R. 43, 2 El. & Bl. 849, and *Kennedy* v. *Panama, &c., Mail Co.*, 15 W. R. 1039, L. R. 2 Q. B., at p. 587.] The claim is for a breach of contract, the damage for which is not within section 38 (7). [Kay, J.—Such damages are not payable out of the assets in competition with the company's debts and liabilities, *per* Lord Cairns, C., in *Houldsworth* v. *City of Glasgow Bank*.] That case can be distinguished, for the claim there went to the root of the contract with the company, here it rests on the collateral undertaking to make the shares fully paid up by registering the contract. The applicants do not seek to impeach the contract itself. The court will follow the decisions in *Mudford's claim* and *Ex parte Appleyard*, which are supported by the reasoning in *White's case*, 27 W. R. 895, 12 Ch. D. 511.

Marten replied on the cases.

Cur. adv. vult.

Nov. 9.—Kay, J.—In the year 1881 this company issued to the present applicants fully paid-up preference shares of the nominal value of £10 each in consideration of the payment of £7 10s. per share. No contract was filed with the Registrar of Joint Stock Companies as required by section 25 of the Companies Act, 1867. On the 9th of May, 1885, an order was made to wind up the company, and the applicants have been placed on the list of contributories, and calls have been made on them for the amount of £2 10s. unpaid on each share. It is not denied that they are liable to these calls. They have taken out the present summons asking for leave to prove against the company in damages "for breach of contract, or otherwise," in relation to the issue of these shares, suggesting that the measure of such damages would be the £2 10s. per share which they have been so made to pay. Of course, it is too late to assert any remedy by way of rescission of the contract; but I will assume for the present that the applicants might elect to retain the shares and sue the company for damages. The question, then, is whether they can prove for such damages in competition with any other creditor not being a member of the company; or whether the case comes within section 38, sub-section 7, of the Companies Act, 1862, which is in these terms:—"No sum due to any member of a company, in his character of a member, by way of dividends, profits, or otherwise, shall be deemed to be a debt of the company, payable to such member in a case of competition between himself and any other creditor not being a member of the company; but any such sum may be taken into account, for the purpose of the final adjustment of the rights of the contributories among themselves."

Now, unquestionably the applicants—retaining these shares and claiming damages because the shares are not exactly what they were represented to be—are making such claims in the character of members of the company, and the only question is whether such claims are for sums due "by way of dividends, profits, or otherwise." To determine that it is necessary to consider the scope and intent of this provision in the statute. The obvious analogy is the case of a partner attempting to prove in bankruptcy in competition with the creditors of the firm. But whether this section is intended to have entirely the same effect or not, it is quite clear from the language of it that a debt due to a member in that character, such as for dividends, directors' fees, or the like, could not be so proved.

Now, is the mischief against which it is intended to provide the same in the case before me? Practically, what these applicants are seeking to recover by their proof is a dividend in respect of the £2 10s. per share which they have been compelled to pay in the winding up. But as shareholders they have contracted that they will pay this money, and that it shall be first applied in payment of the creditors whose debts are not due to them as members of the company—that is, they are practically admitting their liability to pay the £2 10s. per share to such other creditors, and yet seeking to get part of it back out of the pockets of those very creditors themselves. I confess it seems to me that the money so claimed is not only claimed in the character of members, but that the claim is just as unreasonable as if it were a claim of dividends or profits, and that, accordingly, it comes within the words "or otherwise" which I have read from section 38. So much for the principle.

The authorities are these. In *Mudford's case* Hall, V.C., decided that similar shares taken in satisfaction by a creditor of the company gave him a right of proof for the amount of the calls paid by reason of the company's breach of contract in not giving him paid-up shares. The question whether he could prove in competition with other creditors does not seem to have been argued. In *Houldsworth* v. *City of Glasgow Bank* it was held that damages for fraudulent misrepresentation of the director inducing the plaintiff to take shares might give him a right to rescind the contract, but gave him no right whatever to hold the shares and prove for damages against the company. That case was called to the attention of Hall, V.C., in *Ex parte Appleyard*, in which the circumstances were the same as in *Mudford's case*, and he distinguished it as being a case of contract, and followed his own previous decision by holding that in the case before him there was a right of proof; but he does not say a word upon the point which seems to have been suggested in the argument, that such proof should not be in competition with other creditors. He refers to certain *dicta* in *White's case*, where the contract being for payment to a creditor of the company in fully paid-up shares, it was held that the creditor had no money demand against the company, and that the shares not having been, in fact, fully paid up, he was bound to pay calls upon them without prejudice to the question whether he was entitled to damages against the company. But there, again, I do not find any suggestion that he would be entitled to prove for such damages in competition with other creditors. In the two cases before Hall, V.C., the shares were given in satisfaction of *bonâ fide* claims against the company, so that, if they were not fully paid up, it might be said the holders of them should be remitted to their original position of creditors. I do not know how far this may have influenced the decisions. In the present case there is no such fact. The applicants, not being at the time creditors of the company, simply paid £7 10s. for £10 shares. No consideration was given for the remission of the £2 10s. per share which was not paid. I therefore hold that if these shareholders can claim damages at all, that claim cannot be made in competition with creditors in the winding up whose debts are not due to them in the character of shareholders.

But is it the law that this claim for damages could be supported if the company were not being wound up? If it could, the consequence would be that the company would receive, and must then return, in the shape of damages, £2 10s. a share in respect of these so-called paid-up shares. That would practically render nugatory section 25 of the Companies Act, 1867. A solvent company might issue shares, nominally paid up, at a discount and omit to register the contract, and take with on hand and repay with the other the discount on eac share, and if the applicants' argument is sound no on could interfere. But suppose the company insolvent and that the other shares were *bonâ fide* paid up, an that the creditors, who had a right to treat these share as not paid up, had no other property to look to exceg the unpaid calls upon them, could it be said that th case was not touched by the statute? The decisions i favour of such a claim as that to which I have referre proceed upon the ground of a supposed breach of co

tract by the company. But if the shareholder elect to keep the shares, how can there be any such breach of contract? An action against a solvent company would proceed upon the election of the shareholder to retain his shares. Would not the answer to such an action be —"Your only remedy is rescission; you cannot approbate and reprobate; you cannot be heard to say, 'I am a shareholder who has contracted to pay £2 10s. a share when called on'—which is the effect of approbating the contract—'but I ask to recover that amount from the company as damages because I did not so contract.' That would be reprobating the contract."

The truth is—as was said by Lord Cairns in *Houldsworth v. City of Glasgow Bank*—that a share taken from a company is not like an ordinary chattel, in respect of which the purchaser may have a choice of remedies. By accepting such a share the allottee merges himself in a society, and contracts to pay calls when made. Much of the reasoning of the learned lords in that case applies very closely to this. Here, as there, the shareholder "is making a claim which is inconsistent with the contract into which he has entered, and by which he wishes to abide" (p. 325). The loss against which he seeks to be indemnified is in effect what he has contracted to contribute to the debts and liabilities of the company. He seeks to throw this amount on the other shareholders. He is "trying to reconcile two inconsistent positions—namely, that of shareholder and that of creditor of the whole body of shareholders including himself" (p. 333). My opinion is that he could not maintain an action for such damages against the company if it were not being wound up, and that he cannot maintain such a claim as this in the winding-up, either against other creditors, or shareholders, or the company. I assume throughout that the company had power to issue fully paid-up shares at a discount if they had duly registered an agreement with each allottee of such shares. The application must be refused, with costs.

Solicitors, *F. Romer; Trinders & Co.*

Chan. Div. North, J. July 25.

In re Faulkner (*a.*)

Solicitor—Sale by auction—"Conducting fee"—Commission to auctioneer paid by client—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44)—*General Order, August*, 1882, *clause* 2 (c), *schedule* 1, *part* 1, *r.* 11.

Property was put up for sale by public auction and sold in two lots. The auctioneer's commission was paid by the vendor. The solicitor employed by the vendor in connection with the sale charged the scale fee provided by part 1 *of schedule* 1 *to the General Order of August*, 1882, *under the Solicitors' Remuneration Act*, 1881, *for "deducing title," &c., and he also made various charges for work done by him previous to the sale, for which he claimed to be entitled under clause* 2 (c) *of the order. The taxing master allowed the scale fee, but disallowed the other items, considering himself bound by* In re Emanuel and Simmonds, 34 *W. R.* 613, 33 *Ch. D.* 40.

Held, that the solicitor was entitled, under clause 2 (c) *(in addition to the scale fee for deducing title), to charge in respect of work properly done by him in connection with the sale for which the auctioneer had not been paid.*

Adjourned summons.

In the year 1886 certain freehold property, consisting of four houses situate in Grey Friars-street, Northampton, was advertised for sale by public auction by order of the mortgagee. The property was sold in two lots for £420 and £380 respectively. The auctioneer was paid a commission by the vendor. The vendor's solicitor, Mr. John Faulkner, delivered his bill of costs, his charges amounting to £66 11s. 6d. In this bill he charged the sums of £6 15s. and £6 respectively for "deducing title," &c., these sums being the amount of the scale fees as prescribed by part 1 of schedule 1 to the General Order of August, 1882, under the Solicitors' Remuneration Act, 1881. He also charged £13 6s. in respect of certain charges paid to the auctioneer. He also made separate charges in accordance with the old system for drawing the particulars and conditions of sale and the abstract of title, for attendances on the auctioneer, for attending the sale, &c. The mortgagor, being dissatisfied with the bill, obtained an order to tax it.

The taxing master allowed the two scale fees and the payment to the auctioneer, but he disallowed all the other items in the lump without going into the propriety of each particular item.

In answer to objections carried in by Mr. Faulkner, the taxing master said:—"The solicitor objects to the disallowance of these items, because they are not included in those words for which the *ad valorem* scale charge is expressed to be given in part 1 of schedule 1. It is a fact that they, or nearly all of them, are not included in those words taken alone, but it is admitted that all the charges the disallowance of which is objected to are connected with the sale. I have disallowed these items and overruled the objections on the authority of *In re Emanuel and Simmonds*, 34 W. R. 613, 33 Ch. D. 40. The question for the decision of the court is whether the principle decided in that case with respect to a lease applies to a sale. It was decided in that case that, having regard to clause 2 of the order, the scale charge, though expressed to be for 'preparing, settling, and completing leases,' covers all business connected with the lease. I consider it necessarily follows that the scale charges expressed to be for 'conducting a sale' and for 'deducing title, &c.,' or the latter only, if the former is not applicable, cover all business connected with the sale."

This was a summons by Mr. Faulkner to review the taxation.

Cozens-Hardy, Q.C., and *Shebbeare*, for the summons—*In re Emanuel and Simmonds* was the case of a lease, it does not apply to cases of vendor and purchaser. *In re Field*, 33 W. R. 553, 29 Ch. D. 608, was also a case of a lease. In respect of matters done prior and leading up to a sale, the solicitor is entitled on a *quantum meruit*.

They referred to *In re Wilson*, 29 Ch. D. 790, 34 W. R. Dig. 185, and *In re Sykes*, 56 L. J. Ch. 238, 35 W. R. Dig. 179.

McSwinney, contrâ.—The object of the rules is to limit the remuneration of solicitors. The present point was not decided in *In re Wilson*. In the present case the auctioneer was paid by the client, and the solicitor, therefore, is not entitled to the scale fee.

North, J.—In this case certain property has been sold, and upon the taxation of the bill of costs of the vendor's solicitor the taxing master has taken a particular view which is now the subject of consideration before me. The Solicitors' Remuneration Act, 1881, with the orders and schedules to it, lay down certain rules as to the costs to be allowed to solicitors under certain circumstances. In schedule 1, part 1, a scale of charges is provided for in cases of sales, purchases, and mortgages. Before referring to the schedules, perhaps I should refer to the second of the General Orders, which is (subject to an exception not material for this

(a.) Reported by G. E. Jeffery, Esq., Barrister-at-Law.

purpose) as follows:—"The remuneration of a solicitor in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business, not being business in any action, or transacted in any court or in the chambers of any judge or master, is to be regulated as follows—namely," and then come three heads—(*a*), (*b*), and (*c*). Head (*a*) provides for the fees in respect of sales, purchases, and mortgages completed; head (*b*) provides for fees in respect of leases and agreements for leases of the kind mentioned in part 2 of schedule 1 to this order. Now head (*a*) has provided for the remuneration being in accordance with part 1 of schedule 1. In respect of business that comes under head (*b*) the remuneration is provided by part 2 of schedule 1; and then comes head (*c*), which provides for business not hereinbefore provided for, and deals with a good many matters which I need not read through in detail, and at the end it says this:—"And all other business the remuneration for which is not hereinbefore or in schedule 1 hereto prescribed, the remuneration is to be regulated according to the present system as altered by schedule 2 hereto."

Then we come to schedule 1, part 1. The first sum allowed is in respect of the vendor's solicitor negotiating a sale by private contract. That does not apply to the present case. The next is this: "Vendor's solicitor, for conducting a sale of property by public auction, including the conditions of sale." Then the next head is: "Vendor's solicitor, for deducing title to freehold, copyhold, or leasehold property, and perusing and completing conveyance." Therefore, in the case of properties sold by public auction there are two things provided for—a scale fee for "conducting," whatever that means, and a scale fee for "deducing title and perusing and completing conveyance." Now, in the present case the solicitor did deduce the title and peruse and complete the conveyance, and the scale fee has been allowed in respect of that, but he also makes a claim in respect of work done not included in deducing title or perusing and completing conveyance. Now, reading the second head, of conducting a sale of property by public auction, and looking at the fourth of the General Orders, which provides that the remuneration prescribed by schedule 1 is not to include auctioneer's charges; looking at those two alone I should have come to the conclusion that the auctioneer, if employed, was to be paid, and that, in addition, the solicitor was to be paid a charge for conducting the sale of property by public auction, but there are certain rules at the end of part 1 of schedule 1, the 11th of which begins in this way:—"The scale for conducting a sale by auction shall apply only in cases where no commission is paid by the client to an auctioneer." That is not the present case. A commission to the auctioneer was paid by the client, and therefore this scale fee for conducting is not to apply. Supposing that the auctioneer had been employed and had not been paid by the client but paid by the solicitor, then it is quite clear on the rule that this exception in rule 11 does not apply, and that the scale fee for conducting the sale would properly be paid. That seems clear from the language of the rule, and also the precise point is put by Cotton, L.J., in *In re Wilson*, where he says: "The property may have been in such a state that the solicitor could not do all things that were necessary for the sale, but in such a case, if he claims the *ad valorem* remuneration, he must get them done by a person paid by himself. As these things have been done at the expense of the estate I am of opinion that the solicitor cannot claim remuneration according to the scale. The Act and rules were not intended to give the solicitor remuneration according to the scale where he does not do the whole of the work for which the remuneration is provided, but somebody else does and is paid by the client for part of that work."

In the present case, therefore, there is certain work for which the solicitor would be entitled to be paid for conducting the sale if he also had himself paid the auctioneer. Some such work has been done. I am not now dealing with the particular items. If there is no such work done, the taxing master will not allow the charges, but I think it clear there is some such work done, and, therefore, I am dealing with the matter on that footing. The question, then, is, the solicitor having done certain work for which, if he had paid the auctioneer himself, he clearly would be entitled to receive the scale fee, is he not to be paid for that work at all because the auctioneer has been paid by the client? I think that case is not provided for by this rule, and that the scale fee for conducting does not apply, because the auctioneer has been paid by the client, but that leaves the solicitor entitled to remuneration for doing such parts of the work of conducting the sale as the auctioneer has not been paid for. If all that the solicitor has done was auctioneer's work, then there is nothing for which he can be paid; but if there is anything done by him which is not auctioneer's work, but which is expense of conducting the sale, it seems to me, as to those items, he ought to receive payment. The contention is that, because he did not do the auctioneer's work himself, or pay the auctioneer who did it out of his own pocket, he is not to have any remuneration for the work, inasmuch as the scale only provides for a person being paid who does the work, and that, if not paid for the whole, he cannot be paid for any part, but that seems to me inconsistent with the view that has been taken of the scale fee for deducing title, because it has been held that a solicitor cannot be paid the scale fee for deducing title, unless he does all the work of deducing the title, and perusing and completing the conveyance. Now, if Mr. MacSwinney's argument was good as to the scale fee for conducting the sale, it seems to me it would follow that, unless the solicitor did all the work in connection with deducing the title, and so earned the scale fee he ought not to be paid anything at all. But that is directly contrary to the decisions that have been come to in the cases relating to the fee for "deducing title"; because where the solicitor has done part of the work coming under the scale fee for deducing title, but not the whole, he is not allowed the scale fee, but he is allowed the fee for the work which he has done. It seems to me, therefore, that the cases that have applied that construction to the scale fee for deducing title are authorities for saying that the same rule must be applied to the fee for conducting the sale when the whole of the work contemplated by that clause has not been done by the solicitor—namely, when an auctioneer has been employed at the client's expense. It seems to me, therefore, that the construction put by the courts upon the fee for "deducing title" applies to the fee for conducting the sale, and that, under these circumstances, the taxing master has made a mistake in the view which he has taken in holding that the cases relating to leases relate also to the cases of vendor and purchaser.

I should say this, further, that in the case of *In re Wilson* the precise point was raised before the taxing master, and particular fees were allowed by him. The opinion of the Court of Appeal does not touch the point. It was not before them for decision, but they do not seem to have made any comment upon the propriety of the allowance of those fees.

In that case some of the ordinary charges were allowed for work which had been done, and so it was, apparently, in the case of *In re Sykes*. Those cases show that the practice in the taxing master's office has been, where the scale fee for conducting is not allowed, to allow such charges outside the scale fee as are made in respect of work properly done. That seems to me to be the right rule, and the cases upon the second part of the schedule do not seem to me to affect the present case. The

matter must, therefore, go back to the taxing master with the intimation of my opinion that he is not precluded by the decision referred to in his reasons from allowing such of the charges disallowed by him as are proper to be allowed.

Solicitors for the summons, *Hensman & Marshall.*

Solicitors for the client, *Soames, Edwards, & Jones.*

Chan. Div. North, J. — Oct. 26.

In re Peace & Ellis. (*a.*)

Solicitors—Costs—Sale by auction—Commission to auctioneer paid by client—Scale fee for conducting sale—Charge for solicitors' work not included in fee for deducing title—Solicitors' Remuneration Act, 1881 (*44 & 45 Vict. c.* 44)—*General Order,* 1882, *ord.* 4, *and schedule* 1, *part* 1, *r.* 11.

Solicitors employed in a sale of property by auction where the auctioneer's commission was paid by the client delivered a bill in which they charged the scale fee for conducting the sale and deducing the title, and mentioned items of solicitors' work not included in the scale fee for deducing the title. The taxing master disallowed the fee for conducting the sale because of the auctioneer's charge being paid by the client, and did not allow any fee for items mentioned in the bill of solicitors' work not included in the scale fee for deducing the title, on the ground that the bill was made up on a wrong footing and could not be altered by adding charges.

Held, that the taxing master was right in disallowing the scale fee for conducting the sale, but that he ought to have allowed the solicitors a quantum meruit *for solicitors' work done by them and mentioned in their bill, and which was not covered by the scale fee for deducing the title.*

Adjourned summons.

Messrs. Peace & Ellis, solicitors, of Wigan, having been employed to carry out the sale of certain property, which was sold by auction in three lots, delivered a bill of costs as follows :—

"Fee on preparing advertisement for sale of property situate in Isce, Upholland, and Standish, in respect of which you were mortgagee, inserting advertisement in papers, preparing conditions of sale, deducing title thereto, and completing conveyances thereof, as follows:—

"Lot 1 to Mr. Thos. Baldwin, purchase-money £320 .	£10 5 0	
Lot 2 Mr. Thos. Latham, purchase-money £127 .	10 0 0	
Lot 3 to Mr. Harry Mitchell, purchase-money £535 .	13 15 0	
		£34 0 0
"Disbursements.		
"Printer's charges . .	£2 0 0	
Bill poster . . .	2 0 0	
Advertising, *Wigan Examiner* . . .	4 14 0	
" *Wigan Observer* .	5 0 0	
Auctioneer's charges . .	10 1 0	
Hotel bill	2 16 0	
	£26 11 0	£34 0 0
		£26 11 0
		£60 11 0"

The auctioneer's charge of £10 1s. was made up of a fee of £3 3s. for each lot, and 12s. for expenses out of pocket.

This bill was taxed and the taxing master made the following disallowances: In respect of Lot 1, £5; in respect of Lot 2, £5; and in respect of Lot 3, £5 10s. making in the whole £15 10s., which reduced the amount of the bill as delivered to £45 1s.

Messrs. Peace & Ellis objected to the disallowances for the reason that such charges were properly incurred and were allowable under the Solicitors' Remuneration Act, in addition to the amounts allowed by the taxing master.

The taxing master's answer to the objections was as follows: "In this case an auctioneer was employed who negotiated the sales and was paid (by the client) his usual commision. The solicitors are therefore not entitled to charge negotiation fees but only the fees for contract, deducing title, and completing. This being a taxation under the Solicitors Act, I have no power to amend the bill, which otherwise I should have done by allowing the solicitors three guineas for their trouble in instructing the auctioneer and any other labour not covered by the scale fees allowed."

This was a summons by Messrs. Peace & Ellis for a review of the taxation.

Order 4 of the Solicitors' Remuneration Order, August, 1882, provides that "The remuneration prescribed by schedule 1 to this order is not to include stamps, counsel's fees, auctioneer's or valuer's charges, travelling or hotel expenses, fees paid on searches to public officers, on registrations, or to stewards of manors, costs of extracts from any register, record, or roll, or other disbursement reasonably and properly paid, nor any extra work occasioned by changes occurring in the course of any business, such as the death or insolvency of a party to the transaction, nor is it to include any business of a contentious character, nor any proceedings in any court, but it shall include law stationer's charges, and allowances for time of the solicitor and his clerks, and for copying and parchment and all other similar disbursements."

Rule 11, schedule 1, part 1, of the order provides that "The scale for conducting a sale by auction shall apply only in cases where no commission is paid by the client to an auctioneer. The scale for negotiating shall apply to cases where the solicitor of a vendor or purchaser arranges the sale or purchase and the price and terms and conditions therof, and no commission is paid by the client to an auctioneer, or estate or other agent. . . ."

Cozens-Hardy, Q.C., and *O. L. Clare,* for the summons.—The disallowances ought not to have been made. The auctioneer's charge of £10 1s. is not a commission paid to him by the client under rule 11 so as to disentitle the solicitors to the fee for conducting the sale, but is a charge under order 4. At any rate, the solicitors ought to have been allowed some remuneration under schedule 2 of the Solicitors' Remuneration Order for work done by them and specified in their bill and not covered by the auctioneer's charge.

They referred to *In re Wilson,* 29 Ch. D. 790, 34 W. R. Dig. 185.

Everitt, Q.C., and *R. F. Norton, contrà.*—The taxing master was right in making the disallowance. The auctioneer's charge of £10 1s. is a commission under rule 11 and disentitles the solicitors to the fee for conducting the sale. It is too late now to contend that the solicitors ought to have been allowed a *quantum meruit* for work done by them and not covered by the auctioneer's charge. They cannot add items to their bill.

They referred to *In re Faulkner, ante,* p. 59; *In re Wilson.*

Cozens-Hardy, Q.C., in reply.—The solicitors cannot add items to their bill, but they ask for taxation on a

(*a.*) Reported by J. Trustram, Esq., Barrister-at-Law.

proper footing. A bill framed on an erroneous footing can be taxed on a proper footing: *In re Lacey*, 32 W. R. 233, 25 Ch. D. 301.

North, J.—In this case solicitors who acted for a mortgagee in selling the mortgaged property by auction in three lots, send in a bill charging £34 for, in the words of part F. of the schedule to the Solicitors' Remuneration Act, "conducting the sale" and "deducing title, and perusing and completing conveyance." The taxing master allowed the fee for deducing the title, but not the fee for conducting the sale. He therefore divided the sum charged for each lot into two portions, and disallowed one of such portions. It is objected that the three sums for the three lots, amounting in the whole to £34, ought all to be allowed. The solicitors performed a certain part of the business of conducting the sale, but they employed an auctioneer, paid his charges amounting to £10 1s., and charged them in their bill. Rule 11 of part 1, schedule 1, of the Solicitors' Remuneration Order, August, 1882, provides that the scale for conducting a sale by auction only applies when no commission is paid by the client to the auctioneer. In my opinion that rule applies to this case. It is argued that that rule is restricted by order 4, which provides that:—[His lordship read order 4 as set out above, and proceeded:—] and that the auctioneer's charge of £10 1s. is not a commission under rule 11, but a charge under order 4. But in my opinion it is commission under rule 11, and not a charge under order 4. It would be curious if the solicitors' remuneration were to depend upon whether the auctioneer is paid a fixed charge or a commission. The taxing master, who was told what the £10 1s. was made up of, says:—[His lordship read the answer of the taxing master as set out above, and continued:—] I cannot say that this a charge under order 4, so this is a case in which the scale does not apply. The point was not decided in the case of *In re Wilson*, but the opinions of the Lords Justices seem to tend in the direction of the view I take.

But certain work has been done by the solicitors for which they have not been paid, but ought to be paid. They are not entitled to be paid separately for preparing conditions of sale, because that is included in the scale fee for deducing title. But they have charged for preparing the advertisement for sale. It seems to me that preparing the advertisement is the solicitors' business, and is not covered by the scale fee and therefore they ought to be paid something for it. If anything has been done by them which is not the auctioneer's business they ought to be paid for it. There is, however, this difficulty. The solicitors have sent in their bill, and it said they cannot alter their bill by making fresh charges. The taxing master has taken that view. [His lordship read the latter part of the answer of the taxing master as set out above, and continued:—] The solicitors have sent in a bill in which they have charged wrongly. But that does not prevent the taxing master from allowing them the right charges for items mentioned in the bill. The taxing master evidently thought that there were some items the solicitors ought to have been paid for, but which he could not allow. It seems to me that he ought to have allowed them. But he could not allow a charge for anything the solicitor did which is included in the scale fee. The case of *In re Faulkner*, where the solicitor did not charge for conducting the sale, differs from this case. I see that in the case of *In re Sykes*, 56 L. J. Ch. 230, 35 W. R. Dig. 193, before Chitty, J., ten guineas were allowed for work not included in the scale fee. The case of *In re Lacey* would assist me if any assistance were wanted, but I do not think any authority is necessary to support the view that there was nothing to prevent the taxing master from allowing a proper sum for items of solicitor's work charged in the bill and not included in the scale fee. The taxing master was right in disallowing the scale fee for conducting the sale, but he ought to have allowed a fee for work done by the solicitors outside the scale fee which was solicitor's and not auctioneer's work. I must refer the matter back to the taxing master to reconsider the taxation.

Solicitors, *Gregory, Rowcliffes, & Co.*, for *Peace & Ellis*, Wigan; *J. J. & C. J. Allen*, for *William Lees*, Wigan.

Q. B. Div. (Stephen and Charles, JJ.) Nov. 4.

Neaves v. Spooner. (a.)

Costs—Recovery of less than £20—County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 5—Ord. 65, r. 12.

The plaintiffs in an action having recovered the sum of £3, an order was made by a judge at chambers that the plaintiffs do recover their costs against the defendant, to be taxed upon the county court scale B.

Held, that such order was bad.

Appeal from an order of Kekewich, J., as to costs.

The action was brought in the Sheffield District Registry of the Hight Court of Justice to recover a sum for rent of a house which the defendant held of the plaintiffs, and also for an account of rents which the defendant had collected for the plaintiffs as their agent.

An order having been made for an account, and the defendant having set up a counter-claim, the district registrar issued a certificate the effect of which was that he found that the plaintiffs were entitled to recover £3 from the defendant.

The defendant paid into court the sum of £3, which was paid out to the plaintiffs, who then applied to the defendant for their costs of the action, which amounted to £56.

The defendant refusing to pay, the plaintiffs applied at chambers for an order for their costs, when Kekewich, J., made an order that the plaintiffs do recover their costs of the action against the defendant, to be taxed by the Sheffield District Registrar upon the county court scale B.

From that order the defendant appealed.

T. W. Chitty, for the defendant.—By virtue of section 5 of the County Courts Act, 1867, the plaintiffs, having recovered a sum not exceeding twenty pounds, are not entitled to any costs at all, unless the court or a judge by rule or order allow costs. If any such order were made they would be entitled to costs on the High Court scale; but here Kekewich, J., expressly refused to allow the plaintiffs costs on the High Court scale. The effect of section 5 and ord. 65, r. 12, read together, is that where the plaintiff recovers between £50 and £20, he is only entitled to costs on the county court scale, but where he recovers less than £20 he is not entitled to any costs unless in either case an order is made giving him costs on the High Court scale. Therefore ord. 65, r. 12 is not applicable to the present case, and the learned judge had no power to make an order under that rule. Otherwise the rule would repeal section 5 of the County Courts Act.

Morton Daniel, for the plaintiffs.—The judge had an absolute discretion, whether he acted under section 5 of the Act or under ord. 65, r. 12. In either case the plaintiff is only to be disallowed costs unless the judge otherwise orders. Here the judge did otherwise order. [Charles, J., referred to *Calvert* v. *Davison*, W. N. 1884, p. 18, a case decided at chambers. Stephen,

(a.) Reported by F. G. Rucker, Esq., Barrister-at-Law.

—Surely ord. 65, r. 12, must be read together with section 5, and must therefore be limited to cases where the plaintiff recovers a sum not exceeding £50, but exceeding £20.]

The Court (Stephen and Charles, JJ.) held that the order of Kekewich, J., was bad, and allowed the appeal, without prejudice to the plaintiffs' right to apply to a judge for costs on the High Court scale.

Appeal allowed.

Solicitors for the plaintiffs, *J. & W. Maude.*

Solicitors for the defendant, *Bell, Brodrick, & Gray.*

Q. B. Div. (Manisty and Charles, JJ.) Oct. 28, 29.

Lewis v. Lewis. (a.)

County court—Remitted action—Claim reduced by admission—19 & 20 *Vict. c.* 108, *s.* 26.

A plaintiff claimed for £220. The defendant denied the claim in toto, and counter-claimed for £203. The plaintiff admitted the counter-claim, and applied to a judge at chambers for the remittal of the cause to the county court under section 26 of 19 & 20 Vict. c. 108, as for a claim not exceeding £17. The case was so remitted by the judge.

Held, that the judge was right in remitting the action, inasmuch as the amount in dispute did not exceed £50, and that the fact that the defendant "counter-claimed" for the amount due to him did not prevent the amount being treated as a "set-off" against the plaintiff's claim under section 18 of the Judicature Act, 1884.

Appeal from an order of Pollock, B., at chambers remitting an action to the county court under 19 & 20 Vict. c. 108, s. 26.

The plaintiff had brought an action for the produce of a farm under "outgoing tenant's rights" to the amount of £220. The defendant denied the claim *in toto*, and set up by way of counter-claim and set-off a claim for rent up to £203. The plaintiff admitted indebtedness to this amount, and applied to Pollock, B., at chambers, to remit the action to the county court of Glamorgan on the reduced claim for £17, which application was granted, and against which the defendant now appealed.

H. F. Manisty, for the defendant.—The plaintiff's claim is not reduced to a sum "not exceeding £50," which alone would give the county court jurisdiction. The whole claim is disputed, and the county court judge would have to adjudicate on the sum of £220. Section 26 of 19 & 20 Vict. c. 108 only applies to where the claim is admitted to a certain extent, but reduced in amount. The sum "in dispute" must not exceed £50. The words "admitted claim" must be imported to explain the section. This was not a claim in which a set-off could be pleaded, because the counter-claim is for a totally different matter from the claim—viz., for rent. A set-off can only be pleaded to a money debt which is "ascertainable with certainty at the time of pleading": *Grant* v. *Royal Exchange Assurance Co.*, 5 M. & S. 439. The claim here is for an unascertained amount.

Rose, for the plaintiff.—The word "admitted" is not attached to the word "claim" in section 26. The sum in dispute is the criterion, and here only £17 is in dispute. The plaintiff's claim is for a liquidated demand which has been ascertained—*i.e.*, for a debt.

H. F. Manisty, in reply.—The form of judgment must be for £220 if the plaintiff succeeds, that is an adjudication for a sum in excess of county court jurisdiction.

Manisty, J.—The plaintiff here brings an action for £220. The defendant says, "You owe me £203." The plaintiff answers, "I do; therefore my claim is only for £17." The question on that state of facts is whether the cause can be sent to the county court to be tried. I am of opinion that Baron Pollock was right, and that it could be so remitted. Putting the matter simply, the motion by the plaintiff is for the payment of a claim confessedly reduced to £17.

Charles, J.—I am of the same opinion. The fact that the defendant has pleaded by way of counter-claim as well as for a set-off does not affect the question, for there is full power given by section 18 of the Judicature Act, 1884, to the county court to deal with counter-claims under the present circumstances.

Appeal dismissed.

Solicitors for the plaintiff, *Schultz & Son*, for *G. C. James*, Merthyr Tydfil.

Solicitors for the defendant, *Cunliffe & Davenport*, for *R. W. Williams*, Cardiff.

(a.) Reported by Spencer L. Holland, Esq., Barrister-at-Law.

Q. B. Div. (Wills and Grantham, JJ.) July 12.

Baddeley v. Earl Granville. (a.)

Master and servant—Injury to workman—Volenti non fit injuria—*Statutory duty—Employers' Liability Act*, 1880 (43 & 44 *Vict.* c. 42), *s.* 1, *sub-section* 2—*Coal Mines Regulation Act*, 1872 (35 & 36 *Vict.* c. 76), *s.* 52.

The plaintiff's husband had been employed in the defendant's coal mine, where it was the custom that the banksman, though required to be constantly in attendance at the mine while men were ascending or descending, under section 52 of the Coal Mines Regulation Act, 1872, should not be present during the night. The plaintiff's husband was killed while ascending at night, in consequence of an accident caused by the absence of the banksman. In an action under the Employers' Liability Act, 1880,

Held, that the maxim Volenti non fit injuria *did not apply, as the injury was caused by the breach of a statutory duty.*

Appeal from the judge of the Staffordshire County Court, sitting at Hanley.

The action was brought under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1, sub-section 2, under the following circumstances:—

The plaintiff's husband was employed in the defendant's colliery, and while coming out of the pit at night an accident happened owing to a signal to lower the cage, in which the deceased was ascending, having been improperly given by a boy of fourteen years of age not in the course of his duty. There was no banksman present in accordance with the rules established in pursuance of section 52 of the Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), but it was the practice at the mine that no banksman should be present at night.

The county court judge, being of opinion that the negligence of the manager of the mine in not providing for the constant attendance of the banksman was the cause of the accident, gave judgment for the plaintiff.

The defendant appealed.

Aspland, Q.C., and *G. E. Tyrrell*, for the defendant.—The maxim *Volenti non fit injuria* applies. The deceased well knew of the risk he had undertaken, and

(a.) Reported by A. H. Todd, Esq., Barrister-at-Law.

Thomas v. *Quartermaine*, 35 . R. 555, 18 Q. B. D. 685, is in point. *Wilson* v. *Merry*, L. R. 1 Sc. App. 326, is also in the defendant's favour. Further, there was no obligation on the defendant's manager to have a banksman constantly in attendance, and, even if he was negligent in that respect, his negligence was not the cause of the accident.

C. A. Russell, for the plaintiff.—Bowen and Fry, L.JJ., in *Thomas* v. *Quartermaine* point out the distinction between the breach of a common law and of a statutory duty. The decision of the county court judge was right on all the points. It was not shown at the trial that the practice of the colliery as to the absence of the banksman was known to the deceased.

WILLS, J.—The important question is as to the application of the recent decision of the Court of Appeal in the case of *Thomas* v. *Quartermaine*. That case has established the doctrine that where an action lies *primâ facie* under the Employers' Liability Act, 1880, an answer is supplied if the servant has voluntarily undertaken the risk which proved fatal. It is a case which in all probability will give rise to much discussion from the frequency with which similar questions arise in these courts, and therefore I shall not attempt to lay down any general rule, as it is desirable to confine oneself to the particular facts of the case under discussion. I do not propose to discuss the general meaning or limitations of the maxim *Volenti non fit injuria*, the application of which is to be watched with great care in each individual case. But assuming its general applicability in the widest sense, it is sufficient for the purposes of the present case that both the Lords Justices in *Thomas* v. *Quartermaine*, thought that the maxim did not apply at all where the injury complained of arises from the direct breach of a statutory obligation. The remarks of Bowen, L.J., were not made in a casual manner. It is true that the Master of the Rolls expressed a different opinion, and that all the observations made were not necessary for the decision of the particular case, and therefore not a binding authority on us. But we have the deliberately-expressed opinions of Bowen and Fry, L.JJ., in a case in which the judgment was long in suspense. Therefore, I have there an expression of opinion which I should follow. But I think, further, that there is a great deal to be said on public grounds in favour of that view. In the first place, an obligation imposed by statute ought to be capable of enforcement with respect to all future dealings affected by it. As far as the future is concerned, statutory obligations should be incapable of being got rid of.

In respect of past breaches persons may come to what agreement they please. But there ought not to be any encouragement to a deliberate engagement between A. and B. that B. shall take no action for a breach of a law for the protection of A. I do not know whether that would be an illegal agreement as being against public policy. But it seems to me it would be against public policy where the supposed agreement, in consequence of which the principle *Volenti non fit injuria* arises and has to be applied, comes to this, that the master agrees to employ the servant on the terms that the servant will waive breaches by the master of a statutory obligation, and will in that sense, and to that extent, connive at and encourage a breach of a statute the obligations of which are imposed for the benefit of others as well as of the parties to the agreement. I am inclined to think that such an agreement would be in violation of public policy, and one which ought not to be countenanced. There is much that could be said in favour of the proposition that where an accident arises from the breach of a statutory obligation the maxim *Volenti non fit injuria* ought not to apply. In the present case I follow that proposition, and hold that there being a breach of a statutory obligation, the maxim *Volenti non fit injuria* does not apply, and, therefore, this case is taken out of the rule laid down in *Thomas* v. *Quartermaine*. Therefore this appeal must be dismissed, with costs.

His lordship added that the learned county court judge had came to a correct decision upon the other points raised in the argument.

GRANTHAM, J.—I am of the same opinion. It seems to me that the defendant is precluded, by the peculiar character of the decision in the case of *Thomas* v. *Quartermaine*, from arguing that in consequence of the deceased being aware of the danger of going up and down the pit when he knew the banksman was away, the plaintiff cannot recover. The learned Lords Justices who decided the case of *Thomas* v. *Quartermaine* expressly say that their decision in that case is not to apply, where there is a statutory liability as there is here. If that is so, I agree with the Master of the Rolls that in such a case as this the defendant would be liable. The case of *Blamires* v. *The Lancashire and Yorkshire Railway Co.*, L. R. 8 Ex. 283, seems to me to be an important authority and much in point. Here there has been a distinct breach of a statutory obligation, and I think that the plaintiff is entitled to the judgment she has obtained.

Appeal dismissed.

Solicitors for the plaintiff, *Wedlake, Letts, & Wedlake.*

Solicitor for the defendant, *H. F. Tyrrell.*

Q. B. Div. (Lord Coleridge, C.J., and A. L. Smith, J.) April 27.

BLAIR *v.* CORDNER. (*a.*)

Practice—Frivolous and vexatious action—Power of court to stay—Ord. 25, r. 4.

The Queen's Bench Division has an innate and inherent authority to dismiss or to stay a frivolous or a vexatious action. This authority is distinct from the authority conferred on it by ord. 25, r. 4, which is limited to pleadings which are frivolous or vexatious or otherwise objectionable.

Appeal from an order of Huddleston, B., at chambers, staying an action.

The plaintiffs, Messrs. Blair & Girling, solicitors, had commenced an action against the defendants for the detention of a deed of reconveyance of mortgaged property under the following circumstances:—The defendant was transferee of a mortgage which the plaintiffs paid off on receiving an undertaking from the defendant's solicitors that the defendant would execute a proper reconveyance. A dispute afterwards arose between the two firms of solicitors as to an item of 10s. claimed by the defendant's solicitors in their bill of costs. The plaintiffs refused to pay the 10s., but they were willing to pay the other items of the bill. The defendant's solicitors refused to hand over the defendant's reconveyance to the plaintiffs, who then commenced this action.

Huddleston, B., at chambers, ordered the defendant to hand over the reconveyance (duly executed) to the plaintiffs upon their paying the costs of the defendant's solicitors less the 10s. in dispute, and stayed all further proceedings in the action, the parties to pay their own costs of the application. The deed was accordingly handed over to the plaintiffs, and the defendant's solicitors were paid their bill of costs less the 10s. The plaintiffs appealed from the order staying the action.

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

H. Reed, for the plaintiffs.—Huddleston, B., had no power to stay the further proceedings in the action, because it is grounded on a matter of 10s. There is a good cause of action. The statement of claim is a good one, it has been delivered and it must be pleaded to. There is nothing in it which evinces that the action is frivolous or vexatious, and, therefore, there is no power under ord. 25, r. 4, or under any other rule to strike it out.

C. *Dodd*, for the defendant.—The action is frivolous. We offered to execute the deed, and they accepted it, saving our claim for 10s. Ord. 50, r. 8, deals with cases of property retained by virtue of a lien, and enables the court to settle the rights of both parties in a summary manner. Again, by ord. 33, r. 2, a judge may at any stage direct any necessary inquiries to be made: *The Sally*, 48 L. J. P. D. & A. 56, 27 W. R. Dig. 204. The court has an innate jurisdiction to stay vexatious and unreasonable actions. We have handed up the deed, and so soon as we did so the action became an unreasonable one.

H. Reed, in reply.—Ord. 33, r. 2, is merely the old chancery procedure and only applies to redemption suits, actions of account, and so forth. If this rule were applied to other cases it would deprive a suitor of his right to go to a jury, and would alter the whole system of trials. If we had not brought the action we were liable to pay any bill of costs that might be sent to us, and we wanted the deed. [A. L. SMITH, J.—It appears to be merely an action for costs. Lord COLERIDGE, C.J.—I should make you pay the costs of both sides, and in any event, if the action continued.] We have a right to nominal damages at the least, and these we press for.

Lord COLERIDGE, C.J.—The appeal must be dismissed, and the order of Huddleston, B., must be affirmed. I had no doubt throughout the arguments as to what was just. But the doubt which did occur to me was how, in view of technical rules and authorities, we could do justice and carry out the order of Huddleston, B., which I entirely approve of. I am of opinion that Huddleston, B., had no power to stay the action under ord. 25, r. 4, as that order only applies where an action is shown on the pleadings to be frivolous and unreasonable; and this action is not shown to be so on the pleadings. I do not know whether he acted or not under ord. 25, r. 4, but I quite approve of the result which he arrived at. When all the facts concerning this action are understood, there is no doubt but that it is frivolous and vexatious, and this court has an undoubted authority of its own, as was laid down by the Court of Appeal in *Willis* v. *Lord Beauchamp*, 34 W. R. 357, to dismiss or stay a frivolous or a vexatious action. This authority is dependent on no statute and on no rules, but is innate and inherent in this court. In the case before us the whole dispute turned on 10s., which dispute has already been settled by Huddleston, B., who ordered the deed to be handed over to the plaintiffs on their paying the costs less the 10s. in dispute, yet, although they have gained their point, they persist in carrying on their action *in detinue* for the sake of nominal damages for the detention of the deed. In my opinion, from the moment the deed was handed to the plaintiffs their action became both frivolous and vexatious. Thereupon, the power of this court immediately arises to stay the action.

A. L. SMITH, J.—I concur.

Appeal dismissed, with costs.

Solicitors for the plaintiffs, *Blair & Girling.*

Solicitors for the defendant, *Burn & Burridge.*

Court of Appeal.

From Chan. Div. Oct. 25, 26.

BOSWELL *v.* COAKS. (*a.*)

Practice—Action dismissed, with costs, before 24th of October, 1883—*Certificate of costs made after that date—Interest on costs—Time from which interest runs—R. S. C.,* 1883, *preface to rules—"Cause then pending"—R. S. C.,* 1883, *ord.* 42, *r.* 14—*Appendix H, Form* 1.

By a judgment delivered before the Rules of the Supreme Court, 1883, *came into operation, an action was dismissed and the plaintiff was ordered to pay the costs, but the judgment contained no direction as to the date from which interest on the costs was to run. Taxation proceedings were carried on, and the taxing master's certificate was made after the Rules of* 1883 *had come into operation.*

Held, affirming the decision of North, J. (31 *S. J.* 703), *that the Rules of* 1883 *applied to the taxation proceedings, and therefore that interest on the costs ran, not from the date of the taxing master's certificate, as the R. S. C.,* 1875, *provided, but from the date of the judgment, as Form No.* 1, *Appendix H., to R. S. C.,* 1883, *directs.*

Held, also, that the true interpretation of the words in ord. 42, *r.* 14, *of R. S. C.,* 1883: "*The forms used in Appendix H. shall be followed, with such variations as circumstances may require*"—*is, that the forms in Appendix H. can only be varied for the purpose of making them to be in accordance with the terms of the judgment or order.*

Appeal from North, J.

On March 19, 1883, Fry, J., gave judgment in the action of *Boswell* v. *Coaks*, dismissing the action with costs, but gave no special direction as to interest on the costs. At that date the rules of practice of the Supreme Court of Judicature in force were the Rules of 1875. In the form of the writ of *fi. fa.* given in Appendix F., No. 1, to those rules, interest on costs ran from the date of the certificate of taxation. On the 24th of October, 1883, the new Rules of the Supreme Court (1883) came into operation. The preface to these rules enacts that they "shall also apply, so far as may be practicable, . . . to all proceedings taken on or after that day" (October 24, 1883) "in all causes or matters then pending." Ord. 42, r. 14, of the R. S. C., 1883, provides that "every writ of execution shall bear date of the day on which it is issued. The forms in Appendix H. shall be used with such variations as circumstances may require." In the form of the writ of *fi. fa.* given in Appendix H., Form No. 1, of the R. S. C., 1883, interest on costs runs from the date of the judgment. The date of the taxing master's certificate of the costs of one of the defendants was the 3rd of March, 1884, after the R. S. C., 1883, had came into operation. Summonses to vary the certificate were taken out by both plaintiff and defendants, but before they came on for hearing a decision of the Court of Appeal reversed the judgment of Fry, J., and took away the order for taxation. Subsequently the House of Lords restored the judgment of Fry, J. (see 11 App. Cas. 232, 34 W. R. Dig. 211).

The only question now raised was whether the defendant was entitled to interest on costs from the date of the judgment of Fry, J., or only from the date of the taxing master's certificate.

North, J., held that interest on the costs ran from the date of the judgment (31 S. J. 721).

The plaintiff appealed.

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

Cookson, Q.C., and *Langley*, for the appellant.—The whole of these costs were incurred and were adjudged to be paid when the Rules of 1875 were in force, those rules therefore apply, and not the Rules of 1883. By the Rules of 1875 interest on costs runs only from the date of the allocatur, and not from the date of the judgment: R. S. C., 1875, ord. 42, r. 12, Appendix F.; *Schroeder* v. *Clough*, 46 L. J. C. P. 365, 25 W. R. Dig. 189. *Pyman* v. *Burt*, 28 S. J. 428, W. N., 1884, p. 100, only decides that when the new rules (1883) are applicable interest on costs runs from the judgment. North, J., relied on the case of *Landowners' Co.* v. *Ashford*, 33 W. R. 41, a decision of Pearson, J., but the point does not appear to have been argued there. *In re London Wharfage Co.*, 33 W. R. 836, is a case in which the judgment was given after the 24th of October, 1883, and therefore the Rules of 1883 clearly applied. Here the judgment dismissing the action with costs was given before the new rules came into force, and by the rules in force at that time the judgment directing the plaintiff to pay costs obliged him to pay, and gave the defendant the right to receive, interests on costs only from the date of the allocatur. The new rules are not to be construed so as to affect vested rights or obligations: *Evans* v. *Williams*, 13 W. R. 423, 2 Dr. & Sm. 324. The cause came to an end when the action was dismissed—viz., on the 19th of March, 1883—and, therefore, on the 24th of October, 1883, there was no cause then pending: *In re McClellan*, 33 W. R. 888, 29 Ch. D. 495. The form of the writ of *fi. fa.* given in Appendix H. may be varied as circumstances may require: ord. 42, r. 14.

Cozens-Hardy, Q.C., and *Methold*, for the respondent.—The taxation of costs in this case took place after the 24th of October, 1883. That was a proceeding taken in a cause or matter then pending, and therefore the Rules of 1883 apply. Interest on costs, therefore, runs from the date of the judgment, and not from the date of the certificate.

Cookson, Q.C., replied.

COTTON, L.J.—The first point we have to decide is one not free from difficulty. It is whether or not, having regard to the preface to the new rules and orders (1883), the previous rules (1875) do apply under the particular circumstances of this case with regard to the time from which interest on the costs is to run.

Before these rules (1883) came into operation an order was made dismissing this action, with costs. Subsequently these new rules, with alterations as to the mode and effect to be given to an order for the payment of costs, came into operation. The question is whether the new rules and orders apply.

It was said by Mr. Cookson that no cause was pending on the 24th of October, 1883, as the action had then been dismissed, and that it was only to proceedings taken on or after the 24th of October, 1883, in a cause then pending, to which the new rules would apply.

No doubt for some purposes dismissal of an action puts an end to the action—as regards, for instance, the determination of the rights of the parties—but the action is not at an end for the purposes of enforcing the judgment. Take the case of a plaintiff giving an undertaking for damages on the granting, in his favour, of an interlocutory injunction; if the action is subsequently dismissed, no doubt it still continues for the purpose of having effect given to the decree.

In my opinion this action still continues for the purpose of enabling the court to work out its own decree and for the purpose of enabling the parties to work out the taxation of costs and to take proceedings to enforce payment of the costs. The action, therefore, was, within the meaning of the preface to the Orders and Rules of 1883, "a cause pending" on the 24th of October, 1883, for the purposes of what remained to be done under the decree. That, I think, is the true interpretation of the preface.

Then there were some other points urged. It is said that the form of the writ of *fi. fa.* given in Appendix H. may be varied as circumstances may require, having regard to the words of ord. 42, r. 14, "the forms in Appendix H. shall be used with such variations as circumstances may require." I think that North, J., gave the true interpretation to these words in holding that the forms should be followed, having regard, however, to the directions contained in the judgment or order itself; for instance, if an action were dismissed without costs, the form of the writ of *fi. fa.* would, of course, be varied by omitting from it the provisions as to enforcing payment of costs.

Mr. Cookson also urged that the right of the successful defendant depends on the judgment of the 19th of March, 1883, and that the new orders ought not to be construed so as to interfere with vested rights. Now the Rules of 1875 altered the old common law rule by making the time from which interest on costs was to run later—viz., from the date of the taxing master's certificate instead of from the date of the judgment. That appears from the case of *Schroeder* v. *Clough*, and the present rules have altered that again; but it is wrong to say that the parties have vested rights at the moment a judgment is given as to the manner in which it is to be worked out. The rights of the parties in that respect are dependent on the rules and practice relating to the working out of judgments in existence at the time the judgment is worked out. Here there is a form prescribed by the rules which applies to this case. In my opinion the judgment of North, J., was right.

LINDLEY, L.J.—I am of the same opinion. The right to recover interest on costs ordered to be paid was given by the 1 & 2 Vict. c. 110, ss. 17, 18, and section 20 of the same Act gave all courts power to issue new or altered writs in such forms as they should think fit to order. The old Court of Chancery, in pursuance of these provisions, issued a form of the writ of *fi. fa.* (see Consolidated Order 29, Part 3, r. 6), which directed that interest on costs should run from the date of the taxing master's certificate. That is how it happened that interest on costs ran in the Court of Chancery from the allocatur and not from the date of entry of the incipitur. When the Rules of 1875 came in they did not alter the Consolidated Rules of the old Court of Chancery, and therefore the chancery practice was not touched till 1883. The new Rules of 1883, however, struck out all the old Chancery Consolidated Rules and Orders and made one new code of rules, and there we find the form of the writ of *fi. fa.* varied, and interest on costs is thereby directed to run from the date of the judgment.

Now the circumstances of this case render it peculiar. The judgment here was given on the 19th of March, 1883, when the old chancery practice was in force, but owing to circumstances the taxation of costs did not take place till after the new Rules of 1883 had come into operation. It is impossible to accede to the contention that the action was then so completely at an end as not to be pending for any purpose. It was then pending for all purposes of enforcing the judgment. Otherwise a *fi. fa.* would have to issue in an action not pending at all. The action, however, was then pending for the purposes of working out the decree, and amongst other matters for taxation of costs. In my opinion, therefore, interest on the costs runs from the date of the judgment. Then it was said that this would affect the vested rights of parties, but parties have no vested rights in what is a mere rule of practice, and the rule that interest ran from the date of the allocatur was a mere rule of practice.

LOPES, L.J.—The preface to the Rules of 1883 states that those rules apply to all proceedings taken in any

case or matter then pending. I think that on the 24th of October, 1883, this action, although dismissed, was still a cause pending for the purpose of giving effect to the decree. The new rules, therefore, apply, and interest runs from the date of the judgment. Ord. 42, r. 14, of these rules provides that "the forms in Appendix H. shall be used with such variations as circumstances may require." I entirely agree with the view of North, J., as to the words "as circumstances may require."

Appeal dismissed.

Solicitors for the appellant, *Whytes, Renard, & Co.*

Solicitors for the respondent, *Johnson & Master.*

From Chan. Div. June 22.

In re Wray. (*a.*)

Solicitor—Attachment—Default in payment of money—Receiving order—Jurisdiction—Discretion—Appeal—Debtors Act, 1869, *s.* 4, *sub-section* 4—*Bankruptcy Act,* 1883, *ss.* 9, 10.

On an *application for liberty to attach a solicitor for contempt in not paying a sum of money ordered to be paid by him where a receiving order in bankruptcy subsequently to such order had been made,*

North, J., *held that he had jurisdiction to order such attachment to issue, but, in the exercise of his discretion under section* 10 *of the Bankruptcy Act,* 1883, *he refused the application, on the ground that no benefit could therefrom accrue to the applicants, and that the bankruptcy proceedings might be thereby embarrassed.*

Held, on appeal, that the Court of Appeal *would not interfere with the discretion so exercised.*

Decision of North, J., *affirmed.*

Appeal from a decision of North, J.

Aaron Wray, a solicitor, had acted as solicitor to the trustees of the will of W. Simpson, and had received from them certain trust moneys for investment. He did not invest them, but applied them improperly.

On the 7th of March, on the application of the present appellants, the surviving trustee and the residuary legatees under the will, North, J., made an order that the solicitor should, on or before the 7th of April, pay the moneys in question, "being moneys in his hands and received by him as solicitor" for the trustees, to the surviving trustee.

On the 22nd of March the order was served on the solicitor personally, but he failed to obey it.

On the 27th of April a notice of motion, dated the 22nd of April, was served on Wray by the applicants, asking that they might be at liberty to issue a writ of attachment against him for his contempt in not paying the money pursuant to the order.

On the 25th of April a receiving order in bankruptcy was made against Wray upon the petition of another creditor, but the applicants were ignorant of this fact until after they had served the notice of motion.

North, J., held that, notwithstanding the receiving order, he had jurisdiction to allow the attachment to issue, because an attachment against a solicitor for the non-payment of money which he had been ordered to pay in that character was not a merely civil process for the recovery of the debt, but was in its nature "punitive or disciplinary." But in the exercise of the discretion given to the court by section 10 of the Bankruptcy Act, 1883, he declined to allow the attachment to issue, on the ground that, by reason of the receiving order, no benefit could result to the applicants from the attachment, and the issue of it might embarrass the bankruptcy proceedings.

From this decision the applicants appealed.

Warrington, for the appellants, referred to *Jarmain* v. *Chatterton,* 30 W. R. 461, 20 Ch. D. 493; *In re Freston,* 31 W. R. 804, 11 Q. B. D. 545.

Bunting, for the respondent, was not called upon.

Cotton, L.J.—This is an appeal from a decision of North, J., refusing to send the solicitor to prison. If the judge had held that the existence of the receiving order deprived him of jurisdiction to order the attachment, or that on some other grounds there was no such jurisdiction, we should have entertained the appeal. But I understand that North, J., held that he had jurisdiction to order the attachment, but that taking into consideration all the circumstances of the case and the fact that a receiving order had been made, the issue of the attachment would produce no good result. He, therefore, in the exercise of his discretion, declined to allow it to be issued. I give no opinion what order I myself should have made if I had been hearing the application as a judge of first instance, but I think it would be wrong of the Court of Appeal to interfere with the discretion of the judge below. It is like the case in which, upon a motion to commit a person for contempt, the judge, in exercise of his discretion, declines to make an order for committal, but orders the respondent to pay the costs of the motion. In such a case the Court of Appeal ought not to interfere. I do not say that the court will not interfere in a very gross case, but in the present case I do not think the court ought to interfere by imposing on the solicitor a heavier penalty than the judge in the court below thought fit to inflict.

The costs of the appeal must be set off against the costs which the solicitor has been ordered to pay in the court below.

Bowen and Fry, L.JJ., concurred.

Appeal dismissed.

Solicitors, *Collyer-Bristow & Co.,* for *E. Laverack,* Hull; *Hickin & Fox,* for *G. A. Wray,* Hull.

From Q. B. Div. Nov. 11.

Scott *v.* Morley. (*a.*)

Married woman—Debtors Act, 1869 (32 *&* 33 *Vict. c.* 62), *s.* 5—*Committal of married woman—Judgment against separate estate—Form of order—Married Women's Property Act,* 1882 (45 *&* 46 *Vict. c.* 75), *s.* 1, *sub-section* 2.

A married woman cannot be committed to prison under section 5 *of the Debtors Act,* 1869, *for non-payment of a judgment debt recovered against her, payable out of her separate estate, under section* 1, *sub-section* 2, *of the Married Women's Property Act,* 1882.

Form of order upon such a judgment.

This was an appeal against an order of Kekewich, J., sitting as Vacation Judge, for the committal of the defendant, a married woman, for non-payment of a judgment debt payable out of her separate estate, recovered against her in an action on a simple contract entered into after marriage.

Kisch and *Salter,* for the appellant.—A married woman cannot be committed under the Debtors Act, 1869, *s.* 5, for non-payment of a judgment debt, which is, in fact, a charge upon her separate estate: *Meager* v.

(*a.*) Reported by W. Ivimey Cook, Esq., Barrister-at-Law.

(*a.*) Reported by A. H. Todd, Esq., Barrister-at-Law.

Pellew, 33 W. R. 573, 14 Q. B. D. 973; *Draycott* v. *Harrison*, 34 W. R. 546, 17 Q. B. D. 147. In this case, if the appellant had any property, it must be taken to have been free from any restraint on anticipation.

H. Reed, for the respondent, the judgment creditor.—A married woman was, at the common law, always liable to process by *capias*, though she might have been released, according to the practice of the courts, upon proof being given of the absence of any separate estate: *Ivens* v. *Butler*, 5 W. R. 202, 7 El. & Bl. 159; *Edwards* v. *Martyn*, 17 Q. B. 693. That was the law in cases where the contract had been made *dum sola*, though, on her marriage, the contract became the contract of her husband. So, also, where she omitted to plead coverture, the court would not release her on subsequent proof of coverture, unless proof were also given of the absence of separate estate: see Tidd's Practice, p. 696; *Poole* v. *Canning*, L. R. 2 C. P. 241, 15 W. R. C. L. Dig. 70. *Dillon* v. *Cunningham*, L. R. 8 Ex. 23, 21 W. R. C. L. Dig. 90, is directly in point; see also *Ex parte Linton, In re Linton*, 33 W. R. 714, 15 Q. B. D. 239. The judgment in the present case is against the woman personally, and she may be compelled to pay the debt out of her separate estate. In *Draycott* v. *Harrison* the woman had no property except such as was subject to a restraint on anticipation.

He also referred to *Newton* v. *Boodle*, 9 Q. B. 948; *Bursill* v. *Tanner*, 32 W. R. 827, 13 Q. B. D. 691; and *Conolan* v. *Leyland*, 27 Ch. D. 632, 33 W. R. Dig. 94.

Salter replied.

Lord ESHER, M.R.—It seems to me that in this case it is necessary to consider, in the first place, what was the liability of married women before and up to the time of the passing of the Married Women's Property Act, 1882. At common law, with respect to the contracts made by a married woman before her marriage, upon which action was brought after marriage, she and her husband were sued together, and, if the contract was proved to have been made by her before her marriage, there was judgment against husband and wife. Thereupon execution followed the judgment, which was the result of the contract, against both husband and wife, and therefore the woman would have been properly taken in execution to satisfy the judgment. The practice of the courts, however, was to deal with the woman in a different manner from that in which the husband was treated. After her marriage a woman could not enter into a contract, and no action would lie in respect of a contract attempted to be entered into by her without her husband's authority, nor, indeed, with such authority, for then it was his contract. In respect of certain torts committed by a married woman, she and her husband might be sued together, and, if the action proceeded to judgment, she and her husband might both be taken in execution. But she was under no liability on her contracts at common law.

In equity it was possible to take proceedings by which a decree could be obtained declaring that the separate estate now vested in a married woman was chargeable to the extent of a judgment against her, but it was not possible to make her personally liable so that she could be taken in execution. Therefore, until the passing of the Married Women's Property Act, 1882, women could be taken in execution in certain cases, but neither at law nor equity in respect of contracts entered into by them after marriage. The Married Women's Property Act did not alter the liability of the woman in this respect as it existed at common law. It does not prevent an action against her in respect of a claim against her arising before her marriage, nor in respect of wrongful acts done after her marriage; and further, where by the common law a woman is personally liable in this sense, that she could be taken under a *ca. sa.* in those cases, now, by virtue of the Debtors Act, she may be summoned and dealt with according to the provisions of that Act. But in respect of the new liability imposed by this Act of 1882, and which the common law had not laid upon her, while she is rendered liable upon contracts into which she could always enter, but which could not be enforced against her, if section 1, sub-section 2, stood alone, the consequences to her would be the same as if she were still a *feme sole*. For if no new remedy had been given by the Act of 1882 the common law remedy against her as a *feme sole* would have been established. But a remedy is given by the Act, and that must be taken to be the only remedy. For if a new liability is established by statute, and a remedy also given in respect of that liability, it must be a remedy different from that which the common law would supply. The statute says that she is to be liable in respect of and to the extent of her personal property as if she were a *feme sole*, and that damages and costs are to be payable out of her separate property, and not otherwise. That means that payment is to be made, not by the married woman personally, but out of her separate property. The judgment in such a case as this ought to follow the words of the statute. The new liability given in this Act is intended to have the same result with regard to the married woman at law as existed in equity, which was, as I have said, a decree that the debt should be a charge on her separate estate, and it is now recoverable against her, and payable out of her separate estate. Is the Debtors Act applicable to such a case? Section 5 of that Act requires that the debt upon which proceedings are taken should be a debt "due from" the debtor, and that means a debt which the debtor is personally liable to meet. If the Married Women's Property Act is set up as an authority to courts to commit to prison persons who could not have been committed previously to its enactment, it must be considered as a highly penal statute, and must be construed strictly, and it is not possible to say that money payable out of certain property is money payable personally. But if the Act was intended to enable the courts to modify the effect of imprisonment or the taking in execution as it stood at common law, there being nothing to modify, the statute is not applicable; for there is no arrest in this case, and we are not called upon to release the woman on terms. In either case, with regard to the judgment which can be recovered against a married woman only by virtue of the Married Women's Property Act, the Debtors Act is not applicable, and I agree with the result of the judgments arrived at in *Draycott* v. *Harrison*.

I desire to say that this decision only applies to judgments obtained under the Married Women's Property Act, and not to such judgments as could have been obtained against married women before the passing of that Act.

BOWEN, L.J.—I am of the same opinion. The power of committal under the Debtors Act is a substitute for the old powers of arrest for debt. If the Debtors Act had not been passed, would the plaintiff in such an action as this have been entitled to arrest a married woman on his judgment? As a general rule the writ of *capias* followed a regular judgment obtained against a married woman in an action against her and her husband, or against her alone. In *Benyon* v. *Jones*, 15 M. & W. 566, and *Newton* v. *Boodle*, the *capias* followed the writ. Where, if the woman had taken the proper course and pleaded coverture she might have escaped, she was not allowed to complain of arrest under a *capias* where she had not so pleaded. A limitation was put to the right of arrest by the courts, and she might have been discharged after being taken on a judgment against her and her husband where she had no separate property: *Edwards* v. *Martyn*, *Larkin* v. *Marshall*, 4 Ex. 804. That was an act of indulgence after she had been duly taken in execution.

Does the judgment to which the plaintiff becomes entitled under the Married Women's Property Act, 1882, confer upon him the same rights as a common law judgment in the old common law actions maintainable against married women? A married woman is now capable of contracting, and is liable on the contract to the extent of her separate property. If that provision stood alone it would not seem to create a personal liability, but a liability in respect of her property only. Then the statute goes on to alter the procedure to the extent that the husband need no longer be joined; and, finally, the result is expressed to this effect, that damages and costs become payable out of the married woman's separate property, and not otherwise. Satisfaction for the judgment must therefore be sought in the personal estate, and not in arresting the person. That is certainly not like the old judgments at common law. Then, does the Act of 1869 give the court power to commit her? It would seem to be improbable, having regard to the history of the Act, which was intended to reform abuses, and was passed before this new liability had been imposed on married women. Finally, I agree with the Master of the Rolls in the construction he has placed on the Married Women's Property Act. The 5th section of the Debtors Act does not include a debt which is due, not from the debtor personally, but from her only to the extent of her personal property, and we cannot stretch that section to make it cover such a debt.

FRY, L.J.—A married woman might have been taken in execution on a *capias* in certain cases before the *Debtors Act of 1869*. Wherever the power of arrest existed before that Act it would seem that a committal might be obtained under its provisions. But neither at law nor in equity could the defendant have been taken for the debt now sued on. In equity the form of order gave no relief as against her personally. The Married Women's Property Act empowers married women to sue and be sued on contracts to the extent of their separate property, and the subject-matter against which damages and costs can be obtained is the separate estate. Even if the Act of 1882 had been passed before the Debtors Act of 1869, I think that no *capias* could have been taken out, because the judgment is made recoverable out of a particular fund, and a debt due out of a special fund cannot be a debt due from the defendant personally.

Appeal allowed.

Nov. 12.—The COURT announced that the proper form of order against a married woman on a judgment (under section 1, sub-section 2, of the Married Women's Property Act, 1882) would be as follows:—"It is adjudged that the plaintiff recover £ and costs to be taxed against the defendant J M , such sum and costs to be payable out of the separate property as hereinafter mentioned, and not otherwise. And it is ordered that execution hereon be limited to the separate property of the said J M , not subject to any restriction against anticipation (unless by reason of section 19 of the Married Women's Property Act, 1882, such property shall be liable to execution notwithstanding such restriction)."

Solicitor for the appellant, *Edward Le Voi.*

Solicitor for the respondent, *Francis Scott.*

High Court of Justice.

Chan. Div. Chitty, J. } July 27.

In re NEWBEGIN.

EGGLETON *v.* NEWBEGIN. (*a.*)

Pauper lunatic—Past maintenance—Statute of Limitations, 21 *Jac.* 1, *c.* 16—*Lunatic Asylums Act,* 1853 (16 & 17 *Vict. c.* 97), *s.* 104.

Only six years' arrears of money paid for the past maintenance of a pauper lunatic, who has subsequently become entitled to property, are recoverable by the guardians of the poor under section 104 *of the Lunatic Asylums Act,* 1853.

Adjourned summons.

T. Y. Newbegin had, since the year 1867, been confined as a pauper lunatic in the Sussex County Asylum, and had been maintained by the guardians of the poor for the parish of Brighton.

In 1880 the lunatic became entitled to property of substantial value under the will of his father.

The guardians put in a claim for past maintenance, and this was a summons which raised the question whether the claim of the guardians was to be limited to six years' arrears, having regard to section 104 of the Lunatic Asylums Act, 1853 (16 & 17 Vict. c. 97).

Whitehorne, Q.C., and *R. F. Norton*, for the guardians claimed the full amount paid, without restriction of time.

They referred to *In re Upfull's Trust*, 3 Mac. & G. 281; *In re Drewery's Trusts*, 2 W. R. 436; *In re Buckley*, Johns. 700, 8 W. R. Ch. Dig. 40; *Wentworth v. Tubb*, 1 Y. & C. C. C. 171.

Upjohn, contrà, referred to *In re Marman's Trusts*, 26 W. R. 621, 8 Ch. D. 256; *In re Weaver*, 31 W. R. 224, 21 Ch. D. 615; *In re Webster*, 27 Ch. D. 710.

Whitehorne replied.

CHITTY, J.—This is a case of some difficulty. The point is this. An executor has funds in his hands which belong to a person who is a lunatic, and who has been in the county asylum for a considerable number of years on the footing of being a pauper, and under his father's will he has lately had an accession of property. The executor desires the direction of the court with regard to the application of the funds he has in his hands belonging to the lunatic. The lunatic has no family and he is still in the asylum, and the question for decision relates to past maintenance.

The guardians of the parish chargeable say that for more than six years they have been applying moneys in their hands for the purposes mentioned in the 104th section of 16 & 17 Vict. c. 97, and that they are now entitled to have repaid to them out of the lunatic's fund the whole of the amount, without regard to the Statute of Limitations. The question is whether the statute does or does not apply to this. The exact part of the section on which the question turns is a part which I will read:—"If any trustee or other person having the possession, custody, or charge of any property of such lunatic, or if the Governor and Company of the Bank of England or any other body or person having in their or his hands any stock, interest, dividends, or annuity belonging or due to such lunatic pay any money according to any such order" (I will state what that is in a minute), "or pay any money without any such order to the guardians of any union or parish or to any officer of any parish not in a union or under a board of guardians, or to the treasurer of any county or any other officer of any

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

county authorized to receive the same, to defray the charges paid or incurred by or on behalf of such parish, union, or county, for the examination, bringing before a justice or justices, removal, lodging, maintenance, clothing, medicine, and care of such lunatic, the receipt of the person authorized to receive such money under such order, or of such guardians, overseer, treasurer, or other officer shall be a good discharge to such trustee, Governor and Company, or other body or persons as aforesaid.' That is in its form a mere permissive enactment. The trustee, and not only the trustee but the other persons in a position which, for the purposes of this enactment, the Legislature considered to be analogous, are allowed to make the payment; and if they do make the payment then the receipt of the guardians and the other persons here mentioned is a good discharge.

But this part of the section cannot be interpreted properly without reading the earlier part, and a question which has been argued before me is with regard to the effect of the previous part of this same section—is this previous part founded on obligation on the part of the lunatic to make the payments mentioned, or is it the creation of a new statutory liability?—is it the recognition of an old or the creation of a new? Now I must read the earlier part shortly—"If it appear to any justice or justices by this Act authorized to make any order for the payment of money for the maintenance of any lunatic that such lunatic has an estate, real or personal, applicable to his maintenance, and more than sufficient to maintain his family, if any, he or they shall, by an order under his or their hand and seal or hands and seals, direct the overseers of the parish, or a relieving officer of the parish, a receiver, or the treasurer or some other officer of the county to which such lunatic is chargeable, or in which any property of the lunatic may be, or any officer of the asylum in which the lunatic may be, to seize so much of any money, and to seize and sell so much of the goods and chattels, and to take and receive so much of the rents and profits of the lands and tenements of such lunatic and other income of such lunatic as may be necessary to pay the charges of the examination, bringing before a justice or justices, removal, lodging, maintenance, clothing, medicine, and care of such lunatic, accounting for the same to such justice or justices, such charges having been first proved to the satisfaction of such justice or justices, and the amount set forth in such order." It is a power to seize, and to seize property to the amount required for the payment of the sum mentioned in the order. Land or real estate is mentioned, but there is no charge upon the *corpus* of the land; and it appears to me that all that the justices can direct to be seized under this is the property of the lunatic, real and personal, to which the lunatic is entitled, not through the medium of any trust, and I think that this part of the section must be read as certainly creating a new remedy.

But was it intended merely to recognize an old pre-existing liability or not? That is a question of some little difficulty. I think consistently with the decisions that have been pronounced upon this section, or a section in the repealed Act (7 & 8 Vict. c. 101, s. 27), which, for all practical purposes, is equivalent to this, I am bound to hold that this statute recognizes a liability on the part of the lunatic to pay for the matters which are here mentioned, which are in the nature of necessaries for the lunatic.

In *Buckley's Trusts* Wood, V.C., said that his impression was that he had often acted on the authority of *Upfull's Trusts*, which was Lord Truro's decision, and continued:—"There may be same doubt whether the justices could make an order actually to seize the stock or whether the overseers could get anything more than the income of the stock under such an order. But I think that the court will be acting for the benefit of the lunatic in paying the debts for which he is liable, and saving him from process under which he might be incarcerated." In that part of his judgment he plainly considers that an action might be brought, either on the footing that these were necessaries supplied for the benefit of the lunatic, or that the statute created an obligation to pay. The latter may be, after all, the true view. So that it either stands as a recognition of the pre-existing liability or the creation of a new liability by statute. But it is a liability according to this judgment on which an action might be brought. The decision which I am reading was in 1860, when a man might be thrown into prison for debt; and the grounds on which the Vice-Chancellor proceeds are that he ought now, being placed in the position of a trustee, to do that which would save the lunatic from being incarcerated for a debt for which he is liable. I have slightly transposed, but I have not altered, the sense in the least. Then he goes on:—"In order, therefore, to relieve the lunatic from the possibility of an execution against him the court will apply the *corpus* of his property in satisfaction of the claim of the petitioners. I apprehend that the court has a discretion at any time to say whether it will exercise this power of dealing with a lunatic's property, or whether it will leave the claimants to their remedy by execution. In cases where the application was to take away the whole of the lunatic's property, the court might prefer to leave the creditors of the lunatic to do their worst; but this is not such a case, and there will be an order as prayed." Throughout the judgment the Vice-Chancellor relies on the fact that there is a debt for which the lunatic might be sued, and then his reasoning is this: "I am now acting in the place of the trustee, and in executing this trust will do that which I think the trustee ought to do." There is no jurisdiction by this section conferred on the old Court of Chancery which then existed or on the High Court as it now exists. All that is done is to authorize the trustee to make the payment, and then, says the Vice-Chancellor, "I will make the payment executing the trust, because I consider it for the benefit of the lunatic so to do in order to save him from the process of execution and the other liabilities to which a debtor is liable." Now I am not at liberty to overrule what the Vice-Chancellor did in the year 1860, and if he has taken a wrong view of the Act of Parliament it is not for me to say so.

I find that Bacon, V.C., has held in *In re Webster* that the guardians, who had not obtained any order under the first part of the section, are creditors of a deceased lunatic and entitled to be paid. In my opinion, if I may express it, that is right, that this is either a recognition of a pre-existing liability or a new statutory obligation.

Now I come to the exact point. If this is a debt apart from the statute, then it follows as a matter of course that the lunatic, appearing as he does now by his guardian *ad litem*, is entitled to set up the statute, and there is no pretence, as was partly suggested in argument, that this court is to administer the lunatic's estate in some such way as to pay all the debts without regard to the question of the Statute of Limitations. The lunatic is entitled now to defend this as if it was an action being brought against him, and that is the view I take of the matter. I stated the exact form at the beginning of this judgment in which the question arises, but it is substantially this, that the guardians are suing the lunatic. Having made that statement, I say it is obvious that the lunatic can set up the statute—that is, on the footing of the section being a recognition of the debt. But if it is a statutory liability created, the statute only creates the liability and is silent with regard to the point of time. It does not say that this debt or obligation shall be paid at whatever time it accrued, or notwithstanding the general law as to the statute. It appears to me to leave the statute ap-

plicable to the case where it would apply. As I have tried to point out at the beginning of this judgment, it does not make it in terms obligatory or in substance obligatory on the trustees to pay. It is merely permissive. I think if it is a statutory obligation the lunatic is entitled to set up the statute, and it appears to me that this case is analogous to the case of necessaries supplied to a lunatic, though in *In re Weaver* some doubt is cast by the Court of Appeal as to the liability of a lunatic with regard to necessaries supplied to him, and I do not see any substantial distinction for this purpose between the case of an infant and the case of a lunatic so far as the Statute of Limitations is concerned.

So much for the section itself. I think the section is silent with regard to the Statute of Limitations, and that it is competent for the lunatic to set it up. That is the conclusion I arrive at on the section, having regard to the authorities.

But there would be a most extraordinary anomaly if it were otherwise. I admit it is competent for Parliament to create any number of anomalies if Parliament, in its wisdom, thinks fit, and it may consider, in its superior wisdom, that they are not anomalies. But this would be the result, that if there is what is called a pauper lunatic he shall remain liable, notwithstanding the Statute of Limitations, for any number of years for that which has been spent on him, say ten or twenty years; but if he is an ordinary pauper—that is to say, a pauper who is not lunatic, and he has been, say, in the workhouse for a period of ten years, and then suddenly, as sometimes happens, a large fortune shall accrue to him, possibly by the death of some unknown relation, he shall be liable to pay for his maintenance for one year and one year only. That is the plain effect of 12 & 13 Vict. c. 103, s. 16, where there is a limitation of one year. In the main Act I have been construing there are two other clauses in which there is a limitation of time imposed, and that is where there is one parish, to put it shortly, which has paid for the maintenance of the lunatic, and another parish in the result is found to be the parish that ought to have paid. In that case there is a limitation of a year; and there is another similar limitation. Thereupon it is argued, and it was for Mr. Whitehorne to do so, that, when the statute intended to impose a limitation of time, it said so. But to my mind that argument is not sound as applied to this statute, because that is a shorter time than the time allowed by the statute; and if I had to decide on the sections that I have just been referring to—namely, the 97th and the 98th, if it had not been for the twelve months' limit, I think I must have held that it was a six years' limitation. Therefore, so far from that being an argument against the conclusion I have arrived at, I think in some slight degree it supports it. The question, I agree, is one of difficulty involving the construction mainly of this section of the Act of Parliament. It is impossible, as I have often heard the late Master of the Rolls say, to dogmatize on such a matter; but I have given the best opinion I can, and I think the guardians are not entitled to recover more than six years.

Solicitors, *Clarke & Calkin*, for *Clarke & Howlett*, Brighton; *Digby & Liddle*.

Chan. Div. Stirling, J. } Nov. 12.

In re FREEMAN'S TRUSTS. (*a.*)

Appointment of new trustees—Persons resident out of the jurisdiction—Appointment of trustee at a remuneration—Trustee Act, 1850 (13 & 14 *Vict. c.* 60), *ss.* 32, 34—*Trustee Extension Act,* 1852 (15 & 16 *Vict. c.* 55), *s.* 9.

Under a settlement of real estate situate within the jurisdiction, the trustees had a power of sale with the consent of the tenant for life, the proceeds to be invested in the purchase of land. A power of appointing new trustees was vested in the surviving or continuing trustees or the heirs or assigns of the last surviving or continuing trustee.

The last surviving trustee died in 1874 *without making any devise of trust estates. His heir had not been heard of for ten years.*

All the cestui que trusts *were and had for many years been resident out of the jurisdiction, and knew no one within the jurisdiction but A. who would consent to become trustee. A. had for many years managed the estate and received the rents as agent at a commission of five per cent. on the annual rental, and declined to be appointed trustee except at the same rate of remuneration. Two of the proposed new trustees, B. and C., were resident out of the jurisdiction.*

On the application of all the cestui que trusts, *some of whom were infants, and of A., B., and C.,* Stirling, J. (*remarking that, if all the trustees should be resident out of the jurisdiction, they might exercise their power of sale and remove the whole trust estate out of the jurisdiction*), *appointed A., B., and C. to be trustees, A. to manage the estate at a commission of five per cent. on the annual rental, and B. and C. undertaking, in the event of A.'s death, not to appoint a new trustee resident out of the jurisdiction without applying to the court.*

Petition.

By an indenture of settlement dated the 10th of February, 1840, certain real estate, situate in the county of Cardigan, was assured to the use of John Bethell and S. B. Freeman upon trust to pay the income to Mary Freeman during her life for her separate use without power of anticipation, and after her death to pay the income to Joshua Freeman during his life, and after the death of the survivor to hold the said trust premises upon trust for the children of Mary Freeman as she should by deed or will appoint, and in default of and subject to any such appointment in trust for all and every the child and children of Mary Freeman, who, being a son or sons, should attain the age of twenty-one years, or, being a daughter or daughters, should attain that age or marry, in equal shares as tenants in common, and if there should be no such child upon such trusts as Mary Freeman should appoint, with an ultimate trust for Mary Freeman, her heirs and assigns, for ever. The settlement conferred upon the trustees a power of sale with the consent of Joshua Freeman and Mary Freeman, the proceeds of such sale to be invested in the purchase of land; and it was thereby provided that if the trustees, or either of them, or any future trustees, should die or desire to be discharged from, or refuse or become incapable to act in the trusts thereof, it should be lawful for the then surviving or continuing trustee, or (if by any accident it should become necessary) the heirs or assigns of the last surviving or continuing trustee by deed to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying or desiring to be discharged or refusing or becoming incapable to act as aforesaid.

(*a.*) Reported by C. HERBERT BROWN, Esq., Barrister-at-Law.

John Bethell, one of the trustees, died in 1867. S. B. Freeman, the other trustee, died in 1874, leaving his son, George Freeman, his heir-at-law. S. B. Freeman's will contained no devise of trust estates.

George Freeman had not been heard of for ten years, and could not be found. When last heard of he was out of the jurisdiction.

There were six children of Mary Freeman who attained the age of twenty-one years or married. No appointment to any child had been made in exercise of the power in that behalf contained in the settlement.

Joshua Freeman and Mary Freeman had, since the year 1840, and for many years prior thereto, resided, and all the *cestui que trusts* resided, in Canada or the United States.

This was a petition presented by all the *cestui que trusts*, including two infant co-heiresses-at-law of one of the children of Mary Freeman, and by the proposed new trustees, for the appointment of Duff, Lazier, and Lloyd, as trustees of the settlement, and for a vesting order. The petition asked that the new trustees might be authorized to pay to Lloyd, so long as he should manage and collect the rents of the real estate comprised in the settlement, a commission at the rate of five per cent. on the annual rents.

Duff and Lazier were resident out of the jurisdiction. The *cestui que trusts* knew of no one within the jurisdiction but Lloyd who would undertake the duties of trustee. Lloyd had, for many years, collected the rents as agent, at a commission of five per cent., and declined to accept the office of trustee except upon the terms of his continuing to receive such commission.

Farwell, for the petitioners.—Formerly the court would not appoint persons resident out of the jurisdiction to be trustees, but for many years this has, under special circumstances, been done: *In re Guibert's Trusts*, 16 Jur. 852; *In re Long's Settlement*, 17 W. R. 218; *In re Smith's Trusts*, 20 W. R. 695; *In re Hill's Trusts*, W. N., 1874, p. 228; *In re Drewe's Settlement Trusts*, W. N., 1876, p. 168; *In re Cunard's Trusts*, 27 W. R. 52; *In re Liddiard*, 28 W. R. 574, 14 Ch. D. 310; Lewin on Trusts, 8th ed., p. 662. [STIRLING, J., remarked that if all the trustees should be resident out of the jurisdiction they might exercise their power of sale and remove the whole trust estate out of the jurisdiction.] As to Lloyd, he is the only person within the jurisdiction known to the beneficiaries who will become trustee. He has for many years received the rents at a commission, and if not appointed as trustee at a like commission he will continue to receive it as agent. A trustee dealing with the court is at liberty, before accepting the trust, to stipulate for any remuneration which the court may choose to give him: Lewin on Trusts, 8th ed., p. 632; *Marshall* v. *Holloway*, 2 Swan. 432. All the beneficiaries who are *sui juris* wish for his appointment on the terms proposed.

STIRLING, J., made an order appointing Duff, Lazier, and Lloyd trustees, subject to the production of a satisfactory affidavit by Lloyd as to the nature of the property and of his duties in the management of it, Duff and Lazier undertaking by their counsel that in the event of the death of Lloyd they would not appoint as a new trustee any person resident out of the jurisdiction without applying to the court.

Solicitor for the petitioners, *F. Romer*.

Chan. Div. } Nov. 1.
Kekewich, J. }

UNION BANK OF LONDON *v.* MUNSTER. (*a.*)

Specific performance — Auction — Bidding — Want of bona fides *on part of bidder.*

At an auction for the sale of some mortgaged property sold by order of the court, a person, acting in the interest of the mortgagor, and who had no intention of purchasing the property, and no means of doing so if it were sold to him, bid for it, and ran up the price considerably above the reserve, when it was knocked down to the defendant. The plaintiffs, the mortgagees, who had the conduct of the sale, had no knowledge of this dishonest bidding, and were not party to it in any way.

Held, that the vendors could enforce the contract.

Trial of action.

J. J. E. Mayall equitably mortgaged to the plaintiffs, the Union Bank of London, some property situated at Lancing, in Sussex, known as the Stork's Nest. An action to enforce their security was commenced by the plaintiffs in the Chancery Division, and by an order made therein the property was ordered to be sold by public auction or private contract, the plaintiffs to have the conduct of the sale. The property was put up for sale in five lots on June 11, 1886, subject to conditions which included one that the sale was subject to a reserve price and that the vendors reserved the right to bid up to such reserve price for each lot by themselves or their agent. The reserve price fixed for lot 1 was £2,250. The biddings commenced at a price considerably below the reserve price and eventually the defendant, Henry Munster, made a bid of £2,270 for the property.

After this several biddings were made by one Brown, who had no intention whatever of buying, and no means of purchasing the property even if it were knocked down to him. Lot 1 was knocked down to the purchaser, the defendant, for £2,610, and he paid a deposit, and signed the usual contract, but he refused to complete on the ground that the bids made by Brown after the reserve price was reached were not *bonâ fide* bids, but made solely with a view of improperly and fraudulently running up or increasing the price, and that Brown had been employed to run up the biddings in the interest of the owner of the equity of redemption in the property. The defendant was willing to pay £2,270, the first bidding made by him after the reserve price had been reached, and counter-claimed for conveyance to him at that price.

Lemon, for the plaintiffs.

Oswald, for defendant.—The sale was for the benefit of the mortgagees as well as the mortgagor, so that they profited by the fraud of the stranger. In section 699 of Fry on Specific Performance, 2nd edition, p. 313, the following passage occurs: "Will the fraudulent act of a mere stranger, to which the plaintiff was neither party nor privy, deprive him of his right to enforce the performance of a contract? The question has never, it is believed, been judicially answered. But upon the general equitable principle that no person, though innocent, can derive a benefit from the fraud of another, the contract, if resting absolutely *in fieri*, could not be enforced." That applies here; the bidding by Brown was fraudulent, and the whole contract is therefore tainted, and cannot be enforced.

KEKEWICH, J., after stating the facts, said it had been contended for the defendant that the plaintiffs, the bank, were not the sole vendors, but were in fact trustees for other people, amongst others the owner of the equity of redemption. No doubt they were trustees, but

(*a.*) Reported by J. W. GREIG, Esq., Barrister-at-Law.

they were also sole vendors, and possessed all the rights of vendors. The owner of the equity of redemption had an interest in the purchase-money to this extent, that his interest was that the full value should be obtained for the property, and the bidding without any intention of purchasing could not be justified. But it had not been suggested that the vendors had any privity with the dishonesty. Did the existence of it on the part of third parties enable the defendant to refuse to perform his contract. If it could be said that a vendor was liable for dishonest bids a purchaser might also be bound to beware of them in an auction room. A passage had been cited from the well-known book of Lord Justice Fry on Specific Performance. Many warnings had been uttered against treating text-books written by eminent judges as *quasi*-judicial, and Lord Justice Fry himself, in the preface to the work in question, said this: "There is one notion often expressed with regard to works written or revised by authors on the bench which seems to me in part at least erroneous, the notion, I mean, that they possess a *quasi*-judicial authority. It is hardly enough remembered how different are the circumstances under which a book is written and a judgment pronounced, or how much the weight and value of the latter are due to the discussions at the bar which precede the judgment." That remark applied here, since, if it were endeavoured to apply the passage quoted from Lord Justice Fry's work, counsel would be asked what he meant by "fraudulent act." But it was not necessary to express an opinion on the passage since the fraudulent act of a mere stranger must, to prevent the court from granting the vendor specific performance, be something more than a dishonest bid on the part of such stranger in an auction room.

A case might exist in which the owner of a house next door to one which was being sold by auction might run up the bidding in order possibly to enhance the price to be obtained for his own if he should afterwards sell it. The morality of such conduct might be questionable, but the act would not be of that fraudulent character which would give the purchaser a right of relief against the vendor. Under these circumstances the vendors were entitled to specific performance, and the counterclaim must be dismissed, with costs.

Solicitors for the plaintiffs, *Campbell, Reeves, & Hooper.*

Solicitor for the defendant, *W. Brewer.*

Chan. Div. Kekewich, J. June 30.

Hobbs v. Wayet. (a.)

Indemnity — Trustee and cestui que trust—Shares—Action for indemnity before call—Distringas—Disclaimer.

A. and B. agreed that the income of money invested in their joint names in shares in a company, but in fact supplied by A., should go to A. for her life, and afterwards to B. for his life, and the principal then to such charities as A. should by will appoint.

Held, on failure of such appointment, after the determination of the life estates, that there was a resulting trust of the principal in favour of A.

B. having survived A., and the company having gone into liquidation, B.'s executor, being liable in the winding up, sued A.'s executors for an indemnity before any call had been made on him.

Held, that the plaintiff was entitled to the indemnity.

A legatee of shares in a company who puts a distringas on those shares does not thereby irrevocably declare his acceptance of them, so as to be estopped from subsequently disclaiming them.

Trial of action.

This was an action by the legal personal representative of Dr. Edward Thomas Roe against the legal personal representatives and the residuary legatee of Miss Hannah Hughes, claiming to be indemnified against all liability in respect of sixteen shares in the Oriental Bank Corporation.

By an agreement of December 26, 1863, between Miss Hughes and Dr. Roe in pursuance of a previous arrangement between them to the same effect, it was agreed that the investment of her money in the Oriental Bank Corporation and in East India debentures in their joint names shall go and be according to their original intention (namely) the interest or income to her for her life, and afterwards to him for his life, and the principal then to go to such charities as she by her will or codicil should direct.

In 1864 Miss Hughes and Dr. Roe executed a deed poll releasing each other from all claims except under the above agreement.

Miss Hughes, who died on the 26th of March, 1878, by her will directed that her shares, moneys, or funds invested in the Oriental Bank Corporation and in East India Railway Debentures in the joint names of herself and Dr. Roe should, subject to his life interest, be deemed as given and bequeathed, and she thereby gave and bequeathed the same (free from legacy duty) to seven charitable institutions mentioned in her will, of which the British and Foreign Bible Society was one.

Dr. Roe died in September, 1884. On May 15 in the same year an order had been made by Chitty, J., for the winding up of the Oriental Bank Corporation, and the charitable institutions disclaimed the gift of the shares. It appeared, however, that in the year 1878 the solicitors of the British and Foreign Bible Society, having made the necessary affidavit, had caused a distringas to be placed on the Oriental Bank shares and East India Railway Debentures, and that it had never been removed. A distringas had also been placed on the same shares and debentures by the executor of Miss Hughes.

The liability on the sixteen shares was £400, being £25 per share, and the East India debentures were insufficient in value to answer that sum, the whole of which, it was stated, would be required by the liquidator.

In April, 1885, the liquidator informed the plaintiff that he would be placed on the list of contributories as executor of the survivor of the joint shareholders. The plaintiff claimed to be indemnified by Miss Hughes's representatives against all calls and liabilities in respect of the bank shares.

Warmington, Q.C., and *Hull*, for the plaintiff.—This case is covered by *Balsh* v. *Hyam*, 2 P. Wms. 453, and *Jervis* v. *Wolferstan*, L. R. 18 Eq. 18, 22 W. R. Dig. 251, The defendants are, as regards the Oriental Bank shares, *cestui que trusts* of the plaintiff, and we prove the liability on the shares. Miss Hughes was absolute owner of them subject to the life estates, nor was her ownership (in the result) divested by her will at her death, because the charities disclaimed the shares. The Bible Society are not estopped from disclaiming by their distringas, which was merely a precautionary measure.

B. B. Rogers, for the defendants.—In order to succeed the plaintiff must at least make out, first, that Miss Hughes was a *cestui que trust* as to the shares, and, secondly, that there is some liability on them. Neither point has been made out. Miss Hughes had, under the agreement, no beneficial interest beyond her life estate,

(a.) Reported by R. H. Drane, Esq., Barrister-at-Law.

but merely a power to appoint to charities, and, therefore, in the default or failure of appointment, which happened, the ultimate interest in the shares, being undisposed of, became the property of Dr. Roe as the survivor of the joint owners and as the legal owner on the company's register of shareholders. Moreover, in *Fraser* v. *Murdoch*, 6 App. Cas. 855, Lord Blackburn expressed an opinion (p. 872) that Jessel, M.R., in *Jervis* v. *Wolferstan*, L. R. 18 Eq., at p. 24, had stated too broadly the rule as to the liability of a *cestui que trust* to personally indemnify a trustee who has accepted the trust at his request. Furthermore, Miss Hughes released her interest (if she ever had any) by the deed poll of 1864. The Bible Society were estopped from disclaiming the shares by their distringas affidavit, which must be treated as an acceptance by them of the shares.

Kekewich, J.—I think the plaintiff is entitled to succeed. It seems that there had been accounts between Miss Hughes and her medical attendant Dr. Roe, into the history of which I do not think it necessary to go, but ultimately an arrangement was come to between them as to other matters apparently, but especially as to certain East India Railway Debenture Stock, and shares in the Oriental Bank Corporation, which stood in the joint names of Dr. Roe and Miss Hughes. This arrangement was subsequently embodied in a written agreement which is as follows :—[His lordship read the agreement of December, 1863.] Upon this agreement the question arises what is to happen after both the parties to the agreement are dead, without the power of appointment having been exercised—in other words—what is the ultimate trust? To my mind, looking at the agreement alone by the light of the previous transactions, there is no doubt whatever that Dr. Roe estopped himself from making any claim to that money. It is admitted to have been Miss Hughes's money, but was invested by him, and certain trusts were declared of it. It would never be held under such circumstances that the beneficial interest could be controlled by the legal interest. Whichever survived would be a trustee for the purposes of that instrument, and so far as that instrument failed to declare how the money was to be applied ultimately, I hold there was a resulting trust in favour of the lady who supplied the money.

About the same time or shortly afterwards a release was executed which seems to me to confirm my view. Neither Dr. Roe nor Miss Hughes would be entitled under the agreement to any ultimate interest in the funds therein referred to, as it does not deal with such ultimate interest, but the release recites all the transactions between them, and settles them on the terms of the agreement. Therefore, for Dr. Roe now to come and say "the money is standing in my name and belongs to me subject to your life interest" would be to open up one of the very questions settled by the two documents. The release was intended to settle by way of general release the several accounts and pecuniary transactions therein recited, but would not prevent Miss Hughes claiming the money dealt with by the agreement. I hold that this money belonged to Miss Hughes, and was invested in the joint names for her benefit as well as Dr. Roe's, and the question is whether his estate is entitled to be indemnified. Unfortunately the Oriental Bank shares have turned out valueless. Dr. Roe, or rather the plaintiff as his personal representative, will be placed on the list of contributories and will be liable to pay some money. It is said that even if he is called upon to pay he will not be entitled to an indemnity, and, secondly, that the right to an indemnity cannot at any rate exist before he is called upon. As to the first point, I believe I am entitled, and therefore bound to accept in the broadest sense the rule laid down by Jessel, M.R., in *Jervis* v. *Wolferstan*, L. R. 18 Eq., at p. 24, on which Lord Blackburn merely remarked that perhaps it was too broadly stated. Lord Blackburn himself states the rule in terms on which I can, for the present purpose, rely equally well. He says, in *Fraser* v. *Murdoch*, 6 App. Cas., at p. 872 :—"No doubt anyone who requests another to incur a liability which would otherwise have fallen on himself is, in general, bound, at law as well as in equity, to indemnify him." There is no doubt that Dr. Roe accepted these shares, on which there was a liability, at the request of Miss Hughes, and the liability has fallen on his estate in consequence. I think, therefore, that his executor ought to be indemnified by Miss Hughes's estate. But then it is said secondly, that this action is brought too soon. As to that the evidence shows that it is being attempted to settle Dr. Hobbs on the list as the executor of Dr. Roe, and that the liability will be enforced, which distinguishes the case from that of *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.*, 31 W. R. 285, 22 Ch. D. 561, which I may accordingly pass by without further remark. I hold that the particular case is aimed at and hit by the decision of Giffard, V.C., in *Wooldridge* v. *Norris*, 15 W. R. 965, L. R. 6 Eq. 410, though no doubt the passage he quotes applies to a surety more than to a *cestui que trust*. A man who accepts any liability, and is, therefore, entitled to be indemnified, is entitled, directly the cloud, however small, appears, to go to the man who made the request, and say, "Do you acknowledge my right to be indemnified?" and, unless the right is acknowledged, he is entitled to come to this court for a declaration of his right to be freed from liability. This is the very case. An action has been commenced, and the liability is denied at the bar.

There is one other point—an interesting one—the distringas. Miss Hughes exercised her power of appointment over the fund by will by leaving it among seven charities, but there is nothing to show that any of these, except the British and Foreign Bible Society, did anything with reference to this particular fund. They executed a disclaimer, the shares being *damnosa hæreditas*, and I think they were quite at liberty to do so, and I hold that disclaimer good, and that it removes them from the field in any case. But as regards the British and Foreign Bible Society, their solicitor, knowing the trust fund was in the hands of a sole trustee, thought the charity ought to be protected, and therefore, either acting under a general resolution, or doing what he would have advised a meeting of the governors to do, he put a distringas on the Oriental Bank shares. Even treating the case as if he had had express authority, which he had not, what does it amount to? The distringas is put on under rules which are of very recent origin.

His lordship proceeded to discuss the history of the rules now in force in relation to the putting on of a distringas, and the mode of procedure, and concluded as follows :—The object is that anyone who thinks he has a claim to a fund standing in the name of trustees, or may have an interest in it, may stop it while he makes enquiries or takes proceedings, not being certain whether he is entitled or not. The distringas does not operate as an injunction. If anyone wishes to transfer the fund notice has to be given to the man who put on the distringas, and then, if he does nothing within a limited time, the distringas ceases.

If I were to hold that a man, by swearing he believed he had an interest in a fund, did what committed him to an acceptance and amounted to an election so as to estop him from subsequently denying the fact, the consequences might, in some cases, be terrible, and I certainly will not be the first to hold that a mere affidavit, made because a solicitor believes a man is beneficially interested in some bank shares, amounts to an acceptance of those shares so as to estop him from

subsequently disclaiming. I give the plaintiff the relief he asks by way of indemnity. Under the circumstances it will not, I think, be necessary to do more than declare the right to an indemnity.

I declare that Miss Hughes's estate is liable to indemnify Dr. Roe's estate in respect of the Oriental Bank shares formerly standing in his name.

Solicitors, *James Robinson; Bowerman.*

Q. B. Div. Manisty and Charles, JJ.) Oct. 28.

UNDERHAY *v.* READ. (*a.*)

Mortgage—Subsequent lease by mortgagor—Notice to tenant in possession by mortgagee—Evidence of new tenancy.

The mortgagor of property leased it to B. in March, 1886, *without notice of the mortgage. B. paid to the mortgagor one quarter's rent up to June. On the 7th of July the mortgagees served a notice on B. to pay them rent due from that date until further notice. On the 10th of September B. received notice of a transfer of the mortgage. No one applied to B. for the rent due on the 29th of September. In December the plaintiff obtained judgment for a debt due to him from the mortgagor, and was appointed receiver of all rents then due to the mortgagor without prejudice to prior incumbrances. Notice of his appointment was sent to B. On the 25th of January,* 1887, *B. paid the two quarters' rent due up to the 25th of December,* 1886, *to the assignees of the mortgage. Upon a summons at chambers by the receiver for the rent, the judge ordered the quarter's rent up to the 29th of September to be paid to him.*

Held, that the proper inference to be drawn from the conduct of B. was that a new tenancy from year to year had been created between him and the mortgagees from the date of the notice served on him by the mortgagees on the 7th of July, 1886, *and that the receiver had no right to claim the rent due for either quarter since that date.*

Quære (per Manisty, J.), *whether a judge at chambers has power to make such an order as was made in this case.*

Appeal from an order of Pollock, B., at chambers, ordering the payment of one quarter's rent to a receiver.

The facts of the case were as follows:—

The defendant Read mortgaged certain property in September, 1885. On the 11th of March, 1886, Read let the property to one Butler, as tenant, who had no knowledge of the mortgage. Butler paid to Read the quarter's rent due in June.

On the 7th of July Butler received notice from the mortgagees that the rent due from that date was to be paid to them. On the 10th of September Butler received notice of a transfer of the mortgage.

On the 14th of December an order was made by Field, J., appointing the plaintiff as "receiver of rents then due to Read, without prejudice to prior incumbrances." Notice of this order was sent to Butler.

On the 25th of January, 1887, Butler paid the half-year's rent then due to the assignees of the mortgagees. Upon application to Pollock, B., at chambers, the judge ordered the quarter's rent due at Michaelmas, 1886, to be paid to the receiver.

Against this order Butler now appealed.

Gore, for the tenant, Butler.—A fresh tenancy was created between the tenant and the mortgagees from the date of the notice given by the mortgagees in July, 1886; *Evans* v. *Elliot,* 9 A. & E. 342; *Waddilove* v. *Barnett,* 2 Bing. N. C. 538; *Hickman* v. *Machin,* 4 H. & N. 716, 7 W. R. C. L. Dig. 57; *Moss* v. *Gallimore,* 1 Sm. L. C., 9th ed., 604. Butler paid the rent due to a person in a position to receive it, having the title to possession during the period for which payment was made. The receiver took no action to recover the rent subsequent to the notice of his appointment.

Powell, for the receiver.—Butler should have paid the previous quarter's rent to the receiver after receiving the notice of his appointment: Woodfall on Landlord and Tenant, 11th ed., 49. There notice by the mortgagees has been held to be insufficient. Attornment by the tenant is necessary to create a new tenancy: *Brown* v. *Storey,* 1 M. & G. 117; *Ward* v. *Carter,* 35 Beav., *per* Lord Romilly, at p. 176. The receiver, as an officer of the court, can apply for a summons for money due without an action; and the judge at chambers can decide the whole issue of law and fact involved as if sitting in court.

Gore replied.

MANISTY, J.—This is an appeal from an order of Pollock, B., ordering £18 7s. 6d., which was one quarter's rent due from Mr. Butler at Michaelmas, 1886, to be paid to the plaintiff as receiver of the defendant's property. Butler, the tenant, now appeals to us, on the ground that he was, from July, 1886, a tenant to the mortgagees of the defendant's property, and not to the defendant, his original lessor, and that consequently, having paid his rent to them, there is no rent due from him to the plaintiff as receiver of the defendant's estate. The facts in the case are simple. There is no doubt that Read, the defendant, mortgaged his property in February, 1886. In March, after this mortgage, he let the property in question to Butler, the present appellant, at a rent of £73 10s., payable quarterly. Butler was not aware of the mortgage. Subsequently an action is brought by the present plaintiff, Underhay, against Read. Judgment is obtained by Underhay, and a sort of equitable execution is further obtained through his being appointed to act as a receiver on the 13th of December, 1886. The only point is whether or not the plaintiff, as such receiver, had a right to the rent due from Butler at Christmas, 1886. Butler had paid his rent to the defendant in June. He had not paid his rent in September, apparently because he was not called upon to do so either by the defendant or anyone else. Nothing, in fact, took place as to the September rent. Butler continued in possession. In July, 1886, however, he had received notice from the mortgagees that the rent accruing due from that time would be payable to them, and that he was not to pay it to anyone else than themselves. It does not appear that either party demanded any payment of the first quarter subsequent to this notice, but in September notice was given to Butler of the transfer of the mortgage. This, however, has no material bearing on the question whether, in July, 1886, from the date of the notice, a new tenancy commenced between Butler and the mortgagees. On the 13th of December the order appointed the plaintiff a receiver "for all rents due and to become due" to the defendant as landlord. Now the receiver can have been placed in no better position than the defendant himself. That cannot be disputed. The question is whether the defendant had or had not a right at that time to the payment of this rent? This case differs much from any case cited, because, in January, 1887, the defendant paid the half-year's rent due to the assignees of the first mortgagees. No rent was paid by him after July, 1886, when he received the notice of the mortgage, to anybody but to these assignees in January, 1887. What is the proper inference to be drawn from such facts? Is it not that Butler assented

(a.) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

to the notice given him in July—*i.e.*, that he assented to become tenant to the mortgagees from that date not, I should say, under the terms of the original lease, but as their tenant from year to year. That would be for the jury to say. I take it that a judge at chambers would draw the same inference. Upon that the case of *Brown* v. *Storey* is almost conclusive. It is there laid down to be the proper inference that where, after notice, the tenant agreed to abide by such notice, he does thereby become the tenant of the mortgagees from year to year.

It is said that the case of *Evans* v. *Elliot* lays down that notice only is insufficient—that is to say, that the party in possession cannot be compelled to become tenant to the mortgagees by merely receiving notice. That is so; and no doubt some passages in the judgments in that case seem to go further and to support the present plaintiff's view; but they do not do so really, for the facts here differ from those in that case. Moreover, *Brown* v. *Storey* comes subsequently to *Evans* v. *Elliot*, and clearly says that it is a question of fact for a jury whether such tenancy has been created in the absence of any express assent, but that the tenant's conduct after such notice has been received is to be considered as evidence, and if his conduct towards the mortgagees has been that of a tenant, the proper inference to be drawn, and the one which the jury may and ought to draw, is that a new tenancy has been created from the date of the notice. Indeed, one judge—Chief Justice Tindal—in the later case, goes so far as to say that the fact of the receipt of the notice alone may be sufficient evidence from which to draw that inference, and his whole judgment is a very strong decision in favour of the view which I take of this case, for he says: "I agree that the relation of landlord and tenant cannot be created without the consent of both parties;" and, after showing the evidence of consent by the mortgagees, he continues: "The plaintiff—*i.e.*, the tenant—receives a notice from the parties in whom was the legal interest. If he remained in possession without repudiating the notice he seems to have been in possession under the old terms. It is not clear that, upon issue joined upon the replication, it was necessary to show an attornment by the tenant. It would seem that no distinct act of assent need have been proved." Butler here might have been ejected by the mortgagees had he paid no attention to the terms of their notice by not complying with the payment of the rent to them. He remains in possession; and that also is some evidence that he assented to become their tenant. As Bosanquet, J., puts it, in *Brown* v. *Storey*, "It is said that it ought to have been left to the jury whether the plaintiff assented to a new tenancy. It is clear that there can be no demise without an assent by both parties. But if it had been wished to raise the point of want of assent, that should have been suggested to the learned judge. If it had been, the jury could have found but one way." Doubtless, cases are not argued at chambers quite as they are in open court, but such an inference as that a new tenancy was created was a question of fact for a jury, had there been a jury, and if it has been held to be a correct inference, the judge or jury ought to draw such inference upon such facts—namely, that the tenant, Butler, was tenant to the mortgagees—and, if so, the order here made was wrong. Whether a judge at chambers has any power to make such an order as that made here need not now be settled by us, but I should very much like to hear such a question argued.

Charles, J.—I am of the same opinion. The question of whether or not there was a new tenancy is one of fact. What was the *status* of the tenant on Michaelmas Day, 1886? The facts have been so fully detailed by my brother Manisty that I need only say that the proper conclusion was that Butler had become a tenant of the mortgagees and had ceased to be a tenant of the defendant's from the date of the notice to which he assented.

Appeal allowed, and order of Pollock, B., discharged.

Solicitors for the appellant Butler, *Peacock & Goddard*, for *Trevannion, Curtis, & Ridley*, Bournemouth.

Solicitor for the receiver, *A. H. Crowther*.

Q. B. Div. (Lord Coleridge, C.J., and Denman, J.) June 16.

South Staffordshire Waterworks Co. *v.* Stone. (*a*.)

Justice of the peace—Practice—Special case—Summary Jurisdiction Act, 1879 (42 & 43 *Vict. c.* 49), *s.* 33—*Summary Jurisdiction Rules*, 1886, *r.* 18.

A court of summary jurisdiction has no power to state a special case under section 33 *of* 42 & 43 *Vict. c.* 49 *unless an application has been made to the court in writing, and unless a copy of such application has been left with the clerk of the court within seven days of the date of the proceeding to be questioned according to rule* 18 *of the Summary Jurisdiction Rules*, 1886.

Case stated by justices of the county of Stafford under the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 33.

The respondent contended that the justices had no power to state a case on the ground that no proper application had been made.

It appeared that at the hearing an oral application for a case had been made on behalf of the appellants, which was granted by the justices. No application was made in writing, and a written notice of appeal was served on the clerk to the justices by the appellants within seven days from the oral application.

Hugo Young, for the respondent.—Two processes are prescribed by rule 18 of the Summary Jurisdiction Rules, 1886, for the purpose of getting a case stated—viz., an application in writing to the justices and the leaving of a copy of the application with the clerk to the justices. The right to have a case stated depends absolutely upon these formalities being observed. *Ex parte Curtis*, 26 W. R. 210, 3 Q. B. D. 13, shows the necessity of strict compliance with the rules.

Wills, for the appellants.—Section 33, sub-section 1, of the Summary Jurisdiction Act gives an aggrieved person an absolute right to apply for a case stated. Sub-section 2 and rule 18 are mere directions as to procedure, and cannot be held to limit the absolute right created by sub-section 1. The oral application to the justices having been successful, another application became superfluous. Besides, rule 18 was substantially complied with by service of the notice of appeal.

Lord Coleridge, C.J.—Our decision on this preliminary objection must be in favour of the respondent. Whatever be its merits, we cannot entertain the appeal because the statutory conditions have not been complied with. The Summary Jurisdiction Act, 1879, which creates the appeal, expressly states that the application shall be made and the case stated according to the rules under the Act. Rule 18 of the Summary Jurisdiction Rules, 1886, directs in the plainest manner that an application to a court of summary jurisdiction to state a special case shall be made in writing and a copy left with the clerk of the court. To hold that this rule has been complied with by an oral application and the notice

(*a*.) Reported by Cecil Chapman, Esq., Barrister-at-Law.

of appeal would be to create a new rule, and cannot be done.

Denman, J., concurred.

Appeal dismissed.

Solicitors for the appellants, *Burton, Yeates, Hart, & Burton*, for *Johnson, Barclay, Johnson, & Rogers*, Birmingham.

Solicitors for the respondents, *Wilkins, Blyth, & Dutton*, for *Wright, Son, & Hollins*, Oldbury.

Q. B. Div. (Day and Wills, JJ.) June 14.

Harper v. Davis. (a.)

County court—Payment into court with denial of liability—County Courts Act, 1846 (9 & 10 *Vict. c.* 95), *s.* 82—*County Court Rules*, 1886, *ord.* 4, *rr.* 11, 12; *ord.* 51, *r.* 37.

Where a defendant in a county court action paid money into court, but stated at the same time in a memorandum addressed to the registrar that the payment was made "without prejudice to the defendant's defence to this action, and while denying the plaintiff's cause of action,"

It was held by Day *and* Wills, JJ., *that the payment into court was not an admission of liability, and the defendant was entitled to dispute his liability at the hearing;*

By Wills, J., *that, apart from the notice, the defendant was entitled to pay money into court and afterwards to dispute his liability at the hearing, according to the decision in* Berdan v. Greenwood, 26 W. R. 902, 3 *Ex. D.* 251.

This was an appeal from the Birmingham County Court. The action had been brought for trespass to goods. The defendant paid into court the sum of £2 with 2s. for costs, stating at the same time in a memorandum addressed to the registrar that the payment was made "in full satisfaction of the plaintiff's alleged cause of action without prejudice to the defendant's defence to this action, and while denying the plaintiff's cause of action." The registrar sent a notice to the plaintiff in due form, informing him that the money had been paid in satisfaction, but not giving him any information as to the other terms of the memorandum. The county court judge treated the payment into court as an admission of liability on the ground that the County Courts Acts and Rules contained no provision authorizing the payment of money with denial of liability. The defendant appealed.

T. W. Chitty, for the defendant.—Though the County Court Rules of 1886 contain no specific provision for payment into court with denial of liability, the practice in the High Court, since the decision of the Court of Appeal in *Berdan* v. *Greenwood*, 26 W. R. 902, 3 Ex. D. 251, is a ground for so interpreting these rules as to extend this privilege to defendants in county courts. Apart from this general question the admission was clearly limited by the memorandum.

Hugo Young, for the plaintiff.—Section 82 of the County Courts Act, 1846, which deals with payment into court, impliedly prohibits it with denial of liability. The rules issued under section 82 since the Judicature Acts, the County Court Rules, 1875, ord. 12, rr. 4 and 5, and the County Court Rules, 1886, rr. 11 and 12, are framed on the assumption that it would have been *ultra vires* to introduce the new practice established in the High Court by *Berdan* v. *Greenwood* into the county courts. The registrar was bound to administer the existing rules relating to payment into court, and under orders 51 and 27 had no power to recognize any forms but those numbered 103 and 104, which make no reference to denial of liability.

Day, J.—This appeal must be allowed. If the conditional payment into court, reserving all rights, is not permitted by the practice of the county courts, the registrar was bound to return the money to the appellant. There has been no admission of liability. On the more general question I express no opinion.

Wills, J.—There has been clearly no admission of liability in this case, so the appeal must be allowed. But the question as to county court practice is important. I certainly entertain the opinion that, apart from any notice to the registrar, the defendant in a county court action has the right which was defined by the Court of Appeal in *Berdan* v. *Greenwood*. The existing County Court Rules of 1886, rr. 11 and 12, seem to me to be framed in obvious conformity with the rules comprised in order 30 of the Rules of the Supreme Court, 1875, on which *Berdan* v. *Greenwood* was decided. At any rate, they resemble these rules much more than they do those substituted in 1883. I think the county court judges, by adhering to the text of the rules on which *Berdan* v. *Greenwood* was decided, have adopted that decision into their practice. The apparent want of machinery ought not, in my opinion, to defeat their intention, and in this case the defendant would have reserved his right to dispute his liability at the hearing, even though he had not given the registrar notice at the time of the payment of the money into court.

Appeal allowed.

Solicitors for the plaintiff, *East & Smith*, Birmingham.

Solicitors for the defendant, *T. Needham*, for *R. A. Dale & Son*, Birmingham.

Q. B. Div. (Mathew and Cave, JJ.) April 4, 5; May 2.

Wilson v. Glossop. (a.)

Husband and wife—Necessaries supplied to wife—Liability of husband for—Connivance by husband in adultery of wife—Condonation.

A husband is liable for necessaries supplied to his wife after he had turned her out of his house without any means of support for adultery committed with his connivance.

The claim in this action, which was tried in the Sheffield County Court without a jury, was for £40 for forty weeks' maintenance of the wife of the defendant.

The facts were shortly these:—In August, 1885, the defendant charged his wife with having committed adultery and turned her out of doors without any means of support. She, thereupon, went home to her mother, the plaintiff, who supplied her with board and lodging. The defendant, having subsequently petitioned in the Probate and Divorce Division for a dissolution of his marriage, it was proved at the trial that the wife had committed adultery; that the petitioner had not condoned the adultery committed by the wife; but that the petitioner had connived at the adultery committed by her; and the petition was thereupon dismissed.

In the county court the defence set up to the action was the wife's adultery. To this it was answered that the husband's connivance precluded him from relying upon that defence.

(a.) Reported by Cecil Chapman, Esq., Barrister-at-Law.

(a.) Reported by Cecil Chapman, Esq., Barrister-at-Law.

The county court judge gave judgment for the defendant.

The plaintiff appealed.

Herbert Reed, for the plaintiff.—The reason of the rule that a husband is not liable for goods supplied to his wife after she has committed adultery, is the wrong suffered by him. *Volenti non fit injuria.* No wrong is done to a man who connives at his own dishonour.

He cited *Robinson* v. *Gosnold*, 6 Mod. 171; *Govier* v. *Hancock*, 6 T. R. 603; *Norton* v. *Fazan*, 1 B. & P. 226; *Hunt* v. *De Blaquiere*, 5 Bing. 550; *Culley* v. *Charman*, 29 W. R. 803, 7 Q. B. D. 89.

Moorsom, Q.C. (*Cyril Dodd* with him), for the defendant.—The true test of the husband's liability is, Did the wife's misconduct operate as a revocation of her implied authority to bind him for necessaries supplied to her? The fact that he was a party consenting to his own dishonour is quite beside the point.

He cited *Manby* v. *Scott*, 1 Keble, 69, 80, 87, 206, 337, 361, 383, 429, 441, 482, 1 Sid. 109, 1 Lev. 4; *Cox* v. *Kitchen*, 1 B. & P. 338; *Harris* v. *Morris*, 4 Esp. 41; *Mainwaring* v. *Leslie*, M. & M. 18; *Drew* v. *Drew*, 1 Notes of Eccl. C. 315; *Woodward* v. *Dowse*, 9 W. R. 870, 10 C. B. N. S. 722.

Reed replied.

Cur. adv. vult.

May 2.—The judgment of the COURT (MATHEW and CAVE, JJ.), was delivered by

CAVE, J.—This was an appeal from a judgment of the county court of Sheffield, holding that a husband is not liable for his wife's maintenance after her adultery, although he was guilty of connivance. The case was argued before Mathew, J., and myself on April 4 and 5 last, and I have now to deliver the judgment of the court.

For the purposes of this case it must be taken that the wife committed adultery with the connivance of her husband, that the husband subsequently turned her out of doors, that she had no means of support, and that the plaintiff supplied her with necessaries, and brought this action against the husband to recover the sum so expended.

It is undoubted law, that, if a husband without any justifiable cause turns away his wife, he is bound by any contract she may make for necessaries suitable to her degree and estate: per Bayley, J., *Montague* v. *Benedict*, 3 B. & C. 631, 635. We can nowhere find any statement of what is justifiable cause in point of law for turning a wife out of doors. According to the earlier authorities adultery is not such a cause. Thus in *Robinson* v. *Gosnold* an opinion expressed by Holt, C.J., at *Nisi Prius* is given in the following terms: "Let the woman be ever so vicious, yet while she will cohabit with her husband he is bound to provide necessaries for her and is liable to the actions of such persons as furnish her with them; for his bargain was to take her for better for worse. In like manner it is, if the husband turns his wife away for her wickedness, he remains still chargeable for her necessaries. But if the wife leave her husband, they that trust her after it is notorious that she has left him do it at their peril, and shall not thereupon charge the husband." So again in *Manby* v. *Scott*, Bac. Abr. Baron & Feme (H.) Hale, C. B., says: "Also, if the wife cohabits with her husband, and is ever so lewd, he shall be liable for her maintenance; for he took her for better for worse; so, if he runs away from her, or turns her away, or forces her by cruelty or ill-usage to go away from him." Again, in *Hunt* v. *De Blaquiere*, 5 Bing., at p. 557, Best, C.J., says: "If a man turns his wife out of doors it has been said by judge after judge that he sends her forth with an implied credit for necessaries. This is the general law; and the defendant is liable under it, unless the obligation cast on him by turning his wife out be discharged by something subsequent." But however this may be, it is at all events admitted that a husband has no right to turn his wife out of doors under circumstances that would not disentitle her to succeed in an action for restitution of conjugal rights.

Mr. Moorsom, in his able argument, cited *Drew* v. *Drew* as deciding that the adultery of the wife is a bar to a suit by her for restitution of conjugal rights, even though the husband has connived at her adultery. But when the case is looked into it will be found that it does not really decide that point. The suit was originally one for restitution of conjugal rights. By way of bar to this suit the husband pleaded that his wife had committed adultery, and prayed for a decree on that ground. The cause then resolved itself into a suit of that nature, in answer to which the wife alleged in bar—first, that the husband had himself committed adultery; secondly, that he had connived at her adultery. These matters, it will be seen, were pleaded in reply to the husband's plea in bar to the claim for restitution, and the question whether connivance is an answer to a plea of adultery in such a suit was neither decided nor argued. There are, however, two cases in which, although not decided, the point was discussed. The first is *Seaver* v. *Seaver*, 2 Sw. and Tr., App. II., 665, decided in the Consistorial Court in Dublin in 1846. This was an action by the wife against the husband for restitution of conjugal rights. The husband pleaded adultery of the wife in bar; to which she replied the adultery of the husband, and it was held by the Consistorial Court, and afterwards, on appeal, in the Court of Delegates, that the replication was good.

It seems clear that by the canon law an adulterous wife was entitled to a restitution of conjugal rights if the husband had himself committed adultery or had connived at or had condoned his wife's adultery; and the question in *Seaver* v. *Seaver* was whether this had become the law of England in its whole extent. After considering the authorities the learned judge of the Consistorial Court arrived at the conclusion that by our law condonation or connivance would prevent a husband from relying on his wife's adultery so condoned or connived at as a bar to her suit for restitution.

The same point came before the Court for Divorce and Matrimonial Causes in 1858, in a suit of *Hope* v. *Hope*, 6 W. R. 585, 1 Sw. & Tr. 94, where, however, the learned Judge Ordinary came to a different conclusion from that at which the Irish courts had arrived on the subject of mutual adultery. On the subject of connivance and condonation the learned judge expressed the following views:—"By connivance in this (a passage cited from Oughton's *Ordo Judiciorium*) and other passages, I take it that the party is supposed so to connive as to give a willing consent to the act, although not an accessory before the fact. In such a case it is consistent with reason to say that the party so consenting shall not be allowed to take advantage of the guilt contracted by doing the act consented to. So, as to condonation, it is reasonable to say that an offence which has been blotted out by forgiveness shall not afterwards be made the subject-matter of accusation. But the same observation is not strictly applicable to a case of compensation by mutual guilt. Both break the sacred obligation into which they have entered; neither instigates or consents to, neither pardons the offence of the other. And although it may not be competent to either to obtain the assistance of a court to punish the offence committed, it by no means follows as a reasonable consequence that each shall be bound to treat the other as an innocent party." This view the learned judge supported (amongst other authorities) by a reference to *Govier* v. *Hancock*, and *Re* v. *Flintan*, 1 B. & Ad. 227. In the former of these cases it was held that a husband was not bound to sup

put his wife where he had turned her out of doors and she had afterwards committed adultery. In the second it was held that a man was not liable to a penalty under 5 Geo. 4, c. 83, s. 3, for refusing to maintain his wife, who had committed adultery and then voluntarily left him.

Mr. Moorsom relied somewhat on the former case, on the ground that if adultery, accompanied by any gross misconduct, did not compensate the wife's adultery, connivance, which was only another form of misconduct, should be equally powerless. But, as we have seen, Cresswell, J.O., in *Hope* v. *Hope*, drew a distinction between mutual guilt, which he held not to be compensation, and connivance, which he admitted would entitle an adulterous wife to sue for restitution of conjugal rights. Moreover, in *Govier* v. *Hancock*, the wife, when she was turned out of doors, had authority to pledge her husband's credit; and if, having that resource, she nevertheless committed adultery, she placed herself in a similar position to a woman who leaves her husband's house with an adulterer. In *Harris* v. *Morris* it was held by Lord Kenyon, C.J., that if a husband condones his wife's adultery and takes her back into his house, and afterwards turns her out of doors, he is liable for necessaries furnished to her. This is in accordance with the judgment of the Irish court and the opinion of Cresswell, J.O. And if a husband is liable to maintain a wife whose adultery he has condoned, it seems to be equally just that he should be liable for necessaries supplied to his wife, whose adultery he has connived at. In the one case he has forgiven the wrong done him, in the other he consented to it; and the maxim *Volenti non fit injuria* applies. The appeal must be allowed, and judgment entered for the plaintiff for £40, with costs here and below.

Judgment for the plaintiff.

Solicitors for the plaintiff, *Minter & Morris*, for *Parker & Brailford*, Sheffield.

Solicitors for the defendant, *Clegg & Son*, Sheffield.

Prob. Div. & Adm. Div. Divorce. } May 2, 3; June 29.

Bosvile v. Attorney-General. (a.)

Legitimacy—Access—Possibility of cohabitation—Presumption of legitimacy—Rebutting evidence.

The presumption in favour of the legitimacy of a child born in wedlock may be negatived by evidence, but such evidence must be strong, distinct, satisfactory, and conclusive.

Motion to enter judgment for the plaintiff, or, in the alternative, for a new trial in an action for a declaration of legitimacy brought by Arthur Bolle Bosvile, an infant, by Gordon Arthur Willis, his next friend. The petition prayed for a declaration that the infant was the legitimate son of Mr. Thomas Bolle Bosvile, and the action was tried before Hannen, P., and a special jury on February 28 and March 2, when the jury found a verdict against the petitioner.

Mr. T. B. Bosvile married E. M. J. Willis on June 14, 1882, and a daughter, Nelly Marion, was born in June, 1883. On June 30, 1884, Mrs. Bosvile eloped from her husband's house with A. W. Craven, and she and her husband had never cohabited since; they had, however, occupied the same bedroom up to the day of the elopement. On April 3, 1885, Mrs. Bosvile gave birth to the infant petitioner. Mr. Bosvile instituted a suit for the dissolution of his marriage on the ground of his wife's adultery with A. W. Craven, and a decree absolute was pronounced on February 16, 1886.

Mr. Bosvile, Nelly Marion, the infant daughter of the marriage, and Mrs. Bosvile were all cited to see the present proceedings, and appeared.

At the trial Mrs. Bosvile's maid gave evidence that on June 29, the day before Mrs. Bosvile left her husband, she was at the commencement of her monthly period. Dr. Barnes, Dr. Priestley, and others gave evidence as to the period of gestation, and two letters written by Mrs. Bosvile to her husband at periods after her elopement were put in. In a letter written in March, 1885, after Mr. Craven had left her, there was a strong appeal to her husband for forgiveness and maintenance. "Surely," she said, "you will not let me starve for the sake of the child I bore you. She is the one link of the past and all that is left of our married life."

Hannen, P., in summing up the case to the jury on the points of law, directed them as follows:—"Now it is to be remembered that in any case of this kind the law prescribes this presumption in the outset, that any child born of a married woman is to be deemed to be the offspring of her husband unless the contrary be shown. That is, the *onus* of proof rests upon those who assert that the child born in wedlock is not the legitimate offspring of the two married people.

"At one time the law of England went very far in support of that presumption, and did not allow a child born of married people to be declared illegitimate unless it was proved to be impossible that the husband should have had access to the wife. Even to so great an extreme did the law go, that for many years—hundreds of years I may say—it was the law that it must be shown that the man was not in the kingdom; otherwise, if he was in the kingdom, it was to be presumed that the child of his wife was begotten by him.

"But that is not the law now. The law has gradually relaxed those stringent rules, and now a case of this kind is to be determined by a jury like any other question of fact; and it is for the jury to say whether, upon the whole of the evidence given on behalf of those who assert the illegitimacy of the child, the conviction has been brought home to their minds that the husband was not the father of the child.

"Well, there is still another presumption of law which must be called to your attention before we proceed to deal with the particular facts of this case, and that is that if a husband and wife sleep together, and there be no other facts in the case, then it is to be presumed that sexual intercourse takes place between them, and if it were proved to demonstration that at a time when the husband was sleeping with his wife she was carrying on an adulterous intercourse with some other man, so that it would be possible that the child should be the child of either the husband or the paramour, still the presumption is that it is the child of the husband. You will bear in mind, I say, that is where there is nothing else in the case."

And he concluded his summing up as follows:—

"Now, gentlemen, I have gone through the several facts of the case, and the question which I leave to you is this: whether you are convinced by the evidence in the case that this child was not the child of Mr. Bosvile? and my concluding words to you shall be borrowed from the judgment of a very great judge—Lord Lyndhurst—who has dealt with that particular case of which I have mentioned to you some of the salient points. In the case of *Morris* v. *Davies*, 5 Cl. & F. 163, after stating his view that the conduct of the parties must be taken into consideration for the purpose of repelling the inference of law arising from the relation of husband and wife, he used this language, which I commend to your attention: 'My lords, this, then, is the view I have always taken of the law connected with this sub-

(a.) Reported by J. Gerard Laing, Esq., Barrister-at-Law.

ject; at the same time, as I before expressed and I now feel, that presumption of law—which is that a child born in wedlock is the child of the husband—that presumption of law is not lightly to be repelled. It is not to be broken in upon or shaken by a mere balance of probability; the evidence for the purpose of repelling it must be strong, distinct, satisfactory, and conclusive.' It will be for you to say whether this evidence does establish to your mind conclusively, not by way of conjecture, but by way of conviction, that the child was not begotten by the husband."

The jury found that the infant, Arthur Bolle Bosvile, was not the son of Mr. Thomas Bolle Bosvile.

May 2 and 3.—*Gully, Q.C.*, and *Ram*, for the petitioner.—In this case, as the husband and wife slept together on the night of June 29, there is an irresistible presumption that the child is legitimate. If intercourse was possible that is sufficient to raise the presumption. To repel it impotency or impossibility of access must be proved.

Sir C. Russell, Q.C., Inderwick, Q.C., and *C. A. Middleton, contrâ.*—That the presumption suggested is not irrebuttable is admitted, as impotency may be shown to rebut it, and, if one class of evidence is admissible, why not another? The jury were properly directed in this case, and the verdict was a reasonable one.

Gore, for the Attorney-General.

The following cases were cited:—*Legge* v. *Edmonds*, 4 W. R. 71; *Head* v. *Head*, 1 Sim. & St. 138, T. & R. 150; *Morris* v. *Davies*, 5 Cl. & F. 163; *Bury* v. *Phillpot*, 2 My. & K. 349; *Plowes* v. *Bossey*, 10 W. R. 332; *Aylesford Peerage case*, 11 App. Cas. 1, 34 W. R. Dig. 74; *Fleta*, Introduction to Report on Gardner Peerage, p. 23; Best on Presumptions, pp. 21, 71, 171.

Cur. adv. vult.

June 29.—BUTT, J., delivered the judgment of the court (Lord COLERIDGE, C.J., and BUTT, J.).—In this as in other cases of the birth of a child during wedlock there is, *primâ facie*, a strong presumption in favour of legitimacy.

It is contended on the part of the plaintiff that the facts proved and not in dispute establish not merely a strong presumption in favour of the legitimacy of the child, but such a presumption or such presumptions as the law holds incapable of rebuttal, or in the language of the civilians *præsumptio*, or *præsumptiones juris et de jure*.

There is the highest authority for saying that the presumption in favour of legitimacy may be rebutted by evidence; but counsel on behalf of the plaintiff contend that the admitted facts of this case preclude such evidence. If we rightly understand their argument it is this—From the admitted fact of the husband and wife having occupied the same bedroom on the night of the 29th—30th of June, and of the wife having given birth to a child on the 3rd of April following, the period between those dates being a not impossible period of gestation, a presumption absolute, and incapable of rebuttal, arises that marital intercourse between the husband and wife occurred on the 29th or 30th of June, and that the fact of marital intercourse being so established, another presumption equally absolute and irrebuttable ensues—viz., that the child born on the 3rd of April was the result of that intercourse. It is not clear to us that, having regard to all the circumstances of the case, any such presumption arises. We certainly know of no authority for saying that such presumption of law may be cumulative—*i.e.*, that a presumption based, not on facts established by direct proof, but on another presumption of the same nature, is incapable of rebuttal by evidence.

The decision of the House of Lords in the case of *Morris* v. *Davies* appears to us sufficient to support the proposition that the presumption in favour of the legitimacy of a child born in wedlock may be negatived by evidence. In the more recent case of *The Aylesford Peerage* Lord Blackburn said:—"The case of *Morris* v. *Davies*, a decision of this House, decides what, upon the balance of authority without the decision, I should have no hesitation in deciding, that such a presumption can be rebutted, and it also shows that it can be rebutted by the conduct of the parties, taking the whole *res gestae*, raising a strong and irresistible conclusion that the child born was not the child of the husband, but the child of another."

That being the law on the subject, it is impossible to say that there was misdirection on the part of the learned judge who tried the case, for he read and commended to the jury the following passage from Lord Lyndhurst's opinion in the case of *Morris* v. *Davies*:—"My lords, this, then, is the view I have always taken of the law connected with this subject; at the same time, as I before expressed and I now feel, that presumption of law—which is that a child born in wedlock is the child of the husband—that presumption of law is not to be lightly repelled. It is not to be broken in upon or shaken by a mere balance of probability; the evidence for the purpose of repelling it must be strong, distinct, satisfactory, and conclusive." The learned judge added:—"It will be for you to say whether this evidence does establish to your minds conclusively, not by way of conjecture, but by way of conviction, that the child was not the child begotten by the husband."

The direction to the jury being right, it remains to consider whether the verdict ought to be set aside as against the weight of evidence.

Now we agree with the argument that it is not a case in which the jury would be justified in finding against the legitimacy of the child on a mere balance of probabilities. In order to support such a verdict there must be a strongly preponderating body of evidence making against the presumption of legitimacy. The jury, under proper direction, must be taken to have found that such evidence exists in the present case.

In support of the view they took the following facts were established:—The ordinary period of gestation is 270 to 275 days; anything beyond is exceptional. The child was born 276 or 277 days after the last opportunity of intercourse between the husband and wife, and at the time when that opportunity occurred the wife's periodical menstruation had begun—a circumstance that makes marital intercourse on that day, to say the least, improbable. Reckoning backwards from the birth of the child on each of the days from 270 to 275 both inclusive, the lady slept with Mr. Craven and not with her husband.

Menstruation was certainly going on at the time the lady left her husband on June 30. That is a fact which, in the opinion of the medical men examined on the part of the defendant (and there were none called on behalf of the plaintiff), makes strongly against the probability of the child being the husband's. One of the witnesses, Dr. Barnes, said:—"It would almost exclude the idea." Moreover, the lady herself seems to have regarded the child as the child of Mr. Craven and not of the husband. The time fixed by her for the attendance of the monthly nurse was obviously based on a calculation which placed the commencement of the period of gestation subsequent to the day on which she left her husband's house from which day she was living in adultery with Craven. And in her letters to her husband, written in September, 1884, and March, 1885, Mrs. Bosvile not only refrains from suggesting that the child with which she was pregnant was his child, but does not even mention the fact of her pregnancy, although she is imploring forgiveness and asking pecuniary assistance. Under these

circumstances we are not prepared to say that the jury were wrong in regarding the evidence against the legitimacy of the child as conclusive. The present application must therefore be refused.

Middleton, on behalf of Mr. Bosvile, applied for costs against the petitioner, but the court refused and expressed an opinion that it was not a case in which costs should be given.

The petitioner appealed to the Court of Appeal, but on October 24 the appeal was abandoned.

Solicitors for the petitioner and Mrs. Bosvile, *Gedge, Kirby, & Millett.*

Solicitors for the Attorney-General, *Gregory & Co.*

Solicitor for Mr. Bosvile and others, *Collyer-Bristow & Co.*

Privy Council.

March 10, 19.

In re DILLET. (*a.*)

(On appeal *from the Supreme Court of British Honduras.*)

Appeal from criminal proceedings—Grounds of special leave—Conviction of solicitor for perjury—Striking off the roll—Grounds of reversal.

The rule laid down in Falkland Islands Co. *v.* The Queen, 12 *W. R.* 220, 1 *Moo. P. C.* (*N. S.*) 312, *is subject to few exceptions But leave to appeal from a criminal conviction (as from a conviction for perjury in the present case) will be allowed where such conviction is the sole ground for consequential civil penalties (in this case striking off the roll of solicitors), and where the conviction, having been unfairly obtained, is not conclusive as such a ground.*

A barrister and solicitor of Honduras appealed against a verdict convicting him of perjury, and against an order of court, founded on the conviction, directing him to be struck off the roll of practitioners.

Held, that the directions of the judge having been grievously unjust to the appellant, the conviction and consequential order must be set aside.

Appeal by special leave from the Supreme Court of Honduras to reverse a conviction for perjury dated the 6th of September, 1884, and to set aside an order of that court dated the 27th of March, 1885, striking the appellant off the roll.

The petition for special leave stated the facts, and alleged thirteen grounds for granting the relief prayed. The thirteenth was "that the Chief Justice in his charge to the jury made statements of alleged facts with reference to the petitioner's conduct on previous and other occasions, of which no evidence had been given at the trial, and which were highly detrimental to the petitioner's character, and calculated to prejudice the minds of the jury against him. In particular the Chief Justice made the observations to the jury marked A., B., and C. There was no evidence before the jury as to the matters commented upon in the extracts A. and B."

Those extracts are as follows:—

A. "As allusions have been made in the affidavits and elsewhere to previous cases of contempt in which Mr. A. M. Dillet was concerned, it was right they should know what these cases were, and it was enough to say that the first time he had had to take notice of Mr. Dillet's conduct was when he (Mr. D.) was engaged in editing the *Belize Advertizer*. He (the Chief Justice) had made an order in the case of *Maximo Carrillo* to sell real property, coupled with certain stipulations to be observed when the property should be put up for sale. What punishment did the court give him? He placed himself (at the suggestion of the court) unreservedly in the hands of the court, and nothing was done to him; Mr. Parker, the counsel moving against Mr. Dillet, foregoing all costs in the case. 2. Mr. Dillet having a suit himself pending, in which he (Mr. Dillet) was plaintiff, and Mr. Henry Trumbach, the defendant, plaintiff came to his (the Chief Justice's) house, and brought with him certain papers, demanding an order of the judge. He had ruled, before this, that all business communications to him were to be sent through the clerk of courts. He, therefore, declined to see him. Mr. Dillet then wrote him an offensive letter. Mr. Dillet was again brought before the court. On Mr. Dillet making an affidavit admitting that he had been guilty of a contempt, he got off without any punishment. Mr. Goodman was not then in the colony."

B. "With respect to witnesses to character, if Mr. Dillet had lived at a distance, if he had lived many years out of Belize, he (the Chief Justice) could understand his calling witnesses to character. But then, as he has told the jury, they all know him. Gentlemen, if he says you know him, why call witnesses to character? It may be that you can say of him, though I myself cannot tell, whether he has been a dutiful son, the joy of a mother's heart, the support of a father in his declining years; whether he has been a loyal and staunch husband, a reliable and trusty friend, or whether his name has been mixed up with any tragical or dark transaction. But he (the Chief Justice) begged them to wipe out of their minds what they knew in him to be base, low, and disgraceful, give him all benefit of the good, and try him simply on the evidence before them."

C. "Mr. Dillet tells Mr. Bristowe (according to the former) that he is not coming. He then comes late and says, 'You are asking leading questions.' It is natural for the Attorney-General to say, 'What business is it of yours?' If Mr. Bristowe gave him cause for offence, is that sufficient cause to write such a letter to the Atorney-General? You, gentlemen, are there to stand between the Crown and Mr. Dillet at this his trial. Pause for a second and reflect what the result would be of a verdict in favour of Mr. Dillet. It would be to brand the Attorney-General of the colony, a magistrate, and others, as perjurers; and are you going to brand all the members of my bar as alike perjurers and conspirators? If the jury think so, let them do their duty regardless of consequences."

The appellant appeared in person on the 11th of July, 1885, before Lords Watson, Monkswell, and Hobhouse, Sir Barnes Peacock, and Sir Richard Couch in support of his petition. Their lordships directed the petition and the above extracts to be referred to the Chief Justice for his observations thereon, with liberty for him to appear and show cause.

The Chief Justice's observations appear in their lordship's judgment.

On the 20th of March the appellant in person appeared before their lordships in support of his application for special leave to appeal, and the judgment of their lordships (Lords BLACKBURN, MONKSWELL, HOBHOUSE, and Sir R. COUCH) was delivered by

Lord BLACKBURN.—This is a petition for special leave to appeal in a case of rather an unusual kind, and it requires some statement to make the case intelligible.

By an order of the Supreme Court of British Honduras made in the case of Abraham Mallory Dillet, a solicitor

(a.) Reported by J. M. COLLYER, Esq., Barrister-at-Law.

of the Supreme Court, on the 23rd of June, 1884, it was ordered that the said Abraham Mallory Dillet should, on Monday, the 30th of June, 1884, appear and answer upon oath the various matters set forth in the affidavits of William Meigh Goodman, Thomas Graham, and Richard Cato in the said matter respectively duly filed.

These affidavits related to the conduct of Abraham Mallory Dillet on the 17th of June, 1884. In substance they disclosed that Mr. Graham was, on the 17th of June, 1884, sitting as judge of a petty debtors' damages court. The sitting had begun at 11 a.m.

Mr. Goodman, who was Attorney-General for the colony, was conducting a case before Mr. Graham, and was opposed by Mr. Bristowe, a solicitor. When Mr. A. M. Dillet came into court, Mr. Graham, in his affidavit says, "I noticed that Mr. A. M. Dillet was apparently under the influence of drink." Mr. Dillet interfered, and, "after some words with Mr. Goodman, objected to Mr. Goodman asking leading questions, and called my attention." He states that, after some discussion whether Mr. Dillet was retained or not, Mr. Dillet left the court. Mr. Graham further says:—"Mr. A. M. Dillet's conduct and demeanour throughout were unbecoming a solicitor and a professional man; and appearing, as he did, under the influence of drink, his temper seemed to be excited and uncontrollable, so that I, as judge of the court, had more than once to call him to order, and twice I got up from the bench and threatened to adjourn the court."

The court was, in the ordinary course, adjourned from twelve to three o'clock. After it resumed Mr. Graham saw Mr. A. Dillet come into court with a whip in his hand and take his seat opposite Mr. Goodman. But, apparently on the persuasion of Mr. Bristowe, he left the court.

Mr. Goodman, in his affidavit, gives nearly the same account of what passed in court as that given by Mr. Graham, and states that on his leaving court at twelve o'clock and going to his own chambers he found a note in Mr. Dillet's handwriting addressed to him. It was in the following terms:—

"Sir,—You are an impertinent fellow. If you continue your rudeness by me I shall thrash you.

"Your obedient Servant,

"A. M. DILLET."

Richard Cato, the crier of the court, in his affidavit states that about 2.30 p.m. on the 17th of June, 1884, Mr. A. M. Dillet came to him. He says: "I saw Mr. A. M. Dillet was intoxicated and had a riding-whip in his hand. He then said to me, 'Cato, I want you to take a message to the Attorney-General. Tell him, with my compliments, I wish to see him.'" Cato brought back the answer that Mr. Goodman would not see Mr. Dillet, and Cato swears that Mr. Dillet then said, "He does not wish to see me. I want to thrash him, and if he comes here I will thrash his damned hide." It seems obvious that on such affidavits the Supreme Court had jurisdiction to order Mr. Dillet, a solicitor, and as such the officer of the court, to answer the matters in them, and on hearing his answers to adjudicate on the conduct of the solicitor.

Mr. A. M. Dillet made a long affidavit. It has now been returned from the colony and is to be found in the record. It contains many statements, in the technical sense of the word, impertinent, and does not in any way improve his position. It is difficult to doubt that on these affidavits the Supreme Court might, if it had adjudicated on them, have properly come to the conclusion that A. M. Dillet had been guilty of misconduct as a solicitor, and passed such a sentence as would be adequate to that misconduct.

But that course was not taken. The Attorney-General filed an information containing one count charging A. M. Dillet with perjury in having sworn, in answer to the affidavits of Goodman and Graham stating that he appeared under the influence of drink, "I positively say I was not so," and a second count imputing perjury in swearing, "As to the affidavit of the aforesaid Richard Cato, I deny that I was intoxicated as alleged."

The information was tried before the Chief Justice and after a long trial the jury, on the 6th of September 1884, returned a verdict of guilty, and sentence of six months' imprisonment was pronounced.

After the imprisonment had been undergone the following order was made:—

"In the Supreme Court of British Honduras, 1885.

"In the matter of Abraham Mallory Dillet, a solicitor of this honourable court.

"Upon the motion of Frederick Hardyman Parker acting Attorney-General of British Honduras, and upon reading the affidavit by him made and filed therein, it is ordered that the said acting Attorney-General have leave to serve Abraham Mallory Dillet, a solicitor of this court, with notice of motion for 11 a.m. 27th of March instant, before this honourable court, for an immediate order that the said Abraham Mallory Dillet be struck off the roll of practitioners of this said court as a solicitor thereof, on the ground that the said Abraham Mallory Dillet was tried and convicted of a misdemeanour, to wit, of perjury, at the sittings of this honourable court for criminal business, August, 1884, and was thereupon sentenced and committed to six months' imprisonment in the gaol of Belize; and that the said Abraham Mallory Dillet do pay the costs of and incidental to this application, and the proceedings consequent thereon.—Dated at Belize, this 26th March, 1885.—BY ORDER."

The affidavit consisted only of a verification of the certificate of the conviction.

Mr. Dillet, in an affidavit sworn on the 27th of March, admitted personal service on him of a notice of the 26th of March, about 1 p.m., and stated that he verily believed the whole proceedings from beginning to end in the matter of his trial for perjury were contrary to law.

He, before this board, verbally stated to their lordships that he was in court on the 27th of March, and heard the Chief Justice make the order as moved for, but, having sailed for England on the ensuing day, never saw the formal order.

It was solely on this ground that the order proceeded; there never has been any adjudication on the order to answer the matters in the affidavits.

A conviction for a grave offence is a ground for justifying the conclusion that the person convicted is not a proper person to be a solicitor: *Ex parte Brownsell*, 2 Cowp. 829; *In re King*, 8 Q. B. 129.

No appeal against the striking the petitioner off the roll can be of use unless it is open on it to the appellant to show that the conviction was obtained in such a manner that it ought not to have this effect against him.

When this petition was before the committee in 1885 they reported to her Majesty, as their opinion, that the petition, together with certain extracts from the charge of the Chief Justice, as reported in the *Colonial Guardian*, should be referred to the Chief Justice of Honduras, in order that he might make such observations on the petition and the allegations contained in the extracts as he might think fit, and that his Honour the Chief Justice ought to be directed to return such observations to the Registrar of the Privy Council in order that the same might be laid before this board and considered by their lordships. These have now been returned. After considering them, their lordships think that there is ground for inquiry as to whether the Chief Justice did not, more especially if he spoke to the purport stated in the extracts B. and C. even after giving effect to his observations, obtain the verdict of the jury in such a way that

it ought not to be considered satisfactory and conclusive against the petitioner, in which case the order striking him off the rolls on the ground on which it was made should not stand.

In *Falkland Islands Co.* v. *The Queen*, 12 W. R. 220, 1 Moo. P.C. (N.S.) 312, it is said: "It may be assumed that the Queen has authority, by virtue of her prerogative, to review decisions of all colonial courts, whether the proceedings be of a civil or criminal character, unless her Majesty has parted with such authority. But the inconvenience of entertaining such appeals in cases of a strictly criminal nature is so great, the obstruction which it would offer to the administration of justice in the colonies is so obvious, that it is very rarely that applications to this board, similar to the present, have been attended by success."

In this statement of the general practice their lordships agree. They are not prepared to advise her Majesty to make this conviction for perjury an exception if it were not made the sole foundation for the subsequent order of the 27th of March, 1885.

Their lordships do not think that the petitioner has made out any one of the first twelve grounds of objection stated in his petition, and they do not advise that he should be allowed to appeal on any of these twelve grounds. Nor are they to be taken as considering it as established that the summing-up of the Chief Justice really was as reported in the *Colonial Guardian*.

But they think, after considering the observations of the Chief Justice, Mr. Dillet ought to be permitted, on appeal, to show, *if he can*, that, on the grounds stated in *his 13th reason*, the conviction was obtained in a manner so unsatisfactory that the conviction alone ought *not to be conclusive* as a ground for striking him off the rolls.

Their lordships will humbly advise her Majesty that the petitioner be at liberty to appeal against the order of the 27th of March, 1885, striking him off the roll, and also to the extent above stated, and no further, against the conviction for perjury.

Leave being thus given, the appeal came on for hearing on the 10th of March, 1887.

R. O. B. Lane (*Willis, Q.C.*, with him) for the appellant.

March 19.—The judgment of their lordships (Lord WATSON, Lord FITZGERALD, and Sir BARNES PEACOCK) was delivered by

Lord WATSON.—This appeal is brought by Abraham Mallory Dillet, of the Inner Temple, barrister-at-law, against a verdict returned by a jury on the 6th of September, 1884, finding him guilty of the crime of perjury before William Anthony Musgrave Sheriff, who was at that time Chief Justice of the Supreme Court of British Honduras; and also against a consequential order of the Chief Justice, dated the 27th of March, 1885, directing the appellant to be struck off the list of practitioners of that court. Such appeals are of rare occurrence, because the rule has been repeatedly laid down, and has been invariably followed, that her Majesty will not review or interfere with the course of criminal proceedings, unless it is shown that, by a disregard of the fundamental process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done.

Along with his petition for leave to appeal, the appellant produced a printed report of the charge of the presiding judge, and, *inter alia*, alleged (reason 13) that the judge had made statements to the jury with reference to his conduct on other occasions, of which no evidence had been given at the trial; and he referred in particular to three extracts from the charge, marked respectively A., B., and C., as calculated to prejudice unduly the minds of the jury against him. By Order in Council of the 12th of August, 1885, her Majesty directed the petition and these extracts to be referred to the Chief Justice, in order that he might make such observations thereon as he might think fit, and further ordered that he should be at liberty to appear and show cause against the prayer of the petitioner. His honour did not avail himself of the leave thus given him, but forwarded his observations to the Registrar of the Privy Council. These observations were submitted to this board, and upon their report her Majesty, by Order in Council of the 3rd of April, 1886, allowed the appellant to enter and prosecute his appeal upon the ground stated in the 13th reason of his petition—viz., that the conviction was obtained in a manner so unsatisfactory that the conviction alone ought not to be conclusive as a ground for striking him off the roll. The Chief Justice was duly served with the appeal, but has not made appearance.

The prosecution of the appellant for perjury had its origin in these circumstances. The Chief Justice received a communication from Mr. Goodman, the Attorney-General of Honduras, bringing under his notice the conduct of the appellant in the inferior court at two sittings of the court held upon the 17th of June, 1884, and in the presence of the acting magistrate. His honour thereupon directed the affidavits of three persons who were present on those occasions to be prepared and submitted to him for his approval, and these were subsequently sworn to by the deponents. Two of them (the Attorney-General and the acting magistrate) stated that the appellant "appeared to be under the influence of drink"; the third (Cato, the court crier) stated, "I saw that he was intoxicated." The Chief Justice appointed the appellant to answer the affidavits, and the appellant accordingly made an affidavit in which he stated that he was not "under the influence of drink," and denied Cato's statement that he was intoxicated. Upon consideration of these statements in the appellant's affidavit, the Chief Justice, acting under the authority of 14 & 15 Vict. c. 100, which has been extended to Honduras, directed the Attorney-General to prosecute the appellant for perjury, and a criminal information was filed by that officer on the 15th of August, 1884, containing two counts, one founded upon the appellant's contradiction of the Attorney-General and the magistrate, and the other upon his contradiction of Cato's statement. The trial commenced upon the 27th of August, 1884, and, after occupying eight days, terminated in a verdict of guilty by a majority of five to two, accompanied by a recommendation to the sympathy of the court.

It is very unfortunate that, owing to the fact of there being but one member of the Supreme Court of British Honduras, the trial took place before the same judge who had directed the affidavits to be prepared and submitted to him, had appointed the appellant to answer them, and, upon the affidavit and answers being made, had directed the prosecution. These circumstances may in some measure account for, although they cannot, in the opinion of their lordships, justify many of the observations which were addressed by the Chief Justice to the jury.

The issue which the jury had to try was a very simple one. They had to consider, in the first place, whether the accused was under the influence of liquor on the occasions libelled; and, in the second place, whether he knew and believed that he was so at the time when he made affidavits to the contrary. Unless they were satisfied on both these points, the jury had no right to find the appellant guilty. A man labouring under excitement may appear to others to be under the influence of drink when he is not; and, although he is actually under that influence, he may be unconscious of the fact. The only question submitted to the jury was, whether the appellant's behaviour in court on the 17th of June,

1884, was due to drink. A misdirection of that kind would not necessarily afford a ground for setting aside a conviction in a criminal case. But in the extract C., which the Chief Justice in his observations states to be "substantially correct," he thus put the case against the accused :—"Pause for a second and reflect what the result would be of a verdict in favour of Mr. Dillet. It would be to brand the Attorney-General of the colony, a magistrate, and others as perjurers, and are you going to brand all the members of my bar as alike perjurers and conspirators? If the jury think so, let them do their duty regardless of consequences." Comment upon that language is needless. It grossly misrepresented the real issue, and was most unfair to the accused, whose acquittal by the jury would have cast no imputation of perjury, or even of untruthfulness, either upon the officials alluded to, or upon the members of the Honduras bar.

The Chief Justice does not, in his observations, impeach the substantial accuracy of the extract A., which is sufficiently vouched by the affidavits produced, but he vindicates the remarks contained in that extract by pointing out that the records in the four cases therein referred to were put in evidence by the prosecutor before the case was closed, and that the appellant was the first to refer to these cases of contempt. Apparently, the Chief Justice has failed to appreciate the *gravamen* of the objections which the appellant takes to the remarks in question, which are, in their lordships' opinion, well founded. The judge not only uses these records in a manner altogether unwarrantable, but he converts himself into a witness, and, without being sworn, makes statements to the jury regarding a visit of the accused to his (the Chief Justice's) private house and other matters, which are neither to be found in these records nor in the evidence.

The remarks contained in extract B. are a little, but not much, less objectionable. Their lordships have not, in estimating their character, taken into account a reference which is therein made to a certain "tragical or dark transaction." The Chief Justice, in his observations, states that he has no recollection of making, and is under the impression that he did not make, such a reference, and their lordships have assumed, for the purpose of this appeal, that he did not do so, although there are affidavits produced by persons who heard the words, including one reverend gentleman, who took them down in shorthand at the time they were uttered to the jury.

It would be neither pleasant nor profitable to criticize more minutely the directions of the Chief Justice to the jury, so far as contained in these extracts. Their lordships are of opinion that these directions were grievously unjust to the appellant, and in many instances outraged the proprieties of judicial procedure. A conviction obtained by such unworthy means cannot be permitted to stand; and their lordships will humbly advise her Majesty to set aside the verdict and conviction appealed from. Seeing that the appellant has already undergone the sentence which followed upon the verdict, it is unnecessary to order a new trial. Their lordships will also humbly advise her Majesty to reverse the order of the 27th of March, 1885, removing the appellant from the roll of practitioners of the Supreme Court of British Honduras. Their lordships will direct a copy of their judgment in this case to be communicated to one of her Majesty's Secretaries of State.

Lunacy.

March 28.

In re HUME.

Practice—Petition in Chancery Division as well as in Lunacy—New trustees—Verification of consent—Rules of Court (December, 1885), ord. 38, r. 19a.

On a petition in the Chancery Division as well as in Lunacy the signature of a proposed trustee to his consent to act may be verified as provided by ord. 38, r. 19a, and the old practice requiring an affidavit need not be followed.

G. B. Hume, a trustee of, and a beneficiary under, two wills and a settlement, being of unsound mind, though not so found, and the other trustees desiring to retire, a petition was presented by the beneficiaries under the three instruments in Lunacy and in the Chancery Division asking that two named persons might be appointed trustees of the three instruments in the place of the existing trustees, and for the necessary vesting orders.

The consent of the proposed trustees was verified in the manner provided by Rules of the Supreme Court, ord. 38, r. 19*a* (December, 1885).

Onslow, for the petition.—It was held in *In re Wilson*, 31 Ch. D. 522, 34 W. R. Dig. 202, a case in Lunacy, that the old practice was to be followed, and that an affidavit was necessary, but ord. 38, r. 19*a*, is applicable where the petition is in the Chancery Division as well as in Lunacy.

Leeke, for the existing trustees.

COTTON, L.J.—The consent is sufficiently verified. The General Orders do not apply to lunacy proceedings, but where the petition is in the Chancery Division as well I think the chancery rule may be followed.

LINDLEY and LOPES, L.JJ., concurred.

Solicitors, *Bell, Stewards, & May.*

Court of Appeal.

From Chan. Div. Nov. 8, 9.

HALL v. EWIN. (*a.*)

Restrictive covenant in lease—Covenant by lessee and his assigns "not to permit or suffer premises to be occupied by any person who shall carry on any offensive trade, &c.—Sub-lessee purchasing with notice—Tenant of sub-lessee in occupation—Sub-lessee not liable—Construction of words "not to suffer" in the covenant.

A lease contained a covenant by the lessee and his assigns "not to use, exercise, or carry on upon the demised premises, or permit or suffer any part thereof to be occupied by any person who shall use, occupy, or carry on therein, any noisome or offensive trade," &c. E. purchased an underlease of the premises, with notice of the covenant in the original lease, and made a further sub-demise, containing a similar covenant, to M. M. after being in occupation some months, began to carry on an offensive business on the premises.

In an action by the original lessor, claiming an injunction against both E. and M.,

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

Held, reversing Kekewich, J., *that no injunction ought to be granted against E., there being no evidence to show that E. had authorized or sanctioned M. to occupy the premises to carry on therein an offensive business; and that E. was not to be compelled by means of an injunction to bring an action of ejectment against M.*

The doctrine of Tulk *v.* Moxhay, 2 *Ph.* 774, *explained.*

Haywood v. Brunswick Building Society, 30 *W. R.* 299, 8 *Q. B. D.* 403, *and* Austerberry *v.* Corporation of Oldham, 33 *W. R.* 807, 29 *Ch. D.* 750, *followed.*

Semble, *that the words "shall not suffer or permit" in a covenant of this kind ought not to be construed as equivalent to "shall hinder and prevent," but rather as "shall not authorize or sanction."*

Appeal from Kekewich, J.

In 1849 the predecessor in title of the plaintiff, W. H. Hall, granted a lease of the premises, No. 339, Edgware-road, for a term of eighty years. The lease contained a restrictive covenant by which the lessee covenanted that he, his heirs, executors, administrators, and assigns "shall not at any time during the term use, exercise, or carry on in or upon the said demised premises, or permit or suffer any part thereof to be occupied by any person or persons who shall use, occupy, or carry on therein, any noisome or offensive trade, business, or employment whatsoever without the consent in writing of the lessor, his heirs or assigns, first had and obtained."

In 1851 the original lessee sub-demised the premises by way of mortgage for the residue of the term of eighty years, less three days.

In 1865 the executors of the mortgagee, in exercise of the power of sale in the mortgage, sold the sub-lease to the present defendant, J. Ewin, who purchased with notice of the restrictive covenant in the original lease.

In October, 1885, Ewin demised the premises to the defendant G. McNeff for a term of twenty-one years, and the demise to McNeff contained a covenant by McNeff with Ewin in terms similar to the restrictive covenant in the original lease.

McNeff entered into possession of the premises, and in February, 1886, he opened an exhibition of wild animals on the premises.

An action was brought by the plaintiff, W. H. Hall, as successor in title of the original lessor, and by one of the tenants of premises adjoining, claiming an injunction against the defendants Ewin and McNeff to restrain the defendants from using or permitting the premises to be used for the purpose of carrying on there an exhibition of wild animals . . . and from using . . . or carrying on upon the premises, or permitting or suffering any part thereof to be occupied by any person or persons who should use . . . or carry on therein, any noisome trade. . . .

The facts of the case with reference to the conduct of the defendant Ewin, as shown by the evidence, were as follows:—The solicitor of the plaintiff Hall, before the issue of the writ, wrote letters to the defendant Ewin complaining of McNeff's user of the premises, and requesting Ewin to stop it. The defendant Ewin was ill at the time and did not answer these letters, but on the 12th of March, some days prior to the issue of the writ, a clerk of Ewin's told the plaintiff's solicitor that Ewin would speak to McNeff about it, and on the 14th of March McNeff wrote a letter to the plaintiff's solicitor in which he said: "Out of respect to my landlord, Mr. Ewin, I have closed the exhibition on these premises." The defendant McNeff did not in fact close the exhibition, and on the 18th of March, 1886, the plaintiffs accordingly issued the writ in the action, claiming an injunction against both McNeff and Ewin.

Kekewich, J., granted an injunction against both the defendants.

The defendant Ewin appealed.

Romer, Q.C., and *Farwell*, for the appellant.—The judge below construed the words "not to suffer" as being tantamount to "hinder or prevent." [LINDLEY, L.J.—Is there not a recent case bearing on the meaning of such words in a covenant of this kind? *Romer, Q.C.*—Perhaps *Attorney-General* v. *Guardians of Dorking*, 30 W. R. 579, 20 Ch. D. 595, is the case you refer to? LINDLEY, L.J.—No, that is not the case.*] Ewin is not liable on the covenant at law or in equity: *Cox* v. *Bishop*, 5 W. R. 437, 8 De G. M. & G. 815. Neither is he liable under the doctrine of *Tulk* v. *Moxhay*, 2 Ph. 774, for that principle is confined to the enforcement, by means of an injunction, of covenants of a negative kind, and is not to be extended so as to compel the doing of something actively—*e.g.*, the taking of an action against another: *Haywood* v. *Brunswick Building Society*, 30 W. R. 299, 8 Q. B. D. 403; *London and South-Western Railway Co.* v. *Gomm*, 30 W. R. 620, 20 Ch. D. 562; *Austerberry* v. *Corporation of Oldham*, 33 W. R. 807, 29 Ch. D. 750. There is no evidence or admission here that Ewin has sanctioned or consented to McNeff's user of the premises as an exhibition for wild animals. The cases of *Parker* v. *Whyte*, 11 W. R. 683, 1 H. & M. 167; *Clements* v. *Welles*, 14 W. R. 187, L. R. 1 Eq. 200; and *Carter* v. *Williams*, 18 W. R. 593, L. R. 9 Eq. 678 are therefore distinguishable.

Nichol v. *Fenning*, 30 W. R. 95, 19 Ch. D. 258, was also referred to.

Warmington, Q.C., and *D. Sturges*, for the respondents.—The defendant Ewin, by "suffering" his tenant McNeff to occupy the premises while carrying on this business, has acted contrary to the covenant of which he had notice, and therefore is liable to be restrained on the principle of *Tulk* v. *Moxhay*, or, if the principle of *Tulk* v. *Moxhay* does not cover this case, Ewin is, at all events, having purchased with notice of the covenant, bound in equity as a covenantor in equity: *Baily* v. *De Crespigny*, 17 W. R. 494, L. R. 4 Q. B. 180. *Austerberry* v. *Corporation of Oldham*, and all the cases of that description, only decide that where a person is in possession of the premises an injunction will not be granted to compel such person to do some collateral act, but only to restrain him from using the premises in any manner contrary to the covenant. But where a person who has notice of a restrictive covenant is not in possession of the premises, but has sub-let them to another who breaks the covenant, the original lessor in an action for injunction against the person in possession is entitled to make the person so sub-letting a defendant also, in order to render him liable for the payment of costs.

Farwell replied on the question of costs only.

COTTON, L.J.—This is an appeal by the defendant Ewin against a judgment of Kekewich, J., granting an injunction against him.

The predecessor in title of the plaintiff Hall granted a lease containing a restrictive covenant, the original lessee mortgaged his interest by way of sub-demise, the mortgagee sold, and the defendant Ewin was the purchaser. Ewin, therefore, was an under-lessee, and, as such, is not at law bound by the covenants in the original lease, there being no privity of estate existing between him and the original lessor. Ewin is not in occupation of the premises, and it is not necessary, therefore, to consider the question as to how far the covenant is one running with the land, at law. Relief, if any, against the defendant Ewin must be, not on any doctrine of common law, but on the equitable principle established in *Tulk* v. *Moxhay*. Now in my opinion it would be an ex-

* *Martin* v. *Spicer*, 34 Ch. D. 1, 35 W. R. Dig. 111, is probably the case the Lord Justice referred to: see p. 11 of the report 34 Ch. D.

tension, and a wrong extension, of the principle of *Tulk* v. *Moxhay* to hold that the defendant Ewin is bound under it. [The Lord Justice here read the words of the restrictive covenant in the original lease, and continued:—] Ewin granted a sub-lease to McNeff with a covenant by McNeff not to exercise or carry on upon the premises any noisome trade, business, or employment without the consent in writing of Ewin first had and obtained. If Ewin had given a licence to McNeff to carry on any noisome trade, &c., the case would be quite different, as then Ewin would have done something active, contrary to the terms of the covenant. But Ewin has done nothing, and can he be said to have broken the covenant by merely standing by and doing nothing?

As I understand the principle of *Tulk* v. *Moxhay*, it is that, where there is a restrictive covenant, though not binding on the defendant at law, if the defendant has purchased with notice of the restrictive covenant, a court of equity will not allow him to use the land in any way inconsistent with the restrictive covenant; but the principle of *Tulk* v. *Moxhay* has never been carried to the length of compelling a defendant to do any act entailing, or which might entail, the expenditure of money. The plaintiff here seeks, not to restrain Ewin from doing anything, but to compel him to bring an action against his sub-tenant, who is in possession of the premises. In my opinion it would be wrong to make Ewin liable for not bringing an action against McNeff. [The Lord Justice here referred to the letters in evidence, and said:—] There is no evidence whatever to show that the defendant Ewin gave any sanction or permission to McNeff to carry on this exhibition; on the contrary, the evidence put in by the plaintiff himself negatives even the idea of any tacit consent.

On the facts proved, therefore, in my opinion it would be wrong to grant any injunction against Ewin.

On the question of costs, I first thought that the fact that Ewin did not reply to the letter of the plaintiff's solicitor might have rendered Ewin liable to pay costs. But the evidence shows that a week before the action was brought the plaintiff's solicitor saw a clerk of Ewin's, who promised that Ewin would send to his tenant and try to get him to stop the nuisance, and the letter of the 15th of March, 1886, written by McNeff to the plaintiff, shows that Ewin requested McNeff to close the exhibition. In my opinion, therefore, Ewin cannot be made to pay the costs.

LINDLEY, L.J.—The evidence shows that McNeff, the person in possession, was using the premises in a way not allowed by the covenant. Now McNeff could not have been sued on the covenant at law, but on the equitable doctrine of *Tulk* v. *Moxhay* he would have been bound and would be restrained from using the property in a manner not in accordance with the covenant. But Ewin was not in possession, and was not using the property in a manner contrary to the covenant. He was in fact, I think, doing what he could to stop this exhibition. The evidence as to the interview of the plaintiff's solicitor with Ewin's clerk on March 12, and the expression contained in McNeff's letter of March 15, shows this. The fact that Ewin was ill at the time is, I think, important, as showing a reason for his not answering the letters of the plaintiff. There is no evidence at all to show that Ewin in fact consented to McNeff's carrying on this exhibition. Now the part of the covenant on which the plaintiffs rely is that the lessee, his executors, administrators, or assigns "shall not . . . permit or suffer any part of the demised premises to be occupied by any person . . . who shall use or carry on therein any noisome or offensive business," and they contend that the defendant Ewin is suffering his under-tenant to occupy the premises and carry on this exhibition. But it is all important to bear in mind that Ewin is not an assign of the original lessee, and is not bound in law by that covenant in the sense that an action for damages could be maintained against him. The plaintiffs therefore must rely only on the doctrine of *Tulk* v. *Moxhay*. This is, therefore, an attempt to extend the principle of that case to a person not in possession of the land at all, and who is not doing any act, but simply abstaining from ejecting his under-tenant. In my opinion, to do so would be to extend the principle to what it ought not to apply to. The principles on which the judges in *Haywood* v. *The Brunswick Building Society* refused to extend the doctrine of *Tulk* v. *Moxhay* so as to compel the person in possession to incur expense apply to this case. I don't think it would be right to grant an injunction against Ewin because he has not brought an action against McNeff—for that is what it comes to. There is nothing to justify us in forcing Ewin to bring such an action.

LOPES, L.J.—An action at law on the covenant is clearly not maintainable here, but the doctrine of *Tulk* v. *Moxhay* is relied on. That doctrine is, that a court of equity will not permit a purchaser of land with notice of a restrictive covenant to use the land in a way prohibited by the terms of the covenant. Now what are the facts here? We must look to the evidence to ascertain them. [The Lord Justice here referred to the evidence and continued:—] If Ewin had let this house with notice of the purposes for which McNeff intended to use it, the case would then be different, and an injunction against Ewin might have been right. But there is no evidence of any sanction or acquiescence by Ewin, and it is quite consistent with all the facts proved that Ewin might have taken measures to prevent the user complained of—short of bringing an action for that purpose—when he became aware of the user. The judge in the court below seems to have construed the words in the covenant "not to suffer" as if they were equivalent to "hinder and forbid." I do not think they bear that construction.

I express no opinion as to how this case would be if Ewin were assignee of the original lease.

Appeal allowed.

Solicitor for the appellant, *J. H. Hortin.*

Solicitors for the respondent, *Aston & Hughes*

From Chan. Div. Aug. 1, 2, 5, 9.

DAVIES BROTHERS & CO. *v.* DAVIES. (*a.*)

Covenant in restraint of trade — Covenant to retire so far as the law allows—Validity—Reasonableness—Vagueness.

A deed executed on the dissolution of a partnership between E. D., E. A. D., and J. D., contained the following covenant by J. D.:—"The said J. D. (1) *to retire wholly and absolutely from the partnership; and,* (2) *so far as the law allows, from the trade or business thereof in all its branches; and* (3) *not to trade, act, or deal in any way so as to either directly or indirectly affect E. D. and E. A. D."*

Held, as to (2) *and* (3), *that they were too vague to be enforced, and were therefore void.*

Held, also, as to (3), *that it was a covenant entered into for the protection of E. D. and E. A. D. personally, and that it therefore did not pass to their assignees with the goodwill of the business.*

Per Cotton, L.J.—*It is still the law that a covenant*

(*a.*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

in general restraint of trade, unlimited both as to time and space, is void.

Per Bowen *and* Fry, L.JJ.—*Whether having regard to altered circumstances which now exist in England the old rule still prevails*, quære.

Decision of Kekewich, J., *reversed.*

Appeal from a decision of Kekewich, J.

The plaintiff E. A. Davies and the defendant, J. Davies, were half brothers, and they had formerly carried on business in partnership with their father, who was since dead, in London and Wolverhampton as galvanizers and galvanized iron manufacturers. The partnership was dissolved, and E. A. Davies and his father purchased the defendant's interest in the business and goodwill thereof, which he assigned to them by a deed dated the 11th of October, 1884.

The deed contained the following covenant by the defendant:—"The said James Davies to retire wholly and absolutely from the partnership, and, so far as the law allows, from the trade or business thereof in all its branches, and not to trade, act, or deal in any way so as either directly or indirectly to affect the said E. Davies (the father) and the said E. A. Davies."

The business was afterwards sold to the plaintiff company.

In 1885 the defendant commenced business in Old-street, London, as galvanized iron merchant and manufacturer, in partnership with one Codner, who had been a traveller for the old firm. This trading was alleged to be a breach of the covenant, and the company and E. A. Davies brought the action to restrain the defendant from so trading.

Kekewich, J., granted an injunction restraining the defendant from carrying on business in Old-street, or otherwise trading, acting, or dealing so as directly or indirectly to affect the company in their business.

From this decision the defendant appealed.

Barber, Q.C., Cock, Q.C., and *Russell Roberts*, for the appellant.—That part of the covenant which provides that the defendant shall retire, "so far as the law allows," from the trade or business of the partnership in all its branches is too vague for the court to enforce, and is therefore void. The latter part of the covenant, in respect of which Kekewich, J., granted the injunction, and which provides that the defendant shall not "trade, act, or deal in any way so as to either directly or indirectly affect the plaintiff and E. Davies, is in unlimited restraint of trade, and is also void. *Further*, this part of the covenant is personal, and did not pass with the goodwill of the business to the plaintiff company.

They referred to Pollock on Contracts, 2nd ed. p. 313, and cases there cited; *Horner* v. *Graves*, 7 Bing. 735; *Wallis* v. *Day*, 2 M. & W. 273; *Hitchcock* v. *Coker*, 6 Ad. & E. 438; *Ward* v. *Byrne*, 5 M. & W. 548; *Whittaker* v. *Howe*, 3 Beav. 333; *Mallan* v. *May*, 11 M. & W. 653, 13 Ib. 511; *Jones* v. *Lees*, 1 H. & N. 189, 4 W. R. C. L. Dig. 214; *Leather Cloth Co.* v. *Lorsont*, 18 W. R. 572, L. R. 9 Eq. 345; *Allsopp* v. *Wheatcroft*, 21 W. R. 103, L. R. 15 Eq. 59; *Collins* v. *Locke*, 28 W. R. 189, 4 App. Cas. 674; *Mitchel* v. *Reynolds*, 1 Sm. L. C. (9th ed.), 430, 1 P. Wms. 181; *Young* v. *Timmins*, 1 Tyr. 226; *Homer* v. *Ashford*, 3 Bing. 328; *Rousillon* v. *Rousillon*, 28 W. R. 623, 14 Ch. D. 351; *Hinde* v. *Gray*, 1 Man. & Gr. 195.

Warmington, Q.C., and *C. Walker*, for the respondents.—The old common law rule that a covenant in general restraint of trade is bad no longer exists, but the test of the validity of such a covenant as the present is whether the restriction is reasonably necessary for the protection of the covenantee.

They referred to Conveyancing Act, 1881, ss. 2 (sub-sections 1, 5), 7; *Egerton* v. *Earl Brownlow*, 4 H. L. Cas. 1238; *Gale* v. *Reed*, 8 East, 80; *Hitchcock* v. *Coker*; *Homer* v. *Ashford*; *Mitchel* v. *Reynolds*; *Whittaker* v. *Howe*; *Harms* v. *Parsons*, 11 W. R. 250, 32 Beav. 328; *Pigot's case*, 11 Co. 27; *Ward* v. *Byrne*; *Tallis* v. *Tallis*, 1 W. R. 114, 1 El. & Bl. 391; *Wallis* v. *Day*. [FRY, L.J., referred to *Elves* v. *Croft*, 10 C. B. 241.]

Cock replied.

Cur. adv. vult.

Aug. 9.—COTTON, L.J. [after stating the facts and reading the covenant, continued:—] There is no difficulty as to the first part of the covenant, that the defendant should retire wholly and absolutely from the partnership; the difficulty arises upon the second and third parts. I will first deal with the second part of the covenant, and I must say that there is an example here which ought not to be followed. Where parties have entered into an agreement to execute a deed to contain certain covenants, they ought certainly to work out their agreement, and not come to the court simply to construe what was intended to be an executory agreement. For what the court is here asked is not to enforce specific performance of an agreement by directing a proper deed to be executed, but as a matter of construction to say what is the proper effect of this covenant. For my part I shall decline, when the matter comes before us in this way, to treat it as executory, and to consider how and in what way the court would direct an agreement with these words in it to be construed. But that is not the ground on which I intend to decide this case. Is this covenant one which the law will allow? That is the point I intend to take, because it was said that this might be a contract to retire from the trade or business in all its branches if and so far as the law allows. In my opinion, if that is the covenant, it is one which the law will not allow, because it is an absolute restraint upon the defendant during his lifetime from anywhere carrying on within England the business in which he was exercised. Kekewich, J., held that, in consequence of the change of circumstances which now exist in England, the old rule which was laid down from very early times, that covenants in restraint of trade are bad, was no longer to be considered as the law of the court, and, after the discussion which has taken place, and with my views of the covenant, we must consider that.

That that was the old law is undoubted, and I think in the Year Books in Henry V.'s reign there is a case which lays down generally that covenants in restraint of trade are bad; that it is contrary to public policy and to the interests of the public that any man should be restrained from carrying on an honest business for the best of his own advantage and for that of the public. That was originally the rule, but undoubtedly, to some extent, it has been modified, and it has been held that partial restraints might be good. Even when that was established, it was first of all said that the court must, when it is asked to enforce such a covenant, see whether the consideration was sufficient. Now that is gone, because, if there is valuable consideration, the court will leave the parties to consider whether that consideration is or is not sufficient. And where there has been a partial restraint only, the court has considered whether it was reasonably necessary for the protection of the covenantee. But has the court gone further than that? It is said there are cases which have laid down that the only thing to be considered in judging whether these covenants can be enforced or not, and whether they are valid or not (for it is not only a question of equity), is whether they are reasonable. Of course, Mr. Warmington contended that all that must be considered as regards the reasonableness was what was reasonably required for the protection of the covenantee. But it is very probable that the first rule which I mentioned, that

absolute covenants in restraint of trade are bad is because they are not reasonable, and in that sense it may be that what we have to consider is whether they are reasonable. But, in my opinion, if we look at the cases on which Mr. Warmington relied, we see this, that, where there has been a limited restraint, and a limited restraint only, the court has considered, with reference to the validity of the covenant, whether, though the restraint is limited, it is reasonable, and, of course, that must be considered, even stating the rule, as I have endeavoured to do—namely, that an absolute restraint is bad, but that a limited restraint may be good, provided it is reasonable only, and such as is required for the protection of the covenantee. If we look at the cases which have been referred to by Mr. Warmington in argument, I think it will be found that they are really cases where the judges, though admitting the general rule, and sometimes doing so expressly, have considered, as regards a partial covenant which was before them, whether the case was one in which the restraint was reasonable.

The first case to which I will refer is *Hitchcock* v. *Coker*. That case got rid of the rule as to inquiry into the sufficiency of the consideration, but in other respects it deals with the question whether, in that case, the particular restraint was reasonable or not. That case, which was decided in 1837, was twice considered, once before the Divisional Court and again in the Exchequer Chamber. There the covenant was of the most limited description, because it purported to restrain the defendant from carrying on his business at Taunton or within three miles thereof. It was most limited as regards space, and therefore the observations of the judges which are relied on must be considered with reference to that covenant, and not generally with reference to covenants which are not so limited. What Tindal, C.J., says is this (at p. 456): "We cannot, therefore, hold the agreement in this case to be void, merely on the ground of the restriction being indefinite as to duration, the same being in other respects a reasonable restriction." That decision, I think, introduced the rule that if a covenant is in any way sufficiently limited either as regards space or as regards time, then it will not be considered as an absolute restraint of trade, but only a limited restraint, and then the question as to whether that limitation is reasonable or not will come into consideration.

To my mind that case showed no departure at all from the old rule, unless it was a departure from the old principle of considering the sufficiency of the consideration. I will not go through all the cases, but afterwards, in 1843, in *Mallan* v. *May*, 11 M. & W., at p. 664, the rule was laid down, as I understand it, most clearly by Parke, B., in these terms (at p. 664): "The rule, as laid down by Lord Macclesfield and Lord Chief Justice Willes, is that total restraints of trade which the law so much favours are absolutely bad, and that all restraints, though only partial, if nothing more appear, are presumed to be bad." That, I think, must be modified to this extent, that the presumption is not to be that such restraints are bad, but it is rather a matter for the court to consider whether, on the facts of the particular cases, they are or are not bad. "But, if the circumstances are set forth, that presumption may be excluded, and the court are to judge of those circumstances and determine whether the contract be valid or not." He then quotes a passage from the judgment in *Mitchel* v. *Reynolds*, and he does that undoubtedly, not as his own opinion, but as the rule that is laid down by earlier judges. He does not in any way deal with it as a rule to be departed from owing to the fact of there having been a very great alteration in the circumstances of the kingdom between the year 1843 and the time when *Mitchel* v. *Reynolds* was decided. Then Parke, B., continues: "Contracts for the partial restraint of trade are upheld, not because they are advantageous to the individual with whom the contract is made, and a sacrifice *pro tanto* of the rights of the community, but because it is for the benefit of the public at large that they should be enforced." And that he was considering when he entered into the question as to whether or not in that particular case the restriction was reasonable or not.

I have omitted to mention several cases in which there have been these considerations, but all of them are cases where there was a partial restraint to be dealt with, and the judges were applying themselves, not to the general rule, but to the general rule as applicable to restraints so limited.

But then it is said that not only are there these expressions of opinion, which, I think, in their application are misunderstood, but that there is authority which now leads to the conclusion that the old rule is gone, and is a thing of the past. Now what are those cases? I will take them in chronological order, because I think that that is probably the best way of dealing with them. *Whittaker* v. *Howe*, before Lord Langdale, was first in date, and undoubtedly that was a strong case, because the covenant there was an absolute one, restraining a solicitor from practising in any part of Great Britain for twenty years. I doubt myself whether the limit of time there being so large the covenant was rightly considered as a limited one. It was, however, so treated by Lord Langdale, and it was therefore open to him to consider whether or not the limit was a reasonable one. He held that it was; but that does not show a departure from the general rule.

The next case is that of *The Leather Cloth Co.* v. *Lorsont*, before James, L.J., when Vice-Chancellor. That undoubtedly was a strong case, having regard only to the expressions used by the learned judge when he decided the case. But, in fact, what really was in contest there was a contract as to the divulging of a trade secret, and the covenant not to carry on the trade was only connected with, and in order to give effect to, the contract not to divulge the trade secret; and although he does make general observations in his judgment, yet, in my opinion, the case must be considered so far as it is a decision only on a contract applicable to a trade secret, and not to a covenant generally in restraint or in prohibition of trade. I find that Wickens, V.C., in *Allsopp* v. *Wheatcroft*, does treat that case before James, V.C., as being a case of a trade secret, and not of an ordinary covenant in restraint of trade, because what he says is this:—"No doubt, in the case of *The Leather Cloth Co.* v. *Lorsont*, James, L.J., then Vice-Chancellor, threw some doubt on the existence of a hard and fast rule which makes a covenant in restraint of trade invalid if unlimited in area; but there were expressions in the instrument in that case limiting the generality of the covenant, and it was in substance a case of a different class from this, since the restriction against trading was only a consequence of a clearly lawful restriction against divulging a trade secret. In this point of view it may probably be thought to bear some analogy to *Wallis* v. *Day*. Assenting, as I do, to everything that was said in *Leather Cloth Co.* v. *Lorsont*, I can hardly treat it as authorizing me to depart from the recognized rule as to limitation of space in a case so different from it as the present is, and, unless that rule be departed from, the covenant here is clearly bad." Wickens, V.C., on whose opinion I lay great store, not only treats this case as I do, but, what is probably more important, he treats the old rule as still subsisting in the year 1872 and as the law of the court. I may observe here with reference to that observation of his that the covenant was limited to the period during which certain patents, the right to obtain which throughout Europe was granted to the plaintiff, were to last, and it may be that it was limited in time, though not in

space, in such a way as to make it a limited and not a general covenant. With great respect to the late James, L.J., if he intended to express his view that the cases authorized him to say that on the ground of policy the old rule had been departed from, he could not, in my opinion, have sufficiently considered to what it was that the observations of the judges relied on by Mr. Warmington were addressed, which were not to the general question whether absolute covenants were good, but to the question whether limited covenants were in the particular cases good, and laying down the rule which ought to be applied to such cases. If, then, Wickens, V.C., was not aware that the old rule had been departed from (as I own I am not), I am confirmed in my opinion by what was said in *Collins* v. *Locke* by Sir Montague Smith when giving the decision of the Privy Council, because what he says (at p. 686) is this: "The numerous cases which have been decided on this subject" (covenants in restraint of trade) "are collected in the notes to *Mitchel* v. *Reynolds* in the 1st vol. of Smith's Leading Cases. It may be gathered from them that agreements in restraint of trade are against public policy and void, unless the restraint they impose is partial only, and they are made on good consideration, and are reasonable." He clearly, therefore, lays down the two requisites which are necessary to the validity of covenants in restraint of trade—viz., that they must not be unlimited, and then, if they are limited, it must be considered whether, even having regard to the limit, they are reasonable. In my opinion that old law, notwithstanding the opinion of Kekewich, J., of the change which has taken place in the country, still ought to be recognized and regarded by us as the law, and ought not to be departed from by us. If it is to be done it must not be by this court but by the House of Lords.

Then, if that be so and the covenant bears the construction which at one time was contended for by Mr. Warmington, in my opinion the covenant is bad, because the law does not allow an absolute covenant to give up trade. I need not go into the reasons why that is so, but there are plenty of reasons for it. No man ought to be prevented during his life from earning his livelihood by carrying on his trade, and the public ought not to be prevented from the benefit which they may get from a man who is skilled in a trade carrying on that trade.

There is one other case—*Rousillon* v. *Rousillon*—which I have omitted to mention, which was decided by Fry, L.J., in which I think, undoubtedly, he used expressions which showed that he took a somewhat wider view than I do of the law. In that case there was a limit of time which might have made the covenant a limited one, and not a general one in absolute restraint of trade, and, if so, it comes within what I think is now the true rule, that where there is a limited covenant you have to consider how far, having regard to the particular circumstances of the case, that limit is a reasonable one. About that case I say no more after what I have said on the cases generally.

Then it is said that it is a covenant "not to carry on trade within such limits of time and space as the law will consider reasonable." Now, construing it in that way, which I hardly think is the right way of construing it, it is a covenant which the court, in my opinion, ought not to enforce. If parties wish to restrain those with whom they are dealing from breaking a limited covenant against carrying on a trade, they must, in my opinion, if they wish the court to assist them, themselves fix the limits within which there is to be no carrying on of the trade, and must do so at their peril. The law will determine whether that limit is a good one or whether it is one which is so unreasonable that the covenant must fail. It is entirely different from the covenant to settle property in a certain line or family "so long as the rules of law and equity will allow." They are certain definite and fixed rules laid down as regards the limitation of property which will prevent it from being so settled as to exceed the limits laid down by the rule against perpetuities. There is no definite fixed rule as to the limits within which trade can be restrained. That must depend upon the circumstances of each case, and in my opinion it is wrong to make a covenant in this form, and wrong for the court to enforce it, because it can be seen at once on the injunction which is granted what difficulties will arise.

Kekewich, J., has said that carrying on business in Old-street, in the City of London, is within a reasonable limit, but he has not defined what else will be so, and are we again and again to have this question arise on the covenant where the parties have sought to get the court, without risking the validity of their covenant, from time to time to say whether a particular space and a particular time is within the limits? Is it a limit of time, is it a limit of space which is here to protect the covenantee? In my opinion, if we look at it in that which is the modified form, the answer to it is this:—"There are no limits fixed by law which can be regarded as introduced into this covenant." A covenant in this form, indefinite as it is, in my opinion is one which neither a court of equity nor a court of law ought to enforce. The parties must make up their minds to say what they agree to as regards limit of time or space within which there is to be no trading.

We now come to the third branch of the covenant on which Kekewich, J., to some extent acted—namely, "not to trade, act, or deal in any way so as to either directly or indirectly affect E. Davies and E. A. Davies." Now Mr. Barber did not argue the point because he thought it was covered by a previous decision of the Court of Appeal, but in my opinion there is one great objection to it, which is that it is a covenant the benefit of which would not pass with the goodwill to the purchasers, the plaintiff company. The case to which he referred was a case where there was a contract not to trade within certain limits. That was evidently a covenant entered into in order to protect the business and the goodwill of it, and therefore it was one which would pass with the goodwill to a purchaser of the goodwill, but there is no such absolute covenant here. To my mind the covenant is one which points rather to the personal benefit of the father and of the half brother than to any protection of the goodwill. So far as the parties intended, the goodwill was defended by the previous covenant in restraint of trade, which in my opinion was an invalid covenant, and this could not have been intended as an addition to that which in their minds was absolutely provided for, but as something which the defendant covenanted for the benefit of his father and his half brother personally, and not that which was to affect the trade which he had parted with to them. In my opinion, having regard to the great indefiniteness of this covenant, and to my opinion that it is not one which the purchasers would be entitled to say passed to them with the goodwill, no relief ought to be granted on that branch of the covenant either. In my opinion, therefore, differing from Kekewich, J., in this, the action fails and ought to be dismissed.

BOWEN, L.J.—We are asked to enforce the covenant, which the Lord Justice has read, which divides itself into three parts. The first part of the covenant provides that James Davies is to retire wholly and absolutely from the partnership; the second, that so far as the law allows he shall retire (I incorporate the words "he shall retire" from the previous section) or shall undertake to retire (because it is immaterial to my argument which it is from the trade or business thereof in all its branches and the third part of the covenant provides that "he is not to trade, act, or deal in any way so as to either

directly or indirectly affect E. Davies or E. A. Davies."

With regard to the first part of the covenant—viz., that he shall retire from the partnership, there is no question but that it is a covenant which might be lawfully made and one that has been performed in the present instance. The difficulty arises with regard to the two further parts of the covenant, which I have endeavoured to divide, and which I will take separately.

First, with regard to the provision that, "so far as the law allows, he shall retire, or undertake to retire, from the trade or business thereof in all its branches." I think that must be equivalent to a covenant either to retire absolutely from the trade, if the law allows such a covenant to be made, or, if not, to retire from the trade so far as the law permits of such an undertaking. If it is to be construed in the first of those two ways—a covenant to retire absolutely from the trade or business—it seems to me to be against the common law, for this reason: the principle of the common law that covenants in restraint of trade which are unlimited altogether, whether in space or time, is that such covenants are void. They cannot be enforced. That was laid down as long ago as the Year Book of 2nd Henry 5, which was followed in the reign of Elizabeth, and which is alluded to in the *Ipswich Tailors' case*, 11 Co. 53a. What the court said in the latter case was, "At the common law no man could be prohibited from working in any lawful trade," for these reasons, that it is contrary to the wish of the law that all should not learn and practice lawful trades and sciences which are profitable to the commonwealth, "and therefore the common law abhors all monopolies which prohibit any from working in any lawful trade." Then the court proceed to consider the case in 2nd Henry 5, and they say that, "for the same reason, if a husbandman is bound that he shall not sow his land, the bond is against the common law," and the statute of 5 Eliz. c. 4, which prohibits every person from using or exercising crafts or occupations until they have been apprentices was enacted with intent of encouraging education in trade. "Thereby," said the court, "it appears that, without an Act of Parliament, none can be in any manner restrained from working in any lawful trade." That language must, of course, be taken with reference to the subject-matter of the case, but still I use it as showing that, broadly, the law sets its face, subject to exceptions which I shall have to consider, against restraints of trade. That is laid down in *Mitchel* v. *Reynolds*, a case which may be said to be the foundation of the recent decisions upon the point.

Now there may be limitations to be found in the covenants on the strength of which it is endeavoured to escape from this general doctrine. There may be such a limitation in respect of time, and the view taken by the court has been that a limit in respect of time is not indispensable in order to enable the covenant to be enforced where there is some other limit to be found which makes the covenant reasonable and necessary for the protection of the party who seeks to protect himself. These cases I need not discuss further. Then we come to another limitation which may be found— a limitation in respect of space, and as yet I think that there has been no decision that you may have a covenant altogether unlimited in respect of space, unless in the case of special limitations, which form the third class of limitations—the limitation which is to be found in the special case in the special character of the subject-matter which is sought to be protected. The last or third kind of limitation is a kind of limitation which I think James, V.C., thought he had found in the case of the *Leather Cloth Co.* v. *Lorsont*, though in that case also, as the Lord Justice has pointed out, there may also have been found a limitation in respect of time.

We have been asked by Mr. Warmington, in an extremely able argument, first of all to hold that a limitation in respect of space is not necessary if you can find that protection through the unlimited area of space is reasonably necessary for the protection of the covenantee. But Mr. Warmington has not confined himself to that minor proposition, he has gone further, and has asked us to consider generally whether the state of circumstances—the change in the character of the business of the world, the extension of the means of intercourse between one part of the kingdom and another and one part of the world and another—has not shaken to its core the original doctrine that covenants unlimited altogether ought not to be enforced. It appears to me that if there were to be any change made in the principle of the common law to which I have alluded and which has remained unassailable for centuries, it would better come from the House of Lords than from ourselves. But if there was to be an exception engrafted on the rule, or the rule was to be modified with reference to the requirements of modern society, as to which I will for a moment express no opinion, it could only be if the case in question ranged itself under one of these two heads, either that the covenant in its unrestricted form was one which was a benefit to the public, in which case it might be said that that would destroy the reason for insisting on the old rule which was derived from the public policy of the kingdom; or, secondly, if it was reasonably necessary for the protection of the covenantee. In the present case it seems to me that we have got no material upon which we can, without keeping in the dark, assume that the present covenant is a benefit to the public, for there is nothing to my mind which shows that the public would be benefited by allowing such a covenant as the one in this case to be enforced, nor have we the materials for deciding that such a covenant is reasonably necessary even for the protection of the covenantee. It appears, therefore, to me that it is not necessary in the present case to consider or to decide whether what I have called the old doctrine of the common law, that covenants absolutely unlimited both in respect of space and in respect of time, ought to be modified, having regard to the altered character of the commercial intercourse of the world. We ought to leave that to be discussed on another occasion when the facts really raise the point. For the same reason it appears to me that we are not bound in the present instance to decide even that an absence of limitation in respect of space may be excused or may be excepted if it is reasonably necessary for the protection of the covenantee, because there is nothing here which shows that it was reasonably necessary for the protection of the covenantee. For that reason, without denying that I have an inclination to think that the rule of the common law is too much engrained in its history to be changed at this moment at all events, except by the highest court in this country, I do not decide it, because it seems to me the materials do not enable us to do so. If, therefore, the part of the covenant which I am now discussing, which is that James Davies is to retire as far as the law allows from the trade or business in all its branches, is to be interpreted as being an absolute covenant, and we are asked to hold that the law will allow in such a case such a covenant to be made, I say there are no sort of materials upon which we could attempt to apply the modification of the general principle which Mr. Warmington asks us to accept of the old rule of the common law.

But, then, if we are to read, on the other hand, this branch of the covenant as something short of that, if it only means that the covenant in restraint of trade is not to be unlimited, but that the limit is to be found by an appeal to the law, then it seems to me that the obvious answer is that it is too vague for us to deal with. I think myself that it would have been too vague even if

it had remained in the nature of an executory contract to execute a deed in that shape. The parties would still be asking the law to do for them what they had not made up their minds about themselves; they would, in fact, be asking the law to make a contract for them instead of making it for themselves. But, in any view, it seems to me that this covenant is too vague. This is a covenant, it is said, that Davies will retire as far as the law allows, and that we are to ask the law what is to be the restraint imposed upon the generality of the covenant. The law is absolutely incapable of answering a question so put. It is perfectly true that in many contracts where you want a measure to be applied to a particular subject-matter, you leave the measure to be applied by reason. There are many contracts, for example, which, instead of fixing the regular time for payment, provide that the time shall be fixed by what is reasonable in the trade or in the business. In those cases you introduce the consideration of what measure reason will apply, because the measure which reason will apply tends towards certainty, and, therefore, enables you to make up for the absence of distinction on the part of the contract by reference to a standard—the standard of reason which the parties had in their minds though they did not express it on paper—and you therefore say that that is certain which can be made certain, but that is where the introduction of the measure of reason tends to certainty. In the present case, what we are in search of is some definition which would limit what otherwise is a pure negative. In such a case as that you cannot ask reason to put a limit on a mere negative. You cannot get a measure out of it at all, and whatever reason says about it you remain still in want of the definition which is necessary to make the covenant a restricted one. The most obvious proof of the truth of that proposition is to recall to one's mind this, that, assuming the law will allow certain restrictions, there may be twenty different restrictions—all of which might serve the purpose of the parties, all of which would be absolutely inconsistent with each other, all of which the law would allow. How are we to know which of those particular restrictions the parties intended to impose. They leave it absolutely uncertain, and for the best of all reasons, because they have not made up their minds. Therefore, to ask us to apply reason at this particular point is to ask us to condescend upon some one of the twenty possible alternatives, though the parties themselves could not make up their minds which one they would take. A contract to do nothing that is unreasonable contains in itself no limitation, because there may be a hundred different reasonable courses all of which are inconsistent with one another. Suppose for a moment we take an illustration which was dealt with in the course of the argument: the law of England allows a man to contract for his labour, or allows him to place himself in the service of a master, but it does not allow him to attach to his contract any servible incidents, any elements of servitude as distinguished from service. In what sort of a position would a contracting party place the court who made this sort of contract for himself:—"I will undertake to serve you in every possible way which the law does not consider repugnant to the doctrine that servible incidents are not to be imposed upon a party." That is too vague. It gives you no sort of measure of service. In the same way, contracts in restraint of marriage are void except in certain specified cases, where, for instance, a definite period is imposed for the sake of the health of one of the parties. How could a man contract that he would never marry, subject, always, to such limitations as the law imposed? It would leave the contract absolutely vague. You would not know what he meant. For the same reason, if you read this contract in the secondary sense as an attempt to make a contract in partial restraint of trade, the answer is, We do not know what the parties mean. On that ground it seems to me that that part of the contract cannot be enforced.

Then we come, lastly, to the third branch of the covenant, that James Davies is "not to trade, act, or deal in any way so as to either directly or indirectly affect," whom? E. Davies and E. A. Davies. I doubt myself whether that contract is not an absolutely unrestricted covenant in restraint of trade in one view put upon it, and, if so, I think it is bad for the same reason as I said before with regard to the earlier branch of the covenant. But to read it in a less offensive or less rigid way, suppose it to be, "not to trade, act, or deal in any way so as to affect E. Davies and the plaintiff E. A. Davies in their business," it is a covenant that seems to me to be personal to E. Davies and E. A. Davies, and cannot be assigned. It is perfectly true that there is a class of covenants in restraint of trade which would affect established businesses which can be assigned. For instance, a covenant not to carry on business in a particular street or in a particular town. That may pass by assignment to the assignee of the business; but if the contract, on its true construction, is a personal one, it cannot be assigned. The rule of law is plain. You cannot assign the benefit of covenants which are purely personal. I think this is a purely personal covenant, that it cannot therefore be assigned, and cannot be enforced by the present applicants.

On these grounds it seems to me, with regret, that we must differ from Kekewich, J. As I said before, as far as I am concerned, I leave undiscussed and unsettled the great question as to how far modern changes in commerce affect the old doctrine of common law.

FRY, L.J.—In this case we are called upon to enforce, by way of injunction and by assessment of damages, a covenant contained in an executed contract. We have not before us an agreement which is intended to be afterwards developed into a deed, but we have a solemn and formal deed executed between the parties which contains this covenant. We are told (and I have no doubt with perfect truth) that the history of it is this. That the very formal covenant which we have to construe was part of an earlier executory and informal contract, and that the parties to it, not being able to develop that contract satisfactorily between themselves, inserted in the formal instrument the very words they had used in the informal one. That does not enable us to construe the covenant in any different manner from what we should if the contract was throughout a formal and an executed contract.

Now the covenant consists of three parts. It is, first, that J. Davies is to retire wholly and absolutely from the partnership. With regard to that no question arises. Secondly, J. Davies is to retire (for thus I read it), so far as the law allows, from the trade or business thereof (that is the partnership) in all its branches; and, thirdly, J. Davies is not to trade, act, or deal in any way so as to either directly or indirectly affect E. Davies or E. A. Davies. I deal first with the second branch of that covenant, that J. Davies will, so far as the law allows, retire from the trade and business of the partnership in all its branches. I think that covenant is too vague to be enforced. I think the object of the contracting parties was to leave the law to make the contract between them. I think that it is the function of the courts of law to interpret contracts; to say whether a contract is or is not reasonable; to say whether it is or is not void; but that it is not the duty of the courts to make contracts between parties. Whether these words would be capable of development if the court had directed an instrument to be executed to carry them into effect is a point upon which I need not express any concluded opinion. I entertain the greatest doubt whether the court could be called upon to interpret

such words. The reason why I come to that conclusion is this, that whatever else may be in doubt about contracts in restraint of trade, this is plain and undisputed, that no contract in restraint of trade which is unreasonable—which is larger than is necessary to protect the interest of contracting parties—is good.

It appears to me that there may be a hundred forms of contract, each of which might be reasonable, and might therefore be good, but that the law cannot select which of those hundred forms is to be the contract between the parties. Let me assume for one moment (as is probably the case) that it is necessary, in order to make the contract reasonable, that there should be some limitation in respect of space. Is Wales to be left out, or the Eastern counties, or the Southern counties, or the Northern counties? No human being can tell. That is a matter which ought to have been settled between the contracting parties. Similarly, if a limitation in respect of time be necessary in order to make the contract reasonable, the court cannot lay down what length of time is requisite and what length of time is reasonable. When the parties to the contract have settled all those matters between themselves, then the court can attend to the suggestions of those who say that, looking at all the particulars of the contract, the contract is or is not unreasonable. I repeat that the substance of this document seems to me to throw upon the court the making of the contract between the parties. For that reason I think it is too vague to be enforced.

I have come to the conclusion which I have stated without reference to the larger question which has been so much debated in the course of this argument, and in my judgment it does not require adjudication from us on the present occasion. It is therefore probably safer that I should only say that I am not expressing any opinion upon it. I think, however, that it is not unreasonable that I should add that the inclination of my mind is still in the direction in which it was when I decided the case of *Rousillon* v. *Rousillon*. I think that the law with regard to public policy is one of a very different description from the law which is laid down in absolute terms for all times. It would be strange, and I think it would be unreasonable, if a contract which might now be for the public benefit were held to be void because in the reign of Henry 5 or in the reign of Elizabeth that contract was contrary to public policy. It is impossible to look at the history of the law and not to see that contracts which at one time were deemed—and I dare say justly deemed—to be contrary to public policy, at another time are deemed to be consistent with public policy and for the public benefit. A forcible illustration of that fact is furnished by the very case which is the foundation of this branch of the law, the case in the 2nd Henry 5 which excited the indignation of Hull, J., in a manner which has made his name immortal in the books. As was pointed out by Lord St. Leonards in *Egerton* v. *Earl Brownlow*, the general principle that a contract which is unreasonable in restraint of trade is void is still the law, but the particular conclusion at which he arrived, that that contract is against public policy, is entirely at variance with modern decisions. What Lord St. Leonards said was this: "Angry as the learned judge was at that infraction of the law, what has been the result of that very rule without any statute intervening? That the common law, as it is called, has adapted itself upon grounds of public policy to a totally different and limited rule that would guide us at this day, and the condition which was then so strongly denounced is just as good a condition now as any that was ever inserted in a contract, because a partial restraint created in that way with a particular object is now perfectly legal. Without any exclamation of the judge, and without any danger of prison, any subject of this realm may sue upon such a condition as Hull, J., was so very indignant at in that particular case." The same observation applies to the case of *Mitchel* v. *Reynolds* with more or less force, because, although that case is certainly perfectly sound as regards its great principle, that contracts in restraint of trade which are unnecessarily large are void, yet there can be no doubt that that decision has been more or less affected by the course of the law since. That case seems to have decided that the adequacy of the consideration was a matter to be investigated by the court. The courts have since repudiated their capacity to investigate that adequacy of consideration. The law as laid down in that case created a presumption of invalidity as against the contract. That burden of proof has since been shifted, as soon as it has been shown that the contract has been entered into for the protection of the interest of one of the contracting parties, and therefore I repeat, although that case in its broad features is still undoubtedly the law, the law has grown since that case. I may be wrong, but it appears to me that the ground on which in that case it was said that the condition must be partial in point of space was clearly this. The learned judge said:—"It can never be useful to any man to restrain another from trading in all places, though it may be to restrain him from trading in some, unless he intends a monopoly, which is a crime." The judge who decided that case seems, therefore, to have thought that a total restraint could never be necessary for the protection of the parties. If he was wrong in that assumption it would be a matter for future inquiry how far the limit which he created or imposed on that ground is or is not binding on the courts at the present day.

I desire not to decide that point, but to say that I think the inquiry is still one which is open and worthy of great consideration whenever it shall come up for decision before the courts. What I mean to indicate is this, that I am not convinced that there is any other rule of limitation except that the contract shall not be unreasonably large. If it be more than reasonably large then it tends to a monopoly without any corresponding good to the parties. If, on the other hand, it is not larger than is reasonable, then it still seems to me that it would be remarkable that something else should be imposed on the contract so that the contract would be required to be not only reasonable but something else. I rather incline to think that a reasonable contract ought to be enforced.

Then, leaving those observations—which, after all, are only by the way in my decision—I come to the last branch of the contract, which is, that J. Davies is "not to trade, act, or deal in any way so as to either directly or indirectly affect E. Davies and E. A. Davies." In order to construe these words we must have regard to the position of things between the contracting parties. J. Davies was a son by the first Mrs. E. Davies; E. Davies was carrying on the business with his younger son E. A. Davies. The assignment of the goodwill had (as was pointed out by Mr. Warmington) an implied contract for quiet enjoyment of the goodwill. We have, therefore, before we arrive at this covenant, a covenant for the quiet enjoyment of the goodwill, a covenant to retire from the business, a covenant to retire from every branch of the same business which the partnership carried on. Now, the covenant for quiet enjoyment has not been sued upon. Therefore, we have not to consider it, except for the purpose of construction, but I am bound to give this last covenant some real meaning in addition to all the previous covenants. I think, therefore, that it is something more than retiring from the business of the partnership, and not carrying on any branches of the same business. I think that, popularly speaking, it means this, that as long as the father and the half-brother are connected together J. Davies will not, in any way, annoy or interfere with them, but I think that is a contract not relating to business only, but re-

ting to the two Davies so long as they have any common interest. I think it is therefore one which does not pass with the business, and which cannot be broken after the death of E. Davies.

But, further than that, I desire to say that the contract appears to me to be couched in such vague terms and doubtful words that I think it can be enforced neither at law nor in equity. Mr. Warmington, who undoubtedly felt the difficulty in the way, asked us to separate the words "directly or indirectly," and to hold, if the covenant could not be enforced with regard to its indirect affection with the Davies, that it might with regard to its direct affection. But that construction is not open in this case, because the words "either directly or indirectly" are only an amplification or explanation of the affirmative words "in any way." Therefore we have a contract not to trade in any way to affect the two Davies, not to act in any way to affect them, not to deal in any way to affect them. I think that no such vague and general covenant, which is not even in terms confined to injurious affection, could be enforced. As I have already said and think, it is a personal contract with the two Davies, and that after the death of the one it cannot be broken, and that it did not pass by the assignment of goodwill to the company.

For these reasons I am unable to concur in the conclusion arrived at by Kekewich, J., and I think that this action ought to have been dismissed, with costs, and must now be dismissed, with costs, here and in the court below.

COTTON, L.J.—As Fry, L.J., misunderstood me I think I had better state (what I thought I had done) that my first ground for deciding that the previous clause of this covenant is bad is that it is in restraint of trade generally, which, in my opinion, the law holds to be bad. The law does not allow that, and, therefore, it is not covered by that expression "so far as the law allows."

Appeal allowed.

Solicitors for the appellant, *Brooks, Jenkins, & Co.*

Solicitor for the respondents, *R. Chapman.*

From Q. B. Div. [and Grove & Denman, JJ.] } May 25, 26, 27; Aug. 5, 6.

TUCK *v.* PRIESTER. (*a.*)

Copyright—Picture—Common law right—Copyright Act, 1862 (25 *&* 26 *Vict. c.* 68). *ss.* 1, 4, 6, 11—*Copies made before registration and sold after.*

The defendant, at the request of the plaintiffs, executed numerous copies abroad of a picture, the property of the plaintiffs, before registration of the copyright. Some of the copies were sent to the defendant's agents in England before, and sold by them after, registration of the copyright.

Held, by Grove *and* Denman, JJ., *that the plaintiffs could not recover against the defendant for an infringement of their copyright either under* 25 *&* 26 *Vict. c.* 68 *or otherwise.*

Held, by the Court of Appeal, *that the plaintiffs were entitled to an injunction and damages for breach of contract; and* (dissentiente Lopes, L.J.) *to an injunction, damages, and an order for delivery of pirated copies; but that they were not entitled to penalties.*

(*a.*) Reported by A. H. TODD and SPENCER L. HOLLAND, Esqs., Barristers-at-Law.

The action was brought by Messrs. Raphael Tuck & Sons for infringement of their copyright in a picture called "Sounding the Charge."

The plaintiffs, at the time of the action, were the registered proprietors of the copyright in this picture, and had, before the registration, employed the defendant, a printer at Berlin, to produce copies of the work. Some of these copies were sent by the defendant to his agents in England before, and sold by them to various persons after, the registration by the plaintiffs of their copyright. The plaintiffs' claim was for penalties under the 6th section of the Copyright Act, 1862, and for damages under the 11th section.

The jury found a verdict for £100 damages and £175 penalties, and Day, J., entered judgment for the plaintiffs for the damages only, as he considered that the defendant had not sold the copies knowing them to have been unlawfully made within the meaning of section 6 of the Act.

The plaintiffs had a cross-motion that judgment might be entered for them on the question of penalties also.

R. T. Reid, Q.C., and *Kisch,* for the defendant.—These copies were executed before registration. The registered proprietor of a copyright obtains protection from that time. There is no copyright at common law which could enable the plaintiffs to recover for acts done by the defendant before registration. The statement of claim is framed solely with regard to the statutory right.

Sir E. Clarke, S.G., Cock, Q.C., and *McCall,* for the plaintiffs.—The recital in the Copyright Act, 1862, is not true, and the statute itself elsewhere admits it. For instance, in sections 6 and 11, where the words are, "in which there shall be a subsisting copyright." In section 6 there are two correlative expressions on which this action is based—viz., "subsisting copyright" and "unlawfully made." There was an unlawful making by the defendant in this case—that is to say, a making without the consent of the plaintiffs. That there was a subsisting copyright before publication the case of *Turner* v. *Robinson,* 10 Ir. Ch. Rep. 510, shows: *Miller* v. *Taylor,* 4 Burr. 2303; *Donaldson* v. *Beckett,* 4 Burr. 2408. That view has been adopted in Scrutton on the Law of Copyright, p. 100. There is no distinction in this respect between literary and artistic works: *Prince Albert* v. *Strange,* 2 De G. & Sm. 652; and the judgment of Lord St. Leonards in *Jefferys* v. *Boosey,* 4 H. L. Cas. 815, 3 W. R. Dig. 155, and the language of section 4 of the Act. See also *Hole* v. *Bradbury,* 28 W. R. 39, 12 Ch. D. 886. The right to delivery up of copies made without the consent of the author existed before the Act; *Prince Albert* v. *Strange; Mayall* v. *Higby,* 10 W. R. 631; *Turner* v. *Robinson; Murray* v. *Heath,* 1 B. & Ad. 804. Day, J., ought to have entered judgment for the plaintiffs on both the claims. The defendant had to make a definite number of copies, and he made more than were sufficient to satisfy the order, and sold the surplus.

R. T. Reid, Q.C., in reply.—I admit that there is a common law right as to literary and artistic work to this extent, that a man may prevent his property from being interfered with, as in *Prince Albert* v. *Strange.* In *Jefferys* v. *Boosey* the judges point out that this is very different from copyright proper. Here there is no proof that the multiplication and sale by the defendant took place before publication by the plaintiffs.

Cur. adv. vult.

May 27.—GROVE, J.—This was an action for penalties and damages brought for the infringement of copyright in certain engravings. The plaintiffs were possessed of a design or picture called "Sounding the Charge," and asked the defendant to print off certain copies, which

the defendant did, and sent them to England before the registration required by 25 & 26 Vict. c. 68. After the registration certain of the copies so sent to England were sold by the defendant, which is the alleged infringement. The action was tried before Day, J.; the jury found a verdict for the plaintiffs for £175 penalties and £100 damages. We have to decide whether Day, J., was right in entering judgment for the plaintiffs on that verdict for £100 damages.

The Act which regulates the matter is 25 & 26 Vict. c. 68. The preamble to that Act is as follows:—"Whereas by law as now established the authors of paintings, drawings, and photographs have no copyright in such their works, and it is expedient that the law in that respect should be amended."

It was contended by the Solicitor-General that that preamble is wrong in fact, and that there is a copyright at common law, and that the designer of works of art had a right in them combined with certain prohibitory powers. Substantially the whole of the argument turned on the meaning of the word "copyright," and the question whether the copyright dealt with in the Act included copyright at common law, or whether the word in the Act refers only to the copyright given by the Act. Day, J., entered judgment for the defendant on the question of the penalties because he considered that, under the terms of section 6 of the Copyright Act, the defendant was not liable, as there was no evidence that he knew that these copies had been unlawfully made; but as the words "knowing them to have been unlawfully made" do not occur in section 11 of the Act, Day, J., thought that the plaintiffs could recover damages, which were assessed by the jury at £100.

After hearing the arguments we think that the defendant is entitled to judgment on both grounds. It was ably contended by the Solicitor-General that this Act included in its provisions a copyright at common law—namely, a right in the proprietor of anything capable of copyright to prohibit his property being made use of for publication. I think that the term as used in the Act simply applies to the statutory copyright—*i.e.*, copyright after publication. It is a privileged monopoly given by the statute to enable persons to sell their own drawings, &c., made by their own skill; and I think that "copyright" is confined to that, and not extended to any common law right. The term has, no doubt, been applied to that right, but I think it did not exist in the early times when the common law grew into existence. That view of the application of the term has been taken by many learned judges. Supposing that the word copyright in the statute merely refers to the right conferred by the Act and not to the common law right, there would be no misrecital. It seems to me that the statute would be inconsistent if construed otherwise. The question was largely discussed in *Jefferys* v. *Boosey*, the marginal note to which sets out the result of the judgments to be that copyright is the creature of statute. That is the view I have always held. Lords Brougham, Cranworth, and St. Leonards use the term copyright as a right in published works, and do not apply it to unpublished matter, a right to prevent the pirating of which existed at common law. The learned judges who gave their opinion on the case explain the difference which had existed in the use of the word. Erle, J., says:—"The nature of the rights of an author in his works is analogous to the rights of ownership in other personal property, and is far more extensive than the control of copying after publication in print, which is the limited meaning of copyright in its common acceptation."

The definition of Parke, B., is in accordance with this; and Jervis, C.J., says:—"Copyright here means the exclusive right of multiplying copies, which right does not attach to personal chattels." The Lord Chief Justice further says that copyright in the sense of the right to the individual copy has no application to the subject under discussion. The judgments of the law lords are to the same effect—viz., that copyright is the creature of the statute; that there is no copyright at common law after publication; and that this common law right is a species of private property, and not like the statutory monopoly. That seems to me to show that the statute was intended to apply exclusively to the copyright given by it.

With regard to the 6th section of the Act, which says: [his lordship read the section]. The Solicitor-General urged that the term "subsisting copyright" in this and the 11th section applies to the common law right, and that, therefore, the plaintiffs were entitled to an exclusive right of multiplying the drawing, though they had not registered it. At the common law monopoly was given by the Crown, and, no doubt, wrongly given, as the statute of James declares, but no monopoly existed apart from the grant of the Crown.

The preamble proves what was meant by the framers of the Act; they considered that authors, painters, and designers had at that time no copyright such as the Act proceeded to confer. Again, section 2 says, "Nothing herein contained shall prejudice the right of any person to copy or use any work in which there shall be no copyright," but there ought to be copyright in everything if the Solicitor-General's argument is right. Section 4 must be the main guide to our decision in this case. It is there enacted for the first time that a register of proprietors should be kept, the object being that there should be a record open to the public in which persons claiming to be the owners of copyright in artistic productions should be enumerated. There has been much criticism expended on the words "such copyright" in this section, and it has been contended that they cannot apply to the copyright conferred by the Act. No doubt there is much difficulty in construing them, but that I think arose from the way the Act was framed; it is an Act not very carefully worded. But the section says that no action shall be maintained nor penalties recovered in respect of anything done before registration. Now what was done in this case? The copies in question were made and imported into England before registration. Therefore, if this action was maintainable the statute must be read so as to affect something that was lawfully done before registration. If a person was allowed to delay registration for a considerable time and allow the public to get possession of the article intended to be afterwards registered, and invest money in dealing with it, and then by registering the article prohibit the public from dealing with the article, the result would be most unsatisfactory. I certainly do not think the Act can be read in that manner. In my opinion the Act only makes unlawful anything done after registration, and I think, further, that a sale, to be unlawful within the meaning of the Act, must be a sale of works of art unlawfully made or obtained within the meaning of the Act. These copies of the plaintiffs' picture were not unlawfully made, because at the time the defendant made them there had been no registration of the principal picture. I admit that there seems to have been a breach of faith on the part of the defendant, but I must construe the Act with regard to the conduct of others who may act in all good faith. I think the defendant is entitled to judgment.

DENMAN, J.—GROVE, J., has dealt so fully with the questions raised by this case that it is only necessary for me to add a few words. I agree that judgment should be entered for the defendants, for I am clearly of opinion that this action is founded solely on the statute. The statement of claim states that the defendant, without the consent of the plaintiffs, as such registered proprietors, reproduced and sold copies of this picture, but I do not think that it was proved that, after the time at

which the plaintiffs had become the registered proprietors of the copyright, there was any copy made or any multiplication for sale took place. It seems to me that the 4th section of the Act, when properly construed, is clearly against the right claimed for the author or proprietor of a painting to say that, though he has not been registered until after the making of copies, he has the right to sue for penalties and damages in respect of a sale of copies made before registration. That contention would violate the last part of the section. It seems to me that by suing after registration in respect of acts done before registration such author or proprietor would obtain without registration all the benefits that the Act confers after and in consequence of registration.

Aug. 5.—The plaintiffs appealed.

Sir E. Clarke, S.G., and *T. E. Scrutton* (*McCall* with them), for the appellants.—The damages recoverable under section 11 of the Act apply to both the proprietary rights and statutory rights of the copyright holders. The fact of registration after the production of the article, the subject of copyright does not affect this right to sue, because the statute gives them proprietary rights before registration. That is only the condition precedent to the form of remedy. An assignment of copyright before registration has been held good, and the Copyright (Books) Act, 1842 (5 & 6 Vict. c. 45), has been held to give a general copyright apart from the special remedies: *Ex parte Walker, In re Graves*, 17 W. R. 1018, L. R. 4 Q. B. 715, and *Novello* v. *Ludlow*, 12 C. B. 177.

Reid, Q.C., and *H. Kisch*, for the respondent.—The plaintiffs lost their proprietary right by what amounted to publication before registration. There was no express contract to bind the defendant not to publish copies on his own account. The plaintiffs seek to recover penalties under section 4, which they are not entitled to previous to registration: *Ex parte Beal*, 16 W. R. 852, L. R. 3 Q. B. 387.

Lord ESHER, M.R.—In this case there was a contract in writing between the plaintiffs and the defendant, and in my opinion it is clearly implied from it that the defendant was to make the copies of the picture for the plaintiffs, to return the picture to them, and not to make any copies for himself or for anyone else. The defendant committed a breach of this obligation, and is entitled in equity to an injunction and to damages. The plaintiffs are thus entitled to judgment independently of the statute. As to the Copyright Act, 1862, section 1 standing alone gave a copyright the moment the picture was painted, and would give a right to sue for breach of that copyright. The next two sections support that view, and then we come to section 4. By that section it is provided that a register of copyrights shall be kept, and that no proprietor of any copyright shall be entitled to the benefit of the Act until registration. The statute, after conferring the benefit, bridles the proprietor with this, that he shall not reap the benefit until registered. But directly he is registered he may take the benefit. He might have brought an action or recovered penalties even in respect of acts already done if the section had stopped there; but it proceeds, "and no action shall be sustainable, nor any penalty be recoverable, in respect of anything done before registration." Even after registration, although there is a right to bring an action and recover penalties, that does not extend to damages or penalties for acts done previously to the registration. As to section 6 it does not deal with the right to sue. By "subsisting" copyright it means copyright that is not lost. If the author has sold the work and retained the copyright it is subsisting in him, but if he has sold the copyright it subsists in someone else. The section proceeds to enact that if such person import or sell any copy made without the consent of the proprietor, such proprietor may recover damages and enforce the delivery of unlawful copies, or obtain damages for the retention of them. May any person sell after registration a copy made without the proprietor's consent before registration? What is the breach? If it is making the copy he cannot sue for it. But the section says "or" sell, not "and." He has sold after registration copies made without consent. He has sold copies in which there was a copyright when he produced them, and he did not obtain consent to their production or sale. It is true that there was a defect in the remedies of the proprietor when he produced them; but it was wrong in him to make them. Therefore the plaintiffs may recover damages for the sale, and have delivery of "unlawful copies." That phrase is not well considered, but it means copies wrongfully made—that is equivalent to being made without the necessary consent. Having section 1 in view it appears that he has really pirated the copyright before the registration. He cannot be sued for it then, but if he goes on, by selling, publishing, letting for hire, or doing any one of the things mentioned after registration, he can be sued, except that damages for any act done before registration cannot be recovered.

The plaintiffs, therefore, are entitled to damages and an injunction; are they also entitled to penalties? We must look at the Act with different eyes in so far as it imposes penalties. If section 6 is capable of the milder construction we must adopt that, and there is some doubt whether, when a copy is made, not in England, but in a foreign country, it can be said to be unlawfully made. In the country in which they were made the making of them was not unlawful, and it would seem that making abroad and importing to and selling in England is not meant to be penal. The words in section 6 are different from those in section 11, from which the qualification, "knowing that they are unlawfully made," is omitted. The words of section 6 are capable of the more lenient construction, and it is safer to say that in this case there can be no penalty. Damages and an injunction are, therefore, the proper relief, and the order of the Divisional Court will be altered accordingly.

LINDLEY, L.J.—Whether the plaintiffs had a copyright or not, the defendant, in my opinion, did that which exposed him to an injunction. The employment which he undertook carried with it that he should not produce copies to sell to others, and to do so was a gross breach of faith and confidence. In *Morrison* v. *Moat*, 9 Hare, 241, 21 L. J. Ch. 248 (on appeal), where the defendant had been intrusted with a secret in the course of his employment by the plaintiff, it was held that he could be enjoined from divulging it, and Turner, V.C., said that it did not follow that, because there was no patent, there might not be a breach of contract entitling to an injunction. That carries the right to an injunction beyond controversy, but the case was fought out before Day, J., on different lines, and the equitable view was lost sight of. The statute with which we have to do is one of a group of statutes dealing with copyright in literature, the drama, designs, and music, of which the statutes dealing with patents and trade-marks form another group. Copyright is the exclusive right to multiply, and in my view the preamble, which recites that the authors of paintings, drawings, and photographs had no copyright before, is correct. What is called copyright at common law is an incident of property, as appears from the decision in the House of Lords of *Jefferys* v. *Boosey*. We find the right created and defined by statute. It is made personal estate and assignable. Subject to section 4, it

is plain that under the first three sections the right of exclusive publication is capable of assignment before registration. This is nothing new, as it is recognized in *Ex parte Walker, In re Graves*. There were two assignments in that case, and each assignor had acquired copyright capable of assignment before registration. Apart from section 4 they had the full right of property conferred by the Act. Under that section registration is the foundation of the remedy. The word "benefit" is ambiguous. One construction is, that benefit includes copyright; but the result of this would be that when you cannot have copyright unless you register, you have no copyright to register. It must be remembered that in 1862 suits in equity were not called "actions" to which the second clause applies, so that the word "benefit" would prevent resort to equity as well, before registration. Looking, not at this Act alone, but at the Literary Copyright Act, it seems plain that there is a copyright before registration. There was, therefore, a copyright vested in the plaintiffs, but it was confined to this country. There was nothing unlawful in copying their picture in Germany. They had no rights abroad. The right to damages conferred by section 11 extends, in my opinion, to the sale after registration of copies made before, and the case is brought literally within that section. As to the penalties, I should consider that "unlawful" in section 6 means without consent, but I do not like to substitute an equivalent. If the copies are made in England the section applies, but unlawful means contrary to law, and it would be difficult to say that copies made abroad were unlawful, especially as the defendant is required to have known that it was unlawful. The other view would be dangerous, and the sounder view of a penal section is to say that it does not apply to the case. It seems to follow that there is a hole in the Act, because from section 10 it was obviously intended to prevent importations. That section allows the importation to be stopped, but the importer escapes penalties.

LOPES, L.J.—I am sorry to be obliged to differ from the opinions that have been given. The preamble, in my opinion, is correct, and there is no copyright at common law. It is given to the persons named in the first section. I agree in the construction which has been put on that section, but I differ as to the meaning of the concluding part of section 4. I presume that the words there appearing were inserted with care, and it was intended that they should carry their meaning. It says that "no proprietor of any such copyright shall" be entitled to the benefit of this Act until such registration; and having dealt with "benefit" it goes on to forbid an action in respect of anything done before registration. The effect, to my mind, of those words is that the person is to be in the same position before registration as if the Act had not passed. As soon as he registers he has the benefit of the Act, and not till then. These copies were therefore lawfully made, and to bring an action in respect of them is to bring an action "in respect of something done before registration," which is forbidden by section 4. As to the injunction, I agree with the rest of the court. I think it is impossible to contend that the defendant has not been guilty of a breach of contract.

Appeal allowed.

Solicitor for the plaintiffs, *Herbert Bentwitch.*

Solicitors for the defendant, *Heath, Parker, & Brett.*

High Court of Justice.

Chan. Div. Chitty, J. — Nov. 26.

TETLEY v. GRIFFITH (a.)

Practice—Statement of claim—Married woman—Contract — Separate estate — Motion for judgment — R. S. C., ord. 27, r. 11.

Where a married woman is the defendant to an action on a contract, and has made default in the delivery of a defence, the plaintiff's statement of claim must contain an allegation that the defendant has separate estate; otherwise the court will refuse to make an order against the defendant on the statement of claim under R. S. C., ord. 27, r. 11.

Short cause.

This was an action for the specific performance of an agreement for a lease. The plaintiff was the intended lessor and the defendant the intended lessee.

The defendant was a married woman, and, after entering an appearance to the action, put in no defence, and the action now came on upon motion for judgment upon default of the defendant in delivering a defence (ord. 27, r. 11).

The statement of claim contained no allegation that the defendant had separate estate.

W. D. Rawlins, for the plaintiff.

CHITTY, J.—The plaintiff is only entitled to such judgment as, upon the statement of claim, the court considers he is entitled to. The plaintiff does not allege that the defendant, who is a married woman, has any separate estate. *Primâ facie* a married woman cannot enter into a contract, but if she has separate estate she can do so. I decline, therefore, to make any order at present, but the plaintiff can mention the matter again, and take liberty to amend his claim, in which case he must serve the defendant again.

Solicitors, *Bolton, Robbins, & Busk.*

Chan. Div. North, J. — July 22; Oct. 25.

In re ELEY. (b.)

Costs—Taxation after payment—Overcharge—Solicitor and client—Agreement not to dispute charge—Negotiating loan—Investigating title—Solicitors Remuneration Act, 1881 (44 & 45 *Vict. c.* 44)—*General Order*, 1882, *schedule* 1, *part* 1.

R., the lessee of some property, with an option to purchase, told E., the lessor's solicitor, that he intended to purchase the property and should require some money on mortgage. E. put R. into communication with M., and a loan was arranged between them, E. taking no part in the negotiation. A week after the date fixed for the completion of the purchase and mortgage, E. sent R.'s solicitor a bill "for negotiating and preparing mortgage as per scale, £20," and demanding completion on the following day. On the day of completion R. and his solicitor objected to E.'s charge; but afterwards R.'s solicitor said that, if E. would accept R.'s cheque and hold it for a week before paying it in, R.'s solicitor

(a.) Reported by A. D. MACLAREN, Esq., Barrister-at-Law.

(b.) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

would advise R. not to dispute E.'s charge. This was agreed to. R.'s cheque was dishonoured on presentation, and the amount recovered after an action had been brought.

Held, on a summons by R. for taxation after payment, that E. had overcharged, as he had not negotiated the loan nor investigated the title for the mortgage, and was not entitled to fees for that work, which was included in the charge of £20; and that R. would have had a right to taxation after payment, but was bound by the agreement not to dispute E.'s charge in consideration of E. taking R.'s cheque and holding it for a week.

In re Norman, 34 *W. R.* 313, 16 *Q. B. D.* 673, *discussed.*

Adjourned summons.

By an agreement dated the 23rd of November, 1883, made between W. Johnson and G. S. Miller of the one part, and W. Rumming of the other part, Rumming agreed to take the lease of certain property at Wandsworth, with an option of purchase for £1,100, W. Eley being the solicitor of the lessors.

On the 17th of August, 1886, after a previous letter to Eley in reference to the matter, Rumming called and stated that he intended to purchase the property and to erect buildings upon it, and that he should require to borrow some money on mortgage of the property. There was some conflict of evidence as to what took place at the interview, but it appeared that Eley mentioned to Rumming that Miller, one of the lessors, would advance some money on mortgage of the property, and put Rumming and Miller in communication with each other.

In December, 1886, Rumming called upon Miller, and it was ultimately arranged between them that Miller should lend Rumming £800 on the security of the property, Eley taking no part in negotiating the loan.

The 25th of December, 1886, was the day originally fixed for the completion of the purchase and mortgage of the property. Eley acted as solicitor to Johnson and Miller in respect to the purchase; and as solicitor to both Miller and Rumming in respect to the mortgage. On the 31st of December, 1886, Eley wrote to the solicitor acting for Rumming in the matter of the purchase requiring completion on the day following, and stating that his clients would object to a further extension of time, and also inclosing a bill of costs as follows:

	£.	s.	d.
"Charge for negotiating and preparing mortgage as per scale. . . .	20	0	0
"Stamp	1	0	0
	21	0	0"

On the 1st of January, 1887, Rumming's solicitor wrote to Eley objecting to the charge in his bill.

On the 6th of January, 1887, completion took place. There was a discussion as to Eley's bill of costs, Rumming and his solicitor objecting to the charges, and Eley refusing to complete without payment. Eley in his affidavit, which was uncontradicted, stated that after the discussion Rumming and his solicitor left, that the solicitor afterwards returned and had a private conversation with him, in which the solicitor stated that his client did not know how his bank account stood, and asked Eley to accept a cheque for the amount of his costs and for a quarter's rent due to the vendors, and hold it for a week before paying it in to his bank, and added, in order to induce him to accept the proposal, that he (the solicitor) should advise Rumming not to object to Eley's charges; and that this proposal was subsequently agreed to, and the completion then took place.

The cheque was dishonoured. An action was brought in the Lord Mayor's Court, and the amount of the cheque was paid by Rumming before judgment.

This was a summons by Rumming for the taxation of Eley's bill of costs, notwithstanding the payment.

T. Terrell, for the summons.—The applicant is entitled to taxation notwithstanding payment, on several grounds. The document delivered was not in reality a bill at all, it was merely a claim for charges not according to the scale, and, therefore, no special circumstances need be shown for the taxation: *In re Street*, L. R. 10 Eq. 165, 18 W. R. Ch. Dig. 130. But there are special circumstances. Eley required completion without delay, and yet refused to complete without payment, thus exercising pressure: *In re Bennett*, 8 Beav. 467; *In re Boycott*, 34 W. R. 26, 29 Ch. D. 571. Then there is overcharge. The amount charged can only be made up by including the scale fee of £1 per cent. for negotiating the loan, and 30s. per cent. for investigating title and preparing and completing mortgage. But W. Eley did not negotiate the loan or investigate the title for the mortgage, as that was done on the purchase of the property. Therefore he is not entitled to make the charge: *In re Lacey & Son*, 32 W. R. 233, 25 Ch. D. 301; *In re Pybus*, 35 W. R. 770; *In re Harris, Powell, & Goodale*, W. N., 1887, p. 29.

E. W. Byrne, for Eley.—There are no special circumstances in this case which would justify taxation after payment, even if the charge made was too great. There was no undue pressure. The completion did not take place until a week after Eley's letter enclosing his bill and requiring completion. To justify taxation after payment there must be pressure and overcharge amounting to fraud. [North, J., referred to *In re Norman*, 34 W. R. 313, 16 Q. B. D. 673.] Eley's bill was objected to at the time of completion, and there was an agreement that the objection should be abandoned in consideration of Eley taking a cheque and holding it over for a week. That agreement holds good, and is a sufficient answer to the application for taxation. The cheque was dishonoured. An action was brought on it, and the amount was paid before judgment, and no objection to the amount was made. Eley brought the mortgagor and mortgagee into communication, and this justified the fee for negotiating. The court will not go into the question of how much negotiation there was. The introduction of the parties to each other has been decided to be sufficient in the case of auctioneers and house agents.

Terrell replied.

North, J.—This is an application for taxation of a bill of costs after payment. The first argument in support of the application is that no bill was delivered, because the bill delivered was not properly a bill at all. [His lordship read the bill set out above, and continued:—] Looking at the scale, there is a fee allowed to the mortgagee's solicitor for negotiating a loan, so, if the bill had been "mortgagee's solicitor for negotiating loan, £8," it would have been right. There is also a fee of 30s. per cent. allowed to the mortgagee's solicitor for investigating title and preparing and completing mortgage, so, if the bill had followed these words, it would have been right. If the amounts were wrong, it could not have been said there was no bill. And, as both the items charged by Eley are such as might under proper circumstances be charged, I cannot say that no bill has been delivered.

Is there anything in the circumstances to justify taxation of this bill after payment? According to the decision of the Court of Appeal in *In re Norman*, I must not only examine whether there has been pressure and overcharge or overcharge amounting to fraud, but exercise a discretion. The headnote to that case states:—"The 'special circumstances' which, under 6 & 7 Vict. c. 73, s. 37, allow a solicitor's bill of costs to be

referred for taxation, although twelve months have elapsed since it was delivered to the client, are not merely pressure and overcharge or overcharge amounting to fraud. A judge has a discretion in ordering the bill of costs to be taxed, if it contains items unreasonably large, or charges requiring explanation, or gross blunders. *Semble*, that the same principle ought to be applied to the taxation of a bill of costs which has been paid." That headnote is quite borne out by the judgments, and Lindley, L.J., refers to *In re Robinson*, 16 W. R. 110, L. R. 3 Ex. 4; which he states thus: "In that case it was the unanimous opinion of the judges present on the bench that 'an unusual charge of a large amount requiring explanation to justify it was sufficient ground for referring the bill to taxation, even after the expiration of twelve months.'" Both in that case and in *In re Norman* the question was as to taxation after twelve months had elapsed since delivery; but it appears that the court was of opinion the same rule ought to be applied to taxation after payment. I have to consider, then, whether there are in this bill any charges which are unreasonably large. To my mind the charge of £20 for the work done in respect of this mortgage for £800 is outrageously large. To justify it according to the scale there must have been an investigation of the title; but there was not. The respondent cannot say more than that he investigated the title as far as was necessary, which means not at all. There must also have been a negotiation of the loan; but the respondent is not entitled to charge for that, as what he did was to mention Mr. Miller's name to Mr. Rumming, and so bring them into communication. Mr. Rumming afterwards called upon Mr. Miller, and all the negotiation which was done they did themselves. That is not enough to justify a solicitor in charging the fee for negotiating the loan. The cases of auctioneers and others depend upon the custom of trade, and can have nothing to do with the right to charge a negotiation fee as between solicitor and client.

I am of opinion, therefore, that the applicant would have a right to have this bill taxed if there were no agreement to the contrary; but Eley has given in his affidavit certain details of what happened on the day of completion which are not denied. [His lordship read the portion of Eley's affidavit stated above]. I do not lay much stress on what took place in respect to the action in the Lord Mayor's Court; but Eley's evidence, which is uncontradicted, shows that there was a special negotiation and bargain as to holding over Mr. Rumming's cheque. Under the circumstances I come to the conclusion that a bargain was made at the time of completion, that, if the cheque was held over, Eley's charge should not be disputed, and from that bargain Mr. Rumming cannot draw back. The summons must, therefore, be dismissed, with costs.

Oct. 25.—From this decision the applicant appealed; but when the appeal came on for hearing no one appeared in support of it, and it was dismissed.

Solicitors, *J. A. Neale; W. Eley.*

Chan. Div. North, J. [March 24, 26.

BAINES *v.* GEARY. (*a.*)

Contract in restraint of trade—Reasonableness—Limit as to time—Severable—Partial enforcement.

An agreement for the employment of a servant contained an undertaking that he would not, after leaving the employment, serve or interfere with "any of the customers served or belonging at any time to" the master.

Held, that, whether or not the agreement might be construed so as to extend to persons who became customers of the master after the servant left his employment, it was at any rate good as to persons who were customers of the master during the employment of the servant, and that it was severable and enforceable as to such last-mentioned persons; and an injunction was granted to restrain the servant from serving or interfering with such last-mentioned persons.

By an agreement dated the 16th day of February, 1885, and made between Clement Baines, a dairyman, of Twickenham, of the one part, and Thomas Geary of the other part, Thomas Geary agreed to serve Clement Baines, his successors or assigns, as milk-carrier and general servant on the terms therein expressed, and the agreement proceeded as follows:—"In consideration of the wages paid to him, he undertakes that he will not, either during such service or after being discharged or quitting such service, serve or cause to be served with milk or any other dairy produce for his own benefit or that of any other person or persons, or, either directly or indirectly interfere with, or cause to be interfered with, in any way, any of the customers served or belonging at any time to the said Clement Baines, his successors or assigns."

In February, 1887, Baines agreed to sell his business of a dairyman to S. H. Edelsten, who entered upon the business on the 7th of March, 1887.

On the 5th of March, 1887, Geary quitted the service of Baines and set up as a dairyman on his own account in partnership with his brother at Twickenham. He both served with milk and solicited the custom of persons who were customers of Baines.

This was a motion by Baines and Edelsten for an *interim* injunction to restrain Geary from serving or interfering with the customers of Edelsten, or the former customers of Baines, in breach of the undertaking.

R. F. Norton, for the motion, stated the facts.

MacSwinney, for Geary.—The undertaking is void as being unreasonable. It extends to persons who became customers of the business after the servant left.

He referred to *Rannie* v. *Irvine*, 7 Man. & Gr. 969; *Rousillon* v. *Rousillon*, 28 W. R. 623, 14 Ch. D. 351.

R. F. Norton, in reply.—The undertaking
construed as referring only to customers of
any time during the employment of Geary
is reasonable, and should be enforced.

NORTH, J., stated the facts, and
been argued that the covenant no
with the customers at any time
or assigns, is too extensive
v. *Irvine* was cited. In t
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(*a.*) 1.

nt's book, and the restraint was virtually limited to a given number of persons ascertained and agreed upon by the parties at the time." It is argued that the covenant ought to have been limited to persons who were customers of Baines at the time when it was entered into, or who became such during the period of the defendant's employment. The terms of the covenant in the present case are larger than those of the covenant in Rannie v. *Irvine*, and it is said that they are too extensive, and that therefore the covenant must fail altogether. A covenant in restraint of trade is good if it does not go further than is necessary to give reasonable protection to the covenantee; but it is unreasonable if it imposes a larger restraint than is necessary for that purpose. The courts, however, treat such a covenant as divisible, and enforce it so far as it is reasonable, while declining to enforce such part as is unreasonable. There are many cases in which covenants in restraint of trade have been held to be divisible as regards space. I will refer to one—*Price* v. *Green*, 16 M. & W. 346. There the defendant covenanted not to carry on the trade of a perfumer within the cities of London or Westminster, or within the distance of 600 miles from the same respectively, and the court held that the restriction was reasonable as to London and Westminster, and enforceable to that extent, but unreasonable, and therefore not enforceable, as to the 600 miles. But no case was cited in which such a covenant had been held to be divisible as regards time, and I postponed my judgment to see if any such case had been reported. I have found the case of *Nicholls* v. *Stretton*, 7 Beav. 42, where the defendant, on being articled for five years to the plaintiff, who was a solicitor, covenanted that he would not during the five years, nor at any time after the expiration of that term, either directly or indirectly, interfere or intermeddle with, or be concerned as attorney, agent, or otherwise for any person who had already been, or should from time to time thereafter become or be, the client or correspondent in business of or with the plaintiff, or any partner or partners he might admit to a share or shares with him, or any person or persons to whom he might sell or assign the whole or any part of his business or profession of attorney, solicitor, and conveyancer. Lord Langdale, M.R., held that the covenant was not too extensive, and granted an interlocutory injunction to restrain the defendant from interfering or intermeddling with, or being concerned as an attorney, agent, or otherwise for any client or correspondent of the plaintiff, or of the plaintiff and his partners in the plaintiff's business of an attorney, solicitor, or conveyancer. A note to the report states that an appeal was presented from this decision, and that a case was stated for a court of law. Either that case, or an action for damages for breach of the covenant, came before the Court of Queen's Bench in *Nicholls* v. *Stretton*, 10 Q. B. 246. Two sets of breaches of the covenant were relied on by the plaintiff. The first was in respect of persons who had been clients of the plaintiff before and at the time of the defendant's entering into the covenant; the second was in respect of persons who became clients of the plaintiff afterwards while the defendant continued articled to him.

Mr. Bramwell, for the defendant, who had demurred, argued that "such a covenant almost puts it in the power of the plaintiff to exclude the defendant from business whenever; and it is much more extensive than can be required for the protection of the plaintiff in no limitation as to time or space. . . . It would have been fully secured against the loss of from the opportunities which he gave the defendant a covenant that the defendant should not be for anyone who had been the plaintiff's client at the time of the defendant being with him. But it will be argued that the covenant good, and that the good part may be separated. Now, here, the contract is a covenant on one side is in consideration of every covenant on the other; and if any part is void the whole is void.

Mr. Cowling, for the plaintiff, argued that [illegible] out separating the different parts of the covenant [illegible] was no more protection than the particular [illegible] required, the defendant only being restrained [illegible] persons and not as to place or time.

Lord Denman, C.J. said: "The body of [illegible] may alter from time to time. Could you [illegible] prohibiting a man from dealing with [illegible] might name from time to time." It [illegible] contended that the contract [illegible] it concerned the clients who [illegible] with the plaintiff at the time [illegible] or during the continuance of [illegible] breaches were confined to those [illegible] whether under seal or not, [illegible] contract failed; but the [illegible] illegal, but only to abstain from [illegible] which a party could not but [illegible] legally abstain from doing [illegible] would enforce such restriction [illegible] himself to observe. Lord [illegible] judgment of the court [illegible] decided in favour of [illegible] decision of *Price* v. [illegible]

That decision is [illegible] the terms of the covenant [illegible] the persons who [illegible] any time, still it [illegible] as regarded those [illegible] plaintiff during the [illegible] serving his articles [illegible] sidered that, [illegible] the plaintiff after [illegible] ment, the [illegible] to the power [illegible] struction of the [illegible] to persons who [illegible] his successors [illegible] employment [illegible] customers [illegible] restraining [illegible] with any [illegible] time during [illegible]

[illegible] covenant [illegible] many [illegible] licensed [illegible] customers [illegible] Lessee [illegible] actually [illegible]

[illegible] is the paramount object is [illegible] of Works shall let or sell [illegible] and although there is a power [illegible] houses themselves in certain [illegible] be done by means of powers [illegible] raise money for the purpose, and [illegible] at sort in the present Act.

[illegible] re, at the Acts, I find nothing that [illegible] Metropolitan Board of Works, outside [illegible] now before me, to build on this land the [illegible] the Act of 1882 contemplates shall be [illegible] land for the purposes mentioned in that [illegible] ms to me, therefore, that section 33 of the [illegible] 7 is not wholly out of the case. It may be [illegible] erms it is to be read as not being in the Act; [illegible] n the powers given to, and the obligation imposed upon, the Metropolitan Board of Works, seem to [illegible] to be such that they cannot have effect given to them [illegible] less by this Act itself. Powers—I do not say in the same terms precisely, but to the same effect—are by implication conferred upon the board such as were, in ex[illegible] inferred by the Act of 1877.

[illegible] mendations contained in the report of [illegible] s, so far as it is recited in the Act of [illegible] et importance in considering its effect. [illegible] difficulties are. Then the Act of 1882

Chan. Div. North, J. July 9.

In re WILLIAMS' TRUSTS. (*a.*)

Appointment of new trustees—Death of sole trustee in lifetime of testator—Death of testator's heir intestate—Form of vesting order—Trustee Act, 1850 (13 & 14 *Vict. c.* 60), *ss.* 32, 34—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 30.

The sole trustee of freehold land, appointed by will, died in the lifetime of the testator. The testator's heiress-at-law died intestate (after the Conveyancing Act, 1881, *had come into operation), and there was no legal personal representative of her estate.*

A petition, which was served on the testator's heir, was presented for the appointment of new trustees and a vesting order.

Held, that the court had jurisdiction to appoint new trustees and to make an order vesting the trust property in the new trustees for such estate as was vested in the heiress-at-law at the time of her death.

Petition.

Thomas Williams (who died on the 4th of June, 1876), by his will dated the 22nd of September, 1862, devised and bequeathed all his real estate and the residue of his personal estate unto his brother David Williams, his heirs, executors, and administrators, upon the trusts therein mentioned, and also appointed him his executor. The will contained no power to appoint new trustees.

David Williams died on the 21st of October, 1865.

At the time of the testator's death his heiress-at-law was Mary Jenkins. She died on the 13th of March, 1882, intestate, leaving her son, D. W. Jenkins, her heir-at-law, who thereby became the testator's heir-at-law.

At the time of his mother's death D. W. Jenkins was under twenty-one, and limited administration to her estate was granted until he should attain twenty-one.

This petition was presented under the Trustee Acts for the appointment of new trustees and for a vesting order.

The trust estate consisted of freeholds and certain stock.

The petition was served on D. W. Jenkins, who had attained twenty-one, so that there was no legal personal representative of his mother.

Bardswell, for the petitioners.—As the testator's heir is before the court there is jurisdiction under the Trustee Act to appoint a new trustee: *Gunson* v. *Simpson*, 16 W. R. 782, L. R. 5 Eq. 332; *In re Smirthwaite's Trusts*, 19 W. R. 381, L. R. 11 Eq. 251. Having regard to section 30 of the Conveyancing Act, 1881, it is doubtful in whom the legal estate in the trust property is now vested, since there is no legal personal representative of the deceased heiress-at-law.

He referred to *In re Pilling's Trusts*, 32 W. R. 853, 26 Ch. D. 432, and *In re Rachstraw's Trusts*, 33 W. R. 559.

G. Melville Dale, for D. W. Jenkins.

Simmonds, for another respondent.

NORTH, J.—I feel no difficulty in appointing new trustees and making an order vesting the property in them for all such estate as was vested in Mary Jenkins at the time of her death.

Solicitors, *Burton, Yeates, & Co.; S. B. Somerville.*

(*a.*) Reported by G. E. JEFFERY, Esq., Barrister-at-Law.

Chan. Div. North, J. May 6, 13, 25.

WIGRAM *v.* FRYER. (*a.*)

Easement—Ancient lights—Obstruction by lessee of public body—Public undertaking—Land injuriously affected—Compensation—Injunction—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 68—*Metropolitan Street Improvements Act*, 1877 (40 & 41 *Vict. c. ccxxxv.*), *ss.* 2, 4, 7, 25, 33—*Metropolitan Street Improvements Act* (1877) *Amendment Act*, 1882 (45 & 46 *Vict. c. ccxxii.*), *ss.* 1—3.

By the Metropolitan Street Improvements Act, 1877, *which incorporated the Lands Clauses Consolidation Act*, 1845, *the Metropolitan Board of Works were authorized to acquire land for the purpose, amongst other things, of widening Gray's-inn-road, and to purchase easements for that purpose. The board were also empowered, by section* 33 *of the Act, to let or sell certain portions of land for the purpose of building labourers' dwellings for the accommodation of labourers displaced by the improvements, the erection of which dwellings was imperatively required by the section. By the Amendment Act*, 1882, *the board were required to erect a certain number of labourers' dwellings on certain portions of land, without being expressly empowered to let or sell for that purpose, and section* 33 *of the principal Act was repealed.*

The board sold a building lease of portions of the land for the purpose of the erection of the required labourers' dwellings, and the tenants of the board, in erecting the dwellings, obstructed the ancient lights of adjacent owners.

Held, that the remedy of the adjacent owners was compensation under the 68*th section of the Lands Clauses Act*, 1845, *and that they were not entitled to an injunction.*

Motion.

The action was brought for an injunction to restrain the defendant from erecting labourers' dwelling-houses so as to obstruct the ancient lights of the plaintiffs.

The plaintiffs were the owners and tenants of houses situate on the north side of Portpool-lane, Gray's-inn-road. The defendant Fryer was a sub-lessee of the executors of Thomas Pink (since deceased), the purchaser from the Metropolitan Board of Works of a building lease of a piece of land situate in Gray's-inn-road, and abutting on the south side of Portpool-lane, immediately opposite to the plaintiffs' houses, which piece of land was, together with other land, acquired by the board under the Metropolitan Street Improvements Acts, 1877 and 1882, which required the erection of labourers' dwellings upon the piece of land.

The building lease was sold by the board "subject to the obligations imposed by the said Acts, and to all rights and easements (if any) existing in or over the said piece of land," and "subject to the rights (if any)" of adjacent owners. The form of lease contained a covenant to submit plans to the board for approval, and after such approval to build in accordance therewith, and not, during the first eighty years of the term, to add to or alter the character of the dwellings without the consent of the board in writing. The sub-lease to the defendant contained provisions similar to those in the lease from the board.

The defendant, in erecting labourers' dwellings in accordance with the approved plans and specifications as required by his under-lease, interfered with the ancient lights of the plaintiffs.

This was a motion by the plaintiffs for an *interim* injunction until the trial of the action.

(*a.*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

The question to be decided was whether the plaintiffs had a right to an injunction, or whether their only remedy was by compensation under the Lands Clauses Consolidation Act, 1845, s. 68.

Cozens-Hardy, Q.C., and *Byrne*, for the plaintiffs.—We are entitled to an injunction to restrain the obstruction of the ancient lights, and are not restricted to compensation under section 68 of the Lands Clauses Act, 1845. The cases of *Clark* v. *School Board for London*, 22 W. R. 354, L. R. 9 Ch. 120, and *Duke of Bedford* v. *Dawson*, L. R. 20 Eq. 353, 24 W. R. Dig. 236, in which it was decided that the persons entitled to ancient lights which were obstructed had no remedy by injunction, do not apply, because the public bodies in those cases differ from the Metropolitan Board of Works, and the public buildings erected by them differ from labourers' dwellings. Here the dwellings are being built by the defendant, who is a private individual, and not by the Metropolitan Board of Works or any public body, and the privileges of a public body do not extend to a private individual. The board had no power to grant the building lease, as the 33rd section of the Metropolitan Street Improvements Act, 1877, which gave such power, is repealed by the 3rd section of the Amendment Act of 1882. The plaintiffs could not obtain compensation under the 68th section of the Lands Clauses Act, 1845, from the defendant, who is a private individual. Besides, the terms of the lease provide for the rights of adjacent owners, which include the ancient lights of the plaintiffs.

Gifford, Q.C., and *Creed*, for the defendant.—This case is governed by *Clark* v. *School Board for London* and *Duke of Bedford* v. *Dawson*, and the plaintiff is not entitled to an injunction, but his remedy is compensation under the 68th section of the Lands Clauses Act, 1845. The Metropolitan Board of Works having no means of erecting labourers' dwellings themselves, were of necessity entitled to grant the building lease, and the 3rd section of the Amendment Act of 1882 does not take away that right by repealing the 33rd section of the Act of 1877. The rights and privileges of the board, including their immunity from injunction, extend to persons who erect for the board the labourers' dwellings which the Act requires. The terms of the lease granted by the board cannot take away the statutory immunity from injunction, and do not give to adjacent owners remedies to which they would not otherwise be entitled.

Cozens-Hardy, Q.C., replied.

NORTH, J.—I should have thought, independently of authority, that an easement of light over a neighbouring property was an easement which the board might purchase, under the 7th section of the Metropolitan Street Improvements Act, 1877, in the usual way, by notice. But it has been held, in *Clark* v. *School Board for London* and *Duke of Bedford* v. *Dawson*, that the interference by the board with the access of light over the premises required by them to the neighbouring premises, is a matter for which the person injured may obtain compensation under section 68 of the Lands Clauses Act, 1845, by applying for compensation for the injury done at any time, even after the works are completed, and that he has no remedy by way of injunction to restrain the work being done. I said the "board," but neither of those two cases related to the Metropolitan Board of Works. One related to the School Board for London, and the other to the Clearing House. I have looked at those two cases and the sections of the Acts on which they were founded, and I see no substantial distinction between the cases of those bodies under their Acts, and the case of the Metropolitan Board of Works under the present Acts.

Now the paramount object of the 33rd section of the Act of 1877 is to have the lands on which artizans' dwellings were intended to be erected devoted to the purpose of building such dwellings for the labouring classes, and the Metropolitan Board of Works are merely an instrument, with considerable discretion and control, but not the absolute owners of the property, because they are subject to the control of the Secretary of State. The question is, what is the meaning of the 3rd section of the Amendment Act of 1882 as applicable to the Act of 1877? Is the Act of of 1877 to be read, for the present purpose, as if that section had not been contained in any way whatever within that Act, as that section of the Amendment Act would seem to imply; or is it to receive some other modified meaning, having regard to the language of the Act, the state of things existing immediately before the passing of the Act, and the duties imposed upon the Metropolitan Board of Works by the Act itself?

It is clear that the erection of these additional buildings for the labouring classes was required by the Act of 1877. It is clear, also, that by the Act of 1882 similar buildings were also required. Nothing in the Act of 1882 removes the obligation of erecting such buildings, although the mode of doing it may, no doubt, be modified by the later Act. It is suggested that the 33rd section of the Act of 1877 is to be taken, so far as relates to the Gray's-inn-road improvement, as if it had never been enacted. Under those circumstances, how was the erection of artizans' buildings, required by the Act of 1882, to be carried out? I do not see how it could be done.

I have looked at other Acts which have been passed with reference to the erection of artizans' dwellings. I cannot find that under those Acts the board has any power to erect any buildings on this land. The principal Act is the Act of 1875 amended in 1879. Under that Act it is clear that the Metropolitan Board of Works have power to erect buildings under certain circumstances. But in the first place that Act is confined to what are called unhealthy areas, and there is no suggestion that the land upon which these houses are, falls under that category; and, in the next place, it is only to be put in force by means of certain machinery pointed out by the Act. It is clear that in the present case what has been done has been to follow the powers given, or purported to be given, by the two Acts I have been reading, and no appeal is made to the powers of the other Acts which I have just mentioned.

Then, even under those Acts the paramount object is that the Metropolitan Board of Works shall let or sell the property they take, and although there is a power given to them to construct houses themselves in certain cases, yet it is only to be done by means of powers authorizing them to raise money for the purpose, and there is nothing of that sort in the present Act.

Looking, therefore, at the Acts, I find nothing that would enable the Metropolitan Board of Works, outside of the two Acts now before me, to build on this land the buildings which the Act of 1882 contemplates shall be erected on the land for the purposes mentioned in that Act. It seems to me, therefore, that section 33 of the Act of 1877 is not wholly out of the case. It may be that in terms it is to be read as not being in the Act; but then the powers given to, and the obligation imposed upon, the Metropolitan Board of Works, seem to me to be such that they cannot have effect given to them unless by this Act itself. Powers—I do not say in the same terms precisely, but to the same effect—are by implication conferred upon the board such as were, in express terms, conferred by the Act of 1877.

Then the recommendations contained in the report of the select committee, so far as it is recited in the Act of 1882, are of the utmost importance in considering its effect. They state what the difficulties are. Then the Act of 1882

recites that certain obligations in relation to the removal of existing houses and the accommodation of the labouring classes were imposed upon the board by the Act of 1877; that, by reason of those obligations, the board have been prevented from carrying into effect certain of the purposes of the Act; and that they recommend that, subject to certain conditions, the board shall be relieved of the obligation imposed by section 33, as far as the same is applicable to the Gray's-inn-road improvements, and that it is expedient to give such relief by this Act.

Now, what obligations are they relieved from by the Act of 1882? They are not relieved from the obligation of taking the land in question in the Gray's-inn-road. It is clear it must be taken, and it must be employed, for the purposes intended. It seems to me, therefore, that the obligation of taking it and doing what that section authorizes—namely, selling it or letting it for the purpose of erecting suitable dwelling-houses for the labouring classes—is continued by this Act, and is imposed upon them, notwithstanding that the 33rd section of the Act of 1877, giving express power, is taken to be out of the Act for the present purpose. It is clear, therefore, that they must, under the implied powers of the Act (I suppose that is the proper way of considering it) be authorized to take land and to deal with it accordingly; that is, using the language of the Act, it shall be appropriated exclusively to the erection of buildings of a certain class. Inasmuch as they have not, as far as I can find out, any power themselves of applying the moneys raised by rates for the construction of such buildings, it can only be done by doing what the Act of 1877 contemplated should be done in the Gray's-inn-road, and what the Act of 1877 still contemplates should be done, so far as it has not been done, in carrying out the improvements in various other parts of the metropolis to which the Act of 1877 still applies. It seems to me, therefore, that there is an implied power in the board to do what they could have done under the 33rd section of the Act of 1877 under the express direction contained there.

Well, then, what are the purposes for which the repeal of that section, so far as the Gray's-inn-road is concerned, takes effect? It says: "After the passing of this Act the provisions contained in section 33 shall cease to be in force." That looks rather as though it were intended to apply to the various provisoes that follow upon what I may call the enacting part; but I have great doubt whether that can be the meaning of it, because the language of the section is, "And in relation thereto the Act of 1877 shall be read as though the section were not contained therein." But it is unnecessary for me to deal with that, because, although there are certain provisoes in the 33rd section as to which I see no reason why they should not continue to apply to what has to be done under the Act of 1882, it is not material for the present purpose, and, therefore, I say no more about them, excepting that I do find that the proviso in section 33—that not more than fifteen houses are to be taken until accommodation has been provided for such numbers of persons as would be displaced by such taking—is one which clearly created a great difficulty in the matter, and to remove which the Act of 1882 was intended to apply. Putting the best construction I can upon the Act, it seems to me that the obligation on the board to appropriate the land coloured green to the erection of artizans' dwellings, is at least as strong under the Act of 1882 as it was under the Act of 1877. It must be carried out in the only way in which it can be done. It cannot be done by the board erecting the buildings themselves; it can only be done by letting or selling to some person who is to do the same thing. It seems to me, therefore, that the power of letting or selling expressly contained in the 33rd section of the Act of 1877 is to be implied as still existing in the board as regards the land referred to in the 2nd section of the Act of 1882.

If the board could have built the houses, any remedy the plaintiffs might have for interference with their lights could not be maintained by getting an injunction to restrain the building, but must be obtained by compensation under the 68th section of the Lands Clauses Act. The plaintiff's right previously to the Act was a right to an easement of light. The effect of the Act was to extinguish that right and to convert it into a right to be compensated for the injury he has sustained by reason of that light being taken away.

It is important, next, to consider whether there can be any injunction against the defendant Fryer, who is now erecting the buildings for the board. It appears to me that the persons who act for the board are in the same position as if the board themselves had been building. If this land had been taken for a railway, and the promoters of the undertaking had entered into an agreement with contractors that they should construct the line, and have a lease of the line, and work the line when made, it seems to me that those persons would be in precisely the same position as the promoters of the undertaking as regards the relative rights of the persons whose land was taken from them by the promoters. As the Metropolitan Board of Works cannot build themselves, and as they are entitled to let or sell for the purpose of building, the rights conferred by the Act upon them apply to persons to whom the land may pass for the purposes of the Act, who must have the like privileges and freedom from obligations as the board would have had if they themselves had been erecting the buildings, which are not only authorized but bound to be erected under the Act.

Then it is said there is a difference, because the sale to Mr. Pink and the lease to Mr. Fryer are subject to existing easements. That does not appear to me to alter the case as regards the plaintiffs. It would be depriving the Metropolitan Board of Works of the power which they are intended to have under the Act if they could limit their rights in that way by recreating an obligation on land of this sort and attaching to it certain liabilities from which the Legislature intended it to be freed in passing the Act and authorizing them to acquire land for these purposes under the Act. It seems to me that they could not set up again those easements and obligations from which the land is to be free for the statutory purposes for which it is to be taken. But it does not follow that those words are without meaning. They are matter of express bargain between the Metropolitan Board of Works and the purchasers from them; and, again, as between Pink's executors and the defendant. There may be certain rights arising out of those stipulations between the parties who enter into them, wholly unimportant as regards the owners of the land, the persons who did have the easements, now at an end, to which the land was subject. I have formed an opinion about those words, but I do not intend to say anything on the subject, as I have only one of the parties interested before me. It is obvious that Pink's executors and the Metropolitan Board of Works may still have a great interest in the construction of those documents.

Then, further, it is said that what is being done leaves the plaintiffs without remedy, because, whatever right of compensation they might have had against the Metropolitan Board of Works under the Acts, if the Metropolitan Board of Works had taken the land, and had themselves proceeded to erect buildings and blocked out the access of light from the plaintiffs, yet the Metropolitan Board of Works are not doing it, they have parted with all their interest, and they are doing nothing whatever of which the plaintiffs can complain.

Now the right to compensation under the 68th section of the Lands Clauses Act, 1845—to take only the

material words—is this:—It is compensation "in respect of any lands which shall have been injuriously affected by the execution of the works." The works mean those for which the lands were taken under the Act, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of the Act. Therefore, as far as those words go, it appears to me that this is land which, if the plaintiffs are right as to the obstruction of light (which I assume for the present purpose), is injuriously affected by the execution of the works. There is nothing limiting the obligation to make compensation during the execution of the works authorised by the Act, pending the works done by the promoters of the undertaking themselves. As I have already pointed out, the promoters of a railway would be bound, so far as any act injuriously affecting neighbouring land is done by the contractors with whom they have entered into an obligation to make the line and take a lease of it, corresponding *mutatis mutandis* with the provisions of the agreement in the present case.

It seems to me, therefore, that the contention that, by the board's disposing of the property, the right against them has ceased, and that there can be no right against Mr. Fryer for compensation, and therefore there must be a right for an injunction, cannot be sustained. In the first place, although the work has been done by the lessee, that of itself is not sufficient to exclude a right to compensation. In the next place, this is to be borne in mind, which is a very important matter: the Metropolitan Board of Works are not mere passive agents in the matter. They have not got the land in lease, yet they have got it under an obligation and have recognized that obligation. They have insisted on that obligation being performed by the persons to whom they have sold the land, and they have taken express covenants and provisions that the land shall be dealt with exactly in the way in which it has been dealt with by the persons claiming to build thereon. They have reserved the power to re-enter in case the works are not performed in accordance with the proposed plans.

It seems to me, therefore, that, as between the plaintiffs on the one hand and the Metropolitan Board of Works on the other, it cannot be said that all right to relief or all liability to give relief had passed away from the Metropolitan Board of Works to the persons who are the actual erectors of the building which causes the nuisance.

Then, again, the plaintiffs were not consulted about or parties to the arrangements the board made with respect to the land; and I do not think that the board has the power of depriving the plaintiffs of any remedy the statute gives against the board by any private arrangements that the board make with the persons to whom they sell or lease for the purpose of carrying out the objects of the Act.

Under the circumstances, I am of opinion that the remedy of the plaintiffs, if they are injured, is by obtaining compensation, and not by injunction; and I refuse the motion.

Solicitors, *Bowman & Crawley-Boevey; Benbow, Bellwell, & Tryon.*

Q. B. Div. (Stephen and A. L. Smith, JJ.) Nov. 16.

JUDGE v. BENNETT. (*a.*)

Conspiracy and Protection of Property Act, 1875 (38 & 39 *Vict. c.* 86), *s.* 7—*Intimidation—Threatening to "watch and beset."*

An intimation conveyed in a letter to an employer that his shop would be picketed, in language so threatening as "to make such employer afraid," amounts to "intimidation" within the meaning of section 7, *sub-section* 1, *of the Conspiracy and Protection of Property Act,* 1875, *whether the picketing amounts to an unlawful "watching or besetting" within sub-section* (4) *or not.*

Case stated by the stipendiary magistrate for the borough of Leeds under 42 & 43 Vict. c. 49, s. 33.

The appellant, Judge, was secretary to the Leeds National Union of Operative Boot and Shoe Rivetters and Finishers. He had been summoned by the respondent, Mrs. Bennett, a boot and shoe manufacturer, under the Conspiracy and Protection of Property Act, 1875, s. 7, in that, "with a view to compel the aforesaid Mrs. Bennett to do a certain act which she had a legal right to do or abstain from doing—namely, in refusing to take back certain workmen into her employment—the said Judge did intimidate the said Mrs. Bennett." The facts found were as follows. There had been a strike among the rivetters in Mrs. Bennett's employ, whereupon the appellant wrote the following letter to the respondent:—"I have to inform you that the rivetters in your employ have determined not to again start work unless you are willing to start the whole of them. Should you refuse to start them all, the finishers will also be stopped and your shop picketed until such time that you comply with the conditions above stated. . . . . If you are agreeable to take back all your hands the matter is settled. If not, then we shall fight it out to the end." The respondent refused to take back the men, and her shop was ordered by the Union to be picketed. Two men paraded in turns before the front of the shop for three days. It was admitted that the picketers behaved in an orderly manner and did not personally interfere with the workpeople going in and out of the respondent's shop, but a crowd of four to five hundred people assembled in the roadway outside the shop, and the police were called upon by the respondent to protect her shop from, as she alleged, a well-grounded fear on her part of personal violence. The magistrate found that, on the above facts, "intimidation" was proved "on the ground that the statement contained in the above letter, that the shop would be picketed, was a threat to watch and beset the house or place where a person carries on business, and therefore amounted to intimidation; and that if the letter was not intended to intimidate it ought to have been couched so as merely to show the writer's wish to obtain or communicate information, but that a person receiving such a letter as this must have looked upon it as a threat to watch and beset the premises within sub-section 4 of section 7 of the Act."

R. Wright (*Rentoul* with him), for the appellant.—The magistrate has not distinguished the different offences detailed in the separate sub-sections of section 7 of the Conspiracy Act, 1875. "Using violence or intimidating" is an offence under sub-section (1). This was a charge of "watching and besetting" under sub-section (4). A mere announcement, or even a threat to watch and beset, is not "intimidation" under sub-section (1). Picketing in a certain way was legalized by this Act. It was only restrained so far as it amounted to an "unlawful watching and besetting" of the hous

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

or place of the employer or other workmen. Here it is admitted that the picketers behaved in a regular and orderly way, without interfering with the other workmen, and only attended for purposes of information on behalf of the Union. An announcement to picket, however forcibly expressed, does not amount to intimidation within this Act. As to what was illegal picketing before the Act see *Reg.* v. *Shepherd*, 11 Cox C. C. 325.

Longstaffe, for the respondent, was not called upon.

STEPHEN, J.—Intimidation is to use violence so as to make a person afraid. It is not brought about by actual threats of violence to a person or his property, but by attempting by any means to make that person afraid—in this particular instance, of doing or not doing that which such person has a legal right to do or to refuse to do. If a man expresses his intention to picket in such terms as to make the person addressed afraid, that is sufficient to bring his action within the meaning of intimidation. I can imagine that such intention to picket might be conveyed in such terms as to show that there was no intention to do anything within the terms of this Act. Here this determination was conveyed in such a way as to cause fear. That is equivalent to intimidation, and this conviction must be upheld.

A. L. SMITH, J.—Intimidation is not merely to use violence or to threaten to use violence. Sub-section (1) of section 7 shows this. It says, "Everyone . . . who uses violence or intimidates." What is the meaning of "intimidates"? Why, the using of language which causes another man to fear. I think this conviction was right.

Appeal dismissed.

Solicitors for the appellant, *Hamlin, Grammer, & Hamlin*, for *Dunn & French*, Leeds.

Solicitors for the respondent, *Iken*, for *H. Child*, Leeds.

Q. B. Div. (Lord Esher, M.R., and Lindley and Lopes, L.JJ., sitting as a Divisional Court). — July 27.

THOMAS *v.* MIREHOUSE. (*a.*)

Landlord and tenant—Sheriff—Notice of claim for arrears of rent—Removal and sale of goods without payment of rent—Forced sale—Measure of damages—8 Anne, c. 14, s. 1.

In an action brought by a landlord against a sheriff, under 8 Anne, c. 14, s. 1, for the removal and sale of goods taken in execution, without paying a year's rent, it is not sufficient for the defendant to show, in mitigation of damages, that the goods realized less than the amount of the rent, but he must prove that their actual value to the landlord at the time of removal was less.

Appeal from the Pembroke County Court.

This was an action brought by the landlord of a house in Hill-street, Issels, Pembroke, against the sheriff of the county to recover, under section 1 of 8 Anne, c. 14, the sum of £30, being the amount of one year's rent due from the tenant at the time that an execution was levied upon his goods.

It appeared that, although the plaintiff had given notice of his claim, as required by the statute, the goods were removed and sold by the defendant without payment of the rent. The goods, when sold, realized only £21 17s. 3d. From this sum the defendant claimed to deduct £6 4s. 6d. for the expenses of the sale, and contended that he was liable to the plaintiff for the balance only, amounting to £15 12s. 9d.

The county court judge found a verdict for the plaintiff, and assessed the damages at £30.

T. Terrell, for the defendant.—The measure of damages is not the amount of rent due, but the value of the goods seized, or what, with reasonable care, they would sell for. The sheriff is liable to the landlord for the proceeds of the sale only, after deducting his lawful charges: *Henchett* v. *Kimpron*, 2 Wils. 140.

The following cases were also cited: *Palgrave* v. *Windham*, 1 Str. 212; *West* v. *Hedges*, 1 Barnes' Notes of Cases, 211; *Green* v. *Austin*, 3 Camp. 260; *Foster* v. *Hilton*, 1 Dowl. 35; *Calvert* v. *Joliffe*, 2 B. & Ad. 418; *Riseley* v. *Ryle*, 11 M. & W. 16; and the remarks of Patterson, J., in *Wharton* v. *Naylor*, 12 Q. B. 673.

Wilfred Allen, for the plaintiff.—The measure of damages is the sum due in respect of arrears of rent: *Arnitt* v. *Garnett*, 3 B. & Ald. 440; *Colyer* v. *Speer*, 2 Brod. & B. 67. Until the rent is paid there are no goods out of which the sheriff is bound to levy: *Cocker* v. *Musgrove*, 9 Q. B. 223.

Lord ESHER, M.R.—The law appears to be as follows. When notice has been given by the landlord to the sheriff that rent is due it becomes the duty of the sheriff under the statute not to sell anything upon the demised premises till the rent has been paid, although there may be goods upon the premises of a value many times exceeding the amount of rent due. He must, therefore, before he proceeds with the execution, apply to the execution creditor for the necessary sum. If the execution creditor provides it the sheriff pays the landlord and proceeds with the execution. If the execution creditor does not provide it the sheriff cannot be called on to infringe the statute, and may either return *nulla bona* and withdraw from possession, or may himself pay the rent, looking to the execution creditor for reimbursement, and proceed to sell. This is the position of the sheriff under the Act. If he commits a breach of duty by a wrongful sale—*i.e.*, a sale which takes place before the rent is paid—the statute appears to me to state by implication that he will be liable to compensate the landlord by paying him the amount of rent which is due. The cases, however, show that though the amount of the rent is *primâ facie* the measure of the damages, it is open to the sheriff, after the landlord has proved his case by giving evidence of the tenancy, the amount of rent due, and notice, to show, in mitigation of damages, that the value of the goods removed was not sufficient to pay the rent. In such a case the loss to the landlord by the removal of the goods, or, in other words, their value to him at the time of the removal, becomes the measure of damages.

Here the defendant has failed to show that the value of the goods to the landlord at the time of the removal was less than the rent. He has merely shown that they produced less on a forced sale. This does not necessarily represent their value to the landlord unless he were bound to distrain, and to distrain at the same time, under the same circumstances, and employing the same auctioneer as the sheriff when the wrongful sale took place. The appeal will therefore be dismissed.

LINDLEY and LOPES, L.JJ., concurred.

Appeal dismissed.

Solicitor for the plaintiff, *H. J. Allen.*

Solicitors for the defendant, *Speechly, Mumford, & Landon*, for *Roderick*, Llanelly.

(*a.*) Reported by G. K. PALEY, Esq., Barrister-at-Law.

Q. B. Div. (Wills and Grantham, JJ.) July 8, 9, 23.

ROYAL MAIL STEAM PACKET CO. (LIMITED) v. ENGLISH BANK OF RIO DE JANEIRO (LIMITED). (a.)

Shipping—General average—Partial discharge of cargo before taking of extraordinary measures for safety of the ship—Effect of.

A steamer carrying, among other things, a large amount of specie on board ran aground and was in a position of danger. The specie was immediately landed by the master of the steamer and conveyed by land to another port. Subsequently part of the cargo on board was jettisoned for the purpose of getting the steamer off.

Held, that the losses and expenses incurred in getting the steamer off and the expenses incurred in landing and conveying the specie were not general average to which the owners of the specie were liable to contribute.

This was a special case.

The plaintiffs were owners of the British steamship *Tagus*, and the defendants were bankers at Rio de Janeiro and in London. On June 22, 1886, the defendants delivered to the plaintiffs £25,000 specie in boxes to be carried on board *The Tagus* from Rio de Janeiro to Southampton. The bill of lading was an ordinary one, and by one of its clauses the plaintiffs were empowered to "tranship or land" the goods shipped; by another of its clauses "average, if any," was "to be adjusted in England and according to the practice of English average adjusters." *The Tagus* left Rio de Janeiro on June 24, 1886, with passengers, mails, and a general cargo, in addition to the specie referred to. On June 27 *The Tagus* ran aground on a coral reef off Aritubа, on the Island Itaparica, about fifteen miles from Bahia. The majority of the passengers were landed at Itaparica the same evening, as soon as the sea was calm enough to admit of it. The next day the remaining passengers, with their effects, and all the specie, including that belonging to the defendants, were landed. On June 29, owing to the "tremendous rollers from the southward prevailing, the master deemed it expedient, as the only means of saving the vessel, to throw overboard the cargo and ballast." This was accordingly done, and the ship came off on the morning of July 2 and proceeded under her own steam to Bahia, and from thence to Southampton without the necessity of repairs. Meanwhile the specie had been conveyed to Bahia under military escort, and was eventually forwarded to Southampton by agreement with the various shippers in another vessel called *The Elbe*. But it was agreed that, for the purposes of this case, it should be treated as having been carried by the plaintiffs to Southampton in *The Tagus*. The losses and expenses in respect of which the plaintiffs claimed from the defendants a general average contribution were the losses by and incidental to the jettison; the cost of the hire of the tugs, lighters, and other salvage expenses; and the cost of landing, protecting, conveying, and warehousing the specie at Itaparica and Bahia. The court had power to draw inferences of fact.

Sir R. E. Webster, A.G. (*Sir C. Russell, Q.C.*, and Inches with him), for the plaintiffs.—The specie was landed at Itaparica, guarded while there, and sent on to and warehoused at Bahia as part of a continuous salvage operation undertaken for the common preservation of ship, cargo, and freight, of which the jettison, and the employment of tugs formed another part. If the specie had been kept on board or placed in a ship's boat or a lighter while the jettison and towing continued, it would clearly have been liable to contribute. The fact that it was landed can or ought to make no difference. It was landed with a view to being again taken on board and conveyed to its destination. There was no real severance of the adventure. The true inference to be drawn from the facts is that all the extraordinary measures taken from the stranding of the vessel until July 3, when both ship and specie reached Bahia, had reference, not to a single, but to the common interest. Among these extraordinary measures must be included landing of the specie, because although the master was justified in bestowing upon it a special degree of care on account of its value, it really had the effect of enabling him to use his best efforts to get the ship off. He would not have been justified in prosecuting a dangerous salvage operation while an article at once so valuable and so easily removed remained on board. But even after the landing the specie remained in danger, and was liable to be taken by force or stolen, as the employment of a military escort proves. This, too, was a common danger to the general adventure and continued till the voyage was resumed at Bahia, so that the specie must, like the rest of the cargo, contribute to the extraordinary losses and expenses incurred in consequence. The case of *Moran* v. *Jones*, 5 W. R. 503, 7 E. & B. 523, which closely resembles this case, is supposed to be inconsistent with *Job* v. *Langton*, 4 W. R. 641, 6 E. & B. 779, and *Walthew* v. *Mavrojani*, L. R. 5 Ex. 116, 18 W. R. C. L. Dig. 93, but the cases may be reconciled. In all three cases part of the cargo, which it was sought to make contributory, had been taken out before the efforts to get the ship off commenced, but in one case the court drew the inference of fact that the removal was part of a general salvage operation, and in the other two that it was a special operation undertaken for the preservation of the goods themselves. In this case the former inference should be drawn, the captain, who is agent for all, ought not to have the power of exonerating part of the cargo from liability to contribute, and on the other hand it is inexpedient that a captain should be tempted improperly to keep valuable cargo on board and exposed to risk in order to preserve its liability.

He cited, further, *Beavan* v. *Bank of United States*, in the Supreme Court of Pennsylvania, 4 Wharton, 300, and *Nelson* v. *Belmont*, in Superior Court of New York, 5 Duer, 310.

Bigham, Q.C. (*J. Gorell Barnes* with him), for the defendants. — The removal of the specie did not appreciably lighten the vessel or assist the salvage operations; the gold was placed in safety for its own protection just as the passengers were landed for theirs, and not with a view to, or as a part of, the salvage operation. The jettison and towage were of use to the ship and the cargo remaining on board, but were of no use to the specie, which was already safe on shore. The fact that the ship was thereby enabled to continue the voyage is irrelevant to a question of general average: *Walthew* v. *Mavrojani*, *Svensden* v. *Wallace*, 13 Q. B. D. 69, 32 W. R. Dig. 191. The true criterion is given in *Kemp* v. *Halliday*, 14 W. R. 697, 6 B. & S. 723, where Blackburn, J., cites as a "perfectly accurate statement of the law" the following passage from Arnould on Marine Insurance, 2nd ed., vol. 2, p. 931:—"A stranded vessel is in most cases in danger of being lost unless speedy steps be taken for her preservation, either by unloading the cargo to lighten her, or by endeavouring to float her by means of buoys, &c., with the cargo in her. The remuneration which the shipowner is obliged to pay for the services thus rendered gives a claim to general average contribution, provided such services shall appear to have been incurred for the joint benefit of ship and cargo, which will be the case if ship and cargo are both exposed to common danger, and both saved by the exertions employed for their rescue." Here the common danger to the ship and the specie ceased as soon as the

(a.) Reported by CECIL CHAPMAN, Esq., Barrister-at-Law.

specie was removed from the ship, and the specie was safe and exposed to no peril in common with the shid when those exertions began for which contribution is now sought. In *Walthew* v. *Mavrojani*, in the Exchequer Chamber, Bovill, C.J., thus applied the principle to a similar case:—"Whereas to ground a claim for general average there must be a danger, actual or impending, common to both ship and cargo, here the cargo was safe, and the ship only in peril; it was indifferent to the owners of the cargo whether the ship floated or not, and there was, therefore, no sacrifice made or extraordinary expense incurred to save both ship and cargo, or for the common benefit of both." If the captain had left the gold on board to run the risks incident to that position and to the salvage operations, the shipowner would have been liable to an action for negligence: *Notara* v. *Henderson*, 20 W. R. 443, L. R. 7 Q. B. 225. In *Svendsen* v. *Wallace* Brett, M.R., expressed the opinion that *Moran* v. *Jones* cannot be sustained. The American decisions are no authority, because American law has adopted the criterion of the continuation of the voyage, which is repudiated by English law.

Sir R. E. Webster, A.G., in reply.

Cur. adv. vult.

July 23.—The following judgments were delivered:—

WILLS, J.—In this case the owners of *The Tagus* claim contribution, by way of general average, from the owners of specie carried by her on a voyage from Rio to Southampton under the following circumstances:—

The Tagus grounded off the island of Itaparica, about fifteen miles from Bahia, at 2.30 a.m. on June 27, 1886. She grounded on a coral reef, on one part or another of which, with slight variations of position, she remained till the evening of July 2. The sea was running high, and very shortly after she struck seas broke over her which continually swept the decks and washed away the cutter. She was exposed to the unbroken force of the Atlantic rollers, and I cannot doubt that she was from the first, and remained till the last, in a position which threatened destruction alike of ship and cargo, and which made it necessary that extraordinary sacrifices should be made and extraordinary expenses incurred to save the ship and cargo. In the forenoon of the day on which she struck (June 27) the master began to land his passengers and their baggage, and completed this operation on the 28th. About ten o'clock on the 28th he landed the specie, of which 25,000 sovereigns belonging to the defendants formed part.

The vessel lay about two and a-half miles from the shore, and very nearly opposite to a fishing village called Aritubа, consisting of a few huts. The island is from twelve to fourteen miles long, mostly uninhabited, but about four miles off is a small town called Catu, on the Western coast of the island. A small steamer plies several times a week between Catu and Bahia, distant about twenty miles. The specie was landed at Aritubа, and placed there in a hut hired for the purpose, and remained there in charge of the purser and doctor from June 28 to July 2, when the purser handed it over to a Brazilian custom house officer, under the charge of whom, accompanied by the purser, it was on July 3 taken across the island to Catu, and there put on board a small steamer sent from Bahia by the plaintiffs' agent. A file of soldiers had been sent from Bahia by the president of the province on July 1 and placed at the disposal of the captain, and they guarded the specie from their arrival till it left Catu, and escorted it on the steamer to Bahia, where it was handed over to the plaintiffs' agent, and by him forwarded to Southampton by *The Elbe*, under an agreement between the plaintiffs and defendants by which the defendants agreed to pay general average as if it had come by *The Tagus*.

The master of *The Tagus*, finding her immovable, sent away the second officer with the mail boat about eight a.m. on June 27.

Her position on the reef had been ascertained at 3.30 a.m., when she had four fathoms of water under her bow and three and a-half under her stern, so that she must have been resting on the reef somewhere between bow and stern, and there can be no doubt that she was in a position of great peril. The plaintiffs' agent at once proceeded to engage lighters and tugs at Bahia to proceed to the assistance of *The Tagus*, and I have no doubt from this fact that the master had sent him word that it would be necessary to lighten the vessel in order to get her off. The mail boat, with the officer in charge, returned to the ship about eight p.m. on the 27th. The first steamer sent by the agent arrived near *The Tagus* in the forenoon of the 28th; but the weather appears to have been too heavy to admit of her rendering any assistance, or even to allow communication between the agent's clerk who was on board her and the stranded vessel, and about midday she steamed back to Bahia.

In the night between the 28th and 29th very heavy rollers set in from the south, and about 5 a.m. the master came to the conclusion that the only means of saving the vessel was to jettison the cargo, and the crew worked at getting the cargo overboard the whole of that day. A tug arrived in the evening of the 29th, and on June 30 and July 1 several other tugs followed. The work of jettisoning cargo and coals went on till the evening of July 2, the tugs hauling on to the ship and the ship's engines working at each high water. The hawsers parted repeatedly, and it was not till the evening of July 2 that the steamer floated. Lighters had been sent out to the ship to save, if possible, some of the cargo that had to be taken out, but the weather was too heavy to permit of their being used, except one, which carried some of the passengers' effects ashore. The steamer proceeded the next morning (July 3) under her own steam to Bahia, where she arrived a few hours before the small steamer with the specie. A portion only of the cargo had been jettisoned, and *The Tagus* was so far uninjured that she proceeded without repairs to Southampton with the remainder of her cargo on board, which she delivered in good order. She could have carried on the specie, but it was carried by *The Elbe* at the request of the defendants and under the agreement hereinbefore referred to.

The plaintiffs contend that the specie is liable to contribute, by way of general average, to the loss by jettison, and the expense of getting the ship afloat, and the cost of landing, guarding and transporting, warehousing and reloading the specie. No attempt has been made on either side to draw a distinction between the claim in respect of jettison and that in respect of the cost of tugs and the like, and for the purposes of this case I treat these two heads of claim as standing on the same footing.

The case is in one important respect peculiar. There is no question as to circumstances having arisen which gave rise to a general average loss. It is not suggested that cargo generally is exempt, nor is it denied that the goods remaining on board and the goods jettisoned alike must bear their share of the common loss, but it is said that, so far as the specie is concerned, it was in a place of safety before any of the loss or expense was incurred, and that the expenses of landing, guarding, transporting, warehousing, and reloading the specie are particular average chargeable on the specie alone, and are not general average at all.

The question is not, therefore, whether the circumstances are or are not such as to make cargo, as distinct from ship and freight, liable to general average, nor whether, granting that cargo is liable to general average, the liability extends to this or that head of damage or expenditure, but whether one particular

parcel of the cargo is exempt from the general burden. It is true the question is raised whether the specie is liable, by way of general average contribution, to bear its share of the expenses incurred for landing and guarding it and for transporting it to Bahia, but this seems to me to come pretty much to the question whether the specie is or is not liable to contribute to general average. If it be so liable, these expenses can hardly be particular average. If it be not, they certainly cannot be general average. The cases, therefore, which deal with the liability of the cargo as a whole, differ so materially in their circumstances from the present case that they can hardly be said to govern it, and it is to the principles they lay down and illustrate rather than to actual precedent, of which there is a singular dearth, that we must look for the solution of the question.

I take it to be settled now that the circumstances which impose a liability in the nature of a general average must be such as to imperil the safety of ship and cargo, and not merely such as to impede the successful prosecution of the particular voyage: *Svensden* v. *Wallace*; *Harrison* v. *Bank of Australasia*, 20 W. R. 385, L. R. 7 Ex. 39. I take it also to be settled that if the cargo as a whole be landed, and in safety, the expenses of getting the ship afloat thereafter are not general average: *Job* v. *Langton*, a case with which *Moran* v. *Jones*, has been supposed to conflict, does not seem to me, so far as principles are concerned, to be open to that observation. It is the decisions if anything, which are at variance, not the principles upon which they are based. The Master of the Rolls has stated in *Svensden* v. *Wallace*, at p. 80, that the decision in *Moran* v. *Jones* cannot be supported, and I refer to the case, therefore, only to show that it has not been overlooked. Where the cargo as a whole is safely landed, the shipowner has his ship as she lies, either supposed to be worthless, in which case she will be left where she is, or supposed to be worth something to him, in which case he will be held to spend the money necessary to rescue her on his own account, and for his own purposes only, in which case the expenditure cannot be the subject of general average. These principles, though they deal with different epochs, so to speak, in the chain of events which give rise to general average, the first dealing with the state of things at the commencement of the liability, and the other with a state of things at which the liability has terminated, have this in common: both point to the necessity, in order to establish a case of general average, of the existence of common danger of destruction at the moment when the liability is incurred. This necessity is laid down as the cardinal element necessary to establish a general average contribution in Arnould on Insurance, p. 917, 1st ed., p. 934, 2nd ed., where the learned author says, "All which is ultimately saved out of the whole adventure—*i.e.*, ship, freight, and cargo—contributes to make good the general average loss, provided it has been actually at risk at the time such loss was incurred, but not otherwise, because if not at risk at the time of the loss it was not saved thereby." This, however, is not a complete statement of what things are liable to general average, for goods jettisoned themselves contribute, and after they are thrown overboard they are no longer at risk; and yet no one ever contended that, as each parcel or bale went over the side and was swallowed up by the waves, its liability to be carried into the account of future general average ceased, leaving the burden to be borne in a continually increasing ratio by the ship and its continually decreasing contents. It seems to follow that the loss spoken of must be regarded as a whole, and as that resulting from a continuity of operations. Mr. Arnould's proposition, to make it complete, must be amplified. Property, I think it may be said, whether ultimately saved or jettisoned, actually at risk at any time during which the operation causing oss has been going on (comprehending under that phrase all such acts as may be properly considered as forming together one whole), is liable to contribution, provided that in consequence of that operation the whole adventure be preserved from destruction, because if it was not at risk during any part of that time, no adventure of which it formed one of the constituents was saved by the operation. It is clear that Mr. Arnould's "loss" includes both jettison and expenditure to save ship and cargo from destruction.

It is obvious that if, in such a case, portions of a cargo, removed from the ship instead of being jettisoned, are carried on shore in lighters, and put in a place of safety, or are kept in the lighters and ultimately replaced in the ship, questions may arise whether such treatment is to be considered as the equivalent of jettison, or as the equivalent of remaining on board the ship, in either of which cases, as it seems to me, the liability to general average must ensue, or as a removal of a totally different character, not subjecting the goods to contribution.

If the object of the removal has been the lightening of the ship for the common safety, and the object of effecting the removal in such a fashion as to avoid jettison has been to do to that which must be got overboard something less wasteful than actual jettison, there seems to be no reason whatever for drawing a distinction between such a case and that of actual jettison so far as liability to general average is concerned. But if the lightening of the ship formed no part, or no appreciable part, of the purpose for which the removal was effected, if the object of the removal was not to minimize the cost of jettison but to get out of harm's way the thing removed, and to prevent it from being or remaining at risk at all, it seems to me that a different result may very well ensue, and that a portion of cargo landed under such circumstances may well be regarded as separated from the adventure, and no longer liable to contribution. There is authority for saying that the purpose for which an act causing loss is done may determine whether it constitutes general average or not. It is said in Abbott on Shipping, 7th ed., p. 479, to have been "considered" that where bullion was thrown overboard to escape capture by an enemy the loss was not general average, and the author gives as the reason that the jettison in case of pursuit by an enemy, in order to constitute a case of general average, must be for the purpose of saving ship and cargo by lightening her and increasing her speed. A reference is given to *Butler* v. *Wildman*, 3 B. & Ald. 398. The question in that case was whether such a loss was covered by a policy of insurance. It was said incidentally by Holroyd, J., that jettison, under these circumstances, would not be general average, and the observation is but an *obiter dictum*, but it is adopted by Lord Tenterden, and shows that the purpose for which an act causing loss is done must be regarded in determining whether it gives rise to general average contribution, and it illustrates the principle that, if the act be not done to avert some danger common to ship and cargo, it does not constitute a case of general average.

Mr. Lowndes has some pertinent observations in a passage dealing with the case where the ship and cargo are placed in a situation which may probably, but not certainly, result in total wreck. In the earlier stages he points out the difficulty of saying whether what is done is for the common safety or for the rescuing of the property piecemeal, and expresses the opinion that the purpose rather than the result shall govern the allowance adding a warning against the natural tendency "to accept accomplished facts," and to settle the question of purpose by reference to the result (Lowndes on General Average, 3rd ed., p. 147). Cases, no doubt, may occur in which it may be difficult to say whether the

purpose for which goods are removed is that of lightening the ship or of saving the goods, and there will, no doubt, from time to time be instances in which it is impossible to separate the one purpose from the other. "The mere fact that the cargo is unladen, although it is done in part for the purpose of saving the goods, yet if it is also done for the purpose of lightening the vessel, and as a means of causing her to float, and of saving her from the common peril, will not necessarily divest the transaction of its character as an act performed for the joint benefit of ship and cargo": *McAndrews* v. *Thatcher*, 3 Wallace, at p. 370, in the Supreme Court of the United States. It is impossible with reference to such a matter to lay down any rigid or inflexible rule. The question will be one of circumstances and degree, and each case must depend upon its own facts. In the present instance, however, there seems to me to be no room for reasonable doubt that the predominant and probably the only object aimed at in sending the specie ashore was to put it beyond the reach of the peril to which the ship and the rest of the cargo remained exposed.

From the fact that the master sent the mail boat to Bahia as early as possible, and that the agent there immediately set to work to hire tugs and lighters, I have no doubt that it was present to the mind of the master very soon after the ship grounded that it would be necessary at all costs to lighten her, and that the jettison was delayed only because he hoped to be able to substitute for it the less disastrous expedient of getting the cargo ashore or into lighters. But I have equally little doubt that the specie was sent ashore, not to lighten the vessel, but to put such valuable property beyond the reach of possible danger by reason of the ship's breaking up or going to the bottom when she came off. What is the first step we always hear of when a vessel is wrecked? That the passengers and specie are put ashore. Specie is seldom aboard in quantities large enough for its removal to make any appreciable difference to the ship's chances of getting off when aground. The whole of the specie in this case weighed, we are told, about a ton and a half. *The Tagus* is a vessel of some 3,000 tons burthen. The ease to the vessel could be nothing at all. The combined value and smallness of total weight would be certain in any case to save the specie from jettison. Its value, and the facility with which it could be got ashore, would be certain in any case, where it was possible to land it, to save it from being left on board, and I cannot doubt that its removal was carried out, not in any sense or degree as a means of securing the common safety of ship and cargo, but simply for the purpose of saving the specie itself.

I think, therefore, that, when the general average loss was incurred, in whatever sense, restricted or enlarged, that can be properly used, the specie had ceased to be at risk, and that upon no reasonable view of the facts can its removal be considered as a part of the means taken for saving any common adventure. I am consequently of opinion that it is not liable, using the words of the special case, "to contribute to the jettison or to any of the expenses of getting the ship off the ground incurred after it was landed."

It is objected that the master has no right to prefer one part of the cargo to another, and to favour it at the expense of the rest. I make two answers. First, it is not a question of what the master had a right to do, but of what was done. He may have acted wrongly, but it is none the less the fact that the specie was landed, and was landed with the object of putting it out of the way of danger and not of helping the general adventure. Secondly, I do not see any reason to suppose that it was favoured at the expense or to the detriment of the chances of the rest of the adventure. The objection, moreover, is founded, I think, upon an erroneous view of the master's duty in such a case. It was laid down in the very learned and elaborate judgment of the Exchequer Chamber, delivered by Willes, J., in *Notara* v. *Henderson*, that a shipowner is a bailee of the goods intrusted to him for carriage in his ship, and that, although exempt under the bill of lading from the absolute liability of a common carrier, he is yet bound to use reasonable care in respect of the goods he carries, and it follows that if the master, when it was easy to land the specie, neglected so to do, and it was lost in consequence of his neglect, the shipowner would be liable. The master of a ship is under the same obligation as everyone else having duties to perform to act as a reasonable man in performing them. Specie, owing to its small bulk, can be placed in safety with exceptional facility. Its great value makes it exceptionally desirable to save it if possible. Suppose that two boxes of equal bulk and equal weight lay side by side in the ship's hold, and that one was filled with gold and the other with iron, and that only one could be saved, would anyone contend that a master who saved the iron in preference to the gold would be acting reasonably? It is pointed out in the judgment of the Exchequer Chamber in *Notara* v. *Henderson* that many of the Continental codes expressly recognize and enforce the duty of the master in such a case to place the more valuable article in safety before the other.

This observation answers another objection that was raised. To decide that the specie was not liable to general average contribution would, it was said, be to hold out an irresistible temptation to the master to leave the specie at all events on board, so as to insure its contribution to general average. A jury or any other tribunal having to determine whether the specie had been lost through the negligence of the master would, I should think, make very short work of it if it were shown that, when it was easy to save the specie without adding to the difficulties of either ship or cargo in general, the master had forborne to do so in order to make certain that it should not escape contribution to general average. Moreover, there are two sides even to that question. The specie might in the end be lost, though the ship and the cargo in general, or a substantial portion of it, were saved, and then the amount of general average to be made up in part by the ship and the cargo would be enormously increased. I cannot but think that the danger suggested is chimerical, but, whether it be real or imaginary, it is no reason for departing from the clear and well-established principles which appear to me to govern this case. I am, therefore, of opinion that our judgment should be for the defendants.

GRANTHAM, J.—I also am of opinion that our judgment must be for the defendants. It was admitted by the Attorney-General that, unless he could distinguish this case from the cases of *Job* v. *Langton* and *Walthew* v. *Mavrojani*, our judgment must be against him; and I am of opinion that, although the facts are not identical, yet that, on the principles of law deducible from those cases, the defendants, as owners of the specie landed from *The Tagus* under the circumstances set forth in the special case, are not liable for general average for the losses and expenses subsequently incurred in getting the ship off the reef on which she had struck. The law as applied in the English courts seems to differ materially from the law applied in the American courts, and, although there may be, on grounds of general policy, some advantage in adopting the American view, yet there can be no doubt that our English courts have followed more closely the original principles of the doctrine of general average contribution.

According to the decisions of our English courts, if the cargo sought to be made liable for general average contribution has been at the time of the loss and expenditure removed to a place of safety, and is not subject to

the particular peril which causes the special loss and expenditure, then such cargo is not liable to general average contribution in respect of such charges. The only difficulty that arose in this case arose from the apparently conflicting cases of *Moran* v. *Jones*, and *Job* v. *Langton*, because the Attorney-General was, in one aspect of the case, able to bring the facts of the case nearly within the law as applied in the former case; but as that case has not been since followed, even if it has not been overruled, we could not act upon that decision unless the facts were absolutely identical.

Looking at the log-book, and at the protest of the captain and crew of *The Tagus*, I have come to the conclusion that the landing of the specie was not done in pursuance of the common purpose of lightening the ship to get her off the reef, and so enabling her to continue her voyage, but was done for the same purpose that the passengers and their baggage were landed for—viz., for safety to the persons and things landed, they being respectively the most important parts of the cargo on board. The captain, having thus freed himself from his responsibility for the immediate safety of the passengers and specie, waited to see what turn events would take, and his subsequent action was the result of a subsequent judgment formed by him as to the best course to adopt' and was not the result of a single and original intention partly carried out by landing the passengers and specie as mentioned in the case. This view of his conduct is, I think, completely justified by the language of the protest, from which the difference in the action of the captain on the 28th and 29th fully appears. "The forenoon," he *writes*, "was spent in landing the remainder of the passengers' effects. At 7 p.m. a moderate breeze blowing," &c. Apparently, therefore, nothing more was done on the 28th after the passengers' effects were landed, and no idea was then formed of throwing cargo overboard. But the protest tells us "at 5 a.m. on the 29th" (the day after the landing of the specie) "the master of the said vessel deemed it expedient, as the only means of saving the vessel, to throw overboard the cargo and ballast." "The cargo" does not include the specie, which was already landed. What other interpretation can be put upon this language than that, having landed the passengers and specie, he waited to see what the next morning would bring forth, and finding when it came that the ship was in greater peril he determined to incur the expense and loss which is the subject of the general average claim?

But in *Moran* v. *Jones* the ship had become a wreck before the cargo was got out, and there can be no doubt that the cargo was got out not only for the safety of the cargo but for the purpose of lightening the ship. The Attorney-General very adroitly confused the term safety of the cargo as applied to its safety from perils of the sea with the safety of the cargo as applied to the necessity of protecting it from pillage on shore, and argued that, as it remained on shore under the charge of the officers of the ship, therefore unity of control was the same as unity of danger; but a little examination of the facts soon exposed the fallacy of this argument, because, if it were allowed to hold good, then, in case no further loss or expense had been incurred to the ship or rest of the cargo, but a guard of soldiers had been paid by the captain to look after the specie and save it from pillage by the islanders, the ship and cargo would have been liable to contribute for such expenses under the head of general average loss. For these reasons I am of opinion that our judgment must be for the defendants.

Judgment for the defendants.

Solicitors for the plaintiffs, *Wilson, Bristow, & Carpmael.*

Solicitors for the defendants, *Waltons, Bubb, & Johnson.*

Q. B. Div. (Lord Esher, M.R., and Lindley and Lopes, L.JJ., sitting as a Divisional Court.) — July 25.

BLAIR v. CORDNER (No. 2). (a.)

Solicitor—Bill of costs—Interest—Demand from client—Solicitors' Remuneration Act, 1881, (44 & 45 *Vict. c.* 44), *s.* 5—*General Order, clause* 7.

By clause 7 *of the General Order made in pursuance of the Solicitors' Remuneration Act*, 1881 "*a solicitor may charge interest at four per cent. per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from demand from the client.*"

A solicitor delivered a bill of costs to his client, but without any express demand of payment or claim for interest. The bill was taxed, the amount allowed on taxation paid, and the solicitor then claimed interest.

Held, that the sending in of the bill constituted a demand within the meaning of clause 7, *and that he was entitled to such interest.*

Appeal from the City of London Court.

The action was brought by a firm of solicitors to recover interest on a bill of costs, at the rate of four per cent. per annum, commencing one month from the date of delivery of the bill to the defendant. The facts were as follows:—On December 3, 1886, the plaintiffs delivered a bill amounting to £133 18s. 3d., but without any express demand for payment or claim for interest. This bill was taxed down to £89 13s. 10d., and, on April 21, 1887, the defendant, in compliance with the order of the taxing master, paid the latter sum to the plaintiffs. On April 22 the plaintiffs claimed interest on this amount at four per cent. from January 3 to April 21, and the judge found a verdict in their favour.

Gould, for the defendant.—The right of the plaintiffs to interest under clause 7 of the General Order depends upon a "demand from the client." There was no demand here. Mere delivery of a bill does not constitute a "demand."

De Sausmarez, for the plaintiffs.—The delivery of the bill of costs constitutes a statutable "demand." Clause 7 does not make it necessary to claim interest.

Lord ESHER, M.R.—The question is as to the meaning of clause 7. The contention that the sending in of a bill does not constitute a demand is hypercritical and fanciful. The words "from demand" mean "from sending in the bill," and from the date of the sending in of the bill a solicitor becomes entitled, under the order, to interest at four per cent. on the true amount as ascertained by taxation. I do not say what might have been the result if he had postponed claiming interest for an unreasonable time, but he practically claimed the interest as soon as it had become due, that is as soon as the amount on which it was payable had been taxed, and had become payable under the master's order.

LINDLEY, L.J.—I am of the same opinion. I think that, under clause 7, a solicitor may claim interest on the taxed costs at any time before they have been paid. Here, practically, the claim was made when the amount was tendered.

LOPES, L.J., concurred.

Appeal dismissed.

Lord ESHER stated that the COURT had conferred with COTTON, BOWEN, and FRY, L.JJ., who agreed with the decision.

Solicitors for the plaintiffs, *Blair & Girling.*

Solicitors for the defendant, *Burn & Berridge.*

(a.) Reported by G. K. PALEY, Esq., Barrister-at-Law.

Prob. Div. & Adm. Div. Divorce. } July 16, 26.

MOORE v. MOORE. (a.)

Divorce — Judicial separation — Desertion—Separation deed after two years' desertion—Deed not pleaded in bar—No covenant not to sue.

After a husband had deserted his wife for more than two years, a separation deed was executed, but it did not contain a covenant by the wife not to sue. The husband filed a petition against the wife for dissolution, on charges which were not sustained. The wife, by her answer, prayed for a judicial separation. The husband did not, by his pleading, set up the deed as a bar to the wife's remedy, but his counsel relied on it at the trial.

Held, that the wife was entitled to a decree for judicial separation.

Further consideration.

In this case the husband had filed a petition on April 27, 1887, for dissolution of marriage on the ground of adultery. His wife denied the charge, and by her answer prayed for a judicial separation on the ground of desertion for two years without reasonable excuse. The parties were married on November 14, 1866, and lived together until November, 1884, when the husband left his wife and had never since cohabited with her. There were six children of the marriage. On January 5, 1887, a deed was executed by which the husband and wife agreed to live apart, he allowing her £2 10s. a month for her maintenance as long as the separation continued, she agreeing to refrain from all annoyance, importunity, and molestation, and to maintain herself out of the allowance and her own earnings, and not to pledge her husband's credit or to take any of the children out of his custody.

July 16.—The issues were tried before Butt, J., and a common jury. No evidence was given in support of the petition, and the jury found on all the issues in favour of the wife. The case was postponed for argument.

Bargrave Deane, for the wife.—The desertion was completed at the date of the deed, and the deed does not condone it; it contains no covenant not to sue.

Middleton, for the husband.—The deed itself is condonation. It is an accord and satisfaction of the wife's claim.

Tress v. *Tress*, 35 W. R. 672, 12 P. D. 128; *Rose* v. *Rose*, 30 W. R. 736, 7 P. D. 225, affirmed 31 W. R. 573, 8 P. D. 985; *Buckmaster* v. *Buckmaster*, 17 W. R. 1114, L. R. 1 P. & D. 713; *Parkinson* v. *Parkinson*, L. R. 2 P. & D. 25, 18 W. R. Dig. 7; *Brown* v. *Brown and Shelton*, L. R. 3 P. & D. 202, were cited.

BUTT, J., after stating the facts, said:—The question is whether the deed of separation of January 5, 1887, ought to operate as a bar to the decree which the wife claims, and to which by the finding of the jury, she is otherwise undoubtedly entitled. I had some little doubt about the matter at the trial, and therefore I adjourned my decision for further consideration. The conclusion to which I have come is that I ought not to hold that that agreement is a bar to the wife's remedy. In the first place it is not pleaded, and that is a serious matter, because there may be many defences to a deed which appears at first sight to be valid and binding. And there is authority for saying that the court is not bound to take notice of a deed which is not pleaded. But if that were not so I should hold that it is no bar to a decree for judicial separation because it contains no covenant not to sue, nor anything approaching such a covenant. There is no condonation or any expression pointing to condonation. In the cases cited there was either an agreement to live apart before the desertion had been continued for two years, or there was condonation or a covenant not to sue. Therefore, under all the circumstances of the case, I pronounce a decree for judicial separation.

Decree nisi for judicial separation.

Solicitor for the petitioner, *Chesters*.

Solicitors for the respondent, *Field, Roscoe, & Co.*

(a.) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

Prob. Div. & Adm. Div. Admiralty. } July 12.

"THE VIVIENNE." (a.)

Restraint—Special form of bail-bond—Shares owned by defendants transmitted to third parties—Cancellation of bail-bond on terms.

Where, in an action of restraint, the defendants put in bail, consenting that execution might issue against the bail if the vessel proceeded against should not safely return to a port within the jurisdiction from as many voyages as she should sail upon before notice should be given by the plaintiffs of the withdrawal of their claims for security, the court, about two years after the execution of the bail-bond, on its being proved that the vessel was in safety within the jurisdiction, and that the defendants had parted with all their interest in her to third parties, ordered the bail-bond to be cancelled in three days unless the vessel should have passed out of the jurisdiction before she be arrested by a further warrant, otherwise the bond to remain in force until the return of the vessel from her next voyage.

This was an action of restraint instituted on behalf of the owners of 43-64th shares in the steamship *Vivienne* against the said steamship *Vivienne*. The remaining owners of *The Vivienne* intervened as defendants, and, in order to obtain the release of *The Vivienne*, two sureties, at their request, executed a bail-bond, of which the portion material to this report was in terms as follows:—

"Now, therefore, we . . . jointly and severally submit ourselves to the jurisdiction of the court, and consent that, if the aforesaid steamship *Vivienne* shall not safely return to a port within the jurisdiction of this honourable court from as many voyages as she shall sail upon before notice shall have been given to the defendants by the plaintiffs that they withdraw their claims for security for the value of their shares in the said steamship, execution may issue against us for a sum not exceeding £3,000, being the value of the plaintiffs' shares in the said steamship." This bail-bond was duly filed in the registry on the 27th of October, 1885.

On or about the 6th of July, 1887, notice of motion on behalf of both the defendants and the bail was given that the judge would be moved in court to order the bail-bond to be cancelled. In support of the motion an affidavit was brought in, which stated that *The Vivienne* was at the date of the affidavit lying at Cardiff loading for an outward voyage, that the plaintiffs had parted with all interest in her, and that the persons by which she was then being managed were not the persons by whom she had been managed at the date of the institution of the suit or of the execution of the bail-bond.

The motion was now heard before Butt, J.

Barnes, for the defendants and the bail, in support of the motion.—The court has full power over bail taken in actions before it, and on equitable principles would

(a.) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

ever allow the bail-bond in the present case to be enforced now that the circumstances which led to its being given no longer exist. The plaintiffs obtained security because they dissented from the employment of the vessel by the defendants, but the defendants no longer own any interest in her, and she is not now managed by the same persons who formerly managed her. As it would thus be inequitable to enforce the bail-bond, the sureties now ask to be dismissed from the suit and that the bail-bond be cancelled.

J. P. Aspinall, for the plaintiffs.—The bail-bond is not in terms confined to the duration of the ownership of the defendants in the vessel, and the condition of the bail-bond being in such plain language the court ought not to interfere to relieve the sureties from what they have undertaken, but should leave them to come to terms with the plaintiffs. At any rate, the plaintiffs have a right to arrest the vessel under a fresh warrant, and the court ought to secure this right to the plaintiffs and refuse to cancel the present bail-bond until the second arrest has been effected.

Butt, J.—I think it would be unreasonable to keep the sureties to the bail-bond in this action under a liability in perpetuity. It could not have been in their contemplation to undertake so indefinite a liability, and on behalf of other than those by whom they were requested to be parties to the bail-bond. I shall therefore order the sureties to be released, and the bail-bond cancelled on such terms as will be fair to the plaintiffs.

The minute of the order drawn up in the registry was as follows:—"The judge, having heard counsel on both sides, ordered that the bail-bond filed in this action on October 27, 1885, be cancelled in three days unless the steamship *Vivienne* shall have passed out of the jurisdiction of the court before she be arrested by a further warrant; otherwise the bond to remain in force until the return of the vessel from her next voyage. And the judge further ordered that if the bond be cancelled the defendants should pay the costs of this motion; otherwise the said costs to be reserved, and that either party be at liberty to apply."

Solicitors for the plaintiffs, *Clarkson, Son, & Wyles.*

Solicitors for the defendants and the bail, *T. Cooper & Co.*

Prob. Div. & Adm. Div. Admiralty. } June 18, 20, 25.

The Cargo ex "Laertes." (a.)

Salvage—Exemptions in contract of carriage exonerating shipowner from liability for loss or delay in consequence of unseaworthiness through latent defect in machinery—Award for salving cargo carried in vessel belonging to owners of salving vessel.

A steamship having become disabled at sea by the breaking of her flywheel shaft, was taken in tow by another steamship belonging to the same owners, and, after a tow of more than 700 miles, was placed in safety. At the time these services were rendered the disabled steamship was carrying cargo under three different forms of bills of lading, of which one form stated that the vessel was warranted seaworthy only so far as ordinary care could provide; another form provided that the vessel was warranted seaworthy only so far as due care in the appointment of agents, superintendents, pilots, masters, officers, engineers, and crew could insure it; whilst in the third form there was a stipulation that the shipowners were not to be liable for loss, detention, or damage if arising from latent defects in machinery even existing at time of shipment, provided all reasonable means had been taken to secure efficiency.

In an action of salvage brought by the owners, master, and crew of the salving vessel to recover salvage remuneration for salving the cargo shipped under those forms of bills of lading, and valued at £116,400, the court found as facts that the flywheel of the disabled steamship had broken down from a latent defect, that such latent defect existed when the voyage commenced, but could not have been discovered by the exercise of any reasonable care on the part of the owners, and that the steamship had been seaworthy to the extent required by the bills of lading.

Held, that the plaintiffs were entitled to £1,200 salvage remuneration for the services rendered to the cargo, and that of this amount £250 must be awarded to the crew of the salving vessel, £50 to her master, and the remainder to the shipowners.

This was an action of salvage instituted on behalf of the owners, master, and crew of the screw steamship *Achilles* valued at £15,000, against the owners of certain cargo valued at £116,400, which had been lately shipped on board the screw steamship *Laertes* on a voyage from Shanghai and other ports to Amsterdam, and was being carried in *The Laertes* on the same voyage, when on the 10th of March last that vessel broke her fly-wheel shaft in latitude 5° 57′ N. and longitude 91° 30′ E., and was two days later fallen in with by *The Achilles*, taken in tow by her and towed by her in safety to the harbour of Colombo a distance of about 720 miles.

The action was brought to recover for the services rendered by *The Achilles* on this occasion, and the owners of the cargo against which the suit had been instituted admitted that the salvage services proceeded on had been rendered, but raised the defences that the owners of *The Achilles* were the owners of *The Laertes*; that the act of the owners of *The Achilles* in towing and assisting *The Laertes* was done only in fulfilment of the contracts in pursuance of which the cargo of *The Laertes* had been shipped to be carried to its destination, or for the purpose of avoiding their liability for the non-delivery of the said cargo to the defendants, or for the sake of bringing their own vessel safe into port, and was in any case an act for the sole behalf and advantage of the owners of *The Achilles*, and was not, so far as they were concerned, a salvage service; and, further, that *The Laertes* had not, as required by such contracts, been seaworthy for the voyage or reasonably fit to carry the cargo at the commencement of the voyage, inasmuch as her screw-shaft was defective and unsound and in consequence thereof broke down, and *The Laertes* for this and no other cause received assistance from *The Achilles*, and her owners were not entitled to claim in respect of such assistance. The defendants, also, by way of counter-claim, claimed as damages for breach of the contract in the bills of lading for non-delivery of their cargo except subject to certain claims, and for *The Laertes* having been unseaworthy so that the assistance of *The Achilles* was required—whatever sum might be awarded to the master and crew of *The Achilles* for salvage. The plaintiffs, the owners of *The Achilles*, in their reply, alleged, *inter alia*, that the shaft of *The Laertes* had broken through a latent defect not discoverable by means of any ordinary care, and, further, that if they had contracted to carry the defendants' cargo, they had done so on the terms of certain bills of lading containing certain excepted perils, causes, or matters, and exemptions or restrictions, and that the breaking of the shaft of *The Laertes* was an excepted peril, cause, matter, or thing, or was within the said exemptions and restrictions.

June 18, 20.—On these days the action was heard

(a.) Reported by C. F. Jemmett, Esq., Barrister-at-Law.

before Butt, J., and two of the Elder Brethren of the Trinity House, and on the 25th of June the arguments of counsel on the questions of law arising on the bills of lading of the cargo belonging to the defendants were concluded before Butt, J.

The result of the evidence appears from the judgment, where also will be found set out the exemptions in the bills of lading relied on by the plaintiffs.

Cohen, Q.C., and *Barnes*, for the plaintiffs.—The owners of *The Achilles* are not claiming for salving the freight of *The Laertes*, but they contend that by reason of the terms of the contracts under which the defendants' cargo was shipped they are exonerated from liability for the consequences of *The Laertes* having broken down, and therefore are entitled to claim as salvors for their services to such cargo. In other words, they claim to have contracted themselves out of the decision in the case of *The Glenfruin*, 33 W. R. 826, 10 P. D. 103, and to have rendered themselves free from responsibility to the defendants even if *The Laertes* was unseaworthy at the commencement of the voyage.

They referred to *The Chartered Mercantile Marine Bank of India* v. *The Netherlands India Steam Navigation Co.*, 31 W. R. 445, 10 Q. B. D. 521; *Gilson* v. *Small*, 4 H. L. Cas. 353; *Worms* v. *Storey*, 4 W. R. 115, 11 Ex. 427; *The Rona*, 30 W. R. 614, 7 P. D. 247.

Myburgh, Q.C., and *Raikes*, for the defendants.—The exemptions relied on in the bills of lading apply only to protect the owners of *The Laertes* from liability for unseaworthiness arising during the voyage, and do not exonerate them from liability for a breach of the implied warranty that *The Laertes* was seaworthy at the commencement of the voyage: *Steel* v. *The State Line Steamship Co.*, 3 App. Cas. 72, 26 W. R. Dig. 216. The owners of *The Achilles* were, therefore, when they salved the cargo of *The Laertes*, merely doing an act for their own benefit in order to save themselves from being responsible to the cargo owners for the non-delivery of the cargo. This was clearly so, for the latent flaw, in consequence of which the shaft of *The Laertes* broke, must have existed at the time of her sailing.

Cohen, Q.C., replied.

BUTT, J.—This is a case of salvage services rendered by the steamship *Achilles*, of 2,359 tons gross register, her master and crew, to *The Laertes*, a steamship of 2,148 gross register tonnage, and to the cargo on board her. It is the cargo on board *The Laertes*, or rather the greater portion of that cargo, which is proceeded against in the present suit. *The Laertes* had broken down in the course of a voyage from Shanghai to Amsterdam with a cargo of tobacco and other goods on board. *The Achilles* fell in with her when she was so in distress and towed her a distance of about 700 or more miles to Colombo. Now *The Achilles* and *The Laertes* belong to the same owner, and this circumstance has given rise to the several questions which I have now to decide.

The salvage services were rendered in fine weather. There was little or no danger to the salvors or to their ship, and no immediate danger to the cargo on board the salved ship, though, as *The Laertes* had broken down, if she had been left to her own resources serious danger might have followed. It is said that the owners of *The Achilles*, being also the owners of *The Laertes*, should, in order to avoid circuity of action, be held barred from recovering salvage in this suit, because, having undertaken to carry the cargo on board *The Laertes* to its destination, and the vessel having broken down, if they recovered salvage from the owners of the cargo they would be immediately liable to an action for breach of their contract to carry, and that in that action the cargo owners would be entitled to recover back the same amount. The whole case, therefore, resolves itself into the question whether the owners of *The Laertes* have been guilty of a breach of contract for which they would be liable to the cargo owners. No doubt the ordinary rule is that, at the commencement of the voyage, there is an implied warranty that the ship is seaworthy, not that the owner will use his best endeavours to make her so, but that she is, in fact, seaworthy. *The Laertes* broke down from a latent defect, which I find, as a fact, could not have been discovered by the exercise of any reasonable care on the part of the owners, but the flaw in the shafting which led to the breakdown existed when the ship started, and, therefore, she was not seaworthy for the voyage. If the implied warranty existed, or was not limited by the contract in the bills of lading, then the owners of *The Laertes*, being the owners of *The Achilles*, could not sue as salvors. The cargo was shipped under three different bills of lading, and it is said on the part of the defendants that the stipulations in these bills of lading had no effect whatever in limiting the warranty of seaworthiness. The first of these bills of lading contains a provision to the effect that the vessel was only warranted seaworthy so far as ordinary care could provide. Mr. Myburgh contended that this provision only amounted to a stipulation that the shipowner would keep his vessel seaworthy during the voyage, but I think the words apply, and were intended to apply, as a limitation of the original implied warranty, and that they do, in fact, for present purposes, abrogate the warranty of seaworthiness, which would otherwise be implied. The second form of bill of lading in this case contains the following clause:—"The vessels of the Ocean Steamship Co. are warranted seaworthy only so far as due care in the appointment or selection of agents, superintendents, pilots, masters, officers, engineers, and crew insure it." I cannot follow Mr. Myburgh in his view that the exception in the second bill of lading is only limited to the period subsequent to the loading of the cargo; and I think the provision in the third form of bill of lading, that "the owners are not to be liable for loss, detention, or damage if arising directly or indirectly from latent defects in boilers, machinery, or any part of the vessel in which steam is used, even existing at time of shipment, provided all reasonable means have been taken to secure efficiency," if it does not abrogate, at all events limits, the warranty which the law would otherwise imply, that *The Laertes* was seaworthy at the beginning of the voyage. I am aware of the decision in the case of *Steel* v. *The State Line Steam Navigation Co.* That decision was that, under ordinary circumstances, the stipulations in a bill of lading apply after the warranty of seaworthiness of the vessel on which the goods were shipped has come into effect. In the bills of lading which were before their lordships in that case there were no such stipulations as those I have referred to in the present case, and, in my opinion, I am not departing from the decision in that case in holding, as I do, that the clauses in the bills of lading now before me limit the implied warranty of seaworthiness of *The Laertes*.

With regard to the facts which must be established in order to give effect to the limitations in these bills of lading, I find as facts (1) that *The Laertes* was seaworthy as far as ordinary care could make her so; (2) that she was seaworthy as far as due care in the appointment and selection of agents, superintendents, pilots, masters, officers, engineers, and crew could insure it; and (3) that the accident occurred from a latent defect in her machinery existing at the time of shipment, though all reasonable means had been taken to secure efficiency. It follows that there is no reason why the plaintiffs should not recover salvage from the owners of the cargo on board *The Laertes*. The court is always reluctant to make a large award against cargo when the claim is made by the owners of the ship itself, but, having regard to all the circumstances of the case

and looking to the size of both ships, and bearing in mind that the portion of the salved cargo proceeded against is valued at £116,400, I award £1,200 to the plaintiffs as salvage remuneration, and, as I am asked to apportion, I direct £50 of this to be given to the master, £250 to the crew, and the remainder to the owners of *The Laertes*.

Solicitors for the plaintiffs, *Pritchard & Sons*.

Solicitors for the defendants, *Waltons, Bubb, & Johnson*.

Court of Appeal.

From Lancaster Ct. of Chan. Nov. 3.

SOUTHPORT AND WEST LANCASHIRE BANKING CO. *v.* THOMPSON. (*a.*)

Mortgagor and mortgagee—Fixtures—Mortgage by sub-demise—Trade fixtures.

Words which are sufficient when used in a conveyance in fee to pass trade fixtures, are also sufficient to pass them when used in a demise.

By a mortgage by sub-demise, a corn mill and other leasehold premises, together with certain fixtures specifically mentioned, and constituting the motive power of the mill, were conveyed by sub-demise to the mortgagees, to secure a sum due to them by the mortgagors. The deed contained the following general words:—"Together with all buildings, fixtures, rights, lights, easements," &c.

Held, that the word "fixtures" in the general words was not restricted to fixtures ejusdem generis *with those previously specifically mentioned, but was intended to extend and enlarge that class.*

Held, therefore, that the trade fixtures in the mill passed by the sub-demise to the mortgagees.

Observations of Lord Blackburn *in* Hawtry *v.* Butlin, 21 *W. R.* 633, *L. R.* 8 *Q. B.* 293, *explained.*

Decision of Bristowe, V.C., *reversed.*

Appeal from a decision of the Vice-Chancellor of the County Palatine of Lancaster.

By an indenture of mortgage dated the 26th of January, 1882, and made between the Appley Bridge and West Lancashire Corn Mill Co. (Limited) (thereinafter referred to as "the Corn Mill Co.") of the one part and the Southport and West Lancashire Banking Co. (Limited) (thereinafter referred to as "the Banking Co.") of the other part, the Corn Mill Co., as beneficial owners, demised to the Banking Co. (1) a plot of land in Wrightlington, in Lancaster (therein more particularly described), with the appurtenances (except mines), "and also all and every the corn mill and the warehouse and other buildings adjoining thereto, or used in connection therewith, recently erected by the Corn Mill Co. upon the said plot of land or some part thereof: And also all and every the steam-engines, steam-boilers, main and cross shafting and gearing, steam, gas, and other pipes, pillars, and all other the fixtures and fixed machinery therein which, either by itself or in conjunction with other machinery, supplies, or assists to supply, the motive power to the said corn mill and works": (2) Another plot of land (therein more particularly described) in Wrightlington aforesaid, and two semi-detached villa residences thereon, with the appurtenances (except mines): and (3) a plot of land at Appley Bridge, with the appurtenances (except mines), "together with all buildings, fixtures, rights, lights, easements, advantages, hereditaments, and appurtenances whatsoever to the said premises hereinbefore firstly, secondly, and thirdly described respectively, belonging or appertaining (except as is respectively reserved by the lessees thereof respectively)," to hold "all and singular the plots or parcels of ground, corn mill, buildings, easements, hereditaments, and premises hereby respectively demised, or expressed so to be, unto the Banking Co., their successors and assigns," for the residue of the terms for which the Corn Mill Co. held the same respectively, except in each case the last day thereof. The deed contained a power for the Banking Co. to sell "the several plots of ground, corn mill, buildings, easements, and premises hereby demised, or any of them, or any part thereof," and provided that they should have all the powers which by the Conveyancing Act, 1881, were annexed to the power of sale given by the Act to a mortgagee. The deed did not contain any recital of the intention of the parties.

Both the Corn Mill Co. and the Banking Co. were now in liquidation.

On the 28th of December, 1887, the liquidator of the Banking Co. received from the liquidator of the Corn Mill Co. notice that on the 5th of January, 1887, he intended to sell the machinery belonging to the latter company in and about the mill, "other than the steam-engines, steam-boilers, main and cross shafting and gearing, steam, gas, and other pipes, pillars, and all other the fixtures and the fixed machinery which supplies, or assists to supply, the motive power to the corn mill and works."

The Banking Co. thereupon commenced the present action against the liquidator of the Corn Mill Co. and the company for foreclosure or sale and for an injunction to restrain the sale or removal of any machinery, articles, or things affixed or fastened to the freehold of the premises comprised in the mortgage, or any part thereof, during the continuance of the security.

On the 3rd of January, 1887, the plaintiffs obtained an *interim* injunction, which was subsequently continued till the trial.

On the 8th of March, 1887, Bristowe, V.C., held that the word "fixtures" among general words operated to pass to the mortgagees only fixtures *ejusdem generis* with those which had been specifically enumerated, and that the "trade machinery," as distinguished from the "power machinery," did not pass to the mortgagees.

From this decision the Banking Co. appealed.

R. Neville and *P. O. Lawrence*, for the appellants.—The trade fixtures passed by the mortgage to the plaintiffs. The operation of the general words in the mortgage is not restricted by the specific description of things which may be called the motive machinery in the former part of the deed.

They referred to *Hawtry* v. *Butlin*, 21 W. R. 633, L. R. 8 Q. B. 293; *Ex parte Barclay, In re Joyce*, 22 W. R. 608, L. R. 9 Ch. 576, 580; *Ex parte Barclay, In re Gowan*, 4 W. R. 80, 5 De G. M. & G. 403; *Mather* v. *Fraser*, 4 W. R. 387, 2 K. & J. 536, 553; *Haley* v. *Hammersley*, 9 W. R. 562, 3 De G. F. & J. 587. [LINDLEY, L.J., referred to *Holland* v. *Hodgson*, 20 W. R. 990, L. R. 7 C. P. 328.]

Rigby, Q.C., and *Maberly*, for the respondents.—The trade fixtures did not pass by the mortgage. By the word "fixtures" in the general words all that were intended to pass were fixtures *ejusdem generis* with the fixtures mentioned in the former part of the deed.

They referred to the Bills of Sale Act, 1878, s. 5; *Hawtry* v. *Butlin*; *Crompton* v. *Jarratt*, 33 W. R. 913, 30 Ch. D. 298; *Howard* v. *Earl of Shrewsbury*, 22 W. R. 290, L. R. 17 Eq. 378.

COTTON, L.J.—This is an appeal from a decision against the mortgagees that certain trade particulars, not specifically described in the mortgage deed, did not

(*a.*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

pass by the mortgage. To a considerable extent I think the Vice-Chancellor relied on what was said by Lord Blackburn, then Blackburn, J., in *Hawtry* v. *Butlin*. Mr. Rigby, in his argument before us, did not really rely upon that case; but as I think the Vice-Chancellor relied upon it to some extent we ought to state our own opinion about it. That decision was said to be in point in this way, that it was there laid down by Blackburn, J., that as regards trade fixtures there was a difference between a conveyance in fee and a conveyance by sub-demise, where the mortgagor had himself only a certain interest. Did Blackburn, J., intend to lay down any such distinction? I cannot see myself how it can be supposed that he did, because if words in a conveyance in fee are sufficient to pass trade fixtures, I do not understand why they should not be sufficient to pass trade fixtures when used in a demise. What are trade fixtures? They are fixtures passing with the freehold interest if that is conveyed, or passing with the leasehold interest if it is the leasehold interest that is assigned. But as between the landlord and tenant they are removable at the expiration of the term, and therefore as between landlord and tenant they are in a different position from that in which fixtures are which are not so removable. As regards, however, the parcels of a conveyance, whether it is of the fee simple or for a term, they pass either by a conveyance of the fee simple or by a demise of the land for a term. There is, I think, a little ambiguity in the language of the judgment of Blackburn, J., in one respect. If the mortgagee is seeking to remove the fixtures and sell them he must have express power given him by the mortgagor to do so, otherwise he can only take them with the land without any right of removing them. That right of removal and of selling will remain in the mortgagor, the tenant, unless he expressly assigns that right to the mortgagee, who takes by demise from him. Now, in the case I have referred to Blackburn, J., after stating that the mortgagee in that case was a mortgagee in fee (at p. 293), proceeds: — "But when a person has a limited interest in land, such as a term of years, and on the land there are fixtures in which he has an absolute property, and he mortgages his interest in the land by way of under-lease, I should think that the property in the fixtures would not pass by the mortgage, and the right to sever them would still remain in the mortgagor." He does not mean that they will not pass by a grant of under-lease, but that the absolute property in them will not pass, so as to enable the person entitled by demise to say:—"This is only a demise of the land, and I can do whatever the mortgagor could do with them—namely, remove them and sell them as separate chattels." That is plain from what follows, because he goes on to say:— "Unless there is a clear intention, to be gathered from the terms of the mortgage deed, to convey the absolute interest in the fixtures as well as the limited interest in the land." He does not there mean that the mortgagor could remove them while the mortgage was still unsatisfied during the term granted by way of under-lease, but only that the right to remove them will remain in the mortgagor, and that the right to the fixtures will only pass to the mortgagee during the term demised, but that he will not be able to deal with them as his absolute property because that right is left in the mortgagor after the mortgage term is satisfied. I mention this because, when we look first at it, it does seem difficult to understand. But, as I have said, counsel for the respondent here did not rely really upon that. What I understand as the contention of the respondent was this. There are two classes of fixtures; one of which the Bills of Sale Act of 1878 says is to be considered as chattels personal; the other is not. This deed enumerates certain fixtures, but it does not enumerate any of those which the Bills of Sale Act says are to be personal chattels—personal chattels only for the purposes of that Act.

But then it is said, although a mere demise of this mill would have granted all the fixtures, both those which are enumerated and those which are not enumerated, yet as there is an enumeration of one particular class there is an intention expressed on the face of the deed to exclude chattels not of the class which those enumerated are. That, in my opinion, was merely based upon this fallacy—that you must show an intention to pass the chattels where there is a demise of the land which will carry and pass the chattels. That would be the law undoubtedly, having got rid of the distinction between the demise and the fee simple: and it is absurd to say that there is an expressed intention on the face of the instrument, because they cannot do anything more to exclude the other class. Just see what an absurdity it would be to hold otherwise with regard to that expressed intention. This is a mortgage of a flour mill. Here are trade fixtures worth, we are told, something like £4,000; and though the mill would not be entirely reduced to bare walls by their removal, yet it would not be workable without them. And we are to suppose that this mortgage, which is a mortgage to a bank to secure their account, is intended to exclude from the security to the bank that which alone practically made the property valuable. If there were express words of course we should have to deal with them, but there are no express words at all. All that is relied upon is the implication arising from the fact that certain chattels are enumerated and others are not.

I do not intend to dive into the mind of the draftsman and to say why it was he only enumerated these particular fixtures—whether he did so because he supposed they were the most valuable, or because he was afraid of enumerating the personal chattels for fear it should be said that this was a bill of sale. Although I do not rely upon the words "fixtures," &c., in the general words as in any way including the fixtures which would not be included without those words, to my mind they cannot be disregarded, as showing that the draftsman did not intend that the enumeration of the chattels or fixtures which were specified should be an exclusive enumeration, so as to show that nothing else was to be comprised in this conveyance.

I think that the words here are sufficient to carry, by the demise of the land and the mill, these trade fixtures, and that there is no sufficient expression of intention to exclude those fixtures which are not enumerated.

In my opinion, therefore, the decision of the Vice-Chancellor was erroneous, and must be reversed.

I think it unnecessary to go through the other cases which have been cited—*Mather* v. *Fraser* and the others—in which it has been held that an enumeration of certain things was not sufficient to exclude others, because a deed must be construed by itself; and one really cannot get much light by looking at the terms of another deed which has been construed in another way by the court when we have once got the principle for our decision, that this demise is sufficient to carry these trade fixtures unless there is sufficient expression of intention on the face of the deed to exclude them; and in my opinion there is not sufficient in this deed to exclude these trade fixtures.

LINDLEY, L.J.—So far as I can gather from the reasons given by the Vice-Chancellor he has been a little misled by the reasons given, according to the report, by Blackburn, J., in his judgment in the case of *Hawtry* v. *Butlin*. Undoubtedly there are words there which at first sight appear to warrant the notion that he was of opinion that where a mortgagor demised land of which he was tenant for a term of years, and fixtures of which he was absolute owner, a mortgage in ordinary form would not pass the fixtures. But I do not think he meant that at all. What he meant, as I understand,

was that, unless there was something in the deed to warrant it, a mortgagee under a deed of that sort might sell the fixtures only so far as they were chattels separately assigned. If that was what he meant—and undoubtedly there is an expression in his judgment which would seem to show that it was—no doubt the chattels would pass. Any such opinion as to his meaning is fortified by his language in the case of *Holland* v. *Hodgson*, where he again adverts to the same point, showing that what he meant was that a mortgagor might demise, in the absence of express words, so as to sell the fixtures and treat them as chattels. The Vice-Chancellor, in arriving at the conclusion he here did, was, I think, a little misled by those observations.

Now if we look at the matter apart from that difficulty, or with that obscurity cleared away, it appears to me that, unless it can be shown that any fixtures were intended to be excluded, there is ample in this deed to pass them. In the first place, if the fixtures are intended to pass with the land, they are conveyed by a grant of the lease, or in any other way. Then we have here got, curiously enough, this, that the grantor or lessor goes out of his way rather to say what he means. First of all, when he demises the first part of the property, he says expressly, "I mean this part to include the moving property," and when he has done with all those moving lots, he says he means to include the motive parcels; and when he states in that way that he means both, we are asked to say he intended to exclude one. We cannot see anything at all to justify it. The words are, of course, most important, as showing what was intended, and whatever doubt there might be about his intention, they may be useful as removing that doubt. We are really asked to exclude the rest of the fixtures because, it is said, of the trouble the mortgagors took to enumerate only a portion of them. But let us consider the nature of this security. What was it? It was a security for money; and can it be conceived that the parties intended to exclude that which, if excluded, would render the security worthless for the very purpose for which the parties intended it? It is really almost impossible to arrive at the conclusion that the parties intended to exclude that which was an essential part of the security. If that intention were plainly expressed, well and good; but without that we cannot approach this deed with the feeling that, from the nature of the security, their intention was such as to have that result. I cannot possibly follow the argument which was addressed to us by Mr. Rigby, that because the parties have taken the trouble to say twice over what they meant, therefore they meant to exclude these fixtures.

I think the conclusion arrived at by the Vice-Chancellor in the court below was erroneous, and that the decision, therefore, should be reversed.

Lopes, L.J.—In a mortgage of freehold property all things which are annexed to the place are part of the mortgage security, and then, therefore, the deed contains no mention of the fixtures. That is so unless a contrary intention can be collected from the deed. That, no doubt, is the law with regard to freehold property. But it has been said a different rule applies when the mortgaged property is not freehold, but leasehold. In my opinion there is no such distinction. The learned Vice-Chancellor seems to have relied upon certain expressions of Blackburn, J., in the case which has been referred to, and I cannot help thinking that he has misapprehended what that learned judge meant. According to my view, what Lord Blackburn meant was this: that in case of a mortgage of leasehold property the mortgagee was only entitled to use the fixtures for a term, and that the right to sever the fixtures remained in the mortgagor at the end of the mortgage term. I think that is the proper construction to be placed on the expressions used by that learned judge in the case referred to.

But it is said here that these trade fixtures do not pass because a contrary intention is to be collected from this deed, and the way in which that point is put is this. It is said that a contrary intention is to be found in the deed, and that the ordinary inference that the trade fixtures pass is rebutted, because there is an enumeration of one particular class which is to be regarded as an exclusion of the other class. It is to be remembered that in this deed there appear among the general words the words "all fixtures." With regard to those words it is said they are not in any way to enlarge the specific description of the articles enumerated beforehand, but that they are to be interpreted as merely including things *ejusdem generis* with those. I cannot accept that view. I think the words "all fixtures" were put in intentionally, and were intended to extend and enlarge that which had been previously specifically described. It seems to me a most unreasonable thing to say that an intention is to be collected from this deed not to pass these trade fixtures when it is remembered that this is a mortgage of a mill, and that, if these particular articles, trade fixtures, were excluded, it would be rendering that which was intended as a mortgage security absolutely unworkable as a mill.

I think for these reasons that the decision of the learned Vice-Chancellor is wrong, and that the appeal ought to be allowed.

Appeal allowed.

Solicitors, *Buck, Dickeons, & Cockshott*, Southport; *A. S. Mather*, Liverpool.

From Q. B. Div. Nov. 29.

Witt v. Banner. (a.)

Bill of sale—Schedule—Pictures—Inventory—"Specifically described"—Bills of Sale Act, 1882 (45 & 46 *Vict. c.* 43), *s.* 4.

A bill of sale which purported to assign pictures described them in the schedule as so many oil paintings and so many water-colours in gilt frames.

Held, that the bill of sale was void in respect of the pictures for non-compliance with section 4 of the Bills of Sale Act, 1882, *which requires that the schedule shall contain "an inventory," and that the chattels comprised in it shall be "specifically described."*

Decision of the Queen's Bench Division (35 *W. R.* 761, 19 *Q. B. D.* 276) *affirmed.*

Appeal from the decision of a divisional court (Wills and Grantham, JJ.) on an interpleader issue between bill of sale holder and execution creditor, reported 35 W. R. 761, 19 Q. B. D. 276. The execution debtor, who was a picture dealer, had granted a bill of sale "of all and singular the several chattels and things specifically described in the schedule hereto annexed."

The part of the schedule on which a question was raised was "At 77, Mortimer-street, aforesaid, 450 oil paintings in gilt frames, 300 oil paintings unframed, 50 water-colours in gilt frames, 20 water-colours unframed, and 20 gilt frames."

By the Bills of Sale Act, 1878, Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 4, "Every bill of sale shall have annexed thereto or written thereon a schedule containing an inventory of the personal chattels comprised in the bill of sale, and such bill of sale . . . shall have effect only in respect of the said personal chattels

(a.) Reported by A. P. Percival Kerr, Esq., Barrister-at-Law.

specifically described in the said schedule and shall be void except as against the grantor in respect of any personal chattels not so specifically described."

The county court judge, before whom the issue was tried, held the bill of sale to be void in respect of the pictures on the ground that they were not "specifically described," and the Divisional Court affirmed his decision.

The claimant appealed.

Candy, Q.C. (*H. J. Broun* with him) for the appellant.—The description is sufficient. The Act does not require an accurate or true catalogue. This description sufficiently gives the species of chattels assigned, which is all that is required: *Roberts* v. *Roberts*, 32 W. R. 605, 13 Q. B. D. 794.

Channell, Q.C. (*Thornton Sharp* with him), for the respondent.—The bill of sale does not purport to assign all the pictures at 77, Mortimer-street. How is it possible to identify which pictures are assigned out of the stock there?

Candy, Q.C., replied.

Lord ESHER, M.R.—I do not think I can say anything plainer as to the meaning of "specifically described" than I said in the case of *Roberts* v. *Roberts*, and I cannot agree with my brother Grantham in the view he took of that case. The word "specifically" is used in the Act in its ordinary business meaning as applicable to an inventory. The bill of sale is, in my opinion, hopelessly bad as to these pictures. The section is a business section and not a philosophical or dictionary section. Its requirements are an inventory and specific description of the chattels. The term inventory is well known to business men and "specifically described" means so accurately or minutely described as is usual in an ordinary business inventory of such chattels and in such a place as they are. I do not think the description in this schedule was such as would amount to an ordinary business inventory at all. I do not think it would have been an inventory even if the pictures assigned were the whole of the pictures at 77, Mortimer-street. It does not describe the pictures with such speciality as is usual and customary in describing pictures at such a place.

BOWEN, L.J.—In order to see whether there is a compliance with the terms of the section the circumstances of each case must be regarded. The question first arises whether there is any inventory within the ordinary meaning of the term as applied in such circumstances as here existed. I think that there was no inventory, for, in my opinion, that cannot be an inventory which only identifies pictures as so many oil paintings in gilt frames, &c. I agree entirely with what was said in *Roberts* v. *Roberts* on this question, and I think the true test of whether chattels are specifically described is whether they are sufficiently described for the ordinary purposes of business.

FRY, L.J.—I am entirely of the same opinion. I think there was neither an inventory here nor were the chattels "specifically described." It is not easy to say what in all cases is required for specific description, and obviously what is sufficient with regard to one class of chattels or in one state of circumstances would be insufficient in another; but I think there ought to be a sufficient description to distinguish the chattels assigned from other chattels of the same class.

Appeal dismissed.

Solicitors for the appellant, *Nordon & Lazarus.*

Solicitors for the respondent, *Allen & Sons.*

From Q. B. Div. Nov. 29.

GLOUCESTERSHIRE BANKING CO. *v.* EDWARDS. (*a.*)

Sheriff—Liability of under-sheriff after death of high sheriff—Action for money had and received—3 *Geo.* 1, *c.* 15, *ss.* 8, 11.

Where, after the death of a high sheriff and before the appointment of his successor, the under-sheriff sold goods which had been taken in execution before the death of the high sheriff,

Held, that the under-sheriff was accountable for the proceeds to the execution creditor, and not to the executors of the deceased high sheriff; and that, therefore an action for money had and received would lie against him or his executors.

Decision of the Queen's Bench Division (35 *W. R.* 842, 19 *Q. B. D.* 575) *affirmed.*

Appeal from the decision of a divisional court Day and Wills, JJ.), reported 35 W. R. 842, 19 Q. B. D. 575.

The plaintiffs, having recovered a judgment, issued a writ of *fi. fa.* to the High Sheriff of Monmouthshire, who at once seized under it. On January 2, 1884, the high sheriff died, and on January 11 the goods were sold by the under-sheriff, who received the proceeds and paid over a portion of the money to the plaintiffs. A new high sheriff was appointed in March, and in November the under-sheriff died without having paid over the balance. The action was then brought against his executors, the claim being both for negligence and extortion in the under-sheriff, and also for money had and received. Lord Coleridge, C.J., before whom the case was tried, nonsuited the plaintiffs, but the Divisional Court ordered a new trial, on the ground that the action for money had and received would lie, and that, as that action did not require the same evidence to support it as the action for tort, it was not necessary to waive the tort.

The defendants appealed.

Cohen, Q.C., and *Ram*, for the appellants.—The only question is whether there was any duty on the under-sheriff to pay over this money to the execution creditors. If so, it is admitted that an action will lie against his executors. The action has been wrongly brought. The under-sheriff does not receive the money for the execution creditors, but for the high sheriff, and, after his death, for his executors. The action ought, therefore, to have been brought against the executors of the high sheriff. That was certainly the case before 3 Geo. 1, c. 15: *Longdill* v. *Jones*, 1 Stark. 345; *Cooper* v. *Chitty*, 1 W. Bl. 65. No action can be brought against the under-sheriff during the lifetime of the high sheriff for money had and received as under-sheriff: Watson on Sheriffs, 2nd ed., p. 38. The true construction of section 8 of 3 Geo. 1, c. 15, is that the under-sheriff is bound to continue in office during the interval between the death of a high sheriff and the appointment of his successor, and is liable for those wrongs for which he would, before the Act, have been personally liable, but not for anything for which the high sheriff would have been liable.

They cited *Doe* v. *Donston*, 1 B. & Ald. 230; *Clerke* v. *Withers*, 6 Mod. 295.

Bosanquet, Q.C., and *Gwynne James*, for the respondents, were not called upon to argue.

Lord ESHER, M.R.—In this case the only question for us is whether there was any duty on the deceased under-sheriff to pay over the money to the plaintiffs. It is contended for his executors that there was no such duty, and that, therefore, the action must fail. It is said that he received the money as agent for the execu-

(*a.*) Reported by A. P. PERCIVAL KEEP, Esq., Barrister-at-Law.

tors of the deceased high sheriff and that his duty was to pay it to them, and that the action ought to have been brought against them, and not against him or his executors. The whole question depends on the construction to be put on section 8 of 3 Geo. 1. c. 15. Formerly the under-sheriff was the deputy of the high sheriff, who had appointed and could remove him. On the death of a high sheriff during his term of office, the under-sheriff's office also came to an end, as his deputation terminated by the death of the person deputing him. While the high sheriff lived he was liable, and the under-sheriff was not liable for acts done by him as under-sheriff but done wrongly. It is unnecessary now to inquire on whom the duties and liabilities of the high sheriff fell when he died during his term of office. It is certain that they did not fall on the under-sheriff, who could do nothing after the sheriff's decease, and could no longer act at all as under-sheriff. Then came the statute of George I., which said that great inconvenience had been occasioned by this state of circumstances, and it therefore enacted that if the high sheriff should die while he was high sheriff the under-sheriff should continue in office, and should execute the same, that is, should do all the duties of his office in the name of the deceased high sheriff until another sheriff should be appointed, and the section proceeds to say that the under-sheriff shall be answerable for the execution of his office in all things, and to all respects, intents, and purposes, during such interval as the high sheriff would have been if he had lived. This puts him, therefore, in exactly the position of the high sheriff with regard to his liability for all things done in his capacity of under-sheriff. It is plain that if the high sheriff had lived he would have been answerable for this claim to the execution creditor, therefore the under-sheriff, after the death of the high sheriff, was liable. It follows that an action for money had and received would lie against him, and, therefore, against his executors. The appeal must be dismissed.

BOWEN, L.J.—I agree, and for substantially the same reasons. Was there any duty on the part of the under-sheriff to pay over this money to the execution creditors? It is suggested that when the sheriff's functions terminated before his year of office had expired his executors had to complete what he had begun. We are not concerned to consider now whether that was so prior to the statute of George I. The language of that statute is, in my opinion, express, and it makes an under-sheriff directly responsible during the interval between the death of the high sheriff and the appointment of his successor. I think it is impossible to take any other view of section 8, and it is confirmed by the language of section 11. Therefore, I think there was a duty on the under-sheriff to pay the money to the execution creditors, and that this action will lie.

FRY, L.J.—I am of the same opinion. I cannot read section 8 in any other way than that it imposes a direct liability on the under-sheriff.

Appeal dismissed.

Solicitors for the appellants, *Meredith, Roberts, & Mills*, for *Wallis*, Hereford.

Solicitors for the respondents, *Johnston, Harrison, & Powell*, for *Edwards & Le Brasseur*, Pontypool.

NOTE.—By 50 & 51 Vict. c. 55 the Act 3 Geo. 1, c. 15, is repealed, and by section 25, "Where the sheriff of a county dies before the expiration of his year of office, or before he is lawfully superseded, the under-sheriff by him appointed shall nevertheless continue in office, and shall, until another sheriff be appointed for the said county and has made the declaration of office, execute the office of sheriff in the name of the deceased sheriff and be answerable for the execution of the said office as the deceased sheriff would by law have been if living."

From Q. B. Div Nov. 17.

REG. v. POULTER. (a.)

Compensation—Injurious affection—Light—Termination of lease by claimant—Prospective injury—Railways Clauses Act, 1845 (8 *Vict.* c. 20), *ss.* 6, 16.

Compensation cannot be claimed under the Railways Clauses Act, 1845, *for prospective injurious affection of property.*

The claimants held their premises under a lease for seventeen years, terminable at their option at the end of three years by a six months' notice. Six months before the three years came to an end, they perceived that certain buildings which had been commenced by a railway company on land adjoining their premises would so darken their premises as to make them useless, and they consequently gave notice to their landlord to determine the lease at the end of the three years.

Upon a claim for compensation being made by them,

Held, that it must be limited to the damage from injurious affection sustained by them before the date on which the lease actually determined, and must not be assessed on the basis of the lease having fourteen years to run.

Appeal from the decision of a divisional court (Lord Coleridge, C.J., and Denman, J.), refusing to bring up by *certiorari* and quash an inquisition held by the sheriff under section 68 of the Lands Clauses Act, 1845.

Messrs. Poulter carried on business at Whitechapel as colour printers. They held their premises under a lease for seventeen years from November 11, 1883, terminable by them at the end of three years by giving six months' notice. Early in 1885 the London, Tilbury, and Southend Railway Co., having acquired the adjoining premises, began, under the powers of their Acts, to erect warehouses upon them after demolishing the previously existing buildings. Messrs. Poulter being informed that the warehouses would be carried up to a height of 100ft., perceived that this would so seriously interfere with their rights of light and air that their premises would no longer be available for the purposes for which they were used, and accordingly, after informing the company of their intention, they gave six months' notice on May 6, 1886, to terminate their lease at the end of the three years—that is to say, on November 11, 1886, and proceeded to procure other premises, for which they were obliged to pay an increased rent. They then claimed against the company for an injurious affection of their premises, and an inquisition was held before the under-sheriff. The jury gave a verdict for £3,000 damages. The under-sheriff then put the following question to them:—"Assuming that the claimants are not entitled to claim beyond the 11th of November, 1886, what sum are they entitled to in respect of their occupation of the premises up to that date." The jury answered this question, "£450. No land was taken from the claimants. The Divisional Court held that the claimants could recover the larger sum, and that their claim for compensation was not limited to the damage actually sustained before the determination of the lease on November 11, 1886, and refused the application to bring up and quash the inquisition.

The railway company appealed.

R. S. Wright (*Sir R. E. Webster, A.G.*, and *Charles Haigh* with him), for the appellants.—The verdict for £3,000 was wrongly given. The injury done to the claimants when their term expired was of a trifling character. The claimants by their own act put an end to the lease. If the verdict stands, the company will

(a.) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

have to pay twice over, for they will also have to compensate the landlord, who is now in possession, for the injurious affection of the premises when these buildings are completed. The claimants cannot get compensation for being frightened into giving notice. There must have been an injurious affection before the right to be compensated for it arises: *Burkinshaw* v. *Birmingham and Oxford Junction Railway Co.*, 5 Ex. 475; *Ford* v. *Metropolitan Railway Co.*, 34 W. R. 426, 17 Q. B. D. 12; *In re Wadham*, 33 W. R. 215, 14 Q. B. D. 747; *Becket* v. *Midland Railway Co.*, 16 W. R. 221, L. R. 3 C. P. 82; *Ricket* v. *Metropolitan Railway Co.*, 15 W. R. 937, L. R. 2 H. L. 175; *Metropolitan Board of Works* v. *M'Carthy*, 23 W. R. 115, L. R. 7 H. L. 243.

Moulton, Q.C., and *G. M. Freeman*, for the respondents.—The verdict for £3,000 was right. The damage sustained by the claimants directly flowed from the act of the railway company. The claimants naturally gave notice to quit when they found these premises would become valueless. This was both the necessary consequence of the acts of the railway company and also was the course most beneficial to the railway company.

They cited *Eagle* v. *Charing Cross Railway Co.*, 15 W. R. 1016, L. R. 2 C. P. 638; *Caledonian Railway Co.* v. *Walker's Trustees*, 30 W. R. 569, 7 App. Cas. 259; *Caledonian Railway Co.* v. *Lockhart*, 8 W. R. 373, 3 Macq. 813; *Croft* v. *London and North-Western Railway Co.*, 11 W. R. 360, 3 B. & S. 436.

R. S. Wright, in reply, cited *Commissioners of Inland Revenue* v. *Glasgow Railway Co.*, 12 App. Cas. 315.

Lord ESHER, M.R. (after stating the facts).—The question that we have to decide is, To what compensation were the claimants entitled? Were they entitled to compensation as lessees for fourteen years or as lessees of a term which would expire in six months? If the giving of notice were an actual and necessary result of the injury done to the claimant's light by the railway company, the case would be different. But how could it be said that the natural consequence of what the company had done was that the claimants should give notice? Even supposing that their light was partially interfered with, was it otherwise than by their own free will that they gave notice? The notice was given at their own option, and it was no result of what the company had done that they should exercise their option as they did. But it is said that by exercising that option they benefited the railway company, and that if they had not done so they would have been able to recover larger damages from them. If that is so, and they have prevented themselves from getting greater damages than they can now recover, it is by their own act that such is the case. I cannot agree with the view expressed by the Lord Chief Justice that the claimants are entitled to compensation on the basis of a fourteen years' lease. They ceased to hold such a lease solely at their own will, and not as the necessary result of any act of the railway company, and therefore, they are reduced to the position of persons holding a lease which must expire in six months' time. In my opinion, therefore, the finding of £3,000 must be set aside, and the alternative finding must be upheld. The appeal, therefore, must be allowed, and judgment for £450 entered for the claimants.

BOWEN, L.J.—I concur.

FRY, L.J.—The great question in this case is whether the claimants could recover by way of compensation for prospective injury to result to their property from future exercise of the powers of the company, or whether they could only recover for damage arising from the injury already done. The Railways Clauses Act, 1845, provides for full compensation for the value of land "taken or used," and for all damage sustained by reason of the exercise of the statutory powers conferred on railway companies. The words relate, in my opinion, to damages sustained at or before the date of the claim, or (at the latest) at or before the date of the inquisition, and do not relate to any future injury resulting in future damage. The word "damage" is, I think, used in the Act as synonymous with injury. It is suggested that it intended to give compensation for all damages sustained, or hereafter to be sustained, by reason of the exercise, whether present, past, or future, of the powers of the company. It appears to me that such a construction would give two grounds for a claim for compensation—first, for some damage actually sustained, and then for some damage which might be sustained in the future. These two claims might quite possibly overlap, so that it would be possible for two persons to recover for the same injury, the one prospectively, and the other when the injury actually happens. I do not think that the cases of *Caledonian Railway Co.* v. *Lockart* and *Croft* v. *London and North-Western Railway Co.* which have been cited support such a contention. In them, where future injury was considered and compensated it was by the express convention of the parties, and the question whether a claim could be made for prospective damages was not raised, and was certainly not decided. If the right of the claimants to compensation depends on whether an injury has been sustained by them, I must ask whether there is any evidence that any injury had been sustained by them on May 6. If no injury had been sustained it is impossible that the notice given by them on that day could be the result of that injury. It might be the natural result of their fear of injury; but, in my judgment, the Act gives no compensation *quia timet*. That really determines the case, since it follows that the act of the claimants in giving notice was not due to any action on the part of the company which would give rise to a claim under the Act. Even if on May 6 some injury had been sustained, there is nothing, in my opinion, to make the giving of notice the natural result of that injury.

I agree, therefore, in thinking that the appeal must be allowed.

Appeal allowed.

Solicitor for the appellants, *W. W. Young.*

Solicitors for the respondents, *F. C. Matthews & Brown.*

High Court of Justice.

Chan. Div. North, J. — June 28.

In re RICHARDS.

SHENSTONE *v.* BROCK. (*a.*)

Voluntary gift—Declaration of trust—Deposit of a promissory note to be handed over on the fulfilment of a condition.

A testatrix by her will, made in 1873, *bequeathed a legacy of* £150 *to E. H., who was in her employment as housekeeper. In* 1877 *the testatrix handed to C., her solicitor (whom she had appointed one of her executors), a promissory note for* £200, *signed by herself, payable on demand to E. H., telling C. not to mention the note to anyone but E. H., and to retain it until the death of*

(*a.*) Reported by G. E. JEFFERY, Esq., Barrister-at-Law.

the testatrix, and then to give it to E. H. if she should remain in her service until her death. E. H. was informed of the note soon after it had been handed to C. E. H. remained in the service of the testatrix until the latter's death, and the note remained in the possession of C.

Held, that C. was constituted a trustee of the note for E. H., in case she fulfilled the prescribed condition.

Adjourned summons.

This was an action to administer the estate of Louisa Richards, who died on the 27th of July, 1881.

Louisa Richards by her will, dated the 12th of February, 1873, bequeathed a legacy of £150 to Ellen Harris, who was then in her employment as housekeeper.

On the 11th of August, 1877, the testatrix consulted her solicitor, William Cottrell (whom she had appointed one of the executors of her will), as to further benefiting Ellen Harris beyond what she had given her by her will. Ultimately the testatrix handed to Cottrell a promissory note signed by her for £200 payable on demand to Ellen Harris, and desired him not to mention the note to anyone except the said Ellen Harris, but to retain it until the death of the testatrix, and then to give it to Ellen Harris if she should remain in her service until that event happened. The note did not contain the words "value received."

Ellen Harris was informed of the note soon after it had been handed to Cottrell, and she remained in the service of the testatrix until the latter's death. Cottrell retained possession of the note from the time when it was first handed to him.

Ellen Harris (who had married Robert Brock after the death of the testatrix) carried in a claim against the testatrix's estate for £200, the amount of the promissory note. The chief clerk disallowed the claim, on the ground that there was no sufficient delivery of the note.

This was a summons by Mr. and Mrs. Brock to vary the certificate by allowing the claim.

Ellen Harris in her evidence stated that the testatrix on several occasions assured her that she had provided for her by her will, and promised her that if she would continue in the service of the testatrix until the latter's death, and would not during that time marry, she, the testatrix, would leave in the care of Cottrell a present for her beyond what she might leave for her by her will.

Cookson, Q.C., and *S. B. L. Druce*, for the summons.—This is a good gift to Mrs. Brock conditional on her remaining in the service of the testatrix: *Lloyd* v. *Chune*, 2 Giff. 44, 9 W. R. Ch. Dig. 90; *Arthur* v. *Clarkson*, 14 W. R. 754, 35 Beav. 458. Non-delivery of the note to Mrs. Brock is not material: *Hall* v. *Palmer*, 3 Hare, 532; *Bonfield* v. *Hassell*, 11 W. R. 297, 32 Beav. 217.

Cozens-Hardy, Q.C., and *Phipson Beale*, for the plaintiffs.

Giffard, Q.C., and *Bardswell*, for some of the residuary legatees.—The gift was an involuntary and imperfect one, and cannot therefore be enforced. *Hall* v. *Palmer* and *Bonfield* v. *Hassell* were both cases of deeds which were sealed and delivered. The testatrix did not do all she could to divest herself of the property in the note and vest it in the donee.

They referred to *Warriner* v. *Rogers*, 21 W. R. 766, 16 Eq. 346; *Richards* v. *Delbridge*, 22 W. R. 584, L. R. 18 Eq. 11; *Heartley* v. *Nicholson*, 23 W. R. 374, L. R. 19 Eq. 238; *Milroy* v. *Lord*, 4 De G. F. & J. 264, 11 W. R. Ch. Dig. 120.

Manby, for one of the residuary legatees, referred to *Hulse* v. *Hulse*, 4 W. R. 239, 17 C. B. 711.

Yate Lee and *Edward Ford*, for other residuary legatees.

Druce, in reply.—The testatrix did all she could under the circumstances to divest herself of the property in the note. The testatrix wished the person to be benefited to be able to sue on the note at her death, and therefore she made it in the donee's name, but did not deliver it. The case is governed by *Hall* v. *Palmer* and *Bonfield* v. *Hassell*.

North, J. [after stating the facts, continued:—] It has not been—and, indeed, it could not be—disputed that if the testatrix had placed the sum of £200 in cash in the hands of Mr. Cottrell for the purpose and with the directions mentioned by him in his affidavit, there would have been a good trust created in favour of Mrs. Brock. It is not necessary for the completion of a voluntary gift that the money should have been actually paid over in cash into the hands of the person who was intended to receive it; it is sufficient if there was either a complete transfer of the property in the note, or a declaration of trust of it. The testatrix might have made a declaration of trust making herself trustee. It was equally competent to her to make a third person trustee for that purpose. It appears to me that the note was handed to Mr. Cottrell for the purpose and with the intent, as was expressed by the testatrix at the time when it was given, of making him a trustee, and this intention was never altered down to the time of her death, and that enough was done to constitute him a trustee of the note for Mrs. Brock in case she should fulfil the prescribed condition. If the note had been made payable to Mr. Cottrell himself, he would have been able to sue the testatrix upon it immediately, which was not what was intended. It appears to me that the note was placed by the testatrix in his hands as a trustee in order that he might hand it over to Mrs. Brock upon the happening of the particular event mentioned by the testatrix. It is not necessary to consider what the power of the testatrix might have been in the meantime if she had changed her mind, because she did not do so. The claim must be allowed, with interest from the death of the testatrix, and costs.

Solicitors for the summons, *Gamlen & Co.*, for *Cottrell & Son*, Birmingham.

Solicitors for the plaintiffs, *Letts Bros.*, for *J. H. Baker*, Birmingham.

Solicitors for the residuary legatees, *Venn & Co.; Lane, Fagge, & Andrews.*

Chan. Div. } Kekewich, J. } Aug. 4, 5, 12.

Gas Light and Coke Co. v. South Metropolitan Gas Co. (a.)

Metropolis Gas Act, 1860, *s.* 6—*District—Meter the point of supply of gas.*

The Nine Elms Station of the London and South-Western Railway Co. lies partly in the district of the Gas Light and Coke Co. and partly in that of the South Metropolitan Gas Co. Each gas company had, until 1886, *supplied the portion of the station situated within its own district, but in that year the defendant company placed meters within their own district from which gas was supplied by pipes to that portion of the Nine Elms Station lying within the plaintiffs' district. Section* 6 *of the Metropolis Gas Act (which applied to both companies), after defining the limits of each company's district, enacted that "No other company or person than the company to whom such limits are for the time being assigned . . . shall supply gas for sale within the said limits, unless authorized by Parliament so to do."*

(a.) Reported by J. W. Greig, Esq., Barrister-at-Law.

Held, that gas is supplied within the meaning of the Act at the meter, which is the point of supply, and that, so long as the meter is within the district of the supplying company, no injunction would issue to prohibit them from supplying gas by means of pipes passing into the district of another company.

Trial of action.

The plaintiff company was formed by the amalgamation of several gas companies, including the London Gas Light Co., and the district supplied by the plaintiff company coincided with that of the constituent companies of which it was composed. The Metropolis Gas Act, 1860, governed the supply of gas to the district in question. The defendant company, in like manner, was the result of an amalgamation carried out in March, 1860, between the South Metropolitan Gas Co. and the Phœnix Gas Light and Coke Co., and was also subject to the Act of 1860.

The premises of the London and South-Western Railway Co. at Nine Elms, consisting of extensive locomotive and other works, are situate partly in the district assigned by the Acts to the plaintiff company and partly within that assigned to the defendant company.

In 1885 the secretary of the London and South-Western Railway wrote to the Gas Light and Coke Co. requesting them to allow a discount on the price of the gas supplied to them. This the Gas Light and Coke Co. declined to do.

The South Metropolitan Gas Co. allowed a discount of £5 per cent. upon the quantity supplied by them to the London and South-Western, and the intention of the railway company to take the whole of the supply they required from the South Metropolitan Gas Co. if the Gas Light and Coke Co. did not allow the discount was communicated to the latter company.

On the 25th of June, 1886, the London and South-Western Railway finally decided to take their gas supply from the South Metropolitan Gas Co.

The South Metropolitan Gas Co. then laid down mains and supplied gas through three meters placed within their own district to the South-Western Railway Co., but the gas was admittedly used outside the limits of the district of the South Metropolitan Gas Co.

The material parts of the Act of 1860 are as follows:—

After reciting that the following gas companies:—The Gas Light and Coke Co., the City of London Gas Light and Coke Co., the Commercial Gas Light and Coke Co., the Equitable Gas Light Co., the Great Central Gas Consumers' Co., the Independent Gas Light and Coke Co., the London Gas Light Co., the Phœnix Gas Light and Coke Co., the Ratcliff Gas Light and Coke Co., the Surrey Consumers' Gas Co., the South Metropolitan Gas Light and Coke Co., the Western Gas Light Co. (Limited), the Imperial Gas Light and Coke Co., were respectively incorporated under the authority of Parliament for the purpose of supplying several districts of the metropolis with gas; and that the said companies, instead of supplying gas by several mains in the same district, had agreed, as far as possible, each one to confine its supply to a separate district, in order to economize capital and avoid the too frequent opening of the public streets, and subject to the provisions and restrictions of the Act, that it was expedient that such districting should receive the sanction of Parliament.

Section 3 enacts: "This Act applies to the several gas companies and to all persons already or hereafter supplying gas within the metropolis, except as hereinafter excepted."

The interpretation clause contained, amongst others, the following definitions:—

The word "Consumer" means a person receiving or entitled, in accordance with this Act, to receive a supply of gas from any gas company.

The word "District" means, with respect to every gas company supplying gas wholly or in part within the metropolis, the district, so far as it is within the metropolis, within which the gas company are from time to time authorized to supply gas and means, with respect to any person or persons not being a gas company, but supplying gas wholly or in part within the metropolis, the district within the metropolis within which he or they shall from time to time as a trade or business supply gas.

Section 6, omitting immaterial parts, enacted, "The limits of each of the said companies shall be the respective districts supplied with gas by such companies as the same are defined upon four duplicate maps, signed by the Right Hon. T. H. S. S. Estcourt, and no other company or person than the company to whom such limits are, for the time being, assigned or shall hereafter be assigned, shall supply gas for sale within the said limits, unless authorized by Parliament so to do."

Section 14 was in these terms: "Every gas company from time to time supplying gas within any district, shall, as to any premises or street within such district not already supplied with gas, and which shall lie within fifty yards of any existing mains, at their own expense, on being required by the owner or occupier of any premises within the district or in part within the district, who shall contract for not less than two years to pay gas rates in respect of such supply, to an amount equal to twenty per cent. upon the outlay, provide and lay all proper and sufficient communication, service, and other pipes up to the premises of such owner or occupier, to communicate with the gas company's mains, and shall, if so required by the owner, occupier, or local authority, furnish him or them, at the rate prescribed by this Act, with a supply of gas for the purpose of being used in or on the premises, or for lighting the street, and if so required by the owner or occupier, furnish him with one or more meters for ascertaining the quantity of gas consumed; provided that the gas company shall not be bound to supply more than one meter for each consumer occupying a separate dwelling or apartment, nor any meter exceeding a five-light meter; provided also that the meter-rent, which the said company shall be entitled to claim for such meter, shall not exceed ten per cent on the net cost of such meter.

Section 54.—Nothing in this Act contained shall avoid, prejudice, or impair any of the powers now exercised by or vested in the Metropolitan Board of Works, or in the Commissioners of Sewers of the City of London and the liberties thereof, or any powers now vested in any local authority within the metropolis, or any powers now exercised or possessed in respect of the manufacture or supply of gas within the metropolis by any railway company, or by any other person or persons making or supplying gas to the public as a trade or business.

The plaintiffs' claim was for an injunction and damages.

Sir H. James, Q.C., Sir C. Russell, Q.C., Sir Horace Davey, Q.C., R. S. Wright, Danckwerts, and *Haldane,* for the plaintiffs.—The question in this case turns on the construction of section 6 in the Act of 1860. The defendants have invaded the territory of the plaintiffs. The meters through which the gas is supplied are admittedly within the defendants' district, and they contend that the meter is the point of delivery. If that contention is upheld, they could supply gas anywhere throughout the kingdom, and drive through all the gas Acts. Section 15 of the Act of 1847, which applies in this case, says: "The clerk, engineer, or other officer duly appointed for the purpose by the undertakers may at all reasonable times enter any building or place lighted with gas supplied by the undertakers in order to inspect the meters, fittings, and works for regulating the supply of gas and for the purpose of ascertaining the quantity of gas consumed or supplied"; thus the

power of entry applies not merely to the meter, but the place where the gas is supplied and consumed.

Sir R. Webster, A.G., Michael, Q.C., and *Prior*, for the defendants.—The proper construction of the section is that anyone having a source of supply in the area of the supplying company may take the gas whither they like and use it where they like. There is no illegality in giving discount, and we have not attempted any evasion of the law in giving it. Since 1860 the law has been that anyone having property within the district of a gas company can call for a supply of any amount, and may use it where they like. The gas is supplied at the meter where it is delivered to be used as the consumer likes, there the obligation to supply ends, and the rights of the consumer begins. Assume a manufactory with a doorway abutting into the district of a gas company, the owner of the manufactory could call for a supply of gas for the whole factory, and that is similar to the case here. Gas is sold when it leaves the meter. Section 6 gives only a right of exclusive sale within the district, and does not preclude user of gas obtained elsewhere. The point has actually been decided on in a case of the *Imperial Gas Light and Coke Co.* v. *The West London Junction Gas Co. (Limited) and the Great Western Railway Co.*, reported in The Journal of Gas Lighting, Water Supply, and Sanitary Improvement, vol. xvii. (1856), p. 14. Lord Cairns in his judgment in that case (p. 17) says: "This is a question which does not admit of any serious doubt, because, although gas is a very intangible article to our apprehension, still gas is a manufactured article which is sold and delivered like any other manufactured article, and the question is to determine when and at what part this manufactured article is delivered. Certainly as I understand it, with regard to gas, wherever the point is that the meter of the company is fixed, and the gas leaves the meter and is delivered to the consumer, that is the point where the risk of the company ends and the risk of the consumer begins. In a dwelling-house the pipe on both sides of the meter may or may not belong to the company, but where the meter is which tells what gas has passed through and been delivered on the premises that is the place where the risk of the company ends and the risk of the consumer begins; and so I say, in my opinion, the gas company in this case delivering gas through these two metres which are altogether out of the district of the Imperial Co., the gas is there sold and delivered to the Great Western Railway Co., and if there be, which I do not say there is at all, a supply for sale within the meaning of the Act of Parliament, that supply for sale is not, in my opinion, within the limits of the Imperial Co., but in a wholly different district;" and Rolt, L.J. said: "It is only necessary to refer to the 6th section, because that is the clause in favour of the plaintiffs' company and of the other companies within the metropolitan district. No other company or person than the company to whom such limits are for the time being assigned, or shall hereafter be assigned, shall supply gas for sale within the said limit," not "shall supply gas for use within the said limits" but "shall supply gas for sale." It may possibly be read "by way of sale."

Sir H. James in reply.—The case proceeded on a different state of the facts and the law. The West London Junction Gas Co. was not a districted company, and the contract between that gas company and the Great Western Railway Co. was a mere common law contract. In section 6 in our Act each of the districted companies is to confine itself to its own limits, but the West London Junction Gas Co. was not bound to confine itself to any limits. Our contention is that the place where the gas is used is the point of supply.

The following cases were also cited:—*Stockport District Waterworks Co.* v. *Corporation of Manchester*, 11 W. R. 166, 9 Jur. N. S. 266; *Pudsey Coal Gas Co.* v. *Corporation of Bradford*, 21 W. R. 286, L. R. 15 Eq. 167; and also *Imperial Gas Light and Coke Co.* v. *West London Junction Gas Co. (Limited) and Great Western Railway Co.*, 14 W. R. 1019.

Cur. adv. vult.

Aug. 12. — Kekewich, J. — If in expressing my opinion on the points argued before me in this case, I omit to notice any particular section of any Act of Parliament I must not be considered as having omitted to study it. It is unnecessary to refer to more than a few passages. Speaking generally, the points in dispute depend on the proper construction of the Metropolitan Gas Act, 1860, and the general Acts of 1847 and 1871, and more particularly on the proper construction of section 6 of the Act of 1860. That section in some respects stands and must be considered alone, but, of course, in endeavouring to arrive at its proper construction one has to bear in mind the rest of the Act of which it forms part and the incorporated Acts, as also the documents admitted or proved and the oral evidence, so as to test and understand the language of the Act by the light of the circumstances existing when it became law and to apply it to the circumstances of the present day. There is no issue of fact between the parties, and really no conflict of evidence. Both parties know that there is a question of right between them, and there has been no attempt on either side to shirk or obscure it. The discount allowed by the defendants to the London and South-Western Railway Co. was indeed mentioned as if constituting an unworthy method of securing the railway company's custom, but no point was made of this argument, and, in truth, nothing depends on it. I am not called upon to decide whether there is or not any objection to a gas company allowing discount to a large and prompt paying customer, and whether permissible or not it cannot affect the main question here. The admitted and important facts are these:—Of the buildings not constituting the Waterloo Station of the London and South-Western but erected in connection with it, or rather in connection with the business carried on there, some are within the plaintiffs' district as defined by the Act of 1860, and some within the district of the defendants, and until last year, when the dispute between the parties arose, the plaintiffs supplied with gas the buildings within their district and no others, and the defendants supplied the buildings within their district and no others. The defendants now supply many of the buildings situate within the plaintiffs' district, and for this purpose they have placed additional meters at points within their own district, but have laid down mains and pipes within the plaintiffs' district, so as undoubtedly to trespass on the latter if laying down these mains and pipes be a trespass within the meaning of the Act. By laying down these mains and pipes the defendants must, of course, have acquired the knowledge that an additional supply of gas was wanted and intended for property outside their district, and in truth this was known to them before by means of the application made to them by the railway company. The question which I have to consider and decide is whether the defendants are entitled to supply gas to the railway company for these purposes and under these circumstances. The defendants say that by force of their statutory obligations they are bound to supply the railway company with gas if demanded, and that the demand has been made. This, to my mind, is only another form of stating the same question. If the obligation is such as they say it is, the supply is not prohibited. If, on the other hand, as the plaintiffs contend, they are prohibited from supplying gas to the railway company, there can be no obligation. It comes, therefore to this—are they prohibited, or does the 6th section of the Act of 1860, properly construed with reference to

the rest of that Act and to the other Acts mentioned, contain any such prohibition? As regards the construction of the Act of 1860, including of course the 6th section, I am told that it is not a mere statutory contract between the two companies, but a general Act passed for the benefit of the public, and that its provisions must be construed with reference to this consideration. The proposition need not and cannot be controverted, but I am not satisfied that it renders the construction different from what it otherwise would be. All Acts of Parliament are presumably for the benefit of the public, and those conferring powers on railway or other companies or containing restrictions on the use of powers are always expressly stated so to be.

There is no occasion for me to pursue this question further or to dwell on the rights of the Attorney-General as the representative of the Crown, whether given expressly or falling within his general jurisdiction. I am not the guardian of the public in this case more than in any other where there is a contest between two companies, and I must consider and decide it according to the respective rights of the plaintiffs and defendants, even if the conclusion at which I arrive happens to be detrimental to the public—that is, to the consumers of gas within the two districts affected by it. Does, then, section 6 of the Act of 1860 prohibit the defendants from supplying gas to the London and South-Western Railway Co. outside their own district—that is, so as to light buildings outside the district? Does the Act say that all gas consumed within the plaintiffs' district, other than that the supply of which is protected by section 54, must be purchased of the plaintiffs? If the Act does not give the plaintiffs this monopoly which they claim, the gas consumed within their district may properly come from elsewhere—that is, be supplied by persons or corporations other than themselves; and in that event it may come from or be supplied by the defendants not the more or less because they have a district of their own. I recognize the difficulty of the questions thus stated, and of the case apart from this statement of those questions. I perceive many and great objections to the views alike of the plaintiffs and of the defendants, and I am not prepared to say, because it is unnecessary for me to say, what would have been my solution of this difficulty if I had not the advantage of the decision of the Court of Appeal in *Imperial Gas Co.* v. *Great Western Railway Co.*, which was cited and commented upon in argument. Sir Henry James, in reply, not merely suggested, but, I think, established, many distinctions between that case and the present. He pointed out, among other things, that there was no actual supply to the Great Western Hotel, which held a position analogous to that of the buildings of the London and South-Western Railway Co. outside the plaintiffs' district, whereas here is a known and avowed intention to supply the latter buildings. But, although this consideration enters into the arguments of counsel and the judgments of the Lords Justices, yet I do not think it affects so much of their conclusion as most nearly touches the present case. Again, Sir Henry James pointed out that the company there complained of was not one of the districted companies within the Act of 1860, but it is to be observed that, notwithstanding this is apparent from the facts of the case, it was not regarded by the Lords Justices as of any weight, and they discuss and express their opinions on the construction of the Act of 1860 on the footing of its being applicable to all gas companies, districted or otherwise.

Their lordships' judgments, pronounced after an elaborate argument, deal with two questions of vital importance here—viz., first, the question what is the meaning of the words "for sale" in section 6, and, secondly, the question where, for the purposes of construing the Act, gas must be taken to be supplied. As regards the meaning of the words "for sale" there is not to be found a definite conclusion. Rolt, L.J., contrasts them with "for use" or "for consumption," and I take the opinion of both Lords Justices to have been that a supply to a person or company of gas "to be used or consumed" by that person or company, as distinguished from "to be passed on to others," is not within the prohibitive sentence in the 6th clause. As regards the other question, I find a conclusive opinion expressed in plain language by Lord Cairns, who says that wherever the point is that the meter of the company is fixed and the gas leaves the meter and is delivered to the consumer, that is the point where the risk of the company ends and the risk of the consumer begins. They decide, as I understand their judgments, that gas is supplied at the meter and not elsewhere. It may be that neither Lord Cairns nor Rolt, L.J., had in contemplation such a case as has now occurred. It may be that, if it were possible to divine their intention, it would be found to be that their judgments were not intended to conclude such a case, differing as it does in many respects from that which was before them. Further, it may be possible that the Court of Appeal will hold it within their province to scrutinize their lordships' judgments from this point of view, but I am satisfied that it is not within mine. Apart from the deep respect due to the opinion of such eminent judges, it would not be right in me to do otherwise than loyally accept their conclusions, expressed after argument in the Court of Appeal, and apply without cavil the language in which they are expressed to any facts and circumstances fairly coming within it. I think that the facts and circumstances do fairly come within it, and that, the questions here being such as I have stated, those judgments provide their solution. I must therefore hold that the supply by the South Metropolitan Gas Co. to the London and South-Western Railway Co., which the plaintiffs seek to restrain, is not within the prohibition of the 6th section of the Act of 1860, and that, therefore, no injunction can be granted, nor can damages be awarded. The judgment will be for the defendants, with costs.

Solicitors, *Bedford, Monier-Williams, & Robinson; Johnson, Budd, & Johnson.*

Chan. Div. Kekewich, J. } July 1.

Cooke v. New River Co. (a.)

Water company—Right of customer to have water supplied by meter—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17)—*New River Co.'s Act,* 1852 (15 & 16 *Vict. c. clx.*), *ss.* 35, 38—41—"*Domestic purposes*"—*Meaning of* "*dwelling-house.*"

By the New River Co.'s Act, 1852, *s.* 35, *the company, if requested, must supply houses within their limits with sufficient water for domestic purposes at certain rates, varying* ("*for water supplied to any dwelling-house*") *with the annual value of the dwelling-house.*

By section 38, *domestic purposes are not to include* "*working any machine or apparatus.*"

By section 41, "*The company shall, at the request of any consumer of water, for purposes other than the purposes for or in respect of which the rates or charges are hereinbefore provided or limited, or at their own instance, afford a supply of water by means of a meter, . . . and may charge for such supply at certain limited rates per thousand gallons, according to the total quarterly consumption.*"

The plaintiffs demanded that a warehouse belonging to

(a.) Reported by R. H. Deane, Esq., Barrister-at-Law.

them, which was occupied only as a place of business and for storing goods, and not for the purpose of living in, should be supplied with water by the defendants by meter for general purposes and for working a hydraulic lift.

Held, that the plaintiffs were entitled to be so supplied for both purposes at the limited rates fixed by section 41.

Trial of action.

The plaintiffs in this action were a firm of carpet warehousemen carrying on business at 12, Friday-street, in the City of London, and they brought this action for a declaration of their right to have water supplied to their warehouse by meter, for the purpose of working a hydraulic lift necessary for carrying on their business, and for all other purposes in connection with the same hereditaments at the charges provided by the New River Co.'s Act, 1852, and, secondly, for an injunction to restrain the defendants from cutting off their supply of water so long as the plaintiffs duly paid or tendered all moneys justly due from them to the defendants.

The plaintiffs' warehouse consisted of six stories, all used for storing carpets only. One of the means of communication between the stories was a hydraulic lift, worked by water supplied by the defendants. The evidence showed that no one slept in the house or took meals there, and that it was occupied by the plaintiffs and their staff solely for the purposes of their business. The annual rateable value was £1,583.

Section 3 of the New River Co.'s Act of 1852 incorporates the Waterworks Clauses Act, 1847, with certain express exceptions.

Section 35 of the Act of 1852 provides that the company shall, at the request of the owner or occupier of any house or part of a house in any street within their limits in which any pipe of the company shall be laid, or of any person who, under the provisions of this Act or any Act incorporated therewith, shall be entitled to demand a supply of water for domestic purposes, furnish to such owner or occupier or other person a sufficient supply of water for domestic purposes at the rates hereinafter specified—(that is to say):

For water supplied to any dwelling-house: Where the annual value of the dwelling-house . . . shall exceed two hundred pounds, at a rate per centum per annum not exceeding three pounds:

If there be a water-closet or water-closets, or fixed bath or baths, or any high service in such dwelling-house or place, then, in addition to the rates above specified, the following rates shall be payable—(that is to say):

Where the annual value shall exceed £300, a rate not exceeding 12s. for each single water-closet, fixed bath, or high service, and a further sum of 6s. for each additional water-closet, fixed bath, or high service.

Section 38 provides that a supply of water for domestic purposes shall not include a supply of water for steam-engines or railway purposes, or for warming or ventilating purposes, or for working any machine or apparatus, or for baths, &c.

Section 39 empowers the company to take an increased rate by agreement with the person or body requiring the water.

Section 40 provides that the company may supply any person or body within their limits with water, to be used within such limits for other than domestic purposes, at such rate and upon such terms and conditions as shall be agreed upon between the company and the person or body requiring such supply.

Section 41 provides that the company shall, at the request of any consumer of water for purposes other than the purposes for or in respect of which the rates or charges are hereinbefore provided or limited, or at their own instance, afford a supply of water by means of a meter or other instrument or mode for measuring and ascertaining the quantity of water so supplied, and may charge for such supply not exceeding . . . certain specified rates per one thousand gallons, such rates varying according to the total quarterly consumption of water.

The plaintiffs, it appeared, had for some time been supplied by the defendants with water by a meter under an agreement which the defendants had recently given notice to terminate, declining to supply water at the rates specified in section 41, and the plaintiffs understood the defendants as threatening to cut off their supply unless it was paid for on the basis of the rateable value of the warehouse.

Sir Horace Davey, Q.C., Finlay, Q.C., and *R. C. Dobbs*, for the plaintiffs.—The question depends on the construction of certain sections of the Act of 1852. If the construction contended for by the defendants were correct the public would be entirely in their hands—a result very foreign to the intention of the Legislature. In order to make section 40 applicable to the present case, as the defendants are endeavouring to do, they must first prove that the warehouse was a "dwelling-house" within section 35. Otherwise we are entitled to a supply by meter under section 41. The words "dwelling-house" must be construed strictly. When the Legislature said dwelling-house it meant dwelling-house. A dwelling-house is a house where somebody resides in contradistinction to where business is carried on. This warehouse cannot be brought within the definition of a dwelling-house. There may be domestic purposes, such as drinking and cleansing, for which water is required in offices and warehouses, but that does not make them dwelling-houses. To come within section 35 the purposes must be "domestic purposes" in a dwelling-house. A person fainting at a railway station might be supplied with a glass of water there, but no one would describe a railway station as a dwelling-house. As to the claim for an injunction, even if the plaintiffs were mistaken in supposing that the defendants were about to cut off their supply of water, the fact that the latter claim the right to do so is sufficient ground for an injunction.

Sir R. Webster, A.G., Warmington, Q.C., and *Vaughan Hawkins*, for the defendants.—Under their original charter granted by James I., Hugh Myddelton and others were incorporated in perpetual succession and authorized to supply water, but no right was given to any person to be supplied, nor was there any limit to the price to be charged. So things remained down to the passing of the Waterworks Clauses Act, 1847, which, however, has no application unless incorporated by the special Act. Water companies have cast upon them many burdensome duties, some of which they have to discharge without any remuneration. The intention of the Legislature should then be gathered from the entire scheme, and not merely from one or two sections. There is nothing to compel anyone to take the water. In section 35 the term "dwelling-house" occurs. What does it mean? If it is not a dwelling-house, is there no right at all to be supplied with water? though required "for domestic purposes?" And what are "domestic purposes?" Though there is no positive description in the Act, there is a sort of negative description of what are not domestic purposes. That is in section 38. What difference does it make whether people sleep in the premises or not? They wash and drink there, and cleanse the floors and windows. The water is used in exactly the same way as if Mr. Cooke and all his staff slept there. There is nothing in the Act to say that the company shall furnish any water at all for other than what are domestic purposes under the Act. In *Metropolitan Board of Works* v. *New River Co.*, 37 L. T. N. S. 124, in which the headnote cites sections 35, 38, and 41

of the Act of 1852, and section 37 of the Act of 1847, it was held by Mellor and Lush, JJ., that section 41 only applies to the purposes excepted by section 38, but if the plaintiffs' construction is right section 41 would have applied in that case. The decision was upheld on appeal by Bramwell, Baggallay, and Brett, L.JJ. This warehouse is a dwelling-house within section 35, the true distinction being between buildings used for human occupation and purposes, and those used for mere storing only. The word "place" in the expression "such dwelling-house or place" in section 35 means any house or part of a house whether a dwelling-house or not.

Kekewich, J.—I need not trouble you to reply, Mr. Finlay. When the New River Co. sent their men to break up the road outside the plaintiff's warehouse, Mr. Cooke seems to have thought that they meant to cut off both his supply of water for working the hynraulic lift and also the supply for general purposes. In this I think he was unnecessarily alarmed, but though the writ was issued that day, that was not the real occasion of this action, because there are substantial questions between the parties which would have to be decided in any case. As to the claim for an injunction, however, I hold that there is no evidence to warrant the granting of it, and the defendants must have the costs of that part of the action, which I will at once fix (it having been agreed that I should assess them) at 12½ guineas, which, having regard to all the circumstances of the case, I consider will be a proper sum for the defendants to receive for the costs of that part of the action. With regard to the substantial question of rights, I have been referred to the charter of the New River Co., which is a chartered company carrying on business at its own risk, but the position of the company under the Act of 1852 is entirely altered from what it was under the original charter. It appeared from the recitals in that Act that, under the authority of the Legislature, a contract was to be made between the company and that part of the public desiring to be supplied with water, by virtue of which the latter would be placed under obligations they were not under previously. That being so, the Act of 1852 proceeds to incorporate the Lands Clauses Consolidation Act, 1845, and the whole of the Waterworks Clauses Act of 1847, except certain specified clauses. I take it the proper way of construing the Act is to read it as if all the sections of the general Act, except the excepted ones, were written out in the special Act, and, in case of any inconsistency between the two, to read the special Act as overruling the general one. The clauses now in question bristle with difficulties, but there is no serious difficulty in arriving at a satisfactory conclusion on the particular questions arising in this action. Section 34 obliges the company to supply water to the owners or occupiers of houses (that includes not only dwelling-houses but every building) on being requested to do so under certain conditions. Section 53 of the Waterworks Clauses Act, 1847, provides that "Every owner and occupier of any dwelling-house or part of a dwelling-house within the limits of the special Act" shall, under the conditions specified, be entitled to be supplied with water. Reading this with section 35 of the Act of 1852, the operation of the latter section is, in my opinion, limited to dwelling-houses. Section 53 should be read in before section 35 of the special Act. At first I thought there might be a doubt as to the meaning of the phrase "in such dwelling-house or place," but it seems to me that the word "place" may fairly be interpreted as referring to and corresponding with the words "part of a house" occurring in the same section, and not as being a wider term which would let in other buildings. I think, therefore, that according to the proper meaning of that section its application is confined to a dwelling-house. Is this warehouse a dwelling-house? I think that question may be conveniently decided without reference to any other section. Now the term "dwelling-house" means "a house where somebody dwells." Does anyone dwell here? It is occupied in the day-time purely as a place of business, and for storing carpets day and night—it is occupied only by those who come there on business. If anyone takes anything to eat or drink there it is a mere accident. I see nothing whatever to bring this warehouse within the meaning of the term "dwelling-house." The plaintiffs are, no doubt, entitled to use the water for domestic purposes, such as washing, &c. (which do not, however, include the hydraulic lift), but the water cannot be said to be used for domestic purposes in a dwelling-house so as to come within section 35. I think the hydraulic lift clearly comes within the words "a machine or apparatus" in section 38.

There has been a good deal of comment on sections 39 and 40, but it seems to me that the object of those sections was to bring in and enable the company to do certain things which might otherwise have been *ultra vires*. Coming to section 41, I have felt considerable difficulty in ascertaining who were intended to be included in the words "any consumer of water," but I think the reasonable meaning is "any person living within the company's limits and requesting to be supplied with water for purposes other than domestic purposes." If the water is not required for domestic purposes, for which the charges were fixed by section 35, the company are to supply such a person, at his request, by meter. Why should I reduce that? I find, as I should have expected to find, a clause enabling the company to make special agreements in certain cases not provided for in the preceding clause of the Act, and a clause in virtue of which they are under an obligation, if requested, to supply water by meter for other than domestic purposes; I may add that though in the case of *Metropolitan Board of Works* v. *New River Co.* on appeal, the present Master of the Rolls expressed an opinion adverse to mine, he was careful to keep the point open for future decision, as it was not necessary to decide it for the purposes of that case. Therefore, while feeling great diffidence in differing from his opinion, I think I ought not to allow my diffidence to prevent me from forming an independent judgment in the present case.

The conclusion I have arrived at is that the plaintiffs are right (except as to the injunction), and that they are entitled to have their warehouse supplied with water to be measured by meter, and charged for in accordance with section 41 of the Act of 1852, both for general purposes and for working the hydraulic lift, and that the defendants are, therefore, wrong. There will be a declaration in favour of the plaintiffs as claimed. The defendants will have to pay the general costs of the action, but may set off the sum I allowed them on the claim for an injunction.

Solicitors for the plaintiffs, *Hollingsworth, Tyerman, & Andrewes.*

Solicitors for the defendants, *Thompson & Debenhams.*

Q. B. Div. (Stephen and A. L. Smith, JJ.) Nov. 16.

Pape v. Pape. (a.)

Married woman—"Desertion"—Jurisdiction of justices—Married Women (Maintenance in Case of Desertion) Act, 1886 (49 & 50 *Vict. c.* 52)—*Separation under agreement—Non-payment of alimony.*

A mere refusal by a husband to continue the payment of alimony to a wife under a separation agreement is not such a "desertion" of the wife as to give the justices jurisdiction to deal with the case under the Married Women (Maintenance in Case of Desertion) Act, 1886.

Case stated by the justices of Middlesborough under 42 & 43 Vict. c. 49, s. 33.

The parties in this case were husband and wife. An agreement had been executed between them to live separate in consideration of a certain sum to be paid by the husband to the wife as alimony. The husband had declined to continue the payment of such alimony on the ground of being dissatisfied with his wife's mode of living. The wife thereupon summoned the husband for "desertion" under the provisions of 49 & 50 Vict. c. 52, and the justices held that she was deserted and that they were entitled to enforce the payment of the money so agreed upon. The husband now appealed from this order.

McClymont, for the appellant.—"Desertion" is a turning of the wife out of the house or leaving her. It does not consist merely in the fact of her being destitute of means. The Married Women Act, 1886, creates a new jurisdiction, but it does not empower the justices to enforce an agreement which the High Court could not enforce. An agreement to separate, such as this, has always been held to be void by the Probate Court as contrary to public policy and morality. Only in the case of the adultery or cruelty of the husband amounting to danger to life or safety of the wife has the wife been held justified in deserting the habitation. The courts have never sanctioned a mere bargain for separation except when arranged through the medium of trustees: *Reg.* v. *Cookham Union*, 9 Q. B. D. 522, 31 W. R. Dig. 141; *Thompson* v. *Thompson*, 27 L. J. P. & M. 65; *Fitzgerald* v. *Fitzgerald*, 17 W. R. 264, L. R. 1 P. & D. 694. In *Besant* v. *Wood*, 12 Ch. D. 605, 27 W. R. Dig. 95, equity intervened to prevent a separation deed from being evaded for a bye-end. The justices could only find "desertion" as defined under the poor law and by the decisions of the Probate Division. There was no legal desertion here, as the husband might have taken the woman back if she had presented herself.

No one appeared for the respondent.

Stephen, J.—I am of opinion that Mr. McClymont's argument is well founded, but I prefer to avoid going into the wider subjects of the law which he has raised such as would involve a lengthy decision, partly because I believe those subjects may soon be before a higher court in another case, but also because it is sufficient here to say that we think no "desertion" has taken place in this case. The definition of the circumstances of legal desertion has been long laid down—namely, that the parties must be living together at the time the desertion takes place, and not when they have come to any voluntary agreement to separate. Here the husband and wife have agreed to separate, and then the husband, for reasons good or bad, ceases to pay the money in consideration for which they had so separated. That is not desertion. The Married Women's Act of 1886 is one to facilitate the rights of such women who have been deserted. Those rights existed before the Act and the same exist now. No new rights were given by the Act. In this case the husband may or may not take the wife back, or she may or may not obtain parish relief, through which process an order for his contribution to her maintenance could be obtained. But at present there has been no such legal desertion as to enable the justices to deal with the case, and their order must be therefore quashed.

A. L. Smith, J., concurred.

Appeal allowed.

Solicitors for the appellant, *Belfrage & Co.*, for *Bainbridge & Barnley*, Middlesborough.

(a.) Reported by Spencer L. Holland, Esq., Barrister-at-Law.

Q. B. Div. (Stephen and Charles, JJ.) Nov. 3.

Williams v. Ramsdale. (a.)

Slander—"Best particulars of persons present"—Persons "to whom" slanders were uttered.

When particulars are required to be given of the names of persons who may have heard the defendant utter certain slanders in a public room, an order that the plaintiff is to deliver "the best particulars he can give of the persons present" when the slanders were uttered is correct, and will not be varied by the court.

This was an appeal from an order of A. L. Smith, J., in chambers, directing the plaintiff in an action for slander "to deliver to the defendant an account in writing of the best particulars the plaintiff can give of the places where and the persons present when the slanders (the cause of action) were uttered."

The plaintiff, in his notice of motion, asked that the order might be varied by striking out the words "present when" and inserting in their place the words "to whom."

Fillan, for the appellant.—The slanders were uttered in a public room at Cardiff, and it is not possible for the plaintiff to name the whole of the persons who were present.

He cited *Eade* v. *Jacobs*, 26 W. R. 159, 3 Ex. D. 335; *Bradbury* v. *Cooper*, 32 W. R. 32, 12 Q. B. D. 94; and *Wingard* v. *Cox*, 20 S. J. 341, W. N., 1876, p. 106.

Lumley Smith, Q.C., for the respondent.—Of course the defendant does not expect the plaintiff to state the names of all the persons present, but he ought to state the names to the best of his ability. This requirement is not more than what appears to have been asked for and granted in *Roselle* v. *Buchanan*, 34 W. R. 488, 16 Q. B. D. 656.

Stephen, J.—I see no reason to vary the order of my brother Smith. The plaintiff will state all the names that he can of persons present when the slanders were uttered—that is to say, the best particulars that he can.

Charles, J., concurred.

Appeal dismissed, with costs.

Solicitor for the appellant, *O. B. Wooler*, for *Morgan & Scott*, Cardiff.

Solicitors for the respondent, *Field, Roscoe, & Co.*, for *G. H. Hill*, Cardiff.

(a.) Reported by Sir Sherston Baker, Barrister-at-Law.

Q. B. Div. (Mathew and Cave, JJ.) June 24.

VESTRY OF ST. GILES, CAMBERWELL *v.* GREENWICH BOARD OF WORKS. (*a.*)

Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 105, 140—*Metropolis Management Act*, 1862 (25 & 26 *Vict. c.* 102), *ss.* 77, 86—*Street in more than one parish or district—Order placing such street under exclusive management of one authority—Expenses of paving new street.*

The Metropolitan Board of Works made an order under section 140 *of the Metropolis Management Act*, 1855, *and section* 86 *of the Metropolis Management Act*, 1862, *placing a new street, being partly in the parish of the plaintiff vestry and partly in the district of the defendant board, under the exclusive management of the plaintiffs, and providing that the expenses of maintenance should be borne by the two authorities equally.*

Held, that the plaintiffs were not entitled to recover from the defendants one-half of the expenses incurred in paving the street under section 105 *of the Act of* 1855.

Special case.

The plaintiff vestry and the defendant board were two of the authorities entitled to exercise the powers given by the Metropolis Management Act, 1855, and the Amendment Acts of 1856, 1858, and 1862, and subject to the provisions of those Acts. Canterbury-road, which was a street within section 250 of the Act of 1855 and section 112 of the Act of 1862, and also a new street within the last-mentioned section, was situate as to one side thereof in the plaintiffs' parish, and as to the other side thereof in the defendants' district. The two authorities being desirous of paving the new street under section 105 of the Act of 1855, a resolution to that effect was, by arrangement, passed by each of them; and the plaintiffs and defendants each made an estimate of the cost of paving both sides of the street, and made an apportionment of such estimated cost upon the houses and land abutting on the street. The apportionments were identical, each including all the houses and land on both sides of the street; and it was arranged that each of the authorities should endeavour to obtain payment from the owners of the houses and land in its own jurisdiction. It was hoped by this arrangement to get over a difficulty caused by the decision in *Vestry of Mile End* v. *Guardians of Whitechapel Union*, 24 W. R. 364, 1 Q. B. D. 680, where it was held that the cost of paving a new street must be charged on the frontagers on both sides. On the hearing of a summons taken out by the defendants against one of the owners, the magistrate held that the apportionment was bad, and refused to enforce it. An application was then made by the plaintiffs to the Metropolitan Board of Works, who made an order under section 140 of the Act of 1855 and section 86 of the Act of 1862 to the following effect—viz.:—That Canterbury-road should thenceforth, for the purpose of sewerage, drainage, paving, making up, lighting, watering, cleansing, repair, and maintenance, be under the exclusive management of the Vestry of St. Giles, Camberwell, and that the costs of (*inter alia*) the paving of the street should be borne by the Vestry of St. Giles, Camberwell, and the Board of Works for the Greenwich District respectively, the board paying to the vestry one-half of such costs and expenses. The plaintiffs then required the defendants to pay the sum of £613, being one-half of the expenses of paving and making up Canterbury-road. The defendants disputing their liability the plaintiffs brought this action to recover that sum.

The questions for the opinion of the court were:—

1. Whether the said order of the Metropolitan Board was valid.

2. Whether the sum of £613 was then payable under the facts of the above case by the defendant board to the plaintiff vestry.

A. Charles, Q.C. (*Prosser* with him), for the defendants.

Meadows White, Q.C. (*Austin* with him), for the plaintiffs.

MATTHEW, J.—The order of the Metropolitan Board of Works, rightly interpreted, purports to deal with the expenses actually payable by either of the two bodies. To the order, so interpreted, there is no objection. As to the second question, it is manifest that what the plaintiffs are seeking to recover is a share of expenses with which the defendants are not chargeable. Section 105 empowers the vestry or district board to charge the frontagers with the expenses of paving a new street. Then section 140 provides that "it shall be lawful for the Metropolitan Board of Works, where it appears to them that any street or line of street, being in more than one parish or district, should be placed under the exclusive management of one vestry or district board for the purposes of paving, lighting, watering, and cleansing, or any of them, or for the purposes of sewerage or drainage, or for all the purposes of this Act, to order that the same shall be under the management of such vestry or board accordingly." Applying that section to the case of a new street, the effect of it is to substitute the plaintiffs for the defendants, and to give the plaintiffs the right which the defendants would have had against the frontagers, that is, the right of recovering from them the expenses. The section and the order made under it do not throw the expense on the defendants, who would have no right to claim an indemnity from the frontagers. If the defendants were to seek to recover such expenses from the frontagers, the answer would be that the order of the Metropolitan Board had taken away the jurisdiction of the defendants. The answer to the second question must be in favour of the defendants.

CAVE, J.—The effect of the order of the Metropolitan Board, which is justified by section 140 of the Act of 1855, and section 86 of the Act of 1862, is to put the whole of the street within the jurisdiction of the plaintiffs. I can see no inconvenience in their exercising the powers of section 105 of the Act of 1855 and section 77 of the Act of 1862. The latter section provides that the expenses of paving shall be recoverable either before or during the progress or after the completion of the work; and the grievance of the plaintiffs apparently is that they cannot get the money after the completion of the work without having in the first place to advance the money themselves. And they say that it is only fair that they should be at liberty to charge the defendants in the first instance, and that afterwards repayment could be got from the frontagers. But the answer to that is that there is no section in the Acts which enables that to be done.

Judgment for the defendants.

Solicitors for the plaintiffs, *Marsden & Son.*

Solicitors for the defendants, *Watson, Sons, & Room*, for *J. Spencer*, Greenwich.

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

Q. B. Div. (Mathew and Cave, JJ.) June 23.

BRIDPORT ELECTION PETITION.
HOUNSELL v. SUTTILL. (a.)

Election of aldermen—Municipal Corporations Act, 1882 (45 & 46 *Vict.* c. 50), *s.* 60, *sub-section* 3—"*Mayor elect*"—*Vote of the mayor.*

By the Municipal Corporations Act, 1882, *s.* 60, *sub-section* 3, "*An outgoing alderman, although mayor elect, shall not vote.*" *An outgoing alderman, having been elected mayor, and having taken the declaration, voted in the election of aldermen for a borough.*

Held, that the vote was invalid.

Special case under the Municipal Corporations Act, 1882, s. 93, sub-section 7.

On November 9, 1886, the quarterly meeting of the council of the borough of Bridport was held for the ordinary election of mayor and aldermen for the borough.

The election of mayor was the first business transacted at the meeting. Charles Edmunds was elected mayor, and thereupon made and subscribed a declaration as in the 8th schedule to the Municipal Corporations Act, 1882. Immediately after the election and the making and subscribing the declaration, the council proceeded to the election of aldermen.

The outgoing aldermen at such last-mentioned election, subject to the question as to whether Charles Edmunds, by his election to the office of mayor, and by his making and subscribing the said declaration, had ceased to be an outgoing alderman within the meaning of section 60, sub-section 3, of the Act, were John Pickard Suttill, James Beach, and Charles Edmunds.

Charles Edmunds presided as chairman at the said election of aldermen.

The respondents Suttill, Beach, and Knight, and Messrs. Nanks, Whetham, and Biddlecombe, were duly proposed as candidates.

The election was held by the aldermen and councillors entitled to vote delivering voting papers to the chairman, and by the chairman placing amongst the voting-papers a voting paper containing his own vote.

The chairman produced and read the voting papers, when it was found that eleven votes purported to have been given for each of the respondents Suttill, Beach, and Knight, and ten votes each for Nanks, Whetham, and Biddlecombe. Thereupon, without giving any further or casting vote, the chairman declared the respondents Suttill, Beach, and Knight duly elected. One of the voting papers counted by the chairman as being a good vote for each of the respondents Suttill, Beach, and Knight, was the voting paper signed by the chairman as previously mentioned.

If the chairman's vote was not the vote of a person entitled to vote at the election, then the lawful votes would have been ten each for the respondents, and ten each for Nanks, Whetham, and Biddlecombe, in which case the chairman would have had the casting vote under section 60, sub-section 6, of the Municipal Corporations Act, 1882. The question for the opinion of the court was whether, under the circumstances, the respondents were duly elected by a majority of lawful votes.

A. Charles, Q.C. (*Mattinson* with him), for the petitioners, referred to 45 & 46 Vict. c. 50, s. 60; to the former Act 7 Will. 4 & 1 Vict. c. 78, s. 14; and cited *Reg.* v. *Stanley*, 11 Ad. & E. 882.

Sir C. Russell, Q.C. (*Lewis Coward* with him), for the respondents.—"Mayor elect" is used in contradistinction to "mayor qualified." The new Municipal Corporations Act (45 & 46 Vict. c. 50) differs from the earlier one (5 & 6 Will. 4, c. 76). The last-mentioned Act provided (section 25) that aldermen going out of office should not be entitled to vote in the election of a new alderman. That Act was followed by 7 Will. 4 & 1 Vict. c. 78, which (section 14) gave a casting vote to the mayor. The new Municipal Corporations Act enacts (section 60) that an outgoing alderman, although mayor elect, shall not vote. In the case now stated we find that "Charles Edmunds was elected mayor, and thereupon made and subscribed a declaration." A "mayor elect" is not "qualified" until he has made the declaration required by the last-mentioned Act. Edmunds subscribed to this declaration and became mayor. In *Reg.* v. *Stanley* the mayor was elected and qualified, but the statute was then confined to outgoing aldermen.

A. Charles, Q.C., in reply.—Edmunds was not the less an outgoing alderman by being mayor.

MATHEW, J.—The election was clearly invalid, and I come to this conclusion on the plain language of the Act. 45 & 46 Vict. c. 50 provides (section 60, sub-section 2) that the election of aldermen shall be held "immediately after the election of the mayor," and (sub-section 3) that "an outgoing alderman, although mayor elect, shall not vote." Who is the "mayor elect"? It must be the person referred to in the preceding clause—that is to say, the person who had immediately before been elected mayor. It has been argued that on the particular facts of the case, what Edmunds did was merely in anticipation of what he would have done afterwards, and that it is not worth while to complain of what he did, as he might have given a casting vote. But the doctrine of equivalents must not be introduced into the construction of Acts of Parliament. For instance, by sub-section 4, "Every person entitled to vote . . . may vote . . . by signing and personally delivering a voting paper." It might be argued that it sufficed, for the purposes of that provision, to have a paper, not signed, but approved of, or even an announcement of the name of the person for whom the elector voted, but it would not be in compliance with the Act, and the Act must be strictly followed. Here the Act has not been complied with; the election is void and must be set aside.

CAVE, J.—I am of the same opinion. Mr. Edmunds unfortunately took upon himself to do what the Act very plainly said he must not do—viz., vote. The election is therefore void.

Judgment for the petitioners.

Solicitors for the petitioners, *Nicholson & Graham.*

Solicitors for the respondents, *Meredith & Co.*

(a.) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

Q. B. Div. (Day and Wills, JJ.) June 15.

HEATHCOTE v. LIVESLEY. (a.)

Bankruptcy—Execution—Interpleader—Claim of trustee in bankruptcy as against execution creditor—Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), *s.* 45, *sub-sections* 1 *and* 2; *s.* 46, *sub-section* 2.

On an application for trial of an interpleader issue respecting goods taken in execution under a judgment for a sum not exceeding £20, an order was made directing that, in the event of the non-compliance of the claimant with certain provisions, the goods should be sold by the sheriff and the proceeds paid into court pending the result of the trial. The claimant made default, and the goods were accordingly sold and the proceeds paid into court. Notice of a bankruptcy petition having been presented against the debtor was served on the sheriff within fourteen days of the sale, and the debtor was adjudged bankrupt on that petition.

(a.) Reported by G. K. PARRY, Esq., Barrister-at-Law.

Held, that, under sections 45 and 46 of the Bankruptcy Act, 1883, the trustee in bankruptcy was entitled, as against the execution creditor, to the money in court.

Claim by official receiver as trustee under the Bankruptcy Act, 1883, ss. 45 and 46.

The Sheriff of Derbyshire seized, on March 6, certain goods under an execution issued on a judgment obtained by the plaintiff against the defendant. The goods having been claimed by a third person, an interpleader order was made on March 16 directing that, unless the claimant should pay into court the sum of £120 or give security within ten days, the goods should be sold and the proceeds of the sale paid into court, pending the result of the interpleader issue. The claimant withdrew, the goods were sold on March 28, and on March 30 a receiving order was made against the defendant, notice of which was served on the sheriff on April 1 by the official receiver. On April 5 the defendant was adjudicated bankrupt, and the sheriff paid £113 1s. 3d., the proceeds of the sale, less expenses, into court. The plaintiff took out a summons in chambers for the payment to him of this sum, whereupon Pollock, B., referred the matter to the court.

Muir Mackenzie, for the trustee in bankruptcy.—The trustee is entitled, as against the execution creditor, to the proceeds of the sale under the Bankruptcy Act, 1883, s. 46, sub-section 2, and section 45, sub-section 1; *O'Brien* v. *Brodie*, 14 W. R. 840, L. R. 1 Ex. 302.

Smyly, for the execution creditor.—The money being the proceeds of the interpleader issue, and not of the execution, the execution creditor is not seeking "to retain the benefit of the execution," and these sections do not apply.

Day, J.—I think the trustee is entitled to have the money paid over to him. Although the Interpleader Acts protect the sheriff, they do not alter the capacity in which he holds the proceeds of the sale of goods taken in execution. The sale was by the sheriff in his capacity of sheriff under the writ of *fi. fa.*, not under some trust or duty imposed by the Interpleader Acts. Such sale, taken in connection with the previous seizure, constituted a seizure and sale and a completed execution within the meaning of section 45, sub-sections 1 and 2. But, the judgment debt being for more than £20, the sheriff was bound under section 46, sub-section 2, to retain the proceeds for fourteen days, and during this period the trustee duly intervened and gave the sheriff notice of the bankruptcy petition, and so entitled himself under section 46, sub-section 2, as against the execution creditor to the proceeds as part of the bankrupt's estate. It is immaterial that the sheriff in fact paid the money into court under the interpleader order before the expiration of the fourteen days.

Wills, J.—I am of the same opinion. The sale either was or was not under the execution. If it was under the execution, the trustee, having intervened within fourteen days, is clearly entitled to the proceeds under section 46, sub-section 2. If the sale was not under the execution, the execution has not been completed by sale as well as seizure, and the title of the trustee is equally clear under section 45, sub-sections 1 and 2. The argument that the execution creditor would not be "retaining the benefit of the execution," if he were paid this money, is of unintelligible subtlety. It has been clearly shown that the trustee is entitled to the money either under section 46, sub-section 2, or under section 45, sub-sections 1 and 2.

Order for payment to the trustee of the sum claimed.

Solicitor for the trustee, *Solicitor to the Board of Trade.*

Solicitors for the plaintiff, *Brownlow & Howe*, for *Brown & Ainsworth*, Stockport.

IN BANKRUPTCY.

Q. B. Div. (Cave and A. L. Smith, JJ.) Nov. 22.

Ex parte Burne.
In re Burdett. (a.)

Bill of sale—Assignment of property other than personal chattels—Form—Extent of invalidity—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *ss.* 4, 5—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9.

When a bill of sale which is not made in accordance with the statutory form includes property other than chattels personal, such bill of sale is void to all intents and purposes, and not merely as regards the personal chattels comprised in it.

Appeal from an order of his Honour Judge Powell in the County Court at Greenwich declaring a bill of sale void.

The case raised the question whether, when a bill of sale includes property not personal chattels, a deviation from the statutory form invalidates the instrument so far only as regards the chattels personal comprised in it, or whether it is invalidated *in toto*.

The bill of sale in question was given by the debtor, Burdett, who carried on the business of a printer, to a firm of wholesale stationers in the City, and witnessed that, in consideration of the sum of £200, the grantor assigned to the grantee "the several chattels and things specifically described in the schedule."

There was included in the schedule to the bill, amongst other property, an Otto Gas Engine and shafting, which, it was contended, did not fall within the definition of personal chattels for the purposes of the Bills of Sale Acts.

The county court judge set aside the bill of sale *in toto*, it not being made in accordance with the form in the schedule to the Bills of Sale Act, 1882; and the grantee now appealed from that decision.

Robson, for the bill of sale holder.—The bill of sale was not in accordance with the statutory form, and is void as to the personal chattels comprised in it; but the question is whether the property other than personal chattels included in it is not good security. The case of *In re O'Dwyer*, 19 L. R. Ir. 19, is a direct authority; and in that case *Davies* v. *Rees*, 34 W. R. 573, 17 Q. B. D. 408, in the Court of Appeal, was distinguished. Here the question is not whether the covenant for the payment of the principal and interest could be sued on. A bill of sale is a complex document, and this deed is only void *quâ* bill of sale.

R. T. Reid, Q.C., and *Herbert Reed*, for the trustee, were not called upon.

Cave, J.—The point which we have to decide is really what is the meaning of section 9 of the Bills of Sale Act, 1882, which says that "a bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed." Now here we have a bill of sale not in accordance with the form. We have a decision of the Court of Appeal by which we are bound, and in that case the Court of Appeal in effect said that section 9, in avoiding a bill of sale which is not made in accordance with the form in the schedule, avoids it *in toto*—not merely as regards the personal chattels comprised in it—so that a covenant contained in it for the payment by the grantee of the principal and interest secured is rendered void as against him. What was meant was that the bill of sale is void

(a.) Reported by C. F. Morrell, Esq., Barrister-at-Law.

to all intents and purposes, and not as to the personal chattels only. Then we have a decision of Boyd, J., in the Irish courts, by which we are not bound, but which we treat with all respect, and he in effect says that such a bill is not void to all intents and purposes, but only as to the chattels personal. In my opinion that is entirely opposed to the decision of the Court of Appeal, and I cannot distinguish between them. The learned judge, in his judgment, professes to do so, but I must say, with all respect, that to me he seems not so much to have distinguished *Davies* v. *Rees* in the Court of Appeal as to have disregarded it.

A. L. SMITH, J.—I am of the same opinion. The bill of sale here is one in which the grantor in effect says to the grantee, in consideration of the sum advanced I assign chattels A. and engines B. and covenant to repay. It is all one bargain. It is admitted that, as to chattels A., the bill of sale is bad; but it is said that, although that is so, the assignment of engines B. is an independent contract, and can be severed. I cannot see that. The assignment is of the chattels and the engines, and, after the decision in the Court of Appeal, the bill of sale is clearly void to all intents and purposes.

Appeal dismissed, with costs. Leave to appeal given.

Solicitor for the bill of sale holder, *Burney*.

Solicitors for the trustee, *Thomson & Ward*.

Privy Council.

Dec. 2, 11, 1886.

BINNEY v. MUTRIE. (a.)

(On appeal from the Supreme Court of British Honduras.)

Partnership—Winding up—Accretion of profits to capital of partners—Surplus assets—Distribution—Lien.

Partners treated their respective shares of the profits declared or estimated in each year as accretions to their respective capitals.

Held, that, in the year in which the dissolution of the firm occurred, profits could not be so treated. The surplus assets must be distributed, first, in paying to each partner his claims in respect of capital; the residue or deficiency to be divisible in the proportions of the respective interests of the partners; the distribution of surplus assets to be subject to the lien of any partner on the entire assets to satisfy a deficiency.

Appeal from the Supreme Court of Honduras in regard to three orders of the 6th of June and the 1st and 8th of July, 1885, respectively.

These were made on further directions in a suit brought by the appellant for a partnership account and to wind up certain affairs of the partnership.

The partnership consisted of a firm of William Guild & Co., merchants in Belize, in which, for some years prior to 1879, the appellant carried on business as sole partner. A share to the extent of one-fourth in the above business was latterly owned by the respondent Mutrie. The other respondent, Currie, was originally a book-keeper on a fixed salary; but in 1879 he was admitted a partner in the same firm, in which, at that date, the partners were interested in the following proportions—the appellant forty per cent.; the respondent Mutrie thirty-five per cent.; the respondent Currie twenty-five per cent.

This partnership was to come to an end on the 31st of January, 1884. The partnership assets consisted of the stock in trade, and book-debts of the last partnership. The Chief Justice said: "The former was taken at a valuation, and the debts, less an amount carried to suspense account, were accepted as capital. I would merely remark that there is an unhappy conflict of evidence as to this suspense account, but that part of the case is not now before me."

The suit was instituted to wind up the partnership and take accounts on the 9th of April, 1885. The account showed considerable assets in hand and in course of realization.

The point to be decided was the principle upon which these assets should be distributed, and what inquiries should be made finally to settle all questions and accounts between the parties.

These accounts showed that nearly the entire original capital was contributed by the appellant. Contributions were added by Currie from his savings as a book-keeper, and by Mutrie to a smaller amount.

On the 31st of January, 1884, the respective credit balances were as follows:—

Binney . . .	214,815dols.
Currie . . .	60,762dols.
Mutrie . . .	58,422dols.

These balances were arrived at (1) by crediting the appellant with 2,500dols. as rent of the partnership premises; (2) by crediting the partners, in the agreed proportions, with the estimated profits, amounting altogether to 225,000dols.; (3) by allowing interest at five per cent. to each of the partners on their credit balances annually.

The Chief Justice on the 1st of June, 1885, said:—"The liabilities of the firm have either been met or are in course of liquidation. After making due provision for these liabilities there remained a surplus, and it is with respect to the application of this surplus that the parties to this suit are at issue. The plaintiff asks for a direction that it may be applied in payment of the original capital contributed by each of the partners, together with interest at five per cent. The defendants, on the other hand, seek a direction that the surplus may be divided rateably between the partners according to the amount of the respective capitals of the partners at the date of the dissolution of the said partnership." The Chief Justice made his direction according to the prayer of the defendants, and observed that if they had asked that their shares of profits, so far as they had been left in the business, should be treated as capital advanced by them, and as such entitled to rank in priority next after debts to third persons, he was not certain that they might not have done so successfully.

The order actually made directed that the surplus assets ought to be divided rateably between the partners, according to the amount of the respective capitals standing to the respective credits of the partners at the date of the dissolution.

Macnaghten, Q.C., and *Cowell*, for the appellant.

Rigby, Q.C., and *Cutler*, for the respondents.

Macnaghten, Q.C., replied.

Cur. adv. vult.

Dec. 11.—The judgment of their lordships (Lord HOBHOUSE, Lord HERSCHELL, and Sir BARNES PEACOCK) was delivered by

Lord HOBHOUSE.—Of the three orders appealed against, the only important one is that of the 1st of June, 1885. It is, in fact, the only order in the case which decides anything between the parties, for the first order only directs generally that the accounts are to be taken. The order of the 1st of June lays down a principle of

(a.) Reported by J. M. COLLYER, Esq., Barrister-at-Law.

division of the assets calculated to affect the rights of the parties materially.

The court declares that the surplus assets remaining after payment of all partnership debts and liabilities ought to be divided rateably between the partners, according to the amount of the respective capitals standing to their respective credits at the date of the dissolution, that is, on the 31st of January, 1884.

Their lordships take it to be clear that the claims of each individual partner against the partnership are not partnership liabilities within the meaning of the order. The order, therefore, directs exactly the same distribution of the assets among the partners, whether the accounts show a profit, a loss of capital, or an exact balance. But as by the partnership articles profits and losses are not to be shared in the ratio of the respective capitals, it is obvious that the distribution directed by the order cannot be according to the contract, except in the very improbable contingency of an exact balance.

The partnership commenced on the 1st of February, 1879, and expired on the 31st of January, 1884. It was formed for the purpose of carrying on the business previously carried on by Binney and Mutrie, and with the capital employed in that business, but admitting Currie as a partner, and adding to the capital a debt due to him by the old firm. The second of the partnership articles provides that the business (by which the parties evidently mean profit and loss) shall be divided into 100 parts, of which Binney shall have 40, Mutrie 35, and Currie 25. By the eighth and ninth articles Mutrie and Currie agree to allow their shares of profits, after drawing sums of which the maximum is fixed, to accumulate for their benefit. And by the tenth article interest at the rate of five per cent. per annum is to be allowed on the amount of the credit of each partner from the 1st day of February in each year.

The amount of capital thus brought in by Currie was an ascertained sum, but the capital provided by the others, depending as it did upon the outstanding credits of the old firm, could only be the subject of estimate. It was so entered in the books, and the original estimates were altered on account of bad debts. It appears to be still the subject of dispute whether the altered amount entered in the books was so entered by agreement with Binney, and their lordships do not propose to do anything to disturb a settled account if there is any. But so far as appears on the face of the accounts in this record, they are founded on entries of capital which are estimates only, and also on declared profits which are estimates only, and it is open to all parties to have them accurately taken in this suit. It is clear, however, that of the existing capital in February, 1881, a very large portion was attributable to Binney, a small one to Currie, and a still smaller one to Mutrie, if, indeed, his portion was not to be represented by a minus quantity.

The accounts kept by Mutrie and Currie, the managing partners, appear to follow accurately enough the principle of the partnership articles. They credit to each partner on every 31st of January down to the year 1883 his share of the declared or estimated profits, and the interest on the capital standing to his credit on the preceding 1st of February. The sum so accumulated was treated as the capital of each partner for the ensuing year, and this their lordships think was a mode of dealing which, if not compelled by the partnership articles, cannot at any rate be called in question now. As the outgoings were every year much less than the declared profits the capital of each was thus largely increased. The amount of the capital which each could claim to be paid out of the partnership funds on the 31st of January, 1884, would be the amount properly credited to him on 1st of February, 1883, with the year's interest added. The profits of that year never were or could have been made an accretion to the capital, because when the 1st of February came the partnership had ceased to exist, though in the accounts they have been added up together.

Their lordships understand that all claims of persons external to the partnership have been satisfied. That being so, it is clear that the surplus assets should be first applied in paying to each partner his claims in respect of capital. The residue will be profits, and will be divisible as such. If the assets will not satisfy the sums found due for capital, there is a loss which must be borne or made good by the partners in the proportions of forty, thirty-five, and twenty-five. And the possibility of such a loss may make it necessary to keep under the control of the court a sufficient amount of the assets to secure Binney, who has a much larger claim than the others, the benefit of his lien on the assets for contribution. Perhaps the strict course would be to apply for a receiver, but it may be that the parties could agree on some mode of proceeding more convenient to all.

Their lordships see no reason for reversing or varying the order of the 1st of July, which dismissed Binney's petition for payment of money out of court, or that of the 28th of July, which directed issues of the trial of certain questions of fact. But they ought now to indicate the order which, in their opinion, the court should have made on the 1st of June in lieu of the order actually made. It should run as follows:—

(*a.*) Ascertain what amounts ought to be placed to the credit, or to the debit, of each of the three partners in respect of the capital of the partnership business on the 1st of February, 1879.

(*b.*) Declare that each partner is entitled to interest at the rate of five per cent. in each year on the capital standing to his credit on the 1st of February in that year.

(*c.*) Declare that, according to the construction of the articles of partnership, whatever profits and interest were attributable to the share of any partner, and were not drawn out by him, are to be credited to him on the 1st of February in each year down to the 1st of February, 1883, as part of his capital in the concern.

(*d.*) Ascertain what amount of capital is to be credited to each partner on the 31st of January, 1884, according to the foregoing declarations.

(*e.*) Declare that the surplus assets of the partnership after paying all debts and liabilities, including rent and such costs of this suit as are directed to be paid thereout, ought to be applied in payment of the sums due to each partner in respect of his capital ascertained as aforesaid, with interest to the time of payment.

(*f.*) Declare that if the assets of the partnership will not suffice to pay the amounts of capital ascertained as aforesaid the deficiency is a loss of capital, and is to be borne or made good by the three partners, in the proportion of forty shares by the plaintiff, thirty-five by the defendant Mutrie, and twenty-five by the defendant Currie; and that, subject to this liability and to the claim of any of the partners against the entire assets to answer it, the assets are to be applied rateably in payment of the amounts of capital.

(*g.*) Declare that the residue, after payment of capital as aforesaid, is divisible as profit into one hundred parts, of which forty are to be paid to the plaintiff, thirty-five to the defendant Mutrie, and twenty-five to defendant Currie.

(*h.*) Let all accounts be taken and inquiries made which are necessary for giving effect to the foregoing declarations or orders, but not disturbing any accounts which may have been settled or matters which may have been concluded between the parties, if any such there be.

Their lordships see no reason to interfere with the decision of the court as regards costs. They will humbly advise her Majesty in accordance with the foregoing opinion. With regard to this appeal, they think there has been some error on both sides, and they are not at

all sure which party will benefit by the alteration made in the order. The costs should be paid out of the partnership funds.

Solicitors for the appellant, *Parker, Garrett, & Parker.*

Solicitors for the respondents, *Rooke & Sons.*

Court of Appeal.

From Chan. Div. March 30.

MUTRIE *v.* BINNEY. (*a.*)

Practice—Stay of proceedings—Action in colonial court—Colonial decree to take partnership accounts—Action in England—Counter-claim in English action seeking same relief—Application to strike out counter-claim—R. S. C., 1883, *ord.* 25, *r.* 4; *ord.* 19, *r.* 27; *ord.* 21 *r.* 15.

A partnership firm, consisting of M., C., and B. carried on business in British Honduras. B. also carried on business in London in partnership with N. The London firm acted as agents of the Honduras firm, under an agreement which provided that B.'s share in the profits of the Honduras firm was to be brought into the accounts between the two firms to the credit of the London firm.

B. brought an action in Honduras against M. & C., and a decree was obtained in that action to have the partnership accounts of the Honduras firm taken. Before the accounts in that action were taken, though after the decree was made, M. & C. brought this action in England against B. & N., claiming an account of all moneys received and paid by the defendants as agents of the Honduras firm. The defendants, B. & N., counter-claimed to have the accounts of the Honduras partnership firm taken. On the application of the plaintiffs, M. & C., North, J., *ordered that the defendants' counter-claim be struck out. The order of* North, J., *was made, not merely on the ground that, in the exercise of his discretion, he considered that the counter-claim could not be conveniently tried with the original claim, but on other grounds.*

Held, on appeal, that, though any action for taking the accounts of the Honduras firm brought by B. in England after having obtained a decree for the same purpose in Honduras would be stayed, yet, as the action brought in England against B. & N. by M. & C. claimed to have the accounts taken as between the two firms, and as the profits due to B. as a partner in the Honduras firm should be ascertained before the account claimed by the plaintiffs' English action could be finally settled, B. ought not to be precluded from claiming, by way of counter-claim in the English action, to have the accounts of the Honduras partnership taken, and that, on B.'s co-defendant, N., undertaking to be bound by the proceedings in the Honduras action, the order of North, J., *should be discharged.*

Appeal from North, J.

Messrs. Mutrie & Currie, the plaintiffs in the present action, had carried on business in British Honduras in partnership with one of the present defendants, Mr. Binney. The defendant Binney also carried on a business in London in partnership with the defendant Niven, and the London firm acted as agents for the Honduras firm. By the terms of the agency agreement Binney's share of the profits in the Honduras firm was to be brought into account in the books of the London firm to their credit and to the debit of the Honduras firm.

In April, 1885, Binney, as a partner in the Honduras firm, brought an action in British Honduras against Messrs. Mutrie & Currie for an account of the partnership transactions. On April 12, 1885, a decree was made in that action that the partnership accounts should be taken. On September 15, 1886, Messrs. Mutrie & Currie commenced the present action in England against Messrs. Binney & Niven, the London agents of the Honduras firm, for an account of the dealings between the two firms, and alleged that the defendants had made secret profits in their agency. The defendants, by their defence, denied the allegation that they had made any secret profit, and put in a counter-claim by which they claimed to have an account taken of the partnership dealings of the Honduras firm.

The plaintiffs thereupon moved that the defendants' counter-claim be struck out as disclosing no reasonable cause of action and being vexatious.

North, J., on the hearing of the application, made an order that the counter-claim of the defendants be struck out.

The defendants appealed.

Sir Horace Davey, Q.C., Cookson, Q.C., and *Cowell,* for the appeal.—The judgment below is founded on an error of law—viz., that it is *primâ facie* vexatious to commence proceedings here when proceedings in respect of the same matter are pending in a colonial court. Though that may be the rule of law when proceedings are pending here or in the courts in Ireland or Scotland, we contend that rule does not apply when the pending proceedings are either in a foreign or in a colonial court. In such a case it is not *primâ facie* vexatious to commence proceedings here, but the *onus* lies on those who object to show cause why the proceedings here should be stayed: *McHenry* v. *Lewis,* 31 W. R. 305, 22 Ch. D. 397; *Peruvian Guano Co.* v. *Bockwoldt,* 31 W. R. 851, 23 Ch. D. 225. The marginal note to *McHenry* v. *Lewis* in the *Law Reports* is inaccurate on this point and goes beyond the actual decision. *The Christianborg,* 10 P. D. 141, 34 W. R. Dig. 147, is not in point. Again, the decree made in the Honduras action cannot be relied on as a bar to proceedings here, as it was not a final decree concluding the rights of the parties: *Bayley* v. *Edwards,* 3 Swans. 703; *Ostell* v. *Lepage,* 1 W. R. 18, 5 De G. J. & Sm. 95, 2 De G. M. & G. 892. *Beddall* v. *Maitland,* 29 W. R. 484, 17 Ch. D. 174, shows that this is a proper subject for a counter-claim.

Cozens-Hardy, Q.C., and *John Cutler,* for the respondents.—A decree has actually been made in the Honduras action, and the plaintiff in that action is now seeking by his counter-claim as defendant in this action to get a similar decree here. The court in Honduras has full seizin of the case, and this court ought, therefore, to stay proceedings on the counter-claim. There has been an adjudication on the rights of the parties in the Honduras cause by the Privy Council here: *Binney* v. *Mutrie, ante,* p. 129, 12 App. Cas. 160. The judge has exercised his discretion in refusing to allow the counter-claim, and his discretion ought not to be interfered with: *Huggons* v. *Tweed,* 27 W. R. 495, 10 Ch. D. 359.

Sir H. Davey, Q.C., in reply, gave an undertaking that the defendant Niven, who was not a party to the Honduras proceedings, would nevertheless be bound thereby.

COTTON, L.J.—This is an appeal from an order of North, J., striking out altogether a counter-claim put in by the defendants. The action is brought by Messrs. Mutrie & Currie, who carried on business at Honduras in partnership with Mr. Binney, against Binney and a Mr

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

Niven, who carry on business in partnership in England, and who acted as agents for the Honduras firm. The agreement between the Honduras firm and their agents in England is very peculiar, because it introduces into the accounts of the English agents part of the profit of the Honduras firm, it being provided that Binney's share of the profits of the Honduras firm was to be brought into account as between the Honduras firm and their English agents, to the credit of the English agents and to the debit of the Honduras firm.

Before, therefore, it could be ascertained what balance on these accounts was payable by the English agents to the Honduras firm, it had to be ascertained what was the share of Binney in the profits of the Honduras firm. This action is brought by the Honduras partners of the Honduras firm against their English agents to charge the English agents with certain sums which they ought to have allowed the Honduras firm, the plaintiffs alleging that the English firm got the benefit of commissions for which they ought to have accounted to the Honduras firm.

There would come into the general account between the Honduras firm and the English agents the sums which I have mentioned, if the plaintiffs succeeded in recovering them, and there would also be brought in the share of Binney in the profits of the Honduras business. I do not see how the accounts can be finally taken as between the Honduras firm and the English agents until the partnership accounts are taken, so as to ascertain what is Binney's share of the profits which is to form an item in the accounts. Binney, who was a partner in both firms, brought an action in the Honduras courts for the purpose of taking the partnership accounts, and by his defence in the present action he denies the allegation made in this action, and counter-claims to have the partnership accounts taken. North, J., has simply struck out this counter-claim.

It is urged upon us that, as North, J., in the exercise of his discretion, considered that this counter-claim could not be conveniently tried with the original claim, we ought not to interfere. But in my opinion the learned judge never exercised any such discretion at all. The strong point in my mind against his decision is that the profits due to Binney as a partner in the Honduras firm must be ascertained before the accounts between the Honduras firm and the English firm can be finally settled. By the counter-claim the defendants seek to get a decision on a matter which must be decided before the final adjudication of all questions arising between the plaintiffs and the defendants can be made. Now what ought to be done? Undoubtedly, if there had not been this action brought by the Honduras partners I should have thought it would have been wrong for Binney to bring a fresh action in England for taking the partnership accounts when he had already got a decree for that purpose in Honduras. Such fresh action would have been vexatious, and the court would have stayed it. But, although a decree has been made in the Honduras action, there has been no final winding up of that action, and it would be difficult finally to wind it up until this action is tried—the two depend the one on the other, and, in my opinion, it would be wrong now to strike out entirely this counter-claim, so as to prevent Binney from asking, at the trial of this action, for such a decree as may be right, having regard to the then state of proceedings in the Honduras action, though he certainly cannot be allowed to raise again here any questions which have been decided by a competent tribunal as between him and the plaintiffs in the Honduras action. Niven, who is not a party to the Honduras action, has undertaken to be bound by any adjudication or decision in the Honduras action, of course including anything which may be decided on appeal by the Privy Council.

The proper course, therefore, will be to discharge the order made by North, J., but without prejudice to any application that may be made if and when all proceedings in the Honduras action have been finally wound up so far as to determine what, apart from the claim in this English action, are the profits of Binney, and what is the state of accounts. If the Honduras proceedings go on rapidly an adjudication, which will settle all matters and all accounts between the parties with the exception of the claim made in the English action, will be speedily obtained. If so, that will be considered in determining what will be the ultimate balance on the accounts to be taken in this action. I in no way encourage the opinion that if the whole of the accounts of the partnership, with the exception of the claim to get in this asset, had been decided in the Honduras action, it would have been right to make a decree here again that those accounts should be taken. But what has been done by the order under appeal has this effect, that if anything should happen to prevent the Honduras action from being worked out, the defendant Binney will be precluded from getting such a decree or order as will enable him to make perfect those proceedings in the Honduras action which have only gone to a certain length, and which may possibly, in certain events, never go further. The plaintiffs in this case are very confident as to the quickness of the Honduras proceedings. If that confidence prove well founded they may, before the trial of this action, get the matter settled in that action so as to bind Binney and Niven, in which case there will be no further inquiry or decree in order to settle what will have been already settled in the Honduras action.

In my opinion the appeal succeeds, and, on the undertaking of Niven to be bound by any decision in the Honduras action, we discharge the order.

LINDLEY, L.J.—It is unnecessary for us to consider now what kind of decree will have to be made, or ought to be made, when the English action comes on to be heard. That is not the question before us. It does not in the least follow that because the defendants, by their counter-claim, ask for a general account of the partnership dealings and transactions, they will get it, or that if they get it they will get it in an unqualified form. It is quite competent for the court, when the case comes on, to make such a decree for an account as is required by the circumstances of the case, having regard, amongst other things, to what has been done abroad; but the only question we have to consider is whether it is right to strike out the whole of this counter-claim. It appears to me that it is not right. If North, J., had exercised his discretion in this way, if he had thought that as a matter of convenience it was better that the defendants should have their counter-claim struck out, and that they should commence a fresh action in the High Court, of course we should have been very unwilling to take a different view, for the Court of Appeal is slow to interfere with the discretion of the judge. But that is not the case. He has proceeded on a principle that by reason of the pending proceedings in Honduras between Binney and his co-partners for taking the accounts of the Honduras firm, this counter-claim is wrong, and ought to be struck out. In other words, he has come to the conclusion that this counter-claim, asking for accounts of that same partnership in this country, is vexatious and oppressive, and ought to be dealt with accordingly. That is the substance of the view he has taken. Now, in order to deal with that view, we must look at what the claim is. The claim is not a mere claim by the Honduras firm to get in a partnership asset or sum of money due from the English firm to the Honduras firm. It goes far beyond that. The object of the claim is to get in that asset and to distribute it among the partners of the Honduras firm. That is the key to the whole case. How are you

to distribute an asset of the firm without taking the accounts of the firm? It does not at all follow, as I said just now, that in this English action the accounts which have been taken in the Honduras action are to be taken over again. These accounts can, of course, be adopted as far as they go, and such an order can be made as the justice of the case may require; but, in some shape or another, the partnership accounts must be taken if any asset is to be distributed among the partners. We see that every day in the case of the sheriff seizing by *fi. fa.* the share of a partner in certain assets of the firm. You have then to find out what the share of the partner is in the assets seized. We all know that this cannot be done except by taking the partnership accounts, and, therefore, when the plaintiffs ask for the distribution of the asset, they inevitably let in the taking of the partnership accounts. I do not say the defendants will be entitled to an order for taking the accounts of the partnership; it may be necessary or desirable to modify it, but it strikes me as altogether wrong to say that they shall not raise such a point by way of counter-claim. Then it is said, and said truly, that Mr. Niven is not in a position to ask for an account of the Honduras firm. But, on the other hand, having regard to the peculiar nature of the agreement between the Honduras firm and the agents, it seems to us that such an account as is here asked for by the plaintiffs cannot be granted in the absence of Niven, and I do not see how it is possible to distribute the asset without Niven's presence in some shape. Then it is said he is not bound by the Honduras proceedings. That is true, but the difficulty is met by the undertaking given by Sir Horace Davey, and on that undertaking it seems to me that the only right order is to allow the appeal and discharge the order appealed from.

LOPES, L.J.—I agree.

Solicitors, *Rooke & Sons*; *Parker, Garrett, & Parker*

From Lancaster Ct. of Chan. Dec. 1.

WALKER *v.* DODDS. (*a.*)

*Practice—Chancery Court of County Palatine of Lancaster—Service of writ out of jurisdiction—Leave of Vice-Chancellor to issue writ—*17 & 18 *Vict. c.* 82, *s.* 8—*Chancery of Lancaster Rules,* 1884, *ord.* 2, *r.* 4; *ord.* 12, *rr.* 1, 7.

Before an application is made to the Court of Appeal for leave to serve a writ issued out of the Palatine Court upon a defendant who is out of the jurisdiction of that court, but within the jurisdiction of the High Court, the leave of the Vice-Chancellor of the Palatine Court must first have been obtained to the issue of the writ.

Counsel, on making such application, ought to inform the court that the leave of the Vice-Chancellor has already been obtained.

Original motion.

The plaintiffs were the surviving trustees and executors of the will of R. Holt, deceased. The defendants were the executors of the will of T. Dodds, deceased, who had also been one of the trustees of the will of R. Holt.

The present action was brought by the plaintiffs for an account of all trust funds and moneys received by T. Dodds as trustee, and of all dealings in relation to the trust estate, and for payment to them of what should be found due to them on taking such account.

The writ was issued out of the Palatine Court on the 11th of August, 1887, and was served on one of the defendants, who had appeared. The other defendant, H. N. Dodds, resided out of the jurisdiction of the Palatine Court, at Darlington, in the county of Durham.

On the 3rd of November, 1887, an order was made by the Court of Appeal on an *ex parte* application of the plaintiffs giving them liberty to serve a copy of the writ out of the jurisdiction of the Palatine Court upon the defendant H. N. Dodds. At the time when this order was made no leave had been obtained from the Vice-Chancellor of the Palatine Court to issue the writ for service out of the jurisdiction of that court, as required by the Chancery of Lancaster Rules, 1884, ord. 2, r. 2.

The defendant H. N. Dodds now applied by way of original motion that the order of the 3rd of November, 1887, might be discharged on the ground of irregularity.

By section 8 of the Court of Chancery of Lancaster Act, 1854 (17 & 18 Vict. c. 82), the Court of Appeal is empowered to direct that service may be effected out of the jurisdiction of the Palatine Court on any person who may be a necessary or proper party to any suit or other matter in the Palatine Court.

By the Chancery of Lancaster Rules, 1884, ord. 2, r. 4, "no writ of summons for service out of the jurisdiction . . . shall be issued without the leave of the court or Vice-Chancellor."

By ord. 12, r. 1, "service out of the jurisdiction of the court, and not within the jurisdiction of the High Court of Justice, of a writ of summons may be allowed by the court or Vice-Chancellor" in certain specified cases.

By rule 7 of the same order "the practice as to service out of the jurisdiction of the court, and within the jurisdiction of the High Court of Justice, is not hereby affected, and shall be in force as to proceedings under these rules."

O. L. Clare, for the motion.—The practice in the Palatine Court in cases of this kind is for the plaintiff to make an application to the Vice-Chancellor for leave to issue the writ for service out of the jurisdiction, and then to apply to the Court of Appeal for leave to serve it. In the present case the leave of the Vice-Chancellor to issue the writ has not been obtained. The order, therefore, of the 3rd of November, 1887, was irregularly obtained, and ought to be discharged.

He referred to 17 & 18 Vict. c. 82, s. 8; Chancery of Lancaster Rules, 1884, ord. 2, r. 4, ord 12, r. 1; *Sedgwick* v. *Yedras Mining Co.*, 35 W. R. 780; and to an anonymous case, noted in 23 SOLICITORS' JOURNAL, 404.

Maberly, contrà.—The order of the 3rd of November, 1887, is in compliance with section 8 of 17 & 18 Vict. c. 82. Ord. 2, r. 4, and ord. 12, r. 1, must be read together, and apply only to service out of the jurisdiction both of the Palatine Court and of the High Court. This contention is supported by ord. 12, r. 7.

Clare replied.

COTTON, L.J.—This is an application to discharge an order made on an *ex parte* application for leave to serve a writ issued out of the Palatine Court upon a defendant out of the jurisdiction of that court. There are two defendants to the action, one of whom was within the jurisdiction of the Palatine Court, and the other of whom was out of the jurisdiction of that court, but within the jurisdiction of the High Court. The application is made on the ground of the irregularity of the issue of the writ, which had been issued out of the Palatine Court for service out of the jurisdiction of that court without the leave of the Vice-Chancellor having been first obtained to such issue. Reliance was placed on rule 4 of order 2 of the Chancery of Lancaster Rules. That rule is clear in its terms. [His lordship read the rule and continued:—] Then order 12 deals with ser-

(*a.*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

vice out of the jurisdiction both of the Palatine Court and of the High Court, and it was contended on behalf of the plaintiff that ord. 2, r. 4, must be read in conjunction with that order, and that it only applied to service out of the jurisdiction of both courts. But I think that would be giving a wrong construction to order 12, and in my opinion ord. 2, r. 4, applies to all writs for service out of the jurisdiction of the Palatine Court. It is true at the end of the order there is a rule which provides that the practice as to service out of the jurisdiction of the court and within the jurisdiction of the High Court of Justice is not to be thereby affected, and shall be in force as to proceedings under the rules. It is said that is not to interfere with service of a writ out of the jurisdiction of the Palatine Court, but I do not think that is so.

In my opinion the writ in this case was not one which had been properly issued, and if we had seen that we should not have given leave for the service of it out of the jurisdiction. The case referred to, in 23 SOLICITORS' JOURNAL, 404, shows that we shall not be interfering with the practice of the Palatine Court by coming to the conclusion we have. For in that case the Court of Appeal took the same view of the practice as we have done. We do not base our opinion on that case, but we were unwilling to act without knowing what the practice had been. I will only add that counsel applying for leave to serve a writ out of the jurisdiction ought to inform the court that leave for the issue of the writ out of the jurisdiction has been obtained. In my opinion the order for service out of the jurisdiction must be discharged.

FRY, L.J.—I am of the same opinion.

LOPES, L.J.—I am also of the same opinion. The case cited from the SOLICITORS' JOURNAL is in point.

Application allowed.

Solicitors for the applicants, *Price & Woodcock*, Manchester.

Solicitors for the respondent, *Clarke, Woodcock, & Ryland*, for *J. G. Openshaw*, Bury.

High Court of Justice.

Chan. Div. } Kay, J. } Nov. 18.

In re HANSON'S TRADE-MARK. (*a.*)

Trade-mark — Registration — Old mark — Distinctive device—Colour—Fancy words not in common use—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict.* c. 57), *ss.* 64 (*sub-sections* 1 (c), 3), 67, 72.

H. & Co. registered under the Act of 1875 *two trade-marks in respect of coffee as marks which had been used by them before the passing of that Act, and thereby obtained protection in respect of all goods in that class till the passing of the Act of* 1883, *since which the protection applied to coffee only. The marks had never been used for anything but coffee. On an application to register the marks under the Act of* 1883 *in respect of all the goods in that class,*

Held, that the former registration gave them no right to have the marks registered under the Act of 1883 *as old marks for goods other than coffee, although in the same class; and that, with respect to such goods, they must be treated as new marks, and must comply with the provisions of the Act of* 1883.

The trade-marks in question consisted of—first, an oblong label divided into three equal and parallel stripes, coloured red, white, and blue respectively (the colours being shown, for the purposes of the former registration, by shading with dark lines), but with no dividing lines between the stripes; and, secondly, the words "Red, White, and Blue" printed across the label.

Held, that the only distinction in the device was the use of the colour; that the Act treated colour as an accident, so that the device must be something distinctive independently of colour; that the words "Red, White, and Blue" were not "fancy words not in common use"; and that registration must be refused.

Motion.

This was an application for an order directing the Comptroller-General to proceed with the registration in class 42 of trade-marks Nos. 61,265 and 61,266.

On the 28th of November, 1881, the applicants registered under the Act of 1875, s. 10, as old trade-marks used before the passing of that Act, for French coffee—first, an oblong label, divided into three equal and parallel stripes, coloured red, white, and blue respectively, within a figured border, the colours being shown for the purpose of registration by shading with dark lines, but with no dividing lines between the stripes; and, secondly, the words "Red, White, and Blue" printed across the label. These trade-marks had been upheld by the Court of Appeal in *Hanson* v. *The British Tea and Trading Co.* (*Limited*), and it was not now disputed that the applicants had by prior user rightfully obtained the registration of these marks for coffee. They did not allege that they had ever used them for other goods, but they stated that they proposed to apply them to tea and cocoa.

They now applied to register their two trade-marks (the label not shaded, but showing the actual colours as used) under the Act of 1883 in respect of all goods comprised in class 42.

The comptroller refused registration of the label on the ground that prior user for coffee did not make it an old mark for other goods, and that it was not a distinctive mark, and he stated that the same reasons applied to the words "Red, White, and Blue."

Renshaw, Q.C., and *J. Cutler*, for the motion.—Under the Act of 1875 we could not register the trade-mark in colour; but under the Act of 1883, s. 67, we may do so. Under the former Act our registered trade-marks applied to all goods in the class, but under the latter they only apply to coffee, so we are entitled to have them registered in respect of the other goods comprised in the class, so as to give us the same protection as we enjoyed under the former Act. Those marks, indeed, are not now disputed, and have been upheld by the Court of Appeal. "Red, White, and Blue" are fancy words as applied to coffee: *In re Van Duzer's Trade-mark*, 35 W. R. 294, 34 Ch. D. 623.

Sir R. E. Webster, A.G., and *M. Ingle Joyce*, for the Comptroller-General.—These are not old trade-marks for anything but coffee, so the applicants must bring them within the Act of 1883. They are not covered by section 64, sub-section 1 (c). By section 67 a trade-mark may be used in any colour, and as the label depends upon colour it is not a distinctive device, nor are the words "Red, White, and Blue" "fancy words not in common use." The applicants are sufficiently protected by their common law rights and by section 72.

Renshaw, Q.C., in reply.—We are not protected by the Act. Our trade-marks for coffee do not prevent anyone using similar marks for goods in the same class. The words in section 72 are "goods or descriptions of goods," instead of "goods or classes of goods" in the Trade-Marks Registration Act, 1875, s. 6.

(*a.*) Reported by H. C. ROPER, Esq., Barrister-at-Law.

KAY, J.—I am of opinion that the comptroller is quite right. When examined, the case comes to a very simple point indeed. Before this Act of 1883 a device could not be registered in colours. The applicants had an old trade-mark for French coffee, and under the former Act they registered that as an old mark for that article. They were obliged to register it without any colour; so they put it on the register with three parallel and seemingly equal stripes, the two outer ones shaded and the middle one white, and across they printed "Red, White, and Blue."

That they were allowed to do because it was an old mark; but colour could not then, by itself, be registered at all. Now it may be that they are in this position. They have had that mark, and practically used it in the colours "red, white, and blue." An exhibit has been shown to me to show what their use was at the time of an action in 1884 with respect to the trade-mark so registered. Having used it in that way, it may very well be that no one else could apply a label resembling that to the eye to coffee—of course they could not to coffee, but to any similar thing like cocoa or other preparations which are used by some people rather than coffee. Very likely, by doing so, it would be said you are trying to get the public to believe that the goods which you sell are goods which are either manufactured or selected by this firm of Sir Reginald Hanson & Co. That is quite possible. They now come under the Act of 1883, and they say:—"We are afraid rather that we might not have the power of preventing other people using this mark, which we have used so long, for such substances as cocoa and others which come within the class of which coffee is an item, and therefore we ask now to have this mark registered for all such other articles—all articles within the class of which coffee is an item."

Then I have to consider whether, this not being an old mark with reference to any of these articles, but being, with reference to any of these articles, a new trade-mark, they could possibly be allowed to register this under the Act of 1883 as a new mark. That puts out of sight entirely the fact of its having been registered for coffee before, and I must treat it as though this were a new application for registration under the Act of 1883 of a mark which had not been used before. What is the objection? It is a very simple one. The objection is "Your mark, independent of colour, is not distinctive, and under this Act of 1883 colour is treated as an accident." This is the argument as I understand it. It is the plain intention of the Act that where the distinction of the mark depends upon colour that will not do, you may register a mark which is otherwise distinctive in colour, and that gives you the right to use it in any colour you like; but you cannot register a mark of which the only distinction is the use of a colour, because practically, under the terms of the Act, that would give you a monopoly of all the colours of the rainbow and others.

Now let us see whether that is so under the Act of 1883. Section 64 contains words that have been commented on very much, criticized very much, and of which we have had various expositions. The words which apply to this case are: "For the purposes of this Act a trade-mark shall consist of or contain at least one of the following essential particulars:—(c A distinctive device, mark, brand, heading, label, ticket, or fancy word or words not in common use." Now I must look for "a distinctive device, mark, brand, heading, label, or ticket." I have before me the thing which it is proposed to register. It consists of, as I have said, three parallel stripes, of apparently about the same width, and there is no division between them at all. There is no line drawn between them. There is nothing on the paper to divide those three from one another except the colours in which they are printed. One is red, the middle one is white, and the other is blue, and across them is printed "Red, White, and Blue."

To see whether the argument addressed to me on behalf of the comptroller is right I must look at the 67th section. Up to this time colours could not be registered. What says this Act? "A trade-mark may be registered in any colour;" but then the mark must be a distinctive device, must be something independent of the colour if it stopped there—"and such registration shall (subject to the provision of this Act) confer on the registered owner"—what?—"the exclusive right to use the same in that or any other colour." It is obvious that colour is, as I have said, treated as an accident, and that the distinctive device must be something which is distinctive independently of the colour. Because the difficulty arises in an instant. If I allowed this mark to go on the register as a new mark, which is what is now asked, to-morrow or the day after, or at any time, the colours might be altered to any colour. I see nothing in the world to prevent Sir Reginald Hanson immediately obliterating the blue and red and using white for all three stripes, in which case there would be no division, nothing at all on this mark in any way distinctive. Or, again, if that is thought an extreme instance, he might, at any rate, use them all in the colour red, or all in the colour blue, or one of them red and the two others yellow, or one of them red and the other two white, or one of them blue and the other two green. He is to use them in any colour he likes, having registered them in one; so that it seems to me that the point raised in this case against Sir Reginald Hanson is a very sound one. The meaning of the Act I understand to be that you may register a mark in a colour, but the mark must be a distinctive device independently of the colour. In this case there would be no distinctive device independently of the colour, and when you registered it in one colour, or two or three colours, or half-a-dozen colours, you might use it in any colour or colours you pleased. Accordingly it seems to me the comptroller is quite right, and that the application must be refused, with costs.

The other application was for the words "Red, White, and Blue," but I pointed out at once that if the first mark could be registered that would include the use of the words "Red, White, and Blue," because if anybody used "Red, White, and Blue" after that mark was registered he clearly would be infringing that trade-mark by a colourable imitation; and really the whole thing comes to this: the object is to get registration of the words "Red, White, and Blue," which, in my opinion, are not fancy terms.

Motion refused, with costs.

Solicitors, *Ranger & Burton; Solicitor to the Board of Trade.*

Chan. Div.
Chitty, J. } July 1.

LONDON AND YORKSHIRE BANKING CO. *v.* PRITT. (*a.*)

Bond—Condition—Agreement—Injunction—Penalty—Liquidated damages.

The condition of a bond, even though the bond contains recitals, may, having regard to surrounding circumstances and the intention of the parties, be evidence of an agreement sufficient to sustain an injunction.

Motion.

This was a motion by the plaintiffs, a banking company, for an *interim* injunction against the defendant, a

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

former manager of their bank, who had resigned and accepted an appointment as sub-manager of a bank in the same town where the plaintiffs carried on their banking business, to restrain the defendant from acting in breach of an agreement not to accept a similar appointment after leaving the plaintiffs' service.

In addition to the agreement, of which there was evidence, the defendant had executed a bond in £1,000, conditioned to be void if the defendant should not after quitting the plaintiffs' service enter into another banking appointment during twelve months after leaving them and within a radius of five miles from the place where the plaintiffs' bank was.

The chief question was whether the condition contained in the bond was in itself sufficient evidence of agreement to entitle the plaintiffs to an injunction.

Romer, Q.C., and *Carson*, for the plaintiffs, cited *Gravely* v. *Bernard*, 22 W. R. 891, L. R. 18 Eq. 518, and *Howard* v. *Woodward*, 13 W. R. 132.

Maclean, Q.C., and *Upjohn*, for the defendant.

CHITTY, J.—In my opinion the plaintiffs have shown that there was an agreement by the defendant, and that the bond was given as an additional security. But, whether that be so or not, I have no difficulty in deciding that the plaintiffs are entitled to an injunction on the bond itself. The right way of construing the bond is to construe its condition as containing an agreement. That there was an agreement contained in the bond is also shown by the recitals in the bond. I, however, do not feel compelled to rely on the existence of recitals. I think it is quite sufficient to look at the condition; and, bearing in mind the circumstances under which the bond was given and the intention of the parties, I think that the fair way of looking at the bond is to take the agreement as existing in the condition itself. That was done in *Gravely* v. *Bernard*. In that case the bond, for all practical purposes, contained no recitals, and all that the plaintiff relied on was the condition of the bond. It however appears from the report that the able counsel for the defendant felt themselves unable to argue the case on that ground, and were compelled to admit that the defendant's sole chance of escape was to show that there was no consideration for the bond. The Master of the Rolls' observation in that case that the sole question was whether there was a sufficient consideration for the bond, is to my mind tantamount to a clear expression of opinion that the agreement could be extracted from the bond. *Howard* v. *Woodward*, when examined, is also an authority to the same effect, though there was a stipulation there which does not exist here—namely, that the penalty should be a full sum of £1,000 as liquidated damages.

I therefore hold that there is an agreement by the defendant, and the plaintiffs are entitled to an injunction.

Solicitors, *Bompas, Bischoff, Dodyson, & Coxe; Torr, Janeways, & Co.*, for *Middleton & Sons*, Leeds.

Chan. Div. North, J. — Dec. 2.

LYNCH v. MACDONALD. (*a*.)

Practice—Trial with a jury—Action assigned to Chancery Division—Counter-claim—Joinder of cause of action not so assigned—Rules of Supreme Court, 1883, *ord.* 36, *rr.* 3, 4, 56.

A plaintiff, in his statement of claim, charged the defendant with the improper and wrongful sale and conversion of certain shares, and the wrongful detention of certain other shares, and claimed (1) *redemption of all securities in the possession of the defendant;* (2) *damages for the wrongful sale and conversion;* (3) *damages for the wrongful detention;* (4) *sale by the court of the shares detained; and* (5) *a receiver of such shares and the proceeds. The defendant, in his counter-claim, charged the plaintiff with false and fraudulent representation, and claimed* (1) *an account of what was due to him from the plaintiff;* (2) *sale of the shares in his possession;* (3) *payment out of the proceeds of what might be found due to him; and* (4) *damages for fraud.*

Held, on a motion by the plaintiff for an order directing the trial of the action by a judge with a jury, that the plaintiff was not entitled as of right to trial with a jury; and, under the circumstances of the case, the court, in its discretion, refused the application.

Motion.

The plaintiff in the action charged the defendant with the improper and wrongful sale and conversion of certain Griqualand shares, and the wrongful detention of certain Kimberley shares, and claimed (1) redemption of all securities of the plaintiff in the possession of the defendant; (2) damages for the improper and wrongful sale and conversion of the Griqualand shares; (3) damages for the wrongful detention of the Kimberley shares; (4) sale of the Kimberley shares under the direction of the court; and (5) a receiver of such last-mentioned shares and of the proceeds of sale thereof.

The defendant, in his counter-claim, charged the plaintiff with false and fraudulent representation, and fraudulently abstaining from giving certain information and claimed (1) an account of what was due from the plaintiff to him; (2) the sale of the Kimberley shares; (3) payment out of the proceeds of what should be found due from the plaintiff; and (4) damages for fraud.

An application by the plaintiff to North, J., at chambers, that the action might be tried by a judge with a jury, was refused.

This was a motion by the plaintiff that the action might be tried by a judge with a jury, and that the time for giving notice of the trial of the action might be extended until seven days after the application.

Cozens-Hardy, Q.C., and *Swinfen Eady*, for the plaintiff.—Before the Judicature Act the claim for damages for fraud would not have been brought in the Court of Chancery. Now the plaintiff has a right to have a trial by a judge with a jury: Rules of Court, 1883, ord. 36, r. 6; *The Temple Bar*, 34 W. R. 68, 11 P. D. 6; *Coots* v. *Ingram*, 35 W. R. 390, 35 Ch. D. 117; *McGowan* v. *Middleton*, 31 W. R. 835, 11 Q. B. D. 464. The case of *Gardner* v. *Jay*, 33 W. R. 470, 29 Ch. D. 50, is not in point. At any rate your lordship has a discretion to order the action to be tried by a judge with a jury, and the circumstances of this case, in which the plaintiff is charged with fraud and wishes to have his character submitted to the decision of a jury, justify the exercise of such a discretion.

Higgins, Q.C., and *R. M. Bray*, for the defendant.—The plaintiff is not entitled as of right to have the action tried by a judge with a jury. The issues might be divided and tried separately; *Gardner* v. *Jay* is in point. [They were stopped by the court.]

Swinfen Eady, in reply.—The defendant, who has added a common law issue, in his counter-claim, cannot now turn round and ask to have that issue separated.

NORTH, J.—In this case the plaintiff asks for relief which would be extremely inconvenient for a judge with a jury. The defendant makes a counter-claim respecting matters which would also be extremely inconvenient for a judge with a jury; but he also combines a claim for damages for false and fraudulent

(*a*.) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

representation by the plaintiff. The plaintiff now applies to have the whole action and counter-claim tried by a judge with a jury. He claims this first as of right. In my opinion he has no such right. The plaintiff's action is assigned by the Judicature Act, 1873, to the Chancery Division, and must be tried by a judge without a jury, unless the court or a judge otherwise order. The plaintiff relies upon ord. 36, r. 6. Now rule 3 of that order provides that causes or matters assigned to the Chancery Division shall be tried by a judge without a jury, unless the court or a judge shall otherwise order; rule 4 provides that the court or a judge may, if it shall appear desirable, direct a trial without a jury in certain cases which, previously to the passing of the Judicature Act, could, without any consent of parties, have been tried without a jury; and rule 5 provides that the court or a judge may direct the trial without a jury in any case requiring prolonged examination of documents, or accounts, or investigation, which could not in their or his opinion be conveniently made with a jury. Then rule 6 provides that "In any other cause or matter, upon the application of any party thereto for a trial with a jury of the cause or matter or any issue or fact, an order shall be made for a trial with a jury." The rules 4, 5, and 6 do not apply to this case. In my opinion the plaintiff's claim as of right wholly fails. With regard to the discretion of the court to order a trial with a jury, I have pointed out that the claims made in this action would be very inconvenient for a judge and jury to try. This is not an application that the charge of false and fraudulent representation should be struck out of the counter-claim as being more proper to be tried in a separate action; or for a direction that the issue on the counter-claim should be tried separately, but an application that the whole action should be tried by a judge and jury. I see no reason for acceding to this motion, and I direct that the action and counter-claim be tried by a judge without a jury. The costs of this application to be the defendant's costs in any event.

Solicitors, *Saunders, Hawksford, Bennett, & Co.; Watney, Tilleard, & Freeman.*

Chan. Div. } Stirling, J. } Nov. 16, 17.

In re Metcalfe.

Metcalfe *v.* Blencowe. (*a.*)

Solicitor—Bill of costs—Taxation—Election—Notice—"Undertaking any business"—"Client"—One of several trustees—General Order under Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44), *rr.* 6, 8.

The notice of election under rule 6 of the General Order under the Solicitors' Remuneration Act, 1881, *as to remuneration for conveyancing business arising in an action, must be given by the solicitor before he undertakes such conveyancing business. After having done any work in the matter which would properly be covered by the scale charge—e.g., discussed with the client the mode of sale and questions relating to the title—it is too late for him to elect.*

In re Allen, 35 *W. R.* 218, 34 *Ch. D.* 433, *and* Hester *v.* Hester, 35 *W. R.* 233, 34 *Ch. D.* 607, *followed.*

Semble, where a solicitor is acting for several trustees, notice of election must be given to them all.

Summons to review taxation.

The question in this case was as to the validity of a notice of election under rule 6 of the General Order under the Solicitors' Remuneration Act, 1881. This depended upon (1) whether the election was made in time; (2) whether the election, being communicated to only one of two trustees, could be supported.

Messrs. Tamplin, Tayler, & Joseph acted as solicitors for Mr. Blencowe and Mr. W. C. Metcalfe, who as trustees were defendants in an administration action. In the course of this action it became necessary to raise a sum of money for payment of costs. It was at first proposed to do this by way of mortgage; but afterwards it was determined to sell a portion of the estate for the purpose. A summons was taken out in the action, and an order for sale made on the 7th of May, 1886. No steps were taken by the solicitors in the matter of the sale between that date and the 21st of June, 1886, on which day Messrs. Tamplin, Tayler, & Joseph communicated their election in writing to Mr. Metcalfe, one of the trustees, in the following terms: "Re Metcalfe, deceased.—Referring to the proposed sale of the 'Metcalfe Arms,' we beg to inform you and your co-trustee, Mr. Blencowe, that we hereby elect that our remuneration for such business shall be in accordance with the old system of costs as altered by schedule 2 of the Remuneration Orders." Shortly after the 21st of June, 1886, the sale was proceeded with, and in due course completed. The bill of costs was made out on the footing of the above notice. The taxing master disallowed many of the items, on the ground that the remuneration should be according to the scale charge fixed by schedule 1 to the General Order under the Solicitors' Remuneration Act, 1881.

The defendants objected to the disallowance of these items, urging that they were rightly included in the bill, being charges for conveyancing work done as fixed by schedule 2 to the order, and because, before undertaking the business in respect of which such charges were made, the defendants' solicitors, by writing under their hand, communicated to the client that they elected that their remuneration should be according to schedule 2 to the order.

The taxing master overruled these objections on the ground, *inter alia*, that the notice was given only to one trustee, not to both, and that in his opinion a notice of this description should be given to all the trustees.

The taxing master then certified the taxation according to the scale in the General Order, whereupon the defendants took out this summons, asking that their objections to the taxation might be allowed, and for a reference back to the taxing master to vary his certificate accurately.

S. Dickinson, for the applicants.

A. W. Rowden, for the plaintiffs, pointed out certain items in the solicitors' bill of costs (which are referred to in the judgment). [He was stopped by the court.]

Dickinson replied.

Stirling, J.—A point has been argued before me which was not brought to the notice of the taxing master, and on that point I decide the question. While, therefore, it is on that account unnecessary for me to discuss the reasons advanced by the taxing master for the course which he has taken, I wish it to be understood that I do not disagree with those reasons.

The question in this case is whether the election was made in accordance with rule 6 of the General Order under the Solicitors' Remuneration Act, 1881. That rule says that "In all cases to which the scales prescribed in schedule 1 hereto shall apply, a solicitor may, before undertaking any business, by writing under his hand communicated to the client, elect that his remuneration shall be according to the present system as altered by schedule 2 hereto; but if no such election shall be made, his remuneration shall be according to the scale prescribed by this order."

Now the business in this case was conveyancing busi-

(a) Reported by C. Herbert Brown, Esq., Barrister-at-Law.

ness connected with a sale in the course of an administration action for the purpose of paying certain costs. It has been argued by Mr. Dickinson that, the order for sale being made on the 7th of May, 1886, and the notice of election being given on the 21st of June, 1886, and nothing having been done in the matter of the sale in the meantime, the election was in time. But I find in the solicitor's bill of costs an entry, under date the 24th of March, of a charge for preparing the summons for sale; on the 31st of March a charge is made for attending the summons; and on the 5th of April a conference is charged for, at which the question was discussed whether the sale should be by public auction or private contract, and the title was considered. In my opinion this case comes within the principles laid down in *In re Allen*, 35 W. R. 218, 34 Ch. D. 433, and *Hester* v. *Hester*, 35 W. R. 233, 34 Ch. D. 607, and it is too late, under the 6th rule of the General Order, for a solicitor to declare his election after holding a conference with the client for the purpose of discussing the mode of sale and the title to the property. Such a conference is properly business covered by the scale charge, and the election referred to in the rule must be, in my judgment, declared before undertaking any such business.

As regards the reasons given by the taxing master, one of them raises a question of some importance, as to which it may be well that I should express an opinion. The taxing master says that notice to one of two trustees is not sufficient. It is not necessary for me to decide the point; but, as at present advised, I consider that a solicitor must pursue his right of election under the General Order strictly, and that, as according to the rule notice must be communicated to "the client," and the client in this case consisted of two persons, notice to one of them was not sufficient.

Solicitors, *Tamplin, Tayler, & Joseph; Ernest Bevir.*

Chan. Div. North, J. } Nov. 18.

LA TRINIDAD (LIMITED) v. BROWNE. (a.)

Practice—Evidence—Affidavits—Cross-examination of deponent—Discretion of court or judge—Motion—Rules of Court, 1883, *ord.* 38, *r.* 1.

The court or judge has a discretion, in making an order under ord. 38, *r.* 1, *for the attendance for cross-examination of a person who has made an affidavit, and is not bound to make such an order.*

Motion.

This was a motion by the plaintiff company for an *interim* injunction to restrain the defendant from dealing with certain shares of the company which had been allotted to the defendant in part payment of property sold by him to the company, but which they alleged the defendant had not conveyed to them. The motion was supported by an affidavit made by a director which the defendant had not had time to answer.

D. L. Alexander, for the defendant.—I apply under ord. 38, r. 1, for an order directing the deponent who made the affidavit to attend before an examiner for cross-examination. A party against whom an affidavit is used has a right to require the deponent to attend to be cross-examined: ord. 37, rr. 20, 22. I submit that the court is bound to make the order.

Higgins, Q.C., and *P. S. Stokes*, for the plaintiff company.

Ord. 38, r. 1, provides that "Upon any motion, petition, or summons evidence may be given by affidavit; but the court or a judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit."

NORTH, J.—I cannot admit that the rules oblige me to order the attendance of a deponent for cross-examination. If there was any rule requiring me to make such an order under any circumstances, the result would be a waste of time and expense. I do not say that I shall not make such an order when I hear the motion; all I decide is that I shall not do so now. When the rule provides that the court or a judge may do a thing, it does not mean that I must do it. I do not think the time has come for making such an order, and I am not now in a position to tell whether cross-examination ought to be permitted.

[The motion was treated as made *ex parte*, an injunction was granted for a week, and the motion was directed to stand over for that period; and when all parties were prepared to contest the motion the deponent was directed to attend.]

Solicitors, *Parker, Garrett, & Parker; W. F. Tarn.*

(a.) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

Q. B. Div. (Stephen and Charles, JJ.) Nov. 25, 26.

JOWETT v. IDLE LOCAL BOARD. (a.)

Public Health Act, 1875 (38 & 39 *Vict. c.* 55)—*Meaning of "street" in section* 150—*Interpretation clause (section* 4)—*Question of law.*

The meaning of "street" in section 150 *of the Public Health Act*, 1875, *includes any of the words set out in the interpretation clause (section* 4) *which are not inconsistent with the context or subject-matter of that section according to the method of construction laid down in* The Mayor of Portsmouth *v.* Smith, 13 *Q. B. D.* 184, 32 *W. R. Dig.* 123, *by the Court of Appeal; and such extended meaning, if so applicable, must be read into the word "street" throughout the section, without regard to the particular work to be done under it.*

The question whether the place in dispute comes within the interpretation clause is one of law for the judge at the trial, and the question which may properly be left to the jury is whether the said place is "a street in the popular acceptation of the term" as left by Lindley, L.J., *in* The Mayor of Portsmouth *v.* Smith.

The judgment in Reg. *v.* Cleckheaton Local Board, 50 *J. P.* 598, *is inconsistent with the judgment of the Court of Appeal in* The Mayor of Portsmouth *v.* Smith.

Motion for entry of judgment for defendants.

The plaintiffs had brought an action for trespass against the defendant local board for entering upon certain private premises called "Union-yard," for paving the centre of the yard as a roadway. The local board maintained that the yard was a "street" within the meaning of section 150 of the Public Health Act, 1875.

Upon the trial before Manisty, J., "Union-yard" was shown to be a kind of irregular square, with a more or less continuous row of houses on one side having their back premises towards the yard; on the other side were some groups of cottages, and at the head of the yard were some mill works, the gates of which opened on to the yard. Those employed at the mill works passed in and out of Union-yard. The judge left the whole question whether Union-yard was a street within the Act to the jury, and the jury found that "under the exceptional surroundings the road in Union-yard did not

(a.) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

come within the meaning of a street." The judge entered judgment for the plaintiffs, and the defendants now moved, on the ground that the judge ought not to have left to the jury the general question of whether this yard was a "street," but ought to have held that it was a question of law whether "street" here was within section 150 of the Public Health Act, 1875, and that judgment ought to be on that ground entered for the defendants.

Forbes, Q.C., and *Wilberforce*, for the defendants.—It is a question of law in these cases whether, upon the facts as found, the place comes within the meaning of "street" in section 150 of the Public Health Act, 1875, and the meaning of "street" is defined by the interpretation clause (section 4) of the statute: *The Mayor of Portsmouth* v. *Smith*, 10 App. Cas. 361 (*per* Lord Blackburn, at p. 373, and Lord Watson, at p. 375), 13 Q. B. D. 184, 32 W. R. Dig. 123, 33 *Ibid.* 128; *Maude* v. *Baildon Local Board*, 10 Q. B. D. 394, 31 W. R. Dig. 114; *Taylor* v. *Oldham Corporation*, 25 W. R. 178, 4 Ch. D. 395; *Robinson* v. *Barton Eccles Local Board*, 32 W. R. 249, 8 App. Cas. 798.

Tindal Atkinson, Q.C., and *Longstaffe*, for the plaintiffs.—Lord Selborne, in *Robinson* v. *Barton Eccles Local Board*, at p. 801, says: "An interpretation clause like this is not meant to prevent the word receiving its ordinary, popular, and natural sense whenever that would be properly applicable." The word "street" must be taken in relation to the context—*i.e.*, in relation to the particular work to be done. A local board may not of their own choice make a paved road of what is only a trap or yard any more than they may make a roadway over a portion of a square. "Street" for such work must be strictly limited. For sanitary works, "street," it is admitted, might be taken in section 150 in its extended sense, as such works would be for the benefit of the whole square or yard: *Reg.* v. *Cleckheaton Local Board*, 50 J. P. 598; *Reg.* v. *Fulford*, 12 W. R. 715. It is a question of fact for the jury in each case in what sense the word "street" is to be used: *Reg.* v. *Sheil*, 50 L. T. 590, 32 W. R. Dig. 104.

STEPHEN, J.—We have come to the conclusion that under order 40 we have the power to enter judgment for the defendants on the ground that Manisty, J., ought to have decided the question of law himself and not to have left the whole question to the jury. The points to be decided are really few and very simple. The *Portsmouth case*, although dependent upon another statute, clearly decides that an interpretation clause like section 4 in the Public Health Act, 1875, is to be read into section 150 for present purposes. That case overrules *Maude* v. *Baildon Local Board*, and that being so I cannot see my way to reconcile the decision of the Divisional Court in *Reg.* v. *Cleckheaton Local Board* with the *Portsmouth case* as decided by the Court of Appeal and with the observations on it made in the House of Lords. With great respect, therefore, I cannot agree with the judges in that case. Their decision is in direct opposition to the *Portsmouth case*. Following this case we must hold that the interpretation clause must be read into section 150. This is not inconsistent with Lord Selborne's observations in *Robinson* v. *Barton Eccles Local Board*. On the contrary, I think he puts in other words the views I have expressed in the course of the argument. The interpretation clause substitutes the word "street" for any words mentioned in section 4 subject only to the limitation that such words are not inconsistent with the powers to be exercised under that section. As Lord Selborne says, "An interpretation clause of this kind is not meant to prevent the word receiving its ordinary, popular, and natural sense whenever that would be properly applicable; but to enable the word as used in the Act, when there is nothing in the context or subject-matter to the contrary, to be applied to some things to which it would not ordinarily be applicable. I look upon this portion of the interpretation clause as meaning neither more nor less than this, that the provision contained in the Act as to streets (whether new streets or old streets) shall, unless there be something to the contrary, be read as applicable to these different things." The first question is whether the extended sense of the word "street" (and we have nothing to do here with country lanes or any question of that sort), whether any of the words "highway, road, lane, footway, square, court, &c.," as given by the interpretation clause (section 4), accurately describe the place here in question. I am of opinion that one or other of those words do cover this place, Union-yard, provided that such word is not inconsistent with the consequences to ensue. Mr. Tindal Athinson admits, for instance, that the word "square" would apply to this yard. So would the word "court" and possibly the words "footway" or "passage." Any of these words are large enough to cover Union-yard. But Mr. Tindal Athinson says that any such extended meaning of the word "street" is only intended to apply to sanitary work, such as sewering. He would not dispute such a construction in such a case, but he says that it is not right to apply this extended meaning of "street" in a matter of mere road-making in this yard, because under the particular circumstances as alluded to by the jury such a meaning would be inconsistent with road-making done in this particular place. The effect of such a construction would be to split up section 150 in a way which the Legislature could not have intended it to be split up. It is alleged that otherwise local boards are given power to interfere in private matters for other than sanitary reasons and to charge the public for work which is only required for private interests. I feel bound to admit that under our reading of the section it may be the case that such boards might have the opportunity of acting with a view to private rather than public interests. That is a danger which the Legislature must be taken to have preferred to risk rather than the danger of the loss of proper sanitary arrangements. If that reading leaves open opportunities for jobbing the court cannot help that. The word "street" in section 150 can hardly be turned into what I may call a shifting use, and I cannot think that such would be a proper way to read the section. Judgment must therefore be entered for the defendants.

CHARLES, J.—I am of the same opinion. We are bound by the *Portsmouth case* in the Court of Appeal to read into section 150 the definition of "street" as given by section 4 of the Public Health Act. It is true there may be some doubt whether, in the appeal before the House of Lords, it was decided that the definition clause ought to be read into this section. But no final decision was given in that House on that point, and the decision, therefore, of the Court of Appeal remains in this respect untouched. We must read into the section, then, the words "road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not." It seems that on the admitted facts the judge would have been justified in holding that Union-yard was certainly within one or other of those words, and I certainly think that some of them would cover this place in question—for instance, "footway," from the traffic shown of passengers up and down to the mill works. There certainly was considerable traffic of such sort, though the way had never been actually dedicated to the public. The jury were, however, not asked in the way that Lindley, L.J., asked the jury at the trial of the *Portsmouth case*, "Whether this place was a street or not in the popular sense of that word?" but whether it was a street generally so as to come within the meaning of the Public Health Act? Their answer was to the effect that it was not a street within the meaning of that Act. That was not a question for them, nor is there anything inconsistent with such a finding of the jury in our entering judgment for the defendants. I am of opinion that, as a matter of

law, the judge himself at the trial ought to have entered such a judgment.

In the *Oleckheaton case* it is difficult to see how the judges came to the conclusion they did in view of the decision in the *Portsmouth case*. Smith, J., says that "a lane is not included in the word 'street' in the statutory sense of that word." There is some ambiguity in the report, but assuming it to be correct to the effect that section 150 only contemplates expenditure on streets in the ordinary sense of the word, such a decision is contrary to the decision of the Court of Appeal as laid down in the *Portsmouth case*.

Judgment entered for the defendants.

Solicitors for the plaintiffs, *Lancaster & Wright*, Bradford.

Solicitors for the defendants, *Killick, Hunter, & Vint*, Bradford.

Q. B. Div. (Wills and Grantham, JJ.) Nov. 29.

MAYOR OF DARWEN *v.* LANCASHIRE JUSTICES. (*a.*)

Highways and Locomotives Amendment Act, 1878 (41 & 42 *Vict.* c. 77), *s.* 13—*Tramways Act*, 1870 (33 & 34 *Vict.* c. 78), *s.* 28—*Blackburn and Over Darwen Tramways Act*, 1879 (42 & 43 *Vict.* c. *ccxxv.*), *ss.* 47, 50—*Expenses of repair of roadway.*

By a local Tramways Act it was provided that, in case steam power should be used on the tramway, the tramway company should repair the whole extent of that part of a main road over which their lines passed, but that the company might make such contracts and agreements for the repair of the road with the road authority of the borough as might be approved by the Board of Trade. It was also provided that no contract or agreement to be entered into under the Act should operate to lessen the liability of the company under section 28 of the Tramways Act, 1870. *The road authority of the borough entered into a contract with the company, by which the expenses of maintenance and repair of the road were divided between them. In an action by the borough road authority against the county authority for contribution under section* 13 *of the Highways and Locomotives Act*, 1878,

Held, that the county authority were liable to pay out of the county rate one-half of the expenses incurred by the borough authority under the contract.

Special case.

1. The plaintiffs are the highway authority for the highway area of the borough of Over Darwen, in the county of Lancaster, and also the road authority within the meaning of the Tramways Act, 1870, and the Blackburn and Over Darwen Tramways Act, 1879.

2. The defendants are the county authority as defined by the Highways and Locomotives (Amendment) Act, 1878.

4. The Bolton and Blackburn road passes through the said borough, and became on July 20, 1877, a main road within the meaning of section 13 of the Highways and Locomotives Act, 1878.

5. By section 13 of the Highways and Locomotives Act, 1878, it is enacted that "For the purposes of this Act, and subject to its provisions, any road which has within the period between the 31st day of December, 1870, and the date of the passing of this Act ceased to be a turnpike road, and any road which, being at the time of the passing of this Act a turnpike road, may afterwards cease to be such, shall be deemed to be a main road, and one-half of the expenses incurred from and after the 29th day of September, 1878, by the highway authority in the maintenance of such road shall, as to every part thereof which is within the limits of any highway area, be paid to the highway authority of such area by the county authority of the county in which such road is situate out of the county rate on the certificate of the surveyor of the county authority," &c.

6. In 1880 a tramway was constructed upon the said road within the said borough by the Blackburn and Over Darwen Tramways Co. under the provisions of the Tramways Act, 1870, and the Blackburn and Over Darwen Tramways Act, 1879. The said tramway runs for a distance of 2 miles, 6 furlongs, 33 yards over the said road within the said borough. Steam power has always been used upon the said tramway.

7. By section 28 of the Tramways Act, 1870 (33 & 34 Vict. c. 78), it is enacted that "The promoters shall at their own expense at all times maintain and keep in good condition and repair, with such materials and in such manner as the road authority shall direct and to their satisfaction, so much of any road whereon any tramway belonging to them is laid as lies between the rails of the tramway (where two tramways are laid by the same promoters in any road at a distance of not more than four feet from each other), and the portion of the road between the tramways, and in every case so much of the road as extends eighteen inches beyond the rails of and on each side of any such tramway."

8. By section 47 of the Blackburn and Over Darwen Tramways Act, 1879 (42 & 43 Vict. c. ccxxv.), it is enacted that "the company" (meaning the Blackburn and Over Darwen Tramways Co.) "shall maintain and keep in good and sufficient repair the entire width of any road (exclusive of the foot path or foot pavement) along or across which any of their tramways shall be laid to the reasonable satisfaction of the road authority, and in such manner and with such materials as such authority may direct; and if the company at any time fail or neglect so to do, the road authority may cause the necessary repairs to be done, and may in such case recover the reasonable cost of such repairs from the company in any court of competent jurisdiction. The expressions 'road' and 'road authority' shall have the same meanings as are defined by the Tramways Act, 1870. Provided that the provisions of this section shall only apply when steam power is used on the tramways. Provided also, that, notwithstanding anything in the section contained, the company may from time to time enter into and make such contracts or agreements with the road authority of either borough' (meaning the boroughs of Blackburn and Over Darwen) 'respectively for the repair and maintenance of such road as may be approved by the Board of Trade.'"

9. By section 50 of the same Act "Nothing in this Act or in any contract, agreement, or arrangement to be made under this Act shall operate to lessen the liability of the company under section 28 of the Tramways Act, 1870, with respect to the repair of any road whereon any tramway belonging to them is laid."

11. By an agreement, dated the 1st of May, 1880, and made between the plaintiffs of the one part and the Blackburn and Over Darwen Tramways Co., of the other part, it was agreed (*inter alia*) as follows:—Clause 1.—"That in lieu of maintaining in repair the entire width of the roadway along which the company's tramways may be laid, as provided by the 47th section of the Blackburn and Over Darwen Tramways Act, 1879, the company shall only be liable in respect of the repair of so much of the said roadway as lies between the rails of the said tramway, and 3ft. 6in. beyond or on the outer side of such rails, and where two tramways are laid in any road, also the space between the two tramways." By clause 2 of the said agreement the company were bound to

(*a.*) Reported by A. H. TODD, Esq., Barrister-at-Law.

lay down their authorized tramways with a 4ft. gauge and to pave with setts the width of the roadway in respect of the repairs to which the company were liable as aforesaid. By clause 3 it was provided that "After the company shall have effectually paved the said roadway in accordance with the provisions of the last preceding clause of this agreement, the corporation shall within their district thenceforth during the continuance of this agreement maintain and keep in repair the whole width of the said roadway with such materials and in such manner as the said corporation may determine, and the company shall from time to time, and as and when required by the said corporation, pay the said corporation a proportionate part of the expenses which may have been incurred by the said corporation in repairing the said roadway as aforesaid, such proportionate part of such expenses to be ascertained and determined by the borough surveyor."

12. The average width of the said roadway is 28ft. 6in., out of which the company, under the foregoing agreement, repair 11ft.

13. The said agreement was duly approved by the Board of Trade, and the said road for such distance as the said tramways extend over it within the said borough of Over Darwen has always been repaired and the expense thereof apportioned between the plaintiffs and the tramways company in accordance with the terms of the said agreement. No notice of such agreement having been made was given to the defendants by the plaintiffs or by the tramways company.

14. For the purposes of this case it is admitted that the said road has been and is satisfactorily maintained within the said borough, and that the said agreement of the 1st of May, 1880, is now a subsisting agreement.

15. The plaintiffs, as such highway authority as aforesaid, have for the year ending the 31st of March, 1886, expended in the maintenance of the main road upon which the tramways are laid £180 14s. 5d., and in respect of the maintenance of the rest of the said main road within the said borough £246 17s. 1d., making in all £427 11s. 6d.

16. The plaintiffs, as such highway authority as aforesaid, have, under section 13 of the Highways and Locomotives Act, 1878, demanded from the defendants as such county authority as aforessid £213 15s. 6d., being the half of the said sum. The defendants deny their liability to pay one-half or any other proportion of the said sum of £180 14s. 5d.

The question for the opinion of the court was whether the defendants were liable in virtue of the above Acts or otherwise to pay out of the county rate the half or other proportion of such sum of £180 14s. 5d.

Henn Collins, Q.C., and *W. H. Cross*, for the plaintiffs.

Gainsford Bruce, Q.C., and *Fitzgerald*, for the defendants.

Wills, J.—I am of opinion that our judgment must be for the plaintiffs. The question depends upon the provisions of the local Acts. Under the general Tramways Act the scheme was that the tramway company should keep in repair the part of the road occupied by the rails, and it was also provided that on the abandonment of the enterprize the company should restore the road to its original condition, and that the company might make agreements with the road authorities as to repairs and maintenance. There was no reference to the interference of the Board of Trade. The local Act is different. According to its provisions, where steam is used on the tramway the company is to bear the whole expense of maintaining the roadway, but bargains may be made with the road authority as to the repairs, provided that the approval of the Board of Trade be obtained. That addition looks as if something had been intended by the Legislature beyond the protection of the contracting parties. Indeed there would hardly seem to be any need for protecting this borough more than any other. Section 50 of the local Act provides that in case steam power is used a bargain may be made for the division of liability between the parties, provided that the liability of the company be not reduced below that specified in section 28 of the general Act. The defendants argue that section 50 of the local Act merely refers to the restitution of the road on the abandonment of the undertaking, and that the provisions as to agreements relate only to the method of discharging the liability of the company. But it seems to me to be a reasonable view that the Legislature thought fair in case steam power should be used on the tramway to lighten the burden of repair laid on the company by the Act in case the road authority should be willing to consent to an agreement to that effect.

Grantham, J.—I am of the same opinion, though I have not been able to understand the reason of the contract, for it seems to me to have been entered into without any consideration moving to the road authority. The company is allowed to use steam and yet to avoid the obligation to repair laid on them by the Act. But the defendants must pay half the expenses incurred by the road authority under the agreement. The Board of Trade has given its sanction to the arrangement, and the Highways and Locomotives Act is clear.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Pritchard, Englefield, & Co.*, for *C. Costeker*, Darwen.

Solicitors for the defendants, *Ridsdale & Son*, for *Wilson & Hulton*, Preston.

Q. B. Div. (Stephen and A. L. Smith, JJ.) Nov. 18.

Amersham Union v. City of London Union. (a.)

Poor law—Settlement—"Widowed mother"—Child under sixteen—Divided Parishes Act, 1876 (39 & 40 *Vict.* c. 61), *s.* 35.

A pauper under the age of sixteen, whose father was dead and whose mother had married again, having become chargeable to a parish in the respondent union, an order was made for her removal into the appellant union, in which was the birth settlement of the mother. Neither father nor mother had acquired any other settlement than that of their birth.

Held, that the pauper, at the time of adjudication, after her mother had married again, had no other settlement than that of her birth, which was in the respondent union, and that the order was wrong.

This was a special case stated under 12 & 13 Vict. c. 45, s. 11.

The facts set forth in the case were as follows:—

1. On the 9th of April, 1886, Blanche Edmonds, aged four years, an idiot, was admitted into the infirmary a Bow, in the county of Middlesex, and became chargeable to the respondent union.

2. On the 8th of January, 1887, an order was made by two of the justices for the City of London adjudging the pauper to be last legally settled in the parish of Chesham, in the appellant union, and this was the order appealed against.

5. Walter Edmonds, the father of the pauper, was born at Boxmoor, in the parish of Hemel Hempstead, and in the union of that name, in the parish of Hertford.

6. Sarah Ann Glenister, the mother of the pauper, was

(a.) Reported by A. H. Todd, Esq., Barrister-at-Law.

born at Lye Green, in the parish of Chesham, in the county of Buckingham, and in the appellant union.

7. The said Walter Edmonds and Sarah Ann Glenister were married at Chesham, in the appellant union, on or about the 14th day of November, 1875.

8. The pauper is the legitimate daughter of the said Walter Edmonds and Sarah Ann, his wife, and was born on the 19th day of July, 1881, in the parish of St. Mary, Islington, in the county of Middlesex.

9. Walter Edmonds, the pauper's father, died on or about the 7th of May, 1883, leaving his widow, Sarah Ann Edmonds, and the pauper and two other children him surviving. The said Walter Edmonds never acquired a settlement for himself, and had no other settlement than that of his birth.

10. On the 21st of January, 1884, Sarah Ann Edmonds, the pauper's mother, being then a widow, married again. During the interval between the death of her first husband and her marriage the said Sarah Ann Edmonds did not acquire any settlement for herself.

The appellants contended that the pauper derived a settlement from her father, which settlement she retained at the time she became chargeable, or if she did not retain her father's birth settlement that she was legally settled in the parish where she was born.

The respondents contended that the pauper took her mother's birth settlement on the death of her father, which she retained, although her mother had married again.

By the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 35, it is enacted that, "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another."

Graham and *Ashton*, for the appellant union.—The state of things at the time of the adjudication must be considered in determining this question. The mother had married again at that period, and the child had no "widowed mother," therefore this child took its birth settlement.

He referred to *Reg.* v. *Bridgnorth*, 31 W. R. 938, 11 Q. B. D. 320; *Edmonton* v. *Islington*, 15 Q. B. D. 95, 34 W. R. Dig. 135; *Kingsbridge Union* v. *Stonehouse*, 35 W. R. 580, 18 Q. B. D. 528; *Keynsham Union* v. *Bedminster*, 26 W. R. 591, 3 Q. B. D. 344; *Maidstone Union* v. *Holborn Union*, 17 Q. B. D. 819, 35 W. R. Dig. 148; *Headington Union* v. *St. Olave's Union*, 32 W. R. 738, 13 Q. B. D. 293.

Poland, for the respondents.—At the father's death the child took the settlement of her widowed mother, and the only settlement she had was in the appellant union.

He referred to *Croydon Union* v. *Reigate Union*, 35 W. R. 824, 19 Q. B. D. 385.

Graham replied.

STEPHEN, J.—This case has been argued with much ingenuity. The section is, no doubt, very obscure, and it is difficult to attach any significance to the last portion of it. It is common ground to both sides in the present case that the time to which the statute refers is the time at which the child becomes chargeable and its settlement is to be determined. The result is that at that time the child has no settlement at all—that is to say, after the second marriage of the mother the child had no father, for he was dead, and no widowed mother, for she was married, and according to the Act the court cannot look at any derivative settlement. Then there is only the birth settlement remaining, which is the City of London. The argument of Mr. Poland turns on this, that, though the court ought to look at the *status* of the child at the time of adjudication, still it is necessary to consider what her settlement was at that time, and this settlement, he argued, must be the settlement of her widowed mother. But we ought not to suppose that the child took any settlement when her father died. She must be treated as though she took none till she became chargeable. Our judgment must be for the appellants.

A. L. SMITH, J.—The question is whether the child is to be restored to her birth settlement or whether she takes the birth settlement of her mother. It is settled that the way to construe this difficult section is to consider the time when the adjudication arises, and not other byegone matters. At the time of adjudication in this case the child's father was dead and her mother had married again. The sole settlements then possible were the derivative settlement of her mother, now married again, and the child's birth settlement.

Appeal allowed.

Solicitors for the appellants, *Allen & Edwards*, for *H. Bedford*, Amersham.

Solicitors for the respondents, *J. Rexworthy & Co.*

IN BANKRUPTCY.

Q. B. Div. (Cave and A. L. Smith, JJ.) — Nov. 22.

Ex parte COULSON.
In re GARDINER. (*a.*)

Bankruptcy notice—Married woman not carrying on separate trade—Liability to bankruptcy laws—Married Women's Property Act, 1882 (45 & 46 *Vict.* c. 75), *s.* 1, *sub-section* 5—*Bankruptcy Act*, 1883 (46 & 47 *Vict.* c. 52), *s.* 4, *sub-section* 1 (*g.*).

A married woman who does not carry on a separate trade is not subject to the bankruptcy laws, and a bankruptcy notice under section 4, *sub-section* 1 (*g.*), *of the Bankruptcy Act*, 1883, *cannot be served upon her.*

Appeal from an order of the registrar of the county court at Kingston-on-Thames dismissing a bankruptcy notice served upon a married woman.

In August, 1886, Mrs. Gardiner accepted a bill of exchange for £60 payable three months after date. Default having been made, an action was, in November, 1886, commenced by the holder of the bill against the drawer and acceptor, which was defended by Mrs. Gardiner; but on April 19, 1887, a verdict was given for the plaintiff, and judgment was obtained against her in the ordinary form—viz., that the plaintiff recover the above sum against the defendant, but that execution be limited to her separate estate not subject to any restraint on anticipation (unless by reason of section 19 of the Married Women's Property Act, 1882, such estate should be liable to execution notwithstanding such restraint).

In June, 1887, a bankruptcy notice under section 4, sub-section 1 (*g.*), of the Bankruptcy Act, 1883, was issued against Mrs. Gardiner, who thereupon filed an affidavit to the effect that she was married to her present husband on October 7, 1879, and that she did not carry on any separate trade or business.

The county court registrar dismissed the bankruptcy notice, with costs, and the judgment creditor now appealed.

Winslow, Q.C., and *Pyke*, for the appellant.—The

(*a.*) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

petition which follows a bankruptcy notice is not a petition in bankruptcy, it is a petition for a receiving order, and a receiver is appointed. It is quite clear that in an action we could have a receiver, and why may there not be a general receiver appointed by this means? It is not necessary to push the case so far as to consider whether it is possible to make this woman a bankrupt or not; but there is really nothing in either the Married Women's Property Act, 1882, or in the Bankruptcy Act, 1883, to prevent a married woman being made a bankrupt *qud* her separate estate.

They referred to *Scott* v. *Morley*, *ante*, p. 67; *Ex parte Jones, In re Grissell*, 28 W. R. 287, 12 Ch. D. 484.

Herbert Reed, for the respondent, was not called upon.

Cave, J.—It is clear on two grounds that this proceeding is entirely wrong. Previous to 1882 it was held, in the case of *Ex parte Jones, In re Grissell*, that a married woman was not liable to the bankruptcy law, even though she had separate estate and had contracted engagements after her marriage. It had also been held that, under the custom of London, a married woman who traded on her sole account could be adjudicated bankrupt. When the Married Women's Property Act, 1882, was passed, it was enacted by section 1, sub-section (5), that "every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*." That was intended to extend the custom of London to the realm generally, and confined the power of making bankrupt to a married woman who is carrying on a separate trade. The result is, that a married woman who does not carry on a separate trade is not subject to the bankruptcy laws. That is a conclusive answer to the present proceedings; but there is a further one. It has been held by the Court of Appeal that section 4, sub-section 1 (*g*.), of the Bankruptcy Act, 1883, must be construed with strictness, and the words of that section are, "If a creditor has obtained a final judgment against him for any amount," &c. Now I am clearly of opinion that this was not a final judgment against Mrs. Gardiner. There was no personal liability on Mrs. Gardiner, and the creditor has obtained judgment, not against her, but against her estate. The point was well put by Bowen, L.J., in the recent case of *Scott* v. *Morley*. But if there was any doubt on this subject it is cleared up by what follows. The person served, is required "to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it," &c. Now there was no personal obligation on the debtor to pay the debt. There was no debt due from her which could be enforced under section 5 of the Debtors Act, 1869, and there was no liability to secure or compound for it. On either of the grounds stated the decision of the registrar could be upheld.

A. L. Smith, J., concurred.

Appeal dismissed, with costs. Leave to appeal given.

Solicitors for the appellant, *Pyke & Minchin*.

Solicitors for the respondent, *Mear & Fowler*.

Q. B. Div. (Cave, J.) Nov. 16.

Ex parte Ystradfodwg Local Board.
In re Thomas. (*a*.)

Bankruptcy—Special case—Preferential claim for local rate—Liability of bankrupt's estate—Public Health Act, 1875, *s*. 211, *sub-section* (3)—*Bankruptcy Act*, 1883 (46 & 47 *Vict*. *c*. 52), *s*. 40, *sub-section* 1 (a).

On the 12th of January, 1887, *at the time of filing his petition, the bankrupt was tenant of a house under a lease for twenty-one years. The trustee in the bankruptcy did not disclaim, but on the 1st of February*, 1887, *he sold his interest in the lease, the bankrupt remaining in occupation as tenant under the purchaser. There was due from the bankrupt at the date of the receiving order a local board rate made on the 8th of October*, 1886, *for the half-year from the 30th of September*, 1886, *to the 25th of March*, 1887, *and payable in advance.*

Held, that the estate of the bankrupt was liable to pay the rate for the whole half-year.

Special case stated by his Honour Judge Williams from the county court of Glamorganshire for the opinion of the High Court.

On January 12, 1887, the bankrupt filed his petition in the county court of Glamorganshire, and on January 17 he was adjudicated bankrupt. On the same day an order for the summary administration of his estate was made under section 121 of the Bankruptcy Act, 1883, and the official receiver became trustee.

At the time of the petition the bankrupt was tenant of a house and shop at Ystrad Rhondda which he held under a lease for twenty-one years from April 14, 1882, granted by Richard Evans at a yearly rent of £32. The trustee did not disclaim the lease, but on February 1, 1887, he sold his interest in it to a brother of the bankrupt, since which date the bankrupt, with his wife, had remained in occupation as tenant under the purchaser, a business being carried on in the wife's name.

At the date of the receiving order there was due to the Ystradfodwg Local Board the amount of 13s. 1d. for their local board rate made on October 8, 1886, for the half-year from September 30, 1886, to March 25, 1887, and payable in advance. The bankrupt, it was alleged, having gone out of occupation before paying the rate, the trustee contended—(1) that he was not liable to pay under section 40, sub-section 1 (*a*), of the Bankruptcy Act, 1883, in respect of the bankrupt's occupation more than the bankrupt would have been liable to pay; and (2) that having succeeded the bankrupt he (the trustee) was liable for a further amount proportioned to the period of his own occupation which ceased on February 1, 1887. The trustee offered to pay the proportion of the rate from September 30, 1886, to February 1, 1887, but the local board refused this, and contended that they were entitled to payment of the whole rate.

The question for the opinion of the High Court was whether, in the above circumstances, the estate of the bankrupt was liable to pay this rate for the whole half-year—viz., from September 30th, 1886, to March 25, 1887—or whether the estate was only liable to pay an apportioned part of it up to the date of the order of adjudication.

R. V. Williams, for the local board.—The section to be looked to is section 40, sub-section 1 (*a*), of the Bankruptcy Act, 1883, which provides that in the distribution of the property of a bankrupt all parochial or other local rates due from the bankrupt at the date of the receiving order shall be paid in priority to all other debts. This rate was due from the bankrupt at the

(*a*.) Reported by C. F. Morrell, Esq., Barrister-at-Law.

date of the receiving order. The rate was payable in advance on October 8. Up to the date of the receiving order in January the bankrupt, as occupier, was liable to the payment of the whole of the rate in advance, and if he had paid it he could not, under any circumstances, have got it back. The contention on the other side seems to be that, although the bankrupt was liable at the date of the receiving order, because at a subsequent date the trustee parted with the property, there is something to relieve the estate from payment of the rate.

Muir Mackenzie, for the trustee.—The material section which governs the matter is section 211, sub-section (3), of the Public Health Act, 1875. Section 211 deals with the assessment of a general district rate, and, by sub-section (3), if any owner or occupier assessed or liable to any such rate ceases to be owner or occupier of the premises before the end of the period for which such rate was made, and before the same is fully paid off, he shall be liable to pay only such part of the rate as may be in proportion to the time during which he continues to be such owner or occupier. Here the bankrupt occupied up to January 17, on which day a receiving order was made against him, and adjudication took place; and on February 1 the brother bought the estate and became in law liable to be rated. [CAVE, J.—The bankrupt was the occupier all along.] There must have been a change of occupation. At any rate there must be held to have been a break in the occupation.

CAVE, J.—I am of opinion that the estate of the bankrupt is liable to pay the rate for the whole half-year. Section 40, sub-section 1 (*a*), of the Bankrutpcy Act, 1883, provides that in the distribution of the property of a bankrupt there shall be paid in priority to all other debts all parochial or other local rates due from the bankrupt at the date of the receiving order. This was a local rate due from the bankrupt at the date of the receiving order, and the case is clearly within the section unless there is anything to take it out. By section 211, sub-section 3, of the Public Health Act, 1875, if any owner or occupier assessed or liable to any such rate ceases to be owner or occupier of the premises before the end of the period for which such rate was made, and before the same is fully paid off, he shall be liable to pay only such part of the rate as may be in proportion to the time during which he continues to be such owner or occupier. Unfortunately this bankrupt has not ceased to be the occupier of the premises. He was occupier at the date of the receiving order, and he occupied during the whole period over which the rate extends. The case cannot be brought within section 211, sub-section (3), of the Public Health Act, 1875, and, that being so, it is within section 40, sub-section 1 (*a*), of the Bankruptcy Act, 1883. The proper course for the trustee was to have had this question of the liability to the rate taken into consideration on the sale of the property to the bankrupt's brother. I must answer the question that the estate of the bankrupt is liable to pay the whole half-year.

Solicitors for the local board, *I. H. Wrentmore*, for *Morgan & Phipps*, Pontypridd.

Solicitor for the official receiver, *The Solicitor to the Board of Trade.*

Q. B. Div. (Cave, J.) Nov. 16.

Ex parte RAWLINGS.

In re FORSTER. (*a*.)

Bankruptcy—Deed of assignment—Payment of solicitors' costs by trustee under deed—Receiving order—Application to repay—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 4, *sub-section* 1 (a).

On the 20th of August, 1885, in pursuance of a resolution passed at a meeting of creditors, the debtor executed a deed of assignment vesting the estate in a trustee for their benefit. On the 28th of October, 1885, *a petition was presented against the debtor, the act of bankruptcy alleged being the execution of the deed; and on the 31st of October the trustee under the deed paid out of moneys collected by him from the assets the sum of £20 7s. 8d. to a firm of solicitors, being the amount of their bill of costs incurred in connection with the meeting of creditors, and collecting certain book debts, and in preparing the deed of assignment. On the 20th of January*, 1886, *a receiving order was made against the debtor, and subsequently the trustee under the deed sent to the official receiver a cheque for the balance in his hands after deducting the amount paid to the solicitors, together with an account of receipts and payments in connection with the estate.*

Held, that the trustee under the deed must refund the money so paid to the solicitors.

Motion on behalf of the trustee in the bankruptcy of Alfred Forster for an order that G. R. Forster should pay over the sum of £20 7s. 8d., the balance derived from the realization of certain property which came into his hands as trustee under a deed of assignment executed by the bankrupt, and paid by him as costs to Messrs. Scoles & Co., solicitors.

In August, 1885, the bankrupt, being in difficulties, consulted Messrs. Scoles & Co., and a private meeting of the creditors was called. At this meeting a resolution was passed that the debtor should execute a deed of assignment vesting the estate in G. R. Forster for the benefit of the creditors, and on August 20, 1885, the deed was executed. On October 28, 1885, a petition was presented against the debtor, the act of bankruptcy alleged being the execution of the deed of assignment. G. R. Forster had collected sums amounting to £125 19s. 6d. from the assets, which included book debts, and on October 31 he paid to Messrs. Scoles & Co. £20 7s. 8d., being the amount of their bill of costs incurred in connection with the meeting of creditors, and collecting certain book debts, and also in preparing the deed of assignment.

On January 20, 1886, a receiving order was made against the bankrupt, and subsequently G. R. Forster sent to the official receiver a cheque for £105 11s. 10d., the balance in his hands after deducting the amount paid to Messrs. Scoles & Co. with a detailed account of receipts and payments in connection with the estate.

On March 3, 1886, a trustee was appointed in the bankruptcy, and application was now made by him for the recovery of the £20 7s. 8d. so paid to the solicitors.

F. C. Willis, for the trustee in bankruptcy.—The deed of August, 1885, was an act of bankruptcy. If a petition is presented within three months of such a deed all the property which the trustee under the deed may have taken forms the property of the estate, and if he pays it away he must recoup the estate.

Sidney Woolf, for the trustee under the deed.—The trustee in bankruptcy must treat the trustee under such a deed either as his agent and adopt his acts, or he must treat him as a trespasser. He cannot blow hot and cold.

(*a*.) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

The official receiver accepted the proceeds of the realization of the estate after the costs had been paid of collecting debts, &c. They have adopted our act and now wish to treat us as trespassers. [Cave, J.—Most of these expenses were incurred in doing that which was absolutely useless.] So far as the work was done in realising the estate and collecting the debts it would not be useless. The official receiver has not treated our acts under the deed as void. The deed must be wholly set aside or not.

He referred to *Ex parte Vaughan, In re Riddeough*, 33 W. R. 151, 14 Q. B. D. 25; *Smith* v. *Baker*, L. R. 8 C. P. 350, 21 W. R. Dig. 260; *Roe* v. *Mutual Loan Fund Association (Limited)*, 35 W. R. 723, 19 Q. B. D. 347.

Cave, J.—This money must be repaid. The objection to the application is quite an idle one. The trustee under the deed ought not to have taken any of the money until it was found that the deed would be valid. There appears, however, to be a sum of about £2 incurred with reference to the collection of book debts which the trustee in the bankruptcy is willing to allow. There will, therefore, be an order for payment of £18 7s. 8d. and costs.

Motion allowed, with costs.

Solicitors for the trustee in bankruptcy, *Lewis & Churchman.*

Solicitors for the trustee under the deed, *Scoles & Co.*

House of Lords.

From C. A. (England). March 18, 21, 22, 24; July 11.

Trevor v. Whitworth. (a.)

Company—Purchase of its own shares—Reduction of capital—Companies Act, 1862 (25 & 26 *Vict. c.* 89), ss. 8, 12, 26—*Companies Act*, 1867 (30 & 31 *Vict. c.* 131), ss. 9—20—*Companies Act*, 1877 (40 & 41 *Vict. c.* 26), s. 3.

A power given to a limited company by its articles of association to purchase its own shares is void.

Per Lord Macnaghten.—*Such a power given by the memorandum would be void also.*

The memorandum of association of a limited company, incorporated under the Companies Acts, stated that the objects of the company were the acquiring of certain manufacturing businesses, and the undertaking and carrying on of the businesses so acquired, and any other business and transaction which the company might consider to be in any way auxiliary thereto. The articles empowered the company to purchase its own shares. On the company being wound up, a shareholder claimed the balance of the price of shares, sold by him to the company before the winding up and not wholly paid for.

Held, that the company was not entitled by its memorandum of association to purchase its own shares; that the purchase, therefore, was ultrà vires, *and that the claim must fail.*

Decision of the Court of Appeal *reversed.*

In re Dronfield Silkstone Coal Co., 29 *W. R.* 768, 17 *Ch. D.* 76, *disapproved.*

This was an appeal from a decision of the Court of Appeal (Cotton, Bowen, and Fry, L.JJ.) reversing a decision of the Vice-Chancellor of the County Palatine of Lancaster.

The facts are fully stated in the judgment delivered by Lord Herschell.

James Schofield & Sons (Limited) was incorporated under the Companies Acts, with a memorandum of association which stated the objects of the company to be the acquiring and carrying on of the business of certain flannel manufacturers, and any other businesses and transactions which the company might consider to be in any way conducive or auxiliary thereto, or proper to be carried on in connection therewith. The memorandum did not authorize the purchase by the company of its own shares.

Article 179 of the articles of association provided that "Any share may be purchased by the company from any person willing to sell it, and at such price, not exceeding the then marketable value thereof, as the board think reasonable."

Article 181: "Shares so purchased may, at the discretion of the board, be sold or disposed of by them, or be absolutely extinguished, as they deem most advantageous to the company."

The company having gone into liquidation, a claim was made by the executors of Whitworth, a deceased shareholder, for the balance of the price of shares sold by the executors to the company and not wholly paid for. A summons was taken out by the liquidators to determine whether the claim should be paid. The Vice-Chancellor decided against the claim.

The only question dealt with by their lordships was whether it was *ultrà vires* of the company to purchase its own shares.

March 18, 21, 22, 24.—*Rigby, Q.C.* (*O. Leigh Clare* with him), for the appellants, the liquidators.—The articles relied on extend the objects set out in the memorandum, and are therefore invalid: *Ashbury Railway Carriage and Iron Co.* v. *Riche*, 24 W. R. 794, L. R. 7 H. L. 653; *Cree* v. *Somervail*, 28 W. R. 34, 4 App. Cas. 648. *In re Dronfield Silkstone Coal Co.*, 29 W. R. 768, 17 Ch. D. 76, is the only case at all against the appellants. Further, such a purchase amounts to a reduction of capital, and must be invalid in any case: *Hope* v. *International Financial Society*, 25 W. R. 67, 203, 4 Ch. D. 327. All the other cases are distinguishable: *In re Balgooley Distillery Co.*, 17 L. R. Ir. 239, 34 W. R. Dig. 36; *Guinness* v. *Land Corporation of Ireland*, 31 W. R. 341, 22 Ch. D. 349; *Colville's case*, 27 W. R. Dig. 45; *Zulueta's claim*, 18 W. R. 778, L. R. 5 Ch. 444; *Wright's case*, 20 W. R. 45, L. R. 7 Ch. 55; *Snell's case*, 18 W. R. 30, L. R. 5 Ch. 22: *Teasdale's case*, 22 W. R. 286, L. R. 9 Ch. 54; *Hall's case*, 18 W. R. 1058, L. R. 5 Ch. 707.

Romer, Q.C., and *A. C. Maberly*, for the respondents.—The articles must be held good unless clearly bad. In this case the purchases authorized by the articles are also covered by the memorandum as conducive to the other objects of the company. If the intention of the purchase were to reduce capital or to deal in the shares the purchase would be illegal, but in any other case it is legal, and is in the same category as a forfeiture or surrender. The *Dronfield case* is in the respondent's favour.

They also cited *Marshall* v. *Glamorgan Iron and Coal Co.*, 17 W. R. 435, L. R. 7 Eq. 129; *Phosphate of Lime Co.* v. *Green*, L. R. 7 C. P. 43, 20 W. R. Dig. 16; *Taylor* v. *Pilsen Joel and General Electric Light Co.*, 33 W. R. 134, 27 Ch. D. 268.

Rigby, Q.C., replied.

July 11.—Lord Herschell.—Three questions are raised by this appeal—(1) Whether certain shares in James Schofield & Sons (Limited) were purchased by G. W. Schofield on his own account, or as agent for the company. (2) Whether, assuming that they were

(a.) Reported by C. G. Napier Trollope, Esq., Barrister-at-Law.

purchased for the company, and that the company had power to buy its own shares, the purchase took place in accordance with the articles of association. (3) Whether the company had power to purchase the shares.

James Schofield & Sons (Limited) was incorporated under the Companies Acts on the 31st of May, 1865, with a capital of £150,000 in 15,000 shares of £10 each. At an extraordinary general meeting of shareholders of the company, on the 6th of May, 1884, it was resolved that the company should be wound up voluntarily; and on the 15th of May following it was ordered by the Vice-Chancellor of the County Palatine that the voluntary winding up should be continued under the supervision of the court.

By an affidavit filed on the 1st of October, 1884, the respondents claimed from the company in the winding-up £2,873 12s. A summons was taken out by the appellants for the purpose of determining whether this claim ought to be allowed. Upon the hearing of this summons the claim was rejected by the Vice-Chancellor, but upon appeal, this decision was reversed.

On the 1st of May, 1880, G. W. Schofield bought from the respondents, who were the executors of Robert Whitworth, a deceased shareholder, 533 shares in the company (28 fully paid up, 500 with £6 paid, and five with £5 paid), for the price of £3,305, the purchase-money to be paid within three years then next, and interest at five per cent. to be paid until completion. Interest was accordingly paid in the meantime, and on the 3rd of May, 1883, a transfer of the shares was executed by the vendors and G. W. Schofield.

On the 5th of May a receipt was given to G. W. Schofield for the sum of £3,305 for shares bought. But £505 only having been in fact paid, a promissory note was on the same day given to the respondents for £2,800, "deposited on loan at five per cent. per annum interest from date." This was signed "for J. Schofield & Sons (Limited); G. W. Schofield, Director."

The first question is, Whether this transaction was entered into by G. W. Schofield on his own account, or as agent for the company. If the former, it is clear that Schofield was guilty of a gross fraud. Upon a review of the evidence I see no ground for coming to such a conclusion. I think the purchase of the shares was in fact made by him on behalf of the company.

The question whether, assuming the company had power to purchase its own shares, this purchase was effected in accordance with the articles of the company, is one of much greater difficuty. The article empowering the company to purchase its shares is as follows:—"Article 179. Any share may be purchased by the company from any person willing to sell it, at such price, not exceeding the then marketable value thereof, as the board think reasonable." Now there is not the slightest evidence that the directors ever considered, either at a formal meeting of the board or otherwise, the question whether these shares should be purchased. The utmost that can be said to be established is that the directors other than G. W. Schofield, who negotiated the purchase, knew that the respondents had come to see him upon the subject. But, further, the only authority to buy was at such price not exceeding the then market value as the board should think reasonable. The par value of the shares was apparently given in this case, as in the case of the other purchases, as a matter of course, and I see no reason to believe that any judgment was exercised upon the point by the board.

But although I think it far from clear that, even if it was competent for the company to purchase the shares, this transaction can be supported, I do not intend to pronounce an opinion upon this point, because, in consequence of the view which I believe all your lordships entertain upon another part of the case, it is unnecessary to do so.

I pass now to the main question in this case, which is one of great and general importance, whether the company had power to purchase the shares. The result of the judgment in the court below was certainly somewhat startling. The creditors of the company which is being wound up, who have a right to look to the paid-up capital as the fund out of which their debts are to be discharged, find coming into competition with them persons who, in respect only of their having been, and having ceased to be, shareholders in the company, claim that the company shall pay to them a part of that capital. The memorandum of association, it is admitted, does not authorize the purchase by the company of its own shares. It states as the objects for which the company is established the acquiring certain manufacturing businesses, and the undertaking and carrying on the businesses so acquired, and any other business and transaction which the company consider to be in any way auxiliary thereto, or proper to be carried on in connection therewith.

It cannot be questioned, since the case of the *Ashbury Railway Carriage and Iron Co.* v. *Riche*, that a company cannot employ its funds for the purpose of any transactions which do not come within the objects specified in the memorandum, and that a company cannot by its articles of association extend its power in this respect. These propositions are not and could not be impeached in the judgment of the Court of Appeal; but it is said to be settled by authority that, although a company could not, under such a memorandum as the present, by articles authorize a trafficking in its own shares; it might authorize the board to buy its shares "whenever they thought it desirable for the purposes of the company," or "in cases where it was incidental to the legitimate objects of the company that it should do so"—the former is Cotton, L.J.'s expression, the latter that of Bowen, L.J.

I will first consider the question apart from authority, and then examine the decisions relied on.

The Companies Act, 1862, requires (section 8) that in the case of a company where the liability of the shareholders is limited, the memorandum shall contain the amount of the capital with which the company proposes to be registered divided into shares of a certain fixed amount; and provides (section 12) that such a company may increase its capital and divide it into shares of larger amount than the existing shares, or convert its paid-up shares into stock; but that, "save as aforesaid, no alteration shall be made by any company in the conditions contained in its memorandum of association."

What is the meaning of the distinction thus drawn between a company without limit on the liability of its members and a company where the liability is limited, but, in the latter case, to assure to those dealing with the company that the whole of the subscribed capital—unless diminished by expenditure upon the objects defined by the memorandum—shall remain available for the discharge of its liabilities? The capital may, no doubt, be diminished by expenditure upon and reasonably incidental to all the objects specified. A part of it may be lost in carrying on the business operations authorized. Of this all persons trusting the company are aware, and take the risk. But I think they have a right to rely—and were intended by the Legislature to have a right to rely—on the capital remaining undiminished by any expenditure outside these limits, or by the return of any part of it to the shareholders.

Experience appears to have shown that circumstances might occur in which a reduction of the capital would be expedient. Accordingly by the Act of 1867 provision was made enabling a company under strictly defined conditions to reduce its capital. Nothing can be stronger than these carefully-worded provisions to show how inconsistent with the very constitution of a joint-stock company with limited liability the right to reduce its capital was considered to be.

Let me now invite your lordships' attention to the

facts of the present case. The company had purchased prior to the date of the liquidation no less than 4,142 of its own shares — that is to say, considerably more than a fourth of the paid-up capital of the company had been either paid, or contracted to be paid, to shareholders in consideration only of their ceasing to be so. I am quite unable to see how this expenditure was incurred in respect of or as incidental to any of the objects specified in the memorandum. And, if not, I have a difficulty in seeing how it can be justified. If the claim under consideration can be supported, the result would seem to be this—that the whole of the shareholders, with the exception of those holding seven individual shares, might now be claiming payment of the sums paid upon their shares as against the creditors, who had a right to look to the moneys subscribed as the source out of which the company's liabilities to them were to be met. And the stringent precautions to prevent the reduction of the capital of a limited company without due notice and judicial sanction would be idle if the company might purchase its own shares wholesale and so effect the desired result. I do not think it was disputed that a company could not enter upon such a transaction for the purpose of reducing its capital, but it was suggested that it might do so if that were not the object, but it was considered for some other reason desirable, in the interest of the company, to do so. To the creditor, whose interests I think sections 8 and 12 of the Companies Act, 1862, were intended to protect, it makes no difference what the object of the purchase is. The result to him is the same. The shareholders receive back the moneys subscribed, and there passes into their pockets what before existed in the form of cash in the coffers of the company, or of buildings, machinery, or stock available to meet the demands of the creditors.

What was the reason which induced the company in the present case to purchase its shares? If it was that they might sell them again, this would be a trafficking in the shares, and clearly unauthorized. If it was to retain them, this would be to my mind an indirect method of reducing the capital of the company. The only suggestion of another motive (and it seems to me to be a suggestion unsupported by proof) is that this was intended to be a family company, and that the directors wanted to keep the shares as much as possible in the hands of those who were partners, or who were interested, in the old firm, or of those persons whom the directors thought they would like to be amongst this small number of shareholders. I cannot think that the employment of the company's money in the purchase of shares for any such purpose was legitimate. The business of the company was that of manufacturers of flannel. In what sense was the expenditure of the company's money in this way incidental to the carrying on of such a business, or how could it secure the end of enabling the business to be more profitably or satisfactorily carried on? I can quite understand that the directors of a company may sometimes desire that the shareholders should not be numerous, and that they should be persons likely to leave them with a free hand to carry on their operations. But I think it would be most dangerous to countenance the view that for reasons such as these they could legitimately expend the moneys of the company to any extent they pleased in the purchase of its shares. No doubt if certain shareholders are disposed to hamper the proceedings of the company, and are willing to sell their shares, they may be bought out; but this must be done by persons, existing shareholders or others, who can be induced to purchase the shares, and not out of the funds of the company.

It is urged that the views I have expressed are inconsistent with the forfeiture and surrender of shares in a company. I do not think so. The forfeiture of shares is distinctly recognized by the Companies Act, and by the articles contained in the schedule, which, in the absence of other provisions, regulate the management of a limited liability company. It does not involve any payment by the company, and it presumably exonerates from future liability those who have shown themselves unable to contribute what is due from them to the capital of the company. Surrender no doubt stands on a different footing. But it also does not involve any payment out of the funds of the company. If the surrender were made in consideration of any such payment, it would be neither more nor less than a sale, and open to the same objections. If it were accepted in a case when the company were in a position to forfeit the shares, the transaction would seem to me perfectly valid. There may be other cases in which a surrender would be legitimate. As to these I would repeat what was said by the late Master of the Rolls in the *Dronfield case*: "It is not for me to say what the limits of surrender are which are allowable under the Act, because each case as it arises must be decided upon its own merits."

I turn now to the authorities. In *Teasdale's case* James, L.J., said: "There is no doubt that a company may give itself power to purchase its own shares, to take surrenders of shares, and to cancel the certificates of shares." But in the subsequent case of *Hope* v. *The International Financial Society* that learned judge said: "I am reported to have said in *Teasdale's case* that the power to purchase shares would be good. I am not quite sure whether that was not too wide a deduction from the cases to which I was then referring, and certainly it was not necessary for the decision of the case. But, however that may be, when the company deals with an individual shareholder, and does what appears to be right under the circumstances—viz., to accept a surrender from the shareholder who cannot pay, and to release him from further liability—that might be good, although incidentally and to a small extent it may be said to diminish the capital." In the case which gave rise to these observations a company, having 150,000 shares issued, passed a special resolution that the directors should have power to apply the company's assets to purchase from shareholders willing to sell any number of shares not exceeding 100,000, and that such shares should not be re-issued by the directors without the authority of a general meeting. The Court of Appeal, affirming Bacon, V.C., held that this scheme was invalid. James, L.J., said: "Either this is a purchase of shares in the sense of trafficking in shares—which is a purchase not authorized by the memorandum of association—or it is an extinguishment of the shares, and therefore a reduction of the capital of the company." And the present Master of the Rolls made the following observations: "I agree with the Lord Justice that the dilemma is made perfect; for if you assume that there was to be a re-issue of these shares the shares are not cancelled; they are existing shares, and the only way of getting rid of them again is to sell them. It is said that a selling of shares is not of itself a trafficking in shares. Well, that may be quite true. If I make a present of a horse, I cannot be said to be dealing in horses; but I apprehend, if I buy a horse for the purpose of selling it again, I do deal in a horse. So, then, if you take that to be the reasonable meaning of the resolution, then the resolution is this—that the company are to buy the shares for the purpose of re-issuing them, that is, for the purpose of selling them again. They do not say so in terms, but that is the necessary effect of what they intend to do by the resolution. That seems to be a trafficking in shares and a carrying on of the business which is not within the terms of the memorandum of association. It is true that there may not be a continuing business, but no more was that which was done in the case of *The Ashbury Railway Carriage and Iron Co.* v. *Riche*. That was only to be one transaction; but because the tran-

saction was a business transaction not contemplated or mentioned in the memorandum of association, it was not allowed. If that, therefore, was the intention of this resolution, then it broke the rules by enabling or forcing the company to enter upon a business which is not mentioned in the memorandum of association. But if it was not intended to re-issue these shares, then it seems to me to follow that the amount of capital represented by them was necessarily extinguished."

It appears to me that every word which I have just quoted from the judgment of the Master of the Rolls is strictly applicable to the circumstances of the present case. Again, in the case of *Guinness* v. *Land Corporation of Ireland*, Cotton, L.J., after referring to section 38 of the Companies Act, 1862, said: "From that it follows that whatever has been paid by a member cannot be returned to him. In my opinion it also follows that what is described in the memorandum as the capital cannot be diverted from the objects of the society. It is, of course, liable to be spent or lost in carrying on the business of the company, but no part of it can be returned to a member so as to take away from the fund to which the creditors have a right to look as that out of which they are to be paid."

The learned judges of the Court of Appeal in the present case did not purport to depart from the views thus expressed, but their judgments were based upon the decision of that court in the case of *In re Dronfield Silkstone Coal Co.* In that case, disputes having arisen as to the conduct of the business, the directors agreed with Ward, one of the largest shareholders, to purchase his shares and also his interest as landlord in the mines worked by the company. This arrangement was confirmed by an extraordinary general meeting of the company, and was carried into effect in March, 1872. The business of the company was very prosperous for several years, but in 1879 it was ordered to be wound up; and the question then arose whether Ward was liable to be placed on the list of contributories. The late Master of the Rolls held that he was, on the ground that the company had no power to purchase the shares, but this decision was reversed by the Court of Appeal. Upon the question whether the company had the power contended for, I agree with the reasoning of the Master of the Rolls rather than that of the Court of Appeal. But I am not prepared to say that the judgment of the Court of Appeal refusing to make Ward a contributory was erroneous, looking at the circumstances which intervened subsequent to the purchase and prior to the winding up. It is not necessary, however, to detain your lordships by a consideration of this question, as it can have no application to the present case. The transaction here is inchoate, and the court is asked to compel its completion. This, I think, for the reasons I have given, they would not be justified in doing.

I ought to notice one other case, as it was much relied on by the learned counsel for the respondents. I refer to *Phosphate of Lime Co.* v. *Green*. In that case the learned judges appear to have considered that the transaction amounted to a purchase of shares in the company which was prohibited by its articles of association; but they held that it had been ratified by the shareholders. No question was raised in argument or determined as to the powers conferred by the memorandum of association, and it is to be observed that at that time it was not so clearly settled as it has been since the judgment in *The Ashbury Co.* v. *Riche*, that a transaction not within the scope of the memorandum is incapable of ratification.

I move your lordships that the judgment appealed from be reversed, and the judgment of the Vice-Chancellor restored, and that the respondents do pay to the appellants the costs in the Court of Appeal and in this House; and do repay to the appellants any costs received from them.

Lord Watson.—These points were discussed in the argument upon this appeal: Was the purchase of 533 shares of "James Schofield & Sons (Limited)" from the respondents in May, 1880, made by G. W. Schofield for behoof of the company with the sanction of its directors? If so, was the transaction *ultrà vires* of the company? The order appealed from cannot stand if either of these questions be answered in the negative.

I think it is established by the evidence that both parties to the agreement of May, 1880, understood and acted upon the footing that the purchase was made by G. W. Schofield for the company, and that G. W. Schofield, after the shares were transferred to him in May, 1883, held, or at least intended to hold, them as trustee for the company. I doubt whether it is also proved that the purchase was submitted to, and considered and approved by, the board of direction, in terms of the articles of association; but I do not think it necessary to determine that point, because I am of opinion that, assuming the transaction to have been duly completed in accordance with the articles, it was nevertheless *ultrà vires* of the company.

In order to appreciate the real character of the transaction, it is necessary to advert to the position of the concern and its course of dealing in the purchase of its own shares. The company was registered, with limited liability, in the year 1865, for the purpose of carrying on the business of manufacturing flannel goods, and it continued to trade from that time until April, 1884, when it went into liquidation. Its nominal capital was £150,000 in 15,000 shares of £10 each. None of its shares were sold in the market after July, 1875, and no dividend was paid after the year ending the 31st of December, 1877; but at the date of the liquidation the company had acquired by purchase and then owned 4,142 of its own shares, of which 3,609 were entered in the register in the name of "James Schofield & Sons,"—a firm which had no existence—and the remainder (the 553 shares in question) in the name of G. W. Schofield. All of these shares had been bought by the company at par, or, in other words, not at market value, but for the amount which had been paid upon them by previous holders; and 1,389 shares were purchased on these terms between May, 1880, and the date of the liquidation.

In the case of the 533 shares the price was made payable three years after the date of the agreement of sale, in exchange for a transfer, the purchaser meantime paying interest at five per cent., and undertaking to indemnify the sellers from further calls. Interest was regularly paid from the funds of the company, and the transaction was closed in May, 1884, by a transfer of the shares to G. W. Schofield, the sellers giving a receipt for the full price (£3,305) on receiving payment of £505 in cash and being credited in the books of the company with £2,800, the amount of the unpaid balance, as a loan to the company. That is the sum which the respondents claim in the liquidation, and for which the Court of Appeal has held that they are entitled to rank in competition with the creditors of the company.

The articles of association of "James Schofield & Sons (Limited)" give the directors very extensive power to purchase its own shares for the company; and it is provided (Article 181) that "shares so purchased may, at the discretion of the board, be sold or disposed of by them, or be absolutely extinguished, as they deem most advantageous for the company." These powers are of course unavailing in so far as they may include purchases which are either beyond the scope of the memorandum of association, or contrary to the provisions of the Companies Acts. But I assent to the respondents' argument that they must be construed *ut magis valeant quam pereant*, and must be held to authorize all purchases of the company's shares effected on its behalf by the directors which can be shown to have been legitimate

and within the objects specified in the memorandum.

In the case of a company limited by shares, the Act of 1862 requires that the amount of its capital and the shares into which it is divided shall be set forth in the memorandum of association; and section 12, which prescribes the extent to which the conditions contained in the memorandum may be modified, empowers the company to increase but not to diminish its capital. That limitation has been so far relaxed by the Act of 1867 as to permit a company to reduce its capital with the sanction of the court, after due notice to creditors, upon such terms as the court may think fit to impose. The Act of 1877—upon the preamble that doubts had been entertained whether the power of reduction given by the preceding Act extended to paid-up capital—enacts (section 3) that the word "capital," as used in that Act, shall include paid-up capital. That declaration clearly expresses the will of the Legislature that neither the paid-up nor the nominal capital of the company shall be reduced otherwise than in the manner permitted by the statutes.

One of the main objects contemplated by the Legislature in restricting the power of limited companies to reduce the amount of their capital as set forth in the memorandum, is to protect the interests of the outside public who may become their creditors. In my opinion the effect of these statutory restrictions is to prohibit every transaction between a company and a shareholder, by means of which the money already paid to the company in respect to his shares is returned to him, unless the court has sanctioned the transaction. Paid-up capital may be diminished or lost in the course of the company's trading; that is a result which no legislation can prevent, but persons who deal with and give credit to a limited company naturally rely upon the fact that the company is trading with a certain amount of capital already paid, as well as upon the responsibility of its members for the capital remaining at call; and they are entitled to assume that no part of the capital which has been paid into the coffers of the company has been subsequently paid out, except in the legitimate course of its business.

When a share is forfeited or surrendered, the amount which has been paid upon it remains with the company, the shareholder being relieved of liability for future calls, whilst the share itself reverts to the company, bears no dividend, and may be re-issued. When shares are purchased at par and transferred to the company, the result is very different. The amount paid up on the shares is returned to the shareholder, and in the event of the company continuing to hold the shares (as in the present case), is permanently withdrawn from its trading capital. It appears to me that, as Jessel, M.R., pointed out in *In re Dronfield Silkstone Coal Co.*, it is inconsistent with the essential nature of a company that it should become a member of itself. It cannot be registered as a shareholder to the effect of becoming debtor to itself for calls, or of being placed on the list of contributories in its own liquidation. Accordingly, when a company buys and holds its own shares, the device is sometimes resorted to of taking the transfer to a nominee who is entered in the register, and holds the shares as trustee for the company, which undertakes to indemnify him from future calls. In that case, if the company goes into liquidation before its capital is fully paid up, the trustee is liable personally as a contributory for the amount then unpaid; but the amount withdrawn is never restored, and calls made upon the shares whilst the company is a going concern bring no addition to its capital. In *Teasdale's case*, which was frequently referred to in the argument before us, James, L.J., is reported to have said: "There is no doubt that a company may give itself power to purchase its own shares, to take surrenders of shares, and to cancel the certificates of shares." There was no question of purchase in that case, which related to a surrender of original shares in exchange for new shares, by means of which the nominal capital of the company was largely increased, whilst the paid-up capital remained intact. The learned Lord Justice took occasion to modify the opinion thus attributed to him in the subsequent case of *Hope* v. *The International Financial Society*. In that case the purchase of its own shares was not one of the specified objects of the society; but the directors were authorized to purchase the shares of certain members who desired to withdraw from the concern by a special resolution of the society, which provided that shares purchased in terms thereof should not be re-issued by the board without the authority of a general meeting. The Court of Appeal, affirming the decision of Bacon, V.C., held that the scheme involved an improper application of its funds, and was *ultra vires* of the company. James, L.J., said: "Mr. Kay, it appears to me, has succeeded in placing his opponents on the horns of a dilemma. This is a purchase of shares in the sense of a trafficking in shares, which is a purchase not authorized by the memorandum of association, or it is an extinguishment of the shares, and therefore a reduction of the capital of the company." He clearly distinguishes the cases of purchase from that of surrender. After referring to his reported observations in *Teasdale's case* as being too wide a deduction from the authorities, and unnecessary for the decision of the case, he says: "But however that may be, when the company deals with an individual shareholder, and does what appears to be right under the circumstances—namely, to accept the surrender from the shareholder who cannot pay, and to release him from further liability—that might be good, although incidentally and to a small extent it may be said to diminish the capital." Brett and Baggallay, L.JJ., followed the same line of reasoning with James, L.J. They agreed that the resolution of the company to purchase and hold its own shares, subject to the disposal of a general meeting, was in substance either a resolution to deal in the shares, which was outside the memorandum of association, or a resolution to reduce its capital, which was contrary to the provisions of the Companies Acts. The decisions of the learned judges would, I apprehend, have been the same if the directors had been authorized to make the purchase by the articles of association. No authority thereby given could have enlarged the scope of the memorandum, or overcome the statutory prohibition.

Mr. Romer did not, in the course of his able argument for the respondents, impeach the soundness of the decision in *Hope* v. *The International Financial Society*. He sought to extricate his clients from the dilemma presented in that case by endeavouring to show that the purchase of the 533 shares in question was, in a reasonable sense, incidental to the carrying on of the proper business of "James Schofield & Sons (Limited)," or was a legitimate piece of domestic management, and was therefore within the scope of the memorandum; and, upon that assumption, he argued that the transaction was not in contravention of the Companies Acts, although it might lead to some diminution of capital. His argument was mainly rested upon *In re Dronfield Silkstone Coal Co.*, an authority requiring consideration because it is in respect of the principle said to be thereby established that the Court of Appeal has in this case given judgment for the respondents.

Other authorities were relied on by the learned counsel, but these (with one exception) I think it unnecessary to notice, because they were cases either of surrender of shares or of cancellation of allotments, and did not involve any question of purchase.

In *Phosphate of Lime Co.* v. *Green* a dispute had arisen between the company and two of its shareholders, which was eventually compromised. As stated by

Willes, J.: "An arbitration was proposed, and negotiations took place between the directors and Green and Nicholls, which resulted in a compromise on or about the 24th of July, 1866. That compromise in effect was that, instead of paying back the money advanced to them, and returning the debenture bonds, Green and Nicholls should give up to the company 400 shares, on which £10 per share had been paid up, to be cancelled; and it was agreed that this should be considered as a settlement of the claim of the company against them." The learned judges, in delivering their opinions, assumed that the transaction had the character of a sale of the shares, and was struck at by the 19th of the company's articles of association, which expressly prohibited the purchase of its own shares under any circumstances; but they held that the shareholders, with full knowledge of the transaction, had ratified that which had been done by the directors. None of the learned judges seem to have considered whether the transaction was within the limits of the memorandum or consistent with the provisions of the Companies Acts and neither of these points was raised by the arguments addressed to them.

In deciding *In re Dronfield Silkstone Coal Co.* the Court of Appeal had fully in view the previous decisions of this House in *The Ashbury Railway Carriage and Iron Co.* v. *Riche*, and of their predecessors in *Hope* v. *International Financial Society*. It appears from the report that disputes had arisen between the board of directors and Ward, one of their number, from whom and his partner Addy the company had a sub-lease of coal mines which it worked, and that these disputes seriously interfered with the business of the company. In order to terminate their differences the parties entered into an agreement, sanctioned by a special resolution of the company, in terms of which Ward, on the 25th of March, 1872, transferred his shares to the company for £5,000, and on the same date executed, along with Addy, a separate indenture, by which they assigned to the company their whole interest as lessees for the sum of £10,000. The company was registered as owner of the shares shortly after the execution of the transfer in 1872, and retained them until 1879, when a winding-up order was obtained. At the time of the transfer, and for several years following, the business of the company was prosperous, and large dividends were paid. The liquidators included Ward in the list of contributories, and, on an application for the removal of his name, Jessel, M.R., held that the transfer was void as being not only outside the objects of the memorandum, but a diminution of the paid-up capital, forbidden by the Companies Acts, and, consequently, that Ward was still liable to contribute. This judgment was reversed by the Court of Appeal, who directed the applicant's name to be removed from the list. Cotton, L.J., was of opinion that, the purchase having been made in the interest of the company, and not being in any sense a traffic in shares, did not go beyond the memorandum, and that it was not such a diminution of capital as the statutes prohibit. Upon the latter point his lordship observed: "The principal argument of the respondent against the validity of the transaction was that it was a reduction of the capital of the company. If this transaction is to be held invalid on that ground, I do not see how a surrender or forfeiture of shares is ever to be supported." James, L.J., was also of opinion that dealing with shares which did not amount to traffic was not beyond the scope of the memorandum, and he regarded the transaction as "a mere domestic matter" which could not be questioned after the company had first confirmed it and had then acquiesced in it and taken the benefit of it.

In *Guinness* v. *Land Corporation of Ireland* Cotton, L.J., thus explained the principle upon which *In re Dronfield Silkstone Coal Co.* was decided: "The article there empowered the directors in their discretion to apply money in purchasing shares so as to get rid of shareholders who caused difficulty in the internal management of the company, and as the power had been used, and reasonably used, for that purpose, and not as a means of diminishing the capital of the company, the shares not being in any way cancelled or put an end to, but being re-issuable, we were of opinion that the directors had the power which they purported to exercise."

When a company, in order to get rid of a troublesome shareholder, buys his shares and continues to hold them, as in *In re Dronfield Silkstone Coal Co.*, the object may be different, but the result, so far as regards the capital of the company, is precisely the same as if it had purchased the shares as an investment. If the shares are purchased with the view of being re-sold, that is simply a speculation with the funds of the company. If they are purchased with the view of being retained by the company, that is a permanent withdrawal of the money invested in them from the trading capital of the company. I do not agree with Cotton, L.J., in thinking that if such a transaction is invalid no forfeiture or surrender could be supported. When shares are forfeited or surrendered and not re-issued that affects only the nominal amount of the shares so far as unpaid; when they are bought and not reissued that diminishes the paid-up as well as the nominal capital.

Notwithstanding the general prohibition of alterations upon the memorandum of association, which diminish the capital, whether paid up or nominal, of a company limited by shares, the Companies Acts contemplate the possibility of diminution of unpaid capital in certain cases, although the memorandum remains unaltered. Section 26 of the Act of 1862 and the regulations of Table A (17 to 22) show plainly that the Legislature intended companies to have the power of forfeiting shares. There is no reference in the Acts to surrenders of shares; but these have been admitted by the courts, upon the principle, as I understand it, that they have practically the same effect as forfeiture, the main difference being that the one is a proceeding *in invitum*, and the other a proceeding taken with the assent of the shareholder, who is unable to retain and pay future calls on his shares. Whatever may be the case in regard to surrender, I do not think the purchase of its own shares by a company bears any analogy to forfeiture. It appears to me that a transaction by which, as in this case and in *In re Dronfield Silkstone Coal Co.*, the company gave back his money to the shareholder, and accepted and held the shares in his stead, in point of fact operates as a diminution of its paid-up as well as of its nominal capital; and I have been unable to discover any good reason why such a diminution should be held to be legal in the face of statutory enactment to the contrary.

I am not prepared to say, nor is it necessary to say, that the decree in *In re Dronfield Silkstone Coal Co.* directing the removal of Ward's name from the list of contributories was erroneous. If his non-liability to contribute in the liquidation had been wholly dependent upon the original validity of the agreement of March, 1872, for the sale and purchase of his shares, I should have agreed with the decision of Jessel, M.R.; but it appears to me that there were special circumstances in that case which might have justified the order made by the Court of Appeal, although I am unable to concur in the reasoning upon which it was based. The respondents are not resisting an attempt by the liquidators to include them in the list of contributories; they are seeking to enforce, in a question with creditors, the contract under which their shares were transferred to the company, and their success must depend upon the validity of that contract.

In the present case I should have been of opinion, even on the assumption that the reasoning of the Lords

Justices in *In re Dronfield Silkstone Coal Co.* was sound, that the purchase of the respondents' 533 shares was a transaction *ultrâ vires* of the company. It was not an isolated transaction with a single troublesome shareholder, who was obstructing the business of the company, but was part and parcel of a scheme carried out by the directors, under the articles of association, by which they acquired for the company more than one-fourth of the whole shares of its undertaking, and returned to the shareholders, from whom they purchased, more than one-fourth of its paid-up capital. It does not appear to have formed any part of the scheme to re-sell or re-issue the shares; and matters stood in the position I have described at the date of the liquidation. I do not doubt that, as suggested by the learned judges of the Court of Appeal, the object of the directors was to keep "James Schofield & Sons (Limited)" as a sort of family concern, which was a perfectly lawful object if pursued by legitimate means. But the directors and shareholders of a company limited by shares, who desire to have the concern in the hands of themselves and their friends, and to keep its shares out of the market, ought to use their own money for that purpose, and not the trading capital of the company. In my opinion the application of the company's funds in furtherance of any such object is altogether illegitimate, because it is foreign to the proper business of the company, and in violation of statute law. If it were held to be incidental to the business of the company, and not a diminution of its capital, there seems to be no reason why "James Schofield & Sons (Limited)" should not have purchased at par a half or two-thirds, instead of a fourth, of its own shares.

I concur therefore in the judgment which has been moved.

Lord Fitzgerald.—Lord Herschell has stated accurately that there are three questions awaiting our decision. The first is whether the shares in question were purchased by Mr. G. W. Schofield on his own account or as agent for the company? If I had to determine what the true character of that transaction was, and if that was necessary for our decision, I should hesitate very much to say that the agreement of the 1st of May, 1880, was entered into by G. W. Schofield on behalf of the company, and not upon his own account.

The second question is whether, assuming that these shares were purchased for the company, and that the company had power to buy its own shares, the purchase was completed in accordance with the articles of association? Upon that question I make the same observation, that it is not necessary for our present decision to express any decided opinion upon it, but the impression upon my mind is that if I had to decide that question I should say that the transaction was not completed in accordance with the articles of association, and was therefore inoperative.

The third question is the important one in the case. It is a question of very great public importance, and one cannot but feel satisfied that at last it has come to the point where it is necessary to pronounce an authoritative decision upon it. The question is put thus in the reasons for the appeal; the third reason is, "Because the company had no power to make or authorize any such purchase of its own shares." That is answered in the reasons given for the respondents thus, "Because the purchase by the company of the said shares was not *ultrâ vires*, but under the circumstances was and is a transaction in every way binding on the company." The question now is which of these reasons we are to adopt.

I have read the notes of the two very elaborate opinions which have been already delivered upon this subject, and I have also read the notes of the very weighty opinion which has yet to be delivered by Lord Macnaghten. Upon carefully reading these notes and deliberately considering them, I have laid aside what I intended to be my own judgment in the case, and I intend to do little more than, upon this question, to state my entire concurrence in the views which have been expressed by your lordships who have spoken and in those which are about to be expressed by my noble and learned friend. I would add that I consider that the decision which the House has been enabled to arrive at is the most wholesome one in the public interests and for public purposes.

I would not say another word, but that I wish to advert to a case to which I called attention in the course of the argument—it was a case which came up for decision before the Court of Appeal in Ireland, and in which a very elaborate judgment was delivered by Fitz-Gibbon, L.J. I refer to *In re Balgooley Distillery Co.* I only wish to observe that I think that affords the ablest criticism which has taken place up to this morning upon the authorities and upon the question which we have now to determine. I will only repeat that I express my entire concurrence, upon the third question, in the decision of the House and in the reasons given for it.

Lord Macnaghten.—The learned counsel for the appellants raised three points for your lordships' consideration.

In the first place, they contended that the shares belonging to Whitworth's executors, which were the subject of the agreement of May, 1880, were not really purchased on behalf of the company. From facts either proved or admitted, and from documents in evidence, they asked your lordships to infer that in making that agreement George William Schofield was acting on his own account, though he meant all the while to treat the company as the purchaser if the bargain turned out to be a bad one. That is a charge of dishonesty for which, as far as I can see, there is not a shadow of foundation.

In the next place, assuming the purchase clauses in the articles to be valid, it was contended that the requirements of those clauses were not duly complied with. This is a more difficult question. In the unsatisfactory state of the evidence I do not propose to give any final opinion upon it. I will only make one or two observations. Article 179 provides that "any share"—that is, any share in James Schofield & Sons (Limited)—"may be purchased by the company from any person willing to sell it, and at such price, not exceeding the then market value thereof, as the board think reasonable." Now it does not appear that the board ever exercised any judgment or thought in the matter. From the year 1875 the company's shares were not saleable or sold in the market, or dealt with by the public. After that date any shares that any member wished to sell were bought by the company as a matter of course. Except in a few instances where shares were sold below their par nominal value, the price given was invariably a sum equal to the amount paid up, and that although the company was steadily going from bad to worse, trading at a loss, and at the same time borrowing money to buy up the shares of members who wanted to withdraw. Why the price was kept up under these circumstances it is not necessary to inquire. Whatever the reason may have been, the sum which the board agreed to pay for the shares belonging to Whitworth's executors cannot, I think, by any figure of speech, be described as the market value, or as bearing any relation to the market value, of the shares. If that be so, there seems to be a difficulty in the way of enforcing against the company the completion of a contract founded on something like a breach of trust on the part of the directors.

The third point is one of general importance. It raises the question whether it is competent for a company formed under the Act of 1862, on the principle

of limited liability, to purchase its own shares when it is authorized by its articles to do so. The consideration of that question, as it appears to me, necessarily involves the broader question whether it is competent for a limited company under any circumstances to invest any portion of its capital in the purchase of a share of its own capital stock, or to return any portion of its capital to any shareholder without following the course which Parliament has prescribed. If the case were not in some degree embarrassed by the decision in *In re Dronfield Silkstone Coal Co.*, and by *dicta* in earlier cases, I should answer both questions in the negative without the slighest doubt or hesitation. It appears to me that the notion of a limited company taking power to buy up its own shares is contrary to the plain intention of the Act of 1862, and inconsistent with the conditions upon which, and upon which alone, Parliament has granted to individuals who are desirous of trading in partnership the privilege of limiting their liability.

The Act of 1862 requires that the objects for which a limited company is established shall be stated in its memorandum. Those objects cannot be enlarged by anything to be found in the articles, or by anything outside the memorandum. Whatever may fairly be regarded as incidental to the objects stated in the memorandum the company is authorised to do. Everything beyond that is prohibited. Further, every limited company is required to state in its memorandum the amount of capital with which it proposes to be registered, divided into shares of a certain fixed amount. That is equivalent to a declaration that the capital is to be devoted to the objects of the company. The effect of that statement, taken in connection with section 38, is explained very clearly by Cotton, L.J., in *Guinness* v. *Land Corporation of Ireland*. After commenting on section 38, the Lord Justice proceeds thus :—"From that it follows that whatever has been paid by a member cannot be returned to him. In my opinion it also follows that what is described in the memorandum as the capital cannot be diverted from the objects of the society. It is, of course, liable to be spent or lost in carrying on the business of the company, but no part of it can be returned to a member so as to take away from the fund to which the creditors have a right to look as that out of which they are to be paid."

If that be a correct exposition of the law, as I think it is, it seems to me to be decisive on the present question. If the purchase of shares in James Schofield & Sons (Limited) was not one of the objects of that company, how could its capital be properly employed in that purchase? Bowen, L.J., indeed, founding himself on *In re Dronfield Silkstone Coal Co.*, assumes that cases may occur where the purchase of its own shares is incidental to the legitimate objects of a limited company, and such a case he considers the present to be. On that two observations arise. If the exercise of such a power can be regarded as incidental to the objects of a limited company, there seems to be no need for giving the power in express terms either in the memorandum or in the articles. Every company must have it. Every company may exercise it in a proper case. In the next place, whatever may be thought of the special circumstances to be found in *In re Dronfield Silkstone Coal Co.*, there are no special circumstances here. It was said that the company was a family company. But a family company, whatever the expression means, does not limit its trading to the family circle. If it takes the benefit of the Act it is bound by the Act as much as any other company. It can have no special privilege or immunity. It was said that the board did not want Whitworth's shares to be sold to outsiders, or put on the market. Unfortunately there was nothing special in that. That was part of the regular practice of the company, a practice which became more and more confirmed as the company's affairs became more and more embarrassed. The company's balance-sheets for the last few years of its existence are in evidence. On the one side, among the debit items, they show the amount due to the company's bankers; on the other side, under the head of "shares purchased," they show the amount spent by the company in the purchase of its own shares. The figures are instructive. In December, 1880, the company owed its bankers, who were secured creditors, £20,202. Up to that date, from its commencement in 1865, it had spent £16,202 in the purchase of its own shares. By December, 1883, the debt to the bankers had increased to £30,490, and the sum spent in the purchase of its shares amounted to £32,935. By means of these purchases that large sum, more than one-fifth of the nominal capital of the company, had been withdrawn from the fund to which, as Cotton, L.J., says, the creditors have a right to look. In 1884 the company went into liquidation, and the creditors are unpaid.

In the face of the figures to which I have referred, Mr. Romer, who argued the case for the respondents with extreme ability and ingenuity, hesitated to maintain that the particular purchase was incidental to the objects of the company. But he urged that the vendors had nothing to do with that; they were not concerned with the management of the company. It was enough for his argument if it were conceded that the purchase of its own shares might be incidental to the objects for which the company was formed. Your lordships then asked in what case and under what circumstances such a purchase could be said to be incidental to the objects of a limited company? In answer to that question the learned counsel not unnaturally turned to *In re Dronfield Silkstone Coal Co.*, and suggested that at any rate it might be so when the power was used as an incident of domestic management to buy out shareholders whose continuance in the company was undesirable. That was the way in which the proposition was put in *The Dronfield case*, where matters had come to a deadlock. But, I would ask, is it possible to suggest anything more dangerous to the welfare of companies and the security of their creditors than such a doctrine? Who are the shareholders whose continuance in a company the company or its executive consider undesirable? Why, shareholders who quarrel with the policy of the board, and wish to turn the directors out; shareholders who ask questions which it may not be convenient to answer; shareholders who want information which the directors think it prudent to withhold. Can it be contended that when the policy of directors is assailed they may spend the capital of the company in keeping themselves in power, or in purchasing the retirement of inquisitive and troublesome critics? I took the liberty during the argument of referring to a case which is reported under the name of *Harben* v. *Phillips*, 31 W. R. 173, 23 Ch. D. 14. It was the case of a large shipping company in which the shareholders were divided into two hostile camps. One party, with the old directors at their head, wished to make London the port of departure for their fleet. The other party were determined that the business should remain at Southampton. Both sides were perfectly honest, each was fully convinced that the company would be ruined if the view of their opponents prevailed. Could it be suggested that in such a case directors might lawfully employ the company's funds in buying up a sufficient number of shares to silence opposition? or is the purchase allowable only where the undesirable shareholder stands alone, and the other members are all of one mind? In the latter case the action of the directors may not be open to misconstruction; but still the purchase would not be "a mere domestic matter," as it was termed by James, L.J., in *In re Dronfield Silkstone Coal Co.* It must involve the employment of funds which have been dedicated to other purposes, and the use or misuse of which concerns other persons besides the shareholders. Nor can it be considered incidental to the objects

of the company merely because it may be very convenient. After all, the inconvenience sought to be avoided arises either from restrictions which Parliament has thought right to impose, or from the common misfortune of having to pay for what one wants out of one's own purse when there is no other way of getting it. If the capital proposed to be expended in the purchase of its shares "is in excess of the wants of the company," the transaction may be carried out under the provisions of the Acts to which I shall have presently to refer. If the capital of the company is not in excess of the company's wants, it certainly ought not to be diverted from its proper objects. But even then there is no reason why there should be a deadlock. The end in view may still be attained by means to which no exception can be taken. If shareholders think it worth while to spend money for the sake of getting rid of a troublesome partner who is willing to sell, they may put their hands in their own pockets and buy him out, though they cannot draw on a fund in which others as well as themselves are interested. That, I think, is the law, and that is the good sense of the matter.

There remains, however, a more serious objection still. It seems to me that if a power to purchase its own shares were found in the memorandum of association of a limited company it would necessarily be void. There are two conditions of the memorandum—the condition defining the objects of the company and the condition defining its capital—one or both of which would be affected by such a power. It must, therefore, be considered in connection with each. Suppose the dealing in its own shares were stated as an object for which a company was proposed to be established, could it be said that the subscribers were associated for a "lawful purpose" within the meaning of section 6 of the Act of 1862? If it were the only object of the company no one would say so. Does the purpose of the association become lawful if legitimate objects are combined with an object which is not legitimate? It is significant that the Stock Exchange will not grant a settling day or allow a quotation to any company which purports to have the power of buying in its own shares. But let me suppose a case where the purchase of its own shares is not one of the objects of the company, properly so called, but a case where the subscribers to the memorandum think that the power of purchasing its own shares might be useful in the management of the company if it were permissible by law. Then it seems to me that one way of trying whether it is permissible or not would be to read it into the memorandum in connection with the condition which states what the capital is to be. Let me try it here in that way, using the very language of Cotton, L.J., who thought the power in the present case valid because it was only "a power to authorize the board, whenever they thought it desirable for the purposes of the company, to buy the shares." The condition would then run thus: "The capital of the company is £150,000 in 15,000 shares of £10 each; but the board may buy back shares whenever they think it desirable for the purposes of the company to do so." It seems to me that a condition so qualified would be repugnant and contradictory to itself. At any rate, the qualification would have the effect of reducing one of the statutory conditions of the memorandum to an empty form.

So far I have not relied upon the Acts of 1867 and 1877, which are to be construed as one with the Act of 1862, because I think the question is clear on the earlier Act; but I may say that the Act of 1867, as explained by the Act of 1877, seems to prohibit a company from purchasing its own shares except under certain stringent conditions. When Parliament sanctions the doing of a thing under certain conditions and with certain restrictions it must be taken that the thing is prohibited unless the prescribed conditions and restrictions are observed. Now the Act of 1862 makes no provision for reduction of capital. The Act of 1867 allows a limited company to reduce its capital under conditions which carefully protect the interests of creditors. The Act of 1877 explains that the power to reduce capital includes a power "to pay off any capital which may be in excess of the wants of the company," and it dispenses with some of the prescribed conditions when the reduction does not involve either the diminution of any liability in respect of unpaid capital or "the payment to any shareholder of any paid-up capital." It follows that if the operation be effected by payment of capital to any one shareholder all the prescribed conditions must be followed. Payment of capital to any one shareholder is just as much a reduction of capital and just as detrimental to the interests of creditors as the payment of the same amount among all the shareholders rateably. It is none the less a payment off of capital within the meaning of the Act of 1867, as explained by the Act of 1877, because the shareholder to whom the payment is made renounces in return the right to participate in the joint stock of the company.

One word with regard to powers of forfeiture and surrender of shares, which were referred to in argument as affording some support to the views of the respondents. Forfeiture is contemplated by the Act of 1862; it is mentioned in section 26; every company is to return to the Registrar of Joint-Stock Companies once a year "the total amount of shares forfeited." There can be no question as to the power of a company in a proper case to forfeit shares. Surrender of shares stands on a different footing. It is not mentioned in the Companies Acts, but I conceive there can be no objection to the surrender of shares which are liable to forfeiture. A surrender of shares in return for money paid by the company is a sale, and open to the same objections as a sale, whatever expression may be used to describe or disguise the transaction.

If you agree in the result at which I have arrived you will prevent a distinction being set up between the powers of statutory corporations governed by the Companies Acts and the powers of those governed by the Companies Clauses Acts for which, as it appears to me, it would be difficult to find any foundation in reason. In the Companies Clauses Consolidation Act, 1845, provision is made for forfeiture, and for forfeiture only. By the Companies Clauses Act, 1863, companies are authorized to accept surrenders of shares not fully paid up; but it is expressly enacted that "the company shall not pay or refund to any shareholder any sum of money for or in respect of the cancellation or surrender of any share." It has never been suggested, so far as I am aware, that a company governed by the Companies Clauses Acts can purchase its own shares. Your lordships have held that the principles which were laid down in *Ashbury Railway Carriage and Iron Co.* v. *Riche*, as to the limit of the powers of incorporated companies, apply with equal force to companies governed by the Companies Acts and to companies incorporated by special Act of Parliament. It would be a singular thing if your lordships were compelled to hold that one class of companies can purchase its own shares while the other is prohibited from so doing.

It is necessary to say a few words with regard to the decision of the Court of Appeal in *In re Dronfield Silkstone Coal Co.* Much reliance, of course, was placed on that decision, and your lordships were warned against the danger of disturbing its authority, having regard to the time which has elapsed since it was pronounced, and to the probability of its having been acted upon to a considerable extent. So far as my experience goes that decision has never been recognized in the profession as an authority for the general proposition that a limited company may purchase its own shares; and I am confirmed in this view by the criticisms on the case to be found in Mr. Buckley's well-known work, and in the notes in Mr. Palmer's excellent collection of precedents.

I do not think that your lordships' judgment in the present case will touch the decision in *In re Dronfield Silkstone Coal Co.*, though it will, of course, displace much of the reasoning on which that case was decided. If I may respectfully say so, though I agree with the reasoning of Jessel, M.R., on the main point, still I think the decision of the Court of Appeal was right. It seems to me that it may be supported on very simple grounds. Mr. Ward's name was not on the register when the company was ordered to be wound up. To make him a contributory it was therefore necessary to rectify the register. After winding up, the court has that power under sections 35 and 98. But it is a judicial power, as it has been called, and it is to be exercised by the court, to use the language of section 35, "if satisfied of the justice of the case." Those are not mere idle words. They mean, I think, what they say. Although they have been sometimes overlooked, Lord Cairns, I may observe, relied upon them in *In re Sichel*, 16 W. R. 292, L. R. 3 Ch. 119, as showing that the court is bound to go into all the circumstances of the case, and to consider what equity the applicant has to call for its interposition. Now the arrangement under which Ward retired was an honest arrangement. It was in accordance with a provision of the articles which had never been determined to be invalid. It was expressly sanctioned at an extraordinary general meeting, at which all the shareholders were present with the exception of the holder or holders of eleven shares out of 1,600. Ward's name was off the register for seven years. During part of that time the company had been extremely prosperous, and all the shareholders who remained in the company had received dividends largely increased by reason of Ward's retirement. Moreover, there was no creditor whose debt was incurred while Ward was a shareholder, or who had been induced to trust the company by having Ward's name held out as a member. The power to make a person who is not on the register contribute to debts when the company is wound up is a power given by statute. The same statute requires the court, before exercising the power, to be satisfied of the justice of the case. In *In re Dronfield Silkstone Coal Co.* the liquidator, as representing shareholders, had no equity; he had none as representing creditors. It would be a strange travesty of justice to compel a person to pay debts with which he has nothing to do at the instance of an applicant who has no equity to set the court in motion.

The present case is wholly different from *In re Dronfield Silkstone Coal Co.* There it was sought to undo a transaction which could not be undone altogether so as to restore the parties to their original position and which could not be undone at all without committing injustice. Here the applicants are seeking to enforce against the company a contract which has not yet been fully performed and which was beyond the powers of the company. Under these circumstances the application ought, I think, to have been refused by the Court of Appeal as it was by the Vice-Chancellor.

For these reasons I am of opinion that the judgment of the Court of Appeal should be reversed, and the appeal allowed, with costs.

Order appealed from reversed; order of the Vice-Chancellor of Lancaster restored; the respondents to pay to the appellants the costs in the Court of Appeal and in this House, and to repay to the appellants any moneys and costs received from them.

Solicitors for the appellants, *Gregory, Rowcliffes, & Co.*, for *Addleshaw & Warburton*, Manchester.

Solicitors for the respondents, *Marsland, Hewitt, & Everitt*, for *Grundy & Lamb*, Manchester.

Court of Appeal.

From Q. B. Div. Dec. 9.

Weldon v. Maples and Others. (a.)

Practice—Appeal—Security for costs—Special circumstances—Abuse of process of the court—R. S. C., 1883, *ord.* 58, *r.* 15.

An appellant may be ordered to give security for the costs of an appeal where a primâ facie *case of abuse of the process of the court has been made out.*

Application by the defendants for an order that the plaintiff should give security for the costs of an appeal from an order of the Divisional Court (Stephen and Charles, JJ.), affirming an order of the master and judge in chambers striking out the statement of claim and dismissing the action.

The affidavit filed in support of the application is fully set out in the judgment of Bowen, L.J.

J. Digby, for the defendants, relied upon two grounds—the alleged poverty of the plaintiff, and that the appeal was an abuse of the process of the court.

He cited *Harlock* v. *Ashberry*, 30 W. R. 112, 19 Ch. D. 84; *Usill* v. *Brearley*, 3 C. P. D. 206; *Metropolitan Bank* v. *Pooley*, 33 W. R. 709, 10 App. Cas. 210; *Waddell* v. *Blockey*, 27 W. R. 233, 10 Ch. D. 416; *Grepe* v. *Loam*, 32 Solicitors' Journal, 23.

The plaintiff in person.

Cur. adv. vult.

Dec. 9.—Bowen, L.J.—This case is of some importance, because it goes beyond the ordinary case in which security for the costs of an appeal can generally be obtained. As a general rule security for costs is obtained upon an affidavit showing that the appellant has no means of paying the costs if the appeal fails. The affidavit here falls short of that. But the order which we have to apply is ord. 58, r. 15, which states that "such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal." The rule does not confine cases in which security for costs will be ordered to cases of poverty alone. If there are special circumstances in which the court thinks it just to make the order, the order will be made without regard to the suggested limit of poverty. It seems to me that in the present case there is this ground which constitutes a special circumstance—namely, that a *primâ facie* case has been made out of abuse of the process of the court. I have carefully gone through the affidavit which states the whole story. I do not go into the merits of the case, with which we have nothing to do. The question, to my mind, is whether the plaintiff is not *primâ facie* abusing the process of the court and threatening not to pay the costs if she fails in the appeal.

Now, in 1883, the plaintiff brought an action against Sir Henry de Bathe, and Sir Henry de Bathe is entitled, under various orders of the court, to costs against the plaintiff, which have been taxed at £126 16s. 5d. There have also been eighteen different summonses or applications by the plaintiff dismissed in that action, in respect of which about £40 is still owing to Sir Henry de Bathe for costs. On the 8th of July, 1887, the Court of Appeal in that action ordered the plaintiff to give security for the costs of three appeals. In 1887 the plaintiff also brought an action against Sir Henry de Bathe jointly with her husband, and this action was dismissed by order of the master as frivolous, whose decision was affirmed by the judge at chambers and the

(a.) Reported by W. F. Barry, Esq., Barrister-at-Law.

Divisional Court. The plaintiff appealed from that order, and the Court of Appeal, on the 8th of July, 1887, ordered the plaintiff to give security for costs in respect of that appeal.

The plaintiff also brought an action in 1887 against Messrs. Maples, Teesdale, & Co., the solicitors for Sir Henry de Bathe, against three of their clerks, and against Sir Henry de Bathe. This action was based upon allegations of perjury said to have been committed in the previous action by the various defendants. On the 6th of July, 1887, this action was dismissed by the master as frivolous, and upon appeal the judge in chambers also considered that the statement of claim disclosed no real cause of action, but offered to allow the plaintiff to amend her claim, which she refused to do, and the judge thereupon dismissed the appeal. The Divisional Court affirmed this order. The costs due to the defendants in respect of that action were taxed at £26 9s. 6d.

The plaintiff has not paid any of these costs.*

Later in the same year the plaintiff began a fresh action against the same defendants. In this action the master ordered the statement of claim to be struck out and the action dismissed as frivolous. The plaintiff appealed, and this order was affirmed by the judge at chambers and the Divisional Court. The plaintiff is now appealing to this court from that order. The claim is substantially the same as in the former action against the same defendants which was dismissed as frivolous. The above facts show a strong *primâ facie* case of abuse of the process of the court. I say *primâ facie* because we have not now to decide whether or not the action is frivolous. Furthermore, it appears from the affidavit that the plaintiff has announced her intention of not paying any costs if she fails. Upon those two sets of facts I apply the powers vested in us by ord. 58, r. 15. The court ought to protect parties against the abuse or threatened abuse of the process of the court. One word more as to a suggestion that was thrown out during the course of the argument—namely, that execution ought to have been issued before the present application was made. That does not appear to me to be the true view to take of the matter, for the court will not compel a party to take such a harsh proceeding as to put in execution before making the application. We think, therefore, that the plaintiff must find security for £10.

FRY, L.J.—I entirely agree.

Lord ESHER, M.R., concurred.

Application granted.

Solicitors for the defendants, *Maples, Teesdale, & Co.*

* The affidavit, after stating the above facts, proceeded (so far as material) as follows:—

10. "The plaintiff has not paid any of the above-mentioned costs, although such as have been taxed and ascertained have been demanded of her; neither has she given security for the costs of her appeals as ordered."

12. "The plaintiff has stated on oath that she is without any settlement and wholly unprovided for, and that she has not the remotest intention of paying costs so as aforesaid found due and ordered to be paid by her to the defendants. She further deposes that she will be made a bankrupt sooner than pay the defendant, Sir H. de Bathe, one shilling, and has stated in open court that she has not the means to pay the said costs."

High Court of Justice.

Chan. Div. Kay, J. — Dec. 13, 14.

BROWN v. ALABASTER. (a.)

Right of way—Implied grant—Way formed during unity of possession—Grant of part of tenement—Way convenient, but not of necessity.

Where, during unity of possession, a particular and defined way is formed and used over property which is afterwards severed and granted by the owner to different persons, the right of using the way as it is then used may pass by implication, although it be not a way of necessity, and although the general words of the conveyance are not sufficient to pass such right.

An owner of land erected three houses thereon facing a road, with gardens at the back. Behind these ran a way which gave access from the gardens of two of the houses to a side road, which ran at right angles to the front road on the other side of the third house. The owner assigned to the defendant the plots of land with the two houses thereon, "with their rights, easements, and appurtenances," and afterwards assigned to the plaintiff the third plot, the dimensions of which comprised so much of the way as lay between the two other plots and the side road. The gardens of the defendant's houses could also be reached from the road in front by two passages, but these were unsuitable for carrying away rubbish, &c., from the gardens. The plaintiff disputed the defendant's right to use the way over his land to the side road.

Held, that the defendant was not entitled to this as a way of necessity, but that the right of using the way passed to him by implied grant from the owner, although the general words in the assignment to him were not sufficient to pass such right.

Trial of action.

W. Letts, being possessed for a term of years of a plot of land situate at the corner of Augusta-road and Park-road, at Moseley, in the parish of King's Norton, Worcestershire, erected thereon three houses facing on Park-road. One of these, called "Normanhurst," which belonged to the plaintiff, was situate at the angle formed by the two roads. The house next to it was called "Cottisbrook," and beyond it a third, called "Westbourne." Both these houses belonged to the defendant. The three plots of land on which the houses respectively stood were in the shape of a long parallelogram, and each of the houses had a garden at the back. The main entrances to the houses were from Park-road, but both Cottisbrook and Westbourne had also entrances leading to the house from the road by a passage which ran along the side of each house, that to Cottisbrook running between it and Normanhurst, and that to Westbourne running along its further side. These passages ended in a *cul-de-sac*, and then turned inwards at right angles, passing through a portion of the buildings, and thus led into the gardens at the back. They were four feet wide, paved with encaustic tiles, and were approached from Park-road by one step, with two steps of descent into the gardens. They were closed with doors at each end, and, at their passage through the buildings, they had doors on the right and left hand, which communicated with the hall on the one side and with the offices on the other.

There was also another means of access to the gardens of Cottisbrook and Westbourne, as to which the action arose, through a way which ran parallel to Park-road along the plot of land at the lower end of the gardens into Augusta-road. It was walled in, and had a door at the

(a.) Reported by H. F. AMEDROZ, Esq., Barrister-at-Law.

road, and also two doors in the wall which gave access to the gardens of Cottisbrook and Westbourne.

The assignments of these properties by Letts and his mortgagees to the defendant was dated the 14th of December, 1878, and the pieces of land were thereby expressed to be assigned "together with the two messuages or dwelling-houses erected thereon, with their rights, easements, and appurtenances."

The plaintiff derived his title to Normanhurst under an indenture of the 13th of November, 1879, by which Letts assigned that piece of land and the messuage thereon to the plaintiff's vendor. The parcels were therein described as those comprised in the original lease of that portion of the land to Letts, dated the the 5th of October, 1877, in which the piece of land was described as being of a certain length on each side, and as containing so many square yards. These dimensions included so much of the site of the way behind the gardens as lay between Augusta-road and the opposite limit of the Normanhurst property. And the indenture of the 13th of November, 1879, contained no reservation by Letts of any right of way over the same. The way had been formed and existed in its present state prior to either of the above assignments by Letts, and had been used by the defendant since he acquired his two houses. The plaintiff disputed his right of using the way, and brought this action, claiming a declaration that the defendant was not entitled, as against him, to any right of way from or to his houses over or across his land to or from Augusta-road, and that he, his agents and servants, might be restrained from passing over or otherwise trespassing upon the plaintiff's land.

A surveyor and house agent, who was called on behalf of the plaintiff to prove a plan of the properties, said, in cross-examination, that in his opinion the passages to the gardens of Cottisbrook and Westbourne from Park-road were unsuitable for the carrying away of rubbish, &c., from the gardens, and that the use of the way at the back of the gardens was convenient for the occupiers of those two houses.

Methold, for the plaintiff.—The assignment of the 14th of December, 1878, contained no words sufficient to pass this right of way: *James* v. *Plant*, 4 Ad. & El. 749, 5 B. & Ad. 791; and it is not a way of necessity, but only of convenience, for the gardens can be reached by the passage from Park-road: *Pheysey* v. *Vicary*, 16 M. & W. 484; *Gayford* v. *Moffatt*, L. R. 4 Ch. 133, 17 W. R. Ch. Dig. 42. [KAY, J.—Jessel, M.R., referring to this case in *Corporation of London* v. *Riggs*, 28 W. R. 610, 13 Ch. D. 798, said that it was obvious Lord Cairns thought a way of necessity meant a way suitable for the user of the premises. Can these gardens be suitably used without this way?] The defendant can alter the nature of the passage to Park-road. A way of necessity is not a defined way, and the grantor has the right of marking its course: *Bolton* v. *Bolton*, 11 Ch. D. 968, 27 W. R. Dig. 230.

Marten, Q.C., and *Horace Browne*, for the defendant.—The evidence shows that this is a way of necessity. But, as it was a clear formed way, it passed by implied grant under the assignment to the defendant: *Pearson* v. *Spencer*, 11 W. R. 471, 3 B. & S. 76; *Hinchliffe* v. *Earl of Kinnoul*, 5 Bing. N. C. 1. It would pass by general words: *Langley* v. *Hammond*, 16 W. R. 937, L. R. 3 Ex. 161: *Bayley* v. *Great Western Railway*, 26 Ch. D. 434, 32 W. R. Dig. 227. A grant of part of a tenement carries all continuous and apparent easements, or *quasi*-easements, necessary for its reasonable enjoyment: *Wheeldon* v. *Burrows*, 28 W. R. 196, 12 Ch. D. 31; *Ford* v. *Metropolitan Railway Co.*, 34 W. R. 426, 17 Q. B. D. 12.

They also referred to *Palmer* v. *Fletcher*, 1 Lev. 122; *Clarke* v. *Cogge*, Cro. Jac. 170; *Compton* v. *Richards*, 1 Pr. 27; *Pyer* v. *Carter*, 5 W. R. 371, 1 H. & N. 916; and *Russell* v. *Watts*, 32 W. R. 621, 25 Ch. D. 559; on app., 34 W. R. 277, 10 App. Cas. 590.

Methold, in reply.—A right of way is not a continuous and apparent easement: Gale on Easements, 5th ed., p. 25. A way of necessity is limited to what the necessity requires: *Holmes* v. *Goring*, 2 Bing. 76; *Proctor* v. *Hodgson*, 10 Ex. 828, 2 W. R. C. L. Dig. 218; *Dodd* v. *Burchell*, 1 H. & C. 113, 11 W. R. C. L. Dig. 50. In *Hinchliffe* v. *Earl of Kinnoul* the jury had found the way to be of necessity.

KAY, J., after stating the facts and describing the position of the properties, went on to say:—The question is whether the indenture of the 14th of December, 1878, passes a right of way from the gardens of Cottisbrook and Westbourne through this passage into Augusta-road. When this assignment was made this right of way was in no sense an easement. The question, therefore, is twofold—(1) was it a way of necessity, and (2) did it pass by implied grant under the assignment? As a way of necessity it would be difficult for the defendant to sustain the right, for a way of necessity is not a right of passing over a defined way, but is merely a direct means of access to a tenement, and it is clearly established that a grantor is entitled to elect what course such a way shall follow. There is no question of any election in this case—the right claimed is to pass over a particular road, which is enough to show that it is not a way of necessity. If it were such a way, then, whether formed or not, a way would have passed with the property. That is to say, if there had been no back doors, and access to the gardens had only been through the tiled passages, in such case if the owners of Cottisbrook and Westbourne were held to be entitled to a way of necessity to their gardens, then the owner of Westbourne would be entitled to a way over both Cottisbrook and Normanhurst and the owner of Cottisbrook to a way over Normanhurst alone. It would be impossible to hold that having already a way to the road in front through the tiled passages, they were also entitled to a way in some direction or other from the gardens to the other road. I am therefore of opinion that this is not a way of necessity.

Then comes the question whether this right of way will pass, as a continuous and apparent easement, by implied grant. It is stated in Gale on Easements that a right of way is not a continuous easement, but no authority is given for the statement. In *Hinchliffe* v. *The Earl of Kinnoul* a lessee claimed a right of way over a passage on one side of his house which communicated with a coal-shoot and with certain pipes for conveying water and soil from the house. These formed part of the tenement, for Tindal, C.J., in giving judgment, says, at p. 24:—"We cannot, therefore, feel any doubt but that, under the description contained in the lease, the coal-shoot and the several pipes passed to the lessee as a constituent part of the messuage or dwelling-house itself."

Now there was in that case another means of approaching the coal shoot over the tenement, but the jury found that the passage was not merely convenient, but necessary, for the use of the coal shoot, and there is this passage in the judgment, at p. 25: "Since, therefore, as it appears to us, the right in question passed to the lessees under the reversionary lease of 1819, as incidental to the enjoyment of that which was the clear and manifest subject-matter of the demise, it becomes unnecessary to consider the question argued at the bar before us, how far the same right might or might not pass to the lessees under the express words used in the lease itself as 'an appurtenant unto the said piece or parcel of ground, messuage, or tenement, erections, buildings, and premises, belonging, or appertaining.' There are strong authorities in the law books to show these words capable of a wider interpretation, and of carrying more than is an appurtenant in the strictly legal sense of that

word, where such interpretation is necessary in order to give that word some operation." And after a reference to the authorities the judgment continues: "But we think it at once sufficient, and at the same time safer, to rely upon the ground on which we have already held that the right claimed by the plaintiff may be supported, and to give no opinion upon this second point." That ground having been stated on p. 24 to be that "upon the facts found in the special verdict such right did pass as a necessary incident to the subject-matter actually demised, although not specially named in the lease. The rule laid down in Plowden's Comm., 16a, is, "that by the grant of anything, *conceditur et id, sine quâ res ipsa haberi non potest.*"

Therefore, in that case the way was really a way of necessity. That decision has often since been commented on and followed.

In *Langley* v. *Hammond* there was a grant of part of certain demised premises, "together with all ways, &c., therewith now used, occupied, and enjoyed," and Lord Bramwell, in giving judgment, said "suppose a house to stand 100 yards from a highway, and to be approached by a road running along the side of a field, used for no other purpose, but only fenced off from the field, which I assume to be the property of the owner of the house. I should wish for time to consider before deciding that on the conveyance of the house the right to use that road, not being a way of necessity, would not pass under such words as these," that is the words "used, occupied, and enjoyed with," which were the words relied on in the case of *James* v. *Plant*. In the later case of *Watts* v. *Kelson*, 19 W. R. 338, L. R. 6 Ch., at p. 174, Mellish, L.J., said "We may also observe that in *Langley* v. *Hammond* Bramwell, B., expressed an opinion, in which we concur, that even in the case of a right of way, if there was a formed road made over the alleged servient tenement, to and for the apparent use of the dominant tenement, a right of way over such road might pass by a conveyance of the dominant tenement with the ordinary general words." This is a mistake, for the words in *Langley* v. *Hammond* were not ordinary, but extraordinary, as they were in *James* v. *Plant*.

In *Pearson* v. *Spencer*, where the owner of a farm had divided it by his will into two portions, and one portion was landlocked, so that it was necessary to pass over the other portion to reach it, and the devisor had, during his life, used a way in a certain direction over that portion, the right to use this way was held to pass by the devise of the landlocked portion. This was distinctly an advance in the doctrine, for it was held not that a way merely passed by the devise but a particular way. In giving judgment Erle, C.J., said:—"We have been much struck with the argument of Mr. Mellish, in which he contended that, if this right of way were taken as a right of way of necessity simply, the way claimed by the defendant could not be maintained; because we are inclined to concur with him that a way of necessity, strictly so called, ends with the necessity for it, and the direction in which the plaintiff says the way ought to go would so end. But we sustain the judgment of the court below on the construction and effect of James Pearson's will taken in connection with the mode in which the premises were enjoyed at the time of the will. The testator had a unity of possession of all this property; he intended to create two distinct farms with two distinct dwelling-houses, and to leave one to the plaintiff and the other to the party under whom the defendant claims. The way claimed by the defendant was the sole approach that was at that time used for the house and farm devised to him. Then the devise of the farm contained, under the circumstances, a devise of a way to it, and we think the way in question passed with that devise. It falls under that class of implied grants where there is no necessity for the right claimed, but where the tenement is so constructed as that parts of it involve a necessary dependence, in order to its enjoyment in the state it is in when devised, upon the adjoining tenement. These are rights which are implied, and we think that the farm devised to the party under whom the defendant claims could not be enjoyed without dependence on the plaintiff's land of a right of way over it in the customary manner." This, then, is a distinct decision of the Court of Exchequer Chamber that a way following a particular and defined route, and which is not a way of necessity, may nevertheless pass by implied grant from an owner who has unity of possession both of the close granted and of the adjoining close.

In the case of *Wheeldon* v. *Burrows* the Court of Appeal drew a distinction between the effect of an implied grant and an implied reservation with regard to the much-contested question as to what rights are so reserved to a vendor; and Thesiger, L.J., in the course of his judgment, which was approved by the rest of the court, uses this language: "We have had a considerable number of cases cited to us, and out of them I think that two propositions may be stated as what I call the general rules governing cases of this kind. The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean *quasi*-easements)"—and this interpretation by means of the term "*quasi*-easements" was needed, because a man can have no easements over his own land —"or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted. The second proposition is that, if the grantor intends to reserve any grant over the tenement granted, it is his duty to reserve it expressly in the grant." That is to say, he draws a distinction between an implied grant and an implied reservation. The point again came before the Court of Appeal in *Bayley* v. *Great Western Railway*. There the railway company had purchased a piece of land on which was a stable, and the property had been conveyed to the company, together with "all rights, members, or appurtenances to the hereditaments belonging or occupied or enjoyed as part, parcel, or member thereof." The vendor had many years previously made a private road from the highway to the stable over his own land for his own convenience, and had used it ever since. The soil of the road was not conveyed to the company, and no express mention of it was made in the conveyance. It was held that a right of way passed to the company under the general words in the conveyance; and Bowen, L.J., in the course of his judgment, said:—"This particular case is not a case of a way of necessity, though I do not say that there might not be ways which would pass by implication as ways of necessity, even if they were only reasonably necessary and not physically necessary." I do not intend to rest my decision in this case on that *dictum*, the way here not being, in my opinion, a way of necessity. But there is another case before the Court of Appeal—*Ford* v. *Metropolitan Railway Co.*—where a house was divided into two blocks, and part of the back block had been demised without any express grant of access thereto. Access was gained through a hall from the street. The railway company, in the exercise of their compulsory powers, removed the hall, and by thus injuring the access to the lessees' rooms lessened their value. It was held that the access through the hall was not a way of necessity, but was in the nature of a continuous and apparent easement which passed under the demise of the rooms, and that the company's interference with this *quasi*-easement was sufficient to give rise to a valid claim for compensation. And this decision did not rest upon the use of any extraordinary words in

the lease, such as "used or enjoyed therewith," but was based on this, that the court, looking at the whole of the surrounding facts and finding a formed way to the rooms existing over the property, held that this constituted a right of access, although there were no special words in the lease referring to it, or any general words which would carry such a right. And it is doubtful whether general words could have any such effect. In *Thompson* v. *Waterlow*, 16 W. R. 686, L. R. 6 Eq. 36, Lord Romilly said that he did not think such words would constitute a grant of a right of way that had not previously existed as a right. This *dictum* was commented on by Lord Blackburn in *Kay* v. *Oxley*, L. R. 10 Q. B. 360, where he says:—"I cannot agree that, upon the construction of words like those in the conveyance here in question, they cannot as a matter of law create a right of way that did not previously exist as a right." I leave this contest of authority as I find it, but it is clearly law that a right of passage over a particular formed way like this is, leading to gates in a wall, part of the demised premises, and without which those gates would be perfectly useless, may pass by implied grant, although in some sense not a continuous and apparent easement, or rather because, being a formed road, it is considered in contemplation of the authorities as so passing in the absence of any general words at all. These gardens, although not absolutely inaccessible, could only be reached through the houses themselves, unless through the gates. That a right of way through these gates was intended to pass by the assignment, and that the owners of Cottisbrook and Westbourne were intended to have the use of this back way is, looking at the facts, beyond all doubt. Then, this not being for all purposes a way of necessity, do I want an express grant? It seems to me that the authorities are clear that an express grant is not needed. I hold, therefore, that the right to use this back way in the same way in which it was used at the date of the deed did pass by implied grant under the indenture of the 14th of December, 1878, and I so decide. The plaintiff seeks a declaration that the defendant is not entitled to use this way to Augusta-road. This I cannot grant. On the contrary, I hold that he is entitled to use the way, and I make a declaration accordingly. The plaintiff must pay the costs of the action.

Action dismissed.

Solicitors, *R. Jenkins*, for *F. Perry*, Birmingham; *Burton, Yeates, Hart, & Burton*, for *E. M. Beloe*, King's Lynn.

Q. B. Div. (Day and Wills, JJ.) March 14.

BECKETT *v.* TASKER.

Married woman—Separate estate—Settlement—Contract during coverture—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *ss.* 1, 5, 19.

By a settlement before the Married Women's Property Act, 1882, *real estate devised to a married woman for her separate use was settled for her separate use without power of anticipation for life, then to her husband for life, then to the children of the marriage, there being none at the date of the settlement. After the Act and during coverture the wife made a promissory note in favour of the plaintiffs, who, after the death of the husband, obtained judgment on the note.*

Held, that the settled estate was not liable to satisfy the judgment.

Appeal from an order of Huddleston, B., refusing to set aside an order of the master appointing a receiver of the rents and profits of a widow's real estate.

By a post-nuptial settlement of the 27th of March, 1882, real estate which had been devised to Mrs. Tasker for her separate use (without any restraint on anticipation) was conveyed to trustees to pay the rents to the wife for life for her separate use without power of anticipation, remainder to the husband for life, remainder to the children of the marriage, of whom there were none at the date of the settlement.

In 1885, while her husband was alive, Mrs. Tasker joined in making a joint and several promissory note.

After his death an action was brought in the Mayor's Court upon the note against the makers.

Judgment was signed by default, and the action having been removed to the Queen's Bench Division an *elegit* was issued.

Mrs. Tasker, having mortgaged the real estate, the return was *nulla bona*.

On Mrs. Tasker's application the Mayor's Court varied the judgment by adding that as regards her the execution upon the judgment "be limited to the separate estate of the defendant not subject to any restraint against anticipation"; and on the plaintiff's application the further words were added, "unless by reason of section 19 of the Married Women's Property Act, 1882, the property shall be liable to such execution notwithstanding such restraint."

The master's order, made *ex parte*, having been affirmed by Huddleston, B., at chambers, Mrs. Tasker appealed.

Seward Brice, Q.C. (*Yelverton* with him), for Mrs. Tasker, cited *Pike* v. *Fitzgibbon*, 29 W. R. 551, 17 Ch. D. 454; *King* v. *Lucas*, 31 W. R. 904, 23 Ch. D. 712; *Draycott* v. *Harrison*, 17 Q. B. D. 147; *In re Shakespear, Deakin* v. *Lakin*, 33 W. R. 744, 30 Ch. D. 169; *Hewison* v. *Negus*, 1 W. R. 262, 16 Beav. 594; and *In re Whitaker, Christian* v. *Whitaker*, 35 W. R. 217, 34 Ch. D. 227.

Harper, for the plaintiffs.

DAY, J.—I am of opinion that the order appointing the receiver must be set aside. It is admitted that, independently of the Act of 1882, and subject to the question as to the validity of the settlement, this property would not have been liable under a contract entered into by the defendant during her coverture. As the law stood before the Act, the death of the husband would not have in any way affected the liability of the wife under such a contract, and I do not think that the law has been altered in this respect by any of the provisions of the Married Women's Property Act, 1882. The effect of section 1, sub-section 4, is, in my judgment, that a contract entered into by a married woman binds not only the separate property she is possessed of at the date of the contract, but also all separate property thereafter acquired during the coverture; but the property in this case is not separate property of which the defendant was possessed at the date of the contract, nor is it separate property which she acquired afterwards during the coverture, and, as she only contracted to be liable in respect of such property, she has not, in my opinion, in any way bound the property which is the subject of this settlement. Then it is said that, this being a settlement of a woman's own property made by herself, the 19th section provides that no such settlement shall have any greater force or validity against her creditors than a like settlement made by a man would have against his creditors; but I do not think that that section affects any settlement made, as this was, before the date of the Act. Neither can I see on the materials before us that this settlement is void as against an execution creditor. The husband took a life estate in the property determinable on his bankruptcy, and consented that on his bankruptcy his interest should cease and go over to the children of the marriage. I am not therefore disposed to say that there was no consideration, so that, without pursuing the subject

farther, I do not think there is anything in the point taken on this part of the case.

WILLS, J.—I am of the same opinion. It is clear that before the Act of 1882 was passed, whenever a married women entered into a contract she only bound the separate estate free from restraint on anticipation which she had at the time the contract was entered into. Before the Act, therefore, as it is not suggested that, assuming the settlement to be good, this property altered its character until the death of the husband, it was clearly not liable for his debt. But it is said that the Act of 1882 has enlarged the remedy of the creditors. I do not think that it is so. It is contended that section 1, sub-section 4, has affected this change, inasmuch as this property, which, during the coverture, was separate property, subject to a restraint on anticipation, ceased on the death of the husband to be subject to that restraint, and became separate property acquired after the date of the contract within the meaning of the sub-section. In my judgment that is not so, because I think that the words apply to married women and not to widows, and apply only to all separate property which the married woman and not the widow may thereafter acquire. The learned counsel for the plaintiffs also says that the 5th section gives a larger right to the creditors. That section provides that every woman married before the commencement of this Act shall be entitled to have and to hold, and to dispose of, as her separate property all real and personal property her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, and it is contended that by the operation of this section, when the periodical payment of income comes due from this property and comes into the hands of the wife, it is immediately liable for the payment of this debt. I do not think that so large a change was contemplated by the Legislature, because, if it were so, this section would practically do away with all restraints upon anticipation, or, at any rate, with the larger part of their value. In my opinion, also, this section is confined to property the title to which accrued after the passing of the Act and does not apply to this property. Then, with respect to the 19th section, I entertain no doubt that the whole of the latter part relates to settlements made after the passing of this Act, and has no operation on settlements which were in existence at the time the Act was passed.

The other part of the argument also presents some difficulty; but on consideration I do not think that this settlement was voluntary. At the time it was effected there were no children of the marriage, and the birth of issue is of the essence of tenancy by the curtesy. The operation, therefore, of the settlement was to give the husband an immediate life estate on the death of the wife, whether there were children of the marriage or not, while he, on the other hand, submitted to the condition that in any case his life estate should cease on bankruptcy, a restraint which would seriously hamper the use of it by him for the purpose of raising money on it. The mere fact that a settlement is voluntary is not enough of itself to make the settlement void under the statute of Elizabeth. It is, however, an important element in determining the question, and it is the only ground upon which the settlement has been attached in this case. It has not been suggested that there was a *de facto* intention to cheat creditors worked out through the machinery of a settlement. As, therefore, I am of opinion that the settlement is not voluntary, the groundwork of the attack upon it, in my opinion, fails, and I think, therefore, that the order appointing a receiver must be set aside.

Appeal allowed.

Solicitor for the appellant, *N. White.*

Solicitor for the respondents, *J. C. Asprey.*

Q. B. Div. (Wills and Grantham, JJ.) Dec. 8.

LANCASTER BURIAL BOARD *v.* M'GOUGH. (*a.*)

Burial board—"Exclusive right of burial"—Burial Acts (16 & 17 Vict. c. 134 incorporating part of 15 & 16 Vict. c. 85)—Glass shade placed on grave by grantee of grave—Removal by board—Right of board to make rules.

Although section 33 of 15 & 16 Vict. c. 85 authorizes a burial board to sell the exclusive right of burial in any part of their burial-ground, this grant does not include the right to place anything on the grave (such as a glass shade) which the board may object to. The board have full jurisdiction, under section 38, to manage, regulate, and control their burial-ground.

This was an appeal by the Lancaster Burial Board against the decision of the judge of the county court of Lancashire holden at Lancaster.

The respondent had obtained damages in the county court from the appellants for removing from a grave in Lancaster Cemetery, the property of the respondent, and converting to their own use a glass shade and galvanized wire guard, the property of the respondent. The respondent had placed the glass shade and other objects on the grave without the permission of the appellants, who had for upwards of ten years declined to admit shades and stands. The appellants removed the same from the grave and placed them elsewhere, which fact they communicated to the respondent.

The grave was in the unconsecrated part of the cemetery. The property which the respondent had in it depended on a grant from the burial board, which granted "unto the said James M'Gough the exclusive right of burial in the grave space, . . . to hold the same, to him, his heirs and assigns, in perpetuity for the purpose of burial, subject, nevertheless, to the payment of the fees or sums reserved by the Burial Acts (16 & 17 Vict. c. 134, incorporating sections 10 to 42, inclusive, of 15 & 16 Vict. c. 85), and also subject to the regulations now in force or which may hereafter be issued with regard to interments in the said cemetery by her Majesty's Secretary of State or by the said board or any other competent authority."

R. O. B. Lane, for the appellants.—The grant to the respondent was for "the exclusive right of burial only." By section 33 of 15 & 16 Vict. c. 85, "any burial board, under such restrictions and conditions as they think proper, may sell the exclusive right of burial . . . in any part of any burial-ground possessed by such board, and also the right of constructing any vault or place of burial, . . . and also the right of erecting and placing any monumental gravestone, tablet, or monumental inscription in such burial ground." Section 38 of the same Act vests the general management, regulation, and control in the burial board. The regulations of the Secretary of State do not prohibit the glass shade and other objects from being placed on the grave, but the same were removed by the board under the justification of their general power to regulate the cemetery. The county court judge assumed that the respondent had a property in the grave beyond the mere right of burial. The objects placed on the grave were unobjectionable as such, but the broken glass from similar objects is very dangerous. The board were clearly within their rights under section 38.

He cited *Matthews* v. *Jeffrey*, 29 W. R. 282, 6 Q. B. D. 291, and *Ashby* v. *Harris*, 16 W. R. 869, L. R. 3 C. P. 523.

Crompton, Q.C., for the respondent.—Flowers would naturally be planted on a grave, and the right to a grave would include the right to place a gravestone over

a.) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

it. If there is any abuse in the character of the emblems there is an appeal to the Ordinary. This grave is in the unconsecrated portion of the cemetery, and there is nothing in the regulations to prevent the shade and other objects from being placed on it. A grant of a right to bury includes a right to the grantee to do all customary acts in respect thereof. The grant is doubtless subject to the rules of the board, but such rules must be reasonable, and the board must be kept under proper control.

He cited *Spooner* v. *Brewster*, 3 Bing. 136.

WILLS, J.—The judgment of the county court judge was wrong. It is true that the right of the board to make rules may or may not lead to abuses, but the question is what did the appellants convey to the grantee. They granted him the "exclusive right of burial" in the grave space, and the grant is confined by those words. I cannot conceive that these words can be extended to include anything else. The right to place glass shades or other things on the grave is not included in this grant. In *Ashby* v. *Harris* the grant was in perpetuity with the right to keep a monument in repair. That case is not an authority to extend the rights of the grantee under the present circumstances. Section 33 of 15 & 16 Vict. c. 85, confers a power on the board to grant a grave for the right of burial only, and the rules of the board contain nothing analogous to the grants in *Ashby* v. *Harris*. *Spooner* v. *Brewster* is not in point.

GRANTHAM, J.—I concur in the judgment of my brother Wills, but I wish to add that the act of the board in removing the shade and other objects must have been very painful to the feelings of the respondent, and I wish that the board had not stretched their rights to such an extent. However, they had the legal right to do so.

Judgment for appellants, with costs; leave to appeal.

Solicitors for the appellants, *Brownlow & Howe*, for *Swainson, Son, & Roper*, Lancaster.

Solicitors for the respondent, *Johnson & Tilly*, Lancaster.

C. C. R. Dec. 10.

REG. v. BECKLEY AND OTHERS. (a.)

Commitment for trial by justices of division other than that in which offence committed—Jervis's Act (11 & 12 *Vict.* c. 42), *s.* 22.

A person charged with an offence committed in one petty sessional division of a county may be committed for trial by the justices acting for any other division of the same county.

At a general court of quarter sessions of the peace in and for the county of Cambridge the defendants had been tried and convicted upon an indictment charging them with conspiracy.

When they were called upon to plead it had been objected by counsel that the indictment ought to be quashed, as the provisions of the Vexatious Indictments Act (22 & 23 Vict. c. 17), s. 1, which, it was conceded, applied to the offence charged in the indictment, had not been complied with.

The offence with which the defendants were charged was committed at Swaffham Prior, in the county of Cambridge, a place within the petty sessional division of Bottisham, in the said county.

The defendants were arrested at various places not within the county upon a warrant, which recited that information had been laid of an offence committed in the parish of Swaffham Prior, and commanded the constables of Cambridgeshire to apprehend the defendants and bring them before the justices at Bottisham.

The justice who signed this warrant resided and usually acted within the petty sessional division of Cambridge, in the said county.

The defendants were, on the 6th of July, remanded by a justice of the peace for the county residing within and usually acting for the said Cambridge division of that county, and ordered by his warrant to be brought up on the 9th of July at the Shire Hall, Chesterton, the place for holding the petty sessions for the division of Cambridge within the said county, and on the said 9th of July the case was partly gone into and they were further remanded until the 16th of July to the same petty sessional division. On the 16th of July further evidence was given on behalf of the prosecution at the petty sessions held at Chesterton aforesaid, when it was for the first time objected on behalf of the defendants that the justices sitting at Chesterton had no jurisdiction to hear and determine a case arising within another petty sessional division—viz., at Bottisham—and that the justices were bound to remand the case for hearing at Bottisham according to the terms of the warrant. The justices overruled the objection, and sitting within the petty sessional division of Cambridge, holden at Chesterton, heard and determined the case and committed the defendants for trial. Of the justices who so heard and determined the case one only was a justice who resided within and occasionally acted within the Bottisham petty sessional division.

It was contended on the part of the defendants that by virtue of 9 Geo. 4, c. 43, s. 6, it was not competent for the justices sitting at the Cambridge petty sessional divisional of Chesterton to hear or determine or to send for trial a case arising within another petty sessional division of the county, and that the justice, in remanding the defendants on the 6th of July to the Cambridge division, was acting without jurisdiction, and that for these reasons the provisions of the Vexatious Indictments Act had not been complied with, consequently that the indictment ought to be quashed.

The chairman overruled the objection and refused to quash the indictment, and the question for this court was whether he was right in law in so holding.

Cooper, for the defendants, submitted the same objection to the commitment as in the court below.—The duty of the committing justice is defined by the 22nd section of Jervis's Act (11 & 12 Vict. c. 42), when a person is charged before him with an offence committed in another place than that in which such justice has jurisdiction. He should, if the evidence is sufficient to put the accused party on trial, "order him to be taken before some justice or justices of the peace in and for the county or place where and near unto the place where the offence is alleged to have been committed." Here the offence was committed within the petty sessional division of Bottisham, the remand to the petty sessional division of Cambridge was irregular and illegal, and the commitment was also illegal. It may be admitted that the justices, being justices for the county, were competent to deal with the case if it had been properly brought before them; but here, by the express terms of the warrant, the defendants were ordered to be taken to the Bottisham Petty Sessions, not to the Cambridge Petty Sessions. The 9 Geo. 4, c. 43, s. 6, defines the jurisdiction of justices at petty sessions, and provides for the determination of all matters within the division.

No counsel appeared for the Crown.

Lord COLERIDGE, C.J.—I am of opinion that this con-

(a.) Reported by R. E. MELSHEIMER, Esq., Barrister-at-Law.

vision was right. The objection is that the offence of conspiracy is, under the Vexatious Indictments Act, one of the offences which are not to be triable at sessions without certain previous authorization, the authorization in this case being the commitment by the justices of the petty sessional division of Cambridge, whereas it is argued that the proper justices to commit for trial would have been the justices habitually acting for the division in or near which the offence was alleged to have been committed. Authority for this contention is attempted to be invoked from an act which is applicable to cases of an offence committed in one county and for which the arrest takes place in another.

This case stands upon quite a different principle, inasmuch as the committing justices have admittedly jurisdiction in the county. Here the offence is committed and everything takes place within the county of Cambridge, and it matters not in what division of the county the offence was committed provided it is not an offence which by any statute is specially directed to be tried by the magistrates acting within that division. It is the first occasion on which this point has been taken, and I am glad it is taken and set at rest by the unanimous decision of this court.

But it is clear that there is nothing in the objection. The committal under the Vexatious Indictments Act has been duly sanctioned by two justices of the county, and he prisoners have been quite properly tried.

POLLOCK, B.—I would add that the argument founded on the 9 Geo. 4, c. 43, s. 6, presupposes that that statute was intended to limit the powers of justices in the county. But from the preamble it is clear that the Act was passed for the regulation of the contemplated new petty sessional divisions. Without express words the law is very jealous not to cut down the authority of magistrates; and I do not in that Act find any express words having the effect contended for. I think the conviction should be affirmed.

MANISTY, J.—I am of the same opinion. It was contended that the 22nd section of Jervis's Act defined, at least by analogy, the duty of the justices in this case. I do not think the case provided for by that Act is in the least analogous: it provides for the case of a person arrested in one county for an offence committed in another. There is no statutory provision whatever for the case of an offence committed in one division of a county and brought for hearing before the justices of another division of the same county.

HAWKINS and A. L. SMITH, JJ., concurred.

Conviction affirmed.

Solicitors for the defendants, *Ellison & Burrows, Cambridge.*

Court of Appeal.

From Q. B. Div. Dec. 7.

In re NEWBOULD. (*a.*)

Solicitor—Remuneration—Taxation of costs—Sale by auction—Scale fee for "conducting sale"—Commission to auctioneer paid by client—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44), *s.* 2—*General Order, August,* 1882, *clause* 2, *schedule* 1, *part* 1; *r.* 11.

A solicitor employed by the vendor in connection with a sale of property is only entitled to be paid in respect of business connected with the sale the scale fees prescribed in part 1 *of schedule* 1 *to the General Order under the Solicitors' Remuneration Act,* 1881.

Therefore, where the sale is by public auction, and the commission to the auctioneer is paid by the vendor, the solicitor is only entitled to be paid the "deducing fee," and is not entitled to be paid remuneration in respect of other business done by him in connection with the sale.

In re Faulkner, ante, *p.* 59, 36 *Ch. D.* 566, *overruled.*

Appeal from a decision of the Divisional Court refusing to order a review of taxation of costs.

In 1886 Mr. Newbould, a solicitor in London, was employed by Mr. Bailward in connection with the sale of certain freehold property in Gloucestershire. Except as to a small part which was sold by private contract, and as to which no question was raised, the property was sold by public auction in fourteen lots, the auctioneer being employed and his commission paid by the vendor, and not by the solicitor. Mr. Newbould (who had not given notice of election, under General Order, clause 6, to be paid otherwise than according to the prescribed scale) delivered his bill of costs, in which he made various charges for writing letters and making certain journeys in connection with the sale, attending and instructing the auctioneer as to the sale, making list of tenants and their holdings to enable the auctioneer to go over the property and prepare for sale, sending to auctioneer copy plan of estate and extract from valuation as to proposed division into lots, perusing and approving posting bill announcing sale as prepared by auctioneer, drawing list of reserve prices for each lot, sending copies of particulars and conditions of sale, attending auctioneer, attending the auction in Gloucestershire, and preparing and getting contracts signed, and receiving deposits. Upon taxation the master allowed the scale fee for "deducing title," but disallowed all these items without going into the propriety of each. Mr. Newbould carried in objections to the disallowance on the ground that the taxing master having decided that Mr. Newbould, as vendor's solicitor, was not entitled to any negotiating or conducting fee, the above charges for work done were fair and reasonable, and could not be said to be covered by the fee for deducing title.

In answer to the objections the taxing master said:—"I have considered the above objections and adhere to the disallowance of the items referred to therein. It appears to me that the principle laid down by Chitty, J., and the Court of Appeal in *In re Field*, 54 L. J. Ch. 661, decides this question."

The Divisional Court (Stephen and Charles, JJ.), affirming the order of the judge in chambers, dismissed a summons to review the taxation.

Mr. Newbould appealed.*

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* General Order, August, 1882, made in pursuance of the Solicitors' Remuneration Act, 1881.

2. The remuneration of a solicitor in respect of busi-

(*a.* Reported by W. F. BARRY, Esq., Barrister-at-Law.

Bowen Rowlands, Q.C., and *F. C. Philips*, for the appellant.—The taxing master only allowed a "deducing fee" and certain out-of-pocket expenses. The solicitor is not entitled to a "conducting fee," as the auctioneer was paid by the client, but he is entitled to charge for work properly done by him in connection with the sale, and for which the auctioneer has not been paid: *In re Faulkner, ante*, p. 59, 36 Ch. D. 566; General Order, clause 2 (*c*), clause 4. The work is not within the scale, and so the solicitor must be paid reasonable remuneration for it. The cases of *In re Field*, 33 W. R. 553, 29 Ch. D. 608, and *In re Emanuel & Simmonds*, 34 W. R. 613, 33 Ch. D. 40, were cases of leases, and the decisions are not applicable to sales.

Cock, Q.C., and *Cyril Dodd*, for the respondent.—*In re Faulkner* is not consistent with the other cases. The scale is intended to include all charges; and if the solicitor was not satisfied with that he might have made a special agreement under clause 6. "Auctioneer's charges" in clause 4 can only mean charges which the solicitor may have had to pay outside the conduct of the sale; they cannot cover these charges.

Bowen Rowlands, Q.C., replied.

Lord ESHER, M.R.—The solicitor in this case was employed in regard to a sale of his client's property. The sale was carried out, and the question for us to determine is, How is the solicitor entitled to be paid in respect of such employment? The remuneration of a solicitor "in respect of business connected with sales" is regulated by the General Order, clause 2 (*a*). He is to be paid the remuneration prescribed in part 1 of schedule 1 to that order. In the case of *In re Field* the Court of Appeal in effect decided that in respect of all business connected with leases the remuneration of the solicitor having the conduct of the business was to be that, and that alone, prescribed in part 2 of schedule 1, and that the solicitor was to be paid in no other way. That view was challenged in argument in *In re Emanuel & Simmonds*, where Mr. Charles says that "Pearson, J., seems to have read *In re Field* as deciding that all business connected with a lease comes within the scale fee, but the case does not decide that." The answer given to that by Cotton, L.J., is that "the remuneration for all business connected with the lease is to be included in the *ad valorem* remuneration." He then goes on:—"To my mind the only question we have here is this: whether in this particular case it can be said that this agreement, or anything in it, is anything but business connected with the lease?" That is the question which we have to settle if the same rule applies to sales as to leases. It is said, however, that the case of a sale is different from the case of a lease. It seems to me, looking at the language of clause 2, that the same interpretation must be given to 2 (*a*) as to 2 (*b*). The language of the two is almost identical. Reading that rule subject to the interpretation placed upon it in those cases, it seems to me that the only question is whether these are charges in respect of business connected with the sale. If that is answered in the affirmative the solicitor is entitled to be paid solely in accordance with the scale in the schedule.

The decision of North, J., in *In re Faulkner* is, no doubt, contrary to this view. North, J., says, "The question, then, is this: the solicitor having done certain work for which, if he had paid the auctioneer himself, he would clearly be entitled to receive the scale fee, is he not to be paid for that work at all because the auctioneer has been paid by the client?" That is the question which he puts. How does he answer it? "I think that case is not provided for by rule 11. The scale fee for 'conducting' does not apply, because the auctioneer has been paid by the client, but that leaves the solicitor entitled to remuneration for doing those parts of the work of 'conducting the sale' for which the auctioneer has not been paid." It seems to me that this last sentence from the word "but" to the end is directly in the teeth of the decisions in the Court of Appeal. I can see no ground for giving a construction to 2 (*a*) different from that given to 2 (*b*). The scale is in each case made applicable in precisely the same words.

The only question remaining is whether this was business connected with the sale. It was scarcely urged that it was not. The solicitor, therefore, is only entitled to be paid according to the scale fees prescribed in part 1 of schedule 1. When he brings himself within the scale, he is to be paid according to the scale; but if he cannot bring himself within the scale, he cannot be paid according to the scale, and so cannot be paid at all. The solicitor has brought himself within the scale as to the "deducing fee"; he has not brought himself within the scale as to the "conducting fee," because the client has paid the commission to the auctioneer. The solicitor, in fine, is only to be paid according to the scale, and only according to that part of the scale within which he can bring himself. We disagree, therefore, with the decision in *In re Faulkner*, and we think that this appeal should be dismissed.

BOWEN, L.J.—I agree, and have nothing to add.

FRY, L.J.—I entirely concur.

Appeal dismissed.

Solicitors, *W. Newbould; Learoyd & James.*

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ness connected with sales, leases . . . . is to be regulated as follows—namely:

(*a*) In respect of sales . . . the remuneration of the solicitor having the conduct of the business . . . is to be that prescribed in part 1 of schedule 1 to this order, &c.

(*b*) In respect of leases . . . the remuneration of the solicitor having the conduct of the business is to be that prescribed in part 2 of schedule 1.

Schedule 1, part 1, prescribes a separate percentage scale of payment to vendor's solicitor "for negotiating a sale of property by private contract," "for conducting a sale of property by public auction, including the conditions of sale," and "for deducing title to freehold, copyhold, or leasehold property, and perusing and completing conveyance (including preparation of contract or conditions of sale, if any)."

Rule 11 in the schedule provides that "the scale for conducting a sale by auction shall apply only to cases where no commission is paid by the client to an auctioneer."

High Court of Justice.

Chan. Div. } Kay, J. } Dec. 6.

In re LORD SUDELEY'S SETTLED ESTATES. (*a*.)

Settled estate—Capital—Rent-charge—Improvements—Drainage—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 21, 22, 25, 28, 33, 44—*Settled Land Act Amendment Act*, 1887 (50 & 51 *Vict. c.* 30), *ss.* 1, 2—*Improvement of Land Act*, 1864 (27 & 28 *Vict. c.* 114), *s.* 66.

On an application for liberty to apply capital in the hands of trustees of settled land in payment of instalments or proportionate repayments of a loan of £2,700 borrowed in 1879 for the improvement of the estate, secure which the estate was charged with repayment

(*a*.) Reported by H. C. ROPER, Esq., Barrister-at-Law.

half-yearly instalments, consisting partly of principal and partly of interest, calculated so as to pay off the whole debt and interest in twenty-five years,

Held, that, inasmuch as the improvements were such as were authorized by the Act of 1882, *the trustees might from time to time apply capital in their hands in payment of such part of the instalments as should consist of capital, but that the tenant for life must keep down the interest.*

Adjourned summons.

This was an application for liberty to apply capital in the redemption or otherwise providing for the payment of a rent-charge under the Settled Land Acts Amendment Act, 1887, s. 1. The summons asked for a declaration that any money now or hereafter in the hands of the trustees of the settlement created by the will of Lord Sudeley (being capital money or money applicable as capital money under the Settled Land Act, 1882) might properly be from time to time applied in payment of instalments or proportionate repayments of a loan of £2,704 due to the Lands Improvement Co.

Under the will the present Lord Sudeley was tenant for life of the estates. On the 15th of May, 1879, the Inclosure Commissioners, in pursuance of the Lands Improvement Co.'s Acts, made an absolute order charging the inheritance of the settled lands with the payment to the company of the yearly sum of £176 13s. payable half-yearly, being a proportionate repayment of the loan of £2,704 for the improvement of the estate with interest at £4 5s. per cent. per annum. The instalments were arranged in the usual form in such a manner that part of the £88 6s. 6d. payable half-yearly represented capital, and the rest represented interest. The first payment consisted of £30 17s. 4d. capital, and £57 9s. 2d. interest, and the payments of capital were increased and those of interest diminished till the last instalment, which would be payable on the 25th of March, 1904, and would consist of £86 9s. 9d. capital and £1 16s. 9d. interest.

Inasmuch as the tenant for life would be entitled to the interest on the capital in the hands of the trustees the proposed payments would not affect the remainderman.

The improvements had been carried out and consisted of drainage works, and Lord Sudeley, who had hitherto paid the whole of the instalments, now asked that in future that portion of them which represented capital might be paid out of capital in the hands of the trustees of the settled land.

Haldane, for the summons.—This is an application under the Act of 1887, and the question is whether payment of the instalments of this rent-charge as they become due is within the words of section 1, "otherwise providing for the payment thereof." Drains are authorized improvements under sections 21 and 25 of the Act of 1882; and under section 28 and section 2 of the Act of 1887 the tenant for life has to repair them. [KAY, J.—Section 66 of the Improvement of Land Act, 1864, says that the tenant for life must keep down rent-charges.] That was the view of the Court of Appeal in *In re Knatchbull's Settled Estate*, 33 W. R. 569, 29 Ch. D. 588, but the Act of 1887 was passed expressly to obviate the effect of that decision. I would ask to have the interest paid out of capital also, and for leave to amend the summons with that object. [KAY, J.—I do not think you can do that. You get the benefit of the discount as it is, if the capital is paid.]

Shebbeare, for the trustees.

KAY, J.—I think it may be done, assuming, of course, that the improvements which have been made are within the Settled Land Act, 1882, and that, the trustees tell me, is the case. That being so, I think the words of the Act of 1887 are sufficient to justify the trustees in applying capital moneys in their hands, or which may come to their hands, in paying such portion of the instalments due to the Lands Improvement Co. as represent capital: but I do not think it would be right for them to pay the interest on the unpaid portion of the loan for the time being. The Act does not seem to apply to interest on the unpaid portion of capital expended on improvements, and I think the tenant for life ought to keep down the interest. The Act of 1887 was not intended for that, and it is going pretty far to relieve the tenant for life from paying the capital expended in such improvements as drainage; because, as everybody knows, you cannot maintain or repair drainpipes, except to a very slight extent, you can only do the work over again when it is exhausted, and that has to be done frequently. However, that is covered by the fact that it is one of the things that may, under section 25 of the Act of 1882, be done out of capital money. I think that the remainderman will not be injured any more than he is intended by the Act to be injured if the trustees pay the money in this way instead of having originally spent a lump sum in drainage.

Summons allowed.

Solicitors, *Young, Jackson, & Beard.*

Chan. Div. Stirling, J. } April 26, 27; May 3, 4; July 26.

In re TRUFORT.

TRAFFORD *v.* BLANC. (*a.*)

Judgment—Foreign judgment—Domicile—Legitimacy according to law of domicile.

Although the parties claiming to be entitled to the estate of a deceased person may not be bound to resort to the tribunal of the country in which the testator was domiciled, and although the courts of this country may be called upon to administer the estate of a deceased person domiciled abroad, and in such case may be bound to ascertain as best they can who, according to the law of the domicile, are entitled to that estate, yet, where the title has been adjudicated upon in the country to the courts of which the question is referable by the law of the domicile, such adjudication is binding, and must be followed by the courts of this country.

A foreign judgment cannot, as between the same parties, be impeached in this country on the ground that it proceeded on a mistake of law.

A foreign judgment binds, notwithstanding the discovery of fresh evidence, for the courts of this country will not either re-hear cases tried by, or hear appeals from, foreign tribunals; and if the judgment of a foreign court is erroneous, the regular mode provided by every system of jurisprudence, of procuring it to be examined and reversed, ought to be followed.

Administration action.

The testator, who died possessed of personal property in England, Switzerland, Italy, and elsewhere, was by birth an Englishman. He died in France, where he was domiciled, and (as Stirling, J., found) a Swiss by nationality.

According to the French law (that of his domicile), the law to be applied in dealing with the right to his personal property was that of his nationality, and by the effect of the treaty of November 2, 1869, between France and Switzerland, it had in the present case (that of a Swiss by nationality dying in France) to be applied by the Swiss tribunals.

(*a.*) Reported by HENRY T. LAW, Esq., Barrister-at-Law.

Under the Swiss law the plaintiff, if he were, as he alleged, the testator's only legitimate child, was entitled to nine-tenths of his succession. The defendant, who claimed under the will, was concerned to dispute the plaintiff's legitimacy.

Litigation relating to the plaintiff's legitimacy between the plaintiff and the defendant commenced in Switzerland in 1879, and proceeded with varying success until, on February 5, 1884, the District Court of Zurich decided in favour of the plaintiff's legitimacy. It appears that on this occasion the court invoked the aid of the provisions of the French law, because the Swiss and cantonal laws contained no directions as to whether the proof of legitimate birth could be afforded by any other means than the civil registers, which registers gave no elucidation of the legitimacy of the birth in the present case, no marriage certificate having been discovered.

By the Code Civil, Art. 197, it is provided that where there exist children of two deceased persons who lived publicly as husband and wife, the legitimacy of the children cannot be disputed merely on the ground of the non-production of the act of celebration of marriage in cases where this legitimacy is proved by the actual enjoyment of a *status* which is not contradicted by the *acte de naissance*.

The plaintiff's *acte de naissance* at Naples referred to a declaration by the testator stating the plaintiff to be born to him by the plaintiff's mother, the testator's lawful wife. There was put in a declaration of absence as to the mother of the plaintiff under Code Civil, 115 and 119, which the court accepted in lieu of proof of her death, and there was proof of the testator and the plaintiff's mother having lived openly as husband and wife in 1819—1821.

On May 19, 1885, the Zurich Court of Appeal went into some further evidence, and decided that the question of the "family rights" or *status* of the plaintiff was to be decided according to English law, and that, according to that law, a presumption of legitimacy arose from the parents of a child (as was the fact) when recording the birth in the registry of births or of baptisms describing the child as lawful and themselves as husband and wife, so that the burthen of proof does not lie upon the child to prove his legitimacy, but upon the party who disputes it to prove his illegitimacy. Starting from this basis, the court came to the conclusion that certain entries in the Neapolitan Registers of Births and Baptisms afforded a sufficient proof of the legitimacy of the plaintiff, subject to evidence to the contrary being given, and, the defendant having failed to adduce such proof to the contrary, the court affirmed the decision of the Court of First Instance in favour of the plaintiff's legitimacy. Subsequent proceedings failed to disturb this decision, including an attempt to obtain an alteration of the judgment, in view of the discovery of proof of the marriage of the mother of the plaintiff, in 1825, during the lifetime of the testator, who gave her on that occasion a dowry of 1,000 ducats.

The testator married in 1840 Carolina Shulthess; the plaintiff's mother, as was discovered later, died in 1864.

The plaintiff, by his statement of claim, alleged that the judgment of the Zurich Court of Appeal of the 19th of May, 1885, was a judgment *in rem* binding on the defendant and conclusive in this country, and asked to have it enforced accordingly.

This report deals only with the question as to how far the Swiss judgments were enforceable in this country.

Everitt, Q.C., and *Curtis Price*, for the plaintiff.—The testator was a Swiss subject. The Swiss judgments are binding here by the comity of Courts. By analogy to the English law on this point they are binding, although they may have been given upon a mistaken view of the English law. *Castrique* v. *Imrie*, L. R. 4 H. L. 414, 18 W. R. H. L. Dig. 6, 7; *Godard* v. *Gray*, 19 W. R. 348, L. R. 6 Q. B. 139. It appears from the evidence that the parties submitted to the jurisdiction of that court. If the matter were *res integra* the court would have to ascertain the law of France, the country of the testator's domicile and then it would be informed that the rights of succession were regulated according to the Swiss law and by the Swiss tribunals, the law of the testator's nationality: *Doglioni* v. *Crispin*, L. R. 1 H. L. 301, 15 W. R. H. L. Dig. 8. The judgment of the Swiss court as to the legitimacy relates to *status*, and is a judgment *in rem*. It is therefore binding everywhere: *Niboyet* v. *Niboyet*, 27 W. R. 203, 4 P. D. 1. There is ample evidence of the plaintiff's legitimacy: *Slaney* v. *Wade*, 1 My. & Cr. 338, 357; *Monkton* v. *Attorney-General*, 2 Russ. & My. 147; *Lord Braybroke* v. *Inskip*, 8 Ves. 416, 429: *Piers* v. *Piers*, 2 H. L. Cas. 331; *De Thoren* v. *Attorney-General*, 1 App. Cas. 686, 25 W. R. Dig. 427; *Lyle* v. *Ellwood*, 23 W. R. 157, L. R. 19 Eq. 98; even if the testator thought that he remained a British subject, that would not prevent him from acquiring a foreign domicile: *Whicker* v. *Hume*, 13 Beav. 366. The matter is *res judicata*, and no fresh evidence can be received: *In re May, Ex parte House*, 32 W. R. 337, 25 Ch. D. 231; *Marriott* v. *Hampton*, 7 T. R. 269. The English courts cannot examine and review the judgment of a foreign court: *Henderson* v. *Henderson*, 6 Q. B. 288; *Geyer* v. *Aguilar*, 7 T. R. 681; *De Cosse Brissac* v. *Rathbone*, 6 H. & N. 301, 9 W. R. C. L. Dig. 37; *Castrique* v. *Behrens*, 30 L. J. Q. B. 163, 9 W. R. C. L. Dig. 37; *Messina* v. *Petrococchino*, 20 W. R. 451, L. R. 4 P. C. 144. This court is not a court to hear appeals from the courts of Zurich if the decisions of those courts are wrong, they ought to be reviewed by the tribunals of that country.

Graham Hastings, Q.C., and *Nasmith*, for the defendant.—The testator died in France a British subject, and his estate ought to be administered according to English law, and the plaintiff is excluded by the will. The Swiss courts confessed themselves incompetent to deal with the matter, and they had recourse to French law. They, therefore, had no jurisdiction, and there is no judgment of a competent court to enforce. The testator considered that the plaintiff's mother was not his wife, as he subsequently married, and in favour of that subsequent marriage being a valid marriage there is both cohabitation and interest, and against it there is only a rumour of a former marriage. A case of this kind must be looked at altogether, and according to all the circumstances: *Andrewes* v. *Uthwatt*, 2 *Times* L. R. 895. All the facts should have been before the foreign court: *Castrique* v. *Imrie*. The evidence came before the courtpiecemeal. If it had all come before the court at one time, is it not probable that the result would have been different?: *Godard* v. *Gray*. Our courts have never accepted the judgment of a foreign court on a question of the validity of a marriage, which is the real question here: *Sinclair* v. *Sinclair*, 1 Hagg. Cons. Rep. 294, 297. Not every decision *in rem* is binding: *De Mora* v. *Concha*, 33 W. R. 846, 29 Ch. D. 268; *Abouloff* v. *Oppenheim*, 31 W. R. 429, 10 Q. B. D. 295. The testator never having acquired any other nationality, it remained British: Phillimore's International Law, 3rd ed., vol. 1, p. 183, 446; Wheaton's International Law, 2nd ed., p. 109.

Lambert, for the Trafford family.

Everitt, Q.C., in reply, referred to *In re Goodman's Trusts*, 29 W. R. 586, 17 Ch. D. 266; *Hervey* v. *Hervey*, 2 Wms. Bl. 877; Wheaton's International Law, 2nd ed., pp. 105, 106; *Goodman* v. *Goodman*, 28 L. J. Ch. 745, 7 W. R. Ch. Dig. 38.

Cur. adv. vult.

July 26.—Stirling, J. [after referring to *Enohin* v. *Wylie*, 10 W. R. 467, 10 H. L. Cas. at p. 13; *Ewing* v. *Orr Ewing*, 10 App. Cas. 502; and *Doglioni* v. *Crispin* continued]:—The rule to be extracted from these cases appears to be this, that although the parties claiming to be entitled to the estate of a deceased person may not be bound to resort to the tribunal of the country in which the testator was domiciled, and although the courts of this country may be called upon to administer the estate of a deceased person domiciled abroad, and in such case may be bound to ascertain as best they can who, according to the law of the domicile, are entitled to that estate, yet where the title has been adjudicated upon by the courts of the domicile such adjudication is binding, and must be followed by the courts of this country. [His lordship having dealt with the question of Swiss nationality, and found that the testator died Swiss, continued:—]

The testator's nationality, then, being Swiss at the time of his death, it follows that the Zurich tribunals are those which, according to the law of the testator's domicile, have jurisdiction to decide on the right of succession to his estate. This being so, I have here an advantage similar to that which the court had in *Doglioni* v. *Crispin*, that the claim of the party litigating in this court has been actually raised and decided in the courts which, according to the law of the testator's domicile, were the proper and competent tribunals to decide on the right. Those tribunals have decided that the plaintiff is entitled to nine-tenths of the testator's personal estate of which the funds which form the subject-matter of the present action are part. And in accordance with the principle laid down in *Doglioni* v. *Crispin* I consider I am bound by their decision.

Various objections have, however, been raised to this decision, and on them it may be right that I should say a few words.

First it is said that the decision is founded on English law, and that the foreign tribunals have taken an erroneous view of our law. The complaint in substance is to this effect. It was said that an improper weight was attached to these documents, that the tribunal dealt with them as establishing a *primâ facie* case on behalf of the plaintiff which it was incumbent on the defendant to displace, whereas the true mode of dealing with the evidence was that indicated by Chitty, J., in *Andrews* v. *Uthwatt*, where he said that "it was an erroneous mode of trying such a case as that before him by picking out a few facts and isolating them, and thus to endeavour to raise from them a presumption of marriage, and then challenge the other side to produce evidence to the contrary, at the same time arguing that the other side was required by law to produce so strong a case as to render it reasonably impossible that a marriage did take place. The proper mode was rather to take the evidence as a whole and thus to see whether the presumption of marriage was sufficiently rebutted."

To this it was answered that there was nothing in the proceedings of the foreign courts so inconsistent with English law as to render it improper to recognize or enforce their judgments in this country, and that in truth and substance the Zurich Court of Appeal did, in the judgment of the 2nd of October, 1886, deal with all the facts and arrive at an honest and fair conclusion adverse to the defendant. This observation appears to be of considerable weight, but I do not consider it necessary to determine whether it is to any extent well founded, for it was further urged, and it appears to me correctly, that it is established by the decisions in *Castrique* v. *Imrie* and *Godard* v. *Gray* that a foreign judgment cannot, as between the same parties, be impeached in this country on the ground that it proceeded on a mistake as to the English law. In the former case Lord Blackburn, then Mr. Justice Blackburn, in advising the House of Lords [L. R. 4 H. L., at p. 434], said:—"We think . . . that all that can be required of the tribunal that has to decide a question of foreign law is that it should receive and consider all the evidence as to what foreign law is and *bonâ fide* determine on that as well as it can." And Lord Hatherley says this (at p. 445):—"Without expressing any opinion (for I purposely wish to avoid doing so) with reference to a decision of my own, which has been cited in the case of *Simpson* v. *Fogo*, as to what might be done in the case of a court wilfully determining that it will not, according to the usual comity, recognize the law of other nations, when clearly and plainly put before it, without saying anything as to what would justify the courts in our own country in hesitating to give effect to a foreign judgment if obtained by fraud or misrepresentation, it is enough for me to say upon the present occasion that in this case the whole of the facts appear to have been inquired into by the French courts judicially, honestly, and with the intention to arrive at the right conclusion, and, having heard the facts as stated before them, they came to a conclusion which justified them in France in deciding as they did decide." Then at page 448 Lord Colonsay says:—"It appears to me that we cannot enter into any inquiry as to whether the French courts proceeded correctly either as to their own course of procedure or their own law, nor whether, under the circumstances, they took the proper means of satisfying themselves with respect to the view they took of the English law. Nor can we inquire whether they were right in their views of the English law. The question is whether, under the circumstances of the case, dealing with it fairly, the original tribunal did proceed against the ship and did order the sale of the ship." Then, in *Godard* v. *Gray*, Blackburn, J., after citing the above passage from Lord Hatherley's speech, proceeds to examine certain *dicta* and opinions to the effect that the defendant in an action on a foreign judgment is at liberty to show that the judgment was founded on a mistake, and he concludes this portion of the judgment of himself and Mellor, J., as follows:—"The decisions of the Court of Queen's Bench in *The Bank of Australasia* v. *Nias*, of the Court of Common Pleas in *The Bank of Australasia* v. *Harding*, and of the Court of Exchequer in *De Cosse Brissac* v. *Rathbone* seem to us to leave it no longer open to contend, unless in a court of error, that a foreign judgment can be impeached on the ground that it was erroneous on the merits or to set up as a defence to an action upon it that the tribunal mistook either the facts or the law." He then proceeds to discuss the doctrine laid down by the learned author of Smith's Leading Cases, that, "if the judgment appear on the face of the proceedings to be founded on a mistaken view of the English law, it is not conclusive," and he holds it not to be well founded.

This view appears from *Schibsby* v. *Westenholz*, L. R. 6 Q. B. 155, at p. 159, to have subsequently met with the approval of Mr. Justice Lush. It must be stated, however, that Hannen, J., in *Godard* v. *Gray* did not agree in the reasoning of Blackburn and Mellor, JJ.; at page 154 he says this:—"I do not think that any authority binds us, nor am I prepared to decide that a defendant not guilty of any *laches*, against whom a foreign judgment *in personam* has been given, is precluded from impeaching it on the ground that it appears on the face of the proceedings to be based on an incorrect view of the English law, even though there may be no evidence that the foreign court knowingly or perversely refused to recognize that law. I do not, however, enter at length upon the consideration of this question, because I have arrived at the conclusion that the defendants in this case were guilty of *laches*. It does not appear on the face of the proceedings, nor at all, that the French court was informed of what the

English law was. It was the duty of the defendants to bring to the knowledge of the French court the provision of the English law on which they now, for the first time, rely, and, having failed to do so, they must submit to the consequences of their own negligence. The French courts, like our own, can only be informed of foreign law by appropriate evidence, and the party who fails to produce it cannot impeach the judgment obtained against him on account of an error into which the foreign court has fallen, presumably in consequence of his own default." It appears to me that this applies to the present case. The defendant did not, so far as appears, take any step to produce to the Zurich tribunals evidence as to the English law on which he now relies, and having failed to do so he must take the consequences of the error (if error there be) into which those tribunals have fallen. It was said, however, that the whole of the facts were not before the Zurich courts when the judgment of May 19, 1885 (that relied on by the plaintiff in his statement of claim) was given, and that the cases of *Castrique* v. *Imrie* and *Godard* v. *Gray* show that all the facts must be brought before the foreign tribunal. In support of this argument the language of Lord Hatherley in *Castrique* v. *Imrie*, cited in *Godard* v. *Gray*, at p. 449, was relied on.

The passage is, "The whole of the facts appear to have been inquired into by the French courts judicially, honestly, and with the intention to arrive at the right conclusion; and, having heard the facts as stated before them, they came to a conclusion which justified them in France in deciding as they did decide." I am of opinion, however, that the language of the very learned judges, when fairly construed, does not warrant the conclusion sought to be derived from it—a conclusion which seems to me not to be in accordance with the decision in *De Cosse Brissac* v. *Rathbone*, which is cited by Lord Blackburn as being one of the cases that governed the court of first instance. In that case the fifth plea was as follows:—"The defendant further says that the enforcement of the said judgment in England is contrary to natural justice on the following grounds:—That since the hearing of the said suit in which the said judgment was pronounced, and after the pronouncing of the said judgment, the defendants have discovered fresh evidence that was not known to them, or either of them, before the pronouncing of the said judgment, and which, with reasonable diligence, they could not have discovered before the pronouncing of the said judgment, and which said evidence shows and proves that the said judgment is erroneous in fact and law on the merits." This plea was overruled. This is the judgment of Martin, B.:—"We are all of opinion that this question is so concluded by the authorities that it is impossible for us to decide contrary to them, and the case must go to a court of error. I may observe that the question does not come before me for the first time; for many years past I have had occasion to consider it." Consequently, this is a decision that a foreign judgment binds, notwithstanding the discovery of fresh evidence, and, consequently, although the whole of the facts were not before the foreign tribunals, no reasons are given, but the grounds of the decision do not appear to be far to seek. The principle on which the *Bank of Australasia* v. *Nias*, 16 Q. B. 717, was decided appears to be that the courts of this country do not sit to hear appeals from foreign tribunals, and that if the judgment of a foreign court is erroneous the regular mode provided by every system of jurisprudence of procuring it to be examined and reversed ought to be followed. Neither do the courts of this country sit to rehear cases which have been tried abroad. Every system of jurisprudence provides a mode by which a judgment may be reversed and a cause reheard on the discovery of fresh evidence, and to the regular mode so provided recourse ought to be had, as, in fact, has been unsuccessfully done by the defendant in the present case. It was further said that the courts of this country will not accept as conclusive the decision of a foreign court as to the validity of a marriage, and in support of this proposition the case of *Sinclair* v. *Sinclair* was relied on. Whether this proposition is or is not well founded it does not appear to me to apply, for this court is not called on to give effect to a decision of a foreign court as to the validity of a marriage, but as to the right of succession to the estate of a testator.

Lastly, it is said that the judgment of the Zurich Court of the 5th of February, 1884, if not contrary to natural justice, shows at all events on the face of it an admission of incompetence to decide the question at issue, inasmuch as it is there laid down that Swiss law contains no provisions applicable to the case, and consequently the court had recourse to French law. I understand this simply to mean that, failing to find any express provisions in the Swiss law, the court, in arriving at its decisions, was guided by the French law, which they say is, on this subject, the mother of modern law. In like manner our own courts, in the absence of express decision, are sometimes guided by Roman law, in accordance with what is laid down by Parke, B., in the case of *Acton* v. *Blundell*, 12 M. & W. 324, at p. 353. But, however this may be, it does not lie with the defendant now to raise this objection, for it is stated that, whatever their motives may be, both parties expressly consented to its application. I am of opinion, therefore, that effect ought not to be given to the defendant's objection to the decisions of the Swiss tribunals, and that they are binding on this court and ought to be recognized and have effect given to them in the distribution of the testator's estate. There will be a declaration to the effect adopted by Sir Cresswell Cresswell in the case of *Doglioni* v. *Crispin*, that the judgment of the Zurich District Court of the 5th of February, 1884, affirmed by the Zurich Court of Appeal, is, and ought to be deemed and taken as, of legal force and effect in this action, and that regard ought to be had thereto in the distribution or the administration of the estate, or of so much as is in the jurisdiction of the court.

Solicitors, *Heales & Son; F. Rolt; Lambert, Petch, & Shakespear.*

Chan. Div. North, J. } Oct. 29; Nov. 5, 7.

HANCOCK v. HANCOCK. (a.)

Married woman—Separate estate—Property acquired since the 1st of January, 1883—Effect of covenant in prior settlement to settle after-acquired property—Covenant by husband only—Married Women's Property Act, 1882, ss. 5, 19.

A marriage settlement made in 1870 contained a covenant by the husband for the settlement of any future acquired property of the wife exceeding a specified amount (except jewellery, rings, and other articles of that nature). The wife, after the commencement of the Married Women's Property Act, 1882, became absolutely entitled under a will made in 1883 to a share of the residuary estate, which exceeded the specified amount, without any limitation as to separate use.

Held, that sections 5 and 19 of the Act, taken together, prevented the wife from saying that the separate use given to her by the Act excluded the operation of the settlement, and that, therefore, the wife's share was bound by the covenant to settle future-acquired property.

Petition.

(a.) Reported by G. E. JEFFERY, Esq., Barrister-at-Law.

The settlement dated the 19th of October, 1870, and executed prior to the marriage of Mary Rebecca Hancock and George William Brown contained a covenant by the intended husband with the trustees, that, "in case at any time during the intended coverture any real or personal estate (exceeding in amount or value £20 at one time and from one source, and not consisting of jewels, rings, or other articles of that nature) shall be given, devised, or bequeathed to, or descend or devolve upon or vest in the said Mary Rebecca Hancock or any person or persons in trust for her or in the said G. W. Brown in her right, then and in any and every such case the said G. W. Brown shall make, do, and execute, or join or concur with the said Mary Rebecca in making, doing, and executing all such acts, deeds, matters, and things as shall be necessary or proper for vesting such real or personal estate in the trustees or trustee, for the time being, of these presents, upon and for such trusts, intents, and purposes as (having regard to the nature and quality of the property) will correspond, or best or nearest correspond, with the trusts, intents, and purposes hereinbefore declared concerning the property hereby settled, or such of the said trusts, intents, and purposes as may be then subsisting, undetermined, or capable of taking effect." The settlement contained no such covenant on the part of the intended wife, nor any agreement or declaration to that effect.

The property comprised in the settlement belonged to the wife, and was limited in the usual way, life interests being given to the husband and wife with remainder to the children of the marriage.

By her will dated the 6th of March, 1883, Mrs. Brown's mother gave all her residuary estate to be equally divided between her children and the issue of any deceased child, but the will did not contain any declaration that the shares of the daughters were given for their separate use.

The testatrix died on the 22nd of September, 1883. An action was commenced for the administration of her estate, and in it the sum of £1,500 New Three per Cent. Annuities was carried over to the separate account of Mrs. Brown, and her assignees (if any) and her incumbrancers (if any).

This petition was presented by Mrs. Brown asking for a declaration that her share under her mother's will was not bound by the settlement, but that it belonged to her for her separate use absolutely, and that, subject to the payment of costs, the sum of £1,500 New Three per Cent. Annuities might be transferred to the petitioner.

Mulligan, for the petitioner.—The fund in court ought to be paid to the petitioner on her separate receipt. There is not in the settlement any covenant or contract by the wife to settle her after-acquired property. The covenant is by the husband alone, and such a covenant does not bind the wife's after-acquired property; *Ramsden* v. *Smith*, 2 W. R. 435, 2 Dr. 298; *Dawes* v. *Tredwell*, 29 W. R. 793, 18 Ch. D. 354. There is no recital of any intention to settle after-acquired property. Apart from section 19 the petitioner would clearly be entitled to this property for her separate use. That section has been considered in *In re Queade's Trusts*, 33 W. R. 816; *In re Stonor's Trusts*, 32 W. R. 413, 34 Ch. D. 195; and *In re Whitaker, Christian* v. *Whitaker*, 35 W. R. 217, 34 Ch. D. 227. In the last two cases there was a covenant by the wife. *In re Queade's Trusts* is an express decision in the petitioner's favour.

Simpson, for the respondents.—If the petitioner is entitled to this fund it would be impossible to say the settlement is not interfered with by the Act. *In re Stonor's Trusts* and *In re Whitaker, Christian* v. *Whitaker*, are in my favour. [NORTH, J.—In those cases the wife was bound.] Here by executing the settlement she assented to her husband's covenant, and she is, therefore, bound just as much as if she had expressly covenanted. *Dawes* v. *Tredwell* and *Ramsden* v. *Smith* are both cases of construction—viz., what property was bound by the covenant.

He also referred to *Lee* v. *Lee*, 25 W. R. 225, 4 Ch. D. 175.

Mulligan replied.

NORTH, J.—In this case a settlement was made on the 19th of October, 1870, on the occasion of the marriage of the petitioner with her present husband. The settlement contained a covenant by the husband to settle all the after-acquired real and personal property of the wife. In substance the covenant was the same as the similar covenants in *Ramsden* v. *Smith* and *Dawes* v. *Tredwell*. In my opinion the covenant is by the husband alone, and not by the wife. In 1883 Mrs. Brown's mother made her will giving her property equally between her children. The mother died in September, 1883, and in an action to administer her estate a sum of £1,500 stock has been transferred to the separate account of Mrs. Brown. Both the execution of the will and the death of the testatrix took place after the passing of the Married Women's Property Act, 1882, and the question is whether, under section 5 of the Act, Mrs. Brown is entitled to this sum absolutely for her separate use notwithstanding her husband's covenant. There are three decisions which it is important to consider. The first is *In re Stonor's Trusts*. In that case the settlement was executed in 1862, and it contained a joint agreement by the husband and wife for the settlement of after-acquired property of the wife, except property to which she should be entitled for her separate use. After the Act she became entitled to some property which was not settled to her separate use, and Pearson, J., held that section 19 of the Act prevented the application of section 5, and that consequently the property was bound by the settlement.

The next case is *In re Queade's Trusts*. In that case the settlement, which was a post-nuptial one, was made in 1847, and it contained an agreement by the husband and wife that the after-acquired property of the wife should be settled. In 1883 the wife became entitled to some property, and the question arose whether this property was bound by the agreement. The agreement was expressed in terms which were binding on both the husband and the wife, but the wife was not, in fact, bound by it, because at the time when the settlement was made she was a married woman and, moreover, an infant. It was just as if the wife had not been bound at all, and the case is distinguishable from *In re Stonor's Trusts*. Chitty, J., held that the property was not bound by the agreement, and that the wife was entitled to it; that case is very like the present.

Then there is the later case of *In re Whitaker, Christian* v. *Whitaker*, and it seems to me that that case has settled the law, and that I am bound to follow it. In that case the settlement was executed in 1873, and by it the husband and the wife (before the marriage) had jointly covenanted to settle the after-acquired property of the wife, except that to which she should be entitled for her separate use. Under the will of her father the wife, in 1884, became entitled to £10,000 which was not given to her for her separate use, and the court held that section 5 of the Act was modified by section 19, and that, reading the two sections together, the property did not belong to the wife for her separate use so as to be excepted from the settlement. No doubt in that case the covenant was a joint one and not a covenant by the husband alone. But, having regard to the reasons given by the Lords Justices, I do not think that that circumstance makes the difference which Chitty, J., in *In re Queade's Trusts*, thought that it did, and I must, therefore, come to a different decision from the one arrived at in that case.

The result of the judgment of the Lords Justices in

In re Whitaker is that sections 5 and 19 of the Act are to be read together so as to prevent anything from being taken away from the husband and children which they would have had under the settlement if the Act had not taken it away. The effect of a covenant by the husband alone was clearly stated by Sir George Jessel in *Dawes* v. *Tredwell* thus:—"The covenant, to my mind, is plain, and I consider it clear beyond doubt that the husband has only agreed to do what he has power to do. Now he can do two things. If the property vests in him at law, which is the case with a great deal of personal property, or if he has the power of disposition by law, as in the case of leaseholds, he is to assign it. If it is real estate it vests in the wife, not in him, but he has an interest in it and has a power of concurring with her in conveying, and he is bound to convey his interest and to join with her in conveying the whole property, if she is willing to do so, but the covenant does not affect property as to which he has no control whatever." Putting it in another way, a covenant by the husband affects the property of the wife so far as it is under his control, and he is also bound to concur with her in settling any other property, if she is willing to do so. In the present case, if the property is bound at all, it is bound by the covenant of the husband, and sections 5 and 19 of the Act taken together prevent the wife from saying that the separate use given to her by section 5 excludes the operation of the settlement.

The fund in court is bound by the settlement. If, however, any part of the fund has arisen from real estate of the mother, Mrs. Brown may not, as to that part, be bound by the settlement, but, so far as the fund represents personal estate of the mother, Mrs. Brown is bound, and the fund must therefore be transferred to the trustees of her settlement.

Solicitor, *William Horsley*.

Chan. Div. } Nov. 4, 5, 15.
Stirling, J. }

BENDELOW *v.* GUARDIANS OF WORTLEY UNION. (*a.*)

Nuisance — Infectious disease — Small-pox hospital — Interlocutory injunction.

The defendants fitted up a cottage as a small-pox hospital. The grounds in which the cottage stood were bounded by a public road on one side, open fields on two other sides, and the plaintiffs' property on the fourth side. The evidence being conflicting, a medical referee was appointed, who reported that there was appreciable danger to persons dwelling in the plaintiffs' houses.

Held, that an injunction should be granted.

This was a motion for an *interim* injunction to restrain the defendants, the Guardians of the Union of Wortley, in the parish of Ecclesfield, near Sheffield, acting as the rural sanitary authority for Wortley, their servants and agents, from using or permitting to be used the cottage occupied by them as a small-pox hospital at Upper Hirst, in the hamlet of Birley Carr, in Ecclesfield, or any other premises at Upper Hirst aforesaid so as to occasion a nuisance to the plaintiffs.

The cottage in question, which had been recently fitted up by the defendants as a small-pox hospital, stood in grounds bounded on one side by a public road, on two other sides by open fields, and on the fourth side by property of which the plaintiff Bendelow was the freeholder. It was separated from this property by a wall 13ft. high. The property consisted of twenty-one acres of land with farm buildings and three dwelling-houses standing upon it. The other plaintiffs were the tenants of these three houses, which were situate at distances varying between 130ft. and 160ft. from the hospital.

There was considerable conflict of evidence as to whether the hospital was dangerous to the persons residing in the plaintiffs' houses.

When the motion was first brought on it was suggested by the court that a medical gentleman should be appointed to inspect the place and report whether there was danger to the plaintiffs by reason of the situation or management of the hospital or otherwise. The matter consequently stood over until this report was obtained.

A medical referee was accordingly appointed, who reported as follows:—

"As a result of my inspection, I am satisfied that the small-pox hospital, by reason of its proximity to the above-mentioned houses belonging to or occupied by the plaintiffs, is a danger to persons who are susceptible to small-pox and who are dwelling in these houses, and, further, that the hospital, by reason of its proximity to the Hirst Common Lane, is a danger to persons susceptible to small-pox and who frequent that lane.

"I am of opinion that, by the exercise of precautions which I believe are taken in the management of the hospital, it is possible to prevent danger of infection arising from personal communication, but the danger which exists is that of aerial communication of infection from the aggregation of persons suffering from small-pox in the hospital.

"In estimating the amount of danger, it is proper to state that this danger is not great, that the danger is one of possibility rather than of probability of small-pox being caused by the hospital. . . .

"I should add that I have in this report considered only the danger to the plaintiffs from infection by small-pox, and have not had any regard to any effects upon health caused to the plaintiffs by mental anxiety resulting from the use of the Hirst as a small-pox hospital."

Hastings, Q.C., and *Blakesley*, for the plaintiffs, cited *Metropolitan Asylum District* v. *Hill*, 29 W. R. 617, 6 App. Cas. 193; *Fleet* v. *Metropolitan Asylums Board*, 2 *Times* L. R. 361.

Pearson, Q.C., and *Warrington*, for the defendants, said that the question in all these cases was what was the amount of danger necessary to cause a nuisance. The above-cited cases showed that an injunction would not be granted unless the plaintiffs made out that there was real and substantial danger. In the present case the only risk was from aerial communication, and the judgment of Bowen, L.J., in *Fleet* v. *Metropolitan Asylums Board* showed how little importance could be attached to that.

Hastings, Q.C., replied.

The following cases were also cited: *Fletcher* v. *Bealey*, 33 W. R. 745, 28 Ch. D. 688; *Attorney-General* v. *Corporation of Kingston*, 13 W. R. 888; *Salvin* v. *North Brancepeth Coal Co.*, 22 W. R. 904, L. R. 9 Ch. 705; *Baines* v. *Baker*, 1 Amb. 158: *R.* v. *Burnett*, 4 M. & S. 272; *Earl of Ripon* v. *Hobart*, 3 My. & K. 169; and *Matthews* v. *Corporation of Sheffield*, 31 SOLICITORS' JOURNAL, 773.

STIRLING, J.—This case is one which is very near the line. The first question is, what is the law applicable, and that, after the discussion which it has undergone in recent cases, is tolerably clear. The burden of proof is upon the plaintiffs. They must make out, not only that patients suffering from infectious disease are gathered together in this hospital, but also that there has been some injury to their rights as owners of the property on which they live. Then comes the question, What is the amount of injury required in order to constitute a

(*a.*) Reported by L. S. BRISTOWE, Esq., Barrister-at-Law.

nuisance? The expression used in *Fleet* v. *Metropolitan Asylums Board* is that there must be provable injury to the plaintiffs' property. Upon the evidence at first adduced in this case I felt considerable doubt, and I suggested that a medical man should be sent down to report. [His lordship read the report as above set out, and continued:—] What meaning am I to attach to that report? I think it shows that there is a real appreciable danger to persons susceptible to small-pox, though not very great. On the other hand, the nature of the disease is such that if once a person suffers from it the injury is irreparable in the sense in which that word is used in cases of injunction. The plaintiffs have, in my opinion, made out a case of real and appreciable injury, though not a great one, and are entitled to an injunction. The injunction will be suspended until the 19th of December, in order to obviate the necessity of removing existing patients, and the defendants must undertake to introduce no fresh patients, and to adopt every precaution to prevent communication between persons in the hospital and persons outside.

Solicitors, *Carlisle, Unna, & Rider; Torr & Co.*, for *Bransfield & Sons*, Penistone.

Q. B. Div. (Wills and Grantham, JJ.) Dec. 8.

WILKINSON *v.* JAGGER. (*a.*)

Friendly society—Odd Fellows' Society—Right of lodge to secede from district—Acknowledgment of registry—Evidence of secession—Friendly Societies Act, 1875 (*38 & 39 Vict. c.* 60), *ss.* 11 (*sub-section* 10), 22 (*sub-sections* (d) *and* (e)), 30.

By the rules of the Odd Fellows' Society, any branch of the society desiring to secede shall call a special general meeting and go through certain forms. In a dispute between the parent lodge and the members seceding from it as to whether the proper forms had been carried out or not, the parent lodge contended before the county court judge that, so long as the registration of the lodge stood, it was not competent for the seceding members to deny that they were a branch of it. On the Registrar of Friendly Societies declining to cancel the registration, on the ground that he could not deal with the matter until the dispute had been settled by the county court, the county court judge, conceiving that he was concluded by section 11, *sub-section* 10, *of the Friendly Societies Act,* 1875, *refused to receive evidence of secession, and gave judgment against the defendants.*

Held, on appeal, that it was the duty of the county court judge to receive evidence of secession.

Held, also, that the appeal was properly made by notice of motion, and not by special case.

This was a motion by way of appeal by the defendants from the judgment of the county court judge of Huddersfield, who had given judgment for the plaintiffs for £25 16s. 9d., with costs, under the following circumstances:—

The National Independent Order of Odd Fellows' Society is a friendly society registered under the Friendly Societies Act, 1875. It consists of branches called districts and the districts consist of lodges. The districts and lodges as well as the order are registered as friendly societies.

The Huddersfield District (the officers of which were the plaintiffs in this action) is made up of fourteen lodges. The defendants were the officers of one of these, which was established in the year 1852, but was not registered until the 25th of December, 1880.

The relations *inter se* of the order, districts, and lodges are governed and regulated by three sets of rules, known and distinguished as "General," "District," and "Lodge Rules."

The object of this friendly society is to provide a certain weekly allowance to members during sickness and a certain sum for funeral expenses when a member, his wife, or his widow dies. All subscriptions are paid by members into their own lodges, and out of the funds so raised each lodge pays all such money for its own members. The funeral fund is created by means of a quarterly levy made by the district upon the lodges at the rate of 1s. 8d. per member, and out of this fund the district pays all funeral moneys that are required by any of the lodges.

The plaintiffs (the district) made a levy on the defendants (the lodge) of £25 16s. 9d. for the quarter ending in April, 1887. The defendants refused to pay this levy, and the plaintiffs then brought an action in the Huddersfield County Court to recover the amount.

But in July, 1886, the defendants desired to secede from the district and to form an independent society. The procedure for secession is prescribed by the 3rd General Rule and the 54th District Rule in almost identical terms.

The 3rd General Rule is as follows:—"3. Any branch of this society being desirous of seceding shall first call a special general meeting. Every member shall have seven days' notice thereof, and the summons calling the meeting shall require the member to fill up a form which shall be supplied him, stating whether he assents to or dissents from the proposed secession; when if three-fourths of the members of the branch are in favour thereof, the whole of the papers, with a statement of the accounts and the names, ages, addresses, and the nature of the disease of the sick members, shall be sent to the central office. The executive committee shall ascertain the liabilities of such members, and after deducting the necessary amount to meet the same the remainder of the funds shall be divided equitably among the members. The seceding lodge shall be required to pay to the district the amount of liability for each sick member and the share of each of any others who desire to remain members of the order."

The defendants took steps to secede under this rule, and informed the district officers of their proceedings; but on the 11th of December, 1886, the district secretary intimated that the plaintiffs considered that the secession proceedings were irregular and invalid, and that they must decline to allow the secession.

The plaintiffs objected to certain votes, but it was alleged by the defendants that there were more than the necessary majority in favour of the secession. The matter then passed into the hands of the solicitors of the parties, and ultimately, on the 24th of June, 1887, proceedings were instituted in the county court to recover the above amount.

The plaintiffs sought (1) to enforce payment of the above amount of £25 16s. 9d., the amount of levy for funeral money in the quarter ending April, 1887; (2) to enforce the rules of the society; (3) to settle the dispute between the parties; (4) to enforce payment of fines; and (5) to have it declared that the defendant lodge was still connected with and part of the plaintiffs' district.

At the hearing on the 8th of July, 1887, the plaintiffs put in the certificate of the Registrar of Friendly Societies that the defendant lodge had been registered as a branch of the Huddersfield District of the order, and it was not disputed that the registration had not been cancelled or suspended. The plaintiffs cited section 11, sub-section 10, of the Friendly Societies Act, 1875: "The acknowledgment of registry shall be conclusive evidence that the society therein mentioned is duly registered unless it be proved that the registry of the society has been suspended or cancelled." The

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

plaintiffs contended that so long as the registration stood it was not competent to the defendants to deny they were a branch of the district, and that they were liable to pay the amount sued for in the action.

The defendants urged that this section was not conclusive of the case, and that the real question was whether the proceeding for secession had been regularly and properly taken, and that if they had the defendants had seceded and were no longer liable to contribute to the district funds; that a dispute having arisen between the parties, the plaintiffs had expressly invoked the aid of the county court to decide this dispute, and they urged the judge to hear the merits and finally decide the case.

The county court judge considered that he was concluded by the words of the above sub-section; he suggested that an application should be made to the Registrar of Friendly Societies to cancel the registration, and adjourned the case to enable this to be done.

The defendants accordingly made a formal application to the registrar setting forth all the circumstances and desiring that the registration should be cancelled and the defendant lodge registered as a separate and independent society. The registrar gave notice of the application to the secretary of the plaintiffs' society, who said, in reply, that the plaintiffs opposed the application on the ground that the defendants had not complied with the provisions for secession contained in the rules. The registrar thereupon declined to accede to the application, and intimated he could not deal with the matter until the dispute had been settled by the proper tribunal, and this tribunal, he added, was the county court.

The county court judge, however, adhered to his view with respect to section 11, sub-section 10, and refused to entertain the question as to the secession or to receive evidence with respect thereto, and ultimately gave judgment for the plaintiffs for the amount claimed with costs, but gave leave to appeal, and execution was stayed.

The defendants appealed.

Waddy, Q.C. (*J. L. Walton* with him), for the respondents.—There is a preliminary objection to the appeal. The appellants have misconceived their remedy. No appeal lies from the decision of the county court judge in this matter. The judge did not sit *qua* county court judge, but as arbitrator. The right course for the appellants would have been to have applied to the judge to state a case: ord. 59, rr. 9 and 10; County Court Rules, 1886, ord. 32; *Reg.* v. *Sir Rupert Kettle*, 17 Q. B. D. 761.

WILLS, J.—The Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), is undoubtedly involved, and it is desirable that there should be some finality of agreement as to the practice, whether an appeal lies from a county court in matters connected with this Act by special case, or whether the appeal should be by notice of motion. Section 22 is very difficult of construction. By sub-section (*d*) it is enacted that where the rules of a friendly society contain no direction as to disputes the person aggrieved may apply either to the county court or to a court of summary jurisdiction to hear and determine the matter in dispute. This section gives a person aggrieved a remedy either in a county court or else in a court of justices of the peace, at his option. But this proceeding in the county court is the same as a proceeding in an ordinary action—by plaint—and there is no reason why proceedings which, had they been in an ordinary action, would have been the subject of appeal to the superior courts by notice of motion, may not be similarly appealed against when they result from the application of a person aggrieved by a friendly society on such an application. Sub-section (*d*) permits a plaint to be brought in the county court, and the ordinary rules of procedure apply. I think that is the same spirit in which the same section was read by Chitty, J., in *In re Royal Liver Friendly Society*, 35 Ch. D. 332, 35 W. R. Dig. 62. Next we turn to sub-section (*e*) of the same section, that sub-section enacts that the county court judge or registrar may, at the request of either party, state a case for the superior courts, and otherwise, which are not necessary for the ordinary procedure. There being in the other parts of the Act no limit to the words "court," it is clear that it was not intended by sub-section (*e*) to limit the jurisdiction of the county court to appeals by special case only, nor to prevent appeals by notice of motion under sub-section (*d*), nor to establish a separate class of jurisdiction for friendly societies.

The Rules of the Supreme Court regulating appeals from county courts at present suspend the resort to special cases on appeal from county courts. The action of the plaintiffs was a proper action in the county court, and the present appeal is properly constituted.

GRANTHAM, J.—I concur with my brother Wills, but I wish to guard against being thought to say that special cases may not still be used on appeal from county courts under special circumstances, such as under the Agricultural Holdings Act. I also think that Chitty, J., in *In re Royal Liver Friendly Society*, based his decision on section 30 of the Act, and not on section 22. With these reservations I concur substantially in the judgment of my brother Wills.

Tindal Atkinson, Q.C., and *Wilkinson*, for the appellants.

Waddy, Q.C. (*J. L. Walton* with him), for the respondents, cited *Schofield* v. *Vause*.*

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*Court of Appeal. Cotton, Bowen, and Fry, L.JJ. } April 6, 1886.

SCHOFIELD *v.* VAUSE.

This was an appeal by the defendants, the officers and trustees of the Loyal Caledonian Lodge of the Manchester Unity Order of Odd Fellows' Friendly Society, from an order of the Vice-Chancellor of the Chancery Court of the County Palatine of Lancaster, granting an injunction against the defendants. The plaintiffs were, first, the trustees of a friendly society called the Independent Order of Odd Fellows and Manchester Unity Friendly Society; secondly, the trustees of a subordinate society, called the Bolton District Branch of the Independent Order of Odd Fellows; and, thirdly, certain members of the defendants' society, being a minority of the members protesting against a resolution come to by a majority of the members, as being *ultrà vires*. The three societies were independent, separate friendly societies, but had for several years been connected together.

Romer, Q.C., and *O. L. Clare*, for the appellants.

Cozens-Hardy, Q.C., and *H. B. Buckley*, for the respondents.

COTTON, L.J.—In this case there are concerned a great number of individuals, members of societies which play a very useful part in England. The case has been argued fully, and I think we ought not to delay giving our judgment upon it. The action is one with reference to the Order of Odd Fellows, and the defendants—I take their position first—are the members of a lodge who desire to secede from the order, and to withdraw themselves entirely from that union which existed between the different branches of the whole Order of Odd Fellows. The plaintiffs, on the other hand, are the unity, the centre; they represent the districts, and they represent some of the members of the lodge who dissent from the course taken by the majority. How the Odd Fellows' Union originally arose we do not quite know;

Wills, J.—I think that whatever the rules of the societies impose as a condition of secession must be complied with, and I think that on a very cursory reading of them the tenor is that effectual provision must be made so that the central body does not lose more than it ought to lose, pursuant to these rules, by the departure of the minor body. But then the appellants say that all this has been done. The county court judge has refused to

that is not very plain. But, at any rate, when the defendants' lodge was formed there were Odd Fellows, and there were undoubtedly other lodges and other districts; and, as far as I understand, the Odd Fellows thus admitted to the order may originally have been admitted. At this time everyone who joined the lodge was admitted as a member of the Union of Odd Fellows, and at the different lodges formed in this way dispensations were granted by the central body, and then some of the persons (already members) were allowed to form what is called a lodge, with power to initiate into the order new members, and then those would become members of the lodge, but at the same time they would be initiated into and become members of the order. That is most important for consideration, because every member of this lodge is not a member of the lodge by itself, but, being admitted as a member of the order, he becomes a member of the lodge—that is to say, a certain portion of the members of the union to whom the regulations of the union had given a *quasi*-separate action and *quasi*-separate existence. That is to say, that the lodges had a power to a certain extent of regulating their affairs, and the lodges are separated one from another, and have power to a certain extent to regulate their affairs. All the lodges formed part of the districts, and all the districts formed divisions of the union; and what I understand this society is, is this, that funds are provided by contributions of the members of the different lodges for certain purposes; then a portion of those contributions for funeral expenses are handed over to the district. The district provides, in the first instance, for the funerals, and then there are contributions and payments to each lodge when necessary in order to make up what ought to have been, having regard to the number of funerals in the year, their quota. There are now no original members, or for many years there have been none of the centre, the unity, but if any lodge fails, any members of that lodge being also members of the order, as they must necessarily be, having duly performed their duties, fall into and become members of the district. When districts fail in like manner the members who have become members of the district fall into and become members of the unity. Therefore, in fact, we have these different societies regarded as friendly societies, and providing for their members in this position; that there are funds of each lodge; if those fail there is the security of the district; if the district fails there is the security of the central body, the unity.

That is a most important consideration, because it is not only the funds of the separate lodge on which the members have to depend, but there is a guarantee, as it were, to provide for the event of those funds failing by the district, and, finally, by the central body. Now, in my opinion, having regard to those facts, the case of the dissentient minority is conclusive here, because the dissentient minority say, "I joined the lodge and I have been paying my money to the lodge on these terms; that I have the benefit which the lodge could give me; if the lodge fails I have the additional benefit which the district can give me; if the district fails I have the benefit which I can have from the assistance rendered by the unity—by the centre." In my opinion that would entirely have settled the question; because, what are we considering here? Here this lodge, for reasons of its own, wishes to secede from that body—from that union—wishes to secede from the district, and wishes to secede entirely from the unity. In my opinion any member who has contributed his funds to a benefit society of the nature of which this lodge was when he joined it has a right to say: "Do not turn that which I joined into something entirely different; do not deprive me of the benefit which I have from the rules of the unity and from the intercourse between the lodge, the district, and the unity." I should mention, before I leave this part of the case, that it appears not only that the funds are contributed by the lodges to the district, but also that funds are contributed by the district to the unity. Then there are other matters here which are of importance. That, to my mind, as I have already mentioned, is sufficient to decide the case, and to my mind it is the strongest reason for holding that the decision of the Vice-Chancellor is right, and I should be quite content to decide it upon that point. But other points have been argued, and I believe my brothers will deal with those points. I in no way differ from them. Therefore, I will express my opinion shortly on these points. Everyone when he became a member of this lodge, as I said, became initiated into the order, and he promised, on his initiation, to obey the rules from time to time made by the central body. Now what happened here? We have a rule providing for the secession and breaking up of branches, and, whether or no there was a right before that to secede, in my opinion, there being a power to make rules in the central body, that was a rule which it was reasonable and proper for them to make. Because, what does it do? It says that if any branch shall secede—and the district has a similar rule—it shall only do so after providing for its liabilities to those who have joined it when it was intended to be one of the lodges of the unity. Whether that was a right of secession or not, that rule was passed years ago, and, as far as we can understand, was not dissented from by this lodge or by other lodges. This lodge is the only one we can now consider. That rule being passed by what was called the Annual Movable Committee, which consisted of members selected from the different districts of the Odd Fellows, in my opinion we must consider that rule as one which this lodge has bound itself to abide by, and, in my opinion, it was a rule clearly within the power of the Annual Movable Committee, whether or no, antecedently to that rule, there had or had not been a power of seceding from the order. Therefore, in my opinion, as each member when he entered the order—when he was initiated into the order—promised to abide by such orders and rules as might from time to time be made by the Annual Movable Committee, this is one which this lodge or its members are bound to obey, and, in my opinion, the Vice-Chancellor was quite right in holding that they were not entitled to treat this as a separate body—that is to say, to secede, as they intended to do, from the union without following the provisions prescribed by the rule. This rule—"F.," I think—which applies to secession and breaking up of branches, is a rule of the existing body in the district and in the unity.

Now that settles the case to my mind. It is contended that what they were going to do was to register under the new Act, and that if they so registered not as a branch they would have the power of passing a rule so as to bind their own members to enable them to act separately. But they have not so registered, and their own registration was a registration not of themselves as a separate society, but of the rules of the Caledonian Lodge, No. 418 of the Independent Order of Odd Fellows, Manchester Unity, Friendly Society. That is, recognized as a lodge of that unity, recognizing the position which in fact they occupy, not a position of independent action, but simply a connection of certain members of the unity—members initiated into the order. But that, so far as the power was delegated to them, was a power

entertain this question, because he says the registrar has not cancelled the registration. I think that that is a mistaken idea, and that the judge is the proper person to entertain it. The registrar certainly would refuse to ascertain it for himself, having no means of doing so, and no court or tribunal and no power of having witnesses to appear before him. It seems to me that the proper line for him to take is the same line that is taken by the

of making rules to regulate their own proceedings, but all subservient to the general rules of the district and the general rules of the order. There was a registration of such a nature as that, and I do not see how, if any rule were passed to give themselves another and separate existence, that rule could be one which could be sanctioned as duly passed by them, when in their registration they have registered themselves as a branch only of that general unity, as a branch of Odd Fellows subject to all the rules and regulations which they agreed to submit to when the lodge was formed, when each and every of its members joined that lodge. In my opinion the appeal fails. There is one point which, perhaps, I ought to mention. It was contended that whatever the rights of the parties might be, yet the conduct of the central body had been such as to prevent their getting assistance in the way sought. In my opinion that is an erroneous view. The whole contest between the lodges and the centre was, Can the lodges sever and set themselves up as separate and distinct societies? That was the point between them, and as the only object of the central body was to prevent that being done, as the only object of this lodge was to enable them to sever, in my opinion the lodge was in the wrong and not the central body when it required them, as it did, to register as a branch, and not as a separate society. Of course that involved their putting an end to and cancelling the registration which they had already got under the Act of 1851. In my opinion there was nothing unreasonable in that, the object of both sides being in substance that which I have mentioned. In my opinion there is no ground, as the rights are what I have stated them in my opinion to be, for refusing the relief here which has been granted by the Vice-Chancellor.

Bowen, L.J.—I am of the same opinion. It seems to me that when you get to the bottom of the case it determines itself by the application of the very simplest principles of the law of contract. All members of this lodge are members of the order. This is fundamental. By the act of initiation they become members of the order grouped in a particular lodge, and promise that they will, to the best of their ability, conform to all rules duly passed by the authorized committee of the lodge, district, or order. The district and the lodge are not different incorporations. They consist of an aggregate of individuals, all of whom belong to the order. That is the cardinal point of the whole matter to my mind. The members of the order may group themselves into lodges and into districts, and each district, viewing itself for that purpose as a centre, and each lodge viewing itself for that purpose as a centre, for the moment may acquire by registration a separate existence; but, if they do, it is only a separate existence *quoad* themselves as a district and its lodges, and it neither destroys nor affects in any way their outstanding obligations to the order of which they are members, and to a group of members to which they belong—to a larger body. They cannot by anything they do to themselves as a group destroy the contractual obligations which already exist between themselves and the larger body. Now let us apply those principles. What have we got in the first place? Why, we have got the fact that the funds contributed to the lodge are by their own rules funds in the management and in the distribution of which the lodge—that is to say, the group of members forming the lodge—the district, and all the other members of the order have some interest under the rules; they have varying interests, but they have all got some interest. Now, was there an original power of secession when this district and this lodge was created? Mr. Romer and Mr. Clare, with great clearness and ability, have told us this morning and yesterday that there must be an original power of secession, both upon the practice, by which it appears, and by virtue of which it is supposed, that some secessions took place, and also by the application of the Statute of Frauds. Be it so. Let us assume that they start with general powers of secession—that is to say, that you could not compel members of the order to go on continuing members of the order if they chose to cut themselves adrift. It may be so. But where do they get the right, if they secede, to carry away the funds, in the management of which the district to which they belong, and the lodge to which they belong, have already acquired some interest? They cannot do that; they are breaking the law of contract.

If they wish to set up an independent lodge, they cannot take the funds which have been devoted to one purpose, and which have been intended to be carried out in compliance with one set of rules—they cannot abrogate the rules, and set up a lodge with the same money on their own account. That is really to take the money of one person and to devote it to objects which are determined upon by another. It is as clear to my mind as daylight that by so doing you are interfering with the rights of the dissentient minority. The dissentient minority contributed their funds, not in order that they might be made into the funds of a lodge which had no connection with the order, but in order that they might be administered by a lodge which was a sub-branch of the order. It is an attempt to cut adrift the lodge from the order, and to carry with it the funds which have been dedicated, so to speak, to the carrying out and the working out of the objects of the order. But it seems to me, applying the same principle to the members of the district and the order, that all have an interest in the management of the funds contributed by the lodge, though the interest of the members may be more remote—I mean the members who belong to other districts and lodges may be more remote—still they all have an interest and a right to have a voice in the matter. I think that consideration is decisive of the case. But there is another matter to my mind equally decisive of it, and equally plain by the application of the simple principle of the law of contract. The order to which all these lodge members are affiliated, to which they all belong, passes a rule in the regular way by the constituted authority of the order, which authority receives a contingent of deputies who really represent this lodge as well as the other lodges—the order passes a rule, and, indeed, the district does just the same—it passes another rule which regulates the mode in which secessions are to take place. Now, considering the interest of the order and the district in the funds, how can such a rule be said to be *ultrà vires*? How can the Statute of Frauds have anything to do with it? It has become one of the accepted rules of the order in every case. Every subscription which has been made since the time it has been passed has been made on the faith that the members of the order all accepted it, and every initiation that has taken place since, has taken place on the footing that that rule is a rule of the order. Those who were initiated previously, if they had objected to that rule, or if they had got any ground of objection to it, ought to have said so at the time. It is clear to my mind that after the passing of that rule no member of the order, whether he belongs to a lodge or not, has a right to initiate the secession of a lodge or a district, except upon the terms of those rules. He breaks his

court in a winding up. When a question occurs as to a company being actually allowed to be dissolved, the court requires to be satisfied that every liability has been discharged or provided for, but upon that application judges do not go into the question of whether a contention as to a liability is right or wrong. They leave that to be decided upon a different class of application, but they require to be satisfied that every liability has been dis-

contract if he does, and the lodge, which is a created body of individuals, break that contract if they attempt to break that rule. There was a third point taken as to whether or no we could grant this injunction in consequence of the conduct of the order in insisting upon the registration of this branch lodge, the branch that did not choose to register, and did not think that it was bound to register under that particular Act. I agree entirely with what the Lord Justice said. To my mind that is a rule which the order had a right to pass, but be that as it may, it was accepted by the body, and it is too late now to complain that the members are not bound by it. I consider this a very clear case, and one that requires the application of no recondite principles.

FRY, L.J.—The importance of this case induces me to add a few words to what has been said by my learned brethren. The main if not the only question in this case has throughout appeared to me to be this: Upon what terms did the persons who became members of the order and members of this particular lodge become such members? There are three documents which have been put before us which throw the greatest light upon my mind in that inquiry.

The first of those is what has been called the dispensation, which was, in fact, an authority given by the then members of the order to certain officers and brothers of the order (to use the language of the dispensation), which authorized them to constitute the brothers so made to be a particular sub-organization of the order or lodge. But this dispensation provided that the officers and brothers of this new lodge should not deviate from the principles and regulations of the Manchester Unity of Independent Odd Fellows, but "should in all and every respect comply with these dispensation, presents, and laws, and them duly keep, observe, and enforce, according to the purport, true intent, and meaning of the Loyal Independent Order, or this dispensation shall be null and void." Further, the order by this dispensation undertake, in the case of the lodge being destroyed by fire or other accident, to render assistance to the distressed of the lodge. Its object, to my mind, was really to admit persons as members of the order, not to admit them as members of any separate society.

The next document which seems of any importance in this society is this. There is a form of certificate, which has been put before us, which was signed and given to the members as they were admitted to this order, to this lodge. It is a certificate that Brother So-and-So was admitted a member of the Independent Order of Odd Fellows, Manchester Unity, Friendly Society, by initiation in the particular lodge. There, again, it is obvious the certificate indicates the admission of the member as a member of the order.

Lastly, there is a form of initiation which has been put in evidence before us, which to my mind, I confess, seems to become really important as regards this question. After other preliminary inquiries as to his name and so forth, the lecture master, who was the officer presiding at the initiation, addressing the intended candidate, asks him whether he will, to the best of his ability, conform to all rules duly passed by the authorized committee of the lodge, district, or order. To that the member, if he is to be admitted, must give a reply in the affirmative. The same principle runs through the exhortation given by the lecture master to the candidate. He is to do everything which will promote the advantage of the order, and throughout the welfare of the order is the object of the anxiety and care of those who prepared these rules for the initiation. But I return to the words which I have already read—the promise to conform to all rules duly passed by the authorized committee of the order. That is one of the promises made by every member. It seems to me, then, that the only inquiry is this: Are these members, if they are carrying away with them the funds of the lodge, conforming to the rules duly passed by the authorized committee of the order?

The answer to that is plain. The authorized committee of the order has passed a rule that they shall only secede upon certain terms. That rule this body of members, each of whom is common to that promise, do not propose to obey. To my mind that is an end of the case. But I will go further, and I will inquire what is the nature of the terms upon which, according to the contract between the parties, the fund which is primarily under the management of the lodge is to be administered. Undoubtedly it appears to me that every member of the lodge has a primary interest in the fund; it has been contributed for their common benefit, and a dissentient member has a right to say, it appears to me—a member, that is to say, who dissents from the proposed secession has a right to say—"I have contributed to this fund, and you have contributed to this fund, upon terms of its being administered in a particular manner. In the administration I have an interest. I insist upon my right to relief in sickness, and to the right of those who follow after me to the terms of payment on my death, in accordance with the bargain we have entered into. Without my consent you cannot depart from that bargain, and although it is competent for you to leave the society, it is competent to you to leave it only on terms of leaving behind you those contributions which have been made for my benefit." To my mind that is a very plain right of the members in regard to this proposed secession. But I think also the district has a clear interest in the fund, for this reason, that the district has a fund which was to provide for the funeral expenses of the members of the lodges within that district. That is to be a fund provided equally by the lodges. Therefore each lodge in the district has a right to say to the other lodges, "We have combined together for the purpose of constituting the fund, and you have no right to carry with you any portion of that fund which has been contributed to with a common object." I think that probably the district members had a further interest, because there was a system of travelling cards, which, if I rightly understand, gave the member of one lodge who was travelling in the district of another lodge a right to relief in the event of his being distressed. That is not so material, but it appears to me also to give them an interest in the district funds.

Lastly, I think the members of the order who were neither members of the particular lodge, nor the district to which the lodge belonged, had an interest in this fund, because, as was distinctly pointed out by Mr. Romer in his opening, the order has a right to contributions from the district—has a right to make what are called levies, and those levies are for the benefit of all the members of the order; therefore, although the interest of the district members is not so direct, and perhaps not so immediate, as that of the lodge members, I think that every member of the Order of Odd Fellows has a certain interest in this fund which is administered and managed primarily by the committee of the lodge. I think, therefore, that there was no right whatever to secede in the manner which has been suggested.

Now it has been argued that the registration which was effected in the year 1873, under the Act of 1855, of

charged or provided for effectually before they allow a company to be dissolved, and then they have the power of inquiring into it themselves if it becomes necessary to settle a disputed question of fact. The registrar has no such power, and, therefore, the registrar would say as long as there is a question open I shall not allow the registration to be cancelled. It seems to me that that would be the right course for him to take, and it follows that the county court judge is the right person to decide this question of mixed fact and law as to whether, upon the true construction of rule 54 of the District Rules, everything has or has not been done which is the necessary preliminary to the right to secede.

It seems to me, then, if he should establish that in favour of those who claim to have the right to secede, it is impossible that the parent society can have any further claim on them because they remained registered.

GRANTHAM, J.—The judgment of the county court judge shows that he did not do that which he is called on to do under sub-section (*d*) of section 22 of the Friendly Societies Act. He did not do what he was asked to do. We have determined by our previous decision that he had power to do it sitting as judge of the county court and not as an arbitrator. Has he done that? He has not, and therefore those who appeal against his decision are right in asking us to send it back to him and to say he ought to do it. One word with regard to the case in the Court of Appeal (*Schofield and others* v. *Vause and others*), which the respondents have referred to, because this case may be quoted again in the same way that Mr. Waddy quoted it. Mr. Waddy commenced his observations by saying that the county court judge was right, because the defendants had no power of secession, and he quoted this case and said he would give us this case as a distinct authority that they had no power of secession. No doubt, when you read the first part of the judgment of Cotton, L.J., and also of Bowen, L.J., it appears that the defendants had no power to do what they did in that case; but Cotton, L.J., goes on practically to point out that they have a power of secession, but must do that which has been set out by the section. After having determined they were wrong in doing what they did, he goes on to say:—"Now, what happened here? We have a rule providing for the secession and breaking up of branches, and whether or no there was a right before that to secede, in my opinion, there being a power to make rules in the central body that was a rule which it was reasonable and proper for them to make"—that is, to enable them to secede. Then, again, Bowen, L.J., also says, in different words, though to the same purport, that "the order passes a rule and, indeed, the district does just the same"—exactly what has happened here—"which regulates the mode in which secessions are to take place." Therefore, he said, they had a power, but they must do it in the way set out. Whether they have done it in the way set out or not we do not know, because the county court judge said he would not go into it. Under those circumstances it is clear that it must go back to him, and that he must do that which the statute determines he must do under sub-section (*d*) of section 22.

Judgment of the county court judge set aside. Case remitted to that judge to try the case on its merits. Appeal allowed, with costs of appeal.

Solicitors for the appellants, *Godfrey, Rhodes, & Co.*, for *Piercy*, Huddersfield.

Solicitors for the respondents, *Learoyd & James*, for *Learoyd & Simpson*, Huddersfield.

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this particular lodge, giving as it did to the lodge the power to vary its rules, gave to it a power to make a new rule which should constitute it an independent lodge. That I understand really to have been in substance the argument addressed to us yesterday by Mr. Romer. In my view that is entirely a fallacious argument. The power to vary the rules given by the Act of 1855 does not enable any society to depart from its contractual obligations; does not enable the particular members of this lodge, who are really members of the order, to depart from the relations which they had entered into with the order. And they must submit to the obligation of the contract. Then it was said again that whatever might be the capacity of the lodge to secede, nevertheless the conduct of the order in this case was so unreasonable that the court ought not to interfere by granting an injunction. When that is looked into it appears to come to the old question in a new form. It appears that on Whit-Monday, 1883, a resolution was passed by the Annual Movable Committee, delegates to which came from this lodge in question, which required that the members of this lodge and all other lodges should register under the Act of 1875. The lodge in this case said:—"We will not do anything to affect the registration of 1873 under the Act of 1855, because it created us a separate lodge, and if we register ourselves under the Act of 1875 it will place us in a subordinate position as a member of the order." I think the answer to that is very plain. Registration under the Act of 1855 did not constitute them a separate body, therefore they had no separate existence to protect. I think the question, although raised in that form, is only the old question whether the lodge had a right to secede or not—whether it was a separate body. Finally, I will make this observation. It has been attempted this morning to say that some objection can be found in the Statute of Frauds. We have not entered into that argument because, after the delay which has taken place, and after the opportunity which we gave to both parties to adduce such evidence, no evidence having been adduced or put in on that point, and there being no pleadings, we thought it was too late to enter upon that point. I therefore agree, for the reasons I have given, that the order of the Vice-Chancellor is right, and that this appeal must be dismissed.

Appeal dismissed, with costs.

Solicitors for the appellants, *Clarke, Woodcock, & Ryland*, for *Holden & Holden*, Bolton.

Solicitors for the respondents, *Le Riche & Son*, for *Cobbett, Wheeler, & Cobbett*, Manchester.

Q. B. Div. (Pollock, B., and Hawkins, J.) — Dec. 5, 6.

REG. *v.* LINCOLNSHIRE COUNTY COURT JUDGE. (*a*.)

County court—Judgment debtor—Equitable execution—Order for receiver to receive income of fund in hands of trustees—Order on trustees to pay—Prohibition.

W. H., by his will, authorized his trustees, at their absolute discretion, at such time or times as they should think proper, to pay and apply the income of a certain sum of money to or for the benefit of G. An action having been brought in the county court against G., in which the plaintiff recovered judgment, the county court judge made an order, by way of equitable execution, appointing a receiver to receive the interest of the said sum, and ordering the trustees to make certain periodical payments until the judgment should be satisfied.

Held, that the county court judge had no jurisdiction to make such order, and that a writ of prohibition must go.

Application for a writ of prohibition.

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

In an action of *Dixon* v. *Grylls*, in the county court of Lincolnshire, the plaintiff obtained judgment for £22. The defendant was interested in a sum of money under the will of his uncle, William Hargrave, which provided (*inter alia*) as follows:—The testator gave the residue of his property, real and personal, to his executors upon trust to convert the same into money and to set apart and invest a sum of £1,200, and he authorized them at their absolute discretion from time to time, and at such time or times as they should think proper, to pay and apply the whole or any part of the income of the said sum of £1,200 to or for the benefit of the defendant in such manner in all respects as they should think proper. On an application by the judgment creditor for the appointment of a receiver by way of equitable execution, the county court judge made an order by which the registrar was appointed to receive the interest of the above-mentioned sum in the hands of the executors of William Hargrave, and the executors were ordered to pay every half-year as it became due the sum of £10 (part of the interest of the said sum) until the judgment in the action should be fully satisfied.

A summons at chambers was taken out on behalf of the executors and trustees of the will of William Hargrave for a prohibition restraining all proceedings under the above order. The summons was referred to the court.

C. A. Russell, for the executors.—This is a case of a county court judge acting without jurisdiction. Therefore the proper remedy is prohibition. There could be no appeal, the order complained of being an interlocutory order. The judge purported to give himself jurisdiction by a decision which was erroneous in point of law, as in the case of *Elston* v. *Rose*, 17 W. R. 52, L. R. 4 Q. B. 4. In order that an application for a receiver might properly be entertained, it was necessary that there should be a fund of which a receiver could be appointed. The judge held erroneously in law that there was such a fund. The defendant's interest in this fund is not such an interest as can be attached by way of equitable execution. By the terms of the will the trustees have an absolute discretion to apply the income for the benefit of the defendant; they are not bound to pay it to the defendant, and therefore they cannot rightly be ordered to pay it to the receiver. At any rate, the judge had no jurisdiction to order the trustees to pay a definite sum at a definite time to the receiver. If it is right to appoint a receiver at all, he must be left to get what he can.

Chester, for the judgment creditor.—The proper remedy, if the executors were dissatisfied, was by way of appeal. The judge had jurisdiction to entertain an application for a receiver; and having jurisdiction, even if he exceeded his jurisdiction by misconstruing a document, this court will not interfere. But the judge construed the document rightly. The discretion of the trustees is only as to the times and manner of payment. *Snowdon* v. *Dales*, 6 Sim. 524, shows that such an interest as that of the defendant would pass to his trustee in bankruptcy. And the receiver can step in and take what a trustee in bankruptcy could take.

POLLOCK, B.—It is said that, this being a matter in which the county court judge has decided in respect of a suit as to which he originally had jurisdiction, the proper remedy is by way of appeal. The answer to that is that this is an interlocutory matter; and it is clear that the right of appeal from the county court, which is given by statute, does not extend to interlocutory matters. But where a judge of an inferior court acts beyond his jurisdiction, the aggrieved party is undoubtedly entitled to prohibition. The defendant here had an interest under the will of a relative, and the county court judge thought that the will gave him jurisdiction to make an order, not only against the defendant, but against the trustees. It is said, on behalf of the judgment creditor, that where it is once shown that the court *ab initio* has jurisdiction, if the judge then exceeds his jurisdiction by misconstruing any document, this court ought not to interfere. That is untenable. A judge of an inferior court cannot give himself jurisdiction by construing a document in one way rather than in another. I think that the county court judge construed this will wrongly. I am of opinion that a receiver ought not to have been appointed at all. But there is certainly no precedent for an order that trustees should pay over such money. The case of *Pink* v. *De Thuisey*, 2 Mad. 157, is not unlike this case, and is an authority against making any such order. The prohibition must go.

HAWKINS, J.—I am of the same opinion. As to the first part of the order, the judge had jurisdiction to appoint a receiver of such debts as the debtor had control over. But this is virtually an order on the trustees, and affects them. It authorizes the receiver to take that which they alone have authority to apply at their absolute discretion. As to the next part, which orders periodical payments by the trustees, I cannot conceive how it can be said that there was jurisdiction to make such an order.

Prohibition granted.

Solicitor for the executors, *Credland*, Gainsborough.

Solicitors for the judgment creditor, *Scott & Co.*

Q. B. Div. (Pollock, B., and Hawkins, J.) } Dec. 1.

SUCKLING *v.* GABB. (*a.*)

Practice—Costs up to and after payment into court—Effect of discontinuance—Rules of Supreme Court, ord. 26, *r.* 1; *ord.* 66, *r.* 1.

On a summons, under order 14, *for the payment of a sum of money, the master ordered the defendant to pay money into court as to part of the claim, and gave leave to defend as to the remainder. After issue joined, the plaintiff discontinued the action. The taxing master gave the defendant the whole costs of the action from the beginning. On appeal for review of taxation,*

Held, that the costs were not governed by ord. 26, *r.* 1, *but were in the discretion of the court, under ord.* 65, *r.* 1, *and that the plaintiff was entitled to his costs up to the time of payment into court.*

Langridge *v.* Campbell, 25 *W. R.* 351, 2 *Ex. D.* 281, *distinguished.*

This was an application for review of taxation of costs made before Field, J., at chambers, and referred by him to the court. The plaintiff was an executor and brought an action to recover £160 against the defendant. The defendant, before action, offered the plaintiff £54 in satisfaction of his claim. This the plaintiff refused, and on the 15th of June he issued his writ. On the 30th of June application was made before the master under order 14, and it was ordered that unless the defendant paid the sum of £60 11s. 9d. within a week, the plaintiff should have judgment for that sum; and unconditional leave to defend was given as to the remainder of the claim. That amount was paid into court by the defendant on the same day. On the 18th of July the defence was delivered, and, after interrogatories and answers, the reply was delivered on the 28th of July, and issue was joined thereon. In November the plaintiff gave notice of discontinuance. In taxing the costs on the discontinuance order, the master, "on the principle of *Langridge* v.

(*a.*) Reported by CECIL CHAPMAN, Esq., Barrister-at-Law.

Campbell," 25 W. R. 351, 2 Ex. D. 281, allowed the defendant his costs of suit from the commencement.

The plaintiff took out a summons to review the taxation, which was referred by Field, J., to this court.

T. W. Chitty, for the plaintiff.—The plaintiff objects to the allowance of costs to the defendant of the proceedings prior to the payment into court. Costs are in the discretion of the court, except in the case where an issue is tried before a jury, in which case costs follow the event. When, therefore, an action is brought for a sum of money and the defendant pays money into court and the plaintiff afterwards discontinues the action, it is a matter of discretion how the costs are to be apportioned. *Langridge* v. *Campbell* is distinguishable on three grounds: (1) The money was paid in generally; (2) It was agreed that the costs were to abide the event; (3) There was a reference.

He cited also *Buckton* v. *Higgs*, 27 W. R. 803, 4 Ex. D. 174.

Lyndon Bell, for the defendant.—This question of costs is entirely due to the irregularity of the plaintiff. It is a case for which no precedent can be found, and with which the rules do not deal. By ord. 22, r. 7, when payment into court is made before delivery of a defence, the plaintiff may, within four days after receipt of notice of such payment and before reply, accept in satisfaction the sum so paid in. The money in this case was paid in before defence, and that being so the plaintiff ought to have taken the money out within four days and before reply. Not availing himself of this rule, he continues the action. The notice to discontinue in November was entirely irregular, for by ord. 26, r. 1, the right must be exercised before reply, and if after reply by leave of the court, which the plaintiff did not obtain. In *Buckton* v. *Higgs* there was no irregularity. The discontinuance being after reply the case is not within ord. 26, r. 1, and, issue having been joined, the case must be decided as if it had gone to trial and the defendant had succeeded. *Wheeler* v. *United Telephone Co.*, 33 W. R. 295, 13 Q. B. D. 597, and *Goutard* v. *Carr*, 13 Q. B. D. 598 (*n.*), are in point. The latter case is an authority for saying that if the payment in goes to the whole cause of action, as it is admitted it did here, the defendant is entitled to the whole costs. The case of *Goutard* v. *Carr* is similar to *Langridge* v. *Campbell*; in both cases there was an agreement that costs should abide the event. In *Wheeler* v. *United Telephone Co.* there was no such agreement, and the Court of Appeal attached no importance to its absence. If there is discretion, it should, under the circumstances, be exercised in the defendant's favour.

POLLOCK, B.—This is a case of some practical importance. It comes to us as an appeal from Master Johnston's taxation of costs. The summons to review was taken out before Field, J., at chambers, and he referred it to this court. Our decision must be governed only by the facts of this particular case, although it does involve a rather important principle. [After stating the facts the learned judge continued:—] On these facts it is urged that the plaintiff is entitled to his costs up to the time of payment into court, inasmuch as he was compelled to bring the action. The defendant says No, because he did not avail himself of the rules, and the case ought to be treated as if it had gone to trial, for if it had done so it would have been found that £60 would have been sufficient to satisfy the claim, and then ord. 65, r. 1, would have applied.

Now the court has a discretion with regard to costs, except in those cases in which the rules say the costs shall go in a particular way. It is clear that in this case we have such a discretion, and the question here arises, Is the exercise of that discretion fettered in any way? The plaintiff has asked £100 more than he has received. The defendant paid £60 into court and the plaintiff did not take it out under the rules, and if the case had gone on to trial there would have been no cause for interference. The defendant therefore contends that the plaintiff ought to pay the whole costs. Is there any authority for the defendant's contention? The master's taxation was founded on the case of *Langridge* v. *Campbell*. That case is disposed of in very few words. There, by consent, an order of reference had been made, and costs were to abide the event. That amounted to an agreement between the parties that the costs were to abide the event. But this is made clearer by the case of *Buckton* v. *Higgs*, where the discretion of the court was not so fettered. In that case the defendant denied the breach of covenant, and paid money into court, and the issues were referred to a referee, who found that the money paid in was sufficient to satisfy the claim; the discretion was exercised by allowing the plaintiff his costs up to the time of payment into court. In that case Kelly, C.B., expressly explained his decision in *Langridge* v. *Campbell*; therefore, to the extent to which the master relied on that case I think he was wrong.

But our attention has been directed to two later cases —viz., *Wheeler* v. *United Telephone Co.* and *Goutard* v. *Carr*. *Goutard* v. *Carr* may be dismissed with this observation, that in that case there was an agreement that the costs were to abide the event.

Wheeler v. *United Telephone Co.* is not a decision which fetters our discretion at all. For in circumstances somewhat similar to the present the Court of Appeal considered that the case, having gone down to trial, was governed by ord. 65, r. 1. In the present case the facts that existed there do not exist here, and in deciding this case we do not see that our discretion is fettered in any way by modern rules.

It seems to me that when a claim is made for a large amount and a small amount is paid into court which the plaintiff takes out and goes on and then afterwards discontinues, he is not to be put in the same category with a man who drives the defendant to a trial. I am satisfied with ord. 65, r. 1, though it does fetter our discretion. It is a sound and good rule. If the case had gone down to trial that rule would have been applied. The case did not go to trial, and I am of opinion that we have an unfettered discretion. For these reasons I think the master was wrong in thinking that he was bound by *Langridge* v. *Campbell*; he must therefore review his taxation of the costs by allowing the plaintiff his costs up to the time of payment into court.

HAWKINS, J.—I am entirely of the same opinion. It must be borne in mind that this was a claim by an executor, therefore the suggestions that it was extortionate and wicked have no application. Having regard to the possibility of losing on the remainder of the claim, and in that way incurring further costs, he prudently discontinued. Up to the time when the £60 was paid into court it is clear that the plaintiff was right and was entitled to his costs, and it is not easy to see how his subsequent conduct can retrospectively affect his right to them. It was on the discontinuance order that the master proceeded to tax.

What is the effect of the discontinuance order? It is quite clear that ord. 26, r. 1, applies, not only where the whole action is discontinued, but also where part only is discontinued, and it contemplates the payment by the plaintiff of the costs of the matter so withdrawn.

Under the present circumstances what costs is the plaintiff entitled to? The master disallowed him all costs on the authority of *Langridge* v. *Campbell*. The decision in that case depended on the agreement of the parties to abide the event. I think, therefore, that the principle on which the master went is mistaken.

The matter therefore resolves itself into the question, What is just and reasonable, and how ought our discretion to be exercised? I think that plaintiff was compelled to bring the action, and that he is entitled to his costs up to the time of the payment into court.

We ought, therefore, to allow the plaintiff such costs as were necessary to obtain the £60 due to him. And the defendant ought to have the costs incurred after the time when the £60 was paid, and also the costs which he reasonably incurred, before the payment of the £60, in respect of that part of the claim to which the master gave him leave to defend. The master, therefore, must review his taxation on these lines.

Solicitors for the plaintiff, *Smith, Stenning, & Croft.*

Solicitors for the defendant, *Rowland & Ward.*

Court of Appeal.

From Chan. Div. May 21, 23, 25.

LEVER *v.* GOODWIN. (*a.*)

Trade-mark—Imitation—Sale of goods as those of rival traders—Injunction—Form of account.

Where an injunction has been obtained by a plaintiff restraining a defendant from selling his goods in a form so resembling the plaintiff's as to lead purchasers to believe that they were the goods of the plaintiff, the order for an account should direct an account of all profits made by the defendant in selling his goods in that particular form, and should not be limited by excluding therefrom the profits on those of the goods which the defendant can prove were sold as his.

Decision of Chitty, J., *affirmed.*

Appeal from a decision of Chitty, J.

The plaintiffs, who were manufacturers of soap, brought the present action to restrain the defendants, who were also manufacturers of soap, from selling their soap in such a way as to pass it off as the plaintiffs' soap.

The defendants did not sell their soap retail, but they sold it to retail dealers, who then sold it retail to the public. The retail dealers knew that they were not buying the plaintiffs' soap.

At the trial Chitty, J., granted an injunction restraining the defendants from selling any soap not being manufactured by the plaintiffs in the wrapper and in the form of any one of three specified exhibits which were admitted to have been issued by the defendants, or in any form calculated or intended to pass it off, or to enable others to pass it off, as and for the goods of the plaintiffs. And it was ordered that an account should be taken of the profits made by the defendants in selling soap made by them in any wrapper such as that contained in the three specified exhibits, and in the form of those exhibits, and that the defendants should pay to the plaintiffs the amount found due on the taking of the account.

The defendants appealed.

The only part of the appeal which calls for a report is that dealing with the question as to the form of account.

Aston, Q.C., and *Chadwyck Healey*, for the appellants.—The account directed by Chitty, J., is too wide. No damages can be recovered unless the injury can be proved: *Blofeld* v. *Payne*, 4 B. & Ad. 410. [COTTON, L.J.—In a patent case it is clear that you can either get damages or have an account taken of profits.] The case of a patent is different; no one but the patentee can make the patented goods, and he is therefore clearly entitled to the profits. All that the plaintiff is here entitled to is the profit on the defendants' goods which are proved to have been passed off as the plaintiffs'.

They referred to *Leather Cloth Co.* v. *Hirschfield*, 14 W. R. 78, L. R. 1 Eq. 299; *Davenport* v. *Rylands*, 14 W. R. 243, L. R. 1 Eq. 302.

Romer, Q.C., Lockwood, Q.C., and *John Cutler*, who were called upon as to limiting the account by excluding soap which the defendants could show to have been sold as theirs, submitted, on the authority of *Edelsten* v. *Edelsten*, 11 W. R. 328, 1 De G. J. & S. 185, 196, that the account ought not to be so limited.

Chadwyck Healey replied.

COTTON, L.J.—There are two questions here—first of all, whether Chitty, J., was right in granting an injunction against the defendants; secondly, if that be decided against the appellants, what ought to have been the form of the decree as regards profits? Now consider what this case is. [His lordship then stated the facts, and came to the conclusion that the injunction had been rightly granted.] Then, ought there to be an alteration as regards the account of profits? Mr. Healey referred us to cases on the question of damages. In my opinion those cases are not relevant to the question as to the form of the account of profits. It is well known that both in trade-mark cases and patent cases the plaintiff is entitled, if he succeeds in getting an injunction, to take either of two forms of relief; he may either say, "I claim from you the damage I have sustained from your wrongful act," or "I claim from you the profit which you have made by your wrongful act." Mr. Chadwyck Healey contended that the only profit which the plaintiffs could call for was that profit which arose from the sale of this soap where the ultimate purchaser bought it, not as the defendants', but as the plaintiffs' soap. But, in my opinion, that is mistaking the whole gist of this action. The defendants, as I understand, do not sell anything to retail purchasers, what they sell they sell to middlemen—that is to say, to people who purchase from them as wholesale merchants, and who are going to sell it by retail; and the complaint against the defendants is this: "You have dressed up your soap in such a dress that those middlemen to whom you sell it are enabled, by its having that deceptive dress upon it, to sell it to the ultimate purchasers as the soap of the plaintiffs." The profit for which the defendants must account is the profit which they have made by the sale of the soap in that fraudulent dress to the middlemen. It is immaterial how the middlemen deal with it. If they find it for their benefit not to use it fraudulently, but to sell the soap to the purchasers from them as Goodwin's, that cannot affect the question whether the sale by the defendants to those middlemen of this soap in a fraudulent dress is a wrongful act. It still remains a wrongful act, because it put into the hands of the middlemen the means of committing a fraud on the plaintiffs by selling the soap of the defendants as the soap of the plaintiffs. In my opinion, therefore, the account of profits is right as it stands.

LINDLEY, L.J.—I am of the same opinion. [His lordship then dealt with the first question, and continued:—] The question raised by Mr. Chadwyck Healey as to profits and the form of the account struck me as somewhat novel and deserving of attention; but, having looked at *Edelsten* v. *Edelsten*, and having regard to the reasons given in the judgment of Lord Westbury in that case, I am satisfied that Chitty, J., was right, and for the reasons which have been given I am of opinion that the appeal fails.

(*a.*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

BOWEN, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitor for the plaintiffs, *Salaman.*

Solicitors for the defendants, *Emmet, Son, & Stubbs*, for *A. & G. W. Fox*, Manchester.

From Q. B. Div. Nov. 28.

MATTHEWS *v.* MUNSTER. (*a.*)

Counsel—Authority—Compromise of action—Verdict upon terms.

It is within the general authority of counsel conducting a cause in court to consent to a compromise upon terms, unless the client has withdrawn his authority to the knowledge of the opposite party.

Appeal from the judgment of the Queen's Bench Division refusing to set aside a compromise of the action.

The action was brought by Mr. Matthews and his wife for malicious prosecution, and was tried before Pollock, B., and a jury. At a few minutes past 11 o'clock upon the morning of the second day of the trial, before the plaintiffs' case was closed, in consequence of some observations from the judge, the defendant's counsel agreed to settle the case upon the terms of a verdict for the plaintiffs for £350, with costs, the defendant withdrawing all imputations. The defendant and his solicitor were not present in court, being on their way up from Brighton, and the solicitor had telegraphed to the junior counsel that he and the defendant would arrive at London Bridge station at 11.5 a.m. The defendant arrived in court soon after the case was settled and disposed of, and protested against what had been done. An application was made to have the compromise set aside, and in support thereof a joint affidavit was filed by the defendant and his solicitor, in which the defendant stated that he entirely repudiated the terms consented to in court, and that he had given no authority, nor had he been asked to consent to any terms of settlement; the solicitor also stating that he gave no authority to consent to any terms of settlement. The solicitor's managing clerk, who was in court at the time of the settlement, also stated in effect on affidavit that he had no authority, and that he had given the defendant's counsel no authority to consent to any terms of settlement; that he was not consulted as to the nature of the terms; and that he asked counsel to wait until the defendant and his solicitor arrived in court.

The Divisional Court (Stephen and Wills, JJ.), dismissed the motion.

The defendant appealed.

E. Wilberforce (*H. R. Wilson* with him), for the defendant.—Counsel has only authority to conduct the cause in court and to fight it; he has no authority to agree to a compromise. The judgment of Crowder, J., in *Swinfen* v. *Swinfen*, 5 W. R. 203, 1 C. B. N. S. 364, who dissented from the rest of the court, and the judgment of Sir J. Romilly, M.R., in *Swinfen* v. *Swinfen*, 6 W. R. 10, 24 Beav. 549, support this view. It is admitted that the weight of authority is against this contention, but none of the cases were decided in a court of error.

He also cited *Swinfen* v. *Swinfen*, 18 C. B. 485; *Swinfen* v. *Lord Chelmsford*, 8 W. R. 544, 5 H. & N. 890; *Chown* v. *Parrott*, 11 W. R. 668, 14 C. B. N. S. 74; *Prestwich* v. *Poley*, 13 W. R. 753, 18 C. B. N. S. 806; and *Strauss* v. *Francis*, 14 W. R. 634, L. R. 1 Q. B. 379.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Kemp, Q.C., and *R. W. Harper*, for the plaintiffs, were not called upon.

Lord ESHER, M.R.—This was an action for malicious prosecution, and during the course of the trial counsel for the defendant, in the defendant's absence, desiring to do the best he could for his client, submitted to a verdict for the plaintiffs upon terms—namely, for £350 damages, the defendant withdrawing all imputations. The defendant now applies to have that compromise set aside upon the ground that his counsel had no authority to compromise the action. That raises the question of the relation between counsel and client. That relation has been sometimes expressed as that of agent and principal. For myself, I do not adopt that phraseology. The relation between counsel and client is that of advocate and client. No one can become an advocate for another against that other's will; he is requested by that other person, the client, to act as his advocate. The client may withdraw that request at any moment, and the advocate cannot continue to act as advocate after the request has been withdrawn. When, however, the client has requested the advocate to act for him *as his* advocate, he has thereby represented to the opposite party that the advocate is acting for him as advocate, and a secret withdrawal of the request not made known to the opposite party cannot affect that party, if he acts upon the supposition that the relationship is still in existence. The request to act as advocate amounts to a request to do whatever it is the recognized duty of an advocate to do for his client. The duty of an advocate is to act for the client in the conduct of the cause in court. He acts as the client's superior, and has unlimited power to do what he thinks best for the interest of his client in the conduct of the cause. That unlimited power, however, is under the control of the court, which will see that nothing manifestly unjust is done, and will give the client relief in such a case. If the client were in court, and the advocate proposed to do something to which the client objected, the client could not direct the advocate as to the cause he was to pursue. No counsel would submit to such dictation. If the client were to insist upon his view, contrary to the opinion of the advocate, the client would have to withdraw the authority to act as advocate. That was the only mode in which the client could get rid of the paramount power of the advocate. If counsel were to do something outside what could be fairly described as the conduct of the cause, his act would not be binding upon the client, unless done with the client's express authority. The meaning of the words "conduct of the cause" had been well stated by Pollock, C.B., in *Swinfen* v. *Lord Chelmsford*, 8 W. R. 544, 5 H. & N., at p. 922:—"We are of opinion that, although a counsel has complete authority over the suit, the mode of conducting it and all that is incident to it—such as withdrawing the record, withdrawing a juror, calling no witnesses, or selecting such as in his discretion he thinks ought to be called, and other matters which properly belong to the suit, and the management and conduct of the trial—we think he has not, by virtue of his retainer in the suit, any power over matters that are collateral to it." The mode of conducting the suit, and all that is incident to it, is there laid down as the limit of the power, not of the authority, in its ordinary meaning, of counsel so long as the request to act as advocate is in existence. Besides the specific instances given by the Lord Chief Baron, he states that there are many other matters properly belonging to the suit and the management and conduct of the trial. Among those matters must be the power of counsel to consent to a verdict upon terms. Here it is not suggested that the client withdrew the request to act as advocate, and there is no symptom of any injustice to the client, and so the client cannot now come and ask the court to set aside the compromise.

BOWEN, L.J.—In this action for malicious prosecution the defendant instructed counsel to appear for him. The first day of the trial passed, and at the beginning of the second day the defendant was not present in court. He did not come to court till nearly 11.30 a.m. During that interval he left counsel in uncontrolled command, with the duty of doing his best in the interest of his client upon any emergency that might arise. Before the defendant arrived in court counsel agreed to a verdict being given against him, the defendant withdrawing all imputations. This course must now be taken to have been reasonable, the only question being whether the client was bound by it. Counsel, by appearing for a client, undertakes duties which are regulated by professional honour and etiquette, and counsel's retainer implies that the client is bound, within certain limits, by the conduct of his counsel. Those limits are laid down by Pollock, C.B., in the passage which has been read by the Master of the Rolls. By virtue of his retainer, therefore, counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it. He is clothed with that authority by virtue of his retainer, and his being represented to the other side as so retained. Whether counsel can be called an agent or not, it is important to remember that he is not an agent in the ordinary acceptation of the term, and if he can be called an agent he is an agent of a very peculiar kind, the limit of whose authority is perfectly well understood. Supposing the client to be in court, in my opinion it is the duty of counsel to consult him where it is reasonable that he should be consulted. Counsel should, I am inclined to think, consult his client upon so important a matter as a compromise. It does not follow that counsel, if he thinks his client's course prejudicial, is bound to follow it. He has the alternative of returning his brief. But in this case the client was not present in court, and so he cannot complain that counsel, who was doing his best for his client, agreed to a compromise. Counsel was, so to speak, sailing the ship; and, whether we evolve his authority from his retainer or from his position as counsel, he had power to compromise the suit within reasonable limits. I wish to lay emphasis on this, that the duty of counsel and the authority of counsel come to the same thing. If the authority to compromise is withdrawn without the other side being made aware of it, such withdrawal cannot be allowed to prejudice the other side, who have acted upon the faith of the existence of that authority. It is within the duty of counsel to compromise an action, and, therefore, it is within the limit of his authority.

FRY, L.J.—This case seems to me to be a plain one. No instructions were given as to a compromise. The terms of the compromise included nothing that was properly outside the scope of the action; nothing manifestly unjust. It was within counsel's duty to do the best he could for his client in the matter of a compromise, and if within his duty it was within his authority. I may add that, in my opinion, it would be most disastrous in the interests, not of the bar, but of the public, if we were to hold that this compromise was not binding. The consequence would be that an advantageous offer made by the other side might have to be rejected if the client were not present in court.

Appeal dismissed.

Solicitor for the plaintiffs, *A. B. Rickards.*

Solicitor for the defendant, *W. Brewer.*

High Court of Justice.

Chan. Div. Chitty, J. — July 21.

In re PRATER.

DESINGE *v.* BEARE. (*a.*)

Will—Gift of property at "my bank"—Share certificates.

A testator who had a cash balance and also share certificates, some of which were inscribed in his name, and others payable to bearer at R.'s bank, made a bequest of "my property at R.'s bank."

Held, that only the cash balance passed under the bequest.

Adjourned summons.

This was a summons raising a question whether a gift of "my property at Rothschild's Bank" in the will, dated in 1875, of Horatio Prater, M.D., a domiciled Englishman who died in 1885, passed certain shares in the Paris, Lyons, and Mediterranean Railway Co. The shares in question were *actions au porteur* (payable to bearer) and *actions nominatives* (shares inscribed in the testator's name), of the value of about £7,000. The latter shares show on their face the name of the owner, and pass by what is equivalent to transfer and registration, but payment of the dividends may be obtained by the bearer.

The testator, by his will, gave £500 to the Société Protective des Animaux, and also "half of my property at Rothschild's Bank," and the remaining half of his property to be divided between two public libraries in Paris, naming the Mazarin and the library in the Rue Richelieu.

There was a balance of about £320 in English money standing to the account of the testator at his death at Rothschild's Bank, where the *actions* were deposited.

Sir A. Watson, Q.C., and *Wiglesworth* (for *R. F. Norton*), in support of the summons, contended that not only the cash balance, but also the *actions* passed.

They cited *Moore* v. *Moore*, 1 Bro. C. C. 127; *Fleming* v. *Brook*, 1 Roper on Legacies, 4th ed., 258; *Arnold* v. *Arnold*, 2 My. & K. 365; *Earl of Tyrone* v. *Marquis of Waterford*, 8 W. R. 454, 1 De G. F. & J. 613; *Guthrie* v. *Walrond*, 31 W. R. 285, 22 Ch. D. 573; *Brooke* v. *Turner*, 7 Sim. 671; *Marquis of Hertford* v. *Lowther*, 7 Beav. 1.

Romer, Q.C., and *Ingle Joyce*, for the executors, did not dispute that the cash balance passed, and were not called on as to the *actions*.

CHITTY, J.—I think it is somewhat strange that the testator should have annexed to the gift of the £500, a gift of one-half of £7,000, which is equivalent to £3,500. That, to my mind, is a slight circumstance. Something must have been intended to pass under the gift of property at Rothschild's Bank. In strict law the balance was a debt due from the bank, but to adopt part of the phraseology of Sir A. Watson in argument that is not the popular view, and when I say that, I am not speaking of the popular view in any lower sense, but I am speaking of it in the ordinary sense in which the term is used among business men. In will after will is to be seen a gift of "my money at my bankers." It is a perfectly intelligible phrase, about which there can be no doubt, and it is quite usual for business men to talk of so much money and so much cash at their bankers, and seeing that I must give some meaning to these words it appears to me to be quite right on the part of the applicants to say that it includes his balance,

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

because that is property—namely, money—though in law a debt—property of his at his bankers.

That being so, is there on the facts before me anything else included? It was rightly argued that "property" is a large term. I am not at liberty, nor am I disposed, to cut it down, but it is property described with reference to a bank—at a bank. It is not property described with reference to a country or to a large district—to a county like Northumberland or to an island like Mauritius; but it is property described with reference to a limited locality—namely, at a bank. I think that the observations of Lord Eldon in *Stewart* v. *The Marquis of Bute*, 11 Ves. 657, put the matter in the tersest way. He was commenting on Lord Hardwicke's decision in *The Countess of Aylesbury's case*, 1 Ves. sen. 273, that bank-notes passed under words something of the same kind as here, and he says, "It was a bequest of 'my house and all that shall be in it at my death.' Lord Hardwicke held that cash passed, and bank-notes, which Lord Hardwicke there, I do not know why, considered as cash; but not promissory notes and securities, as they were the evidence of title to things out of the house and not things in it. Bank-notes, I think, are just in the same situation."

These *actions* were evidence of the testator's title to property, not at Rothschild's, but to property in the P. L. M. Railway Co. I have read that passage, not for the purpose of citing Lord Eldon's observations with regard to bank-notes, but because I think it expressly in point. If this case were to be decided on authority there are two cases which are authorities upon the general principle and not on the mere special language of any particular will. These are *Brooke* v. *Turner* and *The Marquis of Hertford* v. *Lowther*. I think it unnecessary to go through these or any other cases: they have been so often reviewed. In my judgment, giving the fair meaning to the word "property," taking it in connection with this limiting and restricting context, I think that none of the *actions* ought to pass. No distinction can be made between the two classes of *actions*—namely, those to bearer and those which are called *nominatives*.

Solicitors, *T. P. Dixon; Wilkinson & Howlett.*

Chan. Div. } Aug. 3.
Chitty, J. }

In re GIBBONS' WILL. (*a*.)

Administration—Costs—Class inquiry.

Executors cannot, by payment into court or any other severance of a legacy, relieve the residue from bearing the costs of an inquiry for the purpose of ascertaining who are the persons entitled to take.

Petition.

Executors paid a sum of £9,500 into court under the Trustee Relief Act, stating in their affidavit that they were absolute strangers to the objects of the gift, and that, being unable to ascertain with certainty who composed the class of objects, they were unable with safety to distribute the fund out of court. They named thirty persons who were believed to be interested in the fund.

In January, 1887, twenty-nine of those persons presented a petition for an inquiry and division among the persons found entitled and payment of costs out of the testator's general estate. An inquiry was directed, and the rest of the petition was ordered to stand over.

It was certified that the thirty persons mentioned in the affidavit were the persons entitled, and on the petition now coming on for further hearing a question was raised as to the costs of the petition.

Romer, Q.C., and *Stokes*, for the petitioners, contended that the costs must be paid out of the general residuary estate, and cited *In re Trick's Trusts*, 18 W. R. 123, L. R. 5 Ch. 170; *In re Birkett*, 27 W. R. 164, 9 Ch. D. 576; *In re Sharpe's Trustees*, 15 Sim. 470; *Tyson* v. *Jackson*, 30 Beav. 384.

Whitehorne, Q.C., and *C. Parke*, for the executors, submitted that the parties entitled must, at their own expense, establish their title to the fund, and they referred to *Boycott* v. *Newman*, 4 W. R. 707; *Attorney-General* v. *Lawes*, 8 Hare, 32; *Martineau* v. *Rogers*, 4 W. R. 502, 8 De G. M. & G. 328: *Jenour* v. *Jenour*, 10 Ves. 562; Morgan & Wurtzburg on Costs, 186; *Dugdale* v. *Dugdale*, 12 Beav. 247.

Methold, for one of the persons entitled who had presented a petition but had not proceeded with it.

Romer replied.

CHITTY, J.—In this case the executors were bound to pay the legatees described by the testator. No trust whatever was created by the words of the will; it is simply a money legacy. Within six months after the testator's death the executors, in order to avoid the trouble of ascertaining the legatees, paid the money into court. An inquiry was directed, but if the executors who were not trustees had taken the trouble which they ought to have taken it would not have been necessary to direct an inquiry. It is part of their duty as executors to ascertain who the legatees are; that is part of the ordinary course of administration, the costs of which are payable out of residue. I can see no distinction in principle between the costs of ascertaining the construction of the testator's will and the costs of ascertaining the members of a class of legatees. The preponderance of authority, taking *In re Trick's Trusts* and *In re Birkett* as two of the latest instances, is in favour of the proposition which I think is the right one—viz., that the executors cannot, by payment into court, or any other severance of a legacy, relieve the residue from bearing the costs of an inquiry for the purpose of ascertaining who are the persons entitled to take. The result therefore is that the costs must come out of the residuary estate in the executors' hands.

Solicitors, *Bowlings, Foyer, & Hordern*, for *Moss & Sharp*, Chester; *Chester & Co.*, for *Kent, McKenna, & Kent*, Liverpool; *C. D. Woolley.*

(*a*.) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

Chan. Div. } July 23.
North, J. }

In re CHEPSTOW BOBBIN MILLS CO. (*a*.)

Company—Winding-up petition—Compulsory or supervision order—Wishes of creditors—Costs—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 149.

A creditor's petition was presented for the compulsory winding up of a company. After the presentation of the petition the company went into voluntary liquidation. At the hearing of the petition the petitioner asked for a supervision order, while a majority of the creditors of the company pressed for a compulsory order.

Held, that the court had no jurisdiction under section 149 *of the Companies Act*, 1862, *to force a compulsory order on the petitioner at the instance of a majority of the creditors.*

A supervision order was made, and the creditors asking for a compulsory order were treated as supporting

(*a*.) Reported by G. E. JEFFERY, Esq., Barrister-at-Law.

the petition, and were allowed to share in the costs accordingly.

Petition.

This was a creditor's petition for the compulsory winding up of the company.

After the presentation of the petition the company passed an extraordinary resolution to wind up voluntarily.

On the hearing of the petition the petitioner asked for a supervision order.

Creditors whose debts amounted to more than one-half of the total amount of the company's debts appeared on the petition and pressed for a compulsory order.

One of these creditors had filed an affidavit in which he alleged that certain debentures which had been issued by the directors were illegal, and that it was important, in the interests of the creditors, that the validity of the debentures should be contested.

J. G. Wood, for the petitioner.

S. A. Sampson, for the company, consented to a supervision order.

R. F. Norton, for the creditors.—A majority of the creditors wish for a compulsory order, and I submit that under section 149 of the Companies Act, 1862, the court ought to have regard to their wishes.

North, J.—I am of opinion that I have no jurisdiction under section 149 of the Companies Act, 1862, to force on a petitioner an order which he does not ask; and even if I had jurisdiction to make a compulsory order I see no ground for making one in the present case. The legality of the debentures can be questioned in a winding up under supervision just as well as in a compulsory winding up. A supervision order will therefore be made, and Mr. Norton's clients will be treated as supporting the petition, and will be entitled to share in the costs accordingly.

Solicitors, *Gregory, Rowcliffes, & Co.; Lewin, Gregory, & Anderson; G. S. Warmington.*

Chan. Div. } Oct. 28; Nov. 1, 8.
Stirling, J. }

Whitehouse v. Edwards. (a.)

Advances in testator's lifetime—Advancement—Creditors' deed—Release—Surety.

Testator's son agreed to purchase a business for £300 and a further sum payable by instalments. Testator advanced the £300, and joined with his son in promissory notes to secure the instalments, the first of which he paid when it fell due. The rest were paid by his executors out of his estate. Testator by his will gave his son a share in his residuary estate, directing that advances should be repaid or taken as part of the share. After the testator's death the son executed a creditors' deed, under which the vendor of the business proved for his unpaid purchase-money, but did not obtain satisfaction. The deed contained a release to the principal debtor and a reservation of rights against sureties.

Held, that the sums paid by the testator were advances within the meaning of the will, but that the sums paid by the executors were not; that such advances were not to be deemed advancements for the benefit of the son; and that, as to the subsequent instalments which the executors had paid, they might retain them out of the income of the son's share, or might prove under the creditors' deed, in which case they must adopt the proof already made by the vendor, and stand in his shoes.

(a) Reported by L. S. Bristowe, Esq., Barrister-at-Law.

The late George Frederick Whitehouse, who died on the 20th of May, 1886, by his will, dated the 2nd of October, 1885, after appointing the plaintiffs his executors and trustees, devised and bequeathed to them his real and residuary personal estate upon trusts after the death of his wife, as to one-fifth part for his son Daniel absolutely; and as to one other fifth part to invest the same and pay the income to his son George Frederick Whitehouse for his life, and after his death to stand possessed of the capital and income of that fifth part upon trust for his children at twenty-one or, in the case of daughters, marriage. And the testator proceeded as follows:—"And if there shall be no such child as aforesaid of my son, the said George Frederick Whitehouse, then, subject to the trusts and powers hereinbefore declared in favour of my said son, George Frederick Whitehouse, and his issue, I direct that his original share and also any share or shares which shall have accrued under this provision shall accrue to and be held in trust for my other children in equal shares, but so that the further share accruing to each of them shall be held by the trustees or trustee upon and subject to the like trusts and powers as are hereinbefore and hereinafter declared concerning their original shares." And the testator disposed of one other fifth part upon the like trusts in favour of another son, and the remaining fifth part upon trusts in favour of a daughter. And the will contained the following declaration:—"I declare that before any of my three sons the said Daniel Whitehouse, George Frederick Whitehouse the younger, and Henry Arthur Whitehouse shall participate under the trusts of this my will they shall repay to the trustees or trustee all sums of money that I have advanced to them during my lifetime; but the trustees or trustee for the time being of this my will shall not be answerable or accountable in any way in case my said sons shall be unable to repay such sums of money so advanced by me to them as aforesaid; but such advances shall be taken to be as part of their share under the trusts of this my will."

In March, 1885, George Frederick Whitehouse, the son, entered into an agreement with John Cartland for the purchase from him of the business of a brassfounder at the price of £1,532 6s. 8d., of which £300 was payable at once, and the remainder by five instalments of varying amounts, to be paid at specified dates, the instalments being secured by joint and several promissory notes of the testator and his son. The testator advanced to his son the said sum of £300, and also subsequently paid the sum of £144 16s. 1d., being the amount of the first instalment which fell due, with interest and costs. The other instalments were all paid by the executors out of the testator's estate.

On June 12, 1886, George Frederick Whitehouse, the son, assigned all his property to the defendant Edwards for the benefit of his creditors. This deed was executed by Cartland as a creditor for the balance of his purchase-money. The deed contained a release from the executing creditors to George Frederick Whitehouse, the son, subject to a reservation of rights against sureties.

The present summons was taken out by the executors to determine (1) whether the sums paid by the testator and his executors constituted debts owing by G. F. Whitehouse, the son, to the testator's estate; (2) whether any and which of such sums were advances within the clause in the will; (3) whether such of them as were advances ought to be retained out of the *corpus* of G. F. Whitehouse's share; (4) whether such advances were primarily charged on the life interest in such share; (5) whether the executors had a right to retain the life interest of G. F. Whitehouse to satisfy the sums paid by the executors since the testator's death, and (6) whether the executors should prove under the creditors' deed.

W. P. Beale, for the plaintiffs.

Colt, for the defendant Edwards.

Willis Bund, for a beneficiary under the will.

The cases cited are referred to in the judgment.

Stirling, J., after stating the facts as above set forth, proceeded as follows:—Are all or any of the sums so paid by the testator or his executors to be deemed sums of money advanced during the testator's lifetime within the meaning of the clause in his will? Authority on this is scarcely needed, but *Auster* v. *Powell*, 1 De G. J. & S. 99, 11 W. R. Ch. Dig. 138, is in point. I think the two sums paid by the testator in his lifetime are such advances, but those paid by his executors, as to which the liability only was incurred in the testator's lifetime, are not. With regard to the two sums advanced by the testator in his lifetime, the mode in which they are to be dealt with is marked out by the will. Any sons to whom such advances have been made are directed to repay them, and, if they cannot, they are to be taken as part of their shares. It was contended that this meant that the advances to G. F. Whitehouse, the son, were to be repaid out of the income coming to him during his life, so that there could not be a complete ascertainment of the share until the income had been applied in repaying the advances. I do not think that is so. I think the testator intended that there should be a settlement and division at once, and that "share" means the *corpus*. This construction is also supported by the accruer clause and by the fact that one of the fifth shares is bequeathed absolutely.

It was then contended that the advances in question were to be deemed advancements for G. F. Whitehouse, the son, and the cases of *Dyer* v. *Dyer*, 2 Cox, 92; *Redington* v. *Redington*, 3 Ridg. P. C. 190; and *Drew* v. *Martin*, 12 W. R. 547, 2 H. & M. 130, were relied on.

In *Dyer* v. *Dyer*, which was decided in 1788, the Lord Chief Baron said: "The clear result of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold, or leasehold: whether taken in the names of the purchasers and others jointly, or in the names of others without that of the purchaser: whether in one name or several: whether jointly or successive, results to the man who advances the purchase-money." That is supported by Jessel, M.R., in *Marshal* v. *Crutwell*, L. R. 20 Eq. 328, who says (p. 329), "As I understand it, the law is this: the mere circumstance that the name of a child or a wife is inserted on the occasion of a purchase of stock is not sufficient to rebut a resulting trust in favour of the purchaser if the surrounding circumstances lead to the conclusion that a trust was intended."

These cases do not directly apply here. The cases more particularly relied upon were *Redington* v. *Redington* and *Drew* v. *Martin*. *Redington* v. *Redington*, so far as applicable to the present case, is stated by Lord Hatherley in *Drew* v. *Martin*, 2 H. & M., at pp. 133, 134. [His lordship read the statement of *Redington* v. *Redington* there given, and also stated the case of *Drew* v. *Martin*, and continued:—]

Those cases differ from the present in one important respect. In both the contract was that of the testator himself. Here the contract was not that of the testator at all. It was a contract by the son to purchase and pay for a certain business. The father was only mixed up in it because a surety was required. That distinguishes the case from *Redington* v. *Redington*. But if *Dyer* v. *Dyer* applies, consider how the matter would work out. It is the son's contract. As between father and son, the son has no right to resort to the father for any part of the purchase-money, and if the son pays the purchase-money there is no advancement. If the son does not pay voluntarily, and judgment is recovered against him and payment obtained, there is no advancement. But if the vendor chooses to sue the father there is an advancement. The fact is, you must look at all the circumstances of the case. The testator here did not do anything to bind himself to treat these sums as gifts to the son. They are consequently not advancements.

Then the next question is with regard to the position of the executors. Cartland proved under the creditors' deed of June, 1886. It is immaterial whether he got anything. He did not obtain complete satisfaction, and the residue was paid by the executors: *Green* v. *Wynn*, 17 W. R. 385, L. R. 4 Ch. 204, and *Bateson* v. *Gosling*, 20 W. R. 98, L. R. 7 C. P. 9, show that this was not an absolute release of the debt so as to be equivalent to a covenant not to sue. The surety was not released, and the executors were right in paying as they did. They are, then, entitled to the promissory notes, and may recover upon them against the principal debtor, G. F. Whitehouse, or they may stand in the place of the principal creditor whom they have already paid, and come in under the creditors' deed. In that case they must adopt the proof already made by Cartland, and stand in his place. Would not, then, the release by the deed given to the principal debtor be effective as between the executors and him? It seems to me that it would, and I am confirmed in that view by *Stammers* v. *Elliott*, 16 W. R. 489, L. R. 3 Ch. 195. It seems to me that the position of the executors is this; they may choose whether they will stand upon the original contract, in which case they would be entitled to retain out of the income, or they may go in under the deed, and then they must give up that right of retainer. They must determine according to what is for the benefit of the estate. As to that I cannot decide. I give therefore the following answers to the questions raised by the summons:

(1.) All the sums paid by the testator and his executors constitute debts owing by G. F. Whitehouse to the testator's estate.

(2.) The sums paid by the testator in his lifetime are advances within the meaning of the clause in the will, and the others are not.

(3.) The last-mentioned sums forming advances are to be retained out of the *corpus* of G. F. Whitehouse's share if he cannot pay them.

(4.) Such sums are not primarily charged on his life interest.

(5.) The executors have a right to retain the life interest of G. F. Whitehouse to satisfy the amount paid on the promissory notes since the testator's death.

(6.) The executors should not prove under the deed if on inquiry in chambers it appears that their so proving and consequently giving up the right to retain out of the life estate would not be for the benefit of the estate.

Solicitors, *H. Tyrrell; Miller & Miller; Kennedy, Hughes, & Kennedy.*

Chan. Div. Kekewich, J. } Oct. 27.

Cave v. Harris. (a.)

Will — Construction — Specific devise — After-acquired property — Wills Act, s. 24.

A testator, by a codicil made in August, 1867, devised to the defendant in fee "all those three freehold cottages and premises thereunto belonging, situated in E., adjoining the C. Inn, which I have lately purchased." The testator bought the cottages in 1867. He subsequently sold two of them, but he lived in the third till his death in 1883. In 1875 he acquired a garden at the

(a.) Reported by P. F. Wheeler, Esq., Barrister-at-Law.

rear of the one in which he lived, and used it during his life as part of his residence.

Held, that the garden did not pass to the devisee with the cottage that remained unsold.

The question in this case was whether, under section 24 of the Wills Act, a devise of a cottage "and premises thereunto belonging . . . which I have lately purchased" included a garden attached to the cottage which was acquired by the testator after the codicil containing the devise was executed. The testator, by a codicil dated the 26th of August, 1867, devised to the defendant in fee "all those three freehold cottages and premises thereunto belonging situated in Exeter-street aforesaid, adjoining the Crown and Anchor Inn, which I have lately purchased." The testator purchased the cottages in 1867; he subsequently sold two of them, but he lived in the third (known as No. 105, Exeter-street) until his death in 1883. In 1836 the testator and his brother had purchased a garden at the rear of the cottages, which they held as tenants in common. In 1875 the brother died, having devised his share to the testator. From the year 1875 till his death the testator occupied the garden as forming part of 105, Exeter-street. The defendant claimed the garden as passing under the devise of the house; the plaintiff was the heir-at-law of the testator, and urged that there was an intestacy as to the garden. The arguments used and the cases cited appear from the judgment.

Barber, Q.C., and *Vernon R. Smith*, for the plaintiff.

Warmington, Q.C., and *E. W. Byrne*, for the defendant.

Kekewich, J.—The question which I have to decide is whether a garden which did not, until a late period, belong to or form part of any particular house, passed by the specific devise (because it is strictly a specific devise) contained in the codicil of the testator in this action, which for all purposes we may treat as his will, inasmuch as the will itself contained no devise of real estate, and may be left out of consideration altogether.

The codicil is dated the 24th of August, 1867, and at that time the testator was not the owner of this garden, nor did he occupy it, nor did it belong to any one of the houses mentioned in the codicil. He changed his residence from time to time, and, as he did himself occupy the garden in connection with one or more of those residences, for the present purpose it is enough to observe that for some time before his death, and, as I understand, up to the date of his death, he was in the occupation of No. 105, Exeter-street, which was one of three cottages which he had purchased some time before, the other two having been sold, and that in connection with No. 105, Exeter-street he occupied the garden, which was approached by a door at the back of No. 105. I have to consider whether, under those circumstances, he having died in 1883, the garden passed by this codicil. The devise is in the first instance—that is to say, the governing words of the devise are—"all those three freehold cottages," which I take for granted (there is no dispute about it) mean 105, 106, and 107. It is impossible to suppose that the garden was intended to pass, or would pass, by the description of those freehold cottages—at any rate, at that time. He adds the words, "and premises thereunto belonging, situate in Exeter-street aforesaid," of course referring to the cottages, not to the premises thereunto belonging. This garden, if it is part of the premises thereunto belonging, must be part of the premises belonging to one of the cottages—namely, to 105.

It is not suggested that it belonged to either of the others. That it did at the time of the death belong to No. 105 has, I think, been conceded; at any rate it has not formed the subject of serious argument. In strict language that it did belong to it is a question into which I did not propose to enter. I assume that at the testator's death it did. He then describes the property as adjoining the Crown and Anchor Inn. I do not intend to dwell upon that, because, although in one sense the garden did not adjoin the Crown and Anchor Inn, it was near enough to apply to the whole property. Then come these words, which apply to the whole question, "which I have lately purchased"—a statement which was perfectly true in 1867, but was only true in 1883 on the hypothesis that "lately" is a flexible word and might mean at any time in the testator's lifetime. If I am to construe the will as dated in 1867, and standing alone, I have no hesitation in construing it to exclude the garden; it does not come within any part of that description. But then I am told it does come within it, and that is the real question by force of the 24th section of the Wills Act, which enacts that every will shall be construed with reference to the personal and real estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless the contrary intention shall appear by the will. I understand that to mean that, in order to construe a will with the view of ascertaining what real and personal estate is comprised in it, you must read it to make it take effect as if it had been executed immediately before the death of the testator, and that you are not so to construe it for any other purpose. Attempts have often been made to construe a will as from the date of the death for the purpose of ascertaining the persons beneficially interested, but the section has always been relied upon to answer any such arguments as that; it is only to be construed in that way for the purpose of ascertaining what is the real and personal estate comprised in it.

Now Mr. Warmington says that in order to decide against him I must find words here excluding the garden, which was afterwards annexed to No. 105. That does not seem to me to be the proper way of applying the Act of Parliament. It is a convenient way, from his point of view, of stating the meaning of the Act, but it does not seem to me to be correct. I prefer the principles indicated by Hall, V.C., in *Dickenson* v. *Dickenson*, 28 W. R. 141, 9 Ch. D. 667, 12 Ch. D. 22, where he says there are no words which limit the property there to that which the testator possessed at the date of the will, showing that, in the Vice-Chancellor's opinion, what you want is words which limit the devised property to that which the testator had at the date of the will rather than excluding something purchased afterwards. And I find precisely the same principle, as I understand it, laid down by Wood, V.C., in the case of *Douglas* v. *Douglas*, Kay, 400, 2 W. R. Dig. 123, which was quoted by Mr. Barber. He refers to *Cole* v. *Scott*, 1 Mac. & G. 518, saying, "Lord Cottenham says what everyone must agree in thinking correct—that the intention of the testator is not to be altered, and if it be clear that the testator is not referring to a general class of property, but to something specific, the new statute is not to have the operation of passing property which evidently was not in the contemplation of the testator, where the subject of the gift appears to have been defined and marked out by him as existing at the period when he is speaking."

To my mind the testator here has defined and marked out a specific property as that which was in his contemplation and which he intended to devise; therefore, according to Wood, V.C.'s, principle, the statute is not to have that operation. I observe that Wood, V.C., refers to it as a new statute, though he was speaking in 1854 and the Act was passed in 1837, which, perhaps, may excuse the testator for using the word "lately" with reference to property purchased some time before. Not only does he specify three freehold cottages, but he refers to them as those which he has lately purchased.

I must look at the will as at the date for the purpose of ascertaining what he meant. The words seem to me to deal with this specific property specified by reference to a purchase then lately made. I do not think that any alteration really would be made in the sense if I construed it at the date of the will. The only difficulty would be that "lately" would have a reference to a date long before; but, construing the gift, as I say I think it is, as a specific gift, it is not enlarged by the operation of the words of the Act of Parliament which, for the reasons mentioned by Wood, V.C., have no application.

So deciding, it will be observed that I do not rely at all on the words at the end of section 24, "unless the contrary intention shall appear." I think those words are intended to apply to a case where it would otherwise be possible and right to construe the will so as to include the particular real or personal estate, but in some way or other, expressly or by implication, the testator has evidenced a contrary intention. I do not think it would be right to say here that he has expressed a contrary intention. I prefer to say that he is dealing with something specific, that the will passes that specific property and nothing else, and that, therefore, the Act does not apply.

I think, therefore, I must hold that the defendant is not entitled to this property—in other words, that her counter-claim fails—and I think I must give the plaintiff the costs of that counter-claim, which will be set off against the costs which are to be deducted out of the moneys in the defendant's hands and which are payable by her to the plaintiff in regard to the other property. I suppose there is no need of an account or anything of that kind.

Solicitors for the plaintiff, *Hume, Bird, & Eldridge*, agents for *Moore & Rawlins*, Lymington.

Solicitors for the defendant, *Gregory, Rowcliffes, & Co.*

Q. B. Div. (Stephen and Charles, JJ.) Nov. 19.

REG. *v.* FARRANT. (*a.*)

Justice of the peace — Disqualification on ground of interest—Summoned as witness.

A magistrate had visited, as medical attendant, a person who alleged that he had been assaulted. He strongly advised his patient not to prosecute, and afterwards received a communication from the person alleged to have committed the assault, in which an apology was tendered, and a desire expressed for an amicable settlement. It was alleged that he would be a necessary witness for the prosecution.

Held, that he was not disqualified from sitting to hear a summons taken out for the alleged assault, either on the ground of interest or because he might be called as a witness.

This was an application for a *supersedeas* to set aside a rule absolute for a prohibition to restrain Dr. Farrant, the mayor of Taunton, from sitting as one of the magistrates of that borough to hear and adjudicate upon certain summonses for assault.

It appeared from the affidavits that Dr. Farrant had been called in to attend one of his patients after the alleged assault had taken place as his medical attendant, and had advised him not to bring the matter before the magistrates. He had also received a communication, alleged to amount to an admission, from the person against whom it was intended that a summons for assault should be taken out. It was therefore intended that he should be called as a witness for the prosecution.

(*a.*) Reported by A. H. TODD, Esq., Barrister-at-Law.

It was further alleged that he had offered to bet that the magistrates would not convict in such a case, though this was contradicted.

A rule *nisi* for a *supersedeas* having been obtained,

Wheeler, Q.C., and *Bartley Denniss*, in support of the prohibition.—The conduct of the mayor was equivocal, and showed he had a bias. It is not only a pecuniary interest which disqualifies, but any interest which the magistrate is shown to have which is calculated to bias his judgment.

They cited *Dimes* v. *Grand Junction Canal Co.*, 3 H. L. Cas. 759, and cases there referred to; Shortt on Information, Mandamus, and Prohibition, i., 441; *Reg.* v. *Handsley*, 30 W. R. 368, 8 Q. B. D. 383; *Reg.* v. *Recorder of Cambridge*, 6 W. R. 80, 8 El. & Bl. 637.

Sir H. James, Q.C., and *Blake Odgers, contrà.*—Dr. Farrant was only interested as a peacemaker. The case is not analogous to that of a juror who is interested; it is here sought to deprive a magistrate of his office: *Reg.* v. *Alcock*, 37 L. T. N. S. 829, 26 W. R. Dig. 112. The mere fact that he may be called as a witness would not disqualify him: *Reg.* v. *Tooke*, 32 W. R. 753.

STEPHEN, J.—It is a most important legal principle that no one shall be judge in his own cause; that no one shall sit as a judge when he has the smallest pecuniary interest in the dispute before him is a doctrine that has been carried to very great length. There is no suggestion in the present case that Dr. Farrant has any pecuniary interest in the present matter. But the law says that though the judge or magistrate has no pecuniary interest in a cause, he may be otherwise interested in it to such an extent as to bias his judgment, and then he ought not to sit as a judge. Thus in *Reg.* v. *Rand*, L. R. 1 Q. B. 230, 14 W. R. C. L. Dig. 47, it was held that though the mere possibility of bias in favour of one of the parties does not *ipso facto* avoid the decision of the judge, yet wherever there was real likelihood that such a bias did exist it would be otherwise. That decision was approved of in *Reg.* v. *Myers*, 24 W. R. 392, 1 Q. B. D. 173, and *Reg.* v. *Handsley*. Therefore the question we have to decide is whether such a substantial interest has been shown in this case that it is probable that if Dr. Farrant heard the charges of assault he would be likely to show a real bias in favour of one of the parties. The result of the evidence we have heard is that Dr. Farrant was called in to attend one of his patients, whom he treated for certain injuries, and to whom he gave the advice that it would be better not to take the case into court, but to settle it quietly. That advice seems to have been given by him as a friend. Afterwards he received a message that the person alleged to have committed the assault was willing to apologize for what had happened, and to come to an arrangement. The other side, however, had by this time instructed their solicitors. Does that show any real bias? I am bound to say I cannot see anything of the kind. We suggested when this case was first mentioned that it would be better to settle it out of court, surely that does not show any bias in us. It is also said that it would be necessary to call Dr. Farrant to give evidence in the case as to the nature of the injuries and as to the admission. It may be that this is a ground for Dr. Farrant to say, as a matter of grace, he would not sit on the bench, but it appears to me that to hold as a matter of law that because a magistrate or judge is to be called as a witness that disqualifies him from doing his duty would be to create a precedent which, to say the least of it, would cause very great inconvenience. It has also been suggested that Dr. Farrant offered to make a bet as to the result of the case if it was tried out; if he had done so seriously it would have been a serious matter, even

though he had not actually made the bet, it would show great levity unbecoming in a person in his position, but that is not proved here. The writ of *supersedeas* must be granted.

Charles, J.—I am of the same opinion.

Writ of supersedeas *granted.*

Solicitor for Dr. Farrant, *Wilcocks*, for *Cresswell*, Taunton.

Solicitors for the respondent, *Stephens & Co.*, for *Crawshaw*, Taunton.

Q. B. Div. (Mathew and Cave, JJ.) June 14; Aug. 10.

Bethell *v.* Clark. (*a.*)

Sale—Stoppage in transitu—*Goods bought for delivery on board ship.*

Goods were bought of the defendants by T. & Co., who sent the following consignment note: "Please consign the ten hogsheads hollow ware to The Darling Downs, *to Melbourne, loading in the East India Docks." The goods were sent to Poplar by railway, and were shipped by midday on July 3. In the morning of that day the defendants, having heard of T. & Co.'s insolvency, telegraphed to the railway company, who telegraphed to their agent at Poplar, to stop delivery of the goods. The message arrived after the goods had been shipped. The mate's receipt for the goods was given to the railway company and by them sent on to T. & Co. No bills of lading were applied for in exchange for the receipt. The Darling Downs sailed for Melbourne with the goods on board.*

Held, that there had been no constructive delivery of the goods to the buyers, and that the notice to stop was good.

Special case stated under ord. 57, r. 9.

The facts set forth in the special case, so far as material, were as follows:—

On June 2, 1885, the defendants, ironfounders at Wolverhampton, received from Messrs. Tickle & Co., of London, an order for ten hogsheads of hollow ware. The material part of the order was as follows:—"Please pack the goods for us in usual way, and mark the same as before, following numbers, invoice in duplicate. On receipt of invoice we will forward you shipping documents." An invoice of the goods was accordingly forwarded by the defendants.

On June 28, 1885, the defendants received from Tickle & Co. a consignment note in these terms:—"Please consign the 10 hhds. hollow ware to *The Darling Downs*, to Melbourne, loading in the East India Docks here."

On June 29, 1885, the defendants delivered the ten hogsheads to Pickford & Co., collecting agents for the London and North-Western Railway Co. at Wolverhampton.

On June 30, 1885, the railway company sent to Tickle & Co. an advice note notifying the arrival of the goods, and adding that the goods "are now held by the company, not as common carriers, but as warehousemen, at owners' sole risk. The goods advised by this note have been forwarded to our Poplar Station for shipment *per Darling Downs.*"

By midday on July 3 the goods were shipped on board *The Darling Downs*, and a mate's receipt forwarded by the railway company to Tickle & Co.

On July 3 the defendants received notice of the insolvency of Tickle & Co., and sent, at 10 a.m. of July 3, a message to the agent at Wolverhampton of the London and North-Western Railway Co. asking them to stop delivery of the goods. At that time the goods were on board lighters hired on behalf of the railway company. A telegram was at once sent by the railway company to their agent at Poplar bidding him hold the goods. The agent, however, was not able to transmit the order in time to stop the shipment of the goods on board *The Darling Downs.*

Bills of lading were prepared after the mate's receipt had been made out, but the bills remained in the possession of the shipowners, the stakeholders in the proceedings.

After the shipment of the goods *The Darling Downs* sailed for Melbourne.

On July 11, 1885, Tickle & Co. presented a petition in bankruptcy, a receiving order was made, and eventually a scheme of arrangement was agreed to and duly confirmed. Mr. J. Young was appointed trustee and manager of the estate and business of Tickle & Co.

Mr. J. Young and the defendants both claimed the goods then in possession of the agents of the shipowners.

The question for the opinion of the court was who were entitled to property in or possession of the said hogsheads.

Charles, Q.C., and *G. E. Lyon*, for the trustee, cited *Ex parte Miles*, 15 Q. B. D. 39, 33 W. R. Dig. 315; *Kendall* v. *Marshall*, 31 W. R. 597, 11 Q. B. D. 356.

Underhill and *Plumtre*, for the vendors, cited *Ex parte Rosevear China Clay Co.*, 27 W. R. 591, 11 Ch. D. 560; *Ex parte Watson*, 25 W. R. 489, 5 Ch. D. 35; *Ex parte Davis*, 28 W. R. 481, 13 Ch. D. 628.

Charles, Q.C., replied.

Aug. 10.—Mathew, J.—This is a special case stated to ascertain whether Mr. Young, as trustee for the estate of Tickle & Co., or Messrs. Clark, are entitled to the possession of ten hogsheads of hollow ware which had been forwarded on board *The Darling Downs* from London to Melbourne. On the 1st of June, 1885, Clark & Co. received an order at Wolverhampton, from Tickle & Co., for the goods in question; and on the 25th of June, in pursuance of the order, an invoice for the goods, amounting to £99 6s. 8d., was forwarded by Messrs. Clark to Messrs. Tickle. In the order nothing was stated as to the destination of the goods, but on the 28th of June Clark & Co. received from Tickle & Co. directions to consign the goods to *The Darling Downs*, then loading in the East India Docks for Melbourne. On the 29th of June the goods were accordingly delivered by Clark & Co. to the London and North-Western Railway at Wolverhampton to be put on board *The Darling Downs.* On the 30th of June the railway company notified to Tickle & Co. that the goods had been forwarded to Poplar Station for shipment, and on the morning of July 3 the goods were shipped by lightermen employed by the railway company and put on board *The Darling Downs.* The mate's receipt was sent to Tickle & Co. While the goods were in course of transit to the ship, Clark & Co. were informed that the buyers had stopped payment, and they immediately tried to stop delivery of the goods, but before the notice to stop was received the goods had been shipped. The vessel shortly after sailed for Melbourne with the goods on board. No bills of lading were applied for in exchange for the mate's receipt, and it was arranged that the goods should remain in possession of the owners of the ship pending the settlement of the question whether or not the right to stop *in transitu* was gone. It was contended for the trustee of the buyers' estate that the rule of law applicable to the case was this: that, where goods have arrived at a place indicated by the buyer to the seller, and are to remain there in the hands of an agent of the buyer, there is an end of the *transitus*, although the place be

(*a.*) Reported by A. H. Todd, Esq., Barrister-at-Law.

not that of their ultimate destination. In the particular case it was said that the master and mate of the vessel was the agent of the buyers, who, as between them and the sellers, was to receive the goods for the buyers, and therefore that this transit ended with the shipment. But the principle to be gathered from the many decisions on the subject seems to me to be that, in determining whether there has been a constructive delivery of the goods to an agent of the buyer, it must be ascertained in what capacity the agent has received the goods, whether to carry or to hold for the buyer. In other words, the inquiry must be—What is the exact nature of the contract between the buyer and the agent under which the latter has received the goods? In *Dixon* v. *Baldwen*, 5 East, 175, the evidence was directed to show that Metcalf received the goods as agent for the buyers in order that he might hold them until he received further orders as to their destination, and that without such orders the goods in his hands would remain stationary. The court held, upon this evidence, that when the goods reached Metcalf the transit was at an end.

In *Kendall* v. *Marshall* the facts as presented to the Court of Appeal would seem to be different from those dealt with by the court below. At the trial it appeared that Marshall & Co. had entered into a contract with the buyers to forward the goods at through rate from Bolton to Rouen. It was not suggested that there was any contract between the buyers and Marshall & Co. other than the contract to forward. There was no evidence that the railway company were the agents of the buyers. They were treated as having acted for Marshall & Co. In the Court of Appeal it would appear from the judgment of all the Lords Justices that it was assumed or admitted that the railway company were the agents of the buyers to carry the goods to Garston and there deliver them to Marshall & Co., to be held by them for the buyers until further orders were given. With this material alteration of the evidence submitted to the Court of Appeal the case was readily brought into line with *Dixon* v. *Baldwen*, and it was held that there had been a constructive delivery to the buyers. The judgments delivered in the Court of Appeal in this and in the later case of *Ex parte Miles* seem to me to involve the application of the principle that, in determining whether the goods are still *in transitu*, a sufficient inquiry into the facts must be made to ascertain what has been the contract between the buyers and the agents who have received the goods. The cases referred to are instances of constructive delivery to the buyer, and of consequent termination of the transit. But the numerous cases from *Smith* v. *Goss* (1 Camp. 282) to *Ex parte Watson*, in which the receipt of the goods by the agent has been held not to be a constructive delivery to the buyer, indicate, it seems to me, with the greatest clearness, the existence and application of the rule. These authorities show that although the fact that a person has been named by the buyer to the seller to receive the goods is some evidence, it is by no means conclusive evidence that the receipt by that person is the end of the transit. The case of *Ex parte Rosevear China Clay Co.* presents a close analogy to this case. The buyer had purchased china clay which was to be delivered by the seller free on board at a specified port. Afterwards the buyer named the vessel to the vendor, and the clay was shipped. Before the ship sailed the buyer stopped payment, and notice to stop *in transitu* was given to the master. No bill of lading had been signed, and it was held by the Court of Appeal that the transit was not at an end.

In the present case it seems clear that the railway company, the lightermen, and the shipowners were all agents of the buyers, not to hold, but to forward the goods. The reason urged by the learned counsel for the trustree that the delivery on board ship to the mate was a constructive delivery to the buyers would apply as forcibly to the delivery to the railway company. But if this were a delivery to the buyers the transit would have ended in law at the point at which it commenced in fact. The contract with the shipowners was to forward the goods to Melbourne, and there deliver upon the terms of a bill of lading in the usual form, and until the bill of lading had been transferred to a *bonâ fide* holder for value it seems to me that the sellers in this case would retain the right to stop *in transitu*. It was further urged for the trustee that the transit was over when the goods were shipped, because the goods might, on the demand of the buyers, have been taken out of the possession of the master of the ship; but this possibility, so remote in a business point of view, is no proof that the transit was terminated: see *London and North-Western Railway Co.* v. *Bartlett*, 10 W. R. 109, 7 H. & N. 401. The further point was made that the notice to stop was insufficient because it had been served on the owners and not on the master of the ship. But the notice had been given to the owners under such circumstances as enabled them to communicate with the master and prevent a delivery contrary to the terms of the notice to stop: *Whitehead* v. *Anderson*, 9 M. & W. 518.

I am of opinion, for these reasons, that the sellers were entitled to stop the goods, and our judgment must be for them.

Cave, J.—In all cases of stoppage *in transitu* it is necessary first of all to consider what is the *transitus* or passage of the goods from the possession of the vendor to that of the purchaser. The moment the goods are delivered by the vendor to a carrier to be carried to the purchaser the transit begins. When the goods have arrived at their destination and have been delivered to the purchaser or his agent, or when the carrier holds them as warehouseman for the purchaser, and no longer as carrier only, the transit is at an end. The destination may be fixed by the contract of sale or by directions given by the purchaser to the vendor. But however fixed, the goods have arrived at their destination and the transit is at an end when they have got into the hands of someone who holds them for the purchaser and for some other purpose than that of merely carrying them to the destination fixed by the contract or by the directions given by the purchaser to the vendor. The difficulty in each case lies in applying these principles. In the case now before us, if the purchasers on getting the mate's receipts had sent a clerk down with them to *The Darling Downs* to exchange them for a bill of lading of the goods, I should have been of opinion that the goods had come into the possession of the purchasers and that transit was at an end; because I should from these facts have drawn the inference that it was the intention of the parties that as between them *The Darling Downs* in the docks should be the destination of the goods. For I think it is quite immaterial whether the purchasers do or do not intend after the goods have got into their possession to send them to a further destination, and that it is equally immaterial whether they do or do not communicate such intention to the vendors. On the other hand, if the London and North-Western Railway Co. had exchanged the mate's receipts for a bill of lading making the goods deliverable to the order of the vendors, and had sent that bill of lading to the vendors, and if the purchasers had acquiesced in that course of conduct, I should have drawn the inference that as between the vendors and purchasers Melbourne was the destination of the goods. In this case neither of those courses were exactly followed. The railway company sent the mate's receipts to the purchasers, who did nothing with them. No bill of lading was obtained by anyone, and the goods went to Melbourne because by the direction of the purchasers the vendors had put them on board a vessel bound for that place. Under these circumstances I am

unable to distinguish the case from *Ex parte Rosevear China Clay Co.*, which is binding upon us, although I am also unable to reconcile that case with some of the dicta in *Ex parte Miles*.

Judgment for the defendants.

Solicitors for the defendants, *G. R. Hubbard.*

Solicitors for the trustee of the vendees, *W. Beck.*

IN BANKRUPTCY.

Q. B. Div. (Cave and A. L. Smith, JJ.) Dec. 7, 21.

Ex parte Shilson.
In re Cock. (*a.*)

Bankruptcy—Disclaimer of lease—Mortgage by sub-demise—Vesting order—Application by landlord—Form of order—Practice—Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), *s.* 55.

Leave having been given to the trustee in a bankruptcy to disclaim the bankrupt's interest in certain leases, it was ordered, on the application of the landlord, that, unless the executor of a mortgagee by sub-demise of the bankrupt's interest should, within seven days, elect to accept an order vesting in him the disclaimed property, subject to the same liabilities and obligations as the bankrupt was subject to under the leases, he should be excluded from all interest in and security upon the property.

Held, that the court had power to make the order on the application of the landlord, and that, subject to a formal amendment, the order made was right.

Appeal from an order of his Honour Judge Montagu Bere in the county court at Truro by which, on giving leave to the trustee in the bankruptcy to disclaim the bankrupt's interest in certain leases, he directed, on the application of the landlord, that unless the appellant, as executor of a mortgagee by sub-demise of the bankrupt's interest, should, within seven days, elect to accept an order vesting in him the disclaimed property subject to the same liabilities and obligations as the bankrupt was subject to under the leases, he should be excluded from all interest in and security upon the property.

On August 20, 1883, the Earl of Mount Edgcumbe granted to the debtor, David Cock, three leases for several terms of ninety-nine years at rents from eight to ten guineas and heriots from four to five guineas and burdened with onerous covenants as to repairs, building walls, &c. On March 21, 1885, the debtor mortgaged to C. H. Nankivell these three properties by way of demise, reserving to himself the last three days of the term. In 1886 C. H. Nankivell died, and Shilson, the present appellant, became his executor. In 1887 Cock, the debtor, became bankrupt, and the trustee in the bankruptcy subsequently applied for leave to disclaim these three leases amongst other property, which was granted, and on the application of the solicitor for the Earl of Mount Edgcumbe it was further ordered that the appellant should take a vesting order subject to the bankrupt's liabilities or be excluded from all interest as above mentioned.

Shilson now appealed.

Herbert Reed, for the appellant.—As the order is made the appellant cannot take a vesting order of one lease, but must take a vesting order of all or none. The leases were separate and independent, and permission ought to be given to make election to take or refuse a vesting order as to all or any as the appellant may see fit. Further, the court had no power to make such an order on the application of the landlord. The order could only be made on the application of the sub-lessee. At all events, it could not be made on the application of the landlord.

He referred to *Ex parte Turquand, In re Parker*, 33 W. R. 752, 14 Q. B. D. 405; *Smalley* v. *Hardinge*, 29 W. R. 554, 7 Q. B. D. 524; *Ex parte Walton, In re Levy*, 30 W. R 395, 17 Ch. D. 746.

Sidney Woolf, for the landlord.—As to the first point, the form of order is the usual one, but there is nothing to prevent the appellant from taking a vesting order as to one or any of the leases if he thinks fit. As to the other point, the proviso in sub-section (6) of section 55 of the Bankruptcy Act, 1883, was to remedy the hardship pointed out in *Smalley* v. *Hardinge* and other cases of the kind. The case of *Ex parte Turquand, In re Parker*, does not say that a landlord cannot make application for a vesting order, and that case is a distinct authority that persons like the appellant must take a vesting order or be excluded. The landlord may apply to have a vesting order to the mortgagee, and the mortgagee has the option to take it or not.

Cur. adv. vult.

Dec. 21.—Cave, J., read the written judgment of the court:—

This is an appeal from an order of the county court of Cornwall giving the trustee leave to disclaim the bankrupt's interest in certain leases, and, on the application of the landlord, ordering that, unless the appellant, as executor of Charles Henry Nankivell, a mortgagee by sub-demise of the bankrupt's interest, should, within seven days, elect to accept an order vesting in him the disclaimed property subject to the same liabilities and obligations as the bankrupt was subject to under the leases, he should be excluded from all interest in and security upon the property.

The first point taken for the appellant was that, as the leases from the landlord to the bankrupt were separate and independent, he ought to be permitted to make his election to take or refuse a vesting order as to all or any as he may see fit. This point, which does not appear to have been brought before the judge of the county court, was at once admitted by Mr. Woolf, who appeared for the respondent, and, if necessary, the order may be amended accordingly.

It was next contended that the court had no power to make such an order except on the application of the sub-lessee, or at all events not on the application of the landlord. On this point we took time to put our judgment into writing, not on account of any doubt we felt on the point, but because, on a subject which is so likely to recur, we thought it advisable to lay down a distinct principle in writing for the guidance of the court in future.

By section 23 of the Act of 1869 the trustee was entitled to disclaim, among other onerous property, any lease burdened with onerous covenants; and it was provided that on the execution of such disclaimer the property disclaimed should, if the same was a lease, be deemed to have been surrendered on the date of the order of adjudication. It was further enacted that any person interested in any disclaimed property might apply to the court, and the court might, upon such application, order possession of the disclaimed property to be delivered up to him.

This section soon gave rise to questions of some difficulty. In *Smalley* v. *Hardinge* it was held by the Court of Appeal that when a lessee sublets and afterwards becomes bankrupt and his trustee disclaims, the lessor is not entitled to eject the sub-tenant. In the judgment in that case some expressions are to be found treating the disclaimer as having the same effect as an

(a) Reported by C. F. Morrell, Esq., Barrister-at-Law.

actual surrender. When, however, that question subsequently came before the Court of Appeal in *Ex parte Walton, In re Levy*, the court held that the words of the section must be read with some qualification, and that the disclaimer operated as a surrender so far only as was necessary to relieve the bankrupt and his estate and the trustee from liability, and did not otherwise affect the rights or liabilities of third parties in relation to the property disclaimed.

The construction of this statute came before the House of Lords in *Hill* v. *East and West India Dock Co.*, 32 W. R. 925, 9 App. Cas. 448, and the opinions of their lordships, and especially that of Lord Bramwell, in that case may be referred to as showing the difficulty felt in putting a construction on the language of section 23 of the Act of 1869.

That section, however, has been repealed, and the statute of 1883 has, as Lord Cairns said, substituted an enactment of a very different and much more explicit kind upon this part of the bankruptcy law. Sub-section (1) of section 55 enacts, in general terms, that the trustee may disclaim onerous property of various kinds, including land of any tenure burdened with onerous covenants. Sub-section (2) provides that the disclaimer shall operate to determine as from the date of disclaimer the rights, interests, and liabilities of the bankrupt and his property in, or in respect of, the property disclaimed, and shall also discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other persons. Now, there is no doubt that if the section had stopped there it would have been in substance a re-enactment of the corresponding part of the statute of 1869, as explained by the cases already cited.

By sub-section (6) the court may, on application by any person either claiming any interest in any disclaimed property or under any liability not discharged by the Act in respect of any disclaimed property, make an order for the vesting of the property in, or delivery thereof, to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid on such terms as the court thinks just. This sub-section appears intended to apply to all property that may be disclaimed of whatever kind. In *Ex parte Turquand* I expressed a doubt whether the words "persons claiming an interest in any disclaimed property," include a landlord. They do, of course, include persons claiming under the bankrupt; but on further consideration we think that they include the lessor also. For instance, if a lessee in possession who had neither given nor contracted to give any interest to anyone else were to become bankrupt, and his trustee were to disclaim, we think the court would have authority under this section to give possession to the landlord on his application. This view, however, would not dispose of the present case, for, there being a sub-lessee, the landlord could not under the section, so far as we have yet gone, show that he was entitled to the disclaimed property. We do not, as at present advised, think that the landlord could apply under this part of the section for an order that the property should be vested in, or delivered to, a person other than himself, except in cases were such other person is only a trustee for the landlord. The sub-section, however, provides that where the property disclaimed is of a leasehold nature, the court shall not make a vesting order in favour of any person claiming under the bankrupt, whether as under-lessee or as mortgagee by demise, except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease when the petition was filed, and any mortgagee or under-lessee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property; and, if there shall be no person claiming under the bankrupt who is willing to accept an order in such terms, the court shall have power to vest the bankrupt's estate in the property in any person liable alone or jointly with the bankrupt to perform the lessee's covenants in such lease, freed and discharged from all estates, incumbrances, and interests created therein by the bankrupt. Now we are clearly of opinion that this provision is of general application in all cases in which an application to disclaim is made, and not only to cases where the sub-lessee or mortgagee by demise applies for a vesting order. This is clearly the opinion of Lord Bramwell, who, in *Hill* v. *East and West India Dock Co.*, speaking of this proviso to sub-section (6), says "It is noticeable that it gives a great benefit to landlords, doubtless from a sense of their use to the public. Why should a sub-lessee or mortgagee bear the loss occasioned by a lessee's bankruptcy? Why not the landlord?" To this it may be replied that the benefit is given equally to the lessee where the bankrupt is an assignee and to the surety, where there is one, for a bankrupt lessee.

Let us see how the case will work out in practice. A. grants a lease for ninety-nine years at £100 a year to B., who assigns to C., who, in consideration of an advance of £2,000, demises to D. for the residue of the term, except three days, at a peppercorn. C. becomes bankrupt, and his trustee, wishing to disclaim, brings A., B., and D. before the court. A. cannot apply for a vesting order or a delivery order, because he is not entitled to the property, nor can B. so long as D. is willing to take a vesting order. B. therefore applies that D. may be put to his election, and, if he declines to take a vesting order, that he may be excluded and a vesting order made in favour of him (B.). The same thing occurs where C. is the lessee and B. is only a surety for him. Where there is no person liable either jointly with the bankrupt or alone to perform the lessees' covenants we are of opinion that, notwithstanding the doubt expressed in *Ex parte Turquand*, the landlord may apply that the sub-lessee may be put to his election. If he elects to take a vesting order he gets one. If he declines, the landlord may ask for an order excluding the sub-lessee from all interest in and security upon the property and vesting the property in him (the landlord) discharged from the sub-lease because, by virtue of the disclaimer and the exclusion of the sub-lessee, he has become the party entitled to possession. This course appears to us to be clearly warranted by the language of the Act and to carry out its provisions. Until the sub-lessee has declined to take a vesting order the court has no power to make a vesting order either in favour of the original lessee or of the surety for the bankrupt if there is one, and consequently if the power could only be exercised upon an application by the sub-lessee it would remain a dead letter, for the sub-lessee never would have any interest in making such an application, and the person liable jointly or alone with the bankrupt could not get a vesting order until the sub-lessee had declined. Where all the parties are before the court upon an application for leave to disclaim, the vesting order may at once be offered to the sub-lessee, and on his refusal may be granted to the surety or original lessee, or, if there is no person liable alone or jointly with the bankrupt, an order for a vesting order and for delivery of possession, or for a vesting order only, as the circumstances may require, may be made in favour of the lessor.

Where no leave to disclaim is required, and consequently the parties interested in the property disclaimed or liable to perform the covenants of the lease are not brought before the court by the trustee, we are of opinion that the person liable to perform the coven-

ants, or in the absence of such person the lessor, may bring the sub-lessee before the court and ask for an order for his exclusion and for a vesting order, or for delivery of the property, if the sub-lessee refuses himself to take a vesting order.

For these reasons we are of opinion that the order of the court below was substantially right, and, subject to a formal amendment making it clear that the appellant is entitled to take all or none or any one or two of the leases, the appeal must be dismissed, with costs.

Appeal dismissed, with costs.

Solicitors for the appellant, *Coode, Kingdon, & Cotton*, for *Coode, Shilson, & Co.*, St. Austell.

Solicitors for the landlord, *Bell, Brodrick, & Gray*, for *Bews, Hellard, & Bews*, East Stonehouse.

Q. B. Div. (Cave and A. L. Smith, JJ.) Nov. 21.

Ex parte Official Receiver.
In re Holden. (*a.*)

Bankruptcy—Voluntary settlement—Lien of trustees of settlement for costs—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 47.

In September, 1885, *the debtor executed a post-nuptial settlement, but subsequently brought an action to set aside the settlement which was defended by the trustees, and dismissed, with costs against the plaintiff. The debtor thereupon filed his own petition and became bankrupt within two years after the date of the settlement.*

Held, that the settlement was void by section 47 *of the Bankruptcy Act*, 1883, *but that the trustees were entitled to a lien on a portion of the trust funds for their costs in the action.*

Appeal from an order of his Honour Judge Snagge, in the county court at Halifax, declaring a voluntary settlement executed by the bankrupt to be void under section 47 of the Bankruptcy Act, 1883, but that the trustees of the settlement were entitled to a lien on a portion of the trust funds for their costs in a certain action.

On September 26, 1885, the debtor executed a post-nuptial settlement, vesting the sum of £323 in two trustees for the benefit of himself for life, and, after his death, for his children. In 1886 an action was commenced by the debtor to have the settlement declared void on the ground of undue influence, which action was defended by the trustees, and on March 9, 1887, the case was tried before Kekewich, J., who gave judgment in favour of the defendants (the trustees of the settlement), and ordered the plaintiff to pay their costs. On March 30, 1887, the debtor was adjudicated bankrupt on his own petition, and on May 14 application was made by the official receiver to have the settlement declared void under section 47. The county court judge declared the settlement void, but directed that the trustees were entitled to a lien on the trust funds for £189—the costs above mentioned.

The official receiver now appealed.

Muir Mackenzie, for the official receiver.—When a settlement is void under section 47 as being made within two years before bankruptcy, it is, as against the trustees, a nullity, and there can be no lien upon the trust funds. The trustees are not trustees at all, because they are trustees of a trust which has been declared to have no existence. The effect of section 47, when it declares a settlement void, is that there is no trust, and there cannot be a lien on a void and invalid trust.

He referred to *Dutton* v. *Thomson*, 31 W. R. 596, 23 Ch. D. 278; *Smith* v. *Dresser*, 14 W. R. 469, L. R. 1 Eq. 651.

Sidney Woolf, for the trustees of the settlement.—When the debtor could not defeat the settlement in any other way he filed his own petition. The trustees have an ordinary lien for expenses incurred by them. In the cases cited, either the deed was an act of bankruptcy or the costs were incurred in defending the deed, which proved to be bad.

Cave, J.—This appeal must be dismissed. The trustees undertook to become trustees of a settlement executed by the bankrupt in 1885. It was a post-nuptial settlement, but it does not follow that there was anything wrong about it. At the time of marriage a man may not be able to make any settlement, and afterwards he may come to be in such a position that he feels he can and ought to do so. I cannot see that because it was a post-nuptial settlement it was wrong of the trustees to accept the trusts of it. In the course of the trust there was an attempt by the bankrupt to set aside the settlement, and these trustees, who had no interest in it, in the plain course of their duty defended the settlement for the children, and they were successful, but at the cost of £189. As soon as that occurred the settlor filed his petition, and got himself adjudicated bankrupt, and the official receiver asked for an order on the trustees to pay over the £323. The trustees had no objection to offer to the deed being declared void, but they say that when they thought the deed was valid they incurred the liability of £189 and preserved the trust fund, and because the deed was not invalid in its inception, and because they saved the fund, they ask to be allowed to retain their costs. That seems only to be reasonable, but is there any authority which obliges them to give up all the fund? There seems to be no authority which goes to that length. Undoubtedly if a man becomes trustee of a deed the trusts of which are invalid, or where a deed is valid at the time of settlement, if the trustees resist the application of the trustee in bankruptcy to have the deed set aside, and fail, they cannot have their costs out of the estate. But the present case is not the case of defending an invalid document. It was the duty of the trustees to defend this document at the time they did, and by doing so they saved the trust fund.

A. L. Smith, J., concurred.

Appeal dismissed, with costs.

Solicitors for the official receiver, *J. H. Bridgeford*, for *Jubb, Booth, & Helliwell*, Halifax.

Solicitors for the trustees of the settlement, *J. E. & G. H. Scott*, for *G. Crossley*, Halifax.

Q. B. Div. (Cave and A. L. Smith, JJ.) Nov. 21.

Ex parte Ellis.
In re Crowther. (*a.*)

Administration of estate of person dying insolvent—Jurisdiction—County court—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 125.

Where an order for the administration of a deceased debtor's estate is made under section 125 *of the Bankruptcy Act*, 1883, *the court, in administering, will follow the practice of the Chancery Division of the High*

(*a.*) Reported by C. F. Morrell, Esq., Barrister-at-Law.

(*a.*) Reported by C. F. Morrell, Esq., Barrister-at-Law.

Court, and no power is given to the county court in bankruptcy which the High Court does not possess in administration actions to direct a stranger to pay over money.

Appeal from an order of his Honour Judge Snagge, in the county court at Huddersfield, directing one Ellis to pay over the sum of £47 to the official receiver as trustee of the property of S. Crowther, a deceased insolvent debtor.

In August, 1886, S. Crowther died, being at that time indebted to Ellis in the sum of £39, and Frederick Crowther, the son, subsequently became executor *de son tort*. On March 31, 1887, Ellis issued a writ against Frederick Crowther, the executor, in respect of the debt, and on April 8 judgment was recovered. On April 21 garnishee orders were obtained by Ellis, attaching two debts due to F. Crowther or the estate of S. Crowther, which orders were duly served on April 22 and 27, and were made absolute on April 29. On April 28 a petition for the administration of the estate of S. Crowther, deceased, under section 125 of the Bankruptcy Act, 1883, was presented to the county court. On May 4 two further garnishee orders were obtained by Ellis, which were served on May 5, and on that day an order for the administration of the deceased debtor's estate was made. The total amount received by Ellis under the garnishee orders was £47 which sum the county court judge, on the application, of the official receiver, directed him to repay. Ellis now appealed.

Herbert Reed, for the appellant.—The county court judge had no power to make this order against a stranger. All that section 125 does is to direct administration of the estate in the same manner as an administration in chancery. The county court in bankruptcy is a court created by statute, and it has no power other than that given by the statute. Under section 102 of the Bankruptcy Act, 1883, the county court may decide any question which may arise "in any case of bankruptcy," but the section does not give the court jurisdiction where an order for administration is made under section 125. Section 125 provides throughout a distinction between bankruptcy and administration, and the decided cases go to prove this. Moreover, the service of the garnishee orders bound the debts.

He referred to *Ex parte Official Receiver, In re Gould*, 35 W. R. 569, 19 Q. B. D. 92; *Ex parte Hewitt*, 15 Q. B. D. 159, 33 W. R. Dig. 19; *In re Witherness Bric's Works*, 29 W. R. 178, 16 Ch. D. 337.

Muir Mackenzie, for the official receiver.—The county court had jurisdiction to make the order in this case, because the matter was not like an action to recover a debt at all. It was a motion to declare the trustee's rights over property which Ellis claimed. The motion before the county court was really to declare whether Ellis was a secured creditor or not at the time of the accrual of the trustee's title, which was a question that could be determined in bankruptcy. Section 125 says the estate is to be administered according to the law of bankruptcy, and it is to be administered in the court which would have had jurisdiction over the debtor if he had been a bankrupt. This is not an action for money had and received, but a motion for a declaration that those debts formed part of the estate of the deceased. Section 102 must be taken to be incorporated. Further service of the garnishee orders *nisi* did not make Ellis a secured creditor.

CAVE, J.—The appeal must be allowed. Section 125 has given power to the court of bankruptcy to administer the estate of a deceased debtor who is insolvent, and unless some special provision can be found, the court, in administering, must follow the practice of the Chancery Division of the High Court. Now in the Chancery Division such an application would not be entertained—at any rate, without the consent of the person interested; and in order to establish the jurisdiction of the county court some express provisions of the Act must be shown giving the county court in bankruptcy a power which the High Court does not possess in administration actions. There is no such power. There might be a certain amount of convenience if such a power existed, as sometimes the objection to the jurisdiction is very frivolous, and it was frivolous in this case to the extent that if it had been allowed, as it should have been allowed, a plaint would have been issued in the same county court, and the case would have come before the same judge. The question before us, however, is whether there was jurisdiction to make the order or not, and I am of opinion that there was no jurisdiction.

A. L. SMITH, J., concurred.

Appeal allowed; leave to appeal refused.

Solicitors for the appellant, *Burns & Berridge*, for *Ramsden, Sykes, & Ramsden*, Huddersfield.

Solicitor for the official receiver, *The Solicitor to the Board of Trade.*

Prob. Div. & Adm. Div. Divorce. } July 16.

STORY *v.* STORY. (*a.*)

Divorce—Guilty wife — Prior condoned adultery of husband—Discretionary bar—Exercise of discretion.

A jury found the wife guilty of adultery with the co-respondent, assessing the damages against him at £300. The husband had, six years before, committed adultery with a maid servant in the house where the wife resided, and she had condoned the offence.

Held, that, under these circumstances, the court ought, in the exercise of its discretion under 20 & 21 Vict. c. 85, s. 31, to dismiss the husband's petition.

Trial before Hannen, P., and a common jury.

This was the husband's petition for dissolution of marriage on the ground of the wife's adultery with the co-respondent, O'Connor. In her answer the wife alleged that the petitioner had been guilty of adultery in 1877 with a domestic servant in their service. The petitioner alleged condonation of this offence.

The jury found the respondent and co-respondent guilty of adultery, and assessed the damages against the co-respondent at £300. They also found that the petitioner had been guilty of the adultery alleged.

Searle, for the respondent, asked the court not to grant a decree.—It is admitted that the adultery of the petitioner is not an absolute bar; the court has a discretion under 20 & 21 Vict. c. 86, s. 31: *Goode* v *Goode and Hamson*, 9 W. R. 552, 2 Sw. & Tr. 253. But it is not necessary that the husband's conduct should have contributed to the wife's misconduct, or that she should even have known of it: *Clarke* v. *Clarke*, 13 W. R. 848; *Hulse* v. *Hulse and Tavernor*, 20 W. R. 447, L. R. 2 P. & D. 357. Here there is evidence in a letter written by the wife that although the offence was condoned it had not been forgotten by her.

Lockwood, Q.C., and *Corrie Grant*, for the petitioner.—The present case is within the discretion of the court, and is such a case as was intended to be met by the exercise of that discretion. *McCord* v. *McCord, Ogle, and Coxon*, 23 W. R. 684, L. R. 3 P. & D. 237, was referred to.

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

HANNEN, P.—The decision of the court in each case like the present must depend on the particular circumstances. In 1875 I went carefully into the question and endeavoured to lay down the principles in accordance with which I have acted ever since. In the present case the petitioner's story is that during his wife's absence the maid servant came and thrust herself upon him. That is a highly improbable story. On the other hand the wife tells us a more probable story—viz., that, noticing the condition of the girl, she questioned her and found out that the petitioner had had intercourse with her—that is, in the very house where he resided with his wife. The court always treats this form of adultery as a serious offence. It is perfectly true that the wife, as frequently happens, forgave the husband. But it is impossible not to feel that the act of the husband must have had a very serious effect on those feelings of the wife which go far to constitute the safeguards in married life, and that she would be more likely to fall into error. In *McCord* v. *McCord* I enumerated the facts as constituting the reason which induced me, in the exercise of my discretion, to refuse a decree. So in the present case I come to the conclusion that the husband is not entitled to claim release from the bond of marriage, he having shown himself regardless of its obligations, and I conclude, as I did in *McCord* v. *McCord*, following the principle laid down by Lord Penzance in *Morgan* v. *Morgan and Porter*, 17 W. R. 688, L. R. 1 P. & D. 644, that there are no special circumstances in this case to lead me to exercise my discretion in favour of the petitioner. I therefore dismiss the petition. The respondent is entitled to the general costs. The other costs will be dealt with on taxation. The petitioner is not entitled to the damages; they go with the petition.

Solicitor for the petitioner, *C. J. Smith.*

Solicitors for the respondent, *Beard & Sons.*

Solicitors for the co-respondent, *McKenna & Co.*

Prob. Div. & Adm. Div. } Admiralty. } Aug. 9.

"THE GERTRUDE."

"THE BARON ABERDARE." (*a.*)

Practice—Assessment of damages—Damage to cargo—Damage—Interest.

If an action brought in the Admiralty Division to recover damages for breach of the shipowner's contract of carriage is retained in that division, the damages proceeded for will, even although the action is one which could not have been brought in the Court of Admiralty before the Judicature Acts, be assessed, and interest on the amount found due be given in the same manner and according to the same rules as if the Court of Admiralty had jurisdiction over the suit under the Admiralty Court Act, 1861.

So, also, if an action brought in the Queen's Bench Division to recover damages for negligently mooring a vessel is, after trial in that division, transferred to the Admiralty Division, the damages will be assessed and interest given, in the same manner and according to the same rules as if the action was an action of damage within the inherent jurisdiction of the Court of Admiralty.

"THE GERTRUDE."

This was an action of damage to cargo *in personam* instituted on behalf of Messrs. Stockebye & Hvalsoe, of Copenhagen, against Messrs. Gordon & Stamp, the owners of the British ship *Gertrude*, to recover for the loss of a cargo of mixed corn, which had been shipped on board *The Gertrude*, and had been lost through the stranding of that vessel on the 4th of June, 1886, on the coast of Newfoundland. The defendants, who were domiciled in England, admitted their liability for the damage proceeded for, subject to a reference to the registrar and merchants to assess the amount thereof; but by agreement between the plaintiffs and defendants it was arranged that the plaintiffs should accept, in satisfaction of their cause of action, eighty-five per cent. of whatever amount should be found due by the registrar.

The following claim was then brought into the registry on behalf of the plaintiffs:—

"Claim on behalf of the plaintiffs in respect of the loss of a cargo of 111,838 22-36ths bushels of mixed corn shipped on board *The Gertrude* at New Orleans, and totally lost in consequence of the stranding of *The Gertrude* on the south coast of Newfoundland on the 4th day of June, 1886. At the time *The Gertrude* was on her voyage from New Orleans to Copenhagen *viâ* Sidney, Cape Breton.

	£	s.	d.
"Invoice value of 111,838 22-36ths bushels of mixed corn . . .	9,635	16	3
Five per cent. for merchants' profit	482	13	0
Total	10,118	9	3

with interest and costs."

In support of the claim the plaintiffs filed affidavits annexing the invoices and bills of ladings of the lost cargo, and stating (*inter alia*) that the invoices for the cargo in respect of the loss of which the plaintiffs claimed had been settled and paid for by means of five bills of exchange dated the 4th of June, 1886.

On the 1st of July, 1887, the registrar reported that there was due to the plaintiffs, in respect of their said claim, the sum of £9,800, together with interest thereon, as shown in the following schedule:—Value of cargo of mixed corn shipped on board *The Gertrude*, £9,635 16s. 3d.; merchants' profit, £164 3s. 9d. Total, £9,800, with interest at four per cent. per annum from the 4th of June, 1886, until paid. The defendants objected to the report so far as it found that interest was due to the plaintiffs, and by the consent of all parties it was ordered that the objections to the report should be heard on motion.

July 26.—*Barnes*, on behalf of the defendants, moved the President in court that the registrar's report might be varied by directing that the plaintiffs were not entitled to recover interest against the defendants on the sum of £9,800, as stated in the report and the schedule thereto. He contended that, inasmuch as the claim of the plaintiffs was not one within the jurisdiction of the Court of Admiralty as it existed before the Judicature Acts, the plaintiffs had no right to recover interest except between judgment and payment, and that on that point *Rodocanachi* v. *Milburn*, 35 W. R. 241, 18 Q. B. D. 67—where it was held that the measure of damage was the market value of the goods when and where they were to be delivered, deducting the expenses of carriage—was a binding authority.

Sir W. Phillimore, on behalf of the plaintiffs *contrà*.—The plaintiffs have brought their action in this division, and they must, therefore, be considered to have submitted themselves to the equitable method of assessing damages in use here. It is the usual rule in this division in cases of collision and damage to cargo to give to the cargo owner the invoice value of his cargo together with a sum which would reimburse him for his expenses in loading the cargo, and interest on these amounts from a certain date—*i.e.*, in general from a time when he may be considered to have lost the use of his capital. This rule has been followed in this case,

(*a.*) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

and the time from which interest has been given is the date on which the bills for the cargo fell due. The case of *Rodocanachi* v. *Milburn* is no authority for holding that the usual way of calculating the damages is no longer to be adopted in actions in this division.

Cur. adv. vult.

"THE BARON ABERDARE."

This was an action instituted on behalf of the owners of the vessel *Baron Aberdare* against the London and St. Katharine Docks Co. to recover for the damages occasioned by the defendant company having negligently moored *The Baron Aberdare* in the St. Katharine Docks, in consequence of which she broke adrift and came into collision with certain other vessels in the docks, and sustained such injuries that she sank.

The action was instituted in the Queen's Bench Division, and judgment on the question of liability was given in that division, it being then agreed that the amount of damages should be referred to an arbitrator.

Subsequently the action was by consent transferred to this division.

On the action being transferred, it was intended that all questions as to the amount of damages should be referred to the registrar and merchants, but subsequently the parties agreed that the plaintiff should be deemed entitled to recover damages to the amount of £7,500.

A question was then raised before the registrar whether the plaintiffs were not entitled, in addition to this amount, to interest. On this question the registrar reported that interest at four per cent. was due to the plaintiffs from a date to be agreed on between the parties as the date when the amounts due for raising and repairing *The Baron Aberdare* and for the damages claimed from the plaintiffs by the owners of the vessels damaged by *The Baron Aberdare* had been paid, and that such interest should run until payment of the £7,500 by the defendants. The following reasons for his report were given by the registrar:—

In this case an action was brought in the Queen's Bench Division on the 17th of March, 1884, against the London and St. Katharine Docks Co. by the owners of the barque or vessel *Baron Aberdare* for damages by reason of the negligence of the defendants in and about the care and custody of the plaintiffs' ship while in the defendants' dock in December, 1883. The case was tried before a special jury, and a verdict was given for the plaintiffs on the 19th of May, 1886. It had been previously agreed that the amount of damages should be referred to an arbitrator. After this verdict and judgment a motion was made to a divisional court to enter judgment for the defendants, or for a new trial, which was rejected, with costs. An appeal from this decision of the Divisional Court was then made to the Court of Appeal, which, on the 11th of May, in the present year, was likewise dismissed, with costs. Immediately afterwards, on the 28th of May, the action was transferred to the Admiralty Division by consent of parties for the purpose of the assessment of the damages in the usual way. Since that transfer, however, the parties have come to an agreement that £7,500 shall be deemed to be the amount of damages the plaintiffs are entitled to recover without prejudice to the question as to what interest is recoverable in addition; and that point is the only one which I have been called upon to consider. It is admitted that the whole amount of the £7,500 was paid to the plaintiffs in, or previous to, the month of June, 1884. The interest on that amount since that period necessarily represents a large sum, and, if not recoverable from the defendants, also represents a heavy loss which they have had no means of obviating. The ordinary principles, therefore, of equity and justice would seem to require that compensation for this loss should be made. It is said that some technical rules of common law are against the allowance of interest before judgment, but I am not satisfied that those rules apply to a case of this description, or that, if they do, I am bound to act upon them when called upon as registrar of the Admiralty Division to assess the amount of the plaintiffs' damages. I should rather assume that I am to apply the principles laid down for my guidance in assessing the damages occasioned by other acts of negligence, such as the negligent navigation of a ship by which another ship is injured. That the practice of the Admiralty Court is to allow interest on the loss so sustained from the date of such loss cannot be questioned, and I feel bound to follow the same rule in this instance. The judgment in *The Northumbria*, 18 W. R. 188, L. R. 3 A. & E. 6, followed by a divisional court of the Queen's Bench in the case of *Smith* v. *Kirby*, 24 W. R. 207, 1 Q. B. D. 131, which was an action by the owners of cargo against the carrying ship, seems to me to justify this conclusion. The interest, therefore, will run from a date or dates in 1884 to be agreed on between the parties.

Aug. 9.—*Hollams*, on behalf of the plaintiffs, now moved to confirm the registrar's report.—The practice of the registrar of this division in all actions of collision before him—and this is virtually an action of collision—to proceed on equitable principles and, as an usual rule, to give interest before judgment, is clearly according to law. *The Northumbria* is in accordance with the practice of the Court of Chancery: *Straker* v. *Hartland*, 34 L. J. Ch. 122, 13 W. R. Ch. Dig. 52; and with what the courts of common law considered to be the equitable rule: *Smith* v. *Kirby*; *British Columbia Saw Mill Co.* v. *Nettleship*, 16 W. R. 1046, L. R. 3 C. P. 499.

Barnes, on behalf of the defendants, *contrà*.—This case differs from the case of *The Gertrude* inasmuch as the case was only transferred here after judgment in consequence of an agreement between the parties. The Admiralty registrar, in fact, only acted as an arbitrator, and ought, in the circumstances, to have applied the rules as to the measure of damage in force in the Queen's Bench Division, and have given no interest before judgment. [HANNEN, P.—Having looked into the matter, I think the 3 & 4 Will. 4, c. 42, s. 29, enabling a jury to give interest in certain cases, is an enactment declaratory of the common law.] There is no case of unliquidated damages not within that statute when interest before damage has been given in the courts of common law. [He referred to *Calton* v. *Bragg*, 15 East, 223; *Higgins* v. *Sargent*, 2 B. & C. 348.]

HANNEN, P.—I was prepared to give judgment this morning in *The Gertrude*, which case I had taken time to consider, but I deferred doing so until I had heard the arguments in *The Baron Aberdare*.

There can be no doubt that it has been a long-established practice of the Admiralty Court to allow interest on the amount awarded to plaintiffs from the time when the claims arose. This practice was very fully considered by my learned predecessor in *The Northumbria* in regard to matters solely within the jurisdiction of the Admiralty Court. It is unnecessary for me to travel over that ground again, since it is clearly established that in admiralty actions there should, so far as possible, be a complete *restitutio in integrum*, and for this purpose the award of interest on the damages is necessary. It is a sound and equitable rule, and I can only regret that it is not also a common law rule.

The question is raised in *The Gertrude* whether the registrar, under the circumstances in which that case came before the court, was bound to depart from the usual admiralty rule and to apply the common law rule. I am of opinion that he was not so bound. Reference was made in the course of the argument to 3 & 4 Will 4, c. 42. That statute was partly permissive, it does not

affect to alter the law in any case, but it gives power to award interest in some cases. It applies only to cases tried before a jury, and I am left entirely free to say what rule should be applied in every case which is tried in the Admiralty Division. I therefore confirm the registrar's report in *The Gertrude*.

The Baron Aberdare differs a little as to the facts, and it has been argued that the registrar was simply an arbitrator. I do not think he was, but, assuming him to be one, it appears to me to make no difference. It was right and proper for him to award interest in whichever character he decided the case. *The Northumbria* and *Smith* v. *Kirby* each have a bearing on this case, because in the latter case an arbitrator found, in accordance with the decision in *The Northumbria*, that he could award interest. This fact was, in my opinion, brought to the knowledge of the court, and it held that the admiralty rule was rightly applied, and that interest should be given. I, therefore, in *The Baron Aberdare*, confirm the report. The unsuccessful party must in each case pay the costs of the motions.

Solicitors for Messrs. Stockebye & Hvalsoe, *Stokes, Saunders, & Stokes*,

Solicitors for the owners of *The Gertrude, Botterell & Roche*.

Solicitors for the owners of *The Baron Aberdare*, Hollams, Son, & *Coward*.

Solicitors for the London and St. Katharine Docks Co., *Hacon & Turner*.

House of Lords.

From C. A. (England). April 5, 8, 9, 12, 1886; June 13, 1887.

Bouch v. Sproule. (a.)

Tenant for life and remainderman—Company—Bonus—Dividend—Capital or interest.

A testator bequeathed the residue of his personal estate to T. B. upon trust to permit his wife to receive the interest, dividends, and annual income during her life, and subject thereto to T. B. absolutely. Part of the residuary estate consisted of shares in a company. The articles of association of the company provided that the directors might set aside out of the profits such sum as they thought proper as a reserved fund. After the death of the testator the directors distributed this reserved fund and certain other undivided profits to the shareholders as a bonus dividend, allotted at the same time new partly paid-up shares, and applied the bonus to the part payment of the new shares.

Held, that, in the circumstances, the company did not pay or intend to pay any sum as dividend, but intended to and did appropriate the undivided profits dealt with as an increase of the capital stock in the concern; and that the bonus dividend was therefore part of the capital of the testator's estate, and that the life tenant was not entitled thereto as being interest, dividend, or annual income.

Decision of the Court of Appeal (33 *W. R.* 621, 29 *Ch. D.* 635) *reversed.*

This was an appeal from a decision of the Court of Appeal (Baggallay, Bowen, and Fry, L.JJ.) reversing a decision of Kay, J.

The facts are very fully set out in the judgments of Lord Herschell and Lord Watson.

(a.) Reported by C. G. Napier Trollope, Esq., Barrister-at-Law.

April 5, 8, 9, 12, 1886.—*Graham Hastings, Q.C.*, and *W. Freeman*, for the appellants.—When a bonus dividend is declared out of accumulated profits it is an accretion to capital and belongs to the remainderman and not to the tenant for life: *Brander* v. *Brander*, 4 Ves. 800; *Irving* v. *Houstoun*, 4 Paton's Scotch Appeals, 521; *Paris* v. *Paris*, 10 Ves. 185; *Clayton* v. *Gresham*, 10 Ves. 288; *Witts* v. *Steere*, 13 Ves. 363; *Barclay* v. *Wainewright*, 14 Ves. 66; *Hooper* v. *Rossiter*, McCl. 527; *Ward* v. *Coombe*, 7 Sim. 634; *Price* v. *Anderson*, 15 Sim. 473; *Ex parte Hodgens*, 11 Ir. Eq. Rep. 99; *Plumbe* v. *Neild*, 8 W. R. 337; *Hollis* v. *Allan*, 14 W. R. 980; *Nicholson* v. *Nicholson*, 9 W. R. 676; *McLaren* v. *Stainton*, 9 W. R. 908, 3 De G. F. & J. 202; *In re Hopkins' Trusts*, 22 W. R. 687, L. R. 18 Eq. 696; *Straker* v. *Wilson*, 19 W. R. 761, L. R. 6 Ch. 503. *Preston* v. *Melville*, 16 Sim. 163, is the only case against the appellants.

They also cited *Carr* v. *Griffith*, 28 W. R. 28, 12 Ch. D. 655.

Rigby, Q.C., and *H. B. Buckley*, for the respondent.—The bonus dividend became income as soon as declared; it was not made capital, and there was no compulsion to apply it to the purchase of shares. The cases are distinguishable.

They cited *In re Barton's Trusts*, 16 W. R. 392, L. R. 5 Eq. 238; *Clive* v. *Clive*, Kay, 600, 2 W. R. Dig. 120; *Wright* v. *Tuckett*, 1 J. & H. 266, 9 W. R. Ch. Dig. 36; *Bates* v. *Mackinley*, 10 W. R. 241, 31 Beav. 280.

Freeman replied.

June 13, 1887.—Lord Herschell.—This appeal arises upon a case stated for the opinion of the court to determine whether a bonus of £2 10*s.* per share, sanctioned in the circumstances I shall afterwards mention, on 600 shares in the Consett Iron Co. (Limited), was income of the estate of William Bouch, or was capital of that estate.

William Bouch, who died on the 19th of January, 1876, by his will bequeathed all the residue of his personal estate to Sir Thomas Bouch upon trust to convert the same into money, or, with the consent of Jane Bouch (the testator's wife) to allow the same to remain unconverted; and, upon further trust, to permit his said wife to receive the interest, dividends, and annual income of the said personal estate during her life; and, subject thereto, he bequeathed the residue of his personal estate to Sir Thomas Bouch absolutely.

Part of the residuary personal estate of William Bouch consisted of 600 shares of £10 each in the Consett Iron Co., upon which £7 10*s.* per share had been paid. These shares were, with the consent of Jane Bouch, allowed to remain unconverted, and she received the dividends thereon during her life. Sir Thomas Bouch died on the 30th of October, 1880, having by his will appointed the appellants his executors and trustees. Jane Bouch, the tenant for life, died on the 22nd of February, 1883, having by her will appointed the respondent her executor.

The Consett Iron Co. was incorporated in the year 1864, with a capital of £400,000, divided into £10 shares. The articles of association provided that whenever the net profits of the company during any financial year ending the 30th of June would admit, the directors should recommend to the meeting to declare a dividend on the company's capital, and thereupon it should be competent at such meeting to make and declare a dividend of such amount, and payable at such time, as the meeting should determine. The 109th article was as follows:—"The directors may, before recommending any dividend, set aside, out of the profits of the company, such sum as they think proper as a reserved fund for meeting contingencies or for equalizing dividends, or for repairing or maintaining the works connected with the

business of the company, or any part thereof; and the directors may invest the sum so set apart as a reserved fund upon such securities or in such manner as they may think proper." The capital of the company was afterwards increased to £552,000 by additions of 6,000 and 9,200 new shares of £10 each, with £7 10s. per share paid thereon. In the accounts of the company for the year beginning the 30th of June, 1874, there stood to the credit of a reserve fund £100,000, made up from undivided profits of previous years, and there stood to the credit of another fund, styled "undivided profit," a further sum of £6,203 12s. In August, 1880, the £100,000 still stood to the credit of the "reserve fund," and in addition to the profits of the previous year, £36,070 1s. 8d. was standing to the credit of the "undivided profit" fund.

The report of the directors of the 12th of August, 1880, after recommending that the profits of the previous year should be appropriated to the payment of a certain dividend, and that £7,246 4s. 5d. should be carried forward as undivided profit, proceeded as follows:—"Your directors feel that the time is now come when they may safely recommend some permanent appropriation of the £100,000 standing to credit of reserve fund, and of a considerable portion of the undivided profit fund. They therefore propose that the reserve fund, £100,000, and £38,000 out of the £43,316 6s. 1d. (to which the undivided profit would be brought up by the mode of appropriating the year's profit previously recommended), making together £138,000, shall be distributed as a bonus dividend of £2 10s. per share, equalling £7 10s. in respect of every three existing shares; but, as the company's operations render it desirable to raise an equal amount as capital account, your directors propose that there be created 18,400 new shares of £10 each, with £7 10s. per share payable concurrently with the payment of the bonus dividend. This would allow of one new share being allotted in respect of every three existing shares, and the bonus dividends would pay the £7 10s. on each such new share. Your directors propose that the bonus dividend and the call of £7 10s. per new share be made payable on the 30th of September, the members registered in the company's books on the 25th of September being treated as those entitled to such dividend and to the allotment of new shares. They also propose that the new shares shall take dividend from the 1st of July, 1880, as if the £7 10s. per share had been paid up on that date. They will, therefore, stand on an equal footing with the present shares in regard to all dividends beyond that about to be declared. Every member of the company on the 25th of September would consequently receive a new £10 share in respect of every three shares he then holds, such new share having, like the existing shares, £7 10s. paid thereon."

On the 4th of September, 1880, the directors' report and accounts were received and adopted, and a special resolution was passed adding to the articles of association a new article, empowering the directors, with the sanction of the company in general meeting, to declare a bonus to be paid to the members in proportion to their shares out of the reserve fund, or out of any other accumulated profits of the company. Special resolutions were also passed sanctioning the creation of capital and its allotment in the manner recommended by the directors.

At a meeting of the company on the 25th of September, 1880, these resolutions were confirmed, and a resolution was passed sanctioning the payment of a bonus of £2 10s. per share out of the £100,000 standing to the credit of the reserve fund, and £38,000, part of the undivided profit then in hand. On the same day the registrar of the company sent to the shareholders, including Sir Thomas Bouch (in whose name the 600 shares belonging to William Bouch's estate were registered), a letter enclosing a warrant and forms relating to the new shares.

The letter was in the following terms:—"I am instructed to inform you that, in accordance with the special resolutions confirmed at the meeting of the company held this day, the directors have, in respect of the 600 shares now registered in your name, allotted to you 200 new shares of £10 each, subject to the sum of £7 10s. per share being paid up thereon on or before the 30th instant, and I enclose you a bonus dividend warrant payable on that date for £1,500, which you will be good enough to sign and return to me by Thursday next, when the amount will be applied in payment of £7 10s. per share on your above named new shares. Regarding the registration of these new shares, I have to explain that if you desire to have all that you are entitled to registered in your own name, you must fill up and sign the enclosed form No. 1. If you desire to have all or part registered in some other name, form No. 2 must be filled up and signed both by yourself and by the person in whose name the shares, or any of them, are to be registered." The enclosed form No. 1 was as follows:—"Gentlemen,—I hereby accept the 200 new shares which have been allotted to me, subject to the conditions on which they are issued, and request that the whole be registered in my own name." This was signed and returned by Sir Thomas Bouch. He also signed and returned the enclosed warrant, which was in the following form:—"Consett Iron Co. (Limited). Bonus dividend warrant of £2 10s. per share payable on the 30th of September, 1880. To the members registered in the company's books on the 25th of September, 1880. No. 102. Name of member—Thomas Bouch, Esq. Number of shares—600. Amount of bonus dividend—One thousand five hundred pounds. (Signed) Wm. Cockburn, registrar. I hereby authorize and request you to apply the above amount in payment of the call of £7 10s. per share on the 200 new shares that have been allotted to me in accordance with the special resolutions passed at the ordinary general meeting of the company held on the 4th of September, and confirmed at the extraordinary general meeting held on the 25th of September, 1880. Signature of member. N.B.—This warrant must be signed and sent to the registrar, Mr. Wm. Cockburn, 33, Westgate-road, Newcastle-on-Tyne, on or before the 30th of September, 1880."

The 200 new shares were accordingly registered in the name of Sir Thomas Bouch, and £7 10s. was credited as paid on each share. The dividends on these new shares, as well as on the original shares, were paid to Jane Bouch, the tenant for life, down to the last dividend day prior to her death.

It is to be observed that before the allotment of the new shares in 1880 the shares of the company were at a premium of about £21 per share, but immediately after such allotment they fell to £14 per share premium.

The case came, in the first instance, before Kay, J. He considered that it might be open to doubt whether the bonus at the time it was declared belonged to the tenant for life, or was to be regarded as an accretion to capital, though, on the authority of *Paris* v. *Paris*, he inclined to the latter opinion. But he came to the conclusion that the bonus had been capitalized with the consent of the tenant for life, and that she had agreed that the shares should be treated as capital of the testator's estate so as to avoid raising this question.

The Court of Appeal reversed this judgment. They held that there was no evidence to show that the tenant for life had agreed to relinquish any of her rights, and that the bonus belonged to her, and having been invested by the trustees in shares of the Consett Co., those shares became her property.

I quite concur with the Court of Appeal in thinking that there is no evidence that the tenant for life relinquished her right to the bonus, if she was ever en-

titled to it. And in my judgment the sole question for determination is whether this bonus is to be regarded as income passing to the tenant for life under the trusts of the will, or an accretion to capital, to the income of which alone she was entitled, and which enured after her death for the benefit of the remainderman.

I think this is a question of very considerable difficulty. It was argued at your lordships' bar on behalf of the appellants that it was really settled in their favour by authority. It was said to be well established that where a dividend or bonus appeared to be declared out of accumulated profits, which, *de facto*, had formed part of the capital of the company, it must be treated as an addition to capital, and that the tenant for life was not entitled to it. If I thought that any such rule had been established and were applicable to the circumstances of the present case, I should certainly advise your lordships to decide in accordance with it, whatever I might think of its expediency. The division of the enjoyment of property between a tenant for life and a remainderman is itself artificial, and if any artificial rule has been established regulating such enjoyment, every settlor or testator may well be presumed to have intended that the objects of his bounty should share its benefits according to this rule. I may observe, however, at the outset, that there would often be considerable difficulty in the application of the suggested rule, and that it does not appear to rest on any satisfactory basis of principle.

I will proceed now to consider the authorities relied on. The earliest of these was *Brander* v. *Brander*, decided in 1799. The Bank of England having paid out of their funds for the public service £1,000,000, received £1,125,000 Three per Cent. Annuities. These they resolved to distribute *pro ratâ* among the then proprietors of Bank Stock. The question arose whether the proportion allotted to the testator's representatives was to be regarded, as between the tenant for life and remainderman, as income or capital. Lord Rosslyn took the latter view. He said: "If I am to go upon principle, I must hunt back to see to what part of that saving each is entitled. I have often considered this question, and it seemed to me, in all the different ways I could turn the consideration of it, that there was no way to be taken but to consider it as an accretion to capital." Fry, L.J., says that the principle of this decision was, that what the company says is income shall be income, and what it says is capital shall be capital. "The Lord Chancellor," he says, "seems to have proceeded on the ground that the original £1,000,000 was part of the capital of the bank"; and then, after quoting from his judgment the words I have just read, he adds: "If that were so, it follows that the bank was distributing amongst its proprietors that which had been returned by the Government in satisfaction for the outlay of a part of its capital." I cannot concur in this view of *Brander* v. *Brander*. It does not appear to me to have proceeded on any such principle. The company had in no way said that either the £1,000,000, which had been advanced for the public service, or the annuities which were received in return for it, should be capital. Moreover, it is to be observed (and the importance of this will be seen when we come to consider the scope of this authority and of those which have followed it) that the bank could not have declared that either of those sums should be added to or form part of its capital properly so called, for the bank had no power (as is pointedly stated in the case) to increase its capital, except by obtaining an Act of Parliament.

I think the decision in *Brander* v. *Brander* proceeded on the ground which Fry, L.J., accurately states as the foundation of the judgment in *Irving* v. *Houstoun*, viz., that the accumulated profits had become part of the floating capital of the concern. But they had become so, not by reason of any declaration of the company that they should be so, but only in the sense that, having accumulated, they were, *de facto*, used as part of its capital. In this sense, however, all accumulated profits which are in use for the purposes of the business of any company may equally be said to form part of its floating capital. And I think that the learned counsel for the appellants were well founded in saying that the greater part, if not the whole, of the accumulated profits of the Consett Iron Co., the division of which has given rise to this controversy, were in this sense a portion of the capital of the company.

I pass now to the case of *Irving* v. *Houstoun*, the most important of the series, for, being a decision of this House, your lordships are bound by it. In that case the Bank of Scotland had passed a resolution that an extraordinary dividend or bonus should be given to proprietors holding stock on the 1st of June. Lord Eldon, in delivering his opinion in this House, after stating that *Brander* v. *Brander* had been frequently acted upon, and pointing out the inconvenience of having a different law as to English and Scotch Bank Stock, proceeded as follows: "It is impossible to deny that great difficulties attend this matter; the proper question is, on which side the fewer difficulties lie. The Bank of England, to which the Bank of Scotland is similar in this respect, has a capital limited by Parliament to a certain amount. This limitation, if strictly adhered to, would have this inconvenience attached to it, that circumstances might occur to oblige them to reduce their ordinary dividends. Therefore it is that these companies have what is termed their floating capital, which they lay out in the shape of Exchequer and Navy Bills, in discounts, and in every species of property that can be turned into cash at pleasure. Every person who buys Bank Stock is aware of this; and if he gives a life interest of his estate to anyone it can scarcely be his meaning that the life-renter should run away with the bonus that may have been accumulating on the capital for half a century." Lord Rosslyn, the only other learned lord who expressed an opinion, said: "When I first came to consider the case of *Brander* v. *Brander*, I thought it would be necessary to learn what part of the bonus had accumulated before the testator's death, and what since, to do justice between the claimants. The bank were very much alarmed when I hinted at any intention of that kind. On considering the matter maturely in all its consequences, the judgment was pronounced in that case."

The decision in *Irving* v. *Houstoun*, was followed in 1804 in *Paris* v. *Paris*, and again in *Clayton* v. *Gresham*, though in the former case the Lord Chancellor said that he had great difficulty in stating the principle that led to the earlier decisions. It was further followed in 1807, in *Witts* v. *Steere*, and again in 1847, in the case of *Ex parte Hodgens, In re Hodgens*, where the directors of the Bank of Ireland having decided, "on account of the favourable result of the last four years" to recommend a bonus of 5 per cent. in addition to the ordinary dividend of 5 per cent., Brady, L.C., held that this bonus must be considered as capital. But a disposition was early shown to limit the operation of the rule laid down in *Brander* v. *Brander*, and adopted by this House; and it is manifest that from the first it was felt not to rest on any stable principle. Thus, in *Barclay* v. *Wainewright*, the directors of the Bank of England declared a dividend of 5 per cent. interest and profits for the half-year. It was contended that as this exceeded their ordinary dividend of 3½ per cent., a portion of it must be considered as arising from accumulated profits, and therefore treated as capital. Lord Eldon, in repelling this contention, said: "If it be contended that any part of the 5 per cent. is given out of, or to be paid from capital, a case must be brought before the court, either making that out by evidence, or under circumstances forming a fair

ground for inquiry. But, as the case now stands, I have no means of considering it as more or less than a declaration in the due execution of the right and duty of the bank that the dividend which the proprietors ought to receive is a half-yearly dividend of 5 per cent." And again, in *Preston* v. *Melville*, the directors of the Bank of England having declared a dividend of £3 10s. per cent. out of interest and profits for the half-year, and in addition thereto a bonus out of interest and profits of 1 per cent., the Vice-Chancellor of England held the tenant for life entitled to both. It is to be noted that here, as in the case just cited, there was nothing to show that the bonus was to be paid out of accumulated profits. Fry, L.J., commenting in the court below on the several cases to which I have referred, says: "These cases, however binding they may be under similar circumstances with regard to the same stocks, certainly do not appear to us to support to any extent the proposition now under investigation" (*i.e.*, that the authorities have established a rule that where a sum is paid, whether called bonus or dividend, out of the accumulations of profits in previous years, it must be taken as a payment out of or on account of capital). "The last case—viz., that of *Preston* v. *Melville*—seems to lean strongly in the other direction." Unwilling as I confess myself to be to apply the decision in *Irving* v. *Houstoun* in any case where I am not bound to do so, I feel some difficulty in limiting it to the extent suggested by the Lord Justice, when I consider the language used by Lord Eldon and Lord Rosslyn. Their language seems equally applicable to any company unable to increase its capital, which uses, and is known to use (as many companies are), accumulated profits for capital purposes. I may add that, for the reason I have noted above, *Preston* v. *Melville* appears to me to be in complete harmony with the earlier authorities.

It seems clear that the decision in *Irving* v. *Houstoun* was not considered as applicable only to bank dividends. It was followed, as Fry, L.J., has pointed out, in the case of other companies. Thus, in *Ward* v. *Combe*, the question arose in 1836 in respect of certain settled shares in the London Assurance Co. At a court in 1835 the ordinary dividend of £1 a share was voted, and by another resolution on the same day it was provided that a sum at the rate of £12 a share should be taken out of the profits of the company and divided amongst the shareholders. The Vice-Chancellor held that the £12 a share was capital; and he observed that there was nothing to show at what time the profits out of which the sum was taken arose, and that they might have been profits that had lain dormant for a series of years. It may be doubted whether this decision is altogether consistent with that in *Preston* v. *Melville*, already alluded to. But it is a clear recognition of the doctrine that a division of accumulated profits amongst the shareholders is to be regarded as given by way of increase of capital. It is true, indeed, as Fry, L.J., says, that in *Price* v. *Anderson* the same Vice-Chancellor held, in the case of the Royal Exchange Assurance Co., whose practice was to declare dividends on their stock half-yearly, and bonuses at intervals of two or more years, that a dividend of £12 10s. per cent. declared in 1846, in addition to the ordinary dividend, belonged entirely to the tenant for life. But it will be observed, on examining the report, that where the same company in 1840 had resolved that, in addition to the ordinary dividend of £2 10s. per cent., a distribution of 5 per cent. out of accumulated profits be made to the proprietors, the Vice-Chancellor held that, as this was not made as dividend, it must be considered capital, and ordered it to be invested. The distinction apparently was that, in this case, the dividend in terms was paid out of accumulated profits, and was not expressed to be a dividend. I think, therefore, that *Irving* v. *Houston* must still be regarded as good law, unaffected by any counter-current of authority. But it is, in my opinion, an authority governing only a case similar in its facts; that is to say, a case where the company has no power to increase its capital, but has accumulated profits and used them, in fact, for capital purposes, and afterwards distributes these profits amongst the proprietors. I think it will be seen that there is a substantial reason for the limitation I have suggested.

I quite agree with the court below that, apart from the authorities to which I have alluded, the general principle for the determination of such a question as that before us, and, in my opinion, the only sound principle, is that which is well expressed in the judgment of Fry, L.J.: "When a testator or settlor directs or permits the subject of his disposition to remain as shares or stock in a company which has the power either of distributing profits as dividends or of converting them into capital, and the company validly exercises this power, such exercise of power is binding on all persons interested under the testator or settlor in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholders as capital, or appropriated as an increase of the capital stock in the concern, enures to the benefit of all who are interested in the capital." And it appears to me that where a company has power to increase its capital and to appropriate its profits to such increase, it cannot be considered as having intended to convert, or having converted, any part of its profits into capital when it has made no such increase, even if a company having no power to increase its capital may be regarded as having thus converted profits into capital by the accumulation and use of them as such.

I come now to the question whether the company did in the present case distribute the accumulated profits as dividend or convert them into capital. And here I find myself constrained to differ from the conclusion at which the Court of Appeal arrived. I think we must look both at the substance and form of the transaction. It is to be observed, in the first place, that the amount of that portion of the new capital created which was to be paid up was exactly equal to the amount of profits to be distributed. And it was obviously contemplated, and was, I think, certain, that no money would, in fact, pass from the company to the shareholders, but that the entire sum would remain in their hands as paid-up capital. It is said in the judgment below that a shareholder who refused to take new shares and to fill up the form of authority at the foot of the dividend warrant would have been, nevertheless, entitled to receive his dividend from the company. I agree that this is so. But, to my mind, it was certain, and known to be so by the company, that no shareholder would make such a claim. Take the facts of the present case as an illustration. The holder of 600 shares was, we will assume, entitled to claim from the company £1,500 and to decline to take any new shares. But, if he had been indisposed to add any new shares to those he already held, he would not have dreamed of adopting such a course. By doing so he would have received in cash £1,500 only. If his desire was to have cash, instead of new shares, he would have sold his interest in the new shares, and signed the second form enclosed in the registrar's letter and the authority at the foot of the dividend warrant; for he would thus have obtained from a purchaser, not £1,500, but probably upwards of £4,000. It is said by Fry, L.J., that the two transactions, of the payment of the dividend and the payment of the call, could not be carried into effect as one operation, inasmuch as in the case of a person holding less than three shares, or holding a number not a multiple of three, the dividend on the odd share or shares must, in the absence of arrangement with some other member, have been paid in cash. But it must be remembered that the directors undertook to

afford facilities for the sale or exchange of fractional parts of new shares, and such arrangements were so obviously to the advantage of those entitled to fractional parts of a share that it was certain they would be effected. I cannot, therefore, avoid the conclusion that the substance of the whole transaction was, and was intended to be, to convert the undivided profits into paid-up capital upon newly created shares. And the form in which the operations were effected points in the same direction. The dividend warrant is not in the ordinary form. It is assumed that it will be signed by the member only at the foot of the authority to apply the amount in payment of the calls on the new shares. And it is intimated on the face of it that it must be "signed and sent" to the registrar before the 30th of September, 1880. Moreover, the letter of the registrar enclosing it contains these terms: "which you will be good enough to sign and return to me by Thursday next, when the amount will be applied in payment of £7 10s. per share on your above mentioned new shares." It is to be observed also that, although the bonus was not sanctioned until August, and the £7 10s. per share was expressed to be made payable on the 30th of September, the new capital was to rank for dividend *pari passu* with the old capital from the 30th of June preceding, which is only explicable on the ground that these moneys in the hands of the company, and which were, in fact, in use as capital, were to be so treated as from that date.

Upon the whole, then, I am of opinion that the company *did* not pay, or intend to pay, any sum as *dividend, but* intended to and did appropriate the *undivided profits* dealt with as an increase of the capital *stock in* the concern.

I, therefore, move your lordships that the judgment of the court below be reversed, and the judgment of Kay, J., restored, and that the respondents do pay the costs in the Court of Appeal and the costs of this appeal.

Lord Watson.—I am of opinion, with the learned judges of the Court of Appeal, that the present case does not come within the principle to which this House, following the decision of the Lord Chancellor in *Brander* v. *Brander*, gave effect in the Scotch case of *Irving* v. *Houstoun*.

In the first of these cases the Bank of England, and in the second the Bank of Scotland, whose constitution gave them no power to increase their capital, had, nevertheless, for a long period of years, retained and employed a large amount of accumulated profits as capital in the course of their business; and they ultimately paid a considerable portion of these accumulations to their shareholders in the shape of bonus. In *Irving* v. *Houstoun* the Lord Chancellor (Lord Eldon) appears to me to have come to the conclusion that the bonus belonged to the fiar, and not to the life-rentrix of the testator's shares in the Bank of Scotland, upon two grounds. He expresses the opinion, in the first place, that these accumulated profits, which he describes as the floating capital of the bank, were regarded by the testator and the other owners of bank shares as being in the nature of capital; and, in these circumstances, his lordship says: "If he (*i. e.*, the testator) gives the life interest of his estate to anyone, it can scarcely be his meaning that the life-renter should run away with a bonus that may have been accumulating on the floating capital for half a century." In the second place, his lordship intimates his opinion that on no ground of equity could it be contended that the life-rentrix was entitled to accumulations made during the lifetime of the testator; and that an inquiry into the precise amounts of profit which had accrued before and after the commencement of the life-rent right would lead to inconveniences which would be intolerable. The Earl of Rosslyn, who had, as Chancellor, decided *Brander* v. *Brander*, concurred in the judgment. His opinion, so far as reported, proceeds upon the second ground stated by Lord Eldon. He said:—"When I first came to consider the case of *Brander* v. *Brander*, I thought it would be necessary to learn what part of the bonus had accumulated before the testator's death and what part since that period to do justice between the claimants. The bank were very much alarmed when I hinted any intention of this kind. Upon considering the matter maturely in all its consequences, the judgment was pronounced in that case, holding the bonus to be an accretion to the capital."

The Consett Iron Co. (Limited) stands in a different position from these two banks. By the 109th of its articles of association the directors are empowered, before recommending any dividend, to set aside out of the profits of the concern such sum as they may think proper, "as a reserved fund for meeting contingencies or for equalizing dividends, or for repairing or maintaining the works connected with the business of the company, or any part thereof." The company has likewise under its articles the power, which it exercised in 1872, of increasing its capital by the creation and allotment of new shares to its members according to their respective interests, and of crediting them with a sum as paid on each share from its reserved or undivided profits. It is also worthy of observation, although in the view which I take of this case the circumstance is not material, that the books of the company were kept, and the annual balance-sheets issued to the shareholders prepared in such a form as to disclose the precise amount of profit and loss upon each year's trading; and that the parties have consequently been enabled to state in their joint case the exact proportion of the reserved profits in question which accrued during the currency of the life tenant's right. So that the obstacles to an inquiry which were regarded as insuperable in *Brander* v. *Brander* and *Irving* v. *Houstoun* do not exist in the present case.

I do not doubt that the rule applied by this House in *Irving* v. *Houstoun* must receive effect in all similar cases. But in a case like the present, where the company has power to determine whether profits reserved and temporarily devoted to capital purposes shall be distributed as dividend or permanently added to its capital, the interest of the life tenant depends, in my opinion, upon the decision of the company. I entirely concur in the observations made upon this point by Lord Hatherley (then Vice-Chancellor) in *In re Barton's Trusts*: "The dividend to which a tenant for life is entitled is the dividend which the company chooses to declare. And when the company meet and say that they will not declare a dividend, but will carry over some portion of the half-year's earnings to the capital account and turn it into capital, it is competent for them, I apprehend, to do so; and when this is done everybody is bound by it, and the tenant for life of those shares cannot complain." In my opinion that rule must obtain, whether the profits with which the company is dealing belong to the current year, or have been previously reserved for the purposes of its business.

Applying these principles to the present case, I am unable to concur in the view which the Court of Appeal has taken of the real character of the arrangements under which the Consett Iron Co., on the 25th of September, 1880, issued a bonus dividend warrant and a relative allotment of new shares to each and all of the shareholders of the company.

The balance-sheet of the company for the year ending the 30th of June, 1880, states as an asset a sum of £100,000, which had in the year 1874 been carried from the undivided profits of previous years to a "reserve fund," and had subsequently been entered, under that heading, in the books and balance-sheets of the company. I do

not think (and so far I agree with the learned judges of the Court of Appeal) that the mere fact of moneys being taken from undivided profits and carried to a reserve fund is equivalent to capitalization of them. But the whole or part of the reserve fund may be legitimately expended on the repair and maintenance of works and plant, in such a way as to make it practically unavailable for the purpose of paying dividend, so long as there is no increase of the capital of the company, and the works continue in operation. The balance-sheet of the 30th of June, 1880, shows that, in point of fact, not only the whole reserve fund of £100,000, but a large additional sum of undivided profits had, at that date, been spent upon, and were represented by, not cash or convertible securities, but the works and plant of the company.

In these circumstances, it was undoubtedly within the power of the company, by raising new capital to the required amount, to set free the sums thus spent out of the reserve fund and undivided profits for distribution among the shareholders. It was equally within the power of the company to capitalize these sums by issuing new shares against them to its members in proportion to their several interests. I am of opinion that the latter alternative was, in substance, that which was followed by the company.

The directors issued their annual report on the 12th of August, 1880, to which a copy of the balance-sheet was annexed. In their report they recommended "to the shareholders some permanent appropriation of the £100,000 standing to credit of reserve fund, and of a considerable portion of the undivided profit fund." These words do not suggest either the realization of the works and plant in which the funds had been invested, or the creation of new shares for the purpose of raising moneys for distribution among the shareholders. What they do suggest is, the permanent appropriation of the moneys to the capital purposes to which they had already been temporarily appropriated. In order to attain that object, the directors proposed that the reserve fund, and £38,000 of undivided profits, together amounting to £138,000, "shall be distributed as a bonus dividend of £2 10s. per share, equalling £7 10s. in respect of every three existing shares, but as the company's operations render it desirable to raise an equal amount on capital account, your directors propose that there be created 18,400 new shares of £10, with £7 10s. per share payable concurrently with the payment of the bonus dividend. This would allow of one new share being allotted in respect of every three existing shares, and the bonus dividend would pay the £7 10s. on each such new share." The directors further proposed that the bonus dividend, and the call of £7 10s. per new share should be made payable on the same day; that the shareholders whose names appeared in the register on the 25th of September, 1880, should be entitled to the dividend and to the allotment of new shares; and that the new shares should stand on an equal footing with the old as from the 1st of July, 1880.

The report of the directors was received and adopted without reservation at the ordinary annual meeting of the company held upon the 4th of September, 1880. Various resolutions were passed by the company at that and also subsequent meetings; but I do not consider the terms of these resolutions as of material importance, because they merely provide the requisite machinery for enabling the directors to carry into effect the scheme suggested in their report. For the same reason I do not think any importance can be attached to the form of the dividend warrant and allotment of new shares which was subsequently issued to the shareholders by the officers of the company. None of these documents can, in my opinion, affect the substance of the scheme which was recommended in the report of the directors, and adopted by the company.

At the time when that scheme was submitted the capital of the company consisted of 55,200 shares of £10 each, with £7 10s. paid up per share. Before the proposal to issue new shares was made the old shares were selling at a premium of £21 per share, but after the allotment of new shares the premium fell to £14. The executor of William Bouch held 600 old shares which belonged to the remainderman. The selling value of these shares was, in consequence of the adoption of the new scheme, diminished by £4,200. The bonus on the shares was only £1,500; but the value of the 200 new shares, with that sum imputed as paid upon them, was £4,300. If the company had offered to its members a choice between the bonus dividend and new shares, with £7 10s. paid on each, no sane shareholder would have elected to take the dividend. If William Bouch's executor had done so, the life tenant would have been benefited to the extent of £1,500, but the estate of the remainderman would have deen depreciated in value to the extent of £4,200. I doubt whether, in the case supposed, it would be the duty of an executor to choose the bonus and reject the shares; but I am satisfied that in the present case no such option was given by the company.

I am unable to resist the conclusion that, in adopting the scheme recommended by the directors, the company must have intended that each shareholder should get an allotment of new shares, and that the money declared to be payable as dividend, which was not in the coffers of the company and did not exist in a form available for distribution, should not be paid to the shareholder, but should simply, by means of an entry in the company's books, be imputed in payment of the call of £7 10s. upon each new share. That is plainly indicated in the report as the necessary result of the shareholders agreeing to the proposals therein made. It states expressly that, if the shareholders sanctioned these proposals, "every member of the company, on the 25th of September, would consequently receive one new share in respect of every three shares he then holds, such new share having, like the existing shares, £7 10s. paid thereon, and leaving £2 10s. uncalled." If I am right in my conclusion, the substantial bonus which was meant to be given to each shareholder was not a money payment, but a proportional share of the increased capital of the company. In that view of the facts, it does not, in my opinion, admit of doubt that the benefit must accrue to the remainderman, and not to the tenant for life.

I am accordingly of opinion that the order of the Court of Appeal ought to be reversed, and the judgment of Kay, J., restored.

Lord Bramwell.—The authorities bearing on the question in this case are, to my mind, very unsatisfactory. I can deduce no principle from them. Cases have been decided differently where the facts were the same because different words had been used. This, in my opinion, can never, or very rarely, be right. There seems to have been a confused notion that undivided profits at some time and somehow became capital.

The truth is, as said by the Court of Appeal, that a trader, whether sole or corporate, trades with all the money which he has got, let him have got it how he may. A sole trader with a capital of £10,000 who makes in a year a profit of £2,000 and spends £1,000 only, leaving the other £1,000 in his business, may well in the next year be said to have a capital of £11,000; not so where there is a partnership, whether an ordinary partnership or an incorporated partnership. There the undivided profits of any period, a year or shorter or longer time, continue to be undivided profits unless something in the articles of partnership or some agreement by all the partners makes them capital. They do not become capital by effluxion of time or by their being used in the trading.

For example, a company makes a profit of £10,500 in a year. Suppose its capital to be £200,000, it divides the £10,000, giving 5 per cent. to its shareholders, trading with the £500 as with its other funds. It does this for four years, with the same result of profit and dividend. At the end of the fourth year its undivided profits, including those brought forward, are £12,000, and it can and does pay 6 per cent. to its shareholders, can there be a doubt of its right to do so? Is it not the fair and just thing, as between a tenant for life and remainderman? I say yes. And if true for four years it is true for forty.

I think the right rule would be that contended for by Mr. Rigby. Make the date of the division the date for considering the rights. All profits made up to that date, unless by the articles of partnership or subsequent agreement by the shareholders, are profits to which the tenant for life is entitled, though they have been used in the business. I think that is the opinion of the Court of Appeal.

Now, to apply such a principle to this case, had the company simply divided their profits and reserve fund to the extent they disposed of them and created no new shares, Mrs. Bouch would have been entitled to £2 10s. on each of the 600 shares—that is, £1,500. The 600 shares would have been less in value £2 10s. each, and would have been worth each £26, or in all £15,600 instead of £17,100, as they were at the time of the arrangement. By doing what they did, that is, creating the new shares and paying the £7 10s. on each new share, every share, new and old, became worth three-fourths only of what a share was worth before, and the total value of the 800 shares was the same as of the 600 before—viz., £17,100.

But, applying the above reasoning to the facts that *took place*, it seems to me impossible to say that in reason or on any legal consideration Mrs. Bouch could be entitled to the 200 new shares. For, if so, the remainderman's right would be only to the 600 shares remaining, which, at three-fourths of the £28 10s., would make them worth only £12,825, the new 200 being worth £4,275. The tenant for life cannot have a right to the new shares.

But it may be said that this reasoning shows she had a right to the £1,500. To this I think there are two answers, not that it would not have been a reasonable thing to have given the £1,500 to her and to have made some different arrangement for the new shares; but there are, I say, two answers. First, the authorities are against her. But, secondly, I think it must be taken that there was an agreement by all parties, the company and its shareholders, and, if necessary, I should say by the tenant for life and the remainderman, certainly by those whose case we are considering, that new shares should be created, and that undivided profits should be applied to the payment of £7 10s. on each new share. If I am asked what Mrs. Bouch gained by consenting to this I cannot say. Perhaps her consent was no more than non-dissent. Perhaps if she thought about it all, she did not think she could help it. Perhaps she could not; for it was the offer made by the company to the shareholders which was to be accepted or refused as a whole.

I agree with the first answer of the Court of Appeal, "that the bonus of £2 10s. was income of the estate of William Bouch" to this extent, that in reason and in right it should have been so treated. But I differ from the second answer, which is a sort of conclusion from the first. It is an erroneous conclusion in my opinion. It assumes that £7 10s. bought a new share. It did not. For the price of the new share was that sum and the diminished value of the other shares.

On these considerations, and agreeing with the noble and learned lords who have already spoken in their reasoning and their view of the authorities, I am of opinion that this judgment should be reversed.

Lord Fitzgerald.—I concur with my noble and learned friends, and am of opinion that, for the reasons given, the judgment of the Court of Appeal should be reversed. At the close of the argument at your lordships' bar I had arrived at the conclusion that the directors of the Consett Iron Co., acting within their powers, had so dealt with the extra allowance or bonus made to the shareholders out of accumulated profits and reserve fund as to make that "bonus" capital and not income. I differ from the Court of Appeal, not in its able exposition of the law, but as to the proper inferences to be deduced from the admitted facts. Fry, L.J., puts the question thus: "There remains another question—namely, whether the way in which the declaration of this bonus or dividend was coupled with the creation of new capital did or did not amount to a capitalization of the bonus?" Upon this question I have felt myself unable to follow the Court of Appeal, and I adopt the view of Kay, J. The reasoning and the decision of Lord Hatherley in *In re Barton's Trusts*, then, directly apply.

The proceedings at the ordinary general meeting of the 4th of September, 1880, and the documents which emanated from it, together with the resolutions of confirmation, have been so carefully and critically examined by Kay, J., and by my noble and learned friends that I can add nothing. I adopt their view of the facts and the proper inferences to be drawn from them.

The opinion which I had formed at the close of the case, and to which I adhere, renders it unnecessary for me to criticize any of the endless chain of decisions by which the argument was supposed to be illustrated.

Judgment appealed from reversed. Order of Kay, J., *restored. Cause remitted to the Chancery Division.*

Solicitors for the appellants, *G. H. Barber & Son.*

Solicitors for the respondent, *R. T. Jarvis*, for *Hutchinson & Lucas*, Darlington.

From Court of Session (Scotland). Dec. 6, 7, 9, 1886; June 13, 1887.

Caird v. Sime. (a.)

Copyright—Lectures by professor in a university—Right of students to publish.

A professor in Glasgow University delivered lectures to a class of students, who paid fees for the right to attend.

Held (Lord Fitzgerald *dissenting*), *that he did not thereby publish the lectures to the whole world, so as to entitle anyone who heard them to republish them without the permission of the author.*

Decision of the Court of Session (*reported* 13 *Ct. Sess. Cas., 4th series, p.* 23) *reversed.*

This was an appeal from the Second Division of the Court of Session.

The facts and previous proceedings are fully set out in the judgment delivered by Lord Watson.

Before arguing the point of law there was some discussion as to whether the interlocutor was in proper form, but the argument was at once heard on the merits of the appeal, as if the interlocutor had contained an express finding to the effect that the publication complained of was in substance a reproduction of the appellant's lectures.

(a.) Reported by C. G. Napier Trollope, Esq., Barrister-at-Law.

Dec. 6, 7, 9, 1886.—*Robertson, Q.C., S.G.* (Scotland) and *Sir H. Davey, Q.C.* (*F. W. Clark* with them) for the appellant.—An author has a right to deal with his work as he pleases before publication, and the court will restrain publication by others; *Albert* v. *Strange*, 2 De. G. & Sm. 652; *Jefferys* v. *Boosey*, 4 H. L. Cas. 815; *Cadell* v. *Stewart*, Morrison's Dictionary, sub tit. Literary Property, Appendix, No. 4. Oral delivery does not amount to publication; *Macklin* v. *Richardson*, Amb. 694. Private lecturers retain their rights in their lectures; *Abernethy* v. *Hutchinson*, 1 H. & Tw. 28; *Nicols* v. *Pitman*, 32 W. R. 631, 26 Ch. D. 374. No doubt any person could become a student, but only subject to conditions, and by accepting these conditions a student ceases to attend as a member of the public.

Lorimer (of the Scotch Bar) and *MacClymont* (*C. E. Allan* with them) for the respondent.—Delivery in public to the public is an abandonment of copyright, and where a public person addresses the public there is the same abandonment. A university professor is a public person, all members of the public are entitled to become students, and the lecture is delivered in the execution of a public office. Lectures delivered at a university are not for the benefit of the students only, but also the public, consequently the mode of distributing the information cannot be limited. Further, in the case of a professor there is an implied consent to publication. There can be no property in oral lectures.

They cited *Midwinter* v. *Hamilton*, Mor. Dic. 8295; *Hinton* v. *Donaldson*, *ibid.* 8307; *Millar* v. *Taylor*, 4 Burr. 2303; *Donaldson* v. *Becket*, 2 Bro. P. C. 129.

Robertson replied.

June 13.—LORD HALSBURY, C.—In this case I have had much greater difficulty in dealing with the question of form than with the substantial question between the parties which it was intended to raise by this appeal. It is, I think, manifest that the interlocutor does not comply with the provisions of the Judicature Act of 1825 (6 Geo. 4, c. 120), and I cannot but regret that the suggestion of Lord Rutherfurd Clark was not adopted, by which that which was fact would have been found as fact, and the question of law, which alone under that statute is open to your lordships to review, would have been left to be determined. Nevertheless, although with some doubt, I have come to the conclusion that your lordships may treat the question of fact as having been determined, and the question of law as sufficiently severed from those questions of fact to enable your lordships to pronounce a final judgment between the parties.

The question which it was intended to raise was the legal right of the respondent to publish, in the form of a pamphlet, certain literary compositions of the appellant, which were orally delivered to the students of the University of Glasgow attending his class. A majority of the court has determined that the pamphlet in question is a reproduction of the appellant's literary composition; and I do not stop to discuss what some of their lordships appear to have considered important, that in respect of certain particulars it was a blundering and unsuccessful reproduction of the appellant's work. I confess I am unable to understand what place such topics find in the argument. Assume an unlawful reproduction of an author's literary work; it does not become less an injury to the legal right because the reproducer has disfigured his reproduction with ignorant or foolish additions of his own. It is not denied, and it cannot in the present state of the law be denied, that an author has a proprietary right in his unpublished literary productions. It is further incapable of denial that that proprietary right may still continue, notwithstanding some kind of communication to others. The case of private letters which, though conveniently described by the word "private," involve publication of a certain kind to others than the author of them, is an illustration of a communication which does not permit the infringement of the proprietary right which would be involved in their unauthorized general production. The doubt which I have entertained in the course of the argument has been whether the extent and degree of publication in the case now under debate was not a question of fact which should have been determined on the evidence before the court, and which, if it had been determined, would not have been open to your lordships to review. But, as I have said, I have come to the conclusion that in the form in which it has arisen it may be treated as a question of law, that is to say, whether, on the agreed state of facts, such a publication as is proved here, must, as a matter of law, deprive the author of the literary composition in question of his proprietary right; and whether the fact that he is professor of moral philosophy, teaching in his class-room by the literary composition which is now the subject of debate, makes his delivery of that composition necessarily public to the whole world, so as to entitle anyone who heard it to republish it without the permission of its author.

Now I have designedly used the phrase "literary composition" to avoid the ambiguity of the word "lecture," because I think the word "lecture" involves an assumption which may give rise to error. If by it is signified a lecture delivered on behalf of the university, and, so to speak, as the lecture of the university itself, as the authorized exposition of university teaching, I can well understand that, by the nature of the thing, from the circumstances of its delivery, and the object with which it was delivered, it would be impossible to say that it was the object of those on whose behalf the professor was lecturing, or by himself, to limit the right of communication to others. Whether that limit of the right arises from implied contract or from the existing relation between the hearers and the author, it is intelligible that where a person speaks a speech to which all the world is invited, either expressly or impliedly, to listen, or preaches a sermon in a church, the doors of which are thrown open to all mankind, the mode and manner of publication negative, as it appears to me, any limitation. But without using any phrase which by force of its ordinary meaning implies either a kind of publication or involves a limitation of the right of publication, what are the facts here as found by a majority of the court? A teacher is in his class-room with his students. For the purpose of teaching them he uses a composition of his own, in this case called "The Law of Moral Philosophy." Suppose it had been exercises in grammar, arithmetic, or foreign language. The object and purpose is to teach the students, to enable them to become proficients in the various subjects of which the teacher is the professor. The student is entitled to avail himself of the teaching. The object is to make him a good grammarian, a good arithmetician, or a proficient in the particular language that is taught. But could it be contended that, by reason of such communication to such students, each of them was entitled to publish the professor's exercises, dialogues, dictionary, or the like? It seems to me that it might be, and indeed there is some suggestion here that it is, contrary both to the spirit and meaning of what is called a lecture, that students should be supplied with some mode of answering questions on the subject of their lectures, without that process of mental digestion which is intended to form the substance of the teaching. Illustrations might be infinitely multiplied in which the sole purpose of a professor's teaching might be rendered nugatory by the unauthorized reproduction of his modes of teaching.

The ground on which I have been able to come to the conclusion that the particular form of literary composition, and the degree of communication which is established to a limited class, may be treated as a question of

law is, that it appears to have been decided that, notwithstanding the professor's desire to prevent such reproduction, and contrary to his intention, the delivery of his lecture—of his composition—to a limited class of students, operates, as matter of law, to make his composition public, and to prevent his enforcing any proprietary right.

I am not aware of any university regulation, or any bargain with its professors, which, either expressly or impliedly, enforces on the professors the making public of their literary compositions, of whatever class these compositions may be, and whether merely educational and intended for the use of their students, or intended for more general diffusion. I am disposed to think, although it does not become necessary to discuss it in the present case, that if a professor had entered into a specific bargain to make public the lectures which he was delivering to his students, but, contrary to that bargain, had enforced on his students the condition of secrecy, though the university which employed him on that express bargain might be at liberty to seek their remedy against him for a breach of that undertaking, it would not necessarily make public that which the lecturer himself had neither expressly nor impliedly communicated for general reproduction.

I doubt whether any of the cases which have been brought to your lordships' attention do more than establish the two propositions which, as I have said, cannot now be in debate. The application of the principle laid down in these cases is what gives rise to the matter now in discussion. I do not consider it very important to consider what was the ultimate result of Mr Abernethy's appeal to Lord Eldon, because the ground of Lord Eldon's decision, as originally given, seems not to have been affected, if an arrangement between the parties, as seems probable, put an end to the litigation.

With respect to the Act, 5 & 6 Will. 4, c. 65, I am not prepared to say that I can obtain any light from its provisions. I had at one time an impression that there was something in the nature of a declaration by the Legislature that lectures delivered in a university, public school, or any public foundation, were to be assumed to be so published as for the future to become public property; and, if that were to be assumed to be the construction of the statute, a serious question would arise as to what were lectures within the meaning of that statute. But I am now satisfied that the language of the statute has been adopted by the Legislature for the purpose of not interfering in any way with the law existing on the subject. Possibly it may be that the difficulty of defining what should be a lecture may have occurred to the author of the statute, or the impolicy of affecting to lay down a rule where many circumstances of convenience as to modes of instruction, and so forth, might be appropriately left to the university authorities, may have produced the legislation which, in fact, exists. At all events, I can derive no assistance from a statute which professes to leave the law as it is, without professing to give any hint of what it assumes the law to be.

I am, therefore, of opinion that the appellant ought to succeed, and I concur in the suggested form of judgment which has been prepared by my noble and learned friend Lord Watson, and I move your lordships accordingly.

Lord Watson.—This appeal is taken in two conjoined processes instituted in the Sheriff Court of Lanarkshire by the appellant, who is Professor of Moral Philosophy in the University of Glasgow, for the purpose of having the respondent, a bookseller in that city, interdicted from publishing or advertising for sale certain books or pamphlets, entitled "Aids to the Study of Moral Philosophy," on the ground that these works are mere reproductions of the lectures delivered by the appellant to the students who attend his class in the university. In defence the respondent pleads, in the first place, that the publications sought to be interdicted are not substantially the same with the appellant's lectures, but represent the views of the person who compiled them, and are the result of his independent study and research; and, in the second place, that the delivery of the appellant's lectures in the class-room of the university is equivalent to publication, and that he has consequently lost his right to prevent their publication in a printed form. These defences raise two issues, the first being a question of fact, which, if the actions had originated in the Court of Session, would have been appropriately tried before a jury, the second being a question of law. Proof was led by both parties; and on the 15th of February, 1884, the Sheriff-Substitute granted perpetual interdict as craved, and ordained the respondent to deliver up to the appellant all copies of the publications complained of remaining in his hands or within his control. The learned Sheriff-Substitute, by his interlocutor, found that "the said books or pamphlets are in substance reproductions, more or less correct, of the lectures in use to be delivered by the pursuer to his class of moral philosophy in the University of Glasgow"; and he further found that "the said lectures are the property of the pursuer, and that the defender has not shown that the pursuer has in any way lost his right of property therein, or that he has acquired from the pursuer, or in any other lawful way, a right to publish or reproduce said lectures."

The respondent appealed to the Second Division, who ordered the cause, with minutes of debate, to be laid before the whole judges of the court for their opinion. The result was that of the thirteen consulted judges a majority of nine were of opinion that the respondent's publications are substantially a reproduction of the appellant's lectures. Six judges, Lords Shand, Rutherfurd Clark, Adam, Fraser, Kinnear, and Trayner, held that the appellant has a right of property in his delivered lectures; whilst five judges, the Lord President, the Lord Justice-Clerk, and Lords Mure, Lee, and McLaren, came to the opposite conclusion. Lord Young, though he did express some views unfavourable to the appellant, distinctly intimated that he did not consider it necessary to decide and did not decide the question, being of opinion that the appellant's right, assuming it to exist, must be limited to a right to protection "against any publication which may be reasonably held to anticipate or otherwise substantially or prejudicially interfere with a subsequent publication by himself," and that the publications complained of are not of that character. Lord Craighill expressed no opinion whatever upon the matter of right, holding that the view taken by the minority (of which his lordship was one) upon the question of fact was a sufficient ground for judgment.

On the 23rd of October, 1885, the Second Division pronounced the interlocutor which is now brought under review. It contains the following findings:—"Find that the pursuer is Professor of Moral Philosophy in the University of Glasgow, and that the lectures referred to in this record were delivered by him to his students as part of his ordinary course. Find that the defender, who is a bookseller in Glasgow, published the works now complained of. Find that these works were compiled by a student who had attended the class taught by the pursuer, and also had taken notes in shorthand of the pursuer's lectures." These are in all respects proper findings, although they set forth facts which were not seriously disputed. The important part of the interlocutor follows—"But find, in conformity with the opinions of the majority of the whole court, that such publication did not constitute an infringement of any legal right of property, or otherwise, belonging to or vested in the pursuer; therefore dismiss the appeal," &c.

The last finding of the interlocutor does not comply with the requirements of 6 Geo. 4, c. 120, s. 40, and is beset with ambiguity. It suggests either that a majority of the court held that there was no infringement, or that a majority of the court were of opinion that there was no right capable of being infringed; but in point of fact there was not a majority in favour of either of these propositions. Lord Rutherfurd Clark protested against the terms of the interlocutor, as not being in accordance with the provisions of the Judicature Act of 1825; but he was overruled by the other judges of the division, whose reasons for the course they followed I am at a loss to understand. Apparently they meant to find that, on some grounds or other, a majority of the whole judges were of opinion that interdict should not be granted, such majority being obtained by combining two minorities. It may be doubtful whether Lord Craighill's opinion on the question of fact should have been taken into account in deciding the case, seeing that it had been negatived by a large majority; but in the present state of the case it is unnecessary for your lordships to consider that matter. Whether judgment was given for or against the appellant, it was the statutory duty of the court to insert a finding of fact in their interlocutor, expressing the opinion of the majority of the consulted judges upon the question of infringement, for the guidance of this House. Your lordships are, by the terms of the statute, precluded from reviewing the interlocutor of the 23rd of October, 1885, except so far as it "depends on, or is affected by, matter of law," and the only question which can be competently raised and decided in this appeal is that which relates to the existence of the appellant's alleged right of property in his lectures. It would have been idle to entertain that question if the court below had come to the conclusion that, assuming such a right to exist, the respondent's publications did not constitute an invasion of it. Fortunately, in the present case, the conclusion of the majority of the whole court upon the question of fact is beyond dispute; and the ministerial duty of the Second Division to give effect to that conclusion by a finding in their judgment is equally plain. In these circumstances, your lordships did not think it expedient or necessary to subject the parties to the delay and expense which would have been occasioned by remitting the cause in order to have the interlocutor put into proper shape, and permitted them to be heard on the merits of the appeal, as if the interlocutor had contained an express finding to the effect that the publications complained of are, in substance, a reproduction of the appellant's lectures.

The author of a lecture on moral philosophy, or of any other original composition, retains a right of property in his work, which entitles him to prevent its publication by others until it has, with his consent, been communicated to the public. Since the case of *Jefferys* v. *Boosey* was decided by this House in the year 1854, it must be taken as settled law that upon such communication being made to the public, whether orally or by the circulation of written or printed copies of the work, the author's right of property ceases to exist. Copyright, which is the exclusive privilege of multiplying copies after publication, is the creature of statute, and with that right we have nothing to do in the present case. The only question which we have to decide is, whether the oral delivery of the appellant's lectures to the students attending his class is in law equivalent to communication to the public.

The author's right of property in his unpublished work being undoubted, it has also been settled that he may communicate it to others under such limitations as will not interfere with the continuance of the right. "He has," as was said by Lord Brougham in *Jefferys* v. *Boosey*, "the undisputed right to his manuscript; he may withhold or he may communicate it, and, communicating, he may limit the number of persons to whom it is imparted, and impose such restrictions as he pleases upon their use of it. The fulfilment of the annexed conditions he may proceed to enforce, and for their breach he may claim compensation." He cannot print and sell without publishing his work, but he may legitimately impose restrictions which will prevent its publication, whether the communication be made by giving copies for private perusal or by recitation before a select audience. In the latter case the retention of the author's right depends upon its being either matter of contract or an implied condition that the audience are admitted for the purpose of receiving instruction or amusement, and not in order that they may make a full note of what they hear, and publish it for their own profit and for the information of the public at large. Upon that principle it was decided, in *Macklin* v. *Richardson*, that the fact of a play having been acted for several years in a public theatre with permission of the author did not imply an abandonment of his right, and that he was, therefore, entitled to restrain its publication from notes taken by a shorthand writer who had paid for admission to the theatre. On the other hand, I do not doubt that a lecturer who addresses himself to the public generally, without distinction of persons or selection or restriction of his hearers, has, as the Lord President observes in this case, "abandoned his ideas and words for the use of the public at large; or, in other words, has himself published them."

The main argument addressed to your lordships for the respondent was to the effect that a professorship in a Scotch university being *munus publicum*, and the occupant of the office being under an obligation to receive into his class all comers having the requisite qualification, his lectures are really addressed to the public; and, at all events, that there is no room for inferring that the students are taught under an implied condition that they shall not print and publish his lectures either for their own profit or otherwise. I do not think it can be disputed that, as stated by Lord Shand, this is the first occasion in the history of the Scottish universities on which any such right as that now claimed has been asserted. If the claim be well founded, there can be no copyright in a lecture which has been once delivered in the class-room. Yet it is the fact that professors and their representatives have been in frequent use to publish lectures which had been annually delivered for years before such publication, and have enjoyed, without objection or challenge, the privilege of copyright. That has been notably the case with our great academical teachers of moral and mental philosophy, from Dr. Thomas Reid, who was appointed to the chair now held by the appellant in 1763, to the late Sir William Hamilton. I concede that, although such may have been the prevalent understanding in Scotland as to the professor's right, this is not a case in which it can be said that *communis error facit jus*; but I agree with Lord Shand's observation that in these circumstances effect ought not to be given to the respondent's argument unless he can make it clear "in principle or authority that the law gives him the right he claims."

In the court below there was a good deal of discussion as to the practical result of deciding this case one way or another. I am afraid that I do not estimate so highly as some of the learned judges the advantage of having the professor's lectures printed and subjected to the criticism of public opinion. The capable critics are a small and by no means unanimous section of the community, and I doubt whether the governing body of the university, or the professor, would derive any assistance from their strictures; whilst experience has shown that the public who are interested in it are not ignorant of the character of university teaching. An original thinker and able teacher very soon attracts a large class, and *vice versâ*. I certainly do not appreciate the advantage to the public of furnish-

ing (which is the professed object of the respondent) the appellant's students with a "crib," an aid to knowledge forbidden in well-regulated educational institutions, which, as the Lord Chancellor has already pointed out, supersedes the necessity of intellectual effort, and neutralizes the benefit of the professor's tuition. There appeared to me to be some force in the suggestion of the appellant's counsel, that if it be now held for the first time that delivery of his lectures is publication, the professor may in future (contrary to his present practice) hesitate to communicate his best and most original thoughts to his class before they have been matured and given to the world by himself. But I do not think these considerations, however important they may be in themselves, are decisive of the present question.

As to the position of students attending the appellant's class, it is sufficient to say here that they must be members by matriculation of the university, and they must also be enrolled as members of his class for the session, upon payment of the prescribed fee. A member of the public, as such, has no right to be present at his lectures, and the public has no right to control or interfere with his teaching. By section 85 of the Universities (Scotland) Act, 1858, the duty of superintending and regulating the teaching and discipline of the university is committed to the *senatus academicus* (which is a body consisting of the principal and whole professors of the university), subject to the control and review of the University Court.

The leading, if not the only case having a close analogy to the present, is *Abernethy* v. *Hutchinson*, decided by the Lord Chancellor (Lord Eldon) in 1825. It is true that in that case there were features which do not occur here. It appeared upon the affidavits made by Mr. Abernethy in support of his application for an injunction against the publication of his lectures at St. Bartholomew's Hospital, that it was no part of his duty as one of the surgeons of the hospital to deliver these lectures, which were not in any way open or accessible to the public, and were not attended by any person save by his permission. At the first hearing Lord Eldon entertained some doubt whether there could be satisfactory evidence of the substantial identity of the publication sought to be restrained with the plaintiff's lectures, seeing that these had not been written out at full length, but were delivered orally from notes; and his lordship also desiderated evidence of the way in which the defendants obtained possession of the matter which they printed. The motion for an injunction was accordingly delayed, the learned judge observing: "In the meantime Mr. Abernethy may, if he thinks proper, produce his MSS.; and, on the other hand, the defendants will judge for themselves whether they will or not—and I do not require it of them, because I have no right—inform me of the way in which they became possessed of the means of publishing this work." Upon the first of these points his lordship was satisfied by the production of the notes from which the lectures had been delivered, with an explanatory affidavit. The defendants did not respond to the invitation addressed to them, and his lordship, in the absence of direct evidence, came to the conclusion that they must have obtained the lectures from some person who had attended them, or in some other way of which the court could not approve. Accordingly a perpetual injunction was granted, on the ground that all persons who attended these lectures were under an implied contract not to publish what they heard, although they might take it down for their own instruction and use.

I may here observe that, in the course of the argument for the respondent, Mr. McClymont brought under your lordships' notice the fact that the record in *Abernethy* v. *Hutchinson* shows that the injunction was dissolved by the Lord Chancellor within a few months after its issue, upon a motion by the defendants, and without hearing parties. We were told that no trace had been found of the affidavit on which the motion was made, so that the recall of the injunction may have been the result of an arrangement between the parties, and, at all events, it cannot detract from the weight of Lord Eldon's deliberate judgment *causâ cognitâ*.

In my opinion, the reasoning upon which Lord Eldon's judgment is based applies strictly to the case of a professor in a Scotch university. The principle which pervades the whole of that reasoning is that, where the persons present at a lecture are not the general public, but a limited class of the public, selected and admitted for the sole and special purpose of receiving individual instruction, they may make any use they can of the lecture, to the extent of taking it down in shorthand, for their own information and improvement, but cannot publish it. If that be the real character of the relation between the lecturer and those whom he addresses, it is immaterial whether they are selected by himself or by others, so long as it is matter of express stipulation or of reasonable implication that the duty which he undertakes is limited to giving personal instruction to the individuals composing his audience. Some of the learned judges in the court below seem to have been of opinion that the present case cannot be brought within the principle of *Abernethy* v. *Hutchinson*, because there is nothing in the nature of a contract between the professor and his students, and, therefore, there can be no implied contract that they shall not publish. That may be so; but what Lord Eldon held was that the restriction of the hearers' right to use the lectures arose from the relation established by contract between them and Mr. Abernethy. In that case the restriction necessarily became an implied term of the contract; but the condition itself is the legal consequence of the relation in which the parties stand to each other, and must receive effect wherever a similar relation exists, whether it be established by contract or in any other way.

I do not think that students of moral philosophy in the University of Glasgow, or in any other Scotch university, either are, or can with propriety be said to represent, the general public; of course they are, each and all of them, members of the public, but they do not attend the professor's lectures in that capacity. They must be members of the university, and they must further comply with its regulations, and make payment to the professor of the usual fee, in return for which they receive from him a ticket or certificate of their enrolment as students for the session; and, without observing all these preliminaries, they would have no right to enter his class-room during the lecture hour. The relation of the professor to his students is simply that of teacher and pupil; his duty is, not to address the public at large, but to instruct his students; and their right is to profit by his instruction, but not to report or publish his lectures. It appears to me that the learned judges whose opinions are adverse to the appellant have attributed undue weight to the circumstance that the appellant's office is *munus publicum*. That it is so is an undoubted fact; but, according to my apprehension, the question which your lordships have to decide depends, not upon that fact, but upon the duty which the appellant's office requires him to fulfil. The nature of the duty incumbent upon a professor in an English university is thus described by Lord Eldon in *Abernethy* v. *Hutchinson*:—"Now if a professor be appointed, he is appointed for the purpose of giving information to all his students who attend him, and it is his duty to do that; but I have never yet heard that anybody could publish his lectures." So far as I know, there is no difference whatever between the position of a Scotch and that of an English university professor, so far as regards their

relations to the students whom they teach; and no point of difference has been suggested, either in the court below or by the respondent's counsel. The fact of his being a public official lays the appellant under an obligation to the State as well as to those who pay for their instruction, to teach efficiently, and to the best of his abilities; it does not affect the nature of his obligation, and cannot alter the relation between him and his students.

That Lord Eldon held the lectures of a university professor to be within the rule laid down and given effect to by him in *Abernethy* v. *Hutchinson* is beyond question, because he expressly refers to the case of such a professor as an illustration of the legal principles upon which he gave judgment for Mr. Abernethy. None of the learned judges who are of opinion that the doctrine of *Abernethy* v. *Hutchinson* is inapplicable to this case advert to that part of his lordship's judgment, with the single exception of Lord McLaren, who states, in my opinion correctly, that Lord Eldon "very distinctly and emphatically identifies the case of Mr. Abernethy with that of the lectures of Blackstone, originally delivered by that great lawyer in the University of Oxford, in which he held the appointment of Vinerian Professor of Law." Lord McLaren suggests, however, that there are no means of knowing whether the attention of the Lord Chancellor "had been drawn to the distinction which might be taken between public and private lectures, a distinction on which the main argument of the defender is founded." I cannot, for many reasons, concur in Lord McLaren's suggestion. Lord Eldon, in the passage referred to, was distinguishing between lectures public in this sense, that they are communicated *urbi et orbi* by the mere act of delivery, and lectures which are private, inasmuch as the author does not by their delivery communicate his ideas and language to the public at large, or part with his common law right of property. It was not the habit of Lord Eldon to overlook such obvious differences as did exist between the position of Mr. Abernethy and that of Sir William Blackstone; it is manifest that his lordship was clearly of opinion that these differences could not disturb the application of the same principles of law to both cases alike. In that opinion I entirely concur.

The observations of Lord Eldon assume that Sir William Blackstone would not have had copyright in the text of his Commentaries, if the lectures delivered by him as Vinerian Professor were held to have been thereby published. The accuracy of that assumption is controverted by my noble and learned friend (Lord Fitzgerald). Never having seen the lectures, I can only say for myself, that in the preface to the first edition of the Commentaries, published in 1765, the learned author states that "the following sheets contain the substance of a course of lectures on the Laws of England which were read by the author in the University of Oxford." Lord Eldon heard and took notes of the lectures, and was, no doubt, familiar with the Commentaries; and he was, therefore, in a position to judge (which I am not), and was perfectly capable of judging, whether the two works were substantially the same. If they were, the statute of Anne could give the author no copyright in the original text, although he might acquire the copyright of new matter added to subsequent editions of the Commentaries.

In regard to the Act 5 & 6 Will. 4, c. 65, I adopt the opinion of the great majority of the learned judges, which is in accordance with the view taken by Kay, J., in the recent case of *Nicols* v. *Pitman*. The effect of the statute is to secure their right of property to authors of lectures and to persons to whom the right has been sold or conveyed, notwithstanding delivery, upon their compliance with certain preliminaries; and their right is protected from invasion by forfeitures and penalties. Its provisions are not confined to cases in which the right would have been protected at common law, but extend to many cases in which, according to that law, delivery would have been equivalent to publication. But, by section 5, lectures delivered in a university or a public school, or on any public foundation, are excepted from the operation of the Act, and it is declared "that the law relating thereto shall remain the same as if this Act had not been passed." I cannot gather from the terms of that exception and declaration any indication of an intention on the part of the Legislature to express their understanding of the existing law with respect to lectures in these institutions. There may be lectures delivered within the walls of such institutions which do by their delivery become public property, just as there may be others which do not. Whether they belong to one or other of these classes is a question which must be decided irrespective of the provisions of the statute.

I am accordingly of opinion that the appellant is entitled to have the judgment of the Second Division, in so far as adverse to him, reversed, and to have the interlocutor of the Sheriff-Substitute restored. Should your lordships come to the same conclusion as myself in this case, I have to suggest that the proper course to follow in disposing of the appeal will be to reverse the interlocutor appealed from, with the exception of the first three findings of fact; and in respect of these findings, and also in respect that it was admitted by the parties at the bar, and that the appeal was heard on the footing that, according to the opinion of a majority of the consulted judges, the works complained of are in substance a reproduction of the appellant's lectures, to declare that the delivery of the said lectures by the appellant to his students as part of his ordinary course, was not equivalent to publication thereof; and that the appellant is entitled, notwithstanding such delivery, to restrain all other persons from publishing the said lectures without his consent; and, subject to that declaration, to remit the case to the Second Division of the Court of Session, with directions to affirm the interlocutor of the Sheriff-Substitute dated February 15, 1884, and to find the appellant entitled to the expenses of process incurred by him in the Court of Session; and further to ordain the respondent to pay to the appellant his costs of this appeal.

Lord Fitzgerald.—The question we have to determine on this appeal seems to me to be one of pure law. I agree with my noble and learned friend (Lord Watson) that we must read the interlocutor of the Second Division as if it contained an express finding that the publications complained of are in substance a reproduction of the appellant's lectures.

It was not contested that by the common law of Scotland, as well as by the common law of England, every author has a right of property in his compositions so long as they remain "unpublished," and that a private lecturer may lawfully impose an express condition on persons allowed to hear his lecture, that they shall not publish what they hear, and that such a condition may also be lawfully implied from the circumstances. In such cases the common law protects the author's right of property and forbids infringement. On the other hand, a private lecturer may deliver his lecture under such circumstances as indicate his intention to give his words to the public at large. In the latter case, the lecturer has technically published his lecture, and has abandoned the protection which the common law would otherwise afford. We have now, however, to deal with a case very different from that of any private lecturer.

The facts, as to which there is no dispute, are that the pursuer fills the chair of Moral Philosophy in the University of Glasgow. It is not necessary to investigate the history of that university, as its status is now, in

substance, similar to that of the other universities of Scotland. They are all ancient public endowed corporations, established by public authority for the special purpose of public instruction in theology, law, medicine, and all the arts. In that instruction the public has a direct and deep interest. For an outline of the university and the offices of its professors and their functions and duties, I refer to the eloquent judgment of the Lord President. In point of modern regulation and government they all come under the provision of the imperial statute 21 & 22 Vict. c. 83, which is a statute "for the advancement of religion and learning, and to make provision for the better government and discipline of the universities of Scotland." The University of Glasgow has under that Act a chancellor, a *senatus academicus* "to superintend and regulate (*inter alia*) the teaching and discipline of the university," a University Court to control the decisions of the *senatus academicus* and to enforce due attention on the part of the professors to regulations as to the mode of teaching and other duties imposed on them, and to fix and regulate the fees from time to time in the several classes, it has also a University Council, and in order to produce uniformity in the several universities the statute constitutes a general body of commissioners with legislative powers, for a limited period, to make statutes and ordinances, such as in their opinion would be conducive to the well-being of the universities, the advancement of learning, the course of study, and the manner of examinations, &c. The statute also gives to those commissioners an important power—namely, to recommend grants of public money for certain purposes, and, amongst others, "for increasing the salaries presently attached to existing professorships."

The pursuer was a professor in the University of Glasgow, remunerated partly by salary paid out of the university revenues, or out of money voted by Parliament, and partly by class fees, which, however, equally formed part of the university revenue, though allocated for the time being to him. His obligation and his duty were to teach the nation through its youth, according to the regulations laid down by the governing body of the university. It does not appear what those regulations were, nor is it alleged that there were any restrictions or conditions imposed on the students of the class, or other auditors by that governing body, as to the use to be made of the professor's lectures when delivered. I assume, too, as the contrary does not appear, that the pursuer was left free to teach by lectures if he thought fit. He did teach by the instrumentality of reading lectures. The broad question for our consideration is whether that reading of his lectures to those assembled in the lecture-room is a publication to the nation.

After much anxious consideration I have come to the conclusion that the delivery of the lectures was a publication to the public at large, and that, being such, the pursuer has abandoned to the public the exclusive rights which he otherwise had, and the protection which the common law would otherwise have afforded him. I have struggled against this conclusion, as I am conscious how superior my noble and learned friends are to me in knowledge and judgment, but I have been unable to agree with them, and am compelled, on the other hand, to accept the broad and vigorous reasoning of the Lord President and Lords Young and McLaren.

It was urged in your lordships' House in argument that a decision in favour of the respondent would operate unjustly on the professor, as depriving him of emoluments which he might otherwise derive from the publication and sale of his lectures, by himself or his representatives, for all time; but this seems an exaggeration, and to some extent an imaginary apprehension. There is no power, save that of the university, to interfere with the professor in publishing his lectures for sale, and the public would probably prefer the publication issued with the stamp of his authority, and containing his emendations and additions. This is, however, a consideration which we cannot enter upon. Again, it was urged that the professional practice of repeating the same lecture session after session, in like manner as a minister repeats his sermon, would be interfered with. If this was so, it would seem to be a desirable result. The sheriff, in his note to the interlocutor of the 23rd of November, 1883, says, *inter alia*, on this point: "The professor's thoughts, as expressed that year, must be the same as those to be similarly expressed the next year." This would seem to assimilate the professor's duty to the cuckoo cry of repetition. I rather think that this eminent professor would repudiate such a suggestion, and tell us that the lecturer should remember that—

"Beneath this starry arch,
Naught resteth or is still,"

and that his duty is to watch over and criticize new modes of thought, new works, the march of intellect, and those discoveries which—

"Make old knowledge
Pale before new."

Even in pure mathematics there may be alterations and additions, and ethical science is not free from the inexorable law of mutability.

Lord Young, in the reasons for his judgment, says: "Now I have to observe that neither the common law of property nor the statute law of copyright applies to teaching in a public university. It is obviously expedient in the public interest that such teaching should be public, and open to public comment and criticism. This accordingly, I apprehend, is the reason why lectures in public universities are excepted from the provisions of the Act of 1835." I concur with the learned lord (Lord Young) in opinion that it is essential to the public safety that university teaching should be exposed to comment, to searching criticism, and the full blaze of public opinion. How can this be attained if the contention of the pursuer is well founded? If the lecturer can prevent all other publication of his lectures than that which takes place in his class-room, the nation may be left in Cimmerian darkness as to the teachings of its youth in its great universities. Unless there be full and complete publicity, criticism would be impracticable and a mere empty sound.

Lord Young, in the passage just quoted, touches on another subject—namely, the Act of 1835—to which, perhaps, sufficient attention has not been given. The Bill, which became the Act of 1835 (5 & 6 Will. 4, c. 65), was introduced into this House about ten years after Lord Eldon had given his decision on the injunction motion in *Abernethy* v. *Hutchinson*, and it is not improbable that the difficulties supposed to exist in consequence of Lord Eldon's reasons led to the Bill. It is a Bill entitled "for preventing the publication of lectures without consent." The preamble is obviously taken from the Copyright Act, 8 Anne, c. 19, and the first section is large enough to apply to and embrace all lectures wheresoever delivered; section 2 prohibits, under certain penalties, the publication of any lecture in any newspaper without the licence of the author; section 3 provides that no person allowed for fee or reward or otherwise to be present at a lecture delivered in any place shall be deemed to have leave to print or copy or publish such lecture. The Bill, as introduced in this House, seems to have passed without debate, but in the Commons it met with considerable opposition, on the broad ground that if it was intended to shield public lectures from public inspection it ought not to receive the sanction of Parliament. In the course of the discussion attention was specially directed to *Abernethy* v. *Hutchinson*, which was probably misunderstood. It ended in a compromise, by which words were added at

the end of clause 5 providing that the Act should not extend "to any lecture delivered in any university or public school or college, or on any public foundation, or by any individual in virtue of, or according to any gift, endowment, or foundation, and that the law relating thereto shall remain the same as if this Act had not been passed."

In *Millar* v. *Taylor*, 4 Burr. p. 2332, it is reported that Mr. Murphy, counsel for the defendant, strongly contended, from the amendments made in the Commons on the statute of 8 Anne and from the change of title, that Parliament intended to take away or to declare that there was no property at the common law; but to this Willes, J., answered, that "The sense and meaning of an Act must be collected from what it says when passed into law, and not from the history of the changes it underwent in the House where it took its rise. The history is not known to the other House or the Sovereign." The rule so aptly expressed has always been enforced in this House. But, strangely enough, Willes, J., does shortly afterwards, in the same judgment, seem to offend against his own rule. He uses language which I quote as not inapplicable to the statute before us. His language is this:—"The preamble is infinitely stronger in the original Bill as it was brought into the House and referred to the Committee; but, to go into the history of the changes the Bill underwent in the House of Commons, it certainly went to the Committee as a Bill to secure the undoubted property of copies for ever. It is plain that objections arose in the Committee to the generality of the proposition which ended in securing the property of copies for a term, without prejudice to either side of the question upon the general proposition or to the right."

Now, looking at the 5 & 6 Will. 4, we may at least say that objection was taken in the Commons to the generality of the proposed measure, and the proviso was there added at the end of the fifth clause. The statute seems at once, in its first clause, to recognise the property of the lecturer in his lecture, and to confer on him the sole right and liberty of printing and publishing such lecture, even though he may have delivered the same under such a state of circumstances as would have otherwise amounted to an abandonment of his words and thoughts to the public. "Leave of the author," and "consent of the author," would probably be interpreted as meaning express leave or consent, such as would confer a title on the licensee; and section 4 seems to support that view. There is difficulty of construction in every part of this short statute, but especially in section 5. I am unable to read the concluding proviso of section 5 save as indicating a statutable declaration that lectures delivered in a university, which is necessarily a public institution, become thereby public property for the purposes of publication and public criticism. As to the concluding sentence, "that the law relating thereto shall remain the same as if this Act had not passed," the words seem to me to have no real force. The reservation is of such common law right, if any, as existed before the Act. The statute does not interfere with or abridge any common law right, but leaves it as it was. In my judgment, the only common law right the university lecturer has is a right of property in his lecture when composed, and before its public delivery in the university. There seems to have been no decision whatever on the subject of lectures delivered in a public university prior to the passing of that Act. I am unable to accept *Abernethy* v. *Hutchinson* as final or satisfactory, or the propositions, if any, which it is supposed to decide. It arose on motion only, supported by the affidavit of the plaintiff; there was never a plenary hearing of the cause. Lord Eldon treats as a pure question of law, which he would not decide, "property in sentiments or language not deposited on paper." He then goes into implied contract, or breach of trust, which is wholly inapplicable to the case before us; and it is observable that his strictures are principally, if not wholly, directed against printing for profit. He adopts, in substance, the proposition of Aston, J., in *Millar* v. *Taylor*, that "he has no right to publish for profit the identical work." On the first hearing of the motion Lord Eldon refused the injunction, but gave leave to renew it "on the ground of breach of contract or breach of trust." The Bill having been amended, and the amendment having been supported by affidavit, the motion was renewed on the ground of "contract" only, and Lord Eldon's decision of the motion is expressed in these words: "He was clearly of opinion that, whatever else might be done with it, the lecture could not be published for profit." That is the whole decision of Lord Eldon.

Lord Eldon makes a passing observation (which has already been alluded to by my noble and learned friend (Lord Watson)), which requires attention. He says: "Nor can I conceive on what ground Sir William Blackstone had the copyright in his lectures for twenty years, if there had been such a right as that. We used to take notes at his lectures; at Sir Robert Chambers' lectures also the students used to take notes; but it was never understood that those lectures could be published." These observations of Lord Eldon are rather of a negative character, and are somewhat loose, but are undoubtedly valuable as showing that Lord Eldon had in his mind the case of the university professor. But what do they amount to? I am at this moment unaware whether Sir William Blackstone's lectures were ever published as lectures, or that anyone asserted a right to do so, or was prevented from doing so. When Lord Eldon speaks of Blackstone's copyright for twenty years he is obviously referring, not to his lectures as such, but to Blackstone's Commentaries. The commentaries, which were founded on lectures, revised, corrected, and enlarged with notes, were first published in 1765. Nine editions were published in the lifetime of Sir William Blackstone, all revised and added to by the learned author. He prepared also a tenth edition which was not published till after his death in 1780. He had an undoubted copyright in "The Commentaries" under the statute of Anne.

Finding a statement in the House of Commons on the Bill of 1835, that the Abernethy suit had been abandoned, your lordships made more inquiry, with the result that it was discovered that the injunction had been dissolved, but under what circumstances we have been unable to ascertain. I cannot think that *Abernethy* v. *Hutchinson* is entitled to the great weight that has been attributed to it, and it seems to me to state no principle which ought to guide us in the present case. The public lecturer at a university has no authority of his own to impose conditions on his pupils or those entitled to attend his lectures; nor can it be truly said that he can create a trust in his own favour. It is not necessary to consider what the university might do in the exercise of its plenary powers "for the advancement of religion and learning, and improving and regulating the course of study therein."

In the legal view which I have adopted, it is not necessary for me to consider the weighty authorities to which we have been referred, some of them rather obscured by the extreme length of the judicial reasons. My opinion is that a public lecture, delivered publicly at a university by one of its professors in the performance of the public duty he has undertaken, becomes by the act of delivery published to the nation, and may be likened to a gift from the university or the professor to the nation.

In the course which the case is now about to take my opinion becomes worthless. I am bound to assume that I am wrong in point of law. Your lordships'

judgment settles the law finally, and in yielding a willing obedience I have at least the palliation for mistake in law, that I have erred in company with the Lord President, the Lord Justice-Clerk, and four other able and eminent Scotch judges.

I have only to add that, on looking at the debate in the House of Commons, I find it stated there by a person who had, or at least ought to have had, the most full and accurate knowledge on the subject—namely, the late Mr. Wakley, who was a member for Finsbury, and was one of the editors of the *Lancet*, against which paper the *Abernethy case* had been instituted, that the suit had been abandoned by the professor in consequence of its being been found that he held the position of a public professor.

Interlocutor of the Second Division of the Court of Session appealed from, dated the 23rd of October, 1885, reversed in the terms proposed at the end of Lord Watson's judgment.

Solicitor for the appellant, *W. A. Loch*, for *H. & R. Lamond*, Writers, Glasgow, and *W. & J. Burness, W.S.*, Edinburgh.

Solicitors for the respondent, *Peace & Co.*, for *G. McNee*, Writer, Glasgow.

Court of Appeal.

From Chan. Div. Nov. 18.

SOPER v. ARNOLD. (a.)

Vendor and purchaser—Acceptance of title—Failure of purchaser to complete—Rescission by vendor—Resale—Objection to title by second purchaser decided to be valid—Action by first purchaser for return of deposit.

In November, 1882, the plaintiff agreed to purchase land from the defendants, subject to a condition that, if he failed to complete the purchase, the defendants might forfeit the deposit and put the land up for resale. The plaintiff accepted the title, but failed to complete, owing to want of means. In June, 1885, the defendants agreed to sell the land to F. S., who took an objection to the title, which was brought before the court upon a summons under the Vendor and Purchaser Act, 1874. In January, 1886, an order was made on the summons declaring that the vendors had not shown a good title to the land. In July, 1886, the plaintiff commenced an action against the defendants to recover the deposit paid in November, 1882.

Held, that he could not succeed.

Hart v. Swaine, 26 *W. R.* 30, 7 *Ch. D.* 42, *commented upon.*

Decision of Kekewich, J. (*reported* 35 *W. R.* 451, 35 *Ch. D.* 384), *affirmed.*

Appeal, *in formâ pauperis*, from a decision of Kekewich, J., reported 35 W. R. 451, 35 Ch. D. 384.

By an agreement dated the 4th of November, 1882, and made between the defendants, Arnold and Patten, of the one part, and the plaintiff, Soper, of the other part, the defendants agreed to sell to the plaintiff certain freehold property at Teignmouth for the sum of £6,100, of which sum £610 was to be paid on signing the agreement and the remainder on the completion of the sale.

The agreement contained the usual condition providing that if the purchaser should fail to comply with the conditions of sale his deposit should be forfeited to the vendors, who should be at liberty to resell the property.

(a.) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

Pursuant to the agreement, the plaintiff deposited £610 with the defendants, and the defendants delivered an abstract of the title to the plaintiff, which was approved by the plaintiff's then solicitor.

The plaintiff, however, was unable to find the balance of the purchase-money when the time arrived for completion, and the defendants thereupon rescinded the agreement and retained the deposit as forfeited.

In June, 1885, the defendants agreed to sell the property to F. Slocombe, who took an objection to the title on the ground that a power of sale, under which the land had been purported to be sold to the defendants, did not really exist. This objection was brought before the court upon a summons under the Vendor and Purchaser Act, 1874, and by an order of Chitty, J., on the 28th of January, 1886, it was declared that Slocombe's requisitions and objections in respect of the title had not been sufficiently answered, and that a good title to the hereditaments had not been shown.

As soon as the plaintiff heard of this order he demanded repayment from the defendants of his deposit, with interest at the rate of £4 per cent., on the ground that the agreement of the 4th of November, 1882, had been entered into under a mutual mistake of fact; and that inasmuch as the defendants had no title to the hereditaments there had been a total failure of consideration.

On the 7th of July, 1886, the plaintiff commenced the present action, which was dismissed with costs by Kekewich, J., on the 15th of March.

The plaintiff appealed.

J. M. Rigg, for the appellant—At the time of entering into the contract the defendants had no title, and there was nothing therefore to bind the plaintiff to pay the balance of the purchase-money. *Want* v. *Stallibrass*, 21 W. R. 685, L. R. 8 Ex. 175, is not distinguishable from the present case. There was a mutual mistake as to the defendants' title, and under those circumstances the purchaser could not have been called upon to complete: *Cooper* v. *Phibbs*, 15 W. R. 1049, L. R. 2 H. L. 149; *Jones* v. *Clifford*, 24 W. R. 979, 3 Ch. D. 779. The result of the cases from *Bingham* v. *Bingham*, 1 Ves. sen. 126, is that if a purchaser who has paid his purchase-money subsequently discovers that the vendor has no title to the property sold by him, he can recover his purchase-money. That rule applies to the present case. [LINDLEY, L.J.—How do you distinguish this case from *Howe* v. *Smith*, 32 W. R. 802, 27 Ch. D. 89?] There was no suggestion in that case that the title was bad. As a matter of substantial justice, the defendants are in possession of money to which they have no title, and which they have no equitable right to retain.

He also referred to *Hart* v. *Swaine*, 26 W. R. 30, 7 Ch. D. 42; *Torrance* v. *Bolton*, 21 W. R. 134, L. R. 8 Ch. 118; *Ex parte Barrell, In re Parnell*, 23 W. R. 846, L. R. 10 Ch. 512.

Barber, Q.C., Vernon R. Smith, and *R. Kemp*, for the respondents, were not called upon.

COTTON, L.J.—This appeal before us has been very well and ably argued, but in my opinion the judgment of Kekewich, J., was right. We must consider what the facts of the case are. [His lordship stated them, and continued:—] The question is not one which would arise if the contract were still *in fieri*—that is to say, if the vendors and the purchaser were still dealing with one another, and either the vendors or the purchaser were insisting on specific performance. But the defendants, the vendors, have rescinded the contract, and have claimed to retain the deposit in consequence of the default of the plaintiff, the purchaser.

Under those circumstances the purchaser is in the position of a man who has repudiated his contract. It is true if he had known the facts he would have taken a

different ground, and not have said, "I will accept the purchase, and am ready to complete and take a conveyance"; but he would have said, "No, you cannot enforce specific performance, and on the ground of the absence of title I will not complete," and if on that ground the contract could not have been enforced against him he would have stood in a different position. But to enable him to recover the deposit now would be to enable him to take advantage of his own default in not providing the balance of the purchase-money when he had accepted the title and had expressed himself satisfied with the title as shown. That acceptance of title undoubtedly was the mistake of those who advised him. We must assume that the decision of Chitty, J., was correct, and that the vendors had not a good title. How can the purchaser get his deposit back again?

It is said that the decision in *Want* v. *Stallibrass* is in his favour, but there the question was entirely different from the question in the present case. There the alleged default of the purchaser was in not delivering his objections, and the vendor said, "You have not delivered your objections, and therefore you cannot take an objection to the title at all." The vendor said, "Not only can you not take the objection, but it is a bad one." That was the matter on which they came to an issue, and there never had been repudiation by the vendor of the contract. Both parties were unwilling to move, the vendor because he was not quite certain of the title and the purchaser because he was not certain of his position. Under those circumstances the case came before the court as on a contract *in fieri*, and the decision was that there was no default on the part of the purchaser within the meaning of the conditions of sale, as properly construed, and therefore the case must be treated independently of those conditions and independently of the stipulation that, in the event of the contract not being a breach of the conditions, the vendor should be at liberty to retain the deposit. Then it comes to this: There is a man who has no stipulations on which he can rely giving him by contract a right to retain the deposit. The contract goes off, not from any default of the purchaser, but from the default of the vendor, who has not a good title. Therefore, in my opinion, the purchaser is entitled to claim the deposit. Then it is said that, even independently of that, if there had been a completion by conveyance of the estate to the plaintiff and he had afterwards discovered this, he ought to get the money back again. Cases were quoted to show that the ignorance of law would not excuse him, and that the maxim, *Ignorantia juris quod quisque tenetur scire neminem excusat*, did not apply to a case like the present. Assume that. Where is there any authority that after the conveyance and the money paid the purchaser who has taken the conveyance and accepted the title, because he afterwards finds out in consequence of his being ejected that the title is a bad one, can recover the purchase-money? In my opinion that is not the law. What is the use of covenants for title if, wherever any defect is found out and the purchaser who has taken the conveyance is ejected, he could come to the vendor and say, "Take back the estate for what it is worth, and give me back my money." Some cases were referred to, and, among others, one, before Fry, L.J., of *Hart* v. *Swaine*. I do not think that case of *Jones* v. *Clifford* has any bearing upon the question. The question there was simply how far, when the contract was *in fieri*, the vendor was at liberty to correct a mistake he made in stating that he was selling leasehold when he was selling freehold—that is, how far the purchaser was entitled to correct the mistake he made in accepting the title under a misapprehension. *Hart* v. *Swaine*, it is said, supports the view that, even if there had been a conveyance and the title was a bad one, the money could be got back again. In my opinion that is not the decision. The judge there decided that there had been a misapprehension amounting to legal fraud and to deceit, and considered that the proper remedy was to give back the purchaser his money and let the vendor get back his estate. Whether that was right or wrong may have to be considered hereafter, and whether or not the authorities justified the learned judge in coming to that conclusion I have not had time to consider. It did not amount to a general proposition of law that, where, in the absence of any deceit, the title turns out to be bad after conveyance, the purchaser is entitled to say to the vendor, "Give me back my money and take back your estate." I think that is not the general law, and I am fortified in that view by what was said by Lord Selborne in *Brownlie* v. *Campbell*, 5 App. Cas., at p. 937, where there occurs this passage: "When the conveyance takes place, it is not, as far as I know, in either country the principle of equity that relief should afterwards be given against that conveyance, unless there be a case of fraud, or a case of misrepresentation amounting to fraud, by which the purchaser may have been deceived." In my opinion, therefore, the judgment of Kekewich, J., was right, and we must dismiss the appeal, but not with costs, because it is *in formâ pauperis*.

SIR JAMES HANNEN.—I am of the same opinion. The learned counsel by whom this case has been very well argued put it on a ground which, if he could have substantiated it, would have supported his contention—namely, that the circumstances were such as to make it inequitable on the part of the defendants to retain this money, but it appears to me to be absolutely clear it is not so. There was no misrepresentation, no concealment of any fact, but the facts which were disclosed satisfied the advisers of the plaintiff at that time, and the title was approved of.

There was no common mistake of facts going to the very root of the contract, as in some of the cases which have been referred to. It was a mistake of opinion as to the validity of the title—a mistake which I suppose occurs in innumerable cases. Under the influence of that mistake of opinion the advisers of the plaintiff accepted the title, notwithstanding his inability to pay the money in fulfilment of the contract. That inability to pay was the cause of the repudiation of the contract which the defendants were justified in acting upon, and they accordingly rescinded the contract. That being the state of things, it appears to me it would be highly inequitable that because somebody else discovers years afterwards that the opinion relied upon at the time was erroneous the defendants should be bound to return this money. Therefore I think the judgment of Kekewich, J., was right.

LOPES, L.J.—The facts, to my mind, conclude this case. They are plainly set out in the statement of claim, and it there appears that an abstract was duly delivered, such abstract disclosing the title truly. The plaintiff's solicitor approved of the title, and then, when the time arrived for the payment of the purchase-money, the purchaser was either unable or unwilling to find the money. In point of fact he did not find it. About these facts there can be no doubt. It therefore appears that this purchase went off on the ground of the inability or the unwillingness of the purchaser to pay the purchase-money.

Notice was then given by the vendors to rescind. There is a rescission, and the whole matter is then and there at an end. Years go by, and when the vendors sell the property, or endeavour to sell it, to somebody else, it is discovered that there is this defect in the title. That comes to the knowledge of the present plaintiff, and he then brings this action in order to recover his deposit. Can he do so? I am clearly of opinion he cannot. It would be enabling him to take advantage of that which, in point of fact, was his own default. It would be inequitable to allow such a state of things

to prevail. I do not propose to deal with the cases which have been so fully dealt with by Cotton, L.J., every one of which is distinguishable from the present case.

Appeal dismissed.

Solicitor for the appellant, *Granville Smith*, for *Hutchins*, Teignmouth.

Solicitors for the respondents, *Lovell, Son, & Pitfield*.

From Chan. Div. July 27.

BOSWELL v. COAKS. (*a*.)

Practice—Costs—Severance of defendants—Discretion of the taxing master—R. S. C., 1883, *ord.* 65, *r.* 27, *sub-rule* 29.

The House of Lords, on dismissing an appeal, directed that the plaintiffs should pay the defendants' costs in all three courts, and that in taxing the costs in the High Court and in the Court of Appeal the taxing master should consider whether any of the defendants who had appeared separately had any sufficient reason for severing in their defences, and if, and in so far as, it should appear that they had not, the taxing master was to allow only one set of costs, as he should think right.

The taxing master allowed each of the defendants separate costs.

Held, that the House of Lords had delegated to the taxing master the duty of deciding whether the defendants were entitled to separate costs, and that, as it had not been shown either that he had not exercised his discretion at all, or that he had done so on a wrong principle, an appeal from his decision could not be entertained.

Decision of North, J., *affirmed.*

Appeal from a decision of North, J.

The action was brought to set aside the sale of a life interest on the ground that it had been made under an order of the court to two persons, one of whom was in a fiduciary position to the trust estate, and that a proper disclosure of the facts had not been made. Fry, L.J., dismissed the action with costs, 31 W. R. 540, 23 Ch. D. 267, where the facts are fully stated. This decision was reversed by the Court of Appeal, 33 W. R. 376, 27 Ch. D. 424, but was subsequently restored by the House of Lords, 11 App. Cas. 232, 34 W. R. Dig. 211. The House of Lords directed that the plaintiffs should pay the defendants' costs in all three courts, and that in taxing the costs in the High Court of Justice and in the Court of Appeal (in which the defendants had appeared separately, though they all appeared together in the House of Lords) the taxing master should consider "whether any of the defendants who appeared separately had any sufficient reason for severing in their defences, and if, and in so far as, it shall appear that they had not, then the said taxing master shall allow only one set of costs, or only as many sets of costs as he shall think right."

The taxing master allowed each of the defendants separate costs.

The plaintiffs objected to the allowance of more than one set of costs to certain of the defendants who were not personally charged with fraud, and they took out a summons to review the taxation.

North, J., held that under the order of the House of Lords, as well as under the Rules of Court, the taxing master had a discretion in the matter, which he had exercised, and that his decision was final.

From this decision the plaintiffs appealed.

(*a*.) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

Cookson, Q.C., and *Langley*, for the appellants.—The taxing master was wrong in allowing separate costs to those of the defendants who were not personally charged with fraud. They ought to have appeared together. The taxing master has given a wrong reason for his decision, which is therefore appealable.

They referred to *In re Martin*, 30 W. R. 527, 20 Ch. D. 365; *Van Sandau* v. *Moore*, 1 Russ. 441.

Cozens-Hardy, Q.C., and *E. Beaumont; Phipson Beale; Haldane; Chadwyck Healey*, for the respective defendants, were not called upon.

COTTON, L.J.—In my opinion the decision of North, J., was right. This is not an ordinary case. After the appeal had been disposed of by the House of Lords a special application as to costs was made to the Appeal Committee. The Appeal Committee declined to decide it, and said in substance, "The question depends on details which are not before us, we will not decide it, we will delegate the decision of it to the taxing master." An order was accordingly made that in taxing the costs below the taxing master should consider whether any of the defendants who appeared separately had sufficient reason for severing in their defences, and if, and in so far as, it should appear that they had not, then the taxing master should allow only one set of costs, or only as many sets of costs as he should think right. There is, therefore, no appeal, unless the taxing master has failed to exercise his discretion at all. This case differs from a case where, though an order is appealable, the Court of Appeal will not generally interfere with the exercise of the discretion of the judge in the court below unless he has gone on a wrong principle. In the case cited the order was appealable, and, as the judge had exercised his discretion on a wrong principle, the appeal was entertained. In the present case there is no appeal, unless the taxing master has not exercised his discretion at all. The taxing master was not bound to say as much as he has done, but what he says does not give any ground for saying that he has not exercised his discretion. The appeal, therefore, fails.

BOWEN and FRY, L.JJ., concurred.

Appeal dismissed.

Solicitors for the appellants, *Whites & Co.*, for *M. S. Emerson*, Norwich.

Solicitors for the respondents, *Johnson & Master*, for *Coaks, Rackham, & Cooper*, Norwich; *Smythe & Brettell; G. F. Hudson, Matthews, & Co.*, for *Bailey, Cross, & Barnard*, Norwich; *Blake & Haseltine*, for *Field, Son, & Pully*, Norwich; *Aldridge, Thorn, & Morris*, for *Copeman & Cadge*, Loddon; *S. W. Johnson & Son*.

From Q. B. Div. [& Q. B. Div.] May 20; July 2; Nov. 17, 18, 19, 21; Dec. 20.

Ex parte BELL COX. (*a*.)

Ecclesiastical law—Habeas corpus—*Appeal—Judicature Act*, 1873 (36 & 37 *Vict.* c. 66), *s.* 19—*Decree of suspension—Issue of writ* de contumace capiendo *after expiration of period of suspension*—53 *Geo.* 3, *c.* 127—5 *Eliz.* c. 23, *s.* 10—*Writ irregularly indorsed.*

There is an appeal to the Court of Appeal, under section 19 *of the Judicature Act*, 1873, *against the granting of a writ of* habeas corpus.

The effect of the statute 53 *Geo.* 3, *c.* 127, *is to sub-*

(*a*.) Reported by G. K. PALEY and A. P. PERCEVAL KNEP Esqs., Barristers-at-Law.

stitute the writ de contumace capiendo *for the writ* de excommunicato capiendo, *and to apply to the former writ all proceedings and provisions applicable to the latter. Therefore the methods of release from imprisonment under the writ* de contumace capiendo *are not limited to those provided in the statute, but include the method by submission and satisfaction applicable in cases under the old writ.*

So, where a writ de contumace capiendo *for disobedience to an order of suspension was issued after the period of suspension had elapsed,*

Held (*reversing the decision of the* Divisional Court), *that the writ was rightly issued.*

Per *the* Divisional Court (Lord Coleridge, C.J., *and* A. L. Smith, J.).—*A writ* de contumace capiendo *is not invalidated by being improperly indorsed "The Public Worship Regulation Act,* 1874."

Rule *nisi* for a *habeas corpus* to show cause why the Rev. James Bell Cox, vicar of St. Margaret's, Toxteth-park, Liverpool, then detained a prisoner in her Majesty's prison at Walton-on-the-Hill, Lancashire, should not be discharged from custody.

May 20.—*Jeune* showed cause.

Charles, Q.C., Sir W. Phillimore, and *Beaumont,* in support of the rule.

Sir E. Clarke, S.G., R. S. Wright, and *Danckwerts,* for Lord Penzance and the governor of the gaol.

The facts and arguments and material sections of 53 Geo. 3, c. 127, under which statute the proceedings to imprison Mr. Cox were taken, are sufficiently set out in the judgment of the Divisional Court.

Cur. adv. vult.

July 2.—The judgment of the court was read by

A. L. SMITH, J.—In this case a rule *nisi* for a *habeas corpus* was obtained to show cause why the Rev. James Bell Cox should not be discharged from custody. The rule came on for argument before the Lord Chief Justice and myself on May 20 last, when we made the rule absolute for the release of Mr. Cox, but took time to put our reasons for so doing into writing.

The facts of the case, so far as they are material, are as follows:—In the year 1885 proceedings were taken against the Rev. James Bell Cox for offences against ritual under the provisions of the Church Discipline Act (3 & 4 Vict. c. 86) by Mr. Hakes, of which offences Mr. Cox was found guilty. On September 5, 1885, a monition was served on Mr. Cox admonishing him to desist from the practices of which he had been found guilty, which monition Mr. Cox disobeyed. For this disobedience on June 13, 1886, Mr. Cox was suspended by Lord Penzance *ab officio* for the period of six months. The term would consequently expire on December 13, 1886. Whilst so suspended—viz., on June 20, 1886, Mr. Cox, in breach of such suspension, officiated in his church of St. Margaret's, Liverpool, and on July 30, 1886, he was adjudged by Lord Penzance to have so acted. On August 5, 1886, the disobedience of Mr. Cox to the order of suspension was duly signified to her Majesty in Chancery. Up to this date Mr. Cox had abstained from appearing in the suit, and had taken no part therein. Upon the same day upon which the significavit issued—viz., August 5, 1886, Mr. Cox obtained from the Queen's Bench Division a rule *nisi* for a prohibition calling upon Lord Penzance and Mr. Hakes to show cause why further proceedings in the suit should not be restrained. It is not here necessary to state the grounds upon which this rule *nisi* was obtained; suffice it to say the rule came on for argument on March 11, 1887, when it was discharged by the Queen's Bench Division with costs, which judgment was affirmed on appeal April 28, 1887.

On May 2, 1887, a writ *de contumace capiendo* was obtained by Mr. Hakes, and Mr. Cox was arrested and imprisoned in her Majesty's prison at Walton-on-the-Hill.

The question is whether, after the order of suspension *ab officio* for six months had expired, as it did on December 13, 1886, the writ *de contumace capiendo* could be lawfully issued, the order for the disobedience to which Mr. Cox had been signified being no longer in existence.

This depends upon the true construction of 53 Geo. 3, c. 127, for it was under this statute that the proceedings to imprison Mr. Cox were necessarily taken. The statute, by section 1, enacts as follows—viz.:—"That excommunication, together with all proceedings following thereupon, shall in all cases, save those in the Act specified"—the present is not one of them—"be discontinued, and that in all cases cognizable in the ecclesiastical courts (*a.*) when any person duly cited to appear in any ecclesiastical court shall neglect or refuse to appear; (*b.*) when any person required to comply with the lawful order of any such court shall neglect or refuse to pay obedience to such lawful order; (*c.*) when any person shall commit a contempt in the face of such court, no sentence of excommunication shall be given or pronounced (save in the particular cases therein specified), but instead thereof it shall be lawful to pronounce such person contumacious and in contempt, and within ten days to signify the same to his Majesty in Chancery, and thereupon a writ *de contumace capiendo* in the form to the Act annexed shall issue from the Court of Chancery, and that all rules and regulations not by the Act altered then by law applying to the writ *de excommunicato capiendo* shall extend and be applied to the writ *de contumace capiendo,* and that (*a.*) upon the due appearance of the party so cited and not having appeared; (*b.*) upon the obedience of the party so cited and not having obeyed; (*c.*) upon the due submission of the party so having committed a contempt in the face of the court, the judge of the court shall pronounce such party absolved from the contumacy and contempt aforesaid, and shall forthwith make an order upon the sheriff for his discharge in the form to the Act annexed."

This is the statute, what does it mean? The words of the first section appear to us unambiguous. They are as follows:—(*a.*) When the party who has neglected to appear appears; (*b.*) when the party who has disobeyed an order obeys; (*c.*) when the party who has committed a contempt in the face of the court submits, then he shall be entitled to his discharge.

But it was said by Mr. Jeune, on behalf of Mr. Hakes, that, in addition to appearing, obeying, or submitting, as the case may be, the party imprisoned is not to be discharged until he has made amends for the contempt of which he has been adjudged guilty, or, in other words, until he has done something in addition to the appearing, obeying, or submitting, as prescribed by the statute. He argued that the statute enacted punishment for past offences committed, and that until such offence had been purged by contrition for the past, as well as by promise to obey in the future, the party was not entitled to his discharge.

In our judgment this is not the meaning of the statute. Take the first case—viz., appearing when he had previously neglected or refused to appear. What the statute enacts is, that upon appearance he shall be entitled to be discharged. Why is he to do more? The statute does not say so; it says nothing about purging past offences. Take the second case—obedience to a lawful order after having neglected or refused to obey. Again we ask, Why is he to do more than what the statute says he is to do to entitle him to his discharge? As to the third case—viz., contempt in the face of the court—in this instance the statute does re-enact that the party is to submit; but it should be noticed that in neither of the other cases is submission, in any shape or

form, required. It is solely appearance in the one case, and obedience in the other. The words used in 5 Eliz. c. 23, s. 10—viz., "submission and satisfaction"—are nowhere used in the Act of Geo. 3 excepting the word "submit" as applying to the contempt in the face of the court.

In our judgment Mr. Charles, on behalf of Mr. Cox, put the right construction upon the statute when he insisted that the object and provisions of section 1 of the statute were to enforce and compel obedience in the future to the proceedings and orders of the court, and not to punish for past acts, which when once done could never be undone. Punishments are attained by sections 2 and 3 of the Act, but these sections have no application to the present case. Assume a suit and all proceedings thereunder, in which a party had neglected or refused to appear, to have terminated, and the party imprisoned for not having appeared. How is he to get out of prison? *Ex hypothesi*, he cannot appear. There is nothing left to appear to. Then how is he to get his discharge? He could not, unless it were held, as we hold, that when the suit had terminated any imprisonment thereunder also terminated. The same observations apply with equal force when no order any longer exists which a party in prison can by any possibility obey. In our judgment the true construction of the statute is that, as soon as no suit exists to which a party can appear, or no order exists which he can obey, the party is entitled to his discharge, for from that moment the object of the statute in imprisoning—viz., to compel obedience in the future—has come to an end, and from that time the party imprisoned is entitled to his discharge. It follows from this that, inasmuch as no imprisonment can continue after the order for disobedience to which a party has been signified has come to an end, so also can no order by way of imprisonment take place after such an order has come to an end.

Apart from the cases, that is, in our judgment, the true reading of the statute. But what do the cases say? The first to which we will refer is *Reg.* v. *Thorogood*, 12 Ad. & E. 183, where it was held by the full Court of Queen's Bench, that under the statute (53 Geo. 3, c. 127) imprisonment was not inflicted by way of penalty, but merely for enforcing execution of the sentence pronounced by the court. The court also stated that the decisions on the Act of Elizabeth threw little light upon the Act of Geo. 3, but that its own language was clear. In this we entirely agree. In *Hudson* v. *Tooth*, 2 P. D. 125, 25 W. R. Dig. 107, Lord Penzance lays down the purposes for which an inhibition is granted. That learned judge there states that it is granted not to punish the clerk for the past, but to enforce obedience for the future. "It was," said Lord Penzance, "in the clerk's power at any moment after his arrest to regain his liberty, and not only that, but to get rid of the inhibition and be restored to the exercise of his duties, if he were willing to undertake to discontinue the practices complained of." We now come to the case of *Dean* v. *Green*, 8 P. D. 79, which Mr. Jeune for Mr. Hakes, had to admit was strongly in point and adverse to his contention, but he urged that the judgment of Lord Penzance therein was inconsistent with the judgment of Dr. Lushington in *Baker* v. *Thorogood*, 2 Curt. Eccl. 632, and he insisted that the latter case was to be preferred. In *Dean* v. *Green* Lord Penzance undoubtedly held, as it seems to us, that when the order suspending or inhibiting a clerk for disobedience to which he was imprisoned came to an end, then, inasmuch as there was no order extant which he could either obey or disobey, the clerk was entitled, under 53 Geo. 3, c. 127, to his discharge. In *Baker* v. *Thorogood* Dr. Lushington held that to entitle a person committed for contempt to be discharged, it was incumbent upon him to purge his contempt, and that this could only be done on payment of the costs incurred in consequence of his contempt, and on his taking the usual oath to submit to the lawfully commands of his ordinary. It must be noticed that the point now under discussion—viz., whether an imprisoned clerk is entitled to his discharge when the order which he has disobeyed, and for disobedience to which he is in custody, no longer exists, was not before Dr. Lushington, whereas it was directly before Lord Penzance, and in our opinion the judgment of Lord Penzance is in point, and gives the true construction of the statute, whereas the judgment of Dr. Lushington does not apply to the case in hand. As to the argument addressed to us upon the form of the schedules to the Act of Geo. 3, we have nothing to add to and adopt what was said by Lord Cottenham in the case of *In re Baines*, 1 Cr. & P. 31, and Lord Penzance in *Dean* v. *Green*.

In our judgment the order of suspension *ab officio* which Mr. Cox disobeyed, and for which he was signified, having expired on December 13, 1886, there was, on May 2, 1887, no order which he could possibly obey then existing, and consequently the writ *de contumace capiendo* was improperly issued upon that day.

For the reasons above given we are of opinion that the rule *nisi* for a *habeas corpus* must be made absolute.

Two other subsidiary points were taken for Mr. Cox. One was that the judgment of Lord Penzance on July 30, 1886, adjudicating Mr. Cox to have disobeyed the order of suspension on June 13, 1886, was invalid, by reason of such judgment being delivered by the mouth of his surrogate and not by Lord Penzance, present himself in person in the province of York. This point was dealt with and determined adversely to Mr. Cox in the proceedings by way of prohibition above mentioned, and was concluded thereby. The other point was that the writ *de contumace* was bad, because, although, upon its face, it was in order, it had upon its back a reference to the Public Worship Regulation Act, 1874, and it was said that this made the arrest of Mr. Cox illegal. This indorsement had been inadvertently placed upon the writ by the Vice-Chancellor of the County Palatine when he tested it. In the first place it must be pointed out that the warrant upon which Mr. Cox was taken into custody was in order. Mr. Cox was not entitled as of right to see the writ upon which the warrant issued at all, and, what is more, no statute required that any indorsement whatever should be upon the writ. In our judgment there is nothing technical or otherwise in the point, and it absolutely fails.

The rule for a *habeas corpus*, as we have before decided, must be made absolute. There will be no costs on any side.

Rule absolute.

The promoter appealed.

Nov. 17.—*Sir Walter Phillimore* (*Beaufort* with him), for Mr. Bell Cox, took the preliminary objection that no appeal would lie against a prisoner in the case of a *habeas corpus*.—Under the old procedure there was no appeal, but a prisoner was entitled to go from one judge to another, and if he found any judge who thought he was wrongly imprisoned he obtained his release. The Judicature Act, 1873, s. 19, gives an appeal in all cases not specially excepted, and it is admitted that a *habeas corpus* is not among the special exceptions, but the Judicature Act was never intended to affect a constitutional right. It is true that appeals by prisoners in such cases have been heard, but that is because, the courts being amalgamated, a prisoner can no longer go from one judge to another.

He cited *Reg.* v. *Weil*, 31 W. R. 60, 9 Q. B. D. 701; *The Amstell*, 26 W. R. 69, 2 P. D. 186.

The COURT decided to hear the appeal.

Jeune and *Danckwerts*, for the promoter.—The writ *de contumace capiendo* can be issued at any time, and

is not limited to the time during which obedience could be paid. By 53 Geo. 3, c. 127, special methods are provided by which the prisoner may obtain his release. None of those are, however, applicable in this case, which is a case of disobedience, and in which obedience is now impossible. The Act, however, incorporates 5 Eliz. c. 23, by section 10 of which special reservation is made of the powers of release formerly possessed by the judges of ecclesiastical courts upon "submission and satisfaction": Fitzherbert's *Natura Brevium*, vol. ii., p. 62. The old practice is laid down in *Baker* v. *Thorogood*, 2 Curt. Eccl. 632.

They also cited *Reg. v. Thorogood*, 12 Ad. & E. 183; *Hudson* v. *Tooth*, 2 P. D. 125, 25 W. R. Dig. 107; *Dean* v. *Green*, 8 P. D. 79; *In re Baines*, 1 Cr. & P. 31; *Ex parte Kaye*, 1 B. & Ad. 562; *R.* v. *Rodman*, 3 Cro. Car. 198; *Hole* v. *Scales*, 2 Hagg. Eccl. 566.

Sir Walter Phillimore (*Beaufort* with him), for Mr. Bell Cox.—The object of the writ *de contumace capiendo* is to enforce obedience. Obedience is impossible to a non-existent order. Therefore, if Mr. Bell Cox is to be imprisoned under this writ, he can never obtain his release as he can never be obedient. The provisions of the statute of Elizabeth entirely related to excommunication, and cannot be incorporated in an Act which expressly abolishes that penalty. The power of release given in section 10 of the statute of Elizabeth was limited to the release of prisoners before the return of the writ *de excommunicato capiendo*. In *Baker* v. *Thorogood* the statement as to the old practice was not material to the decision.

Jeune replied.

Lord ESHER, M.R.—In this case the first point taken is that no appeal lies, and it was said that if an appeal does lie a person is deprived of constitutional privileges which he formerly had. It was said that prior to the Judicature Acts a man might move before every judge in turn for a writ of *habeas corpus*, and that if one of those judges was in his favour he must be released and there was no appeal. I think that the practice was to move before each of the common law courts in succession, and if they all refused recourse might be had to the Vice-Chancellors, who appear each to have been treated for this purpose as a separate court. The result was that there was an appeal in fact, though not in form, from one court to another court of co-ordinate jurisdiction. Therefore I should have thought that in this case beyond all others there would be a right of appeal to the Court of Appeal so as to preserve a man from being kept under arrest on the decision of a single court, since the Judicature Acts, by amalgamating the courts, had made it impossible to go from one to the other. The words of section 19 of the Judicature Act, 1873, are precise: "The Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as hereinafter mentioned, of her Majesty's High Court of Justice." The exceptions, it is admitted, do not include the case of a *habeas corpus*. It was also admitted that the prisoner has a right of appeal to this court, but it is urged that the party objecting to his release has none. The prisoner clearly has the right under this section, and equally clearly there is a similar right for the party objecting.

Then what is the appeal which we have to decide? It is suggested that this writ *de contumace capiendo* was issued without jurisdiction because it was issued after the time when the order of suspension became exhausted. That is on the ground that on the true construction of the Act of Geo. 3 there was no power to issue the writ. We have therefore to consider whether we agree with the construction put upon that Act by the Divisional Court. There is no doubt that the Act ought to be construed according to the natural and ordinary meaning of the words used in it. Now the recital of the Act runs thus: "Whereas it is expedient that excommunication, together with all proceedings following thereupon, should, saving in certain cases, be discontinued, and that other proceedings should be substituted in lieu thereof." The object, therefore, of the Act was to get rid of excommunication as a punishment. The first section, enacts that excommunication should in all cases be discontinued. "And that in all causes which, according to the laws of this realm, are cognizable in the ecclesiastical courts, when any person or persons having been duly cited to appear in any ecclesiastical court, or required to comply with the lawful orders or decrees, as well final as interlocutory, of any such court, shall neglect or refuse to appear, or neglect or refuse to pay obedience to such lawful orders or decrees, or when any person or persons shall commit a contempt in the face of such court, no sentence of excommunication shall be given or pronounced, but instead thereof it shall be lawful for the judges or judge who issued out the citation, or whose lawful orders or decrees have not been obeyed, or before whom such contempt in the face of the court shall have been committed, to pronounce such person contumacious and in contempt." That is to say, that in place of the sentence of excommunication there is the pronunciation of contumacy, and thereupon a writ *de contumace capiendo* is to issue, which is to have the same force and effect as a writ *de excommunicato capiendo*, "and all rules and regulations not hereby altered now by law applying to the said writ (*i.e.*, the writ *de excommunicato capiendo*) and the proceedings following thereupon, and particularly the several provisions contained in the Act passed in the fifth year of Queen Elizabeth, entitled an Act for the due execution of the writ *de excommunicato capiendo*, shall extend and be applied to the said writ *de contumace capiendo* and the proceedings following thereupon." Nothing, therefore, can be more plain than that the one writ is substituted for the other, and all that could be done on the old writ is to be done on the new writ. It is the most complete writing into this Act of all the provisions of the Act of Elizabeth applicable to the writ *de excommunicato capiendo*. It is therefore a necessary implication that all the provisions of the earlier statute which are applicable do apply to the writ *de contumace capiendo*. The section then imposes on sheriffs and the executive generally the duty of arresting and detaining a person under the writ, and it goes on: "And upon the due appearance of the party so cited, and not having appeared as aforesaid, or the obedience of the party so cited, and not having obeyed as aforesaid, or the due submission of the party so having committed a contempt in the face of the court, the judges or judge of such ecclesiastical court shall pronounce such party absolved from the contumacy and contempt aforesaid," and shall forthwith make an order for his discharge. He is not, however, entitled to be let out without an order of the ecclesiastical court, and until he has discharged the costs of his custody

The result is, therefore, that when anything is done which under the old law would subject the doer to a sentence of excommunication, he is now to be pronounced contumacious, and if arrested under a writ *de contumace capiendo* he can obtain his discharge in any of the three ways mentioned. But in this case no one of those three ways was open to Mr. Bell Cox, and therefore he is left under the liability that that was to happen to him which would have happened to him if under the former procedure he had been excommunicated. To find what that liability was we must go to the statute of Elizabeth. That statute only deals with the executive. I incline to think there was nothing in it to affect the procedure of ecclesiastical courts; but *ex majore cautelâ* section 10 was introduced into it,

"Saving and reserving to all archbishops and bishops and all others having authority to certify any person excommunicated like authority to accept and receive the submission and satisfaction of the said person so excommunicated in manner and form heretofore used, and him to absolve and release." That is to be applied no longer to an excommunicated person, but to a person who has been pronounced contumacious. We are, therefore, driven to consider what was the old practice in the ecclesiastical courts. One of the chief uses of the case of *Baker* v. *Thorogood* is that it contains a statement by Dr. Lushington of the practice of the ecclesiastical courts. It is a statement made by him after a most careful and laborious examination of the subject. It has been said that that statement was not material, and was not necessary to the decision of the case. I do not think the authority of a great judge must be so treated. He thought it necessary for the decision of the case to state the practice of the courts, and as against that opinion I do not think it can be said that it was not really necessary. No doubt the case is not binding on us, but I think it is one of great value and authority. He states, then, the practice declared applicable by the statute of Elizabeth, and therefore applicable under the statute of Geo. 3. The writ *de contumacs capiendo* is to have precisely the same effect as excommunication, unless the party does one of the three things specified by the statute of Geo. 3. It has been urged that under certain circumstances it would be impossible for him to do such things, as, for instance, he could not obey in the present case when the time for obedience had passed. But the consequence of that is, in my opinion, that he cannot bring himself within any of those three methods of obtaining release, and, therefore, he must resort to the old method of doing so. Several statements of Lord Penzance on the subject of obedience have been cited to us. It is unnecessary to express any opinion on them, for if they are wrong an appeal lies to the Privy Council, and not here.

The Divisional Court decided this question on the construction of the statute of Geo. 3, and they said that the object of that Act was to compel obedience in the future and not to punish past acts. Do they mean that there is a rule of law that punishment is always for the purpose of compelling future obedience? That is true enough as a general principle. In the English law there is no punishment by way of revenge. Every sentence which the law compels judges to pass is passed to compel future obedience, but in the sense that it shows the person punished and the world at large that, if they commit similar offences, they will meet with similar punishment. I think, therefore, as a general proposition it is applicable only to this statute in the sense that it is applicable to all other statutes. I do not think it can alter the construction to be put upon the statute. There are no words in this statute declaring that its object is peculiar. Therefore I cannot agree in the construction given to the statute in the court below. That being so, I think the practice set out by Dr. Lushington in *Baker* v. *Thorogood* applies in this case. I think the statement of the practice there given was right, although, of course, that case is not binding on us. For these reasons, then, I think that the Divisional Court came to a wrong decision, and that the rule for a *habeas corpus* must be discharged. What the effect of our decision may be I am not concerned to say; but I will venture to express a hope that Mr. Bell Cox may be let alone unless he commits some fresh ecclesiastical offence.

BOWEN, L.J.—This case is one of great importance. In the first place, it is an appeal against a *habeas corpus* granted by the court below discharging the prisoner, and it has been suggested that no such appeal will lie. I do not think we desire here either to assume or reject jurisdiction, but I am clearly of opinion that there are no words in the Judicature Acts to take this case out of the ordinary rule, and, therefore, I think that an appeal will lie. The decision of the court below was on a pure matter of law, which we are bound to discuss. It was said that if we allowed the appeal to be argued the Judicature Act would be unfavourable to the liberty of the subject. I think that, as appeals against the discharge of a prisoner are far more rare than appeals by a prisoner, the view we take really gives the prisoner an additional advantage. What, then, is the main question in this case? Had Mr. Bell Cox a right to be discharged from prison if he had been arrested at the conclusion of the period of suspension? I wish emphatically to draw attention to the fact that two views may be taken of the statutes which enable offending clerks to be imprisoned. There is the view of the Ecclesiastical Court. It may be that the judges of that court may use their powers principally for the purpose of compelling future obedience. It may be that they have discretion to regard their powers in that light. But when a person comes to the common law courts and demands his discharge from the imprisonment as of right, the view taken by the courts of common law has to be considered, and we have to consider what are the rights of the prisoner to claim his discharge. It is no longer a question whether, if he had gone to Lord Penzance and asked for discharge, he might or might not have obtained it. What, then, is the effect of the statute of Geo. 3, under which this writ was issued? It was intended to alter the old law as to the use in a summary manner of excommunication as a punishment for contumacy.

Section 1, which is the real section we have to construe, divides into two parts, the first enabling the ecclesiastical courts to deal with an offender, and the second providing methods by which, in certain specified cases, an offender may be released. The fallacy of the argument for the respondent has been in assuming that these two branches cover the same ground. Now, taking first the first part of the section, is there anything to show that the object of the statute is merely to compel future obedience, and not to punish for past acts? There is nothing, in my opinion, which so narrows its application and renders it inapplicable in the cases where a subsequent performance of the thing ordered cannot amount to obedience to the order of the court.

Then, as to the second part of the section, there are three cases specified in which a prisoner may obtain his release. He may appear where he has neglected or refused to appear, he may obey where he has neglected or refused to obey, and he may make due submission where he has been guilty of a contempt in the face of the court.

Now it is said that where a man has been guilty of either of the first two of these offences, either he must at any time be able to appear or to obey, or he must be shut up for the rest of his life because there is no other way of escape. I do not hesitate to say that a man cannot obey a complex order who has once disobeyed a part of it. He cannot cure his disobedience of part by his obedience of the rest. Such a man as that, then, could not obtain his discharge under the section. Are we, then, driven to the dreadful conclusion that such a man must remain in prison for ever? I think not. There is an alternative view of the statute, which is that the statute of Elizabeth and its provisions are read into the statute of George, and are to apply to imprisonment under the new writ. If that is so there is a way to obtain release, since by section 10 of the earlier statute the old method of release by submission and satisfaction is expressly provided. I think that view makes the whole section luminous. An ecclesiastical court may punish summarily for contumacy by means of the writ *de contumacs capiendo*. If the delinquent can still obey, let him do so, and he will obtain his discharge under the provisions of the Ac o Geo. 3. If, however, he

cannot obey because he has already disobeyed part of the order, then he must come and submit, and he will obtain his discharge under the old practice.

It has been argued, however, that the old practice preserved by section 10 of the statute of Elizabeth only applied to cases where there might be submission between the return of the writ and excommunication. I think there is no justification for so confining the operation of the section. It was further said that the word "absolve" in that section was only applicable to excommunication, and that, therefore, to read that section into an Act expressly abolishing excommunication would be inconsistent. I do not think that is so. In incorporating a statute so much only is incorporated as is consistent, and if part of the incorporated statute has become useless it is dropped. It was also urged that sections 2 and 3 of the Act of Geo. 3 were strong reasons for supposing that the view of section 1 which was contended for was correct. I content myself with saying that I can conceive many cases in which sections 2 and 3 would receive ample application without putting such a construction on section 1. I think that the form of the writ *de contumace capiendo* is conclusive neither one way nor the other.

I have formed a strong view that the statute only becomes intelligible by reading in section 10 of the statute of Elizabeth, and, so far from the only object of the statute being to enforce future obedience, I think that it was not intended to fetter the Ecclesiastical Court by any limitations. The court below has taken a different view of the statute. They say that its object was to compel future obedience only. I should hesitate to believe that it was intended by section 1 that a man might have the prison doors fly open directly his period of suspension was over.

But we are bound to respect the authorities on which the court below have decided this case. I confess that I do see running through the judgments of Lord Penzance and other ecclesiastical judges a train of thought to the effect that they are using their power to enforce obedience, and that they would be glad to put an end to the interference with the liberty of the subject as soon as that object has been attained or when it can be no longer attained. That is the way in which ecclesiastical judges treat in their own forum their powers of correction and discipline. But it is a very different thing to say that outside the ecclesiastical court the disobedient person must be treated as of right in the same way in which he is treated in that court by the consideration of the judge. The court below say that it was decided in *Reg.* v. *Thorogood* that imprisonment was not by way of penalty. I do not find such to be the effect of that case. All that was decided in that case was that imprisonment was not a pain and forfeiture within the statute of Elizabeth, but was merely the result of the writ itself, and was for the purpose of carrying out its object. It is wresting language, I think, to say that that case decides that imprisonment under the statute of Geo. 3 was only for the purpose of enforcing future obedience. The next case cited was *Hudson* v. *Tooth*. With very great respect, I think that my learned brothers in the court below have missed the effect of that case. Lord Penzance was there speaking of the case in which a delinquent clerk might come to the court and ask to be released with a promise of future obedience. A promise to obey is not obedience. Can it be so held as a matter of law? That a judge may treat it as such I have agreed. It cannot mean that a man may get out as a matter of right upon a promise to obey. *Dean* v. *Green* was not, I think, precisely in point. The time there had gone by, and the judge might think that enough had been done to justify him in treating that as ecclesiastical obedience; but it falls far short of showing a common law right outside the ecclesiastical courts to have it so treated.

Then there was the case of *Baker* v. *Thorogood*. The defendant had refused to appear, and was committed to prison under a writ *de contumace capiendo*. His friends then got a special Act to deal with such cases, enabling the judge to let him out on payment of the costs and of a sum into court and of the costs of his custody and contempt. The case came on and the judge had to make up his mind what he would do, and to make use of the new Act if he could. The costs had all been paid into court by some outside friend, and it must be taken that the judge knew that the suit was practically at an end, and that there was no question of the defendant's appearing. He treated it, therefore, as though it were necessary to consider in what way the new Act altered the old practice. The case did not fall within the statute of Geo. 3, and therefore he had not to consider its provisions for release. He had to consider what was the old practice to which those provisions did not apply. He says that the old practice was that the party should purge his contempt by an oath of submission and by payment of the costs. He must be there referring to the old system preserved by section 10 of the statute of Elizabeth. It is impossible to contend that Dr. Lushington did not know the practice of his own court. The case therefore gives the true construction of the statute, and is in point as an authority to which we ought to give weight. I regret that we should come to a decision which is adverse to the liberty of the subject and also that we should construe the statute in an opposite view to that taken by the accomplished lawyers in the court below, but we have simply to construe the words of the statute, and on my view I think that the decision of the court below was wrong, and must be reversed.

FRY, L.J.—I agree, and I wish that I need only express my concurrence, but the importance of the case requires that I should give my reasons. Two points have been urged before us—first, that we have no jurisdiction to hear this appeal. Section 19 of the Judicature Act, 1873, has given this court jurisdiction in all cases of orders and judgments of the court below, except as therein mentioned. The only inquiry, therefore, is whether a *habeas corpus* is within the exceptions. It is admitted that it is not. I do not think we can listen to any arguments *ab inconvenienti*, and therefore, I am of opinion that we are bound to entertain the appeal. That being so, we come to the main question. The writ in this case followed the form given in the statute of Geo. 3:—"We command you that you attach the said James Bell Cox by his body until he shall have made satisfaction for the said contempt." The argument that has been addressed to us is that if Mr. Bell Cox were taken during the six months for which he was suspended he would, at the expiration of that time, have been entitled to leave the prison without any further procedure whatever. Now has Mr. Bell Cox made satisfaction for his contempt? It is difficult to see how a gentleman who was in manifest contempt and who has not shown any subsequent obedience can say that he has been obedient to the suspension and has made satisfaction. If he has not made satisfaction then we have to see whether there is any ground, either at common law or by statute, on which he can be entitled to release at some other period than that specified in the writ. Before passing on I desire to say that the expression "making satisfaction" is of well-ascertained significance in ecclesiastical law, and that this writ was manifestly moulded on the old writ *de excommunicato capiendo*, which required the sheriff to hold the person excommunicated *donec sanctæ ecclesiæ tam de contemptu quam de injuriâ eo illatâ ab eo fuerit satisfactum*. Both writs, then, require the sheriff to hold the prisoner till satisfaction shall have been made. Mr. Bell Cox has made no satisfaction. What, then, is the operation of

the statute of Geo. 3. The contention for the respondents is that that statute points out all the modes in which satisfaction can be made. I think that it applies to the new writ all the powers of the statute of Elizabeth with regard to the old writ *mutatis mutandis*. The three cases for absolution appear at first sight to correspond with the three cases in which the old writ was abolished. But are they really commensurate? I think not. Suppose a party cited to appear, after the suit has ended and the final decree has been pronounced it is plain that no "due appearance" can be made. Therefore, if the contumacious person refused to appear until after appearance was impossible, it would be impossible, on such a construction of the statute, for him ever to obtain his release. So, also, as to obedience; it is impossible not to see that there are three kinds of obedience:—

(1) Doing a particular act without any particular time being specified.

(2) Doing a particular act within a specified time.

(3) Refraining from doing a particular act within a specified time.

Disobedience in the first of these cases might be cured by the statute of Geo. 3, but in the second there can be no obedience after the specified time has elapsed. The third is the present case. Now, supposing that there has been disobedience during a portion of the specified time, there can never be full obedience to the order. Sir Walter Phillimore says that, on the true meaning of the section, when the specified period has elapsed there can be no imprisonment. That is to say, the longer the contumacy the less the imprisonment, which is a *reductio ad absurdum*. I think, therefore, that the statute only applies to certain cases of disobedience, otherwise a contumacious person must be imprisoned under circumstances under which he can never escape. Now the statute of Elizabeth saves certain provisions for release. I conclude, therefore, that other cases are left under the statute of Geo. 3, in which satisfaction must be made under the old practice, nor can I help observing that this construction is borne out by the form of the writ, which applies to general satisfaction, and is not framed so as to apply to satisfaction under the statute only. I think that *Baker v. Thorogood* is of the greatest weight in support of this view. Dr. Lushington thought in that case that the only mode of release when the statute of George did not apply was under the earlier practice. It has been said that Dr. Lushington had forgotten the existence of the statute of Geo. 3. I do not think we can come to so violent a conclusion. Dr. Lushington had prepared an elaborate judgment, which he introduces by a statement of the law prior to the passing of Thorogood's Act (3 & 4 Vict. c. 93). It appears to me that Thorogood had passed the stage for appearance, and therefore Dr. Lushington could not use the statute of Geo. 3. He treated the suit as having come to an end. The costs of the whole suit had been taxed, and therefore the suit was over. The registrar, a few days afterwards, paid the sum out of court "according to the event of the suit." Therefore Thorogood was outside the provisions for release given by the statute of Geo. 3, and the old law requiring submission and satisfaction applied. Except for 3 & 4 Vict. c. 93 Thorogood could not have obtained his release without making submission and satisfaction. The case is, I think, a strong authority for saying that Dr. Lushington thought the old practice was still in existence, and that it applied to every case which did not fall within the statute of Geo. 3. It is urged, however, that there are decisions conclusively establishing that the object of the writ is the enforcement of future obedience. I need only say as to those authorities that I agree with the view expressed by the Master of the Rolls and my brother Bowen.

For these reasons, therefore, I am unable to agree with the court below, and I think that this order must be discharged.

Appeal allowed.

Dec. 20.—The COURT having considered the question of costs, gave the appellant the costs of the appeal; but they stated, that although they had come to the conclusion that they had jurisdiction to deal with the costs in the court below, they declined, in the exercise of their discretion, to give these costs to the appellant.

Solicitor for the appellant, *Girdlestone*.

Solicitors for the respondent, *Brooks, Jenkins, & Co.*

High Court of Justice.

Chan. Div. } Kay, J. } Dec. 17.

BROOKING *v.* SKEWIS. (*a.*)

Practice—Mortgage—Foreclosure—Mortgagee in possession—Claim for personal payment—Action or summons—Costs—R. S. C., 1883, *ord.* 55, *r.* 5a.

A mortgagee in possession brought an action for foreclosure, and asked on motion for judgment for (inter alia) *an order for personal payment by the mortgagor of the amount due, but this part of the order was refused.*

Held, that he was entitled to the costs of the action, and not simply to such costs as he would have received if he had proceeded by summons.

Short cause.

This case came on in the form of motion for judgment according to minutes which had been prepared, and a question arose as to whether the plaintiff was entitled to the costs of the action or only such costs as would have been incurred on an originating summons.

The plaintiff was a mortgagee for £1,500 and interest at five per cent., and he had been in possession of the mortgaged property since February, 1886. The statement of claim in the action, which was delivered on the 1st of November, 1887, asked for payment, accounts, sale, or foreclosure.

The minutes provided for judgment, for principal, interest, and costs, an account, a personal order for payment by the defendant, or, in default, foreclosure.

Micklem, for the plaintiff.

KAY, J.—You cannot have an order for payment of the money; you can only have the account. You are a mortgagee in possession, and you do not show what you might have received but for wilful default. I can give you an order for an account and the usual foreclosure judgment when the mortgagee is in possession, but no order for payment. For anything I know you might have received enough to pay off your whole debt and interest.

Chester, for the defendant.—Then the plaintiff must be taken to have abandoned his claim for an order for personal payment, and he should only be allowed the costs to which he would have been entitled if he had proceeded by summons: R. S. C., ord. 55, r. 5a; *O'Kelly v. Culverhouse*, W. N., 1887, p. 36, 31 SOLICITORS' JOURNAL, 269, Ann. Pr., p. 666.

KAY, J.—He has not abandoned his claim, he presses it on me and I refuse it. Can it be said that there is never again to be an action for foreclosure? Why do

(*a.*) Reported by H. C. ROPER, Esq., Barrister-at-Law.

not you pay the money? I decline to make any such order as to costs, and the one I have indicated is the one I think right.

Solicitors, *W. Sturt; Pattison, Wigg, Gurney, & King*, for *Nicholls & Blight*, Plymouth.

Chan. Div. } Dec. 17.
Kay, J. }

BARR v. HARDING. (a.)

Practice—Mortgage—Foreclosure—Receiver—Action or summons—Costs—R. S. C., 1883, *ord.* 55, *r.* 5a.

A mortgagee brought a foreclosure action, the facts being complicated, and the speedy appointment of a receiver being of importance. The receiver was duly appointed, and the defendant did not appear in the action.

Held, on motion for judgment, that the plaintiff was only entitled to such costs as he would have been entitled to if he had proceeded by summons.

Semble, *that a receiver can be appointed on a summons under ord.* 55, *r.* 5a.

Short cause.

On motion for judgment in this case the only question was whether the plaintiff was entitled to the costs of the action, or only to such costs as he would have obtained on a summons.

The plaintiff, a mortgagee, brought the action against the trustee in bankruptcy of the mortgagor. The adjudication was on the 19th of October, 1887, and on the 18th of November the plaintiff, who had obtained leave to serve notice of motion with the writ, applied for and obtained the appointment of a receiver of the mortgaged property.

The defendant did not appear, and the plaintiff now asked for judgment for foreclosure.

Geare, for the plaintiff.—We were obliged to proceed by action in order to get a receiver: *Gee* v. *Bell*, 35 W. R. 805, 35 Ch. D. 160, Ann. Pr., p. 666. The facts were so complicated that a statement of claim was necessary, and, further, it was of great importance to avoid delay.

KAY, J.—I do not see why I should give any more costs than you would have got on a summons. I often appoint a receiver on a summons. The rule enables me to order delivery of possession, and surely that must include power to appoint a receiver. A statement of claim was not necessary, and I cannot accept these as reasons for adopting a more expensive mode of procedure. I make the usual foreclosure order, and I direct that the taxing master shall allow such costs only as the plaintiff would have been entitled to if he had proceeded by originating summons and no more.

Solicitors, *Geare, Son, & Pease*, for *William Forward*, Axminster.

(a.) Reported by H. C. ROPER, Esq., Barrister-at-Law.

Chan. Div. } Dec. 17.
Kay, J. }

In re ORMSTON.
GOLDRING v. LANCASTER. (a.)

Practice—Administration action—Idle and vexatious proceedings—Costs—Delay—R. S. C., 1883, *ord.* 65, *rr.* 1, 11.

An administration action was brought by a person whose only interest in the estate consisted of a share of the residue, which he had bought for £55. The writ was issued in 1882, *judgment given for administration and accounts and inquiries ordered in* 1883, *and the certificate made in* 1887, *when it appeared that the action had been unnecessary and of no benefit to the estate.*

Held, that the plaintiff must pay all the costs of the action incurred since ord. 65, *r.* 1, *came into operation, and that the costs up to that time must be taxed, having regard to the delay which had occurred, with liberty for all parties to apply in respect of such costs.*

Further consideration.

The action was begun on the 19th of April, 1882, by a person who had bought a share in the estate for a sum of £55, and the writ claimed that the trusts of the will of William Ormston, made on the 11th of February, 1879, might be carried into execution, and his real and personal estate administered by the court, and that all proper accounts and inquiries might be taken and made, and directions given.

A statement of claim was delivered on the 17th of June, 1882, and no allegation was made in it of any kind of misconduct on the part of the trustees, or in any matter relating to the estate. The widow of the testator, who by the will was tenant for life of all the real and personal estate, was still living, and the trusts of the will were, subject to her life interest, to divide the property equally between the testator's nephews and nieces, the sons and daughters of his brother Job Ormston and his sisters Mary Ormston and Margaret Clarke, equally, share and share alike.

There was no suggestion in the statement of claim that there was any doubt as to who were the persons entitled, subject to the life interest of the testator's widow.

On the 17th of March, 1883, the usual judgment for administration of the personal estate of the testator was pronounced, and it was ordered that the usual accounts and inquiries should be taken and made, including an account of the rents and profits, in which the plaintiff had no interest whatever.

No certificate was obtained until the 23rd of August, 1887, and the result showed a sum of £33 2s. 7d. due from the defendants, the executors; that the testator's debts and funeral expenses had been paid; the particulars of the estate; and the persons interested.

Renshaw, Q.C., and *J. Stuart Colquhoun*, for the plaintiff, now asked to have their costs allowed out of the estate.

They referred to *In re McClellan*, 33 W. R. 883, 29 Ch. D. 495; *Farrow* v. *Austin*, 30 W. R. 50, 18 Ch. D. 58; *Croggan* v. *Allen*, 31 W. R. 319, 22 Ch. D. 101; *Bartlett* v. *Wood*, 9 W. R. 817; *Williams* v. *Jones*, 34 Ch. D. 120, 35 W. R. Dig. 53, Ann. Pr., p. 757.

S. B. L. Druce, for the defendants.

KAY, J., stated the facts and continued:—I ask, What use is there in any of these inquiries? The estate cannot be divided now; the inquiries will go but a little way to enable the court to divide it when the time comes. Before the division takes place on the death of the tenant for life another inquiry must be made; there is

(a.) Reported by H. C. ROPER, Esq., Barrister-at-Law.

no doubt, and never was any doubt, as to who were the persons interested.

Now, in this state of circumstances, what am I to do? The rule is stated by Lord Westbury in *Bartlett* v. *Wood*, 9 W. R., at p. 817, "that no costs ought to be given out of an estate except for those proceedings only that are in their origin directed, with some show of reason and a proper foundation, for the benefit of the estate, or which have in their result conduced to that benefit."

I ask, What benefit has resulted to the estate in this case? There are not the smallest grounds for supposing that any benefit could result, nor has it resulted, to the estate. I am asked to allow the costs out of the estate, and am told that one benefit has resulted to the estate—namely, the answers to the inquiries; but the answer to that is that at the present time there is no benefit to the estate nor to any human being. Then it is said that some of the investments mentioned in the first schedule are unauthorized by the investment clause in the will. But that was not the object of the action; there is not a hint that that was the object of the action in the pleadings; and since the action was begun there has been no application in chambers, nor has it been shown here that the investments were unauthorized and should be changed. The suit is an idle and vexatious proceeding, resulting in no benefit to any persons except the solicitors, and I refuse to allow the plaintiff the costs of the action out of the estate. The costs incurred since the present rule came into operation are in my discretion, and I order the plaintiff to pay all the costs of this action since ord. 65, r. 1, of the Rules of Court came into operation on the 24th of October, 1883; and I suppose that the costs of the other parties before that date, and the costs, charges, and expenses of the trustees, must come out of the estate. These must be taxed; and I direct the taxing master to have regard to ord. 65, r. 11, to see what costs (if any) have been made fruitless or have been occasioned by the delay; and when the *allocatur* of the taxing master is obtained the parties are to have liberty to apply to me in chambers with respect to the whole of these costs.

Solicitors, *Montagu Scott & Baker; Torr, Janeways, & Co., for John Teale*, Leyburn.

Chan. Div.
Chitty, J. } Aug. 2, 3, 10.

Republic of Peru *v.* Peruvian Guano Co. (*a*.)

Practice — Pleading — Embarrassing pleading — No reasonable cause of action—Foreign Government—Government de facto and de jure—R. S. C., 1883, *ord.* 25, *rr.* 1, 4.

A statement of claim in an action brought to set aside an agreement of compromise between the defendants and a foreign Government, which alleged that the defendants were in a fiduciary position, and had rendered false accounts and improperly withheld information, and that the agreement of compromise had not been confirmed or ratified by a de jure Government, was ordered to be struck out under ord. 25, *r.* 4, *and the action was dismissed.*

Applications under ord. 25, *r.* 4, *must be tried on the allegations contained in the pleading, and other evidence is inadmissible.*

Ord. 25, *r.* 4, *is more favourable to the pleading objected to than the old procedure by demurrer.*

Motion.

An action was instituted in October, 1886, by the Republic of Peru against the Peruvian Guano Co. to set aside an agreement of compromise made on the 29th of May, 1885, at a time when there was no *de jure* Government of Peru between the then *de facto* Government and the company, releasing the company in consideration of £260,000 paid to the Republic, an account and payment of the sum found due, less the £260,000, and consequent relief. The statement of claim, which was very lengthy, contained allegations in substance to the following effect:—

That there was a distinction between a *de jure* and a *de facto* Government, and that the acts of the latter required to be ratified and confirmed by the former before acquiring a binding effect, and that in the present case the agreement for compromise had not been confirmed by the *de jure* Government. That the defendants were fiduciary agents, and had made grave errors and overcharges in their accounts. That the agent employed by the Republic had exceeded his authority. On this point the defendants, at the hearing of the motion, tendered an affidavit, but the court decided that on an application under ord. 25, r. 4, evidence outside the pleadings was inadmissible. That in June, 1886, the *de jure* Government was constituted, and then, for the first time, ascertained the true state of the facts, that shortly afterwards a resolution was passed to the effect that the Government only accepted the £260,000 as part payment and on account, and that the Government only accepted the compromise in that sense, and that in event of an attempt to give it the character of a final settlement the Government declared it void and without effect according to the laws of Peru.

There was no offer to bring the £260,000 into account or to pay the money into court.

It was admitted that the *de facto* Government was recognized by the British Government.

This was a motion by the defendants, under ord. 25, r. 4, that the plaintiffs' statement of claim might be struck out on the ground that it disclosed no reasonable cause of action, and was embarrassing; or in the alternative that paragraph 9 (*i.e.*, the paragraph which stated that between 1879 and 1886 there was no *de jure* Government in Peru, and that, so far as regarded internal acts, the *de facto* Government was bound by the existing laws and usage of the Republic), and all allegations consequent thereon, might be struck out as unnecessary, and tending to prejudice, embarrass, and delay the fair trial of the action, or that the court might make such other order as it should think fit.

Sir Horace Davey, Q.C., Rigby, Q.C., and *Haldane*, for the defendants, in support of the motion, cited on the general question *Metropolitan Bank* v. *Pooley*, 33 W. R. 709, 10 App. Cas. 210; *Emperor of Austria* v. *Day*, 9 W. R. 712, 3 De G. F. & J. 217; *United States of America* v. *Prioleau*, 13 W. R. 1066, 2 H. & M. 559; and *Johnston* v. *Johnston*, 33 W. R. 239, on the question of admission of evidence referred to above.

Romer, Q.C., and *Bramwell Davis*, for the plaintiffs, referred to Kent's International Law, p. 136 (Abdy's Edition); *The Eliza Ann*, 1 Dods. Adm. Rep. 244; *Batthyany* v. *Walford*, 32 W. R. 379; *Burstall* v. *Beyfus*, 32 W. R. 418, 26 Ch. D. 35; *Dadswell* v. *Jacobs*, 35 W. R. 261, 34 Ch. D. 278; *Shafto* v. *Bolckow, Vaughan, & Co.*, 35 W. R. 686, 34 Ch. D. 725.

Davey replied.

Aug. 10.—Chitty, J.—This motion is made under the first branch of ord. 25, r. 4. There is some difficulty in affixing a precise meaning to the term "reasonable cause of action" used in ord. 25, r. 4. In point of law, and consequently in the view of a court of justice, every cause of action is a reasonable cause. But obviously some meaning must be assigned to the term "reasonable." Demurrers are abolished, and it could not have

(*a*) Reported by V. de S. Fowke, Esq., Barrister-at-Law.

been intended to abolish demurrers by the right hand and restore them by the left. So far as method of procedure was concerned, demurrers, certainly in the Court of Chancery, and in the Chancery Division at the time when these orders came into operation, were a cheap and expeditious mode of obtaining a decision; the mere substitution of a motion or summons for the demurrer would not be an adequate explanation of order 25. Having regard to the terms of rule 4, and to the decisions on it, I think that this rule is more favourable to the pleading objected to than the old procedure by demurrer.

Under the new rule the proceeding will not be struck out unless it is demurrable and something worse than demurrable. If, notwithstanding defects in the pleading which would have been fatal on a demurrer, the court sees that a substantial case is presented, the court should, I think, decline to strike out that pleading; but when the pleading discloses a case which the court is satisfied will not succeed, then it should strike it out and put a summary end to the litigation.

What I have just stated is intended to be not an exhaustive explanation of the rule, but merely an indication in a general way of the limits of its meaning.

It was contended for the plaintiffs that the rule applies only to plain and simple cases, and that it does not embrace cases which are susceptible of serious argument on points of law or otherwise; and reliance was placed on the length of time which was taken up by the statement and discussion of this case at the bar. But I decline to accede to this conclusion so far as it was founded on the length of time occupied; by far the greater portion of it was consumed in reading the plaintiffs' statement of claim, which is a lengthy document occupying some sixteen pages of closely-printed matter. The application of the rule cannot depend on the length of the pleading; to hold that it does would be to hold out an encouragement to lengthy pleadings and prolixity of statement.

With these preliminary observations I proceed to consider the plaintiffs' case as disclosed by their pleading. The object of the action is to set aside the agreement of the 29th of May, 1885, which purports to be made on behalf of the Republic of Peru of the one part, and by the defendants of the other part. It is an agreement of compromise of disputes which had arisen between the Republic and the defendants in reference to matters of account under the contract of 1876, generally known as the Raphael contract. The first and one of the principal grounds relied on by the plaintiffs is that the agreement of compromise was made on behalf of the *de facto* Government of the Republic, which was not the *de jure* Government. But the court is bound to take cognizance of the recognition of a *de facto* Government by the Government of this country, and it was admitted by the plaintiffs' counsel at the bar that the *de facto* Government was duly recognized by the Queen. So soon as it is shown that a *de facto* Government of a foreign State has been recognized by the Government of this country, no further inquiry is permitted in a court of justice here. The court declines to investigate, and, indeed, has no proper means of investigating, the title of the actual Government of a foreign State which has been thus recognized. This attempted distinction between the *de facto* and *de jure* Governments which runs through the statement of claim is untenable.

The next point relied on by the plaintiffs arises out of the circumstances under which the agreement was entered into. The substance of the allegations is that the defendants were fiduciary agents, and were bound to give information with regard to the accounts. There were several points on the accounts known to the agent which were in dispute, and with reference to such points information was asked and refused on the part of the defendants. It was said that this was contrary to their duty as agents in a fiduciary capacity, and that may be accepted. But the parties here were at arm's length, and this was one of the matters in dispute, and, therefore, was one of the matters covered by the compromise. No imputation of fraud is made against the defendants in inducing the agent to enter into the agreement. No collusion is alleged between the defendants and the agent. There are some other circumstances alleged which, to my mind, are wholly immaterial; for instance, that the agreement was inequitable and was improvident; that the agent was ignorant of the English language, did not consult professional advisers, and that he acted negligently. It may be these would be grounds for the Republic taking some proceedings against their agent, but it would be no ground for setting aside the agreement if it was honestly and properly entered into. All these allegations, and, indeed, others to the like effect, have no bearing on such a case as that which is presented by the statement of claim.

The next point is that De Izene, who entered into the compromise on behalf of the Republic, exceeded his authority. On this point the defendants tendered affidavits to show what his authority was and that it had not been exceeded. But under rule 4 no affidavit is admissible. That is plain from the terms of the rule, itself. In regard to the second branch of the rule relating to the stay of frivolous and vexatious actions, the inherent jurisdiction of the court over these actions remains unaffected, and on an application to stay a frivolous or vexatious action affidavits are admissible, not by virtue of the rule, but of the general jurisdiction of the court.

With regard to the allegation that the agreement of compromise required confirmation by the Republic, that may mean either that confirmation was required by the terms of the instrument conferring the authority, or by the general law on the subject, which, the plaintiffs' counsel urged, required a ratification by the Government itself. I must, I think, give the pleader the benefit of the first of these propositions, and consequently it is unnecessary for me to express any opinion on the second.

But the want of authority on the part of the agent and the necessity for ratification are immaterial if the contract was in fact ratified by the Republic. The defendants say that on the facts stated there was such a ratification. The material facts stated on this head are to be found in paragraphs 27, 29, 30, 31, and 34 of the statement of claim. It appears that the sum of £260,000, the consideration paid by the defendants for the compromise, was paid to the agent of the Government on or about the date of the agreement—viz., the 29th of May, 1885—and that this sum, or the greater part of it, was received by the Government on or before the 5th of August of that year. On that day a resolution was passed in ignorance of the facts. Being bound to accept this allegation as true, I cannot hold that this resolution was a ratification.

The statement of claim proceeds to allege that the *de facto* Government came to an end in June, 1886, and that it was succeeded by a *de jure* Government, and that the *de jure* Government ascertained the true facts, and that in consequence of the discovery of the facts the Government of the Republic, on the 31st of July, 1886, passed the resolution which is stated in paragraph 30 of the statement of claim. The resolution is thus stated: "(1) That the Government did not accept, or admit as received, the said sum of £260,000 paid as aforesaid, except as part payment and on account of the moneys owing by the defendants to the Government; (2) that the Government accepted the said agreement of compromise only in that sense, and that in the event of an attempt to give to it the meaning of a final settlement in full payment or final liquidation, the Government declared such

agreement of compromise void and without any effect whatsoever according to the laws of Peru."

The effect of this resolution is plain. It is an attempt to affirm in part and to disaffirm in part. A principal must act consistently; he cannot, as was stated by Lord Kenyon, blow hot and cold; or, to use Lord Cairns' expression, derived from the Scotch phraseology, he cannot approbate and reprobate at the same time; he must adopt entirely or repudiate entirely. It is scarcely necessary to cite any authority for these propositions. I may refer to *Wilson* v. *Poulter*, 2 Str. 859, where the court was clearly of opinion that the severing of parts of certain bonds was an affirmance of the defendants' act in laying out the money, and that the plaintiff could not avow the act as to part and disavow it as to the rest. I refer also to *Smith* v. *Hodson*, 4 T. R. 211, where Lord Kenyon gave the judgment to which I have referred, and says:—"Although the assignees may either affirm or disaffirm the contract of the bankrupt, yet, if they do affirm it, they must act consistently throughout; they cannot, as has often been observed in cases of this kind, blow hot and cold; and as the assignees in this case treated this transaction as a contract of sale, it must be pursued through all its consequences." I refer also to *Prince* v. *Clark*, 1 B. & C. 186, where Abbott, C.J., said it was the duty of the principal to notify his objection to the goods within a reasonable time after he received intelligence of the purchase which had been made not in accordance with the authority he had from the agent. Now the resolution here is ambiguous, but the act of the Republic in retaining the £260,000 is plain and unambiguous. The resolution admits the receipt of the money by the Government which passed it, although this is not of importance, because the previous Government, which I am bound to accept as *de jure* Government, had already received it.

The Republic, then, with full knowledge of the facts, deliberately insist on retaining the money paid as the consideration for the release. A merchant who instructs an agent to buy goods, when the goods are bought not in accordance with the authority cannot retain the goods; he must return, or at all events offer to return, within a reasonable time; if he does not, he adopts the transaction. Here the £260,000 would not have been paid had it not been for the agreement. In the expressive and emphatic language of the agreement itself it was paid "as the price of perpetual peace" between the Republic and the defendants. The Republic retained the price with the knowledge of the facts—at least, from the 31st of July, 1886, to the 7th of October following, when the writ was issued. By their statement of claim, delivered on the 7th of February, 1887, they, having the money still in their Treasury, or having spent it, do not even then offer to return it or even to bring it into court. All they do is to offer to bring it into account. Quite apart from the question of ratification, by reason of their having retained, for what appears to me to be an unreasonable time, the price paid for the release contained in the compromise, they could not, it is plain, obtain any judgment except on the terms of refunding or paying into court. Even on the argument of the case at the bar the Republic did not offer, by their counsel, to bring the £260,000 or any part into court. The result, in my opinion, is that they are within the meaning of rule 4. They do not show any reasonable cause of action, and the statement of claim ought to be struck out.

Then comes the question whether the action should be dismissed. The notice of motion does not ask in terms for the dismissal of the action, but it does ask for such other order as may be proper; and there seem to me to be two reasons why I should dismiss the action. First, the pleader has made the best of his case. I am satisfied that he could not state it better than he has stated it. Then the plaintiffs are still deliberately retaining the money. It is a very different thing to offer to bring the money into account and keeping this large sum, as I have said, in their Treasury, or, having spent it for the purpose of the Republic, and refunding it or bringing it into court. There is no offer even now made as I understand it. [*Romer, Q.C.*—No, my lord.] It was not, then, by inadvertence that the offer was omitted. Not only is there no such offer, but the plaintiffs now deliberately refuse to make it. The result, therefore, I think is that no good can come of this lengthy litigation, and that, in accordance with the jurisdiction conferred upon me by the rule, I ought now summarily to put an end to the thing. I therefore strike out the claim and dismiss the action with costs; but of course I allow no costs of the affidavit, which I have said was not properly usable.

Solicitors, *Barnes & Bernard; C. & S. Harrison & Co.*

Chan. Div. Stirling, J. — June 28, 29; Oct. 26.

MILLS v. FOX. (*a*.)

Infants' Settlement Act, 1855 (18 & 19 *Vict. c.* 43)—*Infant—Estoppel—Ward of court.*

Proposals for a settlement on the marriage of an infant ward of court were brought into chambers, which purported to set out the property to which the infant was entitled as tenant in tail under a settlement of 1857; *but by inadvertence a sale of some of the real estate to the London School Board and the payment into court of the purchase-money was overlooked, and the property described as though no such sale had taken place. The trustees of the settlement made an affidavit, which was read in support of the proposals, and which contained the same mistake. On the basis of the proposals, the court sanctioned a settlement, which was carried out by the infant disentailing under the Infants' Settlement Act,* 1855. *The infant married, reached twenty-one, disentailed the fund in court, and settled it upon herself.*

Held, that the trustee of this last settlement and the lady were estopped from setting up a title to the fund adverse to the trustees of her marriage settlement, in consequence of the misrepresentation (although innocent) of the trustees of the settlement of 1857, *which misrepresentation had been made on her behalf.*

Action by the trustees of the marriage settlement of the defendant George Fox and Marion Jane, his wife, for the purpose of establishing the title of the trustees to one moiety of a sum of between £8,000 and £9,000 Consols, paid into court by the School Board for London in respect of lands subject to the trusts of the settlement which had been taken by them.

The defendant Marion Fox and her sister were entitled, under a settlement dated the 23rd of April, 1857, to real estate as tenants in common in tail in equal shares. In 1883 the School Board for London took part of the land compulsorily and paid the purchase-money into court, represented by the sum of Consols.

On the 23rd of May, 1884, Marion Fox, then Marion Mills, an infant, applied in due form for leave to marry the defendant George Fox, and to make a settlement under the Infants' Settlement Act, 1855.

Proposals for a settlement were carried into chambers which purported to contain a statement of the property of Marion Fox, but by inadvertence the sale to the School Board was lost sight of, and the descriptions contained were the same as though this sale had not

(*a*.) Reported by HENRY T. LAW, Esq., Barrister-at-Law.

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could only settle, or contract to settle, under the provisions of the Infants' Settlement Act, 1855, and with the sanction of the court, and that the only settlement, or contract for a settlement, which the court had sanctioned was that contained in the deeds of the 22nd of July, 1884, and that the court had no power to alter them. I think that these objections are of great weight, and I am unable to see how it is possible for me to rectify the deeds in the absence of any independent contract binding on Mrs. Fox. It was, however, further contended on behalf of the plaintiffs that both the marriage and the settlement were sanctioned by the court on the faith of a representation of fact made by her, or on her behalf, that at the date of the order of the 21st of July, 1884, the defendant Mrs. Fox was entitled to an estate tail in the property the purchase-money of which is represented by the fund in court, and that in equity she is bound to make good such representation or, at all events, to abstain from setting up in herself any title to the fund inconsistent therewith. The law on this subject is thus stated by Lord Cranworth in the well-known case of *Jorden* v. *Money*, 5 H. L. Cas. 185, 210, 212: "It is said that upon a principle well known in the law, founded upon good faith and equity, a principle equally of law and of equity, if a person makes any false representation to another, and that other acts upon that false representation, the person who has made it shall not afterwards be allowed to set up what he said was false, and to assert the real truth in place of the falsehood which has so misled the other. That is a *principle* of universal application, and has been *particularly applied* to cases where representations have *been made as* to the state of the property of persons *about to contract* marriage, and where, upon the faith of *such representations*, marriage has been contracted. There the person who has made the false representations has in a great many cases been held bound to make his representations good." His lordship then refers to *Neville* v. *Wilkinson*, 1 B. C. C. 543; *Montefiore* v. *Montefiore*, 1 W. Bl. 363; and *Gale* v. *Lindo*, 1 Vern. 475, and continues: "These principles are plainly and perfectly intelligible, and quite consistent with good sense, and I should be in the last degree sorry that any opinion or decision to which I am a party should lead to a notion that I, in the slightest degree, question their propriety. Nay, more, I think that the principle has been carried, and may be carried, much further; because I think it is not necessary that the party making the representation should know that it was false; no fraud need have been intended at the time. But if the party has unwittingly misled another, you must add that he has misled another under such circumstances that he had reasonable ground for supposing that the person whom he was misleading was to act upon what he was saying. It will not do if he merely said something, supposing it to be quite right, and then that some stranger, having heard and acted upon it, should afterwards come to him to make it good."

In *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (L. R. 6 H. L. 352, 360), Lord Hatherley says:—"I apprehend that nothing can be more certain than this—that the doctrine of equitable estoppel by representation is a wholly different thing from contract, or promise, or equitable assignment, or anything of that sort. The foundation of that doctrine, which is a very important one, and certainly not one likely to be departed from, is this—that, if a man dealing with another for value makes statements to him as to existing facts which, being stated, would affect the contract, and without reliance upon which, or without the statement of which, the party would not have made the contract, and which, being otherwise than as they are stated, would leave the situation after the contract from what it would have been if the statement had not been made, then the person making those representations shall, so far as the powers of a court of equity extend, be treated as if the representations were true, and shall be compelled to make them good. But those must be representations concerning existing facts." He then proceeds:—"The limits of that doctrine, and the distinction between it and contract, were carefully examined, and, I think, well pointed out in the judgment given by Lord Cranworth in this House in the case of *Jorden* v. *Money*."

Now in the present case the proposals for the settlement carried in on behalf of Mrs. Fox, and the affidavit in support of it, constituted a representation of fact made on behalf of Mrs. Fox—that she was, at the date of them, tenant in tail of the property in question, and had power to convey it by means of a disentailing assurance; and the court, being applied to by her to sanction her then contemplated marriage, gave such sanction on the faith of that representation, and on the terms that the property to which it related should (along with other property) be disentailed and conveyed to trustees, and thus secured for the benefit of Mrs. Fox and the issue of the contemplated marriage, which, in fact, was not allowed to take place until the court had ascertained that the proper assurances had been executed by Mrs. Fox and her husband. Under these circumstances, the case appears to me to be brought within the principle laid down by Lord Cranworth and Lord Selborne.

Various points were, however, made on behalf of the defendants, and it may be right that I should deal with them in detail. It was said that the representation was entirely innocent, and was a mere mistake, and that there was no fraud. As regards the innocent nature of the representation and the absence of fraud, the objection appears to me to be met by what is laid down by Lord Cranworth in *Jorden* v. *Money*, and the present plaintiffs, the trustees of the settlement sanctioned by the court, cannot, in my opinion, be regarded as strangers who are not entitled to call on Mrs. Fox to make the representation good.

Mistake, again, may well be a ground of relief in cases where it is of such a nature that it would be inequitable to enforce the obligation arising out of the representation made. In the present case it was the meaning and intention of all parties, and of the court, that the whole of the lady's property, except the sum of £13,000, should be settled, and the mistake which actually occurred amounts to little more than a misdescription of part of that property. Under these circumstances, it appears to me that, so far from the mistake giving rise to any equity to relief from obligation, there would be a failure of equity if the obligation were not enforced to the extent of Mrs. Fox's interest in the fund which represents the purchase-money of the property taken by the London School Board.

It was further said that at the date of the order and of the marriage Mrs. Fox was simply tenant in tail of the fund; that the court could not have ordered her, after her marriage, to execute a disentailing deed of the fund (for which proposition the case of *Hilbers* v. *Parkinson* was cited); and that the circumstance that she has in fact executed one ought not to prejudice her. If she had not executed the disentailing deed it may be that I should have found it necessary to inquire to what extent a court of equity will actively enforce the making good of representations, and whether it will order the execution of a disentailing deed; and in dealing with the latter point the principles laid down by the Court of Appeal in *Bankes* v. *Small* would have to be regarded. But I think that I am relieved by Mrs. Fox's own act from any such inquiry. By reason of the execution of the disentailing assurance she has become the only person (other than the plaintiffs) who can claim any interest in the fund in court. Now the doctrine laid down by Lord Cranworth and Lord Selborne, and the cases cited by the

former, appear to me to show that a person who has made such a representation as is referred to will not be allowed by a court of equity to set up on his own behalf as against the person entitled to the benefit of the representation a claim founded on the untruth of the representation he has made. In the words of Lord Cranworth the person who has made the representation cannot afterwards be allowed to set up that which he has said was false, and to assert the real truth in the place of the falsehood. When Mrs. Fox applied to the court to sanction her marriage the representation was made on her behalf that she was the tenant in tail of one moiety of the property taken by the School Board, and she obtained the sanction for which she asked upon that representation. She was thereby precluded (as between herself and the plaintiffs) from denying the truth of it, and is, consequently, precluded from denying that one moiety of the property taken by the School Board was effectually disentailed and assured to the plaintiffs upon the trusts of the settlement, and that the plaintiffs, as such trustees, became absolute owners of the property, and therefore entitled to the purchase-money payable in respect of it. She can only make out her title to that purchase-money by alleging that in truth she had not, at the date of the disentailing deed, any interest in the property at all, but that the property had long before been conveyed to the School Board. That, in my judgment, she is not at liberty to do, and I think that her position in this respect is not affected by the circumstance that she was an infant when the representation was made. The defendants are consequently precluded from setting up any title to the fund adversely to the plaintiffs as trustees of the marriage settlement, and one moiety of the fund ought to be transferred to them.

Declare that the defendants are precluded from setting up any title to the funds in court adverse to that of the plaintiffs as trustees of the indentures of the 22nd of July, 1884, in the pleadings mentioned, and that one moiety of such fund ought to be transferred to the plaintiffs upon the trusts of the second of such indentures.

Solicitors for the plaintiffs, *Hollams, Son, & Coward.*

Solicitors for the defendants, *Palmer, Eland, & Nettleship.*

Q. B. Div. (Lord Coleridge, C.J., and Denman, J.) July 6.

REG. v. RECORDER OF HANLEY. (a.)

Gasworks—Gasworks Clauses Act, 1847 (10 *Vict. c.* 15) *s.* 35—*Jurisdiction of quarter sessions to inquire into concerns of company—Re-opening accounts—Costs.*

A petition was presented in 1885 *under section* 35 *of the Gasworks Clauses Act,* 1847, *to the Recorder of Hanley praying him to appoint a person to inquire into the actual condition of the British Gas Light Co., and an accountant was appointed. He examined into the accounts of the previous year and of all other years since* 1871, *and drew up a report. It was admitted that the whole of the reserve fund was not then and never had been invested, and that the prescribed maximum dividend had not been paid. The recorder held that the company's earnings had been sufficient to pay the maximum dividend and to have kept invested the whole of the reserve fund, reduced the price of gas* 6*d. per* 1,000 *cubic feet, and ordered the company to pay the expenses of the inquiry and the costs of the petitioners.*

Held, on application for a certiorari *to quash the order, that the order was bad, except as to the direction that the company should pay the costs of the accountant.*

Rule calling on the Recorder of Hanley to show cause why a *certiorari* should not issue to quash an order made by him against the British Gas Light Co. in that borough directing a reduction in the price of gas furnished by them and also payment of the costs of an inquiry under section 35 of the Gasworks Clauses Act, 1847. The facts and arguments fully appear from the judgment.

Sir R. E. Webster, A.G., Bosanquet, Q.C., and *A. Young* showed cause.

Sir H. Davey, Q.C., Balfour Browne, Q.C., and *Boddam,* in support of the rule.

The judgment of the court (Lord COLERIDGE, C.J., and DENMAN, J.) was delivered by

DENMAN, J.—This was a rule *nisi* for a *certiorari* to the Recorder of Hanley to remove, in order to be quashed, an order made by him on the 11th of February, 1887, whereby he ordered that the British Gas Light Co. should make a reduction of 6d. per 1,000 cubic feet in the price of gas supplied by them so as to reduce the same to 3s. per 1,000 cubic feet, and to pay the costs of an inquiry into the concerns of the company, and the costs of the petitioners.

The company was established in 1824 for the purpose of supplying gas to certain places, and subsequently incorporated, with limited liability, under its present name. In 1858 the company obtained an Act (21 Vict. c. xxxiii.) giving it additional powers within certain limits in Staffordshire, including the borough of Hanley, and by section 3 of that Act the Gasworks Clauses Act, 1847, was incorporated save in so far as that Act was modified by the new Act. The Act contains no provision modifying section 35 of the Gasworks Clauses Act, 1847.

The Act of 1858, by section 15, after reciting that £42,610 had been expended by the company on land, &c., and apparatus for the supply of gas, provides that a separate account shall be kept of that sum and of all sums to be expended on similar objects, and goes on to enact as follows:—"The provisions of the Gasworks Clauses Act, 1847, with respect to the amount of profit to be received by the company, shall, as regards the profits which may accrue to the company from the supply of gas within the limits of this Act, be applicable to the said sum of £42,610 and other such sums, &c., which several sums shall, for the purpose of estimating such last-mentioned profits, be deemed to be the paid-up capital applicable to the objects and purposes of this Act according to the intent, &c., of the Gasworks Clauses Act, 1847: Provided, nevertheless, that the capital to be expended by the company for the purposes of this Act shall not exceed £30,000 in addition to the £42,610, and the profits to be divided by the company upon the capital expended for the purposes of this Act shall not exceed £10 per cent. per annum in respect of the £42,610, nor £7 10s. per cent. in respect of so much of the £30,000 as shall from time to time be actually expended." Then follow several clauses relating to the price of gas, its quality, and the testing of it, which were repealed by a subsequent Act of 1866, to be presently referred to, and other provisions not material to this case.

By the Act of 1866 (29 & 30 Vict. c. cxix.) the clauses of the Act of 1858 relating to the price of gas are repealed, and by section 5 it is provided that the maximum charge for gas supplied within the limits of the Act should be 3s. 6d. per 1,000 feet.

By a subsequent Act (43 & 44 Vict. c. cxx.) the company were empowered to enlarge their works and expend £50,000 in addition to the sums already expended, of which £10,000 might be borrowed on mortgage. The profits to be divided in respect of the £40,000 to be expended out of the capital stock of the company, and of

(a.) Reported by A. H. TODD, Esq., Barrister-at-Law.

the £10,000 borrowed on mortgage, were not to exceed five per cent.

By section 6 of the Act the Gasworks Clauses Act was to apply to the undertaking, and by section 28 the accounts to be made up by the company were to be made up in accordance with the provisions of the Gasworks Clauses Act, 1871.

By section 35 of that Act the company are to forward to the local authority every year an annual statement of accounts made up to the end of the preceding year in a certain form. The company had in the present case forwarded accounts in the form sanctioned by the Board of Trade under the provisions of that section.

At the quarter sessions at Hanley, held on July 2 and 3, 1885, a petition was presented by gas ratepayers, under section 35 of the Gasworks Clauses Act, 1847, complaining of the accounts of the company for the year ending 1884, and praying that an accountant might be appointed to inquire into the concerns of the company. The recorder appointed Mr. Carter, who, after a long inquiry, made a report for the year ending June, 1884, and for several previous years, as far back in fact as 1871. This was done in order to discover whether sums had in former years been improperly charged against revenue. The accountant proceeded to point out the errors in the year ending June, 1884. It was contended that the recorder exceeded his jurisdiction in the judgment he has pronounced, that he had no power to re-open accounts for the past years, but that he was confined to the accounts for the year ending June, 1884, and that as the reserved fund had not been invested, nor the full dividend paid, the recorder had no authority to order a reduction of the price of gas. It was also contended that the recorder had not the power to inquire into the method of management of the concern, that he exceeded his jurisdiction in disallowing and carrying to the revenue account for the year 1884 the annual amount deducted for depreciation and the amount laid by as an insurance fund, that the order for the reduction of the price of gas was bad, because unlimited in point of time, and that the recorder had no jurisdiction to order the company to pay the costs of the petition. With regard to the first contention, it is clear that the report of Mr. Carter and the judgment of the recorder were based on a complete re-opening of the accounts for preceding years, that corrections were made as to charges claimed by way of reduction of profits, and the conclusion arrived at that the profits should have been larger. The annual charges for depreciation and insurance which were so corrected are to be found in the schedule to the Act of 1866 and the forms sanctioned by the Board of Trade. We have come to the conclusion that the recorder did exceed his jurisdiction, as, by section 30 of the Act of 1847, it is provided that profits to be divided in any year shall not exceed the prescribed rate, unless a larger dividend be at any time necessary to make up the deficiency of any previous dividend which shall have fallen short of the said yearly rate.

Then, by section 31, it is provided that if the profits in any year amount to a larger sum than is sufficient, after making up any deficiency in any previous year, to pay a dividend at the prescribed rate, the excess is to be invested, and also its interest, and the two are to accumulate at compound interest until they reach a prescribed sum, or ten per cent. of the nominal capital, which sum is to form a reserved fund.

By section 33, when the required sum is reached, the interest is to be no longer invested, but applied to the general purposes of the company.

By section 34, if in any year the profits divisible do not amount to the prescribed rate the dividend is to be made up by drawing upon the reserved fund from time to time.

Then follows section 35, the clause upon which the present question turns. After providing that the court of quarter sessions may, on the petition of two gas ratepayers, nominate and appoint some accountant or other person to examine, at the expense of the undertakers (the amount of such expense to be determined by the said court), the actual state of the concerns of the undertakers and to report the proceeds. "And the said court may examine any witnesses touching the truth of the said accounts and the matters therein referred to; and if it appears that the profit of the undertakers for the preceding year have exceeded the prescribed rate, the undertakers shall, in case the whole of the reserved fund has been and then remains invested as aforesaid, and in case dividends to the amount hereinbefore limited have been paid, make such a rateable reduction in the rate for gas to be furnished by them as in the judgment of the said court shall be proper, but so as such rates, when reduced, shall insure to the undertakers, regard being had to the account of profit before received, a profit as near as may be to the prescribed rate.

By section 37 a heavy penalty is imposed upon the undertakers if they do not produce to the court or to the accountant any books of account, bills, receipts, &c.

Section 38 then provides for the keeping of an account to be sent annually to the clerk of the peace.

Taking into account the whole of these provisions, we do not come to the conclusion that the accountant and the recorder went beyond their province merely because they examined into the accounts of years previous to that ending June 30, 1884. It might be absolutely necessary so to do in order to ascertain and report upon the actual state and condition of the concerns of the company within the meaning of section 35. Moreover, we think that the words "said accounts," into the truth of which the recorder is to inquire (though an inaccurate expression, because no accounts had been previously mentioned) are not intended to refer only, if at all, to the account prepared by the accountant, but to the accounts of the company required by the subsequent section 38 and by any provision of the company's special Acts. But we feel bound to hold that the recorder here has made the order for the reduction of the price of gas in this particular case without jurisdiction by disregarding the limitation of his power to make such order contained in section 35. For it appears on the face of the judgment of the recorder that, in fact, neither had the whole of the reserve fund been invested, nor the whole of the prescribed amount of dividends paid. He expressly states the fact to be so. He then proceeds to put an interpretation on the statute which we think it is incapable of bearing—viz., that a rateable reduction in the price of gas may be ordered by the court when "the undertakers have drawn from the profits of the undertaking during its career enough to have paid all dividends and all liabilities, and also to have invested and kept invested the whole of the reserve fund." This seems to us to amount to an alteration of the law by the recorder, made in order to give himself jurisdiction in the present case. The order is silent upon the point; it is probably, therefore, bad for the want of any statement on the subject, but that point has not been much argued, and we do not give an opinion upon it. Possibly the objections of the company on other points ought to prevail, for though the accountant and recorder might be bound to inquire into previous accounts for the purpose of ascertaining the actual state of the undertaking, it does not follow that when accounts have been properly delivered and remained unquestioned for years section 35 would allow a re-opening and disallowance of those accounts for the purpose of arriving at the proper result as regards the questions before the recorder in an inquiry such as that contemplated by section 35.

Again, the recorder's views as to the illegality of the charges for depreciation and insurance seem open to question; but we rest our judgment on what appears

to be matter going to the jurisdiction to make the order.

There is one point upon which it is necessary to give an opinion. By section 35 the expenses of the proceeding are to be borne by the company, and the amount is to be determined by the court. The recorder has ascertained that amount at £650, and there is no objection to his order in that respect; but he has also ordered the company to pay the costs of the petitioners.

There is nothing in the statute to warrant such an order. The only provision as to costs appears to be in section 36, where the court is empowered to award costs against the petitioners; and as costs are entirely the creation of statute, we cannot hold that the power to inflict them can be given by implication.

Rule absolute.

Solicitors for the prosecutors, *Venning, Son, & Manns.*

Solicitor for the defendant, *H. R. Tyrrell*, for *Llewellyn & Ackrill*, Tunstall, and *Arthur Challinor*, Hanley.

Q. B. Div. (Stephen and A. L. Smith, JJ.) Nov. 28; Dec. 9.

ROBEY & Co. *v.* SNAEFELL MINING Co. (*a*.)

Service out of the jurisdiction—Action for price of goods sold and delivered—Defendants residing in Isle of Man—Place where contract ought to be performed—Ord. 11, *r.* (1 *e*).

By a contract made by the plaintiffs, a firm carrying on business at Lincoln, and the defendants, a mining company carrying on business in the Isle of Man, it was agreed that the plaintiffs should make an engine and deliver it to the defendants, and erect it on the defendants' premises in the Isle of Man, and that the defendants should pay for the same on their engineer giving his certificate that it had been erected to his satisfaction. Nothing was specified in the contract as to the place where payment was to be made. The plaintiffs, who alleged that they had performed their part of the contract, desired to sue the defendants for the purchase-money in the High Court.

Held, that the contract to pay was a contract which ought to be performed at Lincoln, and therefore there was power to allow a writ to be served out of the jurisdiction.

Summons referred from chambers.

The summons was taken out by the defendants to set aside an order made by Charles, J., giving the plaintiffs leave to serve a writ out of the jurisdiction. The plaintiffs were a firm carrying on business in the city of Lincoln. The defendants were a mining company carrying on business at Douglas, in the Isle of Man. By a contract made between the plaintiffs and the defendants it was agreed that the plaintiffs should manufacture an engine and certain machinery, and deliver the same to the defendants, and erect the same on the defendants' premises in the Isle of Man, and that the defendants should pay an agreed price, on their engineer giving his certificate that the engine and machinery had been erected to his satisfaction. The action was brought for the price of the engine and machinery.

Blake Odgers, for the defendants.—This case does not come within ord. 11, r. 1 (*e*). The contract was broken, if at all, in the Isle of Man. The customary rule is that where goods are to be delivered, payment ought to be made on delivery, unless the place or time of payment be specified in the contract. This is a case of goods to be delivered, and the rule applies here, with the addition that the engineer's certificate is to be a condition precedent to any liability to pay. Payment and delivery being concurrent, it follows that payment was to be made in the Isle of Man, and not in this country. This case of the sale of goods to be delivered is an exception to the general rule of law that the debtor must seek his creditor. Another exception to this general rule occurs where the sea comes between the parties, as is the case here. Sheppard's Touchstone (Preston's Edition), p. 378, says "the obligor must, at his peril, seek out the obligee, if he be *intra quatuor mœnia* [read *maria*], otherwise the obligation is forfeit; but if the obligee be not within the kingdom at the time when the thing is to be done, he is not bound to seek him." This follows what is said in Co. Litt., s. 340. For these reasons the order is bad.

Duke, for the plaintiffs.—The old authorities which have been cited are really in favour of the plaintiffs, as they only lay down that a debtor in England is not bound to seek his creditor out of England. But here the creditor is in England, and being in England is entitled to sue here. This is clearly a contract for payment in this country. The proper test to apply is the question where tender ought to have been made. The defendants, in order to successfully answer the plaintiffs' claim for payment by a plea of tender, would have to show a tender at Lincoln. Therefore the contract to pay is a contract which ought to have been performed within the jurisdiction, and the order was rightly made.

December 9.—The judgment of the court (STEPHEN and A. L. SMITH, JJ.) was delivered by

STEPHEN, J.—The question is whether we have power to allow a writ in this action to be served out of the jurisdiction. The contract was one for the delivery of certain machinery to be used for the purposes of the defendant company; and the company were to pay on delivery and on the certificate of their engineer, but nothing was specified as to the place of payment. The question depends on the place where the contract ought to be executed. We think that here the contract to pay is a contract which ought to have been executed at Lincoln, it being a general rule of law that it is the duty of the debtor to send the money to the creditor. The ordinary course of business would be that the defendants would send a cheque to the plaintiffs at Lincoln; and if the cheque were taken in payment, that would be payment at Lincoln. Therefore, this is a case of a contract which ought to be performed within the jurisdiction, within the meaning of ord. 11, r. 1 (*e*). We may add that some light is thrown on the question by the words of the proviso to this part of the rule, "unless the defendant is domiciled or ordinarily resident in Scotland or Ireland." It does not go on to add "the Isle of Man or the Channel Islands." Therefore, we have power to allow a writ to be served out of the jurisdiction. As to the question whether, in the exercise of our discretion, we should allow the writ to go, it is a simple rule, existing almost in the nature of things, that the plaintiff should be allowed to choose his own *forum*, provided that that *forum* have jurisdiction. Here the plaintiffs have chosen the High Court. There is no reason why they should not have leave to issue the writ. As to the question of convenience, the balance of convenience seems to be in the plaintiffs' favour.

Motion dismissed.

Solicitors for the plaintiffs, *Page & Scorer.*

Solicitors for the defendants, *Crowdy, Son, & Tarry.*

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law

Court of Appeal.

From Chan. Div. Dec. 14.

BROWN v. BURDETT. (a.)

Practice—R. S. C., 1883, *ord.* 65, *r.* 11—*Administration action—Delay in proceedings—Costs—Reference to taxing officer for inquiry and report—Reference extending to costs incurred prior to October* 24, 1883 —"*Action then pending.*"

An action for administration of the estate of a testatrix was instituted in 1876. *On August* 2, 1882, Bacon, V.C., *made an order in the action on further consideration declaring* (inter alia) *that the costs of the action were chargeable on the real estate of the testatrix in exoneration of her personalty, and directing taxation of the costs of all parties to the action as between solicitor and client; and on May* 31, 1883, Bacon, V.C., *made a further order to the same effect with reference to the costs of all parties incurred since August* 2, 1882, *but neither of these orders expressly directed payment of the costs when so taxed. On November* 4, 1887, *the action came on, on a second further consideration, before* Kay, J., *who thereupon directed, under rule* 11 *of order* 65 *of* R. S. C., 1883, *a reference to the taxing officer for inquiry and report as to the cause of the delay in the proceedings, and as to who was responsible therefor.*

Held, on appeal, (1) *That neither on principle nor on the authorities did the orders made by* Bacon, V.C., *amount to an allowance of the costs so as to prevent the judge before whom the matter afterwards came exercising any power given him by rule* 11 *of order* 65: Quarrell *v.* Beckford, 1 *Mad.* 269, *and* Wilson *v.* Metcalf, 1 *Russ.* 530, *distinguished:* (2) *That the power given by ord.* 65, *r.* 11, *was not confined to the case where costs had been incurred on behalf of, and were payable by, a party to the action, but applied also to a case where costs were payable out of a fund:* (3) *That the power given by the rule in question was not limited in its operation to costs incurred on or after October* 24, 1883 (*the date when the new rules came into operation*), *but was applicable to all costs, at whatever time incurred, in any action then pending; and, therefore, that* Kay, J., *had jurisdiction, when the matter came before him, to direct a reference with respect to costs incurred prior to October* 24, 1883: In re McClellan, 33 *W. R.* 888, 29 *Ch. D.* 495, *explained.*

Appeal from Kay, J.

Questions were raised by this appeal with reference to ord. 65, r. 11, of the R. S. C., 1883. That rule, so far as it is material to the present case, provides as follows:—"If in any case it shall appear to the court or a judge that costs have been improperly or without any reasonable cause incurred, or that, by reason of any undue delay in proceeding under any judgment or order, or of any misconduct or default of the solicitor, any costs properly incurred have nevertheless proved fruitless to the person incurring the same, the court or a judge . . . may . . . if they or he think fit, refer the matter to a taxing officer for inquiry and report."

The action was an action for administration of the real and personal estate of a testatrix, and it had been instituted in 1876. The plaintiff was one of the trustees named in the will, and also a specific legatee. The defendants were the other trustees of the will, who were also executors; a decree for administration was made on November 21, 1876, and the chief clerk's certificate was issued on June 16, 1882.

On August 2, 1882, an order was made by Bacon, V.C., in the action, on further consideration, declaring (*inter alia*) that the costs of all parties in the cause should be taxed as between solicitor and client; but the order contained no express direction as to payment of the costs when taxed. On May 31, 1883, another order was made by Bacon, V.C., on adjourned further consideration, declaring that the costs of all parties were payable out of the real estate of the testatrix in exoneration of the personalty, and directing (*inter alia*) taxation of the costs of all parties in the action since August 2, 1882, and giving liberty to any of the parties to apply for payment of the said costs (see the report, 31 W. R. 854).

In 1885 the then solicitor of the plaintiff raised money by way of mortgage on the security of the costs due to him; one of the mortgagees was the plaintiff's present solicitor, who, in 1886, was retained by the plaintiff in place of the former solicitor.

On November 4, 1887, the action came on on second further consideration before Kay, J., on an application by the plaintiff for directions as to payment of the taxed costs. The defendants to the action appeared on the hearing of the application, but did not contest the order sought. Kay, J., on the hearing of the application, refused then to make any order for payment of the costs, but directed, under ord. 65, r. 11, of R. S. C., 1883, a reference to the taxing officer for inquiry and report as to the cause of the delay in the prosecution of the action, and what costs were occasioned thereby; also who was responsible for such delay, and the costs occasioned thereby or any part thereof; and meanwhile directed the hearing of the further consideration to stand over.

The plaintiff, the present solicitor of the plaintiff, and the other mortgagee of the former solicitor of the plaintiff appealed. The order made by Kay, J., was not drawn up, but the appeal was set down and came on for hearing.

T. Brett, for the appellants.—The order made by Kay, J., directing a reference is *ultra vires* in this case, the orders made by Bacon, V.C., directing the costs of all parties to be taxed as between solicitor and client, and declaring that the costs of all parties were charged on the whole real estate of the testatrix, practically amounted to a direction that all parties were to be paid their costs out of the real estate, and Kay, J., had no jurisdiction to review those orders: *Krehl* v. *Park*, 23 W. R. 475, L. R. 10 Ch. 334; *Quarrell* v. *Beckford*, 1 Mad. 269; *Clutton* v. *Pardon*, T. & Russ. 301; *Wilson* v. *Metcalf*, 1 Russ. 530. But assuming the orders of Bacon, V.C., are not conclusive, ord. 65, r. 11, is not applicable in a case like this, where the costs incurred are payable out of a fund, but only relates to cases where costs have been incurred and are payable by one of the litigant parties: *Furness* v. *Davis*, 33 W. R. 320. Again, Kay, J., had no power to make the rule in question operate retrospectively by applying it to the delay that took place and to the costs that were incurred previous to October 24, 1883, the date when the new rules came into operation: *In re McClellan*,* 33 W. R. 888, 29 Ch. D. 495; *In re Bradford*, 31 W. R. 919, 15 Q.B.D. 635.

Swinfen Eady, for the defendant Roberts, appeared, but did not support or contest the appeal.

Dibdin, for other parties.

COTTON, L.J.—This is an appeal from an order of Kay,

(a) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

* But see the case of *Boswell* v. *Coaks*, *ante*, p. 65, in which it was held by the Court of Appeal that the provision contained in Form No. 1, Appendix H., of the R. S. C., 1883, relating to the date from which interest on costs runs, was applicable to, and should be, applied in taxation proceedings taken after October 24, 1883, in respect of costs, not only incurred, but also adjudged to be paid, before October 24, 1883.

J., and I doubt if the appeal ought to have been set down, as the order made by Kay, J., has not been drawn up.

Kay, J., on the hearing of an application made on second further consideration of the action, refused to make any order providing for costs until certain inquiries which he directed to be made were answered—that is to say, he directed, under ord. 65, r. 11, a reference to the taxing master for inquiry and report as to the cause of the great delay in the prosecution of the proceedings—and here the delay was very great—viz., from 1876 to 1887—as to what costs had been occasioned thereby, and who was responsible for the delay and the costs occasioned thereby, or any part thereof; and he refused to make any order on the application until these inquiries were answered. The plaintiff in the action and the present solicitor of the plaintiff have appealed from that order of Kay, J.

Now I feel great reluctance in interfering with such an order made by the judge who had knowledge of the proceedings in the action, but, of course, if the judge had no jurisdiction to make the order we should interfere.

With regard to the costs incurred since October 24, 1883, there can be no question, as they are clearly within the operation of this rule.

As to the costs prior to October 24, 1883, three objections have been raised—first, that these costs had been already allowed by an order of Bacon, V.C.; secondly, that rule 11 of order 65 does not apply where costs are payable out of a fund, but only where an individual has to pay a particular sum for costs; and, thirdly, that rule 11 of order 65 is not retrospective in its operation.

The question is an important one, not only to solicitors, but also to persons interested in estates which are being administered.

As to the first objection, the order of Bacon, V.C., of August 2, 1882, directed taxation of costs, no doubt on the footing that they would be payable out of the estate. But at that time, in my opinion, the attention of the judge was not called to the matters contained in the rule we are now considering, for this rule was not then framed, and at that time it was a matter of course generally that the costs of an administration action, by whomever instituted, would be paid out of the estate.

It was with reference to that general practice that it was held in *In re McClellan* that rule 1 of order 65 of the R. S. C., 1883 (which restricted the generality of the practice by enacting that the costs of administration actions should be in the discretion of the judge, with a saving clause in favour of the right of an executor, administrator, trustee, or mortgagee to costs), did not apply to costs of an administration action instituted by a residuary legatee, and incurred before the new rules came into operation, and, therefore, that an appeal lay against the disallowance of the costs of the residuary legatee incurred before that date.

But rule 11 was made to call the attention of judges to the great mischief resulting from delay in administration actions, and to give them the power—if they needed the power—to disallow, even as between the solicitor and his client, costs occasioned by the delay in administration.

I do not consider any of the orders of Bacon, V.C., to be an allowance of the costs so as to prevent the judge before whom the matter might afterwards come from exercising any power of this kind given him by the rules and orders. As to the cases cited in support of this objection, *Quarrell* v. *Beckford* was a case relating to the costs of a mortgagee, but the original order there expressly directed payment of the costs to be made to the mortgagee, that they should be added to his security, and the only question was as to what costs came within the order, and it was held, as it was also held, in *Clutton* v. *Pardon*, that when an order for taxation is made it includes the whole of the costs. *Wilson* v. *Metcalf* is more like the present case, as there does not seem to have been anything in the original order amounting to a direction for payment, but it appears that the court there considered they were only following the decision in *Quarrell* v. *Beckford* without attention having been called to that fact. In my opinion the orders made by Bacon, V.C., do not preclude Kay, J., from dealing with the disposition of the costs of the action as the rules and orders give him the power. The fact that there was no opposition in the court below to the allowance of the costs may, I think, have influenced Kay, J., in making the order he did. No doubt parties are always willing that the costs should be paid out of the money of someone else—we constantly see that illustrated in Lunacy matters—but that very fact properly influences the judge in requiring a more strict investigation. In my opinion, therefore, we are not bound, either on principle or by authority, to recognize the orders of Bacon, V.C., as conclusive.

Then, as to the second objection—that rule 11 of order 65 does not apply to a case where costs are to be provided out of a fund, but only applies where an individual has to pay a particular sum by way of costs—that is a complete mistake. To restrict the operation of the rule in that way would defeat the very object in view, and with regard to which the rule was made, and would to a great extent render the rule inoperative. The rule no doubt specially provides for a particular case, but it does not shut out cases where costs are payable out of a fund in which the litigant parties are not interested.

As to the third objection—that rule 11 of order 65 is not retrospective in its operation—that is a more doubtful point. The cases cited in support of this contention were only cases relating to the right of appeal on the subject of costs. Those cases are no doubt right. But the question we have here to consider is whether this power given to the judge by rule 11 of order 65 of R. S. C., 1883, is confined to seeing whether any delay has occurred since the new rules of 1883 came into operation. In my opinion the power is not confined to costs incurred since the new rules and orders, but the rule, being general in its terms, must be construed as applying to costs incurred in any action pending when the new orders came into operation.

LINDLEY, L.J.—I also think that the contention on behalf of the appellant cannot prevail. The power given by rule 11 of order 65 of the R. S. C., 1883, is a new power. I think no such power was given by the R. S. C., 1875. As to the rule itself, nothing can be more general than its words, and nothing more plain than its object. I take the same view of the rule as that taken by Kay, J. If there has been any extraordinary delay it is perfectly competent for the judge, although not asked to do so, to direct an inquiry to ascertain the facts and to see who is responsible for the delay. As to what ought to be done after the inquiries have been answered is another matter. I think the judge had jurisdiction to make the order he did make in this case.

Appeal dismissed, with costs.

Solicitors, *H. H. Hood Barrs*; *Field, Roscoe, & Co.*; *C. T. Foster.*

From Chan. Div. Dec. 7.

In re ADDLESTONE LINOLEUM CO. BENSON'S CASE. (*a*.)

Company—Contract to issue fully paid-up shares—Non-registration of contract—Winding up—Claim of contributory to prove for damages for breach of contract—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Companies Act,* 1862 (25 & 26 *Vict. c.* 89), *s.* 38, *sub-section* (7).

The principle of the decision in Houldsworth *v.* City of Glasgow Bank, 28 *W. R.* 677, 5 *App. Cas.* 317, *is that a person who has purchased shares in a company has thereby contracted to contribute the amount of the value of the shares, to be dealt with as part of the assets of the company, and therefore cannot, while he remains either voluntarily or involuntarily the holder of the shares, in any way, directly or indirectly, withdraw from the company any part of those assets which, as holder of the shares, he has contracted to contribute.* Mudford's *case,* 28 *W. R.* 670, 14 *Ch. D.* 634, *and* Ex parte *Appleyard,* 30 *W. R.* 147, 18 *Ch. D.* 587, *being contrary to that principle, cannot be relied on.*

A company issued preference shares at a discount, the certificates declaring the shares so issued to be shares fully paid up. It was doubtful whether there was a contract to issue the shares as fully paid-up shares or only a contract to issue the shares at a discount, but no contract was registered under section 25 *of the Companies Act,* 1867. *The shares issued were not in fact fully paid up. The company went into liquidation, and a holder of some of the shares in question was placed on the list of contributories, and paid the liquidator the amount remaining unpaid thereon. The holder claimed to prove against the company in the winding up in damages, to the amount of the call paid by him, "for breach of contract or otherwise in relation to the issue of the shares."*

Held, that, even assuming there was a contract to issue the shares as fully paid up, the holder of the shares was precluded, by the principle of the decision in Houldsworth *v.* City of Glasgow Bank, *from putting in any proof in the winding up in respect of damages for breach of contract.*

Decision of Kay, J. (ante, p. 57), *affirmed.*

The Court *also expressed an opinion that, even if the holder of the shares had been entitled to prove, he could not, having regard to section* 38, *sub-section* (7), *of the Companies Act,* 1862, *have proved in competition with outside creditors of the company.*

Appeal from a decision of Kay, J., reported *ante*, p. 57.

The point raised by this appeal was whether a person who had been placed on the list of contributories of a company which was being wound up, in respect of certain shares not fully paid up which had been allotted to him, was or was not entitled to prove in the liquidation in damages—to the amount of the calls made—"for breach of contract or otherwise in relation to the issue of the shares." The shares in question were issued by the company in pursuance of a resolution to issue part of the nominal capital of the company in the form of preference shares of £10 each, every existing shareholder to be entitled to one such share at 25 per cent. discount for each ordinary share held by him. The present appellant Benson, as an existing shareholder, had applied for and had been allotted some of these £10 preference shares, for which he paid at the rate of £7 10*s.* each share. The certificates of the shares so allotted to him stated that the shares were fully paid up. No contract had been registered at or before the issue of these shares under section 25 of the Companies Act, 1867.

Section 25 of the Companies Act, 1867, provides as follows:—"Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the Registrar of Joint-Stock Companies at or before the issue of such shares."

Section 38 of the Companies Act, 1862, so far as material to the present case provides: "In the event of a company . . . being wound up, every past and present member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts . . . of the company . . . with the qualifications following:" *inter alia*, "Sub-section 7. No sum due to any member of a company in his character of a member by way of dividends, profits, or otherwise, shall be deemed to be a debt of the company payable to such member in a case of competition between himself and any other creditor not being a member of the company."

Kay, J., dismissed the summons taken out by Benson for leave to prove in the winding up against the company in damages for "breach of contract or otherwise in relation to the issue of the shares." (See the report, *ante*, p. 57.)

Benson appealed.

Farwell, for the appellant.—The first point is whether the appellant is a creditor of the company at all; and, second, if he is, whether he is entitled to prove in competition with the other creditors of the company. On the first point I say there was an express contract by the company to issue these shares as fully paid up, and, in addition, there was an independent though implied contract to register the contract at or before the time of issuing the shares. [COTTON, L.J.—I doubt whether you can show that there was any contract in terms to issue these shares as shares fully paid up.] No one reading the resolution and report could suppose that he was to get anything but fully paid-up shares, and the certificates certify that the shares are shares fully paid up. If there had been no liquidation and the company was still a going concern the appellant would have had a right to sue the company for damages in respect of the breach of contract; the fact of liquidation cannot destroy that right, because it was a liability attaching to the company at the date of the winding up. If the appellant cannot prove as a creditor against the company in liquidation, the result will be that the company gets the appellants' money for nothing, and the only consideration the appellant gets is a *damnosa hereditas*—a liability to pay: *Mudford's case*, 28 W. R. 670, 14 Ch. D. 634, and *Ex parte Appleyard*, 30 W. R. 147, 18 Ch. D. 587, are distinct authorities in favour of the appellants' right to prove against the company in liquidation. The case of *Houldsworth* v. *City of Glasgow Bank*, 28 W. R. 677, 5 App. Cas. 317, is distinguishable; that was a case where a shareholder sought to bring an action and get damages for deceit against the company in which he was a shareholder; the reasoning of the judges there show that the decision in that case turned entirely on the nature of the claim made, and not on the fact of the company being in liquidation. Subject to the qualification contained in section 38, sub-section (7), of the Companies Act, 1862, a shareholder may be also a creditor of the company: *Grissell's case*, 14 W. R. 1015, L. R. 1 Ch. 528. On the second point—viz., as to proving in competition with other creditors—section 38, sub-section (7), of the Act of 1862 only provides that a member who is a creditor cannot prove, in competition with non-member creditors, in respect of any sum due to the member in his character of a member: *In re Leicester Club Co., Ex parte Cannon*, 34 W. R. 14, 30 Ch. D. 629; but the claim of the present appellant is

(*a*). Reported by M. J. BLAKE, Esq., Barrister-at-Law.

not for any sum due to him in his character of member, but arises in respect of the independent though implied contract, entered into by the company with him to register the agreement they had made before issuing the shares.

Marten, Q.C., and *F. B. Palmer*, for the liquidator, the respondent.—The principle of the case of *Houldsworth* v. *City of Glasgow Bank* applies; the appellant is not entitled, by making a claim for damages, to get back part of the capital of the company which he was bound to contribute, and to withdraw, therefore, some of the property from the outside creditors. When liquidation supervened rescission became impossible. This is a claim made in respect of the very contract itself to take shares: *Mudford's case* and *Ex parte Appleyard* may be distinguished from *Houldsworth* v. *City of Glasgow Bank* on the ground that the contract for breach, of which proof was allowed in those cases, was a contract quite irrespective and independent of the contract to take shares. Again, a contract by the company to accept £7 10s. as payment in lieu of £10 is *nudum pactum* and invalid. A company such as this is cannot agree to reduce their capital by purchasing its own shares: *Trevor* v. *Whitworth*, *ante*, p. 145, 12 App. Cas. 409; *Foakes* v. *Beer*, 33 W. R. 233, 9 App. Cas. 605. The contract to issue shares at a discount was, therefore, in itself *ultrà vires*: *In re Ince Hall Rolling Mills Co.*, 30 W. R. 945, 23 Ch. D. 545 note; *In re Plaskynaston Co.*, 23 Ch. D. 542, 32 W. R. Dig. 41; *In re Millers' Dale Co.*, 34 W. R. 192, 31 Ch. D. 211. [LOPES, L.J., referred to *Burgess' case*, 28 W. R. 792, 15 Ch. D. 507.] Registration of such a contract, even if there were registration, could not make any difference: *Oakes* v. *Turquand*, L. R. 2 H. L. 345, 16 W. R. H. L. Dig. 15. The company had no power to give a *bonus* to its shareholders: *Lydney and Wigpool Co.* v. *Bird*, 34 W. R. 749, 33 Ch. D. 85; even if the appellant has a right to prove, he cannot prove in competition with outside creditors of the company, section 38, sub-section (7).

Farwell in reply.—The company, or its liquidator, cannot now assert that the contract to issue shares at a discount as fully paid-up shares was *ultrà vires*. They have affirmed the contract by putting the appellant on the list of contributories and compelling him to pay up the unpaid balance. Again, if there was no contract to take shares at all, how can the appellant be liable for calls? In that case, at any rate, the company would be liable to the appellant for money had and received: *Turner* v. *Browne*, 3 C. B. 157.

COTTON, L.J.—This is an appeal from a decision of Kay, J., refusing to allow the present appellant to put in a proof in the winding up of a company in respect of damages for breach of contract, which contract, it is alleged, is contained in an invitation by the company to the appellant to take shares, which was accepted by the appellant.

Now, in the first place, it is very doubtful, in my opinion, if there is, in fact, any such contract as the appellant founds his claim upon. It seems to me the contract was not a contract to issue and take the shares as shares fully paid up, but a contract to issue the shares at a discount—as it was supposed the directors had power to do; and if that was the contract I also doubt if any registration of it under section 25 of the Act of 1867 could have rendered it effectual so as to relieve the shareholder from the liability to pay the full amount of the shares in the event of a winding up of the company. There were cases before the Act of 1867 which showed that it was not necessary that the payment for shares should be in money, but that it was sufficient if money's worth were given by the subscriber as consideration for the shares when there was an agreement to that effect; and section 25 of the Act of 1867 only provided that such agreement should be registered at or before the issuing of the shares.

But I do not enter into either of those questions for the purpose of deciding them; it is not necessary to do so, for in my opinion the case of *Houldsworth* v. *City of Glasow Bank* precludes us from allowing this proof. It is true that that case was not exactly like the present case, for it was a claim by a shareholder in the nature of an action for deceit. But the ground of the decision of the lords was that the claim was founded on that which would have entitled the shareholder to repudiate the shares and sever himself altogether from the company, but that when the claim was made it was too late for the shareholder to repudiate the shares, the company not then being a going concern, and that the shareholder could not, while being a member of the company, withdraw from the assets of the company the sum which he alleged was the damage which he had suffered by the misrepresentations. The principle of that decision governs this case. Mr. Farwell's client may have had a right to go to the company and say, "You gave me something which I did not contract to buy; take me off the list of shareholders," and if he had done so while the company was a going concern he might have been entitled to prove in the liquidation afterwards. But he comes here now as holder of the shares, and as holder of the shares claims to prove in the liquidation of the company. In my opinion he is precluded from doing so, and the appeal therefore fails. I do not think it necessary to decide whether, if the appellant could have brought in this proof, he could have proved in competition with the other creditors having regard to section 38, sub-section (7), of the Act of 1862; in my opinion, however, section 38, sub-section (7), would prevent him doing so.

LINDLEY, L.J.—I am of the same opinion. What was the contract here? It may be put in one of two ways. It was either a contract to issue the shares at a discount or a contract to issue them as fully paid-up shares. If it were the former, the appellant would be saddled with the liability of paying up the full amount, even if the contract had been registered. The amount to be paid for shares is regulated by the memorandum of association. Before the Act of 1867 there were cases which showed that an agreement might be entered into either before or after the issue of the shares for payment being made otherwise than in cash; section 25 of the Act of 1867 put a stop to any such agreement being made after the issue of the shares, and to any such agreement being made before the issue of the shares unless registered. But section 25 of the Act of 1867 has nothing to do with the amount to be paid, but only regulates and restricts the mode of payment. If the contract was to issue the shares as fully paid-up shares, the position of the appellant is this: he has not in fact got fully paid-up shares, but he has kept them, and kept them so long that he cannot now get rid of them.

He cannot, while holder of the shares, get repayment of the consideration by recovering damages for breach of contract from the company. The principle of the decision in *Houldsworth* v. *City of Glasgow Bank* is that a person, by being saddled with shares, is bound to pay the amount of the shares as so much money to the capital of the company, and that it would be inconsistent with that obligation that he could take back any part of that money either directly or indirectly by means of a claim against the company for fraud or in any other way. *Mudford's case* and *Ex parte Appleyard*, both before Hall, V.C., cannot be relied on, having regard to the principle of the decision in *Houldsworth* v. *City of Glasgow Bank*.

LOPES, L.J.—I will assume the contract to have been

a contract to issue fully paid-up shares, and that the appellant has not got what he contracted for; assuming that to be so, I think that in principle there is no distinction between the case of *Houldsworth* v. *City of Glasgow Bank* and the case of the appellant. In my opinion the injured shareholder cannot get damages from a company of which he is a member, but only rescission of the contract. Here rescission has, under the circumstances, become impossible. There was said to be a distinction between *Houldsworth* v. *City of Glasgow Bank* and this case, as the former was the case of a claim for damages for deceit, and this is a claim for breach of contract. I do not think any distinction in principle can be drawn. It is said that this view is contrary to the two cases mentioned before Hall, V.C., but in my opinion those cases cannot be relied on. I agree with the opinion expressed by Cotton, L.J., as to the construction to be put on section 38, sub-section (7).

Appeal dismissed.

Solicitors, *F. Romer; Trinders & Co.*

From Lancaster Ct. of Chan. Oct. 27; Nov. 3.

MITCHELL *v.* CANTRILL. (*a.*)

Easement—Light—Prescription—Lessor and lessee—Prescription Act (2 & 3 *Will.* 4, *c.* 71), *s.* 3.

A lease for 999 years of a plot of building land, with a house which the lessee had erected on the land in pursuance of a building agreement, contained a demise of the house and land, "and all rights and appurtenances, legal, used, or reputed, to the said plot, except rights (if any) restricting the free use of any adjoining land, or the conversion or appropriation at any time hereafter of such land for building or other purposes, obstructive or otherwise."

Held, that the reservation in the lease was not an agreement within the proviso contained in section 3 *of the Prescription Act, and that it did not, therefore, prevent the lessee from acquiring a right to light under that Act.*

Appeal from a decision of the registrar sitting for the Vice-Chancellor of the Palatine Court of Lancaster.

By a lease dated the 21st of April, 1864, made in pursuance of a building agreement, a plot of land, with the house thereon, erected by the plaintiff, was demised to the plaintiff for a term of 999 years, together with "all rights and appurtenances, legal, used or reputed, to the said plot, except rights (if any) restricting the free user of any adjoining land, or the conversion or appropriation at any time hereafter of such land for building or other purposes, obstructive or otherwise."

The plaintiff enjoyed the access of light to the house without interruption down to July, 1887, a period of more than twenty years, when the defendant, who was the lessee of an adjoining plot from the same lessor, commenced building so as to obstruct the access of light to the plaintiff.

The plaintiff thereupon brought this action to restrain the defendant from proceeding with his proposed buildings, and moved for an *interim* injunction in the Palatine Court.

The registrar, sitting for the Vice-Chancellor, refused the injunction, on the ground that the plaintiff was precluded by the terms of her lease from acquiring a right to light as against her lessor or other lessees of the estate.

From this decision the plaintiff appealed.

Section 3 of the Prescription Act provides "that when the access and use of light to any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

Cozens-Hardy, Q.C., and *Clarkson*, for the appellant.—The appellant, by uninterrupted enjoyment for a period of over twenty years, has acquired an indefeasible right to this light: Prescription Act, s. 3. And the circumstance of the two leases being granted by the same lessor will not prevent the plaintiff from acquiring this right: *Frewen* v. *Phillips*, 9 W. R. 786, 11 C. B. N. S. 449. The reservation in the lease of rights restricting the free use of any adjoining lands, &c., does not amount to an agreement within the proviso contained in section 3 of the Prescription Act.

Horton Smith, Q.C., and *W. H. Bather*, for the respondent.—The reservation contained in the lease comes within the proviso contained in section 3 of the Prescription Act, and prevents the plaintiff from acquiring a right to this light by uninterrupted enjoyment for twenty years: *Bewley* v. *Atkinson*, 28 W. R. 638, 13 Ch. D. 283.

Cozens-Hardy replied.

Cur. adv. vult.

Nov. 3.—COTTON, L.J.—This was an appeal from an order of the registrar of the Palatine Court, who, without entering into the facts of the case, dismissed the action, on the ground that the lease under which the plaintiff claimed to be and was entitled to her house prevented her from bringing any action against a lessee on the same estate for obstructing her lights. The plaintiff has been in occupation of this property since 1864, and we must assume that during that period she has enjoyed the lights of her house without any interference. The defendant is now going to build, or has built, I understand, since the action was commenced, as the plaintiff alleges, so as to obstruct and interfere with her lights. That point has not been entered into, because the learned registrar dismissed the action simply on the ground that under her lease there was a proviso which prevented the plaintiff from getting any right to lights, or bringing any action with respect to interference with her lights. We must consider, therefore, if that is so. In my opinion that was an incorrect view. The question turned on one particular provision in the lease, which was a lease for 999 years, and which was granted in pursuance of a building agreement to the plaintiff, and a house had been built under the agreement at the time the lease was granted, and therefore the lease was of the plot of land without describing it "and all that dwelling-house recently erected by the said lessee on the said plot." Now comes the passage relied upon by the registrar, "and all rights and appurtenances, legal, used, or reputed, of the said plot." There is probably some inaccuracy either in copying or in the words of the deed, but it really means all appurtenances used or reputed of the said plot "except rights, if any, restricting the free use of any adjoining land, or the conversion or appropriation at any time hereafter of such land for building or other purposes, obstructive or otherwise." It is clear that this plot was part of an estate which was being used for building purposes. A similar lease to the plaintiff's was subsequently granted to the defendant. But has this clause the effect which is attributed to it by the learned registrar of preventing the plaintiff from claiming any right under the Prescription Act (2 & 3 Will. 4, c. 71) because it is

(*a.*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

under that she claims her right to light? It is said that it brings the case within the proviso at the end of the 3rd section, and therefore prevents her from relying on the previous part of the section. Does it do so? The provision is this, that the right to light is granted where there has been any enjoyment of the access and use of light for twenty years, "unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for the purpose by deed or writing." Now, does this clause which I have read bring it within that? In my opinion it does not. It is not an agreement given for the purpose of the enjoyment of the light, but it is simply an exception out of the grant made of appurtenances and rights so as to prevent the lessee from urging, as against the landlord, or anybody claiming through him, before a right had been obtained by prescription, that the landlord could not derogate from his own grant, either by his own building or granting to anybody else a right to build, so as to interfere with the plaintiff's lights. That is the reasonable, and, I think, the only, meaning of this clause. It was not intended to prevent the plaintiff gaining any right under the statute; it was not an agreement as to her enjoyment of the light so as to prevent the statute from operating; but it was merely a provision to prevent her saying, in case the landlord built upon any adjoining land, that he was derogating from his own grant. But if, independently of the grant, the plaintiff has enjoyed the use of these windows for twenty years, she would have the same right as against the adjoining lessee as against a stranger. No case which was referred to in the argument supports the contention of the respondent. She has the right simply by the effect and operation, not of the grant, but of the statute, and in my opinion she is entitled to enforce that right.

Then another point was suggested—namely, that this must be considered an agreement between the landlord and the lessee that the landlord should be at liberty, if he thought fit to do anything, even although it would operate so as to interfere with the lessee's right to light, but I do not think that is the true meaning of it. If there had been an express proviso in the contract between the parties that, notwithstanding the grant to the lessee, the landlord should be at liberty to build so as to interfere with the right, that would be another thing; but there is no express provision, and in my opinion the fair and clear meaning of this clause, construing it without reference to the consequences to one party or the other, is not anything of that sort. During the twenty years before the plaintiff got the right under the statute it is true that the landlord would have been able to build, and to do anything he liked, although he obstructed the plaintiff's lights, not because there was a contract between him and the lessee, but because under the statute, during the twenty years, the plaintiff would not have got any right. In my opinion neither view can assist the defendant in this case. The case must go on to be tried. As the house has been built, I think the proper course would be to discharge the order and to direct the motion to come on with the trial of the action. If the plaintiff establishes her case, of course there will be a mandatory injunction, as through no fault of hers, but in consequence of the error of the law into which the registrar has fallen she will not be able to stop the defendant from erecting the building.

The only other point I need mention is one raised upon the case of *Bewley* v. *Atkinson*, but that has really no bearing upon this case. There there was an express agreement as to the use and enjoyment of light, and the only question there really was whether a writing signed, not by the owner of the servient tenement, but simply by the owner of the dominant tenement, would be a good agreement within the proviso in the statute; that was the point for the consideration of the court, and the Lords Justices held it was. That had no application to a case like this, where there is no express agreement as to the enjoyment of light. In my opinion, therefore, the appeal succeeds and the order which I have mentioned must be made.

LINDLEY, L.J.—I am of the same opinion. As I understand the matter, the learned registrar decided against the plaintiff upon the ground that the plaintiff's lease was conclusive against her. Now has the plaintiff by the lease the right to restrain the defendant from building on the adjoining plot? The learned registrar has decided she has not, and that the lease contains a clause which is inconsistent with such a right, but that does not dispose of the case at all. The question is whether the plaintiff has not, by actual enjoyment of the access of light for twenty years, acquired something in addition to what the lease gives her. Looking at the 3rd section of the Act, it appears to me that the plaintiff's case upon that Act is unanswerable. That the plaintiff can acquire an easement to light under circumstances such as these, when both the plaintiff and defendant are under the same landlord, is settled in the case of *Frewen* v. *Phillips*. Here the plaintiff has in fact enjoyed access of light for twenty years, that fact has not been controverted, and that fact gives her a statutory right to light unless the last part of section 3 applies to this case. Now the last part of section 3 is this, after saying that access of light for twenty years may confer a right the section says, "unless it shall appear that the same was enjoyed"—that is, the access of light was enjoyed—"by some consent or agreement expressly made or given for that purpose by deed or writing."

Now I cannot construe this document as an express deed or writing under which the right of light was enjoyed without going this length, that under and by virtue of every grant and every lease of land with a house or without a house upon it, the lessee enjoys a right of light, not because it is given or referred to in the grant or lease, but because the ownership given by the grant is within this clause, which would be to destroy the section altogether. The meaning of the last words in that clause is most obvious. It is when you find an agreement under which the light is enjoyed you must look at that agreement and see what, if any, right is given by it. Here the plaintiff falls under the words of the statute, and it appears to me the contention of the defendant is neither warranted by the words of the section nor by the proper construction of it. There is nothing except the grant coupled with the words which Cotton, L.J., has alluded to, and which obviously are for the purpose of preserving to the lessor a right, until an adverse right is acquired, of doing what he likes to the adjoining property. Under the grant he could act within the twenty years, and within that period he might have blocked up all the lights, but the statute comes in after that period has expired, and enables the plaintiff to acquire a right to these lights. I think, therefore, this appeal should be allowed.

LOPES, L.J.—The question in this case is, What is the meaning of this reservation? Is it a bargain between the lessor and the lessee that the lessor is always to have the right to use the adjoining land as he thinks fit, or is it a reservation in the more limited sense? It is clear what the position would have been if this reservation had not been inserted, the lessor, after he granted the lease, could not have used the adjoining land in a way to prejudice any rights arising from the lease he had granted. If he had so done it would have been an act in derogation of his grant. I think, therefore, that the reservation means that such consequences are not to follow as would necessarily do so if the reservation had not been there—namely, that the lessee is not to be

permitted to say to the lessor, "You are acting in derogation of your grant." The reservation, according to my view, cannot be used in any way to operate to prevent acquisition of a right *aliunde* in some other way —for instance, by the operation of the Prescription Act. It is said, however, that the case comes within the latter part of the 3rd section of the Prescription Act, which words are, "unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing." For the reasons which have already been given I am clearly of opinion it cannot be brought within those words. I think, therefore, that the view the learned registrar took was wrong, and that this appeal should be allowed, with costs.

Appeal allowed.

Solicitors for the appellant, *Byrne & Lucas*, for *Taylor, Kirkman, & Co.*, Manchester.

Solicitors for the respondent, *Gregory, Rowcliffes, & Co.*, for *Cooper & Sons*, Manchester.

Bankruptcy. Dec. 16.

Ex parte BISCHOFFSHEIM.
In re AYLMER. (*a*.)

Bankruptcy—Scheme of arrangement—Approval of court—"Judgment by consent"—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 18, 28, sub-section 6.

A scheme of arrangement providing that, "by consent of the debtor the trustee should enter judgment against him for full amount of the debts, and that such judgment should have effect in like manner and to a like extent as though the debtor had been adjudged bankrupt," is to be disapproved, on the ground that such a provision is an attempt to incorporate the powers given to the court in the case of a judgment by consent under section 28, sub-section 6, of the Bankruptcy Act, 1883, and that the powers given to the court under such section are not authorized to be incoporated into schemes of arrangement under section 18.

Appeal by the debtor, Aylmer, against the refusal of Mr. Registrar Giffard to approve of a scheme of arrangement.

A scheme of arrangement had been duly accepted by the creditors of Aylmer under section 18 of the Bankruptcy Act, 1883. The scheme provided (*inter alia*) that the debtor should, prior to the approval of the scheme, consent to a "judgment by consent" being entered against him by the trustee under the scheme for the full amount of the debts provable thereunder, "such judgment to have the same effect and to be enforceable in like manner and to the like extent as though the debtor had been adjudged bankrupt under the proceedings, and as though the court had granted him an order of discharge conditional upon his so consenting to judgment and as though such judgment had been entered accordingly." There was a further provision that "such judgment should only be enforceable in respect of any balance remaining due to the creditors after giving credit for any dividends distributed by the trustee out of the assets vested in him under the scheme or out of moneys which might be paid to him by the debtor for such distribution."

The registrar held that this was an attempt to incorporate section 28, sub-section 6, of the Bankruptcy Act, 1883, and refused on that ground to allow the scheme.

F. Cooper-Willis, for the appellant, the debtor.—The creditors have full control over the scheme without section 28. The debtor can, if in default under the scheme, be subsequently made bankrupt under section 18, sub-section 11. The powers authorized under section 28 can be incorporated into the scheme, and these are sufficient to control the debtor.

Cooper-Willis, Q.C., and *Woodfall*, for the respondent, an opposing creditor.—This court has decided that creditors cannot incorporate into a scheme powers other than those given under section 18: *Ex parte Bischoffsheim, In re Aylmer*, 35 W. R. 532, 19 Q. B. D. 33; *Ex parte Whinney, In re Grant*, 34 W. R. 539, 17 Q. B. D. 238; *Ex parte Clark, In re Clark*, 32 W. R. 775, 13 Q. B. D. (*per* Cotton, L.J.) 435. Consent to a judgment cannot be made in any other way than is provided by this Act, that is, under section 28, sub-section 6, and that section cannot be incorporated into a private scheme.

F. Cooper-Willis replied.

Lord ESHER, M.R.—Many points raised and considered by us in the course of the argument have become unnecessary for our consideration now, and in accordance with the practice of this court we shall not determine points unnecessary to the present judgment. There is one point which is fatal to the adoption of this scheme. The scheme proposes that the debtor should consent to judgment. Such judgment is to have effect in like manner and to the like extent as though the debtor had been adjudged a bankrupt. If the effect of that provision is to give to the scheme the power given by section 28, sub-section 6, that is an attempt to incorporate the statutory provisions of that section of the Act. Such a provision cannot be incorporated under section 18, which authorizes schemes of arrangement. We have previously held, when this case was before us a short time ago, that section 27 of the Act cannot be so incorporated. For the same reason section 28 cannot be so incorporated. If an attempt be made under any scheme to give powers similar to those given to the court by consent of the creditors, such consent cannot give jurisdiction to the parties under the scheme which the court has not otherwise given. That attempt is made here. The scheme makes the judgments illusory and of no effect since it cannot really incorporate the powers given to the court in regard to judgments by consent under section 28, sub-section 6. Such a judgment as is here attempted to be authorized could not be enforced at common law. It could only be enforced by reference to the Act, and it fails to give effect to any judgment allowed under the Act either by consent or otherwise.

BOWEN and FRY, L.JJ., concurred.

Appeal dismissed.

Solicitor for the appellant, *H. F. Barnett.*

Solicitors for the respondent, *Freshfields & Williams.*

From Q. B. Div. Dec. 1, 2.

MERIVALE AND WIFE *v.* CARSON. (*a*.)

Libel—Literary criticism—"Fair"—Questions for jury —Privilege.

In actions for libel conveyed in the public criticism of literary work, the only questions for the jury are, What is the meaning of the words used, and whether such meaning comes within the limits of "fair criticism"? Imputations on the private character of the author or an

(*a*.) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

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account of the work so false as to amount to an actual misdescription of it are outside the limits of "fair criticism." The expression of the opinion of the critic, not the opinion itself, is the criterion of "fair criticism."

Per Lord Esher, M.R.—*If it could be shown that the critic had written the words complained of, not for the purpose of criticism, but with a malicious intent to injure the author, that might make a statement libellous which, if written without such intent, would not be beyond the limits of "fair criticism."*

Held, further, that no question of privilege arises in reference to public criticism in accordance with the judgments in Campbell *v.* Spottiswoode, 11 *W. R.* 569.

Appeal of the defendant against the refusal of a divisional court (Mathew and Grantham, JJ.) to grant a new trial or to enter judgment for the defendant.

The action was one for a libel, as set out below, in the comments of the defendant published in a Liverpool newspaper on a play written by the plaintiffs and acted at Liverpool. The action was tried before Field, J., and a special jury. Field, J., left the following questions to the jury—(1) What construction they thought the words alleged to be libellous would naturally bear; (2) whether the words so construed exceeded the bounds of honest, fair, independent criticism? The jury returned a verdict for the plaintiffs, with damages, 1s., and the judge entered judgment accordingly. The defendant having moved the Divisional Court for an order for a new trial on the ground of misdirection or for judgment to be entered in his favour, that motion was refused by the Divisional Court, against which refusal the defendant now appealed.

The following are the material issues and innuendoes as set out in the statement of claim:—

"On or about the 7th day of May the defendant falsely and maliciously printed and published of the plaintiffs, and of them as joint authors as aforesaid, and of them in their occupation and profession as dramatic authors, the words following in the said newspaper called the *Stage*—'Liverpool: Prince of Wales.—"The Whiphand," the joint production of Mr. and Mrs. Herman Merivale, gives us nothing but a hash up of ingredients which have been used *ad nauseam* until one rises in protestation against the loving, confiding, fatuous husband with the naughty wife and her double existence, the good male genius, the limp aristocrat, and the villainous foreigner.' . . . Meaning thereby that the said play was not original, and that the plot and action of the said play had an immoral tendency and belonged to a class of plays founded upon sexual intrigue and of a low moral character, and that the production of the said play was discreditable to authors of good literary position and repute."

"The plot of the said play is original, and is not, in fact, based upon the adultery of the principal female character, nor does the action of the play in any way turn upon the sexual immorality or intrigues of any of the characters therein. The criticism of the said play and of the plaintiffs' work as the authors thereof contained in the publication referred to is unfair and misleading."

Cock, Q.C., and *Blake Odgers*, for the appellant.—The occasion of the criticism was privileged. The judgments in *Henwood* v. *Harrison*, 20 W. R. 1000, L. R. 7 C. P. 606, and *Campbell* v. *Spottiswoode*, 11 W. R. 569, 32 L. J. Q. B. 185, only apply to the particular circumstances of those cases. An honest and genuine opinion, however untrue in fact, is not libellous when expressed as public criticism of a published work. To be "unfair" it must be an attack on the personal character of the author: *Hibbs* v. *Wilkinson*, 1 F. & F. 608; *Eastwood* v. *Holmes*, 1 F. & F. 347; *Barwell* v. *Adkins*, 1 M. & G. 807; *Turnbull* v. *Bird*, 2 F. & F. 508; *Stevens* v. *Sampson*, 28 W. R. 87, 5 Ex. D. 53.

Lockwood, Q.C., and *Boxall*, for the respondents.—The cases from 1793 onwards show that the word "fair" has generally been adopted by judges as the test word for the jury's consideration. The test of fairness is either the truth of the criticism, or, if false in fact, whether such criticism is the real, honest opinion of the writer expressed in a reasonable and moderate manner. That is reasonable which the jury, as twelve reasonable men, think so. Here the jury have found the criticism to be, in fact, untrue, and, therefore, unreasonable and, by implication, malicious. There is no especial privilege in public criticism, and, even if there were, the jury have in this case practically found malice: *Macleod* v. *Wakley*, 3 C. & P. 311; *Turnbull* v. *Bird*; *Davison* v. *Duncan*, 22 W. R. 575, L. R. 9 C. P. 396; *Campbell* v. *Spottiswoode*; *Wason* v. *Walter*, 17 W. R. 169, L. R. 4 Q. B. 73; *Henwood* v. *Harrison*.

Blake Odgers replied.

Lord ESHER, M.R.—This was an action brought for an alleged libel in a criticism on a play written by the plaintiffs. What are the questions to be left in such a case to a jury? First, "What is the meaning in your view of the words or sentences alleged to be libellous?" The jury are to look at the context, and are to say what any reasonable person would undoubtedly understand by the published statement complained of. That is the first question to be decided. I am not prepared to say that they might not have to look at the subject criticized in order to appraise the libellous nature or otherwise of the criticism. That, however, it is not material here to consider. The jury on the trial of this action were asked to say what would a reasonable man think this particular criticism of the play would mean? The interpretation put before them by the plaintiffs was that the meaning of this statement implied that the play was of a class founded upon the incident of adultery; that no stigma was applied to such an incident; that such a play was mischievous; and that the public were asked to stigmatize the play as immoral. For the defendant it was contended that no such meaning could properly be attached to the criticism, and that the words "naughty wife" as there applied did not necessarily mean an adulterous woman. It might be a question for the judge at the trial whether in this particular play the word "naughty" could imply "adultery," and the court might come to the conclusion that it could not by any reasonable person be taken to mean "adulterous." But unless it was held that there was no evidence to go to the jury upon such a point the jury were right in putting their interpretation upon the words, and I am inclined to agree that such was the meaning of the critic.

Then what is the next question to be decided? Is it to be said that to criticize a published writing is to do something on a privileged occasion? and ought the judge to say that it is so privileged and to hold that, to whatever length the criticism may go, the verdict must be for the defendant unless the plaintiff can show the defendant to have been guilty of malice in fact—that is, that the defendant had some indirect motive for making use of a privileged occasion for a malicious attack on the plaintiff? I say unhesitatingly that that is clearly not the law. This has been for once decided in *Campbell* v. *Spottiswoode*, and over and over again accepted. That case has never been overruled, and all judges have ever since acted upon the principle there laid down, and the principle is that criticism on published matter is not criticism on a privileged occasion within the legal meaning of those words. Lord Blackburn there defines the test of a privileged occasion—namely, that a particular person may do on that occasion what no other person may do on another occasion. But as to criticism on a published work, that is not a case in which one person may do what another may not

do. On the contrary, every member of the public may do the same thing, and is equally forbidden to do the same thing. The real question to be decided after the above-mentioned first question has been answered is, "Whether the criticism is or is not libellous at all?" In what form is this question to be left to the jury? That is well expressed by Crompton, J., in *Campbell* v. *Spottiswoode*, 11 W. R. 571, 32 L. J. Q. B. 200:—"Nothing is more important than that great latitude should be allowed to writers in the public press, and, indeed, to all writers, in canvassing by way of comment or criticism any public matter which may come before the world. . . . And if such a comment or criticism is made the subject of an action it is for the jury to say whether, on the whole, and without looking to minute expressions, it is a fair comment upon the subject-matter which it professes to discuss." That is the true question to be left. Upon the answer to that it depends whether the article complained of is a libel or not. By that question it is to be determined, and not any question of whether it is privileged or not? Now I am prepared to say that the meaning of "fair criticism" is this. Is it in the opinion of the jury criticism beyond what any fair-minded man, however prejudiced or strong his opinion may be—on that I would give a wide latitude—would write of the work discussed? It is easy to say what is altogether beyond that. For instance, clearly anything derogatory as to his private character is beyond that limit. The difficulty is to say what is within that limitation. That depends really so much on the circumstances of each case and requires the careful honest consideration of the jury.

What we have to decide here is whether that question was substantially left to the jury? I think it was. [His lordship then commented upon some of the phrases in Field, J.'s summing up.] If the criticism was, as Field, J., puts it, no more than what "a fair, honest, independent man" might write, even though it might be exaggerated in expression, that would come within the limit, though I think the word "fair" is sufficient, as that implies honesty, while the word "independent" is almost superfluous. Even gross exaggeration may not necessarily make the criticism "unfair." I would repeat that, however wrong the criticism may be in truth, however exaggerated, however prejudiced, all that may be within the limit, which is, Could any fair man, however strong, or exaggerated, or obstinate in his opinions he may be, regard the work criticized in this way or not? If the jury are not satisfied that the criticism is more than that there is no libel in it. The word "fair" has been used or adopted by all judges in leaving such a question to the jury, and I think it is the best word, and one sufficient without any addition to it. The way in which Crompton, J., as before mentioned, says that the question should be left to the jury, is to my mind the clearest and most satisfactory.

In the present case the answer to this second question depended to a great extent on their answer to the first. Upon their finding as to the meaning of the alleged libel, it was for them to say whether a fair-minded man could have given so wrong an account of the play that no fair man who had seen it could possibly have given of it. It is admitted by the defendant that the plot does not turn upon an adultery. In fact, that there is no adulterous incident in the play at all. To say so would be to give a misdescription of the work. If, however, the meaning attributed by the jury to the words of the criticism is correct, I cannot help concluding that such criticism was not only misleading, but carried an imputation on the character of the writer. If that is so, even though the summing up had not been so correct as it was, we should not send the case down for a new trial, since such an imputation would in itself be libellous and exceed fair criticism. But I absolutely deny that any plea of privilege for such criticism, unless proved to be malicious in fact, is capable of being legally raised after the decisions of Blackburn, J., and Crompton, J., in *Campbell* v. *Spottiswoode*. As to one other point raised by the defendant, that if the language alleged to be libellous was not beyond the limits of fair criticism no action could be supported, even though such language contained imputations which if not written in regard to a published work would be libellous, I am inclined to think that if it could be shown that the defendant in such a case had not written with a view of criticizing so much as for the purpose and with the dishonest intention of attacking the credit of the plaintiff, such writing would be libellous, because the result would not be a criticism of the work, but would be the emanation of the mind of a man writing with the intent to injure another. It would not, therefore, be within the limits of "fair criticism," but would fall within the ordinary rule of personal liability for published statements. Upon every ground I hold that this appeal must be dismissed.

BOWEN, L.J.—This case is of such an important nature that, though I could add nothing to what the Master of the Rolls has said, in all of which I entirely agree, I think it right to give one's reasons for concurring in the judgment.

I begin with asking, What is the true meaning of the words used? That question is for a jury. The jury here have found against the interpretation contended for by the defendant. We must, therefore, take it as conclusively settled, so far as we are concerned, that the critic has imputed to the author the writing of a story which turns on the adultery of a wife, so described as to lead no one to suppose that the author objected to adultery as such, but rather that he introduced it as a spicy element without any moral aspect of culpability. That is what is found by the jury. It is an acknowledged fact that the play does not admit of any such argument, that there is no adulterous wife introduced, and no such incident as the jury find implied by the criticism. Such are the facts. Let us apply the law to them. What is the true question to be left to the jury upon those facts as found by them or as admitted by the parties? I take precisely the same view as the Master of the Rolls as to the way in which the plea of privilege is to be used. This is not, in its strict legal sense, a case of privilege at all. A privileged occasion is, in the natural legal sense of the word, one where certain members of the public are clothed in *quasi*-immunity from what would otherwise be the legal result of their statements. Here we have to deal with the right of public criticism which every other single person enjoys. It is the right of criticizing any published work on which public judgment is invited; and the author is the last person who should complain if the work is found to be worthless. There have been different metaphysical explanations of the law as applied to this class of criticism. Willes, J., in *Henwood* v. *Harrison*, treated every such case of public comment as a branch of the general law of privilege, and found a justification of the use of such criticism in the subject-matter and the occasion of the criticism. I do not think that is so good an explanation as that given by Blackburn, J., and Crompton, J., in *Campbell* v. *Spottiswoode*. I do not believe that really it would make much difference in this case which explanation were adopted, but I prefer the latter because it leaves undisturbed the modern practice of leaving to the jury the question which a series of able judges have adopted—namely, have the limits of fair criticism been passed?

It would be more consistent to say that nothing written within that limit was libellous rather than to term such criticism privileged. Once outside that limit a writer is within the region of libel if he uses language which would bring another person into disrepute. He falls then within the ordinary law of libel. Within that limit he is not within the law of libel at all. The whole

question in *Campbell* v. *Spottiswoode*, put shortly, is—What is the true meaning of "fair criticism"? By what standard is it to be judged? Criticism, to be fair, must be fairly expressed. The only limit is in the expression of such criticism. There is no limit in this country as to the opinion which may be expressed. A man has the right to hold any opinion he may choose and to express any opinion he likes, provided that in expressing it he does not transgress the limit of what the law calls "fair."

Although there may be no definition of that word in any decided case, perhaps because judges prefer to leave it to the jury to deal with such a well-known simple word, the words of Lord Tenterden in *Macleod* v. *Wakley*, 3 C. & P., at p. 312, are deserving of mention, being not unlike those just used by the Master of the Rolls: "Whatever is fair and can be reasonably said of the works of authors or of themselves, as connected with their works, is not actionable, unless it appear that, under the pretext of criticizing the works, the defendant takes an opportunity of attacking the character of the author, and then it will be a libel."

Assume that the writer is entitled to express his opinion, however wrong that may be, or however prejudiced, the only question is, Does such expression transgress this reasonable limit of criticism? It is the mode of expression, not the opinion expressed, which has alone to be considered in such cases—whether or not it is outside the region of "fair criticism."

In literature, as in politics or in religion, it is not easy to conceive at once what is outside such limit unless it be an attack on the author personally, some personal imputation. That, one can see at once, travels beyond the limit of public criticism altogether. Such was the question in *Campbell* v. *Spottiswoode*. The jury were asked whether the criticism was fair or whether it went beyond the limits of fair criticism and attacked the plaintiff's personal character. That case is an exact illustration of how criticism ceases to be fair because of its being an attack on personal character. There is another class of cases in which a person clearly travels out of the region of fair criticism—if he imputes to a writer that he has written something which he has not in fact written, so that it amounts to a misdescription of what has been in fact written. Disapproval of the moral tendency of a book or play is one thing. Many may think and others may say that such and such a book may have such tendency, however innocent the intentions of the author may have been. But to say that such a book or play contains a description of an adulterous wife when in fact no such wife is introduced into the work is to impute to a man the authorship of what there is not. That is outside the limit of criticism altogether, just as much as an imputation on a man's trade.

Such a case is *Turnbull* v. *Bird*. There there was no foundation for the statement; and, as Lord Campbell points out, it is not fair criticism to accuse a man of writing what he has not written. The question for us now is: Did the judge misdirect the jury at all, having regard to the construction of the libel as found by them? The libel was found to be the statement implying that the story turned upon adultery when it was admitted that it did not do so in fact. The judge was not called upon in such a case of manifest misdescription to go into *minutiæ* of illustration as to the possible meaning of the words used, as he might have been had the libel been of a different character. The jury had to deal with a positive statement of what was not. It was not a question of opinion, but of fact. If so, does not it clearly fall beyond the limit of fair criticism? and even if the summing up of the judge had not in every particular exactly defined those limits, could we, on such a state of facts, alter the findings of a jury?

I have no doubt in supporting the view of the law as laid down against the suggested plea of privilege. On the contrary, I unhesitatingly adopt that view. I have no possible doubt that a statement such as this was not mere criticism, but transgressed the limits of criticism altogether. It imputes to the author a plot which does not exist, and the jury must be taken to have found there was some other motive actuating the defendant than that of a desire for fair criticism.

Appeal dismissed.

Solicitor for the appellant, *Lamartine Yates.*

Solicitor for the respondents, *Langham*, for *Langham & Son*, Eastbourne.

High Court of Justice.

Chan. Div. } Jan. 11, 1887.
Chitty, J. }

In re SYKES.
SYKES *v.* SYKES. (*a.*)

Solicitor — Remuneration — Administration action—Order for sale of real estate—Sale by auction—Solicitor's charges—Auctioneer's charges—Solicitors Remuneration Act, 1881 (44 & 45 *Vict.* c. 44)—*General Order, schedule* 1, *part* 1, *r.* 11—*Local custom.*

A sale by auction of real property was made under an order of court in an administration action, and the conduct of the sale was given to the plaintiff, whose solicitor personally performed part of the duties of conducting the sale, the auctioneer merely offering the property in the auction room. The auctioneer was paid by the client.

Held, that the solicitor was not entitled, under the Solicitors Remuneration Order, schedule 1, *part* 1, *r.* 11, *to scale fees for his services as auctioneer, and that the existence of a local custom to the contrary did not affect this rule.**

In the above-named action, which was for the administration of the estate of Frank Sykes, a testator, an order was made for the sale of his real estate in the county of York, the plaintiff having the conduct of the sale. Subsequently to the taxation of the solicitor's costs of the sale a summons was taken out to review the taxing master's certificate, and raised the question whether, under schedule 1, part 1, r. 11, of the General Order made in pursuance of the Solicitors Remuneration Act, 1881, the plaintiffs' solicitor was or was not entitled to charge scale fees for conducting the sale.

The property was advertised to be sold by auction in ten lots, and only six of them were sold.

The bill of costs carried in for taxation by the plaintiff's solicitor pursuant to an order dated the 17th of March, 1886, comprised the sum of £23 12s. 6d. for the auctioneer's fees, and the sum of £52 10s. for the surveyor's fees, the latter sum being inclusive of valuation fees.

Six other items were also entered in the bill of costs, together amounting to £31 10s., being scale charges for conducting the sale of property by public auction.

These scale charges, together with other items, were disallowed by the taxing master.

The plaintiff objected to this disallowance on the ground that the six items were the scale charges fixed by schedule 1, part 1, of the Remuneration Order as

(*a.*) Reported by A. D. MACLAREN, Esq., Barrister-at-Law.

* See *In re Newbould* (*ante*, p. 161).

proper to be allowed to the vendor's solicitor for conducting a sale of property by public auction, including the conditions of sale when the property was sold; that there were six lots sold, and it was in respect of these lots that the charges were made; that an auctioneer was employed and paid a fee of £23 12s. 6d., but that this was merely for offering the ten lots in the auction-room, and all the real work connected with the sale was done by the solicitor.

The plaintiff also objected to the disallowance of the sum of £17 10s., being the scale fee for conducting under the same schedule in respect of the four lots not sold calculated as directed by rule 2 on the aggregate amount of the reserved prices.

The plaintiff further objected to the disallowance of the sum of £65, being the scale fee under the same schedule for deducing title and perusing and completing conveyance, including preparation of contract or conditions of sale (if any) in respect of the four lots not sold calculated as directed by rule 2 on the aggregate amount of the reserved prices. It was submitted that the solicitor should not lose his remuneration because no sale of the four lots had been effected, and that it could not have been intended by the rules that no allowance for deducing title (which included particulars and conditions of sale) should be made to the vendor's solicitor in case of an abortive sale by auction.

A fee of ten guineas was added at the end of the bill for extra labour connected with the preparation for the auction not covered by the scale fees allowed, but it was submitted that there was no authority for substituting such an allowance for the items above referred to.

The taxing master's reasons were stated to be as follows:—That, with regard to the first six items and to the £17 10s., it would be a violation of the express terms of rule 11, schedule 1, part 1 of the Remuneration Order to allow those scale fees; and that in this case £52 10s. had been paid to a surveyor for lotting the property for sale and valuing the lots, and £23 12s. 6d. to an auctioneer for offering the lots for sale.

The case of *In re Wilson*, 29 Ch. D. 790, 34 W. R. Dig. 185, was referred to.

With regard to the £65 disallowed, the taxing master did not consider it possible that the solicitor could be entitled to the scale fee for "preparing contract, deducing title, and completing" in respect of the four lots not sold.

The taxing master pointed out that the solicitor was allowed the scale fees in respect of the six lots which were sold, and, in addition, he was allowed a fee of ten guineas for extra labour incidental to the sale which such fees as the scale allowed did not appear to include.

The taxing master, in the exercise of his discretion, allowed the additional fee of ten guineas, which, in his opinion, was abundant remuneration for all the additional labour not covered by the scale fees. He further observed that the abstract and conditions of sale were common to all the lots, and their length was very slightly increased by the fact that the lots not sold were offered for sale; that the length of the particulars was increased by the description of the four unsold lots; but that, as above stated, the ten guineas allowed, as above mentioned, was sufficient remuneration for the extra work, and he overruled the objections.

The taxing master subjoined a note that the objections could not have been made in the interest of the plaintiff, in whose behalf they purported to have been brought in.

It appeared that, in accordance with the prevailing practice in the North of England, the auctioneer had merely offered the lots in the auction-room and had been paid for that only, and the surveyor for valuing, measuring, surveying, and lotting the property; but that all the work in connection with making arrangements for the sale, preparing, printing, and distributing the particulars and conditions of sale, and lithographing the sale-plan, advertising in newspapers and by bill-posting, and getting a full attendance at the auction-rooms was done by the solicitor, and all the bills for printing, advertising, &c., were sent in to the solicitor and paid by him.

On the appointment to tax and also on seeing the taxing master on the objections carried in to the taxation, the plaintiff's solicitor asked the taxing master to strike out the auctioneer's charges and permit the solicitor himself to pay them; but this the taxing master declined to do, stating that when a sale took place through the court the solicitor was not allowed to pay the auctioneer.

It was contended by the plaintiff that it was the solicitor, and not the auctioneer, who had done the work, and that *In re Wilson* was merely a decision that when the auctioneer had done the work and been paid for it the solicitor could not charge scale fees, and that this was the construction which ought to be put on rule 11.

A summons was, therefore, taken out on behalf of the plaintiff, asking that the objections to the taxation of costs in the action might be allowed, and that it might be referred back to the taxing master to vary his certificate accordingly; and that the costs of and occasioned by this application might be taxed and paid out of the residue of certain funds in court.

The summons was adjourned into court.

Dunning, in support of the summons.

G. E. S. Fryer, *contrà*.

Chitty, J.—In my opinion this case falls within the principle of *In re Wilson*. The auctioneer's and surveyor's charges were approved by the chief clerk. The auctioneer and surveyor have not been paid by the solicitor, but by the client, and the case is, therefore, exactly within schedule 1, part 1, r. 11 of the General Order made in pursuance of the Solicitors' Remuneration Act, 1881. The plaintiff's solicitor offered to pay the auctioneer, but the taxing master was right in not permitting the solicitor to pay the auctioneer, for had the solicitor had the power to make such payment, the application in chambers to the chief clerk for his sanction to the payment would not have been required. The allowance was made for what the solicitor really did. It is said that the solicitor himself has done the business which in London usually falls within the duties of the auctioneer, but that the custom in the North of England is different from that in the South. That may be so, but inasmuch as rule 11 of the General Order does not constitute any distinction between customs obtaining in different parts of the kingdom, I have no option except to refuse this application, as I think the taxing master was perfectly right. I shall, therefore, dismiss the summons, but shall make no order as to costs.

Solicitors for the plaintiff, *H. B. Clarke & Sons*, agents for *William H. Clough*, Cleckheaton, Yorkshire.

Solicitors for the defendants, *Flower & Nussey*, agents for *Carr & Cadman*, Gomersal, Yorkshire.

Q. B. Div. (Wills and Grantham, JJ.) Dec. 21.

Friend v. Shaw. (a.)

County courts—Landlord and tenant—Actions for ejectment—"Legal notice to quit"—Determination of tenancy—Jurisdiction—County Courts Act, 1856 (19 *& 20 Vict. c.* 108), *s.* 50—1 *Geo.* 4, *c.* 87, *s.* 1.

A landlord having given a tenant notice to quit for forfeiture by reason of breach of covenants under a lease, brought an action for ejectment in the county court, the rent under the lease being for less than £50.

Held, that, under section 50 *of the County Courts Act,* 1856, *the term or interest of the tenant must be determined by efflux of time or by a legal notice to quit, and that a "legal notice to quit" implied a necessary determination of the lease by law, and not under any private contract.*

Held, further, that the construction of the words "legal notice to quit" was analogous to that of the words "regular notice to quit," under 1 *Geo.* 4, *c.* 87, *and that the old cases decided under that statute applied.*

Appeal from his Honour Judge Powell, sitting at the Greenwich County Court,

The action was one for ejectment on the ground of forfeiture by the defendant through breach of covenants under a lease. The rent of the premises was £40 per annum. The defendant, the tenant, had declined to pay the full rent on the ground that the premises were unfit for human habitation, but he continued to retain possession of them for business purposes.

Cavanagh, for the defendant.—The county court judge had no jurisdiction to try this action. His jurisdiction is limited, by section 50 of the County Courts Act, 1856 (19 & 20 Vict. c. 108), to cases "where the term or interest of the tenant has expired by efflux of time, or been determined by a legal notice to quit. Determination by forfeiture is not included under the phrase "a legal notice to quit." Notice by law to determine a tenancy is not a notice under any special agreement. The phrase "a regular notice to quit" used in 1 Geo. 4, c. 87 is analogous, and the cases decided under the Act apply: *Doe d. Conyngham Tindal* v. *Roe*, 1 Dowl. 143; *Doe d. Carter* v. *Roe*, 10 M. & W. 607; *Doe d. Cundey* v. *Sharpley*, 15 M. & W. 558; *Doe d. Tindal* v. *Roe*, 2 B. & A. 922. *Barlow* v. *Teal*, 34 W. R. 54, 15 Q. B. D. 501, under the Agricultural Holdings Act, 1883, also applies.

Erichsen, for the plaintiff.—The tenancy is no longer in existence after the forfeiture. The value of the premises being under £50 the county court had jurisdiction to try the action. Such a determination is within the meaning of "legal notice." Jurisdiction was a question of fact for the county court judge to determine.

Wills, J.—I am of opinion that the objection to the jurisdiction of the county court raised by the defendant must prevail. No consent by the parties can give jurisdiction where none previously exists. As to the last point raised by the plaintiff's counsel, of course, questions of facts cannot be reviewed by us, but had this case been brought before us on an application for a writ of prohibition or a *certiorari*, we should clearly have had power to review the determination of the tribunal below on the question of jurisdiction. As it is the application comes before us by way of appeal under the statute, and it is an application on a question of law arising out of the facts found in the action. On those facts we hold that the county court judge has made a wrong finding in law. We have no fault to find with his determination on the facts, except that we should have found otherwise upon those facts, and his decision must be altered so as to be in conformity with the law as laid down in this particular statute. The appeal is, therefore, properly instituted, and properly covers a question of law with which we have power to deal. Now, does this action fall within 19 & 20 Vict. c. 108, s. 50? In my opinion it does not. The jurisdiction there given only applies where the writ of ejectment is for rent or for premises of a value not exceeding £50 per annum. Here the rent was, indeed, below that amount, and so far the action was within the section, but then there is a further limitation of the section to cases where the tenancy has expired by efflux of time or been determined by a legal notice to quit. The words are sufficiently significant. The section does not simply refer to any notice, but only to a legal notice to quit. These words must clearly have some further meaning than the wider term, and seem to have been taken from the earlier statute referred to, where the words are "a regular notice to quit." It seems clearly to have been held that a notice given under a lease does not satisfy the meaning of the description of "a regular notice to quit." The phraseology is, indeed, altered in the later statute, but it is impossible from the wording to suppose that the meaning is in any way altered; unless, indeed, the word "legal" implies even a stricter limitation than the word "regular." This case is, therefore, almost entirely governed by the cases under the old Act, and also, apart from those decisions, by the wording of the later Act, which is in substance a legislative re-enactment of the phrase on a similar subject of legislation, and in a manner possibly still further qualifying the limitation before laid down. This is clear evidence of the enactment of the same kind of limitation as that previously laid down in the old decisions on the construction of the words. What does "legal notice to quit" mean? Some reasonable effect must be given to the word "legal." It must be meant to apply to notices to quit under such circumstances that the notice to quit follows as a matter of law from the state of things existing. That may be a vague description, but it is as near a one as I can give. It clearly was not intended to give to the county courts jurisdiction over every question of title within the limit of £50, but only over cases where no question of title arose, and where a clear determination of the term or interest had ensued, one provided for by law and not by any contractual relationship established by the parties. In this case the notice could be in one sense considered illegal. We have one case as an authority to guide us as to what is an illegal notice under the Agricultural Holdings Act, 1883. In that Act the expression used is "a notice by law," instead of "a legal notice to quit." That phrase, "by law," has been held, in *Barlow* v. *Teal*, to mean a notice established by law, and not by private contract. That phrase is less free from ambiguity than the one of "legal notice to quit," but undoubtedly our construction of the latter phrase is strengthened by that decision, and it also is in harmony with the current of decisions under the older Act of George IV. I am of opinion that the defendant's contention is sound, and that the county court judge had no jurisdiction to deal with this action.

Grantham, J.—I am of the same opinion. I cannot imagine a case to which our judgment on this point could be more applicable. The causes of action are complicated and of a kind most desirable for the High Court to deal with. The county courts, indeed, at the time of the passing of the Act under consideration, had not the same extended jurisdiction as has since been given to them, but we must look at their then jurisdiction rather than at present views regarding their capabilities. It was never intended at that time to give

(a.) Reported by Spencer L. Holland, Esq., Barrister-at-Law.

them jurisdiction such as would cover this case. If this were the first case on the point, whether such a notice to quit as is now before us is equivalent to a legal notice to quit, there might be some room for doubt, but now we have got far beyond that. Decision after decision under kindred Acts and kindred legislation have been cited, and we should clearly not be justified in giving any decision contrary to these.

Appeal allowed.

Solicitors for the plaintiff, *Lucas & Sons.*

Solicitor for the defendant, *Cooper Scarr.*

Q. B. Div. (Wills and Grantham, JJ.) Dec. 10.

Emmett & Co. *v.* Heyes. (*a.*)

Practice—Costs—Reference—High Court and county court scale—Rules of 1883, *ord.* 65, *r.* 12.

An action on a partnership account was by consent referred to an arbitrator. The terms of reference were that "all matters in difference between the parties in the action" were to be referred, and that "the costs of the action" should abide the award. Subsequently to this order of reference, the parties agreed to submit to the arbitrator a further matter of account outside the action. The arbitrator awarded £40 to the plaintiff on his claim, and found that a further sum of £14 2s. was due to him on the subsequent account.

Held, that the plaintiff had recovered "in the action" less than £50, and therefore came under the provisions of ord. 65, *r.* 12, *of the Rules of* 1883, *whereby the costs recoverable are limited to county court costs in actions of contract where less than £50 is recovered, unless by leave of the court the High Court scale is allowed.*

Appeal from an order of Field, J., at chambers.

This action was one on a partnership account which had been referred by consent to an arbitrator. By the terms of the reference "all matters in difference between the parties in this action are to be referred, and the costs of the action are to abide the award."

The arbitrator found that £40 was due to the plaintiffs from the defendant up to the date of the issue of the writ. He further stated that "by consent of parties subsequent to the order of reference it was agreed that the reference should include not only the state of accounts between the parties up to the date of the commencement of the action, but also a certain account of £14 2s., which had arisen subsequently." And he found that this sum was also due from the defendant, making up the total amount due to the plaintiff to be £54 2s., with costs.

The plaintiff applied to Field, J., at chambers, to have these costs taxed on the High Court scale, in accordance with ord. 65, r. 12, as being for an amount over £50, which scale Field, J., allowed; and against this order the defendant now appealed.

Trevor White, for the defendant.—The terms of the reference limited the award of the arbitrator and the costs to matters "in the action," and only "costs in the action" were to abide the award. The plaintiff only recovered £40 in the action. The account as to the remaining £14 was by consent referred to the arbitrator, and the costs as to that were in his discretion; but neither that account nor the costs come within the original reference, and the amount recovered under that being less than £50 the costs must be on the county court scale.

Willes Chitty, for the plaintiff.—The total amount recovered by the judgment in the action exceeds £50. There is only one judgment, and that is for £54 2s.: *Ferguson* v. *Davidson*, 30 W. R. 462, 8 Q. B. D. 470, *per* Brett, L.J. The amount is to be tested by the verdict, and the finding of the arbitrator is equivalent to a verdict under section 5 of the County Courts Act, 1867 (30 & 31 Vict. c. 142). The matter is one for the discretion of the court, and upon the merits the plaintiff is entitled to High Court costs.

Wills, J.—I am of opinion that this appeal ought to succeed. The order of reference as agreed to by the parties ordered that "all matters of difference in this action" were to be referred to an arbitrator, and "the costs in the action" were to abide the award. The parties subsequently agree to submit to the arbitrator certain matters of difference not included in the action. The award is separable. Up to the date of the action the arbitrator finds that £40 only is due to the plaintiff, but that a further sum of £14 2s. is also due on a matter outside the action, and possibly outside the terms of the reference altogether. At any rate, this second sum was due after the cause of action accrued and after the writ in the action was issued. The costs of the action are not to abide the gross event of the award, whatever that might be, but the event, so far as it was applicable to the action.

As to costs outside the action itself, they are not really provided for by the provisions of the reference. That expression must be read divisibly: the costs of the action are to abide the legal event of the award, which is for £40. That is clear, and I should only hesitate to be of that opinion because of the decision of Field, J. As it is, I cannot, however, doubt that that is the proper way to treat this award. Otherwise the result would be most unfortunate, because the defendant, who had agreed to refer this other matter to the arbitrator, very reasonably, in order to put an end to further disputes, would find himself saddled with High Court costs; whereas, if he had declined—as he had a right to do—to submit this outside question, the costs must have been on the county court scale. He cannot be held to have agreed to any such result. Such would be an unreasonable decision. The words of the reference are very clear, and I think it would be going contrary to the statute to hold otherwise.

As to the fact that only one judgment is signed for the whole amount, that is a mere method of avoiding the signing of two judgments for the amounts separately; and the mere signing of such judgment for £54 does not affect the legal result of the award in the action, which is for £40. The costs of that award are to abide that event; and that is £40 and no more.

Grantham, J.—I am of the same opinion, and I should have been sorry if we could not have found that this result was right in law. As it is, I have no doubt of the legal effect of the judgment in this action, which is an award for £40.

The Court further held that, on the merits of the case, the costs should only be allowed on the county court scale.

Appeal allowed.

Solicitors for the plaintiff, *Pritchard, Englefield, & Co.*, for *Storer, Taylor, & Co.*, Manchester.

Solicitors for the defendant, *Chester & Co.*, for *Crofton & Craven*, Manchester.

(*a.*) Reported by Spencer L. Holland, Esq., Barrister-at-Law.

Q. B. Div. (A. L. Smith and Charles, JJ.) Nov. 12.

ENGLISH AND SCOTTISH TRUST CO. v. FLATAU. (a.)

Practice—Indemnity—Principals and surety—Claim against co-defendant—Judgment under ord. 16, *r.* 55.

A defendant who is entitled to an indemnity from a co-defendant upon a special agreement is entitled to sign judgment against his co-defendant for the amount of his (the defendant's) liability before he has actually paid anything in discharge of it.

This was an action brought by a limited company against a firm consisting of Messrs. John Nathaniel Flatau, Alfred Louis Elborough, William Charriere Elborough, and Charles Edward Eden, for a sum of £4,000 for money lent. Proceedings were taken under order 14 and judgment was signed against all the defendants except the defendant Eden, who obtained leave to defend on bringing the whole sum into court. Eden, who had been indemnified against liability for the money, then took out a summons under ord. 16, rr. 52, 55, for leave to sign judgment against his co-defendants Flatau and Messrs. Elborough, upon their agreement to indemnify him, or for directions.

The question was referred to Pollock, B., at chambers, who refused the application.

The defendant Eden appealed.

Sidney Woolf, for the appellant.—It is true that the general rule is that an ordinary surety cannot sue the principal debtor until he has been compelled to pay something to the creditor. But this case is different. Here there was a special indemnity agreement between Flatau and Messrs. Elborough of the one part and Eden of the other. Under that special agreement Eden is entitled to sign judgment, because the amount which he would ultimately have to pay the creditor cannot be affected by the alleged counter-claim. Ord. 16, rr. 52, 55, applies to this case, as there is here "no real issue to be tried."

Mews, for the defendants Flatau and Messrs. Elborough.—Flatau has a counter-claim for negligence, which would be an answer to any claim against him by Eden. He ought not to be deprived of any right of defence when he shows that there is a question to be tried: *Gloucestershire Banking Co.* v. *Phillips*, 32 W. R. 522, 12 Q. B. D. 533. The Judicature Act gave no new remedy; it only altered procedure. The money not having been paid by Eden judgment cannot be given against Flatau. That was the case before the Judicature Act both in law and equity, and it has not been altered. Under the old Bankruptcy Rules a surety could not prove for a contingent debt. A man must have been compelled to pay, not merely compellable: *Exall* v. *Partridge*, 8 T. R. 308. An action *quia timet* in equity would not have gone so far as to include a claim like this: *Padwick* v. *Stanley*, 9 Hare, 627.

Chitty, for the plaintiffs.—Under rule 55 the plaintiffs are entitled to be paid at once, and it will prejudice them if judgment is given against Flatau and any delay is interposed. They are also entitled to select whom they will go against. The notice by third parties and the giving of directions is only resorted to when the defendants defend the action. Here there is no defence, and the object of the rule—namely, the prevention of a second trial of the same question—cannot arise. Eden is out of time for paying money into court, and he has no defence whatever to the action. The plaintiffs are entitled to immediate judgment.

A. L. SMITH, J.—This is an application by way of appeal from the decision of Pollock, B., at chambers, who refused to act as requested under rule 55 of order 16. I think that if all the facts had been before Pollock, B., he would have come to the same decision as we have in this case.

The English and Scottish Trust Co. (Limited) lent Flatau £4,000, for which Eden and Messrs. Elborough were security. At the same time indemnity was given by Flatau to Messrs. Elborough by an agreement dated the 19th of March, 1887; and a further special indemnity was given by Flatau and Messrs. Elborough to Eden, they being the principal debtors. This latter agreement was made known to the plaintiffs, who took by way of surety the names of Messrs. Elborough.

In September the plaintiffs issued a writ against Flatau and the sureties, and on the 1st of October they recovered judgment against Flatau and Messrs. Elborough by default, but Eden obtained leave to defend upon payment of £4,000 into court. It is sworn that the plaintiffs' and Messrs. Elborough's solicitors are the same, and it is suggested that they will not take proper steps to get this money from the principal debtor, although they are aware of the indemnity.

Under these circumstances Eden served a third party notice on Flatau and Messrs. Elborough, and asked the court to bring into play ord. 16, r. 55. Under rule 52 of that order, the provisions of which apply when the court is satisfied that there is no real issue to be tried, it may order such judgment as the nature of the case may require to be entered, in favour of the defendant giving the notice, against the third party.

Eden says that he is entitled to judgment against Flatau, but it is urged that he cannot sue upon that agreement until he has paid the money. In my judgment, upon a special bargain such as this is Eden is entitled to sue as soon as he shows legal liability. In Bullen and Leake, *sub. tit.* Contract of Indemnity, I find that in averring damage the author says, "whereby the plaintiff became liable to pay." That is not an authority, but as only one or two of these counts has ever been found defective—so far as I know—it is very good ground for believing that there is authority.

The case of *Randal* v. *Roper*, 6 W. R. 445, 27 L. J. Q. B. 266, is an express authority as to the right to sue upon a special bargain. This has no reference to a count for money paid. The first point, therefore, taken by the defendant Flatau in my opinion fails. Then it is said that Flatau has a counter-claim against Eden. I have taken the trouble to look at the counter-claim, and I can see nothing in it whatever. In my opinion the claim is an undefended one and Eden is entitled to judgment. I think the proper order should be that Eden be at liberty to sign judgment forthwith against Flatau, and that his solicitor gives a personal undertaking for the payment of any money received under the judgment into court, and that Eden have another week to pay the sum of £4,000. I do not think that the plaintiffs can be prejudiced by such an order.

CHARLES, J.—I am of the same opinion. The question is whether a suit can be brought upon a special agreement to indemnify when no money has been paid under it. I think it can. An express contract of indemnity differs in this from an ordinary suretyship contract. *Randal* v. *Roper* is an authority for saying that money need not necessarily have been paid before action brought. There it was held that a first purchaser could sue his vendor for what he was bound to pay, though he had not yet paid, to a sub-purchaser. Flatau, in my opinion, has no answer to the action, and his counter-claim has no substance in it. The plaintiffs will

(a.) Reported by CECIL CHAPMAN, Esq., Barrister-at-Law.

not, in my opinion, be prejudiced by the judgment suggested by my brother Smith, with which I concur.

Solicitors for the defendant Eden, *Hatchett, Jones, & Co.*

Solicitors for the defendants Flatau and Messrs. Elborough, *H. A. Bryden.*

Solicitor for the plaintiffs, *John M. Mitchell.*

Q. B. Div. (Lord Coleridge, C.J., and Denman, J.) June 13, 14; July 6.

REG. v. MAYOR OF POOLE. (*a.*)

Municipal corporation—Liability to repair highway—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 144 *—Form of indictment—"Against the form of the statute."*

An indictment having been preferred against a municipal corporation for non-repair of a highway within their borough, a verdict was found for the Crown.

The indictment did not show on the face of it the kind of liability sought to be imposed upon the defendants, nor did it contain any statement as to the neglect alleged being "against the form of the statute."

Held, that the defendants were entitled to judgment non obstante veredicto *on the grounds that* (1) *the indictment was bad beyond power of amendment;* (2) *they were not indictable for non-repair under the Public Health Act of* 1875, *although they might be if the preliminary steps required by* 5 & 6 *Will.* 4, *c.* 50, *s.* 20, *were taken.*

Rule *nisi* for a new trial on the grounds of misdirection and that the verdict was against the weight of evidence, or for judgment *non obstante veredicto.*

Two indictments were preferred against the defendants, the Mayor and Corporation of Poole, as the urban sanitary authority of the district, for the non-repair of two highways, and alleging respectively that "the mayor, aldermen, and burgesses of the town and county of the town and borough of Poole, acting by the council as the sanitary authority for the urban sanitary district of the said town and county and district, ought to repair and amend the said common highway being in decay as aforesaid when and as often as it shall be necessary." There was no allegation to show how the defendants were liable, nor any statement as to the neglect alleged being "against the form of the statute."

The indictments having been removed by *certiorari*, were tried by Mathew, J., and a special jury at the Dorchester Assizes, and a verdict was found for the Crown. The learned judge at the trial intimated his willingness to make any amendment within his powers, though no amendment was, in fact, made.

B. Fossett Lock (*Charles, Q.C.*, with him) showed cause.—The urban sanitary authority is indictable. The duty of repairing is expressly imposed on them by section 149 of the Public Health Act, 1875, by which the streets are also vested in them. Indictment is the proper remedy. Under section 144 they are not merely surveyors of highways, but also have all the "powers, authorities, duties, and liabilities" under the Highway Acts of the inhabitants in vestry assembled of any parish within the district. Consequently all the machinery by which the inhabitants, if indicted, could silence *inter se* their liability, has been taken from them and given to the sanitary authority, including the power to make rates to defray expenses, which in urban sanitary districts are to be paid out of the general district rate: Public Health Act, 1875, *s.* 216. This was not the case in *R.* v. *St. George's, Hanover-square,* 3 Camp. 222, which was also the converse of the present case. Under the Public Health Acts it was clearly intended by the Legislature that the authority should be indictable and that the inhabitants should not. And this was right, for the sanitary authority is a corporation. When the liability to repair is imposed on a corporation, whether by presumption or otherwise, the inhabitants cease to be liable: *R.* v. *St. Giles', Cambridge,* 5 M. & S. 260, 2 Inst. 700. This indictment is sufficient. The defendants are indicted as the urban sanitary authority, which is a creature of statute only, therefore statutory liability is alleged. It is not necessary to state the particular statute if the offence be described in the words of the statute. Here the words of section 149 of the Public Health Act, 1875, are substantially followed. Nor is it necessary to add "against the form of the statute." No indictment is bad for "want of a proper or formal conclusion": 14 & 15 Vict. c. 100, s. 24; *Reg.* v. *Castro,* 29 W. R. 669, 6 App. Cas. 229. There is no ground for the suggestion that the verdict was against the weight of evidence.

Alderson Foote, in support of the rule.—The form of the indictment is bad in that it does not show that a statutory obligation is relied on or how that obligation arose. The defendants are not indictable under the Public Health Act, 1875. They are in the position of the old surveyors of highways, who could not be indicted for neglect: *Young* v. *Davis,* 11 W. R. 735, 1 H. & C. 197. The procedure by which the statutory duty could be enforced would be summary proceedings for a penalty under section 20 of the Highway Act, 1835, or by application to justices under sections 94, 95. There is no power by statute to proceed against an urban sanitary authority by the old common law indictment which could be preferred against the inhabitants of a parish. Lastly, the roads in question were not laid out under the Inclosure Act (42 Geo. 3, c. 109, s. 9).

The following cases were also cited: *Parsons* v. *St. Matthew, Bethnal Green,* 16 W. R. 85, L. R. 3 C. P. 56; *Gibson* v. *Mayor of Preston,* 18 W. R. 689, L. R. 5 Q. B. 218; *Loughborough Highway Board* v. *Curzon,* 34 W. R. 621, 17 Q. B. D. 344; *Hartnall* v. *Ryde Commissioners,* 11 W. R. 963, 4 B. & S. 361, 12 W. R. Dig. 60; *Ohrby* v. *Ryde Commissioners,* 12 W. R. 1079, 5 B. & S. 743; *Kent* v. *Worthing Local Board,* 31 W. R. 583, 10 Q. B. D. 118; *Smith* v. *West Derby Local Board,* 27 W. R. 137, 38 L. T. N. S. 716; *Moore* v. *Lambeth Waterworks Co.,* 34 W. R. 559, 17 Q. B. D. 462.

Cur. adv. vult.

July 6.— The judgment of the court (Lord COLERIDGE, C.J., and DENMAN, J.) was delivered by

Lord COLERIDGE, C.J., who, after stating the facts, continued as follows:—As regards the omission of the words "against the form of the statute," it is laid down in Hawkins' Pleas of the Crown, vol. 4, Indictment, s. 116, that "If an offence indicted be only prohibited by statute, and not by common law, and the indictment do not conclude '*contra formam statuti*,' it is wholly insufficient, and no judgment can be given upon it." This appears to have been decided in several cases, and we think it is applicable to a case like the present, where a criminal neglect of duty is charged against a corporation, who, in the absence of a statute, would clearly not be persons liable to be indicted for the non-repair of a highway.

So far from containing anything to cure this defect in the indictment, we find that the statutes relating to indictments are so worded as to exclude any power to amend this particular defect, or to authorise us to treat it as immaterial. The power of amendment of indict-

(*a.*) Reported by G. K. PALEY, Esq., Barrister-at-Law.

ments is very limited. The 9 Geo. 4, c. 15 was confined to the case of variances between the record and any matter in writing or print produced in evidence in misdemeanours. The 11 & 12 Vict. c. 46 only carried the power further by applying the same provision to all criminal trials. The 14 & 15 Vict. c. 100, s. 1, enumerates the cases in which amendment is to be allowed. They are numerous; but there is no power given to amend by inserting the words "against the form of the statute" in cases where a statutable misdeameanour is proved and the words have been omitted. The 24th section of that same Act seems conclusive against any such power; for it deals with the very words in a manner wholly inconsistent with any such intention. Again, referring to Hawkins, vol. 4, s. 117, we find this passage: "If there be more than one statute concerning the same offence, and the first of them was never discontinued, and the latter only continue the power without making any addition to it or only qualify the method of proceeding upon it, without altering the substance of its provision, it seems agreed that it is safer in an indictment on any such statute to conclude '*contra formam statuti*,' and it hath been holden that a conclusion '*contra formam statutorum*' will in such cases vitiate the prosecution."

With this before him, in a statute intended to get rid of all over-technical objections to indictments in kindred respects, the draftsman of section 24 of 11 & 12 Vict. c. 100 has provided as follows: "No indictment for any offence shall be held insufficient" (amongst other things) "for the insertion of the words 'against the form of the statute' instead of 'against the form of the statutes,' or *vice versâ*." We think it impossible to read this clause without being convinced that the framer of the enactment deliberately abstained from enacting that in a case where the liability to do an act was imposed by statute, and an indictment was preferred for the violation of a duty so imposed, it should be henceforth competent to the prosecutor to treat the case exactly in the same way in which it would be treated if the neglect alleged were that of a duty imposed by the common law.

Then arises the question whether this is a formal defect apparent on the face of the indictment, or an objection which cannot be taken after the jury are sworn, according to section 25 of the same Act. The very authorities referred to in the passages in Hawkins, above cited, were to the effect that the omission to conclude "*contra formam statuti*" was a fatal objection in arrest of judgment. We do not think that the objection can be considered a formal one any more than the omission of the word "feloniously" would be upon a charge of arson, or "*scienter*" in a case of receiving, which was held to be incurable after verdict by Lord Campbell and the court of criminal appeal in *Reg.* v. *Larkin*, 2 W. R. 496, only two years after the passing of the statute. The indictment fails to give the defendants notice of the kind of liability which it is intended to fix them with. The cases of *Reg.* v. *Sill*, 1 W. R. 147, 22 L. J. (M. C.) 41, and *Reg.* v. *Lardin* are illustrations of the distinction between mere formal defects and defects of which advantage may be taken after verdict.

We think section 25 of the Act must be construed with reasonable reference to section 24, and that for the reasons already given it would be contrary to the intention of the Act to hold that either section was intended to repeal the law as laid down in Hawkins. We therefore think that the defendants are entitled to judgment *non obstante veredicto* on this ground.

We are confirmed in our opinion that the above objection is fatal by the consideration that the questions raised by Mr. Foote as to the liability of the defendants are questions of very great nicety, and that, if the defendants are liable under the statutes to an indictment at all, it is not unreasonable to require that the circumstances creating their liability should be shown on the face of the indictment in such a way that the court might see whether the indictment does or does not show a legal liability; or, at least, that the indictment should inform the defendants whether they are being prosecuted for a common law or a statutory offence.

But, even assuming that in this case the indictment is sufficient without amendment, or, if not, that an amendment could be and was made, we are of opinion that the defendants are entitled to judgment. The liability of the defendants as urban sanitary authority is created by section 144 of the Public Health Act, 1875. The first branch of that section makes the urban sanitary authority subject to all the liabilities of surveyors of highways under the law for the time being in force. No authority has been cited to show that a surveyor of highways (against whom it was decided long ago in *Young* v. *Davis* that an action will not lie) was ever liable to be indicted for the non-repair of a highway. The only persons liable to be indicted were the inhabitants of the parish or the other person or persons liable to bear the burden of repair (see *Loughborough Highway Board* v. *Curzon*.) The case of *Gibson* v. *Mayor of Preston*, in which all the authorities were reviewed, is entirely to this effect, and is recognized, though distinguished, in *Kent* v. *Worthing Local Board*, the only case in which a local board has been held liable to an action for an omission of any of the duties in relation to highways imposed upon them by the Public Health Act, 1875. That case, however, was decided wholly upon the difference or supposed difference between the mere neglect to repair highways and what the court held to be the doing of an act in such a way as to become a nuisance, a distinction which must be considered doubtful after the case of *Moore* v. *Lambeth Waterworks Co.* in the Court of Appeal, in which it is spoken of as the only case in which a local board had been held liable for an act of omission or a mere nonfeasance, and said to be a case only to be supported on grounds quite inapplicable to a case of mere non-repair of a highway.

One conclusive reason for holding that a surveyor could not be indicted for the non-repair of a highway is that, by the law existing as long as surveyors were the only persons appointed for the purpose of attending to such matters on behalf of a parish, at all events since 5 & 6 Will. 4, the surveyor could be punished by specific methods provided by statute; so that it sufficiently appeared from the statute regulating their conduct that it was the intention of the Legislature to provide a different punishment for disobedience to the statute from a prosecution by indictment.

Section 20 of 5 & 6 Will. 4, c. 50 provides that for any neglect of duty for which no particular penalty is by that Act imposed the surveyor shall forfeit £5. Section 144 of the Public Health Act, 1875, also provides that the urban sanitary authority shall be subject to all the duties and liabilities which, by the Highway Act, 1835, or any Act amending the same, are vested in and given to the inhabitants in vestry assembled.

But the liability to an indictment at common law cannot be intended to be a liability which was imposed upon the inhabitants in vestry assembled. No assembly of the vestry was required to constitute such liability. Nor was it a liability imposed by the Highway Act or any other Act. It existed wholly independently of the Acts, though the Acts contained certain provisions limiting the cases in which, and the terms upon which, indictments might be successfully preferred in accordance with the provisions of the Acts. There is nothing, as far as we can see, in the 144th section of the Public Health Act, 1875, nor in any of the existing Acts, to make the urban sanitary authority liable to a common law indictment for neglecting those duties which they have imposed upon them either as surveyors of the highways or as inhabitants in vestry assembled. If their liability is to be established in the latter capacity we

think it could only be upon an indictment preferred according to the provisions of 5 & 6 Will. 4, c. 50, after the preliminary steps thereby required, and not as persons liable at common law, to be indicted as though they were the persons liable for repair in the same sense in which the parish or other persons liable *ratione tenuræ* are liable.

Mr. Foote relied upon another point—viz., that the roads in question had not been set out under the Inclosure Acts. But this was a point, as we understood, not raised at the trial—at all events, not so insisted upon as that we should be justified in setting aside the verdict. It is a matter which might very easily have been taken as proved in the absence of special attention being called to it. But, for the reasons given above, we are of opinion that the defendants are entitled to judgment *non obstante veredicto*, the indictments not alleging a case of liability in the defendants upon which the jury were warranted in finding any verdict against them and the statute not creating any such liability, even if the indictment had alleged all the circumstances upon which the prosecution relied.

Judgment for the defendants.

Note.—Lord Coleridge, C.J., and Denman, J., have recently announced that when they expressed their view of the proper interpretation to be placed on the words of 14 & 15 Vict. c. 100, s. 24, they were not aware that the section had been otherwise interpreted by the House of Lords in *Reg.* v. *Castro*. If the decision had been present to their minds it would have been their duty to defer to it. So much, therefore, of the judgment of the Divisional Court as conflicts with the decision of the House of Lords should not be considered as good law.

Solicitors for the prosecution, *Brownlow & Howe*, for *Edward Seymour Clark*, Wareham.

Solicitors for the defendants, *Prior, Church, & Adams*, for *H. W. Dickinson*, Poole.

House of Lords.

From Court of Session (Scotland). May 20.

Commissioners of Inland Revenue v. Glasgow and South-Western Railway Co. (a.)

Stamp Act, 1870 (33 & 34 *Vict.* c. 97), s. 70, *and schedule*—Ad valorem *duty—Conveyance on sale—Compulsory sale under Lands Clauses Consolidation (Scotland) Act*, 1845 (8 & 9 *Vict.* c. 19)—*Compensation for loss of business.*

A railway company gave notice to the owners of certain saw-mills of their intention to purchase their premises compulsorily. A jury summoned under the Lands Clauses Consolidation (Scotland) Act, 1845, *assessed a certain sum as the value of the land and buildings and £9,500 as compensation for loss of business. The conveyance to the railway company recited these assessments.*

The Stamp Act of 1870 *provides in the schedule for an ad valorem duty on every "conveyance on sale of any property," to be calculated upon the "amount or value of the consideration for the sale," and, by section* 70, *"conveyance on sale" includes "every instrument . . . whereby any property, upon the sale thereof, is legally or equitably transferred to or vested in the purchaser."*

By section 48 *of the Lands Clauses Consolidation (Scotland) Act*, 1845, *the jury shall deliver their verdict as to the "value of lands to be purchased."*

Held, that the total sum, including the £9,500, assessed by the jury was the value of the lands to be purchased, and, as part of the consideration for the sale, was liable to the ad valorem *duty.*

Decision of the Court of Session (*reported* 13 *Court Sess. Cas., 4th series*, 480) *reversed.*

This was an appeal from the First Division of the Court of Session as the court of exchequer in Scotland, upon a case stated under the Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 19.

In 1885 the respondent company gave notice to Messrs. Sommerville & Co., saw-millers, of their intention to purchase their premises for the purposes of the railway.

A jury summoned under the Lands Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 19), assessed the compensation to be paid as follows:—£28,586 2s. 1d. as the value of the land, £14,572 16s. 3d. as the value of the buildings, &c., and £9,499 8s. 3d. as compensation for loss of business.

A conveyance of the property was executed, which recited these findings of the jury, and the appellants claimed duty on the total sum, the respondents contending that the £9,499 8s. 3d. ought to be excluded, as not being, in fact, part of the consideration for the sale.

Section 48 of the Act of 1845 provides that "Where such inquiry shall relate to the value of lands to be purchased, and also to compensation claimed for injury done or to be done to the lands held therewith, the jury shall deliver their verdict, by a majority of their number, separately for the sum of money to be paid for the purchase of the lands required for the works . . . and for the sum of money to be paid by way of compensation for the damage (if any) to be sustained by the owner of the lands by reason of severing of the lands . . ."

The schedule of the Stamp Act, 1870, provides that an *ad valorem* duty shall be paid on every "conveyance or transfer on sale of any property (except, &c.,), where the amount or value of the consideration for the sale does not exceed £5 . . . 6d.," &c.

Section 70 of the Stamp Act, 1870, provides that "the term 'conveyance on sale' includes every instrument . . . whereby any property upon the sale thereof is legally or equitably transferred to or vested in the purchaser . . ."

The Court of Session (*dissentiente* Lord Shand) held that the £9,499 8s. 3d. was not part of the consideration.

The appellants appealed to the House of Lords.

May 20.—*MacDonald* (Lord Advocate), *Sir R. Webster, A.G., Robertson, S.G.* (Scotland), and *A. J. Young* (of the Scotch bar), for the appellants.—Sections 3, 48, and 74 of the Act of 1845 show that the only duty the jury can perform in such a case as this is to assess the value of the property, and that value in this case is the total sum awarded, including the £9,500 for loss of business.

They cited *Potter* v. *Commissioners of Inland Revenue*, 10 Ex. 147, and *Pile* v. *Pile*, 24 W. R. 1003, 3 Ch. D. 36.

Balfour, Q C. (of the Scotch bar), and *R. S. Wright*, for the respondents.—This sum is awarded for loss of business solely, and not as part of the price. If Sommerville & Co. had been occupiers only, they would have received this sum, although they conveyed nothing to the railway company.

No reply was required.

Lord Halsbury, C.—I cannot say that any doubt has been infused into my mind by the arguments

(a.) Reported by C. G. Napier Trollope, Esq., Barrister-at-Law.

which have been addressed to us by Mr. Balfour and Mr. Wright. The matter seems to me to be an exceedingly plain one. That which the railway company had, under the powers of the Act, power to do was to take land compulsorily from the owners, and the statute has provided the machinery by which the price at which it is to be taken should be ascertained. The parties may, if they please, agree, but, if they do not agree, the price is to be ascertained as between them, and two subject-matters are dealt with by the statute—one the value of the property so taken, and the other the question of severing the property so taken from the lands held therewith.

The 48th section of the statute is that which in truth we are at present construing; because this is a proceeding under the 48th section, and, although the other sections may be quoted to throw light upon, and to interpret the language of that section, that which your lordships are at present considering is proceedings under the 48th section. That section expressly provides:—"Where such inquiry shall relate to the value of lands to be purchased, and also to compensation claimed for injury done, or to be done, to the lands held therewith, the jury shall deliver their verdict," and so on; and the latter part of the section refers to severance. The two things, and the only two things, which are within the ambit and contemplation of the statute, are the nature of the lands, and such damages as may arise to other lands held therewith by reason of the particular land which is taken being taken from them.

Now that seems to be at the foundation of the whole argument. That was alone what the jury in this case had power to assess, because it is admitted that no question arises here upon the other part of the section, no question arises here about any damage from severance. It is admitted, therefore, impliedly that the only thing which the jury had here to assess was the value of the land. Of course, the word "value" is a relative term, and in ascertaining what is the value of the land it is extremely common, indeed it is inevitable, to go into a great number of circumstances by which that which is proper compensation to be paid for the transfer of one man's property to another is to be ascertained. A whole nomenclature has been inserted by gentlemen who devote themselves to the consideration of such questions, and sometimes I cannot help thinking that the language which they have employed, so familiar and common in respect of such subjects, is treated as though it were the language of the Legislature itself. We, however, must be guided by what the language of the Legislature is. Now the language of the Legislature is this, that what the jury have to ascertain is the value of the land. In treating of that value, the value under the circumstances to the person who is compelled to sell (because the statute compels him to do so) may be naturally and properly and justly taken into account; and when such phrases as "damages for loss of business" or "compensation for the goodwill" taken from the person are used in a loose and general sense they are not inaccurate for giving verbal expression to what everybody understands as a matter of business; but, in strictness, the thing which is to be ascertained is the price to be paid for the land—that land with all the potentialities of it, with all the actual use of it by the person who holds it, is to be considered by those who have to assess the compensation. As Mr. Balfour has pointed out, the language used in this narrative may not, perhaps, be strictly accurate. I am by no means certain that it is; but suppose it is not, suppose that the jury or the conveyancer who drew this deed has, in the narrative, introduced a description of the different elements by which the gross sum is to be ascertained, and has inaccurately used phrases not altogether appropriate to the particular transaction which they describe, what does that come to? The thing which the railway company had to pay, and the thing which the owners of the land had to transfer by this compulsory process, was, on the one hand, £52,658 6s. 7d., including this £9,499 8s. 3d., and, on the other hand, the lands and premises which were the subject-matter of the transaction.

Under these circumstances it seems to me to be beyond all doubt that that which is to be paid as stamp duty is the *ad valorem* stamp on the transaction itself which conveyed from the one to the other that which by the process of this Act of Parliament is ascertained to be the value; and that is, under the express language of the 48th section, the value of the land. If it is the value of the land, it cannot be doubted that the *ad valorem* stamp must be put upon that value. It appears to me, therefore, beyond all doubt that the judgment of the court below ought to be reversed, and that your lordships ought to affirm the original judgment of the commissioners, and so I move your lordships.

Lord Watson.—I also am of opinion that the judgment of the Court of Session in this case cannot be sustained. The learned judges of the majority appear to me to have fallen into error from assuming that the Lands Clauses Act authorizes persons whose property is taken to claim, and compels railway companies to pay, something in the nature of personal damage. That view is very distinctly expressed by Lord Muir; but it appears to me to be entirely inconsistent with the provisions of the Act. As I read these provisions, the statute authorises, in the first place, compensation for land or an interest in land. By "compensation" is meant an equivalent for that which the railway company take and acquire, and which the proprietor gives up to them. Then, in the second place, these provisions contemplate damages for injury occasioned to lands which are not taken, by reason of the execution of the company's works upon the land taken.

In this case the jury, following the terms of the claim which was lodged by the landowner in answer to the notice to treat given by the railway company, have found the former entitled to £9,500 for loss of business. I do not think that claim would be sustainable if the words in which it is described did correctly express the legal category to which the claim itself belongs. You cannot discover, from the words which are used to describe the sum, that it was claimed as compensation for an interest in land; but I entertain no doubt whatever that it was meant to do so, and that it was so treated by the jury. In assessing the value of the property, or, in other words, the consideration which the railway company ought to pay for the land, or interest in land which they take, it has become the practice of claimants to state the various items into which that price or consideration is capable of being resolved, and ask the jury to consider these separately.

When a proprietor, instead of letting his land to a tenant, occupies it himself for the purposes of trade, that is a special kind of occupancy which must be taken into account in estimating the value of the land; and the claim made here, which was affirmed by the jury to the extent of £9,500, was obviously intended to cover the loss which Somerville & Co. sustained by reason of their having to give up the occupancy of the saw-mills which the railway company took for the purposes of their undertaking. Upon that footing it is an item of value which is rightly included in the price. In the view which the majority of the court below seem to have taken of it it was an item which could not be made matter of charge against the railway company. The Lord President points out what is perfectly true—that occupancy may be severed from ownership. The owner may let to a tenant, and in that case the proprietor's claim would cover only the first two items in the finding of the jury. Upon the third item the railway company would in that case have to deal with the tenant, and to

satisfy his claim for loss of occupancy, which would be greater or less according to the duration of his lease. But then the learned judge goes on to say this, comparing the case of a proprietor occupying his own premises for the purposes of trade with the case of his letting them to other traders:—"Now, does it make any difference that the two characters of proprietor and tenant or occupier are combined in the same person, or does that circumstance of the combination of these two characters affect the nature of the compensation for loss of business which was awarded by the verdict of the jury? I think not." Upon that point I cannot come to the same conclusion as his lordship. Occupancy is a right incidental to property; it passes with a disposition of property, unless it has been severed from it by a lease, in which case the tenant's right becomes a burden upon that of the proprietor. The difference between the two cases, and to my mind the essential difference, is this, that in one case the disposition of Sommerville & Co. carries the whole right of occupancy from the date of entry specified in the deed, in the other case it would not carry any right of occupancy until the expiry of the tenant's lease, and therefore no such item as this could have been claimed by the owner had the currency of the lease been for a considerable period.

It is argued that the sum of £9,500 is not consideration for any right taken by the company or conveyed to the company by Sommerville & Co. If I am right in saying that it is a sum paid in respect of the company taking from them, and becoming possessed of, their exclusive right of occupancy, that is not so. The deed of conveyance, in which the consideration is inserted, gives the company the right of occupancy. So far as I know it is their only title to it; and if Sommerville & Co. refused to give up possession, the railway company's remedy would lie in founding upon the deed of conveyance as giving them the right of occupancy; they have no other title, so far as I can see. In these circumstances I cannot doubt that they have got in return for that sum the very subject, the very interest in the estate, for which it was intended that compensation should be given.

Upon these grounds I have come to the conclusion that the judgment of the court below ought to be reversed.

Lord Fitzgerald.—For the reasons given by the noble and learned lord, the Lord Chancellor, and by the noble and learned lord opposite (Lord Watson), I am of opinion that the interlocutor of the 22nd of January, 1886, by which the Court of Exchequer in Scotland determined "that the sum of £9,499 8s. 3d. sterling is not to be reckoned part of the consideration for the sale on which the conveyance mentioned in the case was granted," should be reversed, and that the determination of the Commissioners of Inland Revenue should be restored.

The conveyance in question is undoubtedly a conveyance on the sale of property, whereby property was legally transferred to the railway company. What was the property so transferred? The lands in question—the conveyance of the lands carrying by its very force the right to the immediate possession—and thus determining the occupation of the vendor. From the conveyance the £9,499 8s. 3d. seems to have been apportioned by the jury as compensation for loss of business. But how was that loss occasioned? The answer must necessarily be, by the determination on the conveyance of the vendors' right to possession and occupation of the lands. The conveyance then appropriately goes on to say, "said three sums amounting in all to the sum of £52,658 6s. 7d." That sum, no matter how you may subdivide it, no matter how you deal with it, is the price to be paid by the railway company in one shape or other for the right to the lands and the immediate occupation, and, in my judgment, forms the consideration for the sale.

Lord Macnaghten.—I entirely agree. The Glasgow and South-Western Railway Co. require to purchase and take for the purpose of their undertaking certain lands belonging to Messrs. Sommerville & Co., who were saw-millers and timber merchants. Messrs. Sommerville & Co. were in occupation of those lands for the purposes of their trade. The railway company gave a notice to treat under the Lands Clauses Consolidation Act in the usual form. In answer to that notice Messrs. Sommerville & Co. sent in their claim: it was a claim in respect of those lands. That was the only claim they could make in answer to the notice to treat. They divided their claim into three heads. That was a convenient mode for enabling the jury to ascertain what was the sum proper to be paid under the circumstances; but still the sum, however arrived at, was purchase-money or compensation for the lands, and it was awarded as such; in fact the jury had no power to award Messrs. Sommerville a single farthing except as compensation in respect of the lands.

Now the Lands Clauses Consolidation Act prohibits a railway company from entering upon any lands, except by consent, until payment or deposit of the purchase-money or compensation agreed or awarded to be paid. It seems to me impossible to contend that the consideration for the sale of the lands was anything less than the full amount of purchase-money or compensation ascertained in accordance with the Act and required by the Act to be paid or deposited before entry.

Judgment appealed from reversed; determination of the Commissioners of Inland Revenue affirmed. Respondents to pay to appellants the costs of the appeal to this House and the costs below.

Solicitor for the appellants, *Solicitor for England to Board of Inland Revenue*, for *Solicitor for Scotland to Board of Inland Revenue*, Edinburgh.

Solicitor for the respondents, *W. A. Lock*, for *John Clerk Brodie & Sons, W.S., Edinburgh.*

From C. A. (England) March 31; April 1; May 20.

Ind v. Emmerson. (a.)

Discovery—Production of documents—Ejectment—Defence of possession and purchaser for value without notice.—Judicature Act 1873 (36 & 37 *Vict. c.* 66), *s.* 24 (2)—*R. S. C.* 1883, *ord.* 37, *rr.* 1, 14.

An action was brought in the Chancery Division for the recovery of land and for the delivery up of title deeds. Upon a summons for production of documents, the defendants raised the objection that they were purchasers for value without notice, and therefore privileged from producing the documents, though they did not in their affidavits aver that the documents related solely to their own title, and did not in any way tend to prove the title of the plaintiff.

Held, that, inasmuch as this objection was, before the Judicature Act, 1873, *allowed by the Court of Chancery in respect of its auxiliary jurisdiction only, and not in respect of its concurrent jurisdiction, it could not now be sustained when the court has a complete jurisdiction over the whole action, and that the defendants were not protected by section* 24, *sub-section* 2, *of the Judicature Act,* 1873.

Decision of the Court of Appeal (*reported* 34 *W. R.* 636, 33 *Ch. D.* 323) *affirmed.*

(a.) Reported by C. G. Napier Trollope, Esq., Barrister-at-Law.

This was an appeal from a decision of the Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.), reversing a decision of Chitty, J. (reported 34 W. R. 778, 33 Ch. D. 323).

A summons for production of documents had been taken out by the respondent, the plaintiff in the original action, which was for the recovery of land and the delivery of title deeds.

The respondent claimed as devisee of the land under the will of Zephaniah Emmerson, and the appellants, Ind, Coope, & Co. and others, were in possession, and by their affidavits claimed to be entitled in fee as purchasers for value from Zephaniah Emmerson's heir-at-law without notice of any adverse claim.

Chitty, J., dismissed the summons, and on appeal the Court of Appeal reversed his decision.

The appellants appealed to the House of Lords.

March 31, April 1, 21.—*Sir H. Davey, Q.C.*, and *Haldane*, for the appellants.—The objection would clearly have been valid in equity before the Judicature Act: *Wallwyn* v. *Lee*, 9 Ves. 24; *Heath* v. *Crealock*, 21 W. R. 380, L. R. 15 Eq. 257 and L. R. 18 Eq. 215, 22 W. R. Dig. 250, *Colyer* v. *Finch*, 5 H. L. Cas. 905, 5 W. R. Dig. 56; *Jerrard* v. *Saunders*, 2 Ves. jun., 454; *Pennington* v. *Beechey*, 2 Sim. and St. 282; *Phillips* v. *Phillips*, 10 W. R. 236, 4 De G. F. & J. 208: *Harrison* v. *Southcote*, 1 Atk. 528; and the rules of equity as to discovery still prevail: *Anderson* v. *Bank of British Columbia*, 24 W. R. 624, 724, 2 Ch. D. 644; *Kearsley* v. *Phillips*, 31 W. R. 467, 10 Q. B. D. 465. *Ovey* v. *Leighton*, 2 Sim. & St. 234, and *Portarlington* v. *Soulby*, 7 Sim. 28, cited in Wigram on Discovery, 2nd ed., pp. 81, 82, s. 135, are not really against the appellants. The principle is admitted after the Common Law Procedure Act, 1854, in *Gomm* v. *Parrott*, 5 W. R. 882, 3 C. B. N. S. 47, and *Horton* v. *Bott*, 5 W. R. 792, 2 H. & N. 249. *Williams* v. *Lambe*, 3 Bro. Ch. 263, and *Collins* v. *Archer*, 1 Russ. & My. 284, are both questioned in Lord St. Leonards' Vendors and Purchasers, 14th ed., pp. 792, 793. See also Roper's Husband and Wife, 2nd ed., vol. 1, p. 451. The defence was good before the Judicature Act, 1873, and is expressly preserved by section 24, sub-section 2.

Whitehorne, Q.C., and *Rigby, Q.C.* (*Ford* with them), for the respondent.—There was a distinction between the auxiliary and concurrent jurisdiction of the Court of Chancery as to the practice in discovery. The defence was held not to be of any avail in *Newton* v. *Newton*, 17 W. R. 238, L. R. 4 Ch. 143; *Greenslade* v. *Dare*, 17 Beav. 502, 3 W. R. Dig. 63; *Stackhouse* v. *Jersey*, 9 W. R. 453, 1 J. & H. 721.

They also referred to *Williams* v. *Lambe*; *Collins* v. *Archer*; *Lyell* v. *Kennedy*, 31 W. R. 618, 8 App. Cas. 217; and *Manners* v. *Mew*, 29 Ch. D. 725, 33 W. R. Dig. 144.

Sir H. Davey, Q.C., replied.

May 20.—Earl of SELBORNE.—By order 31 of the Supreme Court, the rules laid down as to discovery are that interrogatories may be delivered for the examination of the defendant by the plaintiff, or the plaintiff by the defendant, "in every cause or matter" (except cases of alleged fraud or breach of trust, in which they are to be of right) by leave of the court or judge; and that, if interrogatories are delivered, any objection to answering any one or more of them, on any ground (*i.e.*, some ground legally admissible), may be taken in the affidavit in answer; and that any party may apply to the court or a judge for an order directing any other party "to any cause or matter" to make discovery on oath of documents; the party against whom any such order is made being at liberty to object (specifying the grounds of his objection) to the production of any particular documents; and it being for the court or a judge to decide on the validity of any such objection, if taken.

So far as this order goes, the rules as to discovery are general, and apply equally (with the exception mentioned) to all causes and matters. But it is left open to the party required to make discovery in every cause or matter to object to any particular discovery on any ground which he may think tenable; and it is for the court or a judge to decide whether such ground is tenable or not.

I assume, for the purpose of the present question, that a party to whom interrogatories have been delivered by leave of the court or a judge may, by affidavit in answer, object to answer all or any part of them, not only on any special ground of objection to particular discovery, but also on the general ground that he is privileged, by the position in which he stands, against giving any discovery at all in a suit such as that brought against him. It may be that, if such a privilege could be shown to be well founded in law, he would have that right, though I do not think it necessary now to decide that question. The question to be now decided is whether every defendant who, under the old practice in chancery, might have successfully pleaded to a bill for discovery in aid of an action at law that he was a purchaser for valuable consideration without notice, has, under the present law of the High Court of Justice, a privilege of absolute exemption from the obligation to make discovery. The Court of Appeal has held the contrary, and with that opinion I agree.

The argument for the appellants has been that, under section 24, sub-section 2, of the Judicature Act of 1873, the court, and every judge, is bound to give to "every equitable defence," properly alleged, "such and the same effect by way of defence against the claim of the plaintiff or petitioner as the Court of Chancery ought to have given if the same or the like matter had been relied on by way of defence in any suit or proceeding instituted in that court for the same or the like purpose before the passing of the Act." It was contended that in the Court of Chancery before the passing of the Act of 1873 a plea of purchase for valuable consideration without notice would have been a good equitable defence to a bill for discovery only; and, therefore, that it is now a good equitable defence against discovery in the present action, which is (in effect) an action of ejectment brought by the plaintiff upon an alleged legal title, or, at all events, against the production of those deeds and documents of which production and delivery are expressly asked by the plaintiff's amended statement of claim, and which she therein alleges to be necessary to establish her title.

I will consider, first, the question as to the right to discovery generally; and, afterwards, that as to the discovery of the deeds and documents of title.

The first observation to be made is, that the Court of Chancery, when it allowed a plea of purchase for valuable consideration without notice to a bill for discovery only, allowed it, not to particular discovery (as, *e.g.*, of certain deeds and documents), but to the whole; not on the ground that certain things ought not to be inquired into, but because the court ought not, as against such a purchaser, to give any assistance whatever to a plaintiff suing upon a legal title in another jurisdiction. And, upon the same ground, a like plea would have been allowed to a suit asking for more than discovery (*e.g.*, for an injunction to restrain the defendant at law from setting up outstanding terms) when the object of the suit was still to obtain from the Court of Chancery assistance to the suit of the plaintiff suing upon a legal title in another jurisdiction. The defence was, in effect, "no equity," which is a different thing from an "equitable defence." It was thought inequitable, generally, that a man should defeat a legal title by keeping back facts in his own knowledge, or by setting up out-

standing terms; it was thought not inequitable that a purchaser for value without notice should use any such *tabula in naufragio* as best he could. But in the present case there is no suit in any other jurisdiction; the High Court of Justice is asked, and is competently asked, to exercise a principal, and not an auxiliary, jurisdiction, and to give effect to the legal title, which the plaintiff alleges to be in herself. If a like suit had formerly been brought in the Court of Chancery it would have been demurrable; not because there was an equitable defence, but because the title was legal, and the plaintiff stated no equity. To abolish that division of jurisdictions was the very object of the Judicature Act. As against "the claim" of the plaintiff in this suit, it is not, and it cannot be, pretended that purchase for valuable consideration is a good equitable defence. Why, then, should it be an equitable defence against the discovery which is sought only as incident to, and as evidence in support of, the claim? In the class of cases referred to, the separation and division of jurisdictions between the courts of equity and the courts of common law was the real and only ground on which such a defence was admitted. As against an innocent purchaser, sued at law, the Court of Chancery (having no jurisdiction itself to try the title) found no equity requiring it to give assistance to a proceeding brought elsewhere for that purpose. But it is impossible, without departing from that ground, to make the same defence available against discovery (otherwise proper) in a suit in which it is not available against the relief, and in which the High Court has proper jurisdiction to try, and must try and determine the question of title. And, accordingly, we find that there is no instance of any suit competently brought in the Court of Chancery, for relief as well as discovery, in which the defence of purchaser for value without notice has been held available against discovery incident to the relief, and not against the relief itself also. That defence was never admitted as an objection to particular discovery, it went to all or none. And in those cases in which the Court of Chancery had concurrent jurisdiction with the common law courts upon legal titles it was not available against either discovery or relief: *Williams* v. *Lambe*, *Collins* v. *Archer*, *Phillips* v. *Phillips*.

In the words, therefore, of that section of the Judicature Act on which the appellants' reliance was placed, this would not, before 1873, have been a good equitable defence to discovery in the Court of Chancery "in any suit or proceeding instituted in that court for the like purpose."

With respect to the deeds and documents of title, the appellants would be privileged against their production if they could say on oath that they related solely to their own title, and did not in any way tend to prove or to support the title of the plaintiff. But the present question relates to deeds and documents, as to which they have not made (and I presume cannot make) any such averment. To the discovery of such deeds and documents, as evidence to be used at the trial in support of the plaintiff's case, no principle or authority is, in my judgment, opposed. The case of *Wallwyn* v. *Lee*, before Lord Eldon, was that of a plea (which was allowed) to relief as well as discovery; and that of *Joyce* v. *De Moleyns*, 2 Jo. & Lat. 374, before Lord St. Leonards, was also one in which the defence (which prevailed) was to the whole suit.

I am, therefore, of opinion that the order appealed from is right, and that this appeal ought to be dismissed, with costs.

Lord WATSON.—Until the Judicature Act of 1873 came into operation, the plaintiff in an ordinary action of ejectment could not obtain discovery from his opponent, except by an application to the Court of Chancery, which had not jurisdiction in regard to the subject-matter of the suit. It was the general practice of the court to aid the litigant who thus applied to it by giving discovery; but an exception was made when the defendant in ejectment had *in bonâ fide* purchased and paid for the property forming the subject of the litigation without notice of the plaintiff's right. In that case the court declined to exercise its auxiliary jurisdiction, upon the ground that there was no equity requiring it to interfere and deprive the purchaser of what was termed his *tabula in naufragio*. On the other hand, the authorities which were referred to in the course of the argument appear to me to establish that in cases where the plaintiff applied to the Court of Chancery for complete relief, which its jurisdiction enabled the court to give, the court did not hesitate to deprive the defendant, although a purchaser for value, and without notice, of the advantage which, in the exercise of its auxiliary jurisdiction, it permitted him to retain.

I think it is impossible to affirm that a court of equity ought always to give to a litigant who is suing before another tribunal the same assistance to which he would have been justly entitled if the principal action had depended before itself. However that may be, the decision of this appeal appears to me to depend upon the practice as settled, and not upon the sufficiency or insufficiency of the considerations which led to its adoption.

The main object of the Judicature Act was to enable the parties to a suit to obtain in that suit, and without the necessity of resorting to another court, all remedies to which they are entitled in respect of any legal or equitable claim or defence properly advanced by them, so as to avoid a multiplicity of legal proceedings. In pursuance of that object the Act has given to both sides of the High Court the same jurisdiction in suits for the recovery of land which previously belonged to the courts of law; and also (subject, of course, to its provisions) the same jurisdiction to grant discovery for the purposes of these suits, which had belonged exclusively to the Court of Chancery. Auxiliary proceedings, with a view to discovery in a court other than that before which the principal suit depends, are inconsistent with its provisions, and are no longer competent.

The present suit, which is for possession of land, and is in substance an action of ejectment, was instituted in the Chancery Division, and it might, with equal competency, have been brought before the other side of the High Court. The plaintiff has applied for discovery, against which the defendants have stated the plea that they are purchasers for value, without notice of her title. I am not satisfied that, if otherwise available, the plea would have been prejudiced by the alteration in the form of pleadings which the Judicature Act has introduced. Whether it is still available to the defendants depends upon the construction of section 24 (2), which deals expressly with the effect to be given to equitable defences by the new courts constituted under the provisions of the Act.

The Act of 1873 deals with the remedies, and not with the rights, of parties litigant. It was not intended to affect, and does not affect, the quality of the rights and claims which they bring into court and submit to the judgment of the court, whether as plaintiffs or as defendants. But it does not follow that its provisions cannot affect the substance as well as the form of procedure by means of which these rights are to be ascertained and enforced. Discovery is matter of remedy, and not matter of right. If an Act had been passed by the Legislature which simply conferred jurisdiction in ejectment suits upon the Court of Chancery, that would have been a statute altering, not the rights of parties, but the *forum* in which their remedy was to be sought; yet it does not seem to me to be doubtful that its effect would have been to deprive the defendant, who was a purchaser for value and without notice, of the benefit of the plea,

founded on these circumstances, which he could have urged successfully in a mere auxiliary proceeding.

Section 24 (2) enacts that the new courts shall give to every "equitable defence" the same effect which the old Court of Chancery ought to have given "if the same or the like matters had been relied on by way of defence in any suit or proceeding instituted in that court for the same or the like purpose before the passing of this Act." Assuming the plea in question to be an "equitable defence" within the meaning of the sub-section, is an application for discovery, made in the principal cause to the judge before whom it depends, to be regarded as a suit or proceeding instituted for the same or the like purpose with an application made to the old Court of Chancery in aid of an action of ejectment depending before a court of common law? In my opinion that question must be answered in the negative. Before the Act of 1873 the Court of Chancery observed a distinction between an incidental application *in causâ* to a court competent to give full equitable relief, and an application for discovery to another court. Although in an auxiliary application the Court of Chancery declined to interfere with a *bonâ fide* purchaser for value, yet it appears to me to have invariably acted upon the principle that a court which had jurisdiction not only to give relief to the plaintiff, but to enforce the equitable claim of the defendant, was bound by equitable considerations to grant discovery. That is, in my opinion, the rule which ought to be followed in considering whether the plea advanced by the appellants in this case should be sustained; and I have accordingly come to the conclusion that the order of the Court of Appeal must be affirmed.

Lord Fitzgerald.—I entirely concur. I adopt the judgment of the noble and learned earl and the conclusion at which he has arrived, and also the judgment of my noble and learned friend opposite (Lord Watson).

Lord Herschell.—I have arrived at the same conclusion. I think the appellants have established that prior to the Judicature Act the plaintiff in this action could not have compelled the defendants to make the discovery which she seeks either in a court of law or equity. And it seems at first sight strange that, by reason of a change of procedure the object of which was not, except in certain specified cases, to alter rights, but only to enable every division of the High Court to administer both law and equity, and to afford all the relief to which the parties were entitled, it should be possible to obtain discovery when it could not previously have been had either at law or in equity. But I think the explanation is to be found in the fact that the right of a purchaser for value to exemption in equity from the obligation to make discovery had its origin in, and was founded upon, that separation of jurisdiction which it was the object of the Judicature Act to abolish. Where a plaintiff suing at law on his legal title sought the assistance of a court of equity to procure discovery, that aid was denied when the defendant was a purchaser for value. To a bill filed praying discovery the plea that the defendant was a purchaser for value without notice was a complete answer. And it was an answer too in all cases in which the auxiliary jurisdiction of the court of equity was appealed to in furtherance of an action. But I think it was well settled, at the time the Judicature Act was passed, that it was only where discovery was thus sought as auxiliary to an action that it could be successfully resisted by a purchaser for value. If the court of equity had concurrent jurisdiction and a plaintiff sought to enforce his legal title there, as for example in a case of dower, the court compelled discovery even by a purchaser for value as ancillary to the principal relief sought by the suit. No case was cited at the bar in which discovery ancillary to other relief had been refused by the court.

Under the existing system it is not necessary to apply to one branch of the court as auxiliary to another. And there is no longer any need of praying for discovery in the statement of claim which is substituted for a bill. The plaintiff in every action is entitled to discovery as ancillary to the relief which he claims in the action.

It is contended that the right to resist discovery is preserved to a purchaser for value, because by section 24, sub-section 2, of the Judicature Act the Court is bound to give to every equitable defence such and the same effect by way of defence against the plaintiff as the Court of Chancery ought to have given if the same or the like matter had been relied on by way of defence in any suit instituted in that court for the same or the like purpose before the passing of the Act.

I think it may fairly be said that the allegation that the defendant was a purchaser for value was an equitable defence. For the matter which was a bar to the suit did not appear on the face of the bill, and needed to be set up by plea. But it was not an equitable defence unless the bill sought discovery only to assist a plaintiff who was pursuing his remedy elsewhere. I therefore am of opinion that the present action, in which the plaintiff seeks to recover possession of land to which she alleges a legal title, and applies for discovery as ancillary thereto, is not an action instituted for the same or a like purpose as that in which a plea of purchase for valuable consideration could have been relied on as an equitable defence.

I cannot profess to be satisfied with the reasoning which led the Court of Chancery to deny its ordinary assistance to a plaintiff who was suing a purchaser for value at law, and to afford the very same kind of assistance to a plaintiff who, having a choice of either jurisdiction, selected the Court of Chancery as the tribunal to enforce a legal right. But I am satisfied that the distinction existed, and that it was only in the former case that discovery could be resisted.

Every plaintiff is now *primâ facie* entitled to discovery in any action, and I can find nothing, either in the Act or in the rules, to warrant us in depriving the present plaintiff of the right thus conferred.

I accordingly concur in thinking that this appeal must be dismissed.

Order appealed from affirmed, and appeal dismissed, with costs.

Solicitors for the appellant, *Haynes & Clifton.*

Solicitor for the respondent, *John W. Sykes.*

Court of Appeal.

From Chan. Div. July 28, 29.

Arnott v. Hayes. (a.)

Bankers' Books Evidence Act, 1879 (42 & 43 *Vict.*, c. 11), *s. 7—Meaning of the words "any other party" in section 7—Application for order to inspect banker's books—Affidavit in support of application not always necessary—Jurisdiction of court to make the order ex parte.*

Section 7 of the Bankers' Books Evidence Act, 1879, *gives to a litigant party a certain extended right of inspection by enabling him before trial to inspect, and take copies of entries in, banker's books; but such right exists*

(a.) Reported by M. J. Blake, Esq., Barrister-at-Law.

only for, and must be strictly limited to, the purposes of the proceedings.

Section 7 also gives the court jurisdiction—to be exercised, however, with caution—to make the order for inspection on an application made without notice to "the bank or any other party," and the words "any other party" include any party to the action.

Affidavit evidence in support of the application for liberty to inspect may be dispensed with if it is obvious from the issues raised by the pleadings that the entries in the banker's books must be material.

Quære, whether section 7 can be used for the purposes of obtaining "discovery" in the strict sense of that term.

Order of Kekewich, J., *affirmed.*

Appeal from Kekewich, J.

The plaintiff had brought an action for rescission of a contract to take shares in the Automatic Boiler Feeding Co. on the grounds of misrepresentation and that the company was not a *bonâ fide* one. The company, with several other persons, were made defendants. The defendants, in their defences, denied the allegations of the plaintiff. The plaintiff subsequently obtained leave to amend his claim by adding Edward Beall as a defendant, alleging that Beall had, in fact, received and converted to his own use moneys paid for shares in the company by the plaintiff. The defendant Beall, by his defence, denied these allegations.

On June 13, 1887, the plaintiff made an application in chambers *ex parte* and without any affidavit evidence, and obtained an order under section 7 of the Bankers' Books Evidence Act, 1879 (42 & 43 Vict. c. 11), for liberty to inspect and peruse the entries of the accounts of the defendant company and of the defendant Beall in the books of the Royal Exchange Bank, and take copies and extracts therefrom.

On June 28, 1887, the defendant company and the defendant Beall moved to discharge the order of June 13. The plaintiff and the bank were served with notice of the motion and appeared at the hearing thereof, when Kekewich, J., modified the order of June 13 by limiting the period of inspection, and directed that it should begin from the time of registration of the company, and continue, with respect to the company, down to the time of the commencement of the action, and, with respect to Beall, down to the time when he was made a party to the action.

The defendant company and the defendant Beall appealed.

Section 7 of the Bankers' Books Evidence Act, 1879, so far as material, is as follows:—"On the application of any party to a legal proceeding, a court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order under this section may be made either with or without summoning the bank or any other party. . . ."

Humphreys (*Herbert Reed* with him), for the appellants.—The inspection ought to have been confined to those entries which are relevant to the matters in issue; otherwise the result will be to introduce a material alteration in the law relating to discovery. A person against whom an order for discovery is made has a right to seal up what he declares to be not material. [BOWEN, L.J.—Have you made any affidavit that these entries are not relevant to the issue?] In our answer to interrogatories we have. Then the original order was made *ex parte*, and the court had no jurisdiction to make the order *ex parte*. The words in the section "any other party" are words *ejusdem generis*; they do not necessarily mean party to the litigation: *In re Quartz Hill Co.*, 32 W. R. 773, 21 Ch. D. 642. The order was made without any affidavit evidence to show that the inspection of the entries was material for the purposes of the trial; it ought not, therefore, to stand: *Davies* v. *White*, 32 W. R. 520. There is no reported case in which general inspection of the private banking account of a party to an action has been allowed. In *Marshfield* v. *Hutchins*, 34 W. R. 511, 32 Ch. D. 499, it appears from the report in the WEEKLY REPORTER that that part of the application asking for inspection of the private account was given up.

Swinfen Eady (*Warmington, Q.C.*, with him), for the plaintiff, the present respondent.—The plaintiff is entitled to put in as evidence against the defendants copies of the accounts in the banker's books, and for that purpose is entitled to inspection: *Harding* v. *Williams*, 28 W. R. 615, 14 Ch. D. 197. [FRY, L.J.—I think my decision in that case was not approved by the Court of Appeal.] There is no reported case in which *Harding* v. *Williams* has been overruled or its authority shaken. No affidavit evidence was necessary under the circumstances of this case, for, having regard to the whole nature of the claim, and the allegations contained in the pleadings, inspection of entries in the banker's books of the accounts of the company and of the defendant Beall is obviously most material. Then as to the order being made on an *ex parte* application, and as to the application itself being a *bonâ fide* one—[COTTON, L.J.—You need not argue either of those points].

Humphreys replied.

COTTON, L.J.—Various objections have been made to the order of Kekewich, J., as modified by the order of the 28th of June. The first objection was that the original order was made *ex parte*, and that it ought not to have been so made. There was an opportunity when this matter was before Kekewich, J., on the 28th of June, to take an objection on that ground to the order; but neither then nor now has any reason been shown why the order ought not to have been so made in this particular case; and if the Act enables an order under this section to be made *ex parte*, we cannot discharge the order on the ground of want of jurisdiction. At the same time I agree that it is better, as a general rule, in the first instance to serve the person whose account it is desired to inspect. But in my opinion the Act does enable an order to be made *ex parte*.

The next objection was, that the words, "any other party," do not necessarily mean party to the litigation. That may be so, but they must necessarily include a party to the litigation, although they are not confined to such party. Therefore the judge has power to make an order *ex parte* for the inspection of the banking account of any other party, including a party to the action, although I think it would be a wise course for a judge to require notice to be given to the party before making the order, rather than to have the objection taken at a later stage that no such order ought to have been made.

Then it is said the order was made without affidavit. An affidavit is not necessary, in my opinion. In certain cases the court may, and ought to, require an affidavit to enable it to see whether in fact the inspection of the entries or account is material; but I think the judge may dispense with an affidavit if the issues raised on the pleadings (without saying the pleadings are to be taken as true) are such as to render it obvious that the entries must be material. If, on the other hand, it appears probable that the application has been made, not for the purpose of the proceeding, but for some other or collateral purpose, then I think the judge should not make the order without an affidavit. Here, looking at the pleadings, whether the issues raised are true or false, the question is whether Beall did or did not put money into his own pocket which ought to have gone to the company; and it is obvious that the inspection of his banking account must be material to that issue. The

order under the section is to assist the litigant in making out his charge. The objection that in this case an affidavit should have been made before the order for inspection was made falls to the ground therefore.

Is the order which has been made right? The object, or at least one of the objects, of the section is, for the purposes of the proceedings, to enable evidence of material matters to be given at the trial. Of course, the information acquired under an order under the section cannot be applied for other purposes, and if the person who has obtained such an order were to make use of it for any purpose other than the purposes of the proceedings the court would interfere, as it does when a person makes use for some other purpose of the information obtained under an order for discovery.

As Mr. Swinfen Eady pointed out, the Act took away from a litigant the power of compelling a banker to produce his books at the trial of an action, thus taking away a right which the suitor had before. So far the Act is for the relief of bankers. For it was, of course, a great inconvenience for the banker to be summoned himself and to have the books of the bank which were necessary for daily use to be brought into court.

The Act enables copies of entries in bankers' books to be taken and given in evidence. How can a suitor tell, without inspecting the account, of what entries he desires copies to be taken? He can only do that by a prior inspection of the books; and although it no doubt does give the suitor a larger right of examination before the trial than he had before, the object of the Act is to enable evidence to be given at the trial without putting the bankers to inconvenience, and therefore it is necessary to have that examination before trial.

Then it was said that this order, in fact, gave the suitor a greater right of discovery than he had before. But that argument is based on a fallacy; for, although the suitor may obtain the same benefit by this inspection as he would have obtained from discovery, it is not really discovery, which is the extorting of information from the litigant himself, whereas this order only gives the suitor the right to examine the books to see of what entries copies should be given.

But the information should only be used for the purposes of the proceedings, and I am of opinion that the judge should be careful not to make an order in too large terms, but should limit it to suit the facts of each case; and I have considered in this case whether the order could not be more strictly limited. On consideration I do not think it could and yet enable the plaintiff to produce such evidence as may be relevant to the question in issue at the trial. The period covered by the order begins when the transaction began and goes down to the time when the action commenced in the case of the company, and when Beall was made a party in the case of Beall. I think, when we look at the particular charges made, the order does not cover too large a space. If we were to limit it further it might prevent the plaintiff getting evidence on a material point. In many cases, no doubt, it might be right to limit the order to a certain month or number of months, or to some particular item of an account—for instance, in the case of a bill of exchange.

It has been contended that the Act only authorizes an inspection of entries and not of the account. But that is mere form, because if we decide that the respondent could inspect and take copies of all entries between these particular periods that would be exactly what has been done here. The appeal must be dismissed.

BOWEN, L.J.—I am of the same opinion. I agree with Cotton, L.J., in thinking that great caution should be exercised by a judge in putting in force the provisions of this section; but, on the other hand, I have no doubt that caution is properly exercised.

In order to see the effect of this legislation we should consider what was the state of the law as to evidence of bankers' books in 1876. At that time there was no power of obtaining discovery from a bank of the account of its customer, except by the circuitous process of obtaining an order from a judge to examine the particular clerk or officer who made the entry, and to have the books produced. That could be done under the Common Law Procedure Act before the trial, but it was a cumbrous process, and in practice was seldom resorted to. In all probability the judge would refuse to make the order before the trial.

As a matter of practical dealing the banker's books made their first appearance at the trial. A *subpœna* was issued to the banker to produce his books, and to compel the officer who made the entries to explain them, and prove the transaction to which they related. In practice no counsel who regarded either the time of the court or his own convenience—except when the particular circumstances of the case rendered the examination of the officer of the bank necessary—insisted on proof of the account, and the account was put in and treated as a pass-book.

Then came the Bankers' Books Evidence Act, which was passed, *primâ facie*, to relieve the banker. It is described as "An Act to amend the Law of Evidence with respect to Bankers' Books," and its primary object was to simplify proof at the trial.

I also, like Cotton, L.J., refuse to say whether this section ought or ought not to be made use of for the purpose of obtaining inspection of books in cases where the right to discovery would have existed if the books had been in the defendant's possession. As Cotton, L.J., has pointed out, it is obvious that, the object of the Act being to obtain copies of entries of account, a certain extended right of inspection must be given to enable a person to obtain copies of proper entries: but the judge ought to be extremely careful to limit the right to the particular purpose for which the evidence is wanted. Here it is impossible to say that the order under appeal will do anything more than is actually necessary for the purposes of the trial, limited, as it is, to the entries made during the period only over which the contest spreads.

If we could see any indirect attempt to use the power of the section for purposes for which the Legislature did not intend it to be used—if we thought that it would give more information than was absolutely necessary—the court would further limit the order. But here, in my opinion, all has been done in the way of protecting the appellants that could be done. It is said we ought not to act under the section without an affidavit. Of course an affidavit would be necessary if there were any question of the *bona fides* of the application; but no such case can be made here. The moment we look at the pleadings it is obvious that the issue of fraud committed during the period covered by the order will be the real issue to be tried.

Again, it is said that the order ought not to be made *ex parte*. I agree with Cotton, L.J., that such an order can be made *ex parte*, although the judge should be extremely careful as to how he makes it *ex parte*. But all difficulty has been removed here by the conduct of the parties who appeared to move and discharge the order, so that the matter has been, in fact, discussed in the presence of the parties.

FAY, L.J.—I quite agree as to what has been said as to the power to make these orders *ex parte*. I cannot read the words "any other party" otherwise than as including a party to the action, although it has been suggested in argument that the word "party" here means any person "other than a party to the action." There is no irregularity in making such an order *ex parte*, though I agree it should be so made *ex parte* with great caution;

and, speaking for myself, I probably should never make it *ex parte*. But here, the court having power to make the order *ex parte*, the order has been the subject of a motion to which the appellants were parties.

Then with regard to the construction of the Act. I was struck with the arguments of the appellants that we were, in effect, giving inspection at a time when, by the Rules of Court as to discovery, no such right of inspection was allowed. But if such right is necessarily incidental to the new provision introduced by the Act, it may very well be that we cannot use it without, to some extent, altering the balance of rights of the litigating parties.

Before the Act of 1876 the litigant had a right to subpœna the bankers and compel them to produce their books, but he could not look at those books till they were put in. But all these copies of the entries which have been substituted by the section must be obtained by the person putting them in: he cannot call on his antagonist or the bankers to make a copy for him. And, therefore, the result is, that the Act does enable the litigant, by enabling him to take copies of the entries, to obtain inspection at an earlier date than he would have obtained it if he had not been authorized to make the copies.

There is one other observation. The legislation in question began with the statute of 1876. The preamble cites two objects; it runs thus:—"Whereas serious inconvenience has been occasioned to bankers and also to the public by reason of the ledgers and other account books having been removed from the banks for the purpose of being produced in legal proceedings; and whereas it is expedient to facilitate the proof of the transactions recorded in such ledgers and account books." When the Act of 1876 was repealed and the Act of 1879 substituted, I see no reason for supposing that the Legislature was not actuated by a similar motive. I think, therefore, that the facilitating of proof of the transaction recorded in banker's books was as much one of the objects of the Legislature as the relieving of bankers from their liability. Therefore, if the result of the substituted provision be to enable a litigant party to see the accounts before they are put in, it is a right given by the Legislature.

Appeal dismissed.

Solicitors for the defendant company and Beall, *Beall & Co.*

Solicitors for the plaintiff, *Blair & Girling.*

From Chan. Div. July 15, 16, 18.

In re AVERY'S PATENT. (*a*.)

Patent—Petition for revocation—Invention communicated—Patent obtained without disclosure of fact of communication—Patent alleged to be obtained "in fraud of . . . rights" of the petitioner—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict.* c. 57), *s.* 26, *sub-sections* (4), *paragraphs* (c) (d); *sub-section* 8.

The owner of a foreign patent communicated the invention to a person whom he appointed his agent for the purpose of obtaining a patent for the invention in England, with power to the agent to appoint a substitute. The agent appointed a substitute, who applied for and obtained a patent for the invention in England in his own name as first and true inventor, and without disclosing the fact that the invention was communicated. The owner of the foreign patent presented a petition for revocation of the English patent under section 26, *sub-section* (4), *clause* (c), *of the Patents Act,* 1883, *alleging that the English patent was obtained "in fraud of his rights."*

The evidence showed that the substitute had not at any time, either when applying for the patent or after he had obtained it, acted with the intention of depriving the principal of his rights.

Held, on the evidence, that the patent was not obtained in fraud of the rights of the petitioner, and therefore that the petition should be dismissed.

Decision of Stirling, J. (35 *W. R.* 541), *affirmed.*

Appeal from a decision of Stirling, J., reported 35 W. R. 541.

The present appellant, Avery, obtained a patent in the United States for a certain invention. Avery appointed Weeks as his agent to obtain letters patent for the same invention in England, with power to Weeks to appoint a substitute. An agreement was also entered into between Avery and Weeks by which it was agreed that Avery and Weeks and two other persons, one of whom was the present respondent Lindsay, were to be partly interested in the English patent when obtained. Weeks came to England and substituted Lindsay to act in obtaining the letters patent in England. Lindsay was advised by a patent agent to apply for the patent in his own name as the first and true inventor, and accordingly did so, and obtained the patent in his own name as the first and true inventor.

These and all other material facts will be found fully set out in the report of the case in the court below (35 W. R. 541).

A petition was presented—in the first instance by E. Kimber alone, acting as attorney for Avery, but afterwards, by the direction of Stirling, J., amended by adding Avery as a petitioner and by adding all persons interested in the patent as respondents as well as the original respondent Lindsay—under section 26 of the Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 Vict. c. 57),* for a revocation of the patent granted to Lindsay on the ground that it was obtained in fraud of the rights of Avery. The petition also prayed for a declaration that Avery was the first and true inventor, but did not contain any distinct allegation that he was in fact the first and true inventor.

Stirling, J., dismissed the petition.

The petitioner Avery appealed.

Oswald and *R. W. Wallace*, for the appellant.—Neither the agent nor his substitute here was authorized by the power of attorney to take out the patent in his own name, and the act of so doing is a fraud on the rights of Avery, the principal. It is not necessary that there should be any moral culpability on the part of Lindsay to render the act done a fraud on the rights of Avery. Anything done in derogation of the rights of the true inventor by a person to whom the true inventor has confided his rights is in fraud of those rights: *Peek* v. *Gurney*, 22 W. R. 29, L. R. 6 H. L. 377; *Burrowes* v. *Lock*, 10 Ves.

(*a*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

* The Patents Act, 1883 (46 & 47 Vict. c. 57), enacts as follows:—Section 26, sub-section (4)—"A petition for the revocation of a patent may be presented by . . . (*c*) Any person alleging that the patent was obtained in fraud of his rights or of the rights of any person under or through whom he claims; (*d*) Any person alleging that he or any person under or through whom he claims was the true inventor of any invention included in the name of the patentee. . . . Sub-section (8).—Where a patent has been revoked on the ground of fraud the Comptroller may, on the application of the true inventor made in accordance with the provisions of this Act, grant him a patent in lieu of and bearing the same date as the date of the revocation of the patent so revoked, but the patent so granted shall cease on the expiration of the term for which the revoked patent was granted."

470. Rule 27 of the Rules of the Board of Trade under the Act of 1883 provides that an application for a patent for an invention communicated from abroad shall expressly state that the invention has been communicated to the applicant from abroad. That was also the practice under the former Acts: *Milligan* v. *Marsh*, 2 Jur. N. S. 1083, 5 W. R. Ch. Dig. 60; *Steedman* v. *Marsh*, 4 W. R. 476. The keeping back the fact that the invention was communicated is a fraud on the Crown which invalidates the patent obtained, and so Avery's rights are prejudiced. [BOWEN, L.J., referred to *Beard* v. *Egerton*, 3 C. B. 97.] That case is not really against us, as the communication there was made abroad, not in England. Stirling, J., relied on the cases of *Plimpton* v. *Malcolmson*, 3 Ch. D. 531, 24 W. R. Dig. 170, and *Nickells* v. *Boss*, 8 C. B. 679, but both those cases were decided before the Act of 1883 and the present Rules of the Board of Trade were in force. *In re Wirth's Patent*, 26 W. R. 329, 12 Ch. D. 305, is an authority that a patent may be obtained here by an alien resident abroad. The patent should have been taken out either by Weeks in his own name, but as a communicated patent, or by Avery in his own name. Avery is, at all events, entitled to claim revocation of the patent, on the ground that he and not Lindsay is the true inventor: section 26, sub-section (4), clause (*d*). [COTTON, L.J.—There is no allegation to that effect in the petition.] Leave to amend the petition in that way can and ought to be given us. *Marsden v. Saville-street Co.*, 26 W. R. 784, 3 Ex. D. 203, was also referred to.

Graham Hastings, Q.C., and *Yate Lee*, for the respondents Lindsay and Weeks, were not called on.

Pochin, for other respondents, who supported the appeal.

COTTON, L.J.—This is an appeal from an order of Stirling, J., dismissing the petition presented to revoke letters patent which had been granted to a Mr. Lindsay, but giving liberty to the petitioner to present a new petition on the ground of his being the first and true inventor. There is no appeal against the latter part of the order, but we think (and Mr. Graham Hastings does not object to that) that in order to save expense there should be added to that part of the order words giving liberty to either party to use any evidence filed on the present petition, subject, of course, to all just exceptions to be raised by any person affected, and subject also to the right of either party to demand cross-examination of the deponents making any new affidavits.

Then was the order right? I am of opinion it was. The petition was presented really under clause (*c*) of sub-section (4) of section 26. [The Lord Justice here read the words of the clause referred to, and continued:—] If it is made out that the petitioner Avery is a person who brings himself within that clause, then we should have to go into the other question—viz., whether the patent is or is not good; but if the petitioner has no *locus standi* — if he is not one of the persons who are entitled under the Act to present a petition to revoke the letters patent—then we have not to go into the question which was so much argued as to whether this patent is or is not a good patent.

I may say, with regard to sub-section (8) of section 26, which enables a patent obtained by fraud to be revoked and a new patent to be granted, that I am satisfied, as the learned judge was, that this petition avoided alleging that the petitioner was the first and true inventor, because his object was not to destroy the patent, but to get a new patent if he made out that it had been obtained by fraud. Therefore, in my opinion, he intended on his petition to confine himself, under clause (*c*), to the case that the patent had been obtained in fraud of his rights, and he has not alleged that he was the first and true inventor.

It is difficult, notwithstanding the arguments presented on behalf of the appellant, to see who it is alleged ought to be considered here as the first and true inventor—whether Avery, or Weeks, or Lindsay, because it does not appear whether the information under which the patent was obtained was communicated to Weeks or to Lindsay, we not having the correspondence which took place between the parties till August, 1886.

Now has this patent been obtained in fraud of the rights of Avery? [The Lord Justice here referred to the facts as appearing from the evidence, and continued:—] I do not enter into the question whether this patent was good or not. I intimate no opinion that it was bad; the only question I have to consider is, Was the patent thus obtained obtained in fraud of the rights of Avery?

There is no evidence, in my opinion, that Lindsay ever intended to deprive Avery of any of the rights which he would have been entitled to under the agreement that had been entered into. Everything shows just the contrary. If Lindsay, having obtained the patent in his own name, had sought by means of that to deprive Avery of any rights which he would have had if the patent had been in his own name, then the case would have stood very differently; but in my opinion if Lindsay made a mistake—I do not say that he did—but if he made a mistake honestly, that fact, although it might make the patent bad, would not enable Avery to establish that the patent was obtained in fraud of his rights. In my opinion that means obtained in violation of the rights of the true inventor (which I will assume Avery was), and obtained so as directly or indirectly to deprive him of his rights, and to get some benefit for another. An honest mistake by an agent, even although that may cause loss to the principal, is not in my opinion an act done in fraud of the rights of the principal. It is an act done which injures the rights of the principal; but an act done in fraud of his rights is to my mind an entirely different thing. To be in fraud of his rights it must be either done with the intention of depriving the principal of his rights, or must be insisted upon so as to deprive the principal of his rights.

It was urged that anything done depriving a person of his rights, if done by a person in a confidential position such as an agent is, must be considered as done in fraud of the rights of the principal. That, in my opinion, is a misuse of the term "fraud." It may be a mistake for which the agent may be answerable for not having performed his duty; it may be a mistake for which he may not be answerable, but which still may cause great loss to his principal; but an act, to be in "fraud of the rights" of the principal, must involve an attempt by the agent to deprive the principal of something, or to gain for himself something at the expense of his principal.

On the evidence here there is nothing which can justify us in coming to any other conclusion than this—that if, in fact, Lindsay did act under a mistake or was wrongly advised, he acted under an innocent mistake, and not in fraud of the rights of his principal. In my opinion, therefore, the case raised by the petition fails, and Stirling, J., was right in his dismissal of the petition.

BOWEN, L.J.—I am of the same opinion. The simple question we have to determine is this, whether the patent obtained in the name of Lindsay was obtained in fraud of the rights of Avery? We were asked to hold that every mistake which is made by an agent which may operate, or does operate, to the detriment of his principal is an act done in fraud of the rights of the principal. There can be no possible basis for such a contention. It is founded on a misconception of the remedies and relief which equity constantly affords in fit cases where persons are not allowed to take advantage of mistakes, even though they are *bonâ fide*, or misrepresentations which they have made *bonâ fide*. But although equity in such cases gives the same relief as if the mistake or misrepresentation had been fraudulently

made, it does not follow that what is honest is fraudulent, and it would be monstrous to apply such reasoning to the clear words of the statute. We were subsequently asked to deal with this matter as if the case had been launched and the appeal pursued, not upon the line of "fraud of the rights" of another, under clause (*c*) of sub-section (4) of section 26, but as if it were also based on an allegation that somebody other than Avery was the true inventor. That case was not made by the petition, and I think was intentionally not made; for if it had been made, and the petitioner had succeeded on it, he could only have succeeded in getting the patent set aside, and could not have obtained a fresh patent for himself, because, in order to obtain that, he should prove fraud within the meaning of clause (*c*). Therefore the petition was deliberately confined to the allegation that there had been a fraud on the rights of Avery. But in my opinion there was no fraud at all on Avery's rights. Ought we now to allow the petitioner to amend his petition so as to bring it within clause (*d*), and to ask for a declaration that he is the true inventor? It seems to me we should be doing no real good to the parties and saving no expense if we were to allow such amendment at the present moment. Mr. Graham Hastings' client would, for anything I know, desire to stand aloof altogether from such a petition, not appear to it, or not resist it in the first instance. We should therefore be able only to allow the petitioner to make such an amendment, if we did allow it, on his paying all the costs which have been incurred on the other side; and, on the other hand, if Mr. Graham Hastings' client did wish to oppose such a petition, he would naturally like to remould his affidavits or to file affidavits with references to the early correspondence between Lindsay and Avery which we have not got before us, and, indeed, to make an entirely new case. Therefore, in that case, again, we could only allow such a burden to be imposed on Mr. Graham Hastings' client on condition of the prior payment by the petitioner of all the costs incurred by the framing of the case under clause (*c*) and not under clause (*d*). It seems to me, therefore, that no additional costs can be incurred by our refusing leave to amend. The petitioner, if so advised, may present a fresh petition—I do not encourage the presentation of it in any way—and as no objection is raised to all the affidavits being used again, subject to all just exceptions and to the right of cross-examination, so far as the costs are concerned the petitioner will be in no worse position then than if we allowed the amendment now. On the contrary, I think that a petition properly framed would give the parties, not only an opportunity of considering their position, but would prevent the embarrassment and entanglement of such a case as would then be made with the present case. I think, therefore, we are acting in no way contrary to the usual course of the court in refusing leave to amend.

FRY, L.J.—I am of the same opinion. One of the persons who, by the statute of 1883, is permitted to present such a petition as the present, is a person alleging that the patent was obtained in fraud of his rights. In my view that means that the patent was obtained in derogation of the rights of the petitioner and by fraud. The petitioner took that view himself, because his petition contains this allegation:—"Instead of obtaining letters patent for, and on behalf of, your petitioner, Avery, on a communication from abroad, Weeks conspired with Lindsay to wrongfully, and by fraud, obtain from the Crown the grant of letters patent." Therefore, the case which the petitioner came here to try was, as the statute required it to be, a case of fraud against the respondent Lindsay. I desire to state in the broadest terms that, in my judgment, no fraud whatever has been shown to have been committed by Lindsay. As far as I can see, his conduct throughout has been that of a perfectly honest man. The terms in which the prospectuses were settled, and the terms of the letter written by Avery on October 20, 1886, after he knew how the patent had been granted, convince me that Lindsay never intended to set up any claim inconsistent with that of Avery, and I can see no ground for supposing that Lindsay desired to avail himself of any technical right arising from the form in which the letters patent were applied for. The only point that weighed with me was this. It was said that Lindsay had set up the fact that he had invented a portion of the subject-matter of the letters patent as a ground for claiming the invention as his own property. That suggestion, however, appears to be wholly unfounded, for the only way in which Lindsay refers to that fact is by way of explanation of the advice given him by the patent agent. Then it is urged that we ought to allow the petitioner to amend by suggesting that he is the true inventor. I confess I do not know who the appellant's counsel say is the first and true inventor, whether Avery or Weeks. But certain it is, to my mind, that the point was never intended to be raised, and is not raised by the petition. It was raised at the last moment in the hope of saving costs. Stirling, J., gave the petitioner the full measure of what he was entitled to. The petitioner may present a fresh petition if so advised. I do not encourage the presentation of any such petition. I do not desire to express any opinion as to whether there has been any mistake, or as to whether the patent is or is not good. Both those questions deserve full consideration before the petitioner takes any further proceedings.

Appeal dismissed.

Solicitor for the appellant, *E. Kimber.*

Solicitors for the respondents, *Neish & Howell.*

From Chan. Div. May 13, 16, 17; July 9.

ALLCARD v. SKINNER. (*a*.)

Undue influence—Voluntary gift—Religious sisterhood—Gift by professed member of religious sisterhood to the lady superior—Relation existing at the time of the gift—Laches—*Acquiescence.*

The relation existing between professed nun and lady superior in a sisterhood—the rules of which require each professed member to take vows binding for life to give up all present and future property, to obey the voice of the lady superior as the voice of God, and not to seek the advice of externs without the leave of the lady superior—is a relation which of itself alone necessarily raises the presumption in equity that a voluntary gift made, during the existence of the relation, by a professed nun to the lady superior for the purposes of the sisterhood, is a gift induced by undue influence; and, in order to displace that presumption, it is not sufficient for the donee to show that the donor, before the relation existed and while acting as a free agent, had formed and expressed the intention of making the gift.

The donor in such a case has a right to claim a return of so much of the property comprised in the gift as remains in the hands of the donee at the time of making the claim; but that right may be lost by delay, after the relation has ceased, in asserting the right when coupled with acts on the part of the donor from which acquiescence in, or confirmation of, the gift may be reasonably inferred.

Decision of Kekewich, J. (35 *W. R.* 424, 36 *Ch. D.* 145), *affirmed on different grounds by the Court of Appeal* (Cotton, L.J., *dissenting*).

(*a*.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

The cases in equity relating to the setting aside of voluntary gifts on the ground of undue influence reviewed.

Appeal from Kekewich, J. (reported 35 W. R. 424, 36 Ch. D. 145).

In 1868 the plaintiff, Miss M. A. Allcard, then aged twenty-eight, and acting of her own free will, began to assist in the objects and work of a religious sisterhood of which the defendant, Miss Skinner, was the lady superior. The sisterhood was a voluntary association of ladies who resided together and devoted themselves and their property to charitable works. The members of the sisterhood were divided into three grades—postulants, novices, and professed members. The first two grades consisted of probational members, and the third of members who were supposed to remain for life in the sisterhood. By the rules regulating the sisterhood each professed member on becoming professed was required to take certain vows (*inter alia*) to give up all her present and future property, though not necessarily to the sisterhood, to obey the voice of the lady superior as the voice of God, and not to seek the advice of externs without the leave of the lady superior. The rules also provided that all property given by any member to the lady superior was to be held on trust for the purposes of the sisterhood.

In 1870 the plaintiff, being then well acquainted with the rules and objects of the sisterhood, resolved, of her own free will, and contrary to the advice of her brother, a barrister, who acted as the trustee of her property, to devote herself and her property to the purposes of the sisterhood, and intimated that resolution to the Rev. H. D. Nihill, the spiritual director of the sisterhood. Accordingly in January, 1870, she entered the sisterhood as a postulant, became a novice in April, 1870, and a professed member in August, 1871. While a postulant the plaintiff made her will, leaving all her property to the defendant; and after becoming a professed member the plaintiff from time to time made voluntary gifts of large sums of money to the defendant, and in 1874 transferred to the defendant two sums of railway stock.

No external advice as to making the gifts was, on the one hand, sought or obtained by the plaintiff at the time of making the gifts, nor, on the other hand, was there any evidence of any acts of pressure brought to bear by the defendant or Mr. Nihill on the plaintiff to induce the gifts being made before or at the time of making the gifts.

In May, 1879, the plaintiff left the sisterhood, and shortly afterwards revoked her will.

It appeared from the evidence that the plaintiff, in February, 1880, consulted various persons, including her solicitor, as to making a claim for the return of her property, but no claim was actually made till April, 1885.

In August, 1885, the writ in the present action was issued, by which the plaintiff claimed to have the various voluntary gifts set aside on the ground of undue influence and a repayment and retransfer by the defendant of the sums of money and stock in question. At the date of the issue of the writ the only part of the property comprised in the various gifts remaining unexpended for the purposes of the sisterhood in the hands of the defendant was the railway stock above referred to.

Kekewich, J., dismissed the action on the ground that the fact that the plaintiff had originally formed the intention of making the gifts while acting under competent independent advice, and before she joined the sisterhood, was evidence—presumptive in the first instance, but becoming conclusive in the absence of any clear evidence to the contrary—that at the time the gifts were actually made they were made in pursuance and completion of that original intention, and were therefore not induced by any undue influence. The learned judge also expressed an opinion with regard to the railway stock still standing in the defendant's name, that if the plaintiff had succeeded in making out a case of undue influence she would not have been debarred by *laches* or acquiescence from recovering it from the defendant.

The plaintiff appealed from this decision, but on the appeal limited her claim to the recovery of the railway stock above referred to.

Sir Horace Davey, Q.C., Finlay, Q.C., and *F. B. Palmer*, for the appellant.—Two questions of mixed law and fact arise: First, whether this gift was made under circumstances which make it voidable in equity? Secondly, if voidable, whether the right to elect to avoid has been lost by *laches*? At the time this gift was made the plaintiff was not a morally free agent, for at that time the plaintiff was a professed member of this sisterhood, and, having regard to the vows she had taken, she was then in a state of moral and spiritual bondage. It is said that the plaintiff voluntarily entered the sisterhood; no doubt she did; the first act of placing oneself under any influence is no doubt voluntary, but that is not the test. The law on the subject is laid down by Lord Eldon in *Huguenin* v. *Baseley*, 14 Ves. 273, and the arguments used in reply by Sir S. Romilly in that case have been adopted by Lord Cottenham in *Deal* v. *Bennett*, 4 My. & Cr. 277. Where the relation existing between donor and donee is such as to raise the presumption of undue influence, the *onus* of negativing undue influence lies on the donee: *Hoghton* v. *Hoghton*, 15 Beav. 278. The remarks of Turner, L.J., in *Rhodes* v. *Bate*, 14 W. R. 292, L. R. 1 Ch. 252, are not against, but in favour of, the plaintiff's case, because the plaintiff had no competent independent advice at the time the gift was made. Kekewich, J., held that as the plaintiff had formed and expressed the intention of making the gifts before entering the sisterhood, the intention must be presumed to be continuous, and therefore that the making of the gifts must be attributed to an intention formed when the plaintiff was not in the sisterhood. But no such presumption or conclusion arises as a matter of law, because a mere promise or expression of intention does not amount to a gift. The real question is, was the donor, at the time of making the gift, a morally free agent? From the relation that existed at the time of making the gift between plaintiff and defendant, the presumption is that the plaintiff was not a free agent: *Fulham* v. *McCarthy*, 1 H. L. Cas. 703; *Whyte* v. *Meade*, 2 Ir. Eq. R. 420; *In re Metcalfe's Trusts*, 12 W. R. 538, 2 De G. J. & S. 122; *Wright* v. *Vanderplank*, 4 W. R. 410, 8 De G. M. & G. 133; *Clegg* v. *Edmondson*, 8 De G. M. & G. 808, 5 W. R. Dig. 60. On the question of acquiescence and *laches*, the plaintiff in her evidence states that it was not till 1884 she became aware that she might have her money returned. The railway stock still standing in the defendant's name is impressed with a constructive trust in favour of the plaintiff. *Turner* v. *Collins*, 20 W. R. 305, L. R. 7 Ch. App. 329; *Lindsay Petroleum Co.* v. *Hurd*, 22 W. R. 492, L. R. 5 P. C. 221; *De Bussche* v. *Alt*, 8 Ch. D. 286, 26 W. R. Dig. 192, were referred to on this point.

Sir E. Clarke, S.G., Warmington, Q.C., and *Edward Ford*, for the respondent.—First, on the question of *laches* and acquiescence. The plaintiff left the sisterhood in May, 1879, and made no demand for the return of her property till March, 1885. The evidence shows that in 1880 the plaintiff consulted her solicitor and other advisers as to claiming her money back; she therefore then knew, or ought to have known, what her rights were, and yet she made no claim till five years afterwards, but allowed the money to remain in the hands of the defendant, and to be dealt with by the defendant as if it belonged to the sisterhood. Such conduct on the part of the plaintiff amounts to acquiescence in, or

election not to avoid, the gift: *Mitchell* v. *Homfray*, 29 W. R. 558, 8 Q. B. D. 587; *Turner* v. *Collins; Savery* v. *King*, 4 W. R. 571, 5 H. L. Cas. 627. Then, on the question of undue influence. There is no authority for saying that the relation existing between a nun and the lady superior in a convent necessarily raises the presumption that a gift made during the existence of that relation is made under undue influence; *Fulham* v. *McCarthy* and *Whyte* v. *Meade*, the only cases with regard to gifts by nuns, lay down no such doctrine. It is not necessary, therefore, for the defendant to prove that no undue influence in fact existed; the *onus* of proving the existence of undue influence lies on the plaintiff.

Finlay, Q.C., replied.

Haldane and *C. H. Sargant*, for the railway companies.

Cur. adv. vult.

July 9.—Cotton, L.J.—This is an action brought to set aside certain gifts made by the plaintiff to the defendant, Miss Skinner, while the plaintiff was a member of a sisterhood of which the defendant was the lady superior. Kekewich, J., dismissed the action, with costs. The plaintiff, by her action, sought to recover two sums of stock transferred by her to the defendant in 1874, which still remained in the name of the defendant, and also all moneys other than annual income which had been from time to time given by the plaintiff to the defendant, and which had been expended by the defendant for the charitable purposes in which the plaintiff and the other members of the sisterhood were engaged.

On this appeal, however, the claim of the plaintiff is confined to the two sums of stock still remaining in the name of the defendant. [The Lord Justice then stated the history of the case, and continued:—] The stock was transferred by the plaintiff in 1874. There is no evidence as to what took place at the time when the transfer was made.

It was urged by the defendant's counsel that there is no difference between the claim of the plaintiff to the stock remaining and her claim to the moneys given by her to the defendant and applied by the defendant to the purposes of the sisterhood. If the money so expended had been applied by the transferee for her own selfish purposes, or had been obtained by fraud or deception on the part of the donee, probably this would have been the case. But if the plaintiff has an equity to set aside gifts made to the defendant, in my opinion the defendant would have a stronger equity against the plaintiff to prevent the plaintiff making the defendant personally liable for money spent by the defendant for the charitable purposes to promote which the plaintiff and the defendant were at the time of the expenditure associated, and which the plaintiff at the time was willing and anxious to promote.

Is the plaintiff entitled to recall the stock now in question and still in hand? There is no decision in point with reference to a case like the present. For, although in *Whyte* v. *Meade* a deed of gift by a nun was set aside, there were in that case special circumstances which prevent it being treated as an authority in favour of the plaintiff here. The question is, Does the case fall within the principles laid down by decisions of the Court of Chancery in setting aside voluntary gifts executed by parties who at the time were under such influence as, in the opinion of the court, enabled the donor to set the gift aside? These decisions may be divided into two classes—(1) When the court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; (2) when the relation between donor and donee have at, or shortly before, the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such cases the court sets aside the voluntary gift unless it is proved that, in fact, the gift was the result of a free exercise of the donor's will. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the court interferes, not on the ground that any wrongful act has, in fact, been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused.

Influence has been denied. There is no suggestion the defendant acted from any selfish motive, and it cannot be contended that the case comes under the first class of decisions I have referred to. The question is, whether the case comes within the principle of the second class; and I am of opinion that it does.

At the time of the gift the plaintiff was a professed sister, and as such bound to make absolute submission to the defendant as superior of the sisterhood. She had no power to obtain independent advice. She was in such a position that she could not freely exercise her own will as to the disposal of her property, and she must be considered as being (to use the words of Knight-Bruce, L.J., in *Wright* v. *Vanderplank*) "not in the largest and amplest sense of the term, not in mind as well as in person, an entirely free agent."

We have nothing to do with the plaintiff's reason for leaving the sisterhood; but in my opinion when she exercised her legal right to do this she was entitled to recover so much of the money transferred by her as remained in the hands of the defendant, on the ground that it was property the beneficial interest in which she had never effectually parted with. But it was urged that it would be contrary to public policy to grant the plaintiff relief, on the ground that it would be a hindrance to the charitable work in which the plaintiff and the sisterhood were engaged, and that it would be better to show those who were desirous of leaving the work that they could not take with them any part of their property But in my opinion it would be wrong to put such a pressure on those who may wish to leave. Such work, to be effectual, must be done with a willing mind; and in my opinion it would be productive of evil to attempt to retain in such a society as the sisterhood, by the pressure of loss of property, those whose hearts and will are no longer in the work, and who desire to exercise their legal right of withdrawing.

But it is contended that Kekewich, J., decided against the plaintiff on this ground, that she had competent advice—that of her brother—before she joined the sisterhood, and that she then formed the resolution (as Mr. Nihill stated in his evidence) to give everything to the sisterhood, and that this prevents the subsequent transfer being set aside.

In my opinion, even if there were evidence that she had before she joined the sisterhood advice on the question of how she should deal with her property, that would not be sufficient. The question is, I think, whether at the time she executed the transfer she was under such influences as to prevent the gift being considered as that of one free to determine what should be done with her property? No reliance can be placed on the promise made to Mr. Nihill. This could not be enforced, and did not in any way bind her at law or pass the property, and the title of the defendant depends solely on the transfer made in 1874. In my opinion, when the plaintiff left the sisterhood in 1879 she was entitled to set aside the transfer and to have retransferred to her the fund still held by the defendant.

Has she lost this right by delay? The case is not like that of a contract voidable for fraud. There the party defrauded must elect, and within a reasonable time, for until he does so he retains the rights or the benefits,

however inadequate, secured to him by the contract. It is to such a case that the judgment in *Clough* v. *London and North-Western Railway Co.*, 20 W. R. 189, L. R. 7 Ex. 26, applies, and not to a case of voluntary gift like the present, where the person seeking to set aside the transfer never received any benefit whatever from the transaction. There was an attempt to show that in consequence of the plaintiff's delay in bringing the action the defendant and the sisterhood which she represents had incurred liabilities on the faith of retaining the money given by the plaintiff. But I can find no evidence to support this contention. It was contended that in 1883 a lease was taken for the sisterhood at a rent exceeding that for which it had been previously liable. But the lease, if it were of the suggested date, is not in evidence, and the evidence attributes the taking of a larger piece of land at the increased rent to the reliance of Mr. Nihill on the expectations formed in 1870 or 1871, based on the plaintiff's promises that she would give her property to the sisterhood. This defence, in my opinion, therefore fails.

Is the delay (and in this case it was very great) of itself sufficient to deprive the plaintiff of her right to the fund now in the defendant's hands? The defendant has not pleaded the Statute of Limitations, and I do not suggest she could successfully have done so. In cases where the fact of influence depends on the result of conflicting evidence delay must be important, but it cannot be disputed that the plaintiff here was in a state which necessarily subjected her to a powerful influence. The proof of this does not depend on parol evidence, but on the rules and admitted principles of the sisterhood.

Mere delay in endorsing a right is no in itself at defence. It is very different from raising no objection to an act while it is being done, which may be treated as an assent to the act, and, therefore, as being acquiesced in in such a sense as to be an equitable defence. The judgment of Thesiger, L.J., in *De Busseche* v. *Alt* is in point. In *Wright* v. *Vanderplank*, which was much relied on as regards delay, the action was not brought until ten years after the execution of the deed sought to be set aside, yet Turner, L.J., says, "As to the time which has elapsed, if the case had rested on time only, much might have been said in favour of the plaintiff's claim," and in dismissing the action he relied on the way in which the donor had, during the period subsequent to the execution of the deed, dealt with the property, as recognising the deed as effectual. Moreover, delay in asserting rights cannot be in equity a defence unless the plaintiff were aware of her rights. In her evidence she stated that until long after 1879 she did not know that she could set aside the gift. A letter of June, 1879, was relied on to displace that statement. But the terms of the letter, though apparently inconsistent with her evidence, are ambiguous, and the letter was not put to her in cross-examination. Also it is in evidence that shortly after she left the sisterhood she had some conversation with her brother about her money, and with a Roman Catholic priest who advised her not to trouble herself about it, and also that shortly after she left the sisterhood she consulted with a solicitor about making a fresh will, and that he told her "it was too much money to leave behind her." But I understand that Kekewich, J., did not discredit her evidence as to the time when she first was informed of her right to set aside the gifts to the defendant, and I think that we ought to hold that she did not, until long after 1879, know her rights. The delay which has occurred since 1879 is, I think, a defence against any claim on behalf of the plaintiff to the dividends on the stock now in the name of the defendant before the commencement of the action. But in my opinion it is no defence as regards the stock itself remaining in the hands of the defendant and the dividends accrued since the commencement of the action. At the time when the plaintiff left the sisterhood in 1879 that stock was property which the plaintiff was entitled to claim as being held by the defendant in trust for her. The delay in this case does not, in my opinion, amount to evidence that the plaintiff recognized the gift as her own spontaneous act, nor can it be relied on as having deprived the plaintiff of any evidence in her favour which could have been adduced if the plaintiff had brought her action shortly after she left the sisterhood. I think the plaintiff is entitled to a decree for retransfer to her of the stock in question, and for payment of the dividends accrued since the commencement of the action.

LINDLEY, L.J. [after reviewing the facts, continued:—] Two questions are raised by the appeal—first, whether the gifts made by the plaintiff to the sisterhood were revocable or irrevocable when made; secondly, whether, assuming them to have been revocable when made, it was competent for the plaintiff to revoke them when she did. There is no statutory law in this country prohibiting such gifts unless what is given is land or money to be laid out in land. These are provided for by the Mortmain and Charitable Uses Acts. But they have no application to this case. The common law, as distinguished from equity, does not invalidate such gifts as these. There being no duress or fraud, the only ground for impeaching such gifts at law would be want of capacity on the part of the donor, and although the plaintiff was a religious enthusiast, no one could treat her as, in point of law, *non compos mentis*. There is no authority whatever for saying that her gifts were invalid at law.

It is to the doctrines of equity, then, that recourse must be had to invalidate such gifts, if they are to be invalidated. The doctrine relied upon by the appellant is the doctrine of undue influence, expounded and enforced in *Huguenin* v. *Baseley* and other cases of that class. The defendant there had not only acquired considerable personal influence over the plaintiff, but was intrusted by her with the management of her property. His duty to her was clear; and it was with reference to persons so situated that Lord Eldon used the language so often quoted and so much relied on in this case. He said (at p. 299):—"Take it that she (the plaintiff) intended to give it to him (the defendant); it is by no means out of the reach of the principle. The question is not whether she knew what she was doing, had done, or proposed to do, but how the intention was produced; whether all that care and providence was placed around her as against those who advised her which, from their situation and relation with respect to her, they were bound to exert on her behalf." This principle has been constantly recognized and acted upon in subsequent cases, but in all of them, as in *Huguenin* v. *Baseley* itself, it was the duty of the donee to advise and take care of the donor. Where there is no such duty the language of Lord Eldon ceases to be applicable. What, then, is the principle? Is it that it is right and expedient to save persons from the consequences of their own folly? Or is it that it is right and expedient to save them from being victimized by other people? In my opinion the doctrine of undue influence is founded on the second of these two principles. The undue influence which courts of equity endeavour to defeat is the undue influence of one person over another, not the influence of enthusiasm on the enthusiast who is carried away by it—unless, indeed, such enthusiasm is itself the result of external undue influence. But the influence of one mind over another is very subtle, and of all influence religious influence is the most dangerous and the most powerful, and to counteract it courts of equity have gone very far. They have not shrunk from setting aside gifts made to persons in a position to exercise undue influence over the donors,

although there has been no proof of the actual exercise of such influence, and the courts have done this on the avowed ground of the necessity of going this length in order to protect persons from the exercise of such influence under circumstances which render proof of it impossible. The courts have required proof of its non-existence, and, failing that proof, have set aside gifts otherwise unimpeachable.

In this particular case I cannot find any proof that any gift made by the plaintiff was the result of any actual exercise of power or influence on the part of the lady superior or of Mr. Nihill, apart from the influence necessarily incidental to their position to the sisterhood. Everything that the plaintiff did is, in my opinion, referable to her own willing submission to the vows she took and to the rules which she approved, and to her own enthusiastic devotion to the life and work of the sisterhood. I believe that in this case there was, in fact, no undue or undue influence brought to bear on the plaintiff other than such as inevitably resulted from the training she had received, the promise she had made, the vows she had taken, and the rules to which she had submitted herself. But her gifts were, in fact, made under a pressure which, while it lasted, the plaintiff could not resist, and were not, in my opinion, past recall when that pressure was removed. When the plaintiff emancipated herself from the spell by which she was bound she was entitled to invoke the aid of the court in order to obtain the restoration from the defendant of so much of the plaintiff's property as had not been spent in accordance with the wishes of the plaintiff, but remained in the hands of the defendant. The plaintiff now demands no more.

As to the second point—whether it is too late for the plaintiff to invoke the assistance of the court, more than six years having elapsed between the time when the plaintiff left the sisterhood and the commencement of the action. It is not necessary to decide whether this delay alone would be a sufficient defence to the action. The case by no means rests on mere lapse of time. There is far more than inactivity and delay on the part of the plaintiff. There is conduct amounting to confirmation of the gift. Gifts liable to be set aside by the courts on the ground of undue influence have always been treated as voidable, not void. A gift made in terms absolute and unconditional naturally leads the donee to regard it as his own, and the longer he is left under this impression the more difficult it is justly to deprive him of what he has naturally so regarded. So long as the relation between the donor and the donee which invalidates the gift lasts, so long is it necessary to hold that lapse of time affords no sufficient ground for refusing relief to the donor. But this necessarily ceases when the relation itself comes to an end; and if the donor desires to have his gift declared invalid and set aside, he ought, in my opinion, to seek relief within a reasonable time after the removal of the influence under which the gift was made. If he does not the inference is strong, and if the lapse of time is long the inference becomes inevitable and conclusive, that the donor is content not to call the gift in question; or, in other words, that he elects not to avoid it, or, what is the same thing in effect, that he ratifies and confirms it. In this case the plaintiff considered when she left the sisterhood what course she should take, and she determined to do nothing, but to leave matters where they were. She insisted on having her will back, but she never asked for her money until the end of five years or so after she left the sisterhood. In this state of things I can only come to the conclusion that she deliberately chose not to attempt to avoid her gifts, but to acquiesce in them, or, if the expression is preferred, to ratify or confirm them. Looking this as a question of fact, and upon the evidence I can come to no other conclusion than that which I have mentioned. Moreover, by demanding her will and not her money she made her resolution known to the defendant. It was urged that the plaintiff did not know her rights until shortly before she asked for her money back. But, in the first place, I am not satisfied that the plaintiff did not know that it was at least questionable whether the defendant could retain the plaintiff's money if she insisted on having it back. In the next place, if the plaintiff did not know her rights her ignorance was simply the result of her own resolution not to inquire into them; nor is it an answer to an equitable defence based on *laches* and acquiescence. Again, it was urged that the defendant had not been prejudiced by the delay, and that nothing has been done on the faith that the plaintiff would not require her money to be returned to her. But I do not think this material. I treat the money as absolutely given to the sisterhood when the plaintiff determined not to ask for it back, which she did in 1880. But, further, I cannot come to the conclusion that nothing has been done on the faith of the money being the property of the sisterhood. It is contrary to human nature to suppose the plaintiff's money was not for years regarded as the money of the sisterhood, and that they did not act on that assumption and make their arrangements accordingly. Mr. Nihill's evidence satisfies me that they did so, although I do not think he shows that they took any particular steps on the faith of having the particular sum now sought to be taken from them. It is not, however, in my opinion, necessary to prove so much as that. Whether the plaintiff's conduct amounts, in point of law, to acquiescence or *laches*, or whether it amounts to an election not to avoid a voidable transaction, or whether it amounts to a ratification or confirmation of her gifts, are questions of mere words which it is needless to discuss. In my judgment it would not be fair or right to the defendant to compel her now to restore the money sought to be recovered by this appeal. Nor, in my opinion, would such a result be in conformity with sound legal or equitable principles. Upon this ground, therefore, I am of opinion the appeal ought to be dismissed.

BOWEN, L.J.—This is a case of great importance. There are no authorities which govern it; my brethren, on whose experience in matters of equity I naturally rely, differ, and on that ground I think it right to express my own views upon the point. It is a question which must be decided upon broad principles, and we have to consider what is the principle, and what is the limitation of the principle, as to voluntary gifts where there is no fraud on the part of the defendant, but where there is an all powerful religious influence which disturbs the independent judgment of one of the parties, and which subordinates for all worldly purposes the will of that person to the will of the other.

It seems to me that it is of essential importance to keep quite distinct two things which, in their nature, seem to me to be different—the rights of the donor, and the duties of the donee, and the obligations which are imposed upon the conscience of the donee by the principles of this court. As to the rights of the donor in a case like this, I entertain no doubt. It seems to me that persons who are under the most complete influence of religious feeling are perfectly free to act upon it in the disposition of their property, and not the less because they are enthusiasts. Persons of this kind are not dead in law. They are dead, indeed, to the world, so far as their own wishes and feelings about the things of the world are concerned, but such indifference to things external does not prevent them, in law, from being free agents. In the present instance there was no duress, no incompetency, no want of mental power on the part of the donor. It seems to me that, so far as regards her rights, she had the absolute right to deal with her property as she chose. Passing next to

the duties of the donee, it seems to me that, although this power of perfect disposition remains in the donor under circumstances like the present, it is plain that equity will not allow a person who exercises or employs a dominant religious influence over another to benefit directly or indirectly by the gifts which the donor makes under or in consequence of such influence, unless it is shown that the donor, at the time of making the gift, was allowed full and free opportunity for counsel and advice outside—the means of considering his or her worldly position and exercising an independent will about it. This is not a limitation placed on the action of the donor; it is a fetter placed on the conscience of the recipient of the gift, and one which arises out of public policy and fair play. If this had been the gift of a chattel, therefore, the property would have then passed in law, and the distinction between the gift of a chattel and the gift of money may be treated as a pecuniary one only for this purpose.

Now, that being the rule, in the first place, was the plaintiff entitled to the benefit of it? She had vowed in the most sacred and solemn way absolute and implicit obedience to the will of the defendant, her superior, and she was bound altogether to reject the advice of externs, not to consult those outside the convent. Now I offer no sort of criticism on institutions of this sort: no kind of criticism on the action of those who enter them or of those who administer them. In the abstract I respect their motives, but it is obvious that it is exactly to this class of case that the rule of equity which I have mentioned ought to be applied if it exists. It seems to me the plaintiff—so long as she was fettered by this vow, so long as she was under the dominant influence of this religious feeling—was a person entitled to the protection of this rule. Now was the defendant bound by this rule? I acquit her most entirely of all selfish feeling in the matter. I can see no sort of wrongful desire to appropriate to herself any worldly benefit from the gift: but nevertheless she was a person who benefited by it, so far as the disposition of the property was concerned, although no doubt she meant to use it in conformity with the rules of the institution and did so use it. I pause one moment to say a word as to the view of Kekewich, J., which is not quite consistent with the above. He seems to have thought that the question turned on the original intention of the donor at the time she entered the convent, and that what passed subsequently could be treated as if it were a mere mechanical performance of a complete mental intention originally formed. I entirely agree with the view presented to us by the counsel for the appellant as to that part of the judgment of Kekewich, J. It seems to me that it is not the point upon which the case turns, that the standard of duty was originally created by the plaintiff herself, although her original intention is one of the facts, no doubt, which bear upon the case and is not to be neglected. But it is not the crucial fact. We ought to look, it seems to me, at the time at which the gift was made and to examine what was then the condition of the donor who sought to make it.

For those reasons I think that, without any interference with the freedom of persons to deal with their property as they please, we ought to and can hold but one opinion—viz, that in 1879 the plaintiff could have set this gift aside.

Then comes the question of the time which has elapsed since. What effect has time upon a right to the protection of this rule? The rule is an equity arising out of public policy. I do not think that delay in itself is an absolute bar, though it is a fact to be considered in determining the inference of fact which, it appears to me, we must draw on the one side or the other. The principle of the rule arises out of public policy, and imposes a fetter on the conscience of the recipient of the gift. When is that barrier removed from the conscience of the recipient of the gift? It seems to me that the common-sense answer ought to be—and I think the right answer is—as soon as the donor escapes from the religious influence which hampered her at the time, as soon as she becomes free, and has determined to leave the gift where it is.

Now, if she has so acted, if her delay has been so long as reasonably to induce the recipient to think and to act upon the belief that the gift is to lie where it has been laid, then by estoppel it appears to me that the donor would be prevented from revoking it. But I do not base my decision on that ground. I do not base my decision at all upon that view that she is estopped by the delay. But a long time has elapsed—five years. Every day and hour of those five years the plaintiff has had opportunity of reflecting upon her past life and upon what she had done. She has had that opportunity since she passed away from the influence of the defendant, and that she has so passed away is demonstrated by the fact that she has entered the Church of Rome—a different religious community. The influence, therefore, ceased completely. She was surrounded by persons perfectly competent to give her proper advice. She had her solicitor, she had her brother, a barrister himself, and she had the directors of the consciences of the community she had entered. I draw unhesitatingly the inference from these circumstances that she did, in or shortly after 1879, consider this matter and determine not to interfere with her previous disposition. Was she aware of her rights then? I incline to think she must have been, having regard to the advisers who surrounded her; but I do not consider it to be essential to draw that inference. It is enough if she were aware that she might have rights and deliberately determined not to inquire what they were or to act upon them. I again unhesitatingly draw the inference that she was aware she had, or might have, rights, and that she deliberately made up her mind not to enforce them.

In drawing this inference of fact, I do no discredit to the character of the plaintiff, which is above all reproach; but, on carefully considering her evidence, I do not feel that I can place reliance on her memory, and, in my opinion, it would be wrong to draw the inference from her evidence that she did in her own mind never form any definite view about the property she left behind in the convent. In my opinion the appeal must be dismissed, on the ground that the time which has elapsed, though not a bar in itself, though not amounting to *laches*, which disentitles the plaintiff to relief, is, nevertheless, coupled with the other facts of the case, a matter from which but one reasonable inference ought to be drawn by men of the world—viz., that the plaintiff considered her position at the time, and elected and chose not to disturb the gift which she then at that moment felt if she had the will, she had the power, to disturb.

Appeal dismissed, with costs.

Solicitors, *Blount, Lynch, & Petre; Freemans & Dicker.*

From Q. B. Div. Jan. 16.

REAL AND PERSONAL ADVANCE CO. *v.* CLEARS. (*a.*)

Bill of sale—Bills of Sale Act (1878) *Amendment Act,* 1882 (45 & 46 *Vict.* c. 43), *s.* 7—*Covenant necessary for maintenance of security.*

By a bill of sale the mortgagor undertook to pay all rent and other outgoings of the premises on which the goods assigned might be. It was further provided that,

(*a.*) Reported by A. P. PERCIVAL KEEP, Esq., Barrister-at-Law.

is default of such payment within seven days after it became due, the mortgagees might pay any rent, &c., then due, and that all sums so paid by the mortgagees, with interest thereon, should be charged upon the goods assigned, and be recoverable in the same manner as the principal moneys and interest secured by the bill of sale.

Held, that the bill of sale was void, as not being in accordance with the form in the schedule to the Bills of Sale Act, 1882.

Bianchi v. Offord, 17 *Q. B. D.* 484, 35 *W. R. Dig.* 27, *approved.*

Goldstrom v. Tallerman, 35 *W. R.* 68, 18 *Q. B. D.* 1, *distinguished.*

Appeal from the decision of a divisional court (Lord Coleridge, C.J., and A. L. Smith, J.).

The action was brought to recover possession of goods assigned by a bill of sale which contained clauses by which the mortgagor undertook to pay the rent, rates, taxes, and outgoings of the premises whereon the goods might be within seven days after the same should become payable, and to produce to the mortgagees on demand the receipts for such rent, &c. The bill of sale proceeded: "And if the mortgagor shall neglect or refuse to pay the said rent, rates, taxes, and outgoings within the said seven days, or on the expiration thereof to produce to the mortgagees as aforesaid the respective receipts for such rent, rates, taxes, and outgoings respectively, then and in any such case it shall be lawful for the mortgagees, if they shall think fit, to pay any rent, rates, taxes, and outgoings of the said premises which may then be due and owing, and all sums of money so paid by the mortgagees, together with interest thereon, shall be charged upon the goods assigned and shall be recoverable in the same manner as the principal moneys and interest hereby secured." It was further declared that the goods assigned should not be liable to seizure or to be taken possession of by the mortgagees for any cause other than those specified in section 7 of the Bills of Sale Act (1878) Amendment Act, 1882.

The county court judge nonsuited the plaintiffs on the ground that the bill of sale was bad, and the Divisional Court having refused to interfere the plaintiffs appealed.

Bonsll, for the appellants.—The form of this bill of sale is identical with that held to be bad by Bowen, L.J., sitting at *Nisi Prius* in *Bianchi* v. *Offord*, 17 Q. B. D. 484, 35 W. R. Dig. 27. That case, however, was inconsistent with *Ex parte Stanford, In re Barber*, 34 W. R. 507, 17 Q. B. D. 259, and has been impliedly overruled by *Goldstrom* v. *Tallerman*, 35 W. R. 68, 18 Q. B. D. 1.

J. F. Clerk (*Finlay, Q.C.*, with him), for the respondent.—This bill of sale differs from those in *Goldstrom* v. *Tallerman* and *Ex parte Stanford*, since it contains the words "shall be recoverable in the same manner as the principal moneys and interest hereby secured." Those words give a power of seizure in default of payment which cannot be cancelled by the general clause against seizure. The provision has been held not to be necessary for the maintenance of the security in *Bianchi* v. *Offord*.

He also cited *Hetherington* v. *Groome*, 33 W. R. 103, 13 Q. B. D. 789.

Bonsll replied.

Lord ESHER, M.R.—It is admitted in this case that the bill of sale is in the same terms as that in *Bianchi* v. *Offord*. It is also admitted that the words are not the same as those used in *Ex parte Stanford* and *Goldstrom* v. *Tallerman*. The question therefore arises whether we are prepared to overrule *Bianchi* v. *Offord*. I am not inclined to do so. That case decided that this provision was not necessary for the maintenance of the security. The stipulation certainly is not within the form given in the schedule to the Act, and it could only be inserted if it were necessary for the maintenance of the security. Therefore the bill of sale is bad and this appeal must be dismissed.

FRY, L.J.—I am of the same opinion. Undoubtedly the cases on the Bills of Sale Acts are not entirely satisfactory, and the distinctions between them are very narrow. Now this clause provides that the sums paid by the mortgagees are to be recoverable in the same manner as the principal sum and interest. How is that recovered? By action on the covenant and by seizure. Therefore these sums were to be recovered by seizure.

But section 7 of the Bills of Sale Act, 1882, provides that there shall be no seizure except where there is default in the payment of the money thereby secured or in the performance of any covenant contained in the bill of sale which is necessary for the maintenance of the security. This clause is, therefore, at variance with section 7, and has been held to be so by Bowen, L.J., in *Bianchi* v. *Offord*. Nor can that variance be cured by the insertion of the general clause against seizure for any other cause than those specified in section 7. Such a general clause cannot be admitted to cure defects in the bill of sale. In my opinion *Bianchi* v. *Offord* was a correct decision and was not interfered with by *Goldstrom* v. *Tallerman*. In the latter case it was provided that the money so paid by the mortgagees for rent, &c., was to be a charge upon the assigned chattels, but there was no provision that it was to be recoverable in the same way as the principal sum. Therefore there could be no seizure for non-payment in that case. The same was the case in *Ex parte Stanford*. Those decisions are therefore distinguishable from *Bianchi* v. *Offord*. I agree in that decision, and I think that this appeal must be dismissed.

LOPES, L.J.—In my opinion this bill of sale is void, because it has not the same legal effect as the form given in the schedule to the Act. It contains a provision which is not contained in that form and which is not necessary for the maintenance of the security, and cannot therefore be imported into the bill of sale. The case is on all fours with *Bianchi* v. *Offord*, with which I entirely agree, and which I think is easily distinguishable from *Ex parte Stanford* and *Goldstrom* v. *Tallerman*.

Appeal dismissed.

Solicitors for the appellants, *Nye, Greenwood, & Moreton.*

Solicitors for the respondents, *J. & C. Attenborough.*

From Q. B. Div. Dec. 19.

NEAVES *v.* SPOONER. (*a.*)

Practice—Costs—Action founded on contract—Less than £20 recovered—Order for costs on county court scale—County Courts Act, 1867 (30 & 31 *Vict. c.* 142), *s.* 5—*R. S. C.*, 1883, *ord.* 65, *rr.* 1, 12—*Action for an account.*

Where the plaintiff in an action founded on contract within the meaning of section 5 *of the County Courts Act*, 1867, *recovers less than £20, the court can now, under ord.* 65, *r.* 1, *allow him costs upon the county court scale.*

Decision of the Queen's Bench Division (ante, *p.* 62) *reversed.*

Appeal from the Queen's Bench Division, reported *ante*, p. 62.

In an action in the Sheffield District Registry of the High Court to recover a sum due in respect of the rent of

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

a house, and for an account of rents collected by the defendant as agent for the plaintiff, after statement of defence was delivered an order was made for an account.

Upon the account being taken, the District Registrar certified that £3 in all was due to the plaintiff, and the defendant amended his defence by paying this sum into court as sufficient to satisfy the plaintiff's claim.

The plaintiff accepted this sum in satisfaction, and applied at chambers for an order for costs upon the High Court scale. Kekewich, J., made an order allowing the plaintiff costs upon the County Court Scale B.

The Divisional Court revessed this order, on the ground that there was no jurisdiction to make it.

The plaintiff appealed.

Morton Daniel, for the plaintiff.

T. W. Chitty, for the defendant.

The County Courts Act, 1867, s. 5; Judicature Act, 1873, s. 67; Rules of Court, 1888, ord. 65, rr. 1, 12, were referred to.

BOWEN, L.J.—In this case Kekewich, J., had made an order by which costs were to be allowed to the plaintiff upon County Court Scale B. The Divisional Court held that there was no jurisdiction to make that order. The question is whether that order of the judge was within the scope and area of his discretion. The facts are important, and when they are clearly understood the manner in which the judge exercised his discretion becomes clear.

The action was brought in the Sheffield District Registry of the High Court for rent of a house held by the defendant of the plaintiff, and for an account of rents received by the defendant as agent for the plaintiff. The writ, therefore, was indorsed with a claim for an account as well as for rent. Shortly after the issue of the writ an order was made for an account by the district registrar, which order does not seem to have been opposed on the ground that it was necessary to take the account before the action was proceeded with. The defendant did not produce a proper account at first, but only did so after some trouble; and when the account was finally taken the district registrar certified that £3 was due to the plaintiff.

Thereupon the defendant paid this sum into court with his statement of defence, and the plaintiff took it out in satisfaction, and applied for costs upon the High Court scale. Kekewich, J., must have considered that the action was not merely to recover £3, but was an action to compel the defendant to account, founded on a breach of contract to account, because he allowed costs on the higher county court scale. So far, it was a matter upon which he would have before him the materials for arriving at a proper conclusion; and unless he was wrong we cannot interfere. Indeed, it seems to me that his order was perfectly right, unless he had no jurisdiction to make it.

Now it is said that section 5 of the County Courts Act, 1867, applies. That section enacts that if in any action in the superior courts the plaintiff shall recover a sum less than £20, if the action is founded on contract, he shall not be entitled to any costs of suit unless the judge certify that there was sufficient reason for bringing such action in the superior court. The argument was twofold: First, that this action came within that section, being an action founded on contract in which the plaintiff only recovered £3; and, secondly, that, although a judge might allow costs on the High Court scale, he had no right to steer a midway course and give costs upon County Court Scale B.

With regard to the first it is not necessary to decide whether this is an action founded on contract, within the meaning of that section, in which the plaintiff recovers less than £20. It seems to me that there is a good deal to be said against that contention because the claim is for an account as well as for a sum of money. Does an action for an account, to which is added a claim for the sum found due upon taking the account, become an action for the sum so found due? I do not decide it, and so I pass to the second branch of the argument, that a judge must either make no order or give costs on the High Court scale. As a rule, in 1867, costs followed the event. Then came the Judicature Act, 1873, and though section 67 of that Act applies section 5 of the County Courts Act, 1867, to all actions in the High Court in which any relief is sought which can be given in the county court, it leaves the construction of that section to be determined. When we turn to ord. 65, r. 1, it becomes plain that the costs of actions in the High Court are placed in the discretion of the court or a judge, except in particular cases. Therefore, even if the judge had no power before the Judicature Act to make the half-and-half order made in this case, he now has power to do so. Therefore it seems to me to be clear that Kekewich, J., had power, instead of either making no order or giving the plaintiff the full costs, to make this order, which does more perfect justice than could have been done previously. That being so, the court below ought not to have interfered with the exercise of his discretion, and so this appeal must be allowed. The only difficulty, it seems to me, in this case is to apply well-known principles of law to the facts before us, and I rather gather that the case was not so fully argued in the court below as here, and that the argument, as is often the case, proceeded upon a different footing.

FRY, L.J.—I am of the same opinion. It is said that Kekewich, J., had no power to make this order. I myself doubt whether section 5 of the County Courts Act, 1867, applies to an action the substantial part of which is not a money demand but a claim such as this for an account. I abstain, however, from expressing any opinion upon it. It is said that, assuming the case to be within the section, the judge had only one of two alternatives, either to make no order or to give costs on the High Court scale. The view I take is that the Judicature Act and Rules have incorporated into the second alternative in that section the power to give costs less than the full High Court costs. The judge has power to moderate and modify the High Court scale if he does not think fit to give the full High Court costs. The learned judge having jurisdiction to make the order he did, the exercise of his discretion ought not to have been interfered with, and I further say that, in my opinion, that discretion was rightly exercised.

Appeal allowed.

Solicitors for the plaintiff, *J. & W. Maude, for Gee*, Sheffield.

Solicitors for the defendant, *Bell, Brodrick, & Gray.*

High Court of Justice.

Chan. Div. Kay, J. — Jan. 18.

In re Colbeck.
Hale *v.* Colbeck. (*a.*)

Practice—Parties—Addition of defendants—Ex parte application—Notice—R. S. C., 1875, ord. 16, rr. 2, 13—R. S. C., 1883, ord. 16, r. 11.

An application to add a defendant to an action must not be made ex parte.

Motion.

An order had been made on an *ex parte* application by the plaintiff, giving him leave to add a defendant; but the registrar refused to draw up the order, on the ground that it ought not to have been made *ex parte*. He relied on *Tildesley* v. *Harper*, 3 Ch. D. 277, 25 W. R. Dig. 201.

Tanner, for the plaintiff, now asked the court to direct that the order should be drawn up. He contended that *Tildesley* v. *Harper*, which was under ord. 16, r. 2, of the old Rules of Court of 1875, did not apply to an application under R. S. C., 1883, ord. 16, r. 11: Ann. Pr., pp. 214, 226.

Kay, J.—The present rule does not say that it can be done without notice to the other side. [His lordship read ord. 16, r. 11, and continued:—] The plaintiff must give notice of his intention to add a party before the order can be made.

Solicitors, *Elliott & Ash*, for *Deane & Son*, Batley.

Chan. Div. Chitty, J. — May 4, 5, 10, 11, 25.

Colonial Bank *v.* Hepworth. (*b.*)

Company—Shares—Certificates—Negotiable instrument—Blank transfer and blank power of attorney—Estoppel.

The mode of transfer of share certificates in an American railroad company was as follows:—The transfer and a power of attorney were signed by the registered shareholder. When the blank transfer reached the hand of a holder desiring to be registered, his name was filled in by himself or by someone on his behalf, and the certificate was left with the company and then cancelled, the transferee registered, and a new certificate issued in his name.

Held, that every prior holder of the certificates with blank transfers duly signed by the registered holders conferred on each subsequent bonâ fide *holder for value of the certificates for the time being an authority to fill in the name of the transferee, and was estopped from denying such authority, and to that extent, but no further, was estopped from denying the title of such holder for the time being. By delivery an inchoate legal title in the shares passes, but a title by unregistered transfer is not equivalent to the legal estate in the shares, or to the complete dominion over them.*

Trial of action.

This was an action which raised questions respecting the negotiability of shares in the New York Central Railroad Co. under the circumstances stated in the judgment of the court, where the facts and arguments will be found very fully stated.

Rigby, Q.C., Sir A. Watson, Q.C., and *Butcher*, for the plaintiffs, cited the following authorities:—*Heath* v. *Crealock*, 23 W. R. 95, L. R. 10 Ch. 22; *Goodwin* v. *Robarts*, 24 W. R. 987, 1 App. Cas. 476; *Rumball* v. *Metropolitan Bank*, 25 W. R. 366, 2 Q. B. D. 194; *Easton* v. *London Joint-Stock Bank*, 35 W. R. 220, 34 Ch. D. 95; *Dodds* v. *Hills*, 2 H. & M. 424, 13 W. R. Ch. Dig. 57; *Carter* v. *Carter*, 3 K. & J. 617, 6 W. R. Ch. Dig. 48; *Mumford* v. *Stohwasser*, 22 W. R. 833, L. R. 18 Eq. 556; *Shropshire Union Railways and Canal Co.* v. *Reg.*, 23 W. R. 709, L. R. 7 H. L. 496; *Société Générale de Paris* v. *Walker*, 34 W. R. 662, 11 App. Cas. 20; *Colonial Bank* v. *Whinney*, 34 W. R. 705, 11 App. Cas. 426; *Burra* v. *Ricardo*, 1 Cab. & Ellis, 478.

Romer, Q.C., Finlay, Q.C., and *Grosvenor Woods*, for the defendant, cited the following authorities:—*Easton* v. *London Joint-Stock Bank*; *Pilcher* v. *Rawlins*, 20 W. R. 281, L. R. 7 Ch. 259; *Pearson* v. *Scott*, 26 W. R. 796, 9 Ch. D. 198; *Northern Counties of England Fire Insurance Co.* v. *Whipp*, 32 W. R. 626, 26 Ch. D. 482; *Taylor* v. *Blakelock*, 34 W. R. 175, 32 Ch. D. 560; *In re Richardson*, 34 W. R. 286, 30 Ch. D. 396; *Manners* v. *Mew*, 29 Ch. D. 725, 33 W. R. Dig. 144; *In re Cooper*, 30 W. R. 648, 20 Ch. D. 611; *Shropshire Union Railways and Canal Co.* v. *Reg.*

Rigby replied.

The following American cases were cited:—*McNeil* v. *Tenth National Bank*, 46 N. Y. Rep. 325; *Schuyler* v. *New York and New Haven Railway Co.*, 34 N. Y. Rep. 41; *Kortright* v. *Commercial Bank of Buffalo*, 20 Wend. 91, 22 Wend. 348; *Robinson* v. *National Bank of New Berne*, 95 N. Y. Rep. 637; *Moore* v. *Metropolitan National Bank*, 55 N. Y. Rep. 44; *Cushman* v. *Thayer Manufacturing Co.*, 76 N. Y. Rep. 365; *Weaver* v. *Burdon*, 49 N. Y. Rep. 286; *Merchants' Bank of Canada* v. *Livingston*, 74 N. Y. Rep. 223; *Ballard* v. *Burgett*, 40 N. Y. Rep. 314; *Covell* v. *Hill*, 4 Dennis, 323; *Anderson* v. *Nicholas*, 28 N. Y. Rep. 600; *Leitch* v. *Wells*, 48 N. Y. Rep. 613.

Chitty, J.—This action relates to 240 shares in the New York Central Railroad Co. The company is an American corporation, constituted according to the law of the State of New York, and having its principal seat at New York. It has a register of shareholders at New York, and also, for the convenience of European transactions, a register in London. The only persons entitled to receive dividends and to vote are the shareholders whose names appear on the register.

It is clear, then, that, in order to assert a title as against all the world, or, in other words, to acquire a complete and perfect title to the shares, the name of the shareholder must be inscribed on the register.

The company issue to the registered shareholders, and to them alone, certificates duly authenticated by the signatures of the president and treasurer. The name of the registered shareholder is written in before the certificate is issued by the company. The shares are not specifically numbered, but the certificates bear on the face of them definitive numbers. Each certificate is for ten shares. The certificate states that the person named is entitled to ten shares of the company's capital stock. It states also that the shares are "transferable in person or by attorney on the books of the company only on the surrender and cancellation of the certificate in the form and manner which may at the time be required by the transfer regulations of the company." For the transfer of shares a deed is not required; an instrument in writing is sufficient. This must be signed by the

(*a.*) Reported by H. C. Roper, Esq., Barrister-at-Law.

(*b.*) Reported by V. de S. Bowen, Esq., Barrister-at-Law.

registered holder. On the back of the certificate there is a blank form of transfer of the stock or shares mentioned on the face of the certificate and a blank form of power of attorney to execute a surrender and cancellation of the certificate and to do all things requisite to transfer the stock on the books of the company. The transfer and power of attorney do not require a stamp.

The normal mode of transfer, as appears from the documents themselves and the evidence, is as follows:—The transfer and power of attorney are signed by the registered shareholder whose name appears on the face of the certificate, and his signature is attested by a witness. The name of the transferee is filled in and the documents are taken to the office of the company; the certificates are surrendered and cancelled and a new certificate is issued to the transferee whose name has been entered on the register. According to a practice which has extensively prevailed and has been recognized and acted upon by the company, the transferor signs the transfer and power of attorney without filling in the names of the transferee and attorney; and these blank transfers readily pass on the market from hand to hand by delivery only until the documents reach the hands of some holder who desires to be registered. His name is then filled in by himself or on his behalf. The documents are then left with the company, the certificates are cancelled, the transferee is registered, and new certificates in his name are issued in the manner already described.

The plain legal effect of this recognized practice is that the transferor who executes the transfer in blank confers on the holder of the documents for the time being an authority to fill in the name of the transferee, and each successive holder for the time being, when the documents pass through several hands, passes on this authority. The holders must, of course, be *bonâ fide* holders for value without notice.

At the commencement of this action the defendant was the registered holder of the shares in question, and certificates had been issued by the company certifying that he was entitled to the shares. Notwithstanding these facts, the plaintiffs contend that they have a legal title to the shares. For the defendant, it is contended that the plaintiffs have no title to the shares, or if the plaintiffs have any right to them it is only an equitable right, and that this equitable right cannot prevail against the defendant who had the first equitable right, and has acquired the legal right for value in good faith and without notice of the plaintiff's claim.

The case arises out of the frauds committed by some member of the late firm of Thomas, Son, & Co., brokers, of the City of London. Mr. Blakeway, a member of that firm, absconded about the 30th of January, 1884, and, presumably, the frauds were committed by him. Mr. Thomas, another member of the firm, is still in England, and might have been called as a witness; but while neither side has imputed fraud to him, neither side has thought fit to run the risk of calling him or any person in the employ of the firm as a witness—on the facts, so far as they are in dispute, each side has endeavoured to gain some advantage in the argument by reason of the omission of the other side to call Mr. Thomas, or any one in the employment of the firm, as a witness.

Having regard to the disputes as to some of the facts, it is necessary to state the facts as I find them.

The defendant is a country clergyman, Vicar of Shepshed, in Leicestershire. In August, 1883, he was desirous of investing a sum of between £5,000 and £6,000, and he applied to Messrs. Thomas, Son, & Co. for advice on the subject. They had for some years previously acted occasionally for him as brokers in similar matters. He had no reason to doubt their integrity. All the communications between him and them during the transaction in question were by letter or postcard only. On the 27th of August they informed him that, pursuant to his instructions, they had bought for him 230 shares in the New York Central Railroad, and asked him for his full name and address, in order that they might register his name in the company's books. They enclosed the usual bought note, showing that they had bought for him on the Stock Exchange on the 27th of August 230 New York Central Railroad shares at 119dols. per share, and that the purchase-money and commission amounted to £5,502 15s. The bought note stated that the 30th of August was the settlement day. He duly forwarded to them the amount by cheque, which was cashed. They acknowledged the receipt by letter of the 29th of August, in which they stated that they would forward the share certificates, when delivered to them, to New York for registration in his name.

On the 27th of August Messrs. Thomas bought 230 New York Central shares on the Stock Exchange at £119 per share of Messrs. Medley & Co., jobbers, for delivery on the 13th of September. As is usual in such cases the contract was by word of mouth, and the defendant's name was not passed. The contract was checked or verified on the Stock Exchange on the following day in the usual manner. The transaction was completed between the jobbers and the brokers on the 13th of September. The purchase-money was paid or settled on account, and the jobbers delivered to the brokers certificates for 230 shares in the New York Central Railroad. The transfer and powers of attorney on the back of the certificates had been duly signed by the persons whose names appeared on the face of the certificates as entitled to the shares, and who were, in fact, the registered holders of the shares, but the blanks left for the names of the transferees and the attorneys were not filled in. For brevity I will call these documents certificates with blank transfers. The documents were produced in court, and were identified by the jobbers' clerk as those which were delivered on the 13th of September; the identity was clearly made out by the definitive numbers on the face of the certificates. At the time of the completion a dividend amounting to £92 18s. had accrued on the shares, and the buyer was entitled to this dividend. On the settlement the jobbers paid or allowed on account to Messrs. Thomas the amount of this dividend. On the 28th of September the defendant asked Messrs. Thomas when the dividends were due and how he was to obtain them, and on the 3rd of October they stated they had been unable to register his New York Central shares in time for this dividend but had collected it of the sellers, and they enclosed a cheque for the amount—viz., £92 18s. In the same letter they stated that the books of the company would re-open on the 13th of that month, when they would at once proceed with registration of his shares, and that from thenceforth the dividends would be sent to him direct from the office of the company as they fell due.

In these circumstances it is contended for the plaintiffs that the contract entered into on the 27th of August by the brokers, Messrs. Thomas, with the jobbers was not a contract entered into by the brokers as agents for the defendant, but was an independent contract entered into by Messrs. Thomas to enable them to deliver the shares to the defendant, and the argument was pushed so far as to contend that Messrs. Thomas were sellers of 230 shares to the defendant. This contention is founded solely on the slight discrepancy as to the date of completion. Having regard to the other facts proved, I hold this discrepancy to be immaterial. The only contract shown by the evidence to have been entered into by Messrs. Thomas on the 27th of August for New York Central shares was the contract with Medley & Co. It was said for the plaintiffs that some other contract may have been entered

into; but no one was called to prove that there was any other contract, and there is no ground for drawing any inference that there was. The contract with Medley & Co. tallies as to price and the number of shares and in all other respects save the date of completion with the bought note sent to the defendant. The discrepancy is fairly attributable to some error, at all events it is but a slight discrepancy, and it is a circumstance of no weight as against the other facts, including the correspondence down to the 1st of October and the payment of the £92 18s. in respect of the dividend.

The result, then, thus far is this, that, on the delivery to Messrs. Thomas of the certificates with blank transfers for 230 shares, the property in those documents and all the rights which attached to them or passed under them vested in the defendant, and that the documents were left or permitted by him to remain in the hands of Messrs. Thomas as his brokers, and solely for the purpose of their procuring the shares to be registered in his name. It was proved by one of the plaintiff's witnesses that it was the duty of the broker, when such shares were bought for investment, to see to the transfer, and that the broker's commission covered the registration of the shares and the obtaining of new certificates.

Subsequently, on the 4th of October, 1883, Messrs. Thomas bought ten more shares for the defendant. This transaction was duly completed on the 12th of October. It was similar in all respects to the transaction as to the 230 shares, except that it is free from the question as to the discrepancy of date. The certificate with blank transfer for the ten shares was delivered to Messrs. Thomas on the 12th of October, who had previously received the purchase-money and commission from the defendant. The documents remained in Messrs. Thomas' hands solely for the purpose of their procuring the shares to be registered in the defendant's name.

In January, 1884, the defendant applied to Messrs. Thomas for information in regard to his shares, and was informed by them, in reply, that his shares were still in course of registration, but that, the books of the company being closed for dividends, the certificates had not yet been issued. Messrs. Thomas, in the same letter, told him that the dividend would be sent to him direct by the company when it fell due, which would not be till the 15th of January. On that day the defendant received the January dividend on the 240 shares from Messrs. J. S. Morgan & Co., the agents of the company in England. The cheque was accompanied by a letter stating that it was for the dividend on 240 shares standing in his name in the books of the company.

It was not contended for the plaintiffs, and it could not have been successfully contended, that the defendant was guilty of any negligence in leaving the documents in the hands of Messrs. Thomas for registration of the shares.

I now proceed to state the facts on which the plaintiffs found their claim to the shares.

On the 29th of November, 1883, Messrs. Thomas borrowed from the plaintiffs, the Colonial Bank, £50,000, and pursuant to the contract for the loan they deposited, later on the same day, certificates with blank transfers of 230 New York Central shares and other securities. It is immaterial, in the conclusion I have arrived at, to consider whether those securities were deposited as security merely for the £50,000 loan, or for the floating balance of Messrs. Thomas's loan from the bank, which amounted, with the £50,000, to £220,000. The plaintiffs' securities clerks, Mr. White and Mr. Proctor, who were called as witnesses, were unable to identify the particular securities deposited. The bank books contain no entries identifying the certificates by the definitive numbers or other description, and there was no direct evidence that the certificates deposited were the certificates of the defendant's shares. But I think that the reasonable and proper inference to be drawn from the facts proved is that the batch of certificates deposited with the plaintiffs was the batch of certificates for 230 shares delivered to Messrs. Thomas on the 13th of September. On the 11th of December following the bank redelivered to Messrs. Thomas the certificates of the 230 shares. This was done pursuant to a request in writing made to the bank by Messrs. Thomas, in which they stated that they were desirous of sending them "in for registration before the books closed" on the next day, and that they would hand to the bank their receipt that afternoon. In their statement of claim the plaintiffs alleged that this delivery was made for the purpose of having the shares registered in their own names. But the evidence adduced on the part of the plaintiffs did not prove this allegation. The evidence of their securities clerks, who were the only witnesses on the subject, went to prove that they understood that the shares were to be registered in the names of Messrs. Thomas. I hold as a fact that the clerks had no clear view on the subject, but that the plaintiffs, when they thus parted with the certificates, did not intend that the registration should be otherwise than for their benefit. This, I think, was the meaning conveyed, and intended by Messrs. Thomas to be conveyed, by their written request. On the same 11th of December Messrs. Thomas filled in the name and address of the defendant in the blank transfers for 240 shares. The certificates with blank transfers of these shares are clearly identified by the evidence as being the certificates with blank transfers of the 240 shares bought by them for the defendant. On the same day Messrs. Thomas also filled in a form of surrender of the same certificates, giving the name and address of the defendant as the name and address of the person in whose name the shares were to be registered. They handed in these certificates and the transfers and surrender then filled in to Messrs. J. S. Morgan and to the fiscal agents of the company in England for registration in the defendant's name. The fiscal agents, in the usual course of business, passed the documents to the London registrars of the railroad company, by whom the certificates were cancelled. The cancelled certificates were transmitted by the London registrars to New York. The 240 shares were duly registered in the defendant's name on or as on the 11th of December in the register in London, and subsequently in the New York register. The new certificates for the same shares were made out in the defendant's name, and were ready for issue on the 20th of December. The blank transfers on the back of these new certificates were never signed by the defendant.

On the 11th of December Messrs. Thomas, when they handed in the certificates and surrender to Messrs. J. S. Morgan & Co., received from them a ticket or receipt for the surrender, on which receipt there was a number referring to the surrender and a statement to the effect that the new certificates would be ready on the 20th of December. This ticket or receipt Messrs. Thomas delivered on the 11th of December to the plaintiffs, with a memorandum stating that they begged to hand a receipt for 240 New York Central shares sent in for registration. The plaintiffs kept this ticket until the beginning of February, 1884. At the end of January or beginning of February, 1884, they learnt that Blakeway had absconded, and they sent a clerk (who has since died) to the office of Messrs. J. S. Morgan with the ticket to obtain the new certificates. As the clerk was apparently a respectable person coming from a well-known bank and produced the ticket, Messrs. J. S. Morgan & Co. delivered the new certificates to him without inquiring whether he came for them on behalf of the defendant, whose name, as already stated, appeared on the certificates. These new certificates have ever since remained in the possession of the plaintiffs. As a matter of fact I hold, on the evidence, that Messrs. Morgan

handed the certificates to the plaintiffs' clerk in the erroneous belief that he was authorised to obtain delivery of them on behalf of the defendant.

On these facts the claim of the plaintiffs to ten of the shares in question clearly fails. They never had in their possession certificates for ten of the 240 shares. For the defendant it was contended that the plaintiffs' claim must entirely fail because they had not proved what particular certificates came into their possession. But as already stated, I think the right conclusion of fact is that the plaintiffs had possession from the 29th of November to the 11th of December of the twenty-three certificates delivered to Messrs. Thomas on the 13th of September. The result, then, thus far, is that the plaintiffs' claim fails as to the ten shares bought for the defendant in October. The question of the plaintiffs' claim to the 230 shares remains for consideration.

The plaintiffs adduced evidence for the purpose of showing a general mercantile custom, first in the State of New York (the domicile of the railroad company) that the shares passed by delivery of the certificates with blank transfers from hand to hand as negotiable instruments; and, secondly, a similar custom in the City of London, where the transactions in question took place. Having regard to the mode in which the plaintiffs' counsel ultimately shaped their argument, it is unnecessary to say more on this evidence than that it did not prove any such general custom; and for a similar reason it is unnecessary to consider whether any legal effect could have been given to any such customs if proved. The plaintiffs also adduced evidence to show what legal effect was attributed by the law of the State of New York to the delivery from hand to hand of the certificates with blank transfers.

The ultimate shape in which the plaintiffs' counsel put their argument was this. They did not contend, and, indeed, they could not have successfully contended, that the certificates with blank transfers were negotiable instruments in the strict sense of the term; but they urged that these documents were what they termed negotiable by estoppel. They contended that the effect of the mere delivery of the document to a *bonâ fide* purchaser operated as a legal as well as equitable transfer of the shares, whatever might be the defect in the title of the vendor, and that every prior holder was estopped from denying the title of such *bonâ fide* purchaser. They founded this argument on the first proposition relied on by Lord Cairns in *Goodwin* v. *Robarts*.

Now, assuming this argument to be correct, and assuming as a matter of fact that the plaintiffs were purchasers for value without notice, the plaintiffs acquired a legal and equitable title to 230 shares on the deposit of the certificates with them in November, notwithstanding the fraud committed by Messrs. Thomas on the defendant. The defendant thus loses his title to the shares simply by reason of his having left the certificates in his broker's custody, having in this manner, and in this manner alone, put it in the power of Messrs. Thomas to dispose of his shares. But when the plaintiffs redelivered the certificates to Messrs. Thomas they equally put it into their power to make a fraudulent disposition of the shares, which are assumed to have been theirs at the time of such redelivery; and Messrs. Thomas, in turn, made a fraudulent disposition of the shares as against the plaintiffs by dealing with the documents in the manner already described for the benefit of the defendant. Why is not the defendant in turn a purchaser for value of the shares without notice? It is said that he is not, because he was thus taking through the fraud of his own agents, Messrs. Thomas. But when they obtained delivery of the certificates from the bank they did not purport to act, nor were they, in fact, acting, as agents for the defendant. According to the plaintiffs' witnesses, Messrs. Thomas asked for the certificates in order to register the shares in their (Messrs. Thomas') own names. The defendant was wholly ignorant of the fraud which had been committed on himself and of the fraud committed on the plaintiffs. Messrs. Thomas were under an obligation to cause these particular shares to be registered in his name. They filled in his name as transferee, surrendered the certificates, and caused his name to be registered. If they had sold the shares to him or deposited them with him for an advance, or as security for an existing debt, it is admitted that he would have acquired a complete title. It was not necessary that he should go to Messrs. Thomas's office and demand performance of their obligation to procure the shares to be registered in his name. In the correspondence he was pressing them to register the shares in his name. It was this pressure and the fear of their fraud being discovered which induced Messrs. Thomas to obtain the redelivery of the certificates. The performance of the obligation which Messrs. Thomas were under towards him was a valuable consideration for the transfer and registration, which they in fact made and he has in fact accepted. It appears to me that he stands, in reference to the plaintiffs, in as good a position as he would have been in if he had bought the shares of them and paid for them and the certificates had been handed to him on the 11th of December.

But I think that this case does not fall within the principle of estoppel on which Lord Cairns acted in *Goodwin* v. *Robarts*. In that case the instrument in question was simply scrip purporting on the face of it that the bearer would be entitled to receive the definitive bond from the foreign government in exchange for the scrip. The scrip, as Lord Cairns stated, virtually represented that the paper would pass from hand to hand by delivery only, and that anyone who became *bonâ fide* the holder might claim for his own benefit the fulfilment of its terms by the foreign government. Each prior holder was deemed to have concurred in that representation in favour of the ultimate holder in good faith for value. The certificates with blank transfers do not contain any such representation. On the contrary, they contemplate transfer by getting in the name of the transferee and by registration on the books of the company. Adopting the language of Lord Selborne in the *Société Générale de Paris* v. *Walker* to these certificates, there is on the face of them an engagement that the shares thereby represented are tranferable only on the surrender and cancellation of the certificates; and the printed form on the back (which is issued by the company) shows that a complete transfer is a transfer on the books of the company—that is, by registration. Estoppels cannot be manufactured arbitrarily; no estoppel can be raised on a document inconsistent with the terms of the document itself. What, then, is the estoppel here? Having regard to the practice proved and the condition in which these documents are when they pass from hand to hand, the right principle to adopt with reference to them is to hold that where (as is the case before me) the transfers are duly signed by the registered holders of the shares, each prior holder confers upon the *bonâ fide* holder for value of the certificates for the time being an authority to fill in the name of the transferee and is estopped from denying such authority, and to this extent, and in this manner, but not farther, is estopped from denying the title of such holder for the time being. By the delivery an inchoate legal title passes, but a title by unregistered transfer is not equivalent to what has been termed "the legal estate" in the shares or to the complete dominion over them. Had the plaintiffs filled in their own names or the name of some nominee of their own in the blank transfers while in their possession, the case would have stood differently; the defendant would not have been registered as the holders of the shares. As it is, the plaintiffs never had a present absolute unconditional right to register. Their inchoate title was liable to be defeated, and has

been defeated, by the defendant acquiring in good faith for value a complete legal title by transfer filled in with his name as transferee and by registration.

On cross-examination the plaintiffs' witnesses gave evidence to the effect that when Messrs. Thomas made the deposit with the bank the officers of the bank did not suppose that Messrs. Thomas were dealing only with securities belonging to themselves. It is unnecessary to express any opinion on the question, which the plaintiffs say is covered by the recent decision of the Court of Appeal in *Easton* v. *London Joint-Stock Bank*, whether, having regard to the evidence, the plaintiffs are *bonâ fide* purchasers without notice.

As to the counter-claim, the defendant is entitled to have the new certificates delivered to him. He is the legal owner of the shares, the certificates are in his name, and they were delivered to the bank's clerk in error.

I therefore dismiss the action, with costs, and give judgment for the defendant on his counter-claim, with costs.

Solicitors, *Druces & Attlee; Bod, Longstaff, Son, & Fawick.*

Chan. Div. North, J. — Nov. 25.

UNION ELECTRICAL POWER AND LIGHT CO. v. ELECTRICAL POWER STORAGE CO. (a.)

Practice—Action to restrain threats—Discovery—Particulars of objection—List of patents—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 32.

In an action to restrain threats of legal proceedings for infringements of patents, the plaintiffs alleged that the patents upon which the defendants relied in making threats were bad. Upon a motion by the defendants, an order was made in chambers directing the plaintiffs to give particulars of their objections to the defendants' patents upon the defendants giving to the plaintiffs on oath a list of the patents on which they intended to rely.

Held, that the order in chambers was right, except that the list of patents should not be given upon oath by the defendants.

Motion.

The action was brought by the plaintiff company, who are manufacturers of electrical batteries, against the defendant company, who are also manufacturers of electrical batteries, under section 32 of the Patents Act, 1883, for an injunction restraining the defendant company from threatening the customers of the plaintiff company and other persons with legal proceedings in respect of the use and sale of electrical batteries manufactured by the plaintiff company and of which the defendant company claimed to be the patentees by assignment, and for damages sustained in consequence of such threats.

The plaintiffs, in their statement of claim, alleged that the patents of the defendants, upon which they based their threats, were invalid.

Upon the application of the defendants an order was made in chambers that the plaintiffs should, within fourteen days, deliver to the defendants particulars in writing of the batteries which the plaintiffs alleged to be the subject of threats and of the damage which the plaintiffs alleged to have suffered from the threats, and that "upon the defendant company giving to the plaintiffs on oath a list of the letters patent on which they intended to rely," the plaintiffs should, within three weeks after the giving of such list, deliver to the defendants particulars in writing of the objections of the plaintiffs to the validity of the letters patent contained in the list.

This was a motion by the defendants that the words "upon the defendants giving to the plaintiffs on oath a list of the patents on which they intended to rely" might be struck out of the order made in chambers as a condition precedent to the defendants' obtaining particulars of the plaintiffs' objections.

J. C. Graham, for the motion.—The defendants ought not to be ordered to give a list of their patents on which they intend to rely as a condition precedent to their getting particulars of the plaintiffs' objections.

Robert Wallace, for the plaintiffs.—The plaintiffs are prepared to give particulars of objection to the defendants' patents when they know what the patents are upon which the defendants are going to rely. They have several, and if particulars of the plaintiffs' objections to some were given, might state that they relied upon others.

He referred to *Wren* v. *Weild*, L. R. 4 Q. B. 213, 17 W. R. C. L. Dig. 99; Patents Act, 1883, ss. 26, 29, 32.

NORTH, J.—I think that the order in chambers is right, and that the defendants ought to give a list of their patents upon which they rely before the plaintiffs give particulars of their objections to the defendants' patents, except that the list should not be upon oath; and the order must be without prejudice to the question whether the alleged threats were actually made by the defendants.

Solicitors for the defendants, *Renshaws.*

Solicitors for the plaintiffs, *Linklater & Co.*

Chan. Div. North, J. — July 21.

CHALK, WEBB, & Co. v. TENNENT. (a.)

Company—Winding up—Contributory—Balance order—Action to enforce balance order—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 75.

By a balance order made in the winding up of a company a contributory was ordered to pay a certain sum to the liquidator of the company. The sum was not paid, and the liquidator commenced an action in the name of the company against the contributory to enforce the balance order.

Held that an action could not be brought to enforce a balance order.

Trial of action.

The question to be decided was whether the liquidator of a company in liquidation can enforce payment of the amount due under a balance order for calls by bringing an action against the contributory.

By an order dated the 28th of March, 1885, and made in the winding up of the plaintiff company, R. B. Tennent was ordered to pay to W. L. Grimwade, the official liquidator of the company, the sum of £272 10s. and interest at £5 per cent. from the 26th of July, 1884.

The sum of £272 10s. was made up of calls made against Tennent, who was a shareholder and director of the company, and who had on his part established a claim against the company of £285 17s. for director's fees and rent of premises.

On the 15th of March, 1886, Grimwade issued a bankruptcy notice against Tennent, but the court, in *Ex parte Grimwade*, 17 Q. B. D. 357, 34 W. R. Dig. 14, set aside the notice on the ground that the balance order was not a "final judgment" within sub-section 1 (*g*) of

(a.) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

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section 4 of the Bankruptcy Act, 1883, and that a notice could not be issued in respect of such order. Grimwade afterwards took out a *fi. fa.* to enforce the balance order, but the sheriff made a return of *nulla bona*. He then commenced the present action in the name of the company against Tennent for £272 10s. the amount of the balance order, the writ in the action being specially indorsed under rule 6 of order 3 of the Rules of Court, 1883, and the balance order being set forth in the indorsed particulars.

Herbert Reed, for the plaintiffs.—The liquidator is entitled to bring an action for the amount of the balance order, which constitutes a debt due to the company: Companies Act, 1862, s. 75. The defendant cannot set off his claim for fees: Companies Act, 1862, s. 38 (7), *In re Overend, Gurney, & Co., Ex parte Grissell*, 14 W. R. 1015, L. R. 1 Ch. 528.

Emden, for the defendant.—The liquidator cannot bring an action upon a balance order, but he must enforce payment of the amount of the order without further action: ord. 42, r. 24. In the same way an action cannot be brought to enforce an order to pay alimony: *Bailey* v. *Bailey*, 32 W. R. 856, 13 Q. B. D. 855. This action is brought with the view of commencing bankruptcy proceedings.

Herbert Reed, in reply.—The case of *Bailey* v. *Bailey* differs from the present, because there there was no debt except under the balance order. Here there was a debt due for calls. If necessary, I ask leave to amend so as to ask for judgment for the debt, and not on the balance order.

NORTH, J.—In this case the liquidator of the company has obtained a balance order against a contributory. He tried to enforce the order by means of a bankruptcy notice, but failed, and now brings the present action, in the name of the company, against the contributory, for judgment for the amount of the balance order, with the view of commencing bankruptcy proceedings against him. It is clear from the cases of *Carpenter* v. *Thornton*, 3 B. and Ald. 52, and *Bailey* v. *Bailey* that he cannot bring this action to enforce the balance order. If I thought him reasonably right in bringing the action, I might have allowed an amendment, but I do not think so; and, under the circumstances, I must dismiss the action, with costs.

Solicitors, *Beall & Co.; Sweetland & Greenhill.*

Chan. Div. }
North, J. } July 14.

In re COLLINGE'S SETTLED ESTATES. (*a.*)

Settled land—Undivided moiety—Tenant for life—Power of sale—Concurrence of purchaser of other undivided moiety—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-sections* (3), (5), (6); *ss.* 3, 19.

A testator devised real estate upon trust for his two sons, James and John, in equal shares, for their respective lives, and after the death of either on trust for the survivor and the issue of the deceased son, such issue to take their parent's share, and after the death of the survivor upon trust to sell and divide the proceeds into two equal shares and pay one such share to the issue of each of his said sons, and if the sons or either of them should die without issue, then to pay one of such shares to such person or persons as the son or sons so dying should by will appoint. There was no gift over in default of appointment. The testator's son John died without having been married and without having exercised the power of appointment, and his undivided share passed to his brother James as heir-at-law of the testator, who sold the undivided share to E. James then obtained the appointment of two trustees of the will for the purposes of the Settled Land Act, 1882, and gave them notice of his intention to sell, under the powers given by the Act, the undivided share devised upon trust for him for life.

Held, on a summons by the trustees, that James, being only tenant for life of an undivided share, and not of the whole settled property, had no power to sell his undivided share without the concurrence of E., the purchaser of the other undivided share.

Adjourned summons.

By his will, dated the 22nd of April, 1852, J. Collinge devised (*inter alia*) the White Lion Inn and three cottages situate at Rawtenstall, in Lancashire, to trustees upon trust to pay the rents and profits to his wife and two sons, James and John, in equal shares during their respective lives, and after the death of his wife to pay the income to his two sons, James and John, in equal shares during their respective lives, and after the death of either of his two sons upon trust to divide the rents and profits unto and equally between the testator's surviving son and the issue then living of the deceased son, such issue to take the parent's share only, and after the decease of the survivor of the testator's two sons upon trust to sell and to divide the proceeds of sale and the rents and profits until sale into two equal parts and to pay one of such parts to the issue of the testator's son James in equal shares and the other of such parts to the issue of the testator's son John in equal shares, but in case the testator's sons or either of them should die without leaving issue, then upon trust to pay one moiety of the proceeds of sale and of the rents and profits until sale to such person or persons as such son or sons so dying without issue should by will appoint.

The will did not contain any disposition of either moiety of the proceeds of sale and of the rents and profits until sale in the event of the testator's sons or either of them dying without issue and without exercising the power of appointment given by the will.

The testator died on the 30th of April, 1852, and his wife died on the 21st of April, 1876.

On the 19th of January, 1876, shortly before the death of the widow, the testator's son John Collinge died without having been married and without having exercised the power of appointment given to him by the will, and thereupon the share devised upon trust for him and his issue, being undisposed of by the will, descended to his brother James Collinge as the heir-at-law of the testator.

In June, 1880, James Collinge sold and conveyed to James Entwistle the share devised upon trust for John Collinge and his issue to which he became entitled as heir-at-law of the testator.

In August, 1886, upon the application of James Collinge, to which the surviving trustee of the testator's will and James Entwistle were parties, the court appointed J. Taylor and R. H. Whittaker trustees of the will for the purposes of the Settled Land Act, 1882.

In September, 1886, James Collinge gave to the trustees notice of his intention to sell the undivided share of which he was tenant for life of the White Lion public-house and cottages under the powers of the Settled Land Act, 1882.

This was a summons taken out by J. Taylor and R. H. Whittaker to determine whether James Collinge was entitled to sell the undivided share in accordance with his notice without James Entwistle joining in the sale.

The Settled Land Act, 1882, enacts, by section 2 (3), that "land, and any estate or interest therein, which is

(*a.*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

the subject of a settlement, is for purposes of this Act settled land. . . ."

And by section 2 (5) that "The person who is for the time being, under a settlement, beneficially entitled to possession of settled land for his life, is, for purposes of this Act, the tenant for life of that land, and the tenant for life under that settlement."

And by section 2 (6) that "If, in any case, there are two or more persons so entitled as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for the purposes of this Act."

And by section 3 that "A tenant for life (1) may sell the settled land or any part thereof. . . ."

And by section 19 that, "Where the settled land comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares, the tenant for life of an undivided share may join or concur, in any manner, and to any extent necessary or proper for any purpose of this Act, with any person entitled to or having power or right of disposition of or over another undivided share."

Upjohn, for J. Taylor and R. H. Whittaker.—James Collinge, as tenant for life of an undivided share of the settled land, cannot sell without the concurrence of the owner of the other undivided share. The settlement comprises the whole land. The undivided share sold to Mr. Entwistle is not taken out of the settlement, and is still subject to the trust for sale on the death of the survivor of the testator's two sons. James Collinge is not tenant for life of the whole land subject to the settlement, and the Settled Land Act does not empower a tenant for life of an undivided moiety of the land to sell the undivided moiety alone.

He referred to the Settled Land Act, 1882, ss. 2 (5) (6), 3, 19; *Atkinson* v. *Bruce*, 33 W. R. 899, 34 *Ibid.* 445, 30 Ch. D. 605, 31 *Ibid.* 577.

Ryland, for James Collinge.—James Collinge is tenant for life, and, as such, can exercise the power of sale over his undivided moiety: Settled Land Act, 1882, ss. 2 (5), 3. He is not prevented by section 2 (6), which refers to cases where there are two persons "so entitled"—that is, entitled as tenants for life, but here Mr. Entwistle, the owner of the other undivided share, is not a tenant for life: *Atkinson* v. *Bruce*. He is not affected by section 19, which only confers on the tenant for life the additional power of concurring with the owner of another undivided share of the settled land in selling where advisable.

North, J.—I do not think that Mr. James Collinge has power to sell his undivided share. He is not beneficially entitled to settled land for his life, but only to an undivided share of settled land. The property settled was the whole of the land, and not an undivided share of it. But upon the death of John Collinge his undivided share passed to his brother, James Collinge, who sold it to James Entwistle. The beneficial interest in that undivided share is taken out of the settlement, but the share is still subject to the trust for sale of the whole settled property upon the death of James Collinge, the survivor of the testator's two sons, and cannot therefore be regarded as taken out of the settlement for all purposes.

If James Collinge had been tenant for life of the whole subject of the settlement he could have sold, even if the subject of the settlement had been only an undivided share of land; but he cannot sell his undivided share under the circumstances of this case. Section 3 of the Settled Land Act, 1882, gives to the tenant for life power to sell "the settled land or any part thereof," but if the Legislature had intended these words to include an undivided share I think it would have specially mentioned an undivided share, as the Act in several sections specially deals with undivided shares. The definition of the words "settled land" in section 2, sub-section 3, shows that in this case the term "settled land" means the whole land included in the settlement. Sub-section 5 of that section defines the tenant for life as the person beneficially entitled to possession of settled land for his life. But here James Collinge is not entitled to the possession of settled land, but only of an undivided share of it; and he is not, therefore, the tenant for life of settled land. Then sub-section 6 of that section deals with the case of tenants in common and for other concurrent interests, but it does not say that each of them shall be a tenant for life. [His lordship read the section, and continued:—] That shows that where there are two or more tenants in common or for other concurrent interests they together make a tenant for life under the Act. During the joint lives of James and John Collinge neither of them alone could have sold his undivided share, and if James Collinge alone could not have sold his undivided share while the other undivided share was vested in John Collinge, it is not easy to see why he can sell alone now that the other undivided share is vested in James Entwistle. Then section 19 provides that the tenant for life of an undivided share may, not sell, but "join or concur" with any person entitled to another undivided share in selling. [His lordship read the section, and continued:—] It was contended that that section does not prevent the tenant for life of an undivided share of settled land from acting alone in selling that undivided share, but gives him an additional power to concur in selling it, and does not interfere with the power of sale previously given. I think if that had been intended it would have said may either sell his undivided share or concur with any person entitled to another undivided share in selling. The Legislature has taken care to protect the interests of persons entitled in remainder, and it is obvious that there may be reasons why it would not be for the interest of such persons that a tenant for life of an undivided share should have power to sell his undivided share alone. There must be a declaration that James Collinge has no power to sell according to the notice given by him or otherwise under the Settled Land Act, 1882, except by concurring with the owner of the other undivided share under the 19th section of the Act.

Upjohn.—I ask that the costs of the trustees may come out of the whole estate.

North, J.—I cannot order costs to be paid out of Mr. Entwistle's share in his absence; and as the trustees are only trustees for the purposes of the Settled Land Act, 1882, and have no estate, I cannot direct them to retain their costs out of moneys coming to their hands under section 43. I can only give them liberty to apply for their costs on the realization of any part of the estate. There will be no costs of the tenant for life.

Solicitors, *Clarke, Woodcock, & Ryland.*

Chan. Div. North, J. — June 10, 14.

In re Ball.

Slattery *v.* Ball. (*a.*)

Will—Construction—Die without leaving issue male.

A testator bequeathed his residuary personal estate upon trust for W. K. B. and his issue male, and in default of such issue for R. B. and his issue male, "and in case the said R. B. shall die without leaving issue male," then over to J. B.

(*a.*) Reported by J. Trustram, Esq., Barrister-at-Law.

R. B. died in the lifetime of W. K. B., having had one child, a son, who predeceased him. W. K. B. afterwards died without issue.

Held, that the words "die without leaving issue male" must be construed as "die without leaving issue male living at his death," and not as "die without having had issue male"; and that the gift over to J. B. took effect.

White v. Hight, 12 Ch. D. 751, 27 W. R. Dig. 245, not followed.

Adjourned summons.

The action was brought for the determination of the construction of the will of Sir Alexander John Ball, and, if necessary, for administration.

Sir A. J. Ball, by his will, made in 1809, bequeathed his money, chattels, stocks, funds, securities, and all other his personal estate, to trustees, upon trust, for sale and conversion, and to invest the proceeds in the purchase of real estate or upon Parliamentary or real securities, or in the purchase of stock in any of the public funds, and to pay his wife an annuity of £1,300 for life, and to pay the residue of the income to his eldest son, William Keith Ball, for life on attaining twenty-five; and the testator declared that in case William Keith Ball should marry and have children the testator declared that the whole of the interest of his trust estates should, after the death of William Keith Ball, go to the use of his first son and the heirs male of his body, and for default of issue to the use of the other sons of William Keith Ball and their heirs male successively, and in default of such issue male that the whole of the interest of his trust estates should go to Robert Ball and his heirs male, and the will provided: "And in case the said Robert Ball shall die without leaving issue male lawfully to be begotten," then the interest of the testator's trust estates was to go to John Ball and the heirs male of his body successively.

The testator died in 1809, and his widow died in 1832. William Robert Ball (in the will called Robert Ball) died in 1844, having had one child, a son, who died in 1841. William Keith Ball died in 1874, without issue. John Ball died in 1876, leaving the defendant, George Keith Ball, and several children him surviving.

It had been decided by the House of Lords in another action of *Ball* v. *Ball* (1875, E. 13a) that, according to the true construction of the will, the testator's estate was not converted in equity into real estate, but retained its quality of personalty.

The statement of claim in the present action alleged that, as the property remained personalty, and in the event which had happened, that William Robert Ball had had a son who predeceased him, the estate of William Robert Ball, although in form an estate tail, was an absolute one, and that the words of the gift over "die without leaving issue male" must be construed as "die without having had issue male," so that the gift over to John Ball and his heirs male failed.

This was a summons under the Rules of Court, 1883, ord. 25, r. 4, by the defendant, George Keith Ball, to strike out the statement of claim in the action, on the ground that it disclosed no reasonable cause of action.

Cookson, Q.C., and *Dauney*, for the summons.—The gift over to John Ball and his heirs male took effect in consequence of the death of William Robert Ball "without leaving issue male." Those words, as applied to personalty, must, in the absence of special circumstances, be construed literally as without leaving issue male living at his death: *Forth* v. *Chapman*, 1 P. Wms. 663; *Crooke* v. *De Vandes*, 9 Ves. 197.

Kenyon Parker, for the plaintiff.—The gift to William Robert Ball in the event which happened became absolute and the gift over failed. The words "die without leaving issue male" must be construed "die without having had issue male": *White* v. *Hight*, 12 Ch. D. 751, 27 W. R. Dig. 245; *Treharne* v. *Layton*, 23 W. R. 799, L. R. 10 Q. B. 459; *In re Jackson's Will*, 28 W. R. 209, 13 Ch. D. 189; *White* v. *Hill*, L. R. 4 Eq. 265; *Marshall* v. *Hill*, 2 M. & S. 608; *Casamajor* v. *Strode*, 8 Jur. 14; *Ex parte Hooper*, 1 Drew. 264.

Cookson, Q.C., in reply.—The case of *White* v. *Hight* is peculiar. In all other cases where the court has construed "leaving" as "having had" issue, it has only done so to prevent the divesting of clearly vested prior estates.

NORTH, J.—The question for consideration is the meaning of the words "in case the said Robert Ball shall die without leaving issue male." I do not think it makes any difference that the will in this case is prior to the Wills Act, as the estate is personal estate. According to numerous decisions, of which *Forth* v. *Chapman* is referred to as the leading authority, if the gift had been "if he should die without issue," it would have meant without issue living at his death; and all doubt on that point is removed by the fact that the words here are "shall die without leaving issue male," which, unless those words are read in some secondary sense, would mean without leaving issue male living at his death. It is clear that the testator's intention was that the previous gift should be divested in the event of W. R. Ball dying without leaving issue male living at his death, whatever these words may mean; and taking those words literally, that has actually happened. He died without leaving any issue living at his death because, though he had one child, that child died before him, and without issue.

The plaintiff contends that the words "shall die without leaving issue male" are to be read "without having had issue male," and reliance is placed on a series of cases where, for certain reasons, the word "leaving" has been construed as equivalent to "without having had." The first case cited, *Ex parte Hooper*, is not much in point. The words were different. The decision might stand on totally different grounds, and, as was pointed out in the note in Jarman on Wills, 4th ed., vol. 2, p. 466, the decision of the Vice-Chancellor on that point has been misunderstood on several occasions; and it does not seem to me to bear very much on the point in question. The proposition in Jarman on Wills is laid down thus:—[His lordship then read the reference to *Maitland* v. *Chalie* from vol. 2, p. 823, and continued:—]

The rule was clearly laid down in *White* v. *Hill*. There property was given in trust for the daughter for life, and after her death between all her children, if more than one, their heirs and assigns; if but one, to his or her heirs and assigns; in case the daughter should depart this life under twenty-one or afterwards without leaving any child or children, then the property was given over. It was held that the children took at their births indefeasible interests in fee in remainder expectant on the death of their mother. The Vice-Chancellor says:—"The case of *Ex parte Hooper* is rather weaker than the present, because the principle which has prevailed in all these cases is that, where you find an intention that a child shall take a vested interest at a particular period, and words introduced which would divest the interest in the event of the parent dying without leaving the child surviving, if the interest has once vested, the court, considering that the testator has intended to make provision for the child, will, unless the testator has too clearly expressed his opinion to admit a doubt, struggle to maintain the vested gift rather than take it away from the issue in favour of some collateral objects." Then he says:—"In the other case that has been cited, of *Kennedy* v. *Sedgwick*, there was found an additional circumstance which strengthened the case—namely, that it should vest in the children at twenty-one, and then there was a

gift over in the event of the parent dying without leaving children. In that case 'leaving' was construed 'having.' The intent to vest was plain and manifest; the intent to divest was not so plain and manifest. 'Leaving' is a word that may be construed, in its primary sense, as leaving on the decease of the person to whom the word applies; but it has been construed as 'having rather than that a child should be deprived of a vested interest which seems to have been made as a provision for it." And further on he says:—"The circumstances of this case fully justify me in applying the principle, originally founded on marriage settlements, that the court will favour a plain intention to provide for children where the contest is between surviving children and the representatives of deceased children. The testator has here made careful arrangements for the division of his property among his children, and the contest at this moment is between a son of the tenant for life, who may be living at her death (she is now living), and her brother." Therefore he extended the case of settlement to wills. Then, a little further on, he said:—"The only question I have to consider is, whether the word 'leaving' can be construed here as 'having,' and I find that it has been so construed in like cases. I can find no substantial difference between vesting at twenty-one and vesting at birth; and then all the cases say if there is a vested interest it shall not be divested by the simple word 'leaving' in a case of this kind, where a parent is providing for children by his will. It cannot deprive the family of one of the children of that provision because the child does not survive the tenant for life." The same principle was followed in *Treherne* v. *Layton*. There the facts were that the property was given to the granddaughter of the testatrix for life, and after her death to her children in equal shares, and if she died leaving no issue, the whole of the property was to go over to the next of kin. There the words "leaving no issue" were construed "having had no issue"; and Cleasby, B., who delivered the judgment of the court, says:—"We think that the authorities applicable to this case are so clear and so strong that we should not be justified in saying that they are wrong. The position they lay down is that, where an estate is vested in children after a gift to a parent, then the gift over in case of the parent dying without leaving issue must be read 'having had no issue,' in order to carry into effect the intention of the testator; and this rests upon the highest authority, and goes back further than the case of *Maitland* v. *Chalie*, which was a decision of Vice-Chancellor Leach." Then he quotes what I have already stated from Jarman on Wills.

The case of *White* v. *Hight*, most relied on by Mr. Parker, is distinguishable from the cases which have been referred to. There the testator gave real estate to his granddaughter absolutely, and then proceeded: "In case the said Alice White, my granddaughter, shall happen to depart this life before the decease of her said mother, or after her decease without leaving any issue," which may be read shall die without leaving any issue, "then and in such case I give and bequeath and devise" the property over. That was not a gift for a limited interest with remainder over to other persons, in default of any of whom being living at the death of the first taker the gift over was to take effect; but there was an absolute gift to the first taker subject to being divested, and it is more like the present case than some of those to which I have referred. There the Vice-Chancellor came to the same conclusion as was come to in the other cases, that there was a vested gift that could not be divested. I have a difficulty in seeing what was the ground on which he went; but it is clear that he purported to follow the previous decisions. Now the principle of those decisions is that the court will read the words "without leaving" as equivalent to "without having had" if the result is to make the whole instrument consistent, to make a gift over fit in with the intention of the testator as previously expressed, and avoid divesting a previously vested gift. But unless that result is attained the reason fails, and I have been unable to find any case except *White* v. *Hight* in which the effect of the construction adopted has been, not to avoid divesting a vested gift, but to leave a vested gift liable to be divested, in a different event from that in which the divesting would have taken place if the word "leaving" were construed literally. If the word "leaving" be construed literally in the present case, the absolute interest of William Robert Ball would be divested by his death without leaving issue then living. If the word "leaving" be construed as "having had," the absolute interest of William Robert Ball would be divested by his death without having had any child. Whichever view is adopted the will clearly contemplates the divesting in some event of the previously vested gift to William Robert Ball. I find no case except *White* v. *Hight* in which the word "leaving" is read as "having had" with the result merely of altering the event upon which the divesting of a gift previously vested is to take place, and I do not find this point dealt with in the judgment. It makes that case a new one; but the Vice-Chancellor treats it as covered by the old cases, and decides it on the ground that he is following them. I feel bound by those authorities; but I should go beyond them if I acceded to the plaintiff's contention, and I cannot find any principle laid down in *White* v. *Hight* to warrant it. So far as I am aware *White* v. *Hight* has not been followed by any other judge. In *In re Jackson's Will*, it was not cited, and the passage relied on in the judgment of Sir George Jessel has no bearing on the present case. Under those circumstances I accede to the application, and the statement of claim must be struck out.

Solicitors, *R. C. Hanrott; Parker, Garrett, & Parker.*

Chan. Div. Kekewich, J. } July 26, 27; Aug. 12.

Foster v. Wheeler. (a.)

Contract—Agreement to enter into agreement—Specific performance—Damages.

The defendant agreed with the plaintiff that the defendant would enter into an agreement with O. for a lease from O. at a certain rent for such a term and subject to such covenants as O. should approve.

Held, that the plaintiff could recover damages from the defendant for refusing to carry out the agreement made between them.

This was the hearing of an action brought to obtain specific performance of an agreement, or, in the alternative, damages, and the question was whether the agreement was one which the law could recognize as a legal contract.

On the 9th of April, 1886, an agreement was made between the plaintiff and the defendant containing the following terms:—"Within seven days from the date hereof Miss Wheeler [the defendant] is to enter into a binding agreement with Dr. G. B. Ord, the lessor of Cedar Lodge, Queen's-road, Clapham-park, for a lease from Dr. Ord of the said premises at a rental of £140 per annum for such a term (to commence from the 24th day of June next) and subject to such covenants as Dr. Ord shall approve; and Miss Wheeler shall accept and take up such lease when ready, and execute a counterpart thereof."

(a.) Reported by P. F. Wheeler, Esq., Barrister-at-Law.

The defendant ultimately refused to perform this agreement, and the plaintiff thereupon brought this action, alleging that Dr. Ord was willing to grant a lease to the defendant, and that he had suffered damage from the defendant's refusal to accept a lease.

Barber, Q.C., and *Yate Lee*, for the plaintiff.—Even if specific performance cannot be granted, the plaintiff is entitled to damages.

Warmington, Q.C., and *Job Bradford*, for the defendant.—An agreement to make an agreement cannot be enforced. There is nothing here to ground an action: *Pearce* v. *Watts*, 23 W. R. 771, L. R. 20 Eq. 492.

Barber, Q.C., replied.

KEKEWICH, J.—In this case I am asked to enforce a contract of a peculiar character. In April, 1886, the defendant wished to rent and occupy a house then in possession of the plaintiff, as tenant under a Dr. Ord. There is some inaccuracy in the written agreement touching the reference to this gentleman, but he is sufficiently identified with the lessor of the house, and the inaccuracy is not material. The plaintiff was willing that the defendant should have the house, and was prepared to facilitate her taking his place. The defendant had reasons to believe that Dr. Ord would accept her as tenant and grant her such a lease as she required, and the plaintiff stipulated that she should procure this to be done.

These facts sufficiently appear from the correspondence (which, whether strictly admissible in evidence or not, was read without objection), but, apart from the correspondence, may fairly be inferred from the written agreement of the 9th of April, 1886, which has given rise to the litigation. The point for decision arises on the first paragraph of that agreement, which is in the following terms. [His lordship read the paragraph.]

It is not expressed in a form usually adopted by lawyers, and some discussion might have been avoided if it had been expressed differently; but I think that, when examined in connection with the rest of the agreement, it is sufficiently plain. Some of the other clauses specify what is to be done by the plaintiff, or by both plaintiff and defendant, but this clause is restricted to what is to be done by the defendant alone without the plaintiff's intervention, and she thereby binds herself, first, to enter into an agreement with Dr. Ord for a lease at a certain rent, but otherwise according to his own conditions, and, secondly, to accept such a lease, and, if need be, execute a counterpart. It may be that if Dr. Ord had declined to enter into any agreement at all, or had imposed conditions of an unreasonable character, the defendant might have pleaded this as an excuse for non-performance of the agreement, but that question does not arise, and I will not enter into it. Nor is there any question whether the time, "seven days," within which the defendant bound herself to enter into an agreement is of the essence of the contract; for the complaint against her is not that she did not fulfil her obligation within seven days, but that she has not fulfilled it at all—that is, after the lapse of a considerable time, and after every opportunity of fulfilling it has been given her.

The defence is that such an agreement as this cannot be enforced. This defence rests, I think, on a confusion, not by any means uncommon, between enforcing a contract and ordering a contract to be specifically performed. A decree (to use the old chancery term) for specific performance was and is one method of enforcing a contract, but it was not and is not the only method. A contract might equally, though often not so effectually, be enforced by a judgment for damages. There are many contracts which were and are enforceable in one way, but not in the other, and until recent times the jurisdiction of the Court of Chancery was limited to the more effectual remedy and failed when that could not be applied. I assent to the proposition on behalf of the defendant that an agreement (such as occurs here) to enter into an agreement cannot be ordered to be specifically performed, on the ground that before the court can properly make a decree of that character it must be satisfied that the parties have contracted to do something of a definite character, something ascertained, or which can be readily ascertained, and something, too, which can be done by simple methods within the control of the court, and which the court can supervise and, if need be, aid.

But the proposition of the defendant goes beyond this. It is insisted broadly that an agreement to enter into an agreement is not a contract recognized by law—that is, is not enforceable. An agreement between two persons, A. and B., that one of them will either immediately or at some future time, or subject to the performance of some condition, enter into an agreement with the other is, I think, not enforceable, because it does not fall within the term "contract" as defined by law. Definitions of "contract" are to be found in the text books, and I have consulted several of them, including an American one, that of Mr. Parsons. They are all founded on, and many of them simply adopt, the definition given by Pothier in part 1, chapter 1, section 1, of his work on Contracts. This is his definition which I take from the English translation of Mr. W. D. Evans—"An agreement by which two parties reciprocally promise and engage or one of them singly promises and engages to the other to give some particular thing or to do or abstain from doing some particular act." Mr. Pollock's definition in his work on the same subject slightly differs from this, and is, in my opinion, more complete and more accurate. He defines a contract, or rather an agreement, to be "an act in the law whereby two or more persons declare their consent as to any act or thing to be done or forborne by some or one of those persons for the use of the others or other of them"; and in commenting on this definition he explains what is intended by an act in the law saying that it must be on the face of the matter capable of having legal effect and concerned with duties and rights which can be dealt with by a court of justice. Accepting this definition, I think that such a promise or engagement as I have above suggested does not fall within it, for I do not see how a court of justice can deal with a matter so uncertain, or how, in other words, legal effect can be given to a promise or engagement as an agreement when the parties have not yet themselves determined what the agreement is to be.

These remarks would not necessarily be applicable to a promise or engagement to sign a particular document, or even to a promise or engagement to sign a document to be prepared by a certain person or on defined lines. They are not, I think, at all applicable to a promise or engagement by one or two parties to enter into an agreement of a character ascertained or capable of being ascertained with a third, and I see nothing in a promise or engagement of that character to prevent its being a contract capable on its face of having legal effect and concerned with duties and rights which can be dealt with by a court of justice. The breach, therefore, by the defendant of the contract into which she entered with the plaintiff by the first clause of the agreement of the 9th of April, 1886, constitutes a cause of action.

It is not asked that the defendant shall be ordered specifically to perform the contract. If she had in fact entered into a binding agreement with Dr. Ord, he might, of course, demand specific performance of that agreement, and as at present advised I think that the plaintiff might require the defendant to accept a lease pursuant to such agreement under the contract of April, 1886, in the presence of or possibly even without the

presence of Dr. Ord as a party to the action. But it is common ground that no concluded agreement has been entered into with Dr. Ord; and the action is necessarily rested on that basis. It follows that the plaintiff's remedy is in damages only, and his case was opened in that manner.

I must hold the defendant to blame for failing to enter into an agreement with Dr. Ord. Two difficulties arose in the course of the negotiations; one about an allowance of £200 for repairs, and the other about the expense of obtaining the consent of the ground landlord. As regards each of these difficulties the defendant has had conceded to her all that she insisted on, and the plaintiff has met her liberally. She nevertheless, and notwithstanding that practically everything was at length settled, declines to perform her contract. It is not for me to discuss her motives, or to consider whether her conduct has been perfect or otherwise. Suffice it to say that, after expressing some doubt whether she would continue what was styled the arrangement or negotiations, she ultimately determined to have no more to do with the matter. This she was entitled to do at the risk of being held liable in a court of justice, and I hold her liable.

The admitted facts of the case point to the conclusion that the plaintiff has sustained appreciable damage by endeavouring to fulfil his part of the agreement when the defendant has not fulfilled hers. But I have no means of assessing the amount, and I can only direct an inquiry.

Solicitors for the plaintiff, *Wansey, Bowen, & Co.*

Solicitors for the defendant, *Wild, Browne, & Wild.*

Q. B. Div. (Stephen and Charles, JJ.) Dec. 6.

Pilley v. Robinson. (a.)

Practice—Adding a defendant—Pleas in abatement—Partnership—Joint and separate liability—R. S. C., 1883, ord. 16, r. 11.

In an action for a partnership debt the defendant has a right, under ord. 16, r. 11, to add as defendant a person who is jointly liable with himself for the money claimed, although the plaintiff objects to the addition.

Kendall v. Hamilton, 28 W. R. 97, 4 *App. Cas.* 504, *followed.*

This was an appeal from Field, J., at chambers. The action was brought to recover money from a solicitor who had been employed by the plaintiff. At the date of the retainer, and during the employment, one Edmunds was a partner in the defendant's firm, and, as such, jointly liable with him to the plaintiff. The defendant applied under ord. 16, r. 11, to have Edmunds added as defendant. Both Edmunds and the plaintiff objected, and Field, J., refused the order.

The defendant appealed.

Herbert Reed, for the defendant.—The liability of partners is not joint and several, although when the contract has passed into a judgment it is so. If, therefore, one co-contractor is sued the others should be joined. This could have been done before the Judicature Acts by plea in abatement. The Judicature Acts, however, do not alter the rights of parties, they only regulate procedure. Therefore, although pleas in abatement are abolished by those Acts, the right remains. This is laid down in the case of *Kendall* v. *Hamilton*, 28 W.R. 97, 4 App. Cas., at p. 515, where Lord Cairns says: "It is the right of persons jointly liable to pay to insist on being sued together." The cases on the subject are collected in 1 Wms. Saund. 291. In *Werdermann* v. *Société Générale d'Electricité*, 30 W. R. 33, 19 Ch. D. 246, Jessel, M.R., at p. 251, said that a demurrer at common law for want of parties would not lie, though you could in some cases plead in abatement, which was the only remedy; and that ord. 16, r. 11, now provides for such a case. There are grave objections in this case to proceeding by a third party notice.

A. Walker, for the plaintiff. — This application is made solely for delay. The plaintiff is content with the present defendant, and is not at all sure that he has a claim against the partnership. At all events, a third party notice would be sufficient for all practical purposes.

Douglas Walker, for Edmunds.—It is contrary to all ordinary principles of justice that a plaintiff should be forced to sue a defendant whom he does not wish to sue. Pleas in abatement are abolished by the Judicature Act, and there is no new remedy of the kind in that Act. The proper course, therefore, is a third party notice. In the case of *Norris* v. *Beazley*, 25 W.R. 320, 2 C. P. D. 80, Lord Coleridge, at p. 84, says:—"The defendant to be added must be a defendant against whom the plaintiff has some cause of complaint, which ought to be determined in the action, and it—*i.e.*, the rule in question—was never intended to apply when the person to be added as a defendant is a person against whom the plaintiff has no claim, and does not desire to prosecute any." In *Kendall* v. *Hamilton* the *dicta* must be read with regard to the case. That case arose while the Common Law Procedure Act was in force, and under the Judicature Act the rights are the same, but the procedure has been altered, and if Edmunds were to be added as a third party the defendant would have all the rights against him which he would have had under the Common Law Procedure Act.

Stephen, J.—This case has been argued at some length. The matters in dispute in the action arose while Edmunds was a member of the defendant's firm; and the difficulty arises from his interest in the matter. Edmunds does not deny that he was a member of the firm, and therefore *primâ facie* that he is a joint debtor with the defendant.

The defendant now asks that Edmunds may be added as a defendant, as there was a joint contract and a joint debt. But the plaintiff says, "I do not want Edmunds at all," and Edmunds objects to being made a defendant. Mr. Douglas Walker has contended that the proper course to adopt is to make Edmunds a third party. I must confess that we were both struck by that argument, and I do not hesitate to say that were I to follow my own views on the matter I should so decide. But the case of *Kendall* v. *Hamilton* has been cited, and I feel bound by that case. In that case the House of Lords decided that they would allow the plaintiff to add a defendant. The case, therefore, does not exactly cover the present one, yet the *ratio decidendi* is in point. Lord Cairns lays down the law very clearly, and at p. 516 he says: "Although the form of objecting by means of a plea in abatement, to the non-joinder of a defendant who ought to be included in the action is abolished, yet I conceive that the application to have the person so omitted included as a defendant ought to be granted or refused on the same principles as those on which a plea in abatement would have succeeded or failed." And Lord Blackburn, who, at p. 542, goes into the whole history of pleas in abatement, gives judgment to the same effect.

On the other hand, Lord Penzance takes a view of the effect of the Judicature Act which, if it applied, would justify Mr. D. Walker's contention; and I confess that if the matter were new I should be inclined to follow him. Having regard, however, to what was said by

(a.) Reported by Cecil Chapman, Esq., Barrister-at-Law.

Lords Cairns and Blackburn, I think that an order must be made to join Edmunds as a defendant.

CHARLES, J.—I am of the same opinion. I own that I have altered my opinion on this point during the progress of the argument in deference to the decision and the opinions expressed by the House of Lords in *Kendall* v. *Hamilton*. Ord. 16, r. 11, gives power to join any parties who ought to be joined. There is also under the Judicature Act a procedure for making a person not a defendant a third party.

Now it has been decided in *Kendall* v. *Hamilton*, in accordance with *King* v. *Hoare*, 13 M. & W. 494, that an action and judgment against two of three contractors constitutes a bar to another action against the third contractor. Why a bar? Surely because the third co-contractor could have been brought in by a plea in abatement. But pleas in abatement are abolished by the Judicature Act; and it was contended in that case that now you could sue a co-contractor after having obtained judgment against his fellow co-contractors. But Lord Cairns, in the passages which have been already cited, thought that the right of the defendant to bring in a co-contractor as defendant is a right which the Judicature Act does not take away from him.

That being the effect of *Kendall* v. *Hamilton*, it is worth while to notice the opinion of Jessel, M.R., with reference to the abolition of demurrers—that a person who objects to the action for want of parties ought to take out a summons under order 16 asking that the necessary parties may be added.

Therefore, under ord. 16, r. 11, it appears to me that we can add a co-defendant; and I think that Edmunds must accordingly be added.

Solicitors for the plaintiff, *Lowless & Co.*

Solicitors for the defendant, *W. Robinson & Sons.*

Solicitors for Edmunds, *Cayley & Edmunds.*

Q. B. Div. (Stephen and Wills, JJ.) July 21.

REG. v. MIDLAND RAILWAY CO. (*a*.)

Railway Commissioners—Jurisdiction—Arbitration—Agreement "confirmed and made binding" by private Act—Regulation of Railways Act, 1873 (36 & 37 *Vict. c.* 48), *s.* 8—*Prohibition.*

By a private Act between two railway companies an agreement made between them was set out verbatim *as a schedule, which contained a clause providing that all questions of difference arising between them should be determined by arbitration in manner provided by the Railway Companies Arbitration Act*, 1859; *and this was "confirmed and made binding" by a clause of the private Act. Differences having arisen, one company desired to refer the dispute to the Railway Commissioners under section* 8 *of the Regulation of Railways Act*, 1873.

Held, that the right to refer differences to arbitration was derived from the agreement itself, and that, as the difference was not "required or authorized to be referred to arbitration under the provisions of any general or special Act" within section 8 *of the Regulation of Railways Act*, 1873, *the Railway Commissioners had no jurisdiction to undertake the arbitration.*

Application for a rule *nisi* for a writ of prohibition to be made absolute.

Under a private Act (26 & 27 Vict. c. cxiii.) the Midland Railway Co. was amalgamated with the Great Western Railway Co. for certain purposes, to which Act a schedule (B) was attached of certain heads of agreement. By the 29th article of those heads of agreement it was agreed between the two companies that "all questions of agreement not otherwise provided for were to be determined by arbitration in manner provided by the Railway Companies Arbitration Act, 1859 (22 & 23 Vict. c. 59)."

This agreement was confirmed by the Act, which made it binding on the parties thereto.

Differences having arisen, the Midland Railway Co. desired to refer them to the arbitration of the Railway Commissioners under the Regulation of Railways Act, 1373, s. 8, while the Great Western Railway sought to refer the matters in dispute to arbitration under the above agreement, and obtained a rule *nisi* to prohibit the commissioners from hearing the case.

Sir Horace Davey, Q.C., Balfour Browne, Q.C., and *Meysey Thompson*, for the Midland Railway Co., showed cause against the rule.—This is a dispute which, by section 8 of the Regulation of Railways Act, 1873, can be referred to the Railway Commissioners, because "it is a difference which, under the provisions of a special Act passed before the Act of 1873, is required or authorized to be referred to arbitration." If so, it can, at the instance of either party and with the consent of the commissioners, be referred to them in lieu of the arbitration originally proposed: *Caledonian Railway Co.* v. *Greenock and Wemyss Bay Railway Co.*, L. R. 2 Sc. App. 347, 22 W. R. Dig. 13; *Great Western Railway Co.* v. *Waterford and Limerick Railway Co.*, 29 W. R. 826, 17 Ch. D. 493; *Great Western Railway Co.* v. *Halesowen Railway Co.*, 52 L. J. Q. B. 473.

Sir R. E. Webster, A.G., Sir Henry James, Q.C., and *R. S. Wright*, for the Great Western Railway Co., supported the rule.—The word "authorized" in section 8 of the Regulation of Railways Act, 1873, does not cover the disputes in this case, which, by special agreement confirmed by an Act, were to be decided by arbitration. The Midland Railway Co. cannot go behind their contract.

STEPHEN, J.—Although at first sight there seemed some difficulty in this case, it has become clear that the point is comparatively a simple one. It turns solely on the language of section 8 of the Regulation of Railways Act, 1873, as compared with the provisions of the private Act, and more especially of its schedule B. The Act of 1873 declares that when any difference between companies is, under the provisions of any special Act, required or authorized to be referred to arbitration, such difference may be referred to the commissioners. The question is, whether this agreement is "required or authorized" so to be referred by any Act of Parliament? If so, it may be referred to the commissioners. If not, then the Great Western Co. is entitled to a prohibition.

Now I think that the effect of section 8 is that the Railway Commissioners are entitled to accept a reference to them in cases where the difference is required or authorized to be referred to arbitration by any general or special Acts, but not where the companies could, by their own constitution and independent powers, do the thing for themselves; it must be a distinct requirement or authorization of such arbitration by Parliament.

Now in *Caledonian Railway Co.* v. *Greenock and Wemyss Bay Railway Co.* Lord Cairns' words seem especially applicable to the present case. He says that "it is clear beyond the possibility of argument that when an agreement between two companies is scheduled to an Act of Parliament, and when it is enacted in the Act that each company shall be required to fulfil all the provisions in the agreement, every provision and stipulation in that agreement becomes as obligatory and binding as if they had been repeated in the form of statutory

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(*a*.) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

sections." The words of the Act in that case seem to me to be substantially the same as the words in this private Act—namely, where, by section 63, the heads of agreement "are respectively confirmed and made binding on the *several* companies parties thereto." And such words *undoubtedly* have the effect of making these contracts good as between the parties.

From the other cases cited it appears to me that the requisition or authorisation mentioned in section 8 of the Act of 1873 is a requisition to do something which the parties were not otherwise called upon to do, and the authorisation means an authority to do that which they were not authorized to do without the Act. Looking at *all* the cases together, I think this application must be granted and a prohibition issue.

WILLS, J.—I am of the same opinion. Broadly stated, the question is whether, in a case where an agreement between two companies to which the Act of 1873 refers, containing a reference clause, has been embodied in an Act of Parliament, the necessity or privilege, as the case may be, of having their disputes referred to arbitration has been covered by express command of the Legislature, or is the offspring of agreement between the parties: the action of Parliament having been confined to removing obstacles, actual or apprehended, to their power so to contract. The substance of the Act seems to me to be that if substantially the *forum* was selected and adopted by contract between them, then the Legislature does not interfere. The question, then, is under which head the form of words used in section 63 comes.

The case of the Caledonian Co. seems to me to come to this—that in that case Lord Cairns thought that the specific enactments with which he was dealing were divisible into two classes, and that the first head of the enactment was satisfied and completed by giving to the arrangement which has been made as to the agreement entered into by statutory validity; and being of opinion that the earlier words had been exhausted upon giving statutory validity to the agreement, and finding other words afterwards which made no reference to the mere contract between the parties, he came to the conclusion that these latter words were of a different order from the first, and that whereas the operation of the first was to confer that validity upon an agreement which, without assistance, it could not have, the operation of the second was to place the agreement in a different category, and to remove it from the mere category of agreement into the higher place of specific law, so that by the will of Parliament it ceased to be a mere agreement and was transferred into a substantial enactment, to be adhered to for the benefit of the public.

Now that seems to me, shortly stated, to be the explanation and summary of all that is material to observe with regard to that decision. Then, applying that, is there any ground whatever in the simple words which have been used here for dividing them into two such heads as those? I think not, either as regards the words themselves or as to the subject-matter with which they deal. The words are "that the agreement shall be confirmed and made binding between the parties." If an agreement is confirmed it is made binding between the parties. I do not think one can reject the expression "between the parties." I think the whole of that expression must be taken together. It merely means that an agreement is to be confirmed, and is to be a valid agreement, as it professes to be, between the parties. If the subject-matter of the agreement be looked at it is seen why it should have been necessary to resort to Parliament for a simple confirmation, and why it is not necessary to extend the words beyond. As to the cases cited I agree with Stephen, J.'s comments, and I will only say that I agree entirely with every word of A. L. Smith, J.'s judgment in the case of *Great Western Railway Co.* v. *Halesowen Railway Co.* I come to the conclusion, therefore, that this Act of Parliament ought to receive this construction apart from authority, and that there is strong authority beside the mere words of the Act in favour of the view we have expressed. This rule must be made absolute.

Rule absolute.

Solicitor for the prosecutors, *R. R. Nelson.*

Solicitors for the defendants, *Beale, Marigold, & Co.*

Q. B. Div. (Pollock, B., and Hawkins, J.) } Dec. 9, 13.

REG. *v.* MARYLEBONE VESTRY AND HYDE. (*a.*)

Artizans and Labourers Dwellings Act, 1868 (31 & 32 *Vict. c.* 130), *ss.* 3, 5, 7, 25—"*Owner*"—*Accrual of liability—Notice—Order for works to be done.*

In July, 1886, *a notice was served by the Marylebone Vestry, under sections* 5 *and* 7 *of the Artizans and Labourers Dwellings Act*, 1868, *upon H., notifying the report of the surveyor that certain houses were unfit for human habitation. H. at that date was lessee of the houses for a term which expired on the following Michaelmas Day, and was also assignee of a reversionary interest in the same for a lease of twenty-one years, to begin on the said Michaelmas Day. An order made on the report in October*, 1886, *was subsequently varied on appeal in January*, 1887. *Upon completion by H. of the works ordered, a charging order was made, on his application, upon the premises. On an appeal by way of certiorari against such charging order by the freeholder of the premises,*

Held, that H. was, at the time when the notice was served, an "owner" within section 3 *of the Act of* 1868, *as having a possessory interest in the premises for a term of more than twenty-one years; that the notice was, therefore, properly served on him; and that the liability or benefits under the further proceedings accrued from the date of the notice, and not from the date of the order for the works.*

Appeal by motion for a writ of *certiorari* to remove a charging order made by the Vestry of Marylebone into the Queen's Bench Division.

The appellant in this case was Captain Berness, the owner of the freehold of certain premises in the occupation of Hyde. In July, 1886, Hyde was the assignee of the remainder of a long lease of the premises for ninety-six years, which expired at Michaelmas, 1886; he was also the assignee of a reversionary lease for twenty-one years, which was to run from the same Michaelmas. In July, 1886, Hyde was served with a notice from the Marylebone Vestry under the Artizans and Labourers Dwellings Act, 1868, that the premises were reported as unfit for habitation, the receipt of which notice was also notified to Berners. On September 23 Hyde attended at the vestry for the consideration of the matter under section 7 of the Act; but on the application of Berness's representative the hearing was postponed until October 14, upon which day both Hyde and Berners attended, and an order was made for the demolition of the premises. Against this order Hyde appealed, and in the interval he made certain structural alterations in one of the houses complained of. This appeal was heard at the Middlesex Quarter Sessions in January, 1887, and the order of the vestry was varied to the effect that similar structural alterations to those which Hyde had

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

carried out in the one house should be completed in the other houses in lieu of their demolition. Hyde communicated this result to Berners, and informed the latter of his intention to carry out these improvements. No answer was sent to this. Hyde completed the alterations, at a cost of about £500, and thereupon applied to the vestry for a charging order under section 25 of the Act, and an annual charge of £25 3s. 9d. for thirty years was made by the vestry on the premises in Hyde's favour. Against this order Berners now appealed.

Peile, for the appellant.—In July, 1886, when the first notice was served on Hyde, he was not an "owner" within section 3 of the Artizans and Labourers Dwellings Act, 1868, as "a lessee for a term of which twenty-one years remained unexpired." He had only an *interesse termini* in regard to the reversionary lease. The liability is fixed at the time when the order was made, and Hyde was not then—namely, in October, 1886, or January, 1887—a person qualified for such a liability: *Reg.* v. *Swindon Local Board*, 27 W. R. 732, 4 Q. B. D. 305. Hyde was bound under his covenant to keep the premises in repair. He chose to expend money in these improvements and has no right, as "owner" under the Act, to have a charging order made in his favour.

Channell, Q.C. (*Forrest Fulton* and *F. M'Leod* with him), for Hyde, the respondent.—Hyde was an "owner" under section 3, as being, in July, 1886, "a person, holding or entitled to the rents and profits" of these premises for more than twenty-one years. There is no limit to persons "in possession" for that time. The premises required certain "structural alterations" which would not come under Hyde's covenants "to keep in repair." The time for fixing the liability is when the notice of the defects is served; otherwise, if a change of ownership took place between the date of the notice and that of the making of the order, the whole proceedings would have to be begun *de novo*, and might again be evaded. Berners never disputed the right of the vestry to treat Hyde as owner, nor did he make any objection to Hyde so acting until the charging order was made, after Hyde had expended over £500. The case of *Reg.* v. *Swindon Local Board* only decides upon whom the ultimate burden shall fall.

Poland and *English Harrison*, for the vestry.—It is of great importance for the vestry to know at what period the liability accrues. The proper hearing would have been on September 23 had Berners attended, and Hyde was then "owner" for more than twenty-one years.

Peile replied.

Cur. adv. vult.

Dec. 13.—POLLOCK, B.—This is an application for an order of *certiorari* to bring up a charging order made by the Vestry of Marylebone under the Artizans and Labourers Dwellings Act, 1868, s. 25. The charging order under this Act is made against the alleged owner for the time being of the premises in question. The present application is made, not by the person for whom the order was made, but by the freeholder, Berners, for whom the order might have been properly made. The question before us is whether Hyde, for whom the order was made, is an "owner" within the Act. The facts are as follows. At the time when notice was served on Hyde that the premises in question were unfit for human habitation and ought to be demolished—that is, in July, 1886—Hyde was the holder of an unexpired lease for a long term, which was to expire at Michaelmas, 1886. In that respect alone such a property was not sufficient to make him an "owner" under the Act of 1868. But he also had a reversionary interest as the grantee of a fresh lease to run for twenty-one years from Michaelmas, 1886. Was he, under these circumstances, an "owner" under this Act? The Act defines "owner" in the interpretation clause (section 3) as including all lessees, &c., "except persons holding or entitled to the rents and profits of such premises for a term of years of which twenty-one years do not remain unexpired." If, therefore, we take the two periods of time, the unexpired period of the long lease up to Michaelmas and the twenty-one years to commence from that date, and consider the words "entitled to the rents and profits for a term of which twenty-one years do not remain unexpired," Hyde would clearly be a person not coming within that exception, and if so he is to be treated as an "owner."

But Mr. Peile says that, although Hyde was a lessee under the first lease, he had only an *interesse termini* under the second lease. Under the Act, however, a person is not to be held as "owner" only if he holds the property as being entitled to the rents and profits; all that has to be considered is, has he such an interest as to make him "entitled to the rents and profits for a term of which twenty-one years remain unexpired"? Upon that construction I think that Hyde was, at the date of the notice, properly considered to be an "owner" under the interpretation clause of the Act of 1868.

But it is said that, although Hyde may have been an "owner" at the time the notice was served, assuming our construction of the Act to be right, that qualification ceased before any order was served in regard to these premises. The notice was served in July, and on September 23 Hyde attended at the vestry in pursuance of it. Captain Berners, however, the freeholder, was not in attendance, and to suit the latter's convenience the consideration of the matter was adjourned till October 14. An order was at that time made for the demolition of the houses. In January, 1887, another order was made varying the order of demolition into one for carrying out certain structural alterations after the manner already carried out in the interval by Hyde in respect of one of the houses in question. Now though in July Hyde was clearly, by our construction, an owner of a term of which twenty-one years remained unexpired, from Michaelmas Day that interest was diminished, and in October he had ceased to be such an owner, since less than twenty-one years remained unexpired. The question for us is whether this charging order can be maintained in favour of the owner at the time of the notice being first served, or must it be restricted to the owner at the time the order was made? Now the scheme of the whole Act seems to me to answer that question. It contemplates the finding of a person who, for the purposes of the Act, shall be an "owner" of the premises. That owner is to be served with a notice of the surveyor's report, and is allowed to attend the hearing for the consideration of that report. The same person is either to carry out the improvements ordered or to be compensated for the demolition of the premises.

It was pointed out successfully, as I think, by Mr. Channell that it could not be intended by the Legislature that a new process was to be commenced whenever there was a change of occupier. The new occupier might or might not be the owner. It would be most inconvenient for local authorities, and contrary to the spirit of the Act, if the liability was to be evaded by a mere change of occupation by the owner on whom notice had been first served. It was intended to fix the liability on that person, being the "owner," in whose hands the premises had been allowed to fall into dilapidation. Here Hyde was such a person and could not be treated as one whose interest in the premises has expired. Where the Act *ex concessis* is dealing with a person admittedly interested in the premises, it is impossible to suppose that such person can get rid of his liability between the receipt of the notice and the order

for the work to be done, thus quashing his liability by mere efflux of time. It is clear that the person who is "owner" within the terms of the Act at the time when the notice is served is the person liable under all the future proceedings.

There is one authority which has been cited by Mr. Pelle, but which, to my mind, really tells against him—*Reg.* v. *Swindon Local Board*. The question there was not who was liable to do certain sanitary acts under an Act somewhat similar in effect to the present Act—namely, the Public Health Act, 1875—but from whom the expenses for such work were ultimately recoverable; and it was held that they could only be recovered by yearly payments from the existing owners from year to year. This is clearly stated in Cockburn, C.J.'s judgment, otherwise an owner who had first received notice as to the necessity of the work to be done, but who had subsequently sold the property and gone abroad, would remain liable to pay for improvements by which other occupiers were benefiting. I agree fully with that decision, and I think that, as illustrating the spirit in which these Acts are to be administered, it tells rather in favour of the respondent in this case, though not, perhaps, applicable to the particular point before us.

On all these grounds I think that this appeal must be dismissed.

Hawkins, J.—I am of the same opinion. The question before us is whether this charging order in favour of Hyde ought to be quashed. In July, 1886, Hyde was entitled to three months of the unexpired long lease and to re-enter on Michaelmas Day on a new lease for twenty-one years. First, was Hyde, then, at that time within the exception of section 3 applicable to lessees—namely, "A person holding or entitled to the rents and profits of such premises for a term of which twenty-one years do not remain unexpired"? Secondly, was the notice as to the premises being unfit for habitation rightly served upon him? I am of opinion that he was not then within the exception, and that he was rightly so served. I do not think that the objection that he had only an *interesse termini* at that time in regard to the second lease makes any difference under this interpretation clause to a person interested as lessee for a period of more than twenty-one years. His title may not have been then in all respects complete, but I am satisfied that the Legislature intended to include persons in Hyde's position. Beyond all question he was entitled to three months' possession, and was then entitled to perfect his title to possession for a further term of twenty-one years so soon as the old lease expired. Such a person is clearly, in my opinion, an owner within section 3 of the Artizans and Labourers Dwellings Act, 1868, and, if so, the notice was properly served on him in July, 1886. [The learned judge here went through the dates of the various proceedings taken under the Act.] Now on the 30th of September Hyde had ceased to be an owner within the above meaning of the section, since his interest was for less than twenty-one years by one day. Was he, then, the proper person against whom the proceedings commenced by the notice were to be continued? I am of opinion that he was. The object of the Legislature was to call on persons who were owners at the time when the definite condition of the premises was discovered and reported on, and notice was served of the same. That notice was to be served on the then owners, and the subsequent proceedings are merely a continuance from the notice which was served on Hyde when he was the "owner" as we hold, and the person in whose hands the premises were found to have fallen into disrepair so as to be considered unfit for habitation. Throughout all these proceedings Berners, who now appears before us as objecting to the charging order, has made no objection to any of the proceedings of the vestry. He did not object to the order for their demolition. He did not appeal as "a person aggrieved" by any such order under section 9 of the Act. He was informed by Hyde of the variation of the order, and of the structural alterations actually carried out and to be further carried out by him under the order of the quarter sessions. He naturally made no objection to that. But now, when Hyde has expended between £500 and £600 on these works and has, as "owner" under the Act, properly obtained a charging order on the premises under section 25, Captain Berners thinks fit to come forward and endeavour to prevent Hyde from being thereby recouped. If we were bound by law to saddle Hyde with all such expenses of course we should have to do so, with, however, much regret. Happily we are able legally to prevent such a result, and I hold that both the objections—as to Hyde's not being an owner and as to the accrual of the liability only at the date of the making of the order for the work—fail.

As to the case cited, I rather think there is some section in the Public Health Act, 1875, which fixes the liability on the owner who "makes default" under the Act—*i.e.*, the owner at the time when the money becomes due. At any rate, practically that decision has nothing to do with this case.

Appeal dismissed.

Solicitor for the appellant, *Cronin.*

Solicitors for the respondent Hyde and for the Marylebone Vestry, *The Clerk to the Vestry.*

Lunacy.

July 5.

In re Platt. (*a.*)

Lunacy—Petition under Trustee Relief Act—Jurisdiction—Judicature Act, 1873, *s.* 51.

The jurisdiction of the Court of Appeal in lunacy matters is not limited to petitions entitled "In Lunacy and in the matter of the Trustee Acts," but extends to all applications in Lunacy which require an exercise of the jurisdiction of the Chancery Division.

This was a petition by the personal representative of Mary Platt, deceased, a person of unsound mind, not so found by inquisition, for payment out of court of a fund which had been paid in, under the Trustee Relief Act, to the credit of the deceased.

The petition was entitled "In Lunacy and in the Chancery Division of the High Court of Justice."

F. Thompson, for the petition.

The Court at first felt some doubt whether the court had any original jurisdiction under the Trustee Relief Act, but on referring to the request addressed to them some years since by the Lord Chancellor (*vide* 20 Solicitors' Journal, 45) to act as additional judges of the Chancery Division, it appeared that it was not limited to petitions entitled "In Lunacy and in the matter of the Trustee Acts," but that it extended to all applications in Lunacy which required also an exercise of the jurisdiction of the Chancery Division.

The terms of the request were the following:—"As it is convenient that orders should continue to be made, as heretofore, in Chancery, as well as in Lunacy, I have to request you to act as an additional judge of the Chancery Division of the High Court of Justice for the purpose of making such orders."

(*a.*) Reported by W. Ivimey Cook, Esq., Barrister-at-Law.

The COURT (COTTON, BOWEN, and FRY, L.JJ.), accordingly made the order asked for.

Solicitor, *R. C. Adams Beck.*

Court of Appeal.

From Chan. Div. Aug. 9.

MINERAL WATER BOTTLE EXCHANGE AND TRADE PROTECTION SOCIETY *v.* BOOTH. (*a.*)

Restraint of trade—Trade protection society—Rule not to employ servants of other members—Validity.

One of the rules of a society established for the protection of a particular trade provided that no member of the society should employ any traveller, carman, or outdoor employé *who has left the service of another member, without the consent in writing of his late employer, until after the expiration of two years from his leaving such service.*

Held, that the rule imposed an unreasonable restraint on trade, and was therefore bad.

But, semble, *a rule properly framed, preventing one member from injuring another by improperly acquiring information from a servant, would have been valid.*

Decision of Chitty, J., *affirmed.*

Appeal from a decision of Chitty, J.

The plaintiffs were a society incorporated under the Companies Act, 1862, for the purpose of protecting the interests of mineral water manufacturers in London and elsewhere. The 44th article of the articles of association provided that no member should employ any traveller, carman, or outdoor *employé* who had left the service of another member, without the consent in writing of his late employer, until after the expiration of two years from his leaving such service.

The action was brought by the society and J. Cox, one of the members, against Booth & Co., who were also members, claiming an injunction to restrain the defendants from employing a carman who had just quitted the service of Cox.

The number of the members of the society was limited to 500, and the actual number of members was 179.

The members carried on business in various parts of the United Kingdom, and one of them carried on business in New South Wales.

Chitty, J., refused to grant an *interim* injunction, on the ground (*inter alia*) that the rule imposed an unreasonable restraint on trade, the agreement not being between an employer and his servant, but between employers as against employed, and the number of the members of the society and its field of business being practically unlimited.

From this decision the plaintiffs appealed.

Romer, Q.C., and *Bradford,* for the appellants.—The main question in this case is whether this is such a rule as the law will allow. The object of the rule is to prevent unfair competition by persons getting hold of the servants of others who have acquired a knowledge of their masters' businesses. *Collins* v. *Locke,* 28 W. R. 189, is an authority for the proposition that persons carrying on a particular kind of business may enter into reasonable covenants for the appropriation of that business. In that case an agreement to parcel out the stevedoring business of a port among the parties thereto was upheld, though the effect of it might be to create a partial restraint upon the parties to exercise their trade. [BOWEN, L.J., referred to *Bowen* v. *Hall,* 29 W. R. 367, 6 Q. B. D. 333; *Hilton* v *Eckersley,* 4 W. R. 326, 6 El. & Bl. 47, 67. FRY, L.J., referred to *Gunmakers' Co.* v. *Fell,* Willes' Rep. 384.] The rule does not operate in restraint of trade, it merely prohibits members of the society from selecting servants who have been previously employed by other members. Can it be said that an agreement between two, three, or four manufacturers that they will not employ each other's servants is bad? We submit that it is not, on the ground that it does not destroy trade, and does not stop the employment of labour.

They also referred to *Jones* v. *North,* 23 W. R. 468, L. R. 19 Eq. 426.

Whitehorne, Q.C., and *Hull,* for the defendants, were not called upon.

COTTON, L.J.—We are asked here, on appeal from Chitty, J., to enforce a covenant contained in the articles of association of this company. Now I do not enter at all into the question how this company is to be regarded. In my opinion the question here is simply this: can we enforce the 44th article, treating it (as it is) as a covenant between all the members? I think we cannot.

We have not to deal with the question here as to whether the members of this body might have enforced a covenant exclusively pointed to preventing the members from injuring one another in a particular way by improperly acquiring information which had been gained by the servants of one another. That matter is not before us. Therefore I think it better not to give any opinion as to how any such covenant or restriction might have been framed so as to be lawful. What we have to deal with here is not such a covenant. I only mention it so that it may not be supposed that we give any opinion as to any covenant properly framed to prevent one member from injuring another by acquiring information from a servant. The 44th article of the association provides that "No member shall employ any traveller, carman, or outdoor *employé* who has left the service of another member, without the consent in writing of his late employer, until after the expiration of two years from his leaving such service." That is perfectly general. It is not even limited in its application to any particular *employés* who, from their position, might have confidentially acquired any knowledge in their employment. It is not confined to servants who, having been put in places of confidence, have been long enough in the service to obtain any information which they ought not to disclose, and which might be used to the detriment of their employer. So that generally if any outdoor *employé* were in the service of any member of this society even for a week and then left he could not be employed, if this covenant is a good one, by any other member of the association. That of itself might be used most oppressively, and although in the present case (we have not heard the circumstances) it might be proper, if the covenant were aptly framed, to restrain the defendants from employing a particular individual so as to prejudice his late employer by using knowledge he had got confidentially, yet there is no restriction or limitation in this covenant at all. It is very like the case, which Bowen, L.J., referred to, of *Hilton* v. *Eckersley,* in which there was an attempt to regulate the way in which certain members of the association were to carry on their trade. That is a difficulty here. But in my opinion the great objection to this covenant is that it might be used most oppressively by preventing a man who had never been in any confidential position and never desired improperly to use the information he had then acquired from getting employment from another master in the trade which he knew most about, and which he could best carry on. In my opinion, on the ground that this covenant is one which we ought not to enforce, this motion ought to be refused.

(*a.*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

Bowen, L.J.—I agree so entirely with the judgment of the Lord Justice that I will not add anything.

Fry, L.J.—I am entirely of the same opinion. It appears to me that a covenant might have been framed which possibly might have been good, that is to say, that the masters might have contracted not to use in competition with one another knowledge confidentially obtained. It is said the object of this clause is to give effect to that intention. But it has gone far beyond it, because it applies to every traveller, every carman, and every outdoor *employé*, whether they have or have not acquired such knowledge. It applies to those who may have acquired knowledge, although they may have been employed in distant localities where their knowledge is of no avail. I think, therefore, the restraint of trade and of the liberty of her Majesty's subjects in gaining employment is far in excess of any legitimate purpose of the contracting parties.

Application refused.

Solicitors, *W. Webb; Smythe & Brettell.*

From Chan. Div. July 6, 7.

In re Adam Eyton (Limited).
Ex parte Charlesworth. (*a.*)

Company—Winding up—Removal of official liquidator —"Due cause shown" — Appeal — Locus standi— *Companies Act,* 1862, *s.* 93—*Judicature Act,* 1873, *s.* 50.

The power of the court under section 93 *of the Companies Act,* 1862, *to remove a liquidator on "due cause shown" is not confined to cases in which personal unfitness in the liquidator is shown, but extends to cases in which the court is satisfied on the evidence that it is desirable, in the interests of all those interested in the assets, that the liquidator should be removed and another person substituted.*

In re Sir John Moore Gold Mining Co., 28 *W. R.* 203, 12 *Ch. D.* 325, *explained.*

Decision of North, J., *affirmed.*

Appeal from a decision of North, J., in chambers.

On the 23rd of April, 1887, an order was made to wind up the above company, and on the 19th of May *J. S. H.* Banner was appointed official liquidator.

On the 20th of June, on the application of W. Charlesworth, who claimed to be a creditor of the company, and on "the applicant by his counsel undertaking to pay into the Bank of England," to the credit of the matter, on or before a specified day "the sum of £2,500, and to pay any further sum of money to the like credit as the court may direct in respect of claims brought in by other creditors of the company not mentioned in the schedule hereto, and also undertaking to pay any sums necessary to answer any costs properly incurred by Banner as provisional liquidator and official liquidator of the company," North, J., appointed A. W. Chalmers official liquidator of the company in the place of Banner.

From this order Banner appealed.

Cozens-Hardy, Q.C., and *Oswald,* for the appellant. —The order of the 20th of June is bad on two grounds. In the first place, North, J., had no jurisdiction under section 50 of the Judicature Act, 1873, to vary his order of the 19th of May appointing Banner official liquidator, although it had not been drawn up: *In re St. Nazaire Co.,* 27 W. R. 854, 12 Ch. D. 88; *In re Swire, Mellor* v. *Swire,* 33 W. R. 785, 30 Ch. D. 239; *In re Munns & Longden,* 32 W. R. 675. In the second place, the "due cause shown" for which a liquidator can be removed under section 93 of the Companies Act, 1862, means something in the nature of a disqualification arising from his misconduct or unfitness: *In re Sir John Moore Gold Mining Co.,* 28 W. R. 203, 12 Ch. D. 325; Chadwyck Healey's Company Law and Practice (2nd ed.), p. 523; and compare also *Ex parte Sheard, In re Pooley* (*No.* 1), 16 Ch. D. 107, 27 W. R. Dig. 27, and *Ex parte Newitt, In re Mansell,* 33 W. R. 142, 14 Q. B. D. 177, which were bankruptcy cases. No such allegation is here made against Banner. The order, in fact, amounts to a sale of the liquidation to the highest bidder. [Bowen, L.J., referred to *In re Oxford Building Society,* 49 L. T. N. S. 495.]

Higgins, Q.C., and *Hatfield Green,* for the respondent Charlesworth.—North J., has, in the exercise of his discretion, appointed Chalmers official liquidator of the company, and Banner therefore has no *locus standi* to appeal. The "due cause shown" in section 93 of the Companies Act, 1862, is not to be confined to the mere personal unfitness or incapacity of the liquidator, but the court, in making an order under that section, must have regard to the interests of all persons interested in the winding up.

C. H. Turner, Dunham, and *Pochin,* for other parties.

Cozens-Hardy, Q.C., replied.

Cotton, L.J.—This is an appeal by Mr. Banner, who at one time was liquidator of this company, against an order of North, J., in chambers, removing him from being liquidator, and appointing in his stead a Mr. Chalmers, who is also an accountant at Liverpool, as Mr. Banner is.

Several points were raised; one was this, that Mr. Banner had no *locus standi* to appeal. All the court entertain a strong opinion upon that point. Of course he could not have been removed without giving him an opportunity of appearing before the court and stating reasons why he should not be removed. That being so, if the court did listen to those reasons, and he was advised that the court fell into error, he has a right of appeal and has sufficient *locus standi* here.

We come to the question, Was the court right? Had it power under the 93rd section of the Companies Act, 1862, in the circumstances of the case, to remove him? The Act says, "Any official liquidator may resign or be removed by the court on due cause shown." Now I think the matter comes under the section for this reason, that although the order appointing the liquidator had not been drawn up, there had, in fact, been an order of the 19th of May appointing him liquidator; and this order, which is under appeal, was made on the 20th of June, and was made on the footing of its being an order to remove the liquidator; and although the order of May the 19th had not been drawn up, in my opinion he was liquidator, though he had not given security. The security is given after the liquidator is appointed, and is not a condition of his being appointed, although, of course, if anyone who is appointed a liquidator, and ordered to give security, delayed for so long a time, either in drawing up the order or in giving security, that the court might reasonably come to the conclusion that he did not desire to fill the office and had abandoned it, then it might be very material whether the order had been drawn up, or whether security had been given. But here we know that Mr. Banner was anxious to draw up the order, and that he was stopped in consequence of the summons upon which this order was made.

We must therefore consider it as a question of removing Mr. Banner. Now, in my opinion, it is not necessary, in order to justify the court under this

(a.) Reported by W. Ivimey Cook, Esq., Barrister-at-Law.

section in removing the liquidator, that there should be anything against the individual. In my opinion, although, of course, unfitness discovered in a particular person would be a ground for removing him, yet the power of removal is not confined to that, and I do not think that the late Master of the Rolls, in the case of *In re Sir John Moore Gold Mining Co.*, which has been cited, intended to give an exhaustive definition. In fact he points out that, and what he says is this:—"I should say that, as a general rule, they point to some unfitness of the person—it may be from personal character, or from his connection with other parties, or from circumstances in which he is mixed up—some unfitness in a wide sense of the term." He does not intend to exhaust all the grounds, but, in my opinion, and I believe the rest of the court agree with me, if the court is satisfied on the evidence before them that it is against the interest of the liquidation, by which I mean all those who are interested in the company being liquidated, that a particular person should be made liquidator, then the court has power to remove the present liquidator, and, of course, then to appoint some other person in his place.

Now what were the circumstances here? I do not in any way enter into those various questions which are raised by one side or the other; but it appears that Mr. Eyton, who is the father-in-law of Mr. Charlesworth, has large claims, as he contends, as against the company. That is disputed by another section of those who are interested in the liquidation—namely, certain creditors; and Mr. Eyton and Mr. Charlesworth also dispute the claims of certain persons who appear to claim as creditors against this company. But then we are informed by North, J., that the contest was conducted before him on the footing that if the claims of Eyton, Charlesworth, and of other persons named in the schedule to the order came into competition together, there would not be enough to pay 20s. in the pound—that is to say, that the company was insolvent and could not pay its debts in full, and that was the basis of the order upon which the matter proceeded; and on the evidence, as far as I can see here before us, I should have thought probably the parties were quite right in the mode in which they viewed the circumstances of this company. And I mention that especially for this reason—Mr. Cozens-Hardy in reply said that an order like this, where a company was solvent, would produce very great evils and be a very bad precedent. I entirely agree. In my opinion it would be wrong, where it was conceded that a company was solvent, that the court should, because a sum of money was offered by one who wishes another liquidator to be appointed, merely on that ground remove the existing liquidator. That would not be a due cause; it would be like buying the liquidation. So I should entirely dissent from that. Liquidators ought not to consider themselves partizans either on one side or the other. But here is a company which, on the evidence, must be treated as insolvent, and which was treated as insolvent when the matter was before North, J.

But Mr. Charlesworth says:—"Mr. Eyton and I are together very large creditors, and I will take the loss upon myself in this way—I will pay all the other creditors if the assets are not sufficient to pay them, and bear the loss by taking the property into my own hands and providing out of that for whatever may be due to Mr. Eyton and myself." Under those circumstances the matter bears a very different aspect. I think the order is not unreasonable under those circumstances. We have the opinion of North, J., who knows Mr. Chalmers as well as Mr. Banner, and although he is quite satisfied that Mr. Banner would conduct the matter duly and properly, and that there is no possible imputation, or ground of imputation, in this case against him, he is also satisfied that Mr. Chalmers would also conduct the liquidation fairly, and not raise any unnecessary or groundless objection to any claims which may be brought forward by those who claim to be creditors, and whose debts, if established, Mr. Charlesworth undertakes to pay. In my opinion, therefore, the appeal must be dismissed.

BOWEN, L.J.—I am of the same opinion. Mr. Banner may consider that the judgment of the court is not based in any way on the possibility of any reflection upon himself, either in his conduct in this matter or in his general fitness to be liquidator of any honourable company in the kingdom. We do not decline to vary the order of North, J., because Mr. Banner is in any way implicated in anything which he has any reason to fear. On the contrary, his character is clear. With regard to the facts of the case I will say nothing. I will only add two or three words to point out what is the importance of our decision as to the law. In this case it is not necessary, in my opinion, to decide for the first time what I think always has been the law—that a liquidator, once appointed, has a *locus standi* to appeal to this court against his removal, and that a liquidator, when he is appointed, is not the less appointed because he has not, at the time of the appeal coming on, perfected his right to act by giving security. The security is to be given on his appointment—that is to say, immediately after his appointment. The case, therefore, is not important for that reason, but I do think it is an important case to the profession, because a contention was raised by Mr. Cozens-Hardy, and based upon the language of Sir George Jessel, the late M.R., in *In re Sir John Moore Gold Mining Co.*, to the effect that unfitness in the liquidator ought to be shown before he is removed. If anybody understands Sir George Jessel's language in that case to mean that, I think that this court ought now to lay down that such an apprehension of his meaning is incorrect, and that it is not the sole ground under the statute for which a liquidator can be removed.

In many cases, no doubt—and very likely, for anything I know, in most cases—unfitness of the liquidator will be in the general form which the cause will take upon which the court, in this class of case, acts, but that is not the definition of due cause shown. In order to define "due cause shown" you must look wider afield, and see what is the purpose for which the liquidator is appointed. To my mind, the Lord Justice has correctly intimated that the due cause is to be measured by reference to the real, substantial, honest interests of the liquidation, and to the purpose for which the liquidator is appointed. Of course, fair play to the liquidator himself is not to be left out of sight; but the measure of due cause is the substantial and real interest of the liquidation. That should be thoroughly understood, I think, as of great importance; and in that sense it seems to me this case is of interest, because it clears, once and for all, away the misconception upon which the argument of the appellant's counsel was based.

FRY, L.J.—I have nothing to add but to express my concurrence with my brethren.

Appeal dismissed.

Solicitor for the appellants, *T. Hulbert.*

Solicitors for the respondents, *Pitman & Sons*, for *Brown, Wilkin, & Scott*, Wakefield; *Layton & Steel*, Liverpool; *Miller & Miller*; *F. Burchell.*

From Q. B. Div. Jan. 19.

EATON v. LAKE. (a.)

Copyright—Musical composition—Assignment in writing—3 & 4 Will. 4, c. 15, s. 2—5 & 6 Vict. c. 45, s. 20.

An assignment of copyright in a musical composition must be in writing.

So, where the plaintiff had for some years acted as musical conductor at defendant's music-hall, and had composed pieces for performance which had been performed there, and for which he had been paid,

Held, that the relations existing between the parties were no bar to an action by the plaintiff for infringement of copyright under 3 & 4 Will. 4, c. 15, and 5 & 6 Vict. c. 45.

Appeal from a divisional court (Stephen and Charles, JJ.).

The defendant was the proprietor of a music-hall at which the plaintiff had acted for some years as musical conductor at a weekly salary. The plaintiff had from time to time composed pieces of music which had been performed at the music-hall, and for which he had afterwards been paid separately by the defendant. At Christmas, 1886, he composed a ballet, which was performed for the first time on December 24 of that year under his direction. On December 27, in consequence of a dispute with the defendant, he left the defendant's service, taking with him the score and band parts of the new ballet. The defendant applied to him to return them, and he agreed to do so, and received from the defendant a cheque for £20 for them. The ballet was then performed at the music-hall for four nights, when the plaintiff, finding that the payment of the cheque had been stopped by the defendant, brought this action for infringement of copyright, The case was tried before Grantham, J., and a jury. In answer to questions left to them by the judge, the jury found that this was a substantial and independent musical composition composed by the plaintiff, and that the plaintiff had not sold the right of representing it to the defendant. Grantham, J., accordingly gave judgment for the plaintiff. The Divisional Court set aside this judgment, and the plaintiff appealed.

Fullen, for the appellant.—The Act 3 & 4 Will. 4, c. 15, is extended to musical compositions by 5 & 6 Vict. c. 45, s. 20. That Act imposes a penalty of 40s. on any person representing or causing to be represented any such production without the consent of the author in writing. Here there was no consent in writing. No parol agreement, even if such were proved, would avail: *Shepherd* v. *Conquest*, 4 W. R. 283, 17 C. B. 427; *Wallerstein* v. *Herbert*, 15 W. R. 838, 16 L. T. N. S. 453; *Leyland* v. *Stewart*, 25 W. R. 225, 4 Ch. D. 419.

J. Lawson Walton, for the respondent.—The appellant is estopped from saying that this was an unauthorised representation. He stood by and allowed the respondent to incur great expense in preparing for the performance. It was part of his ordinary duty as conductor to compose such pieces, which became the property of the respondent: *Hatton* v. *Kean*, 8 W. R. 7, 7 C. B. N. S. 268.

Lord EMMA, M.R.—In this case the jury have found, and I do not think their finding can be challenged, that the plaintiff was the sole composer of this music, that is to say, that it was the production of his mind solely, and independently of anyone else. He is, therefore, the author of the composition, and as such the owner of the copyright. There was evidence that he had allowed the defendant to represent his compositions, and further there was, I think, evidence, which was not left to the jury, that he had agreed with the defendant that he would allow him to represent these pieces on condition that he paid him for them. But, even if the jury had found this to be so, it would, in my opinion, be absolutely immaterial as long as the agreement was not in writing. Assuming that the plaintiff had orally agreed to compose music for the defendant to perform, and the defendant had agreed to pay him for the right of performing it, nevertheless, unless that agreement is in writing within the terms of the Act of Parliament the plaintiff is to be considered the sole owner of the copyright, and the defendant cannot rely on the agreement. That is so by virtue of the proper construction to be put upon 3 & 4 Will. 4, c. 15, s. 2. That construction was given to the Act in 1856 by the Court of Common Pleas in the case of *Shepherd* v. *Conquest*, a case which was originally tried by Jervis, C.J., who then decided that such an agreement, although not in writing, would prevent the subsequent performance from being "contrary to the rights" of the plaintiff. But after fully considering the case in his own court he came to the conclusion, in which the other judges agreed, that his decision at *Nisi Prius* was wrong. He says, "Literary productions stand upon different and higher ground from that occupied by mechanical inventions. The intention of the Legislature in the enactments relating to copyright was to elevate and protect literary men. Such an intention could only be effectuated by holding that the actual composer of the work was the author and proprietor of the copyright, and that no relation existing between him and an employer who took no intellectual part in the production of the work could, without an assignment in writing, vest the proprietorship of it in the latter."

That construction of the Act has always been acted upon since 1856, and it cannot now be upset.

It is urged that there is an estoppel against the plaintiff. Is he estopped from saying that he composed this piece himself? or that he did not assign the copyright in writing? Those are the only material facts. In my opinion there is no colour for an estoppel. I am, therefore, of opinion that the plaintiff is entitled to succeed on this appeal, and that the judgment must be entered accordingly.

FRY, L.J.—I am of the same opinion. It cannot be contended that this was not an independent musical composition or that the plaintiff did not compose it, since those contentions are negatived by the findings of the jury, which seem unassailable. *Hatton* v. *Kean*, in which the piece of music was not an independent composition, is, therefore, not in point. But, it is said, by the terms of the agreement the defendant was from the first the owner of the copyright in this production. Such a case was not considered in *Shepherd* v. *Conquest*. The jury have, however, found that the plaintiff did not sell his copyright to the defendant. I take that to mean that the terms of the agreement gave no property, either in law or equity, to the defendant in this composition.

It is further said that the performance was not "contrary to the right of the author," since the plaintiff gave a parol licence to the defendant to represent it. But the statute requires that any licence should be in writing, and no one can claim as a licensee without a licence in writing. If we held otherwise we should, I think, be defeating the intentions of the Legislature. As to the argument for estoppel, that is always a refuge for the destitute; but it would be absurd to say that any conduct of the plaintiff had led the defendant to believe either that he was himself the author of this composition or that he had a written licence to perform it. He no doubt acted on the expectation that the arrangement, which had worked harmoniously so far, would continue; but that does not amount to an estoppel.

(a.) Reported by A. P. PERCIVAL KEEP, Esq., Barrister-at-Law.

I agree, therefore, in thinking that this appeal must be allowed.

LOPES, L.J.—In this case the findings of the jury were clearly right, and that brings it within *Shepherd* v. *Conquest*, as to which I will add nothing to what has been said. As to the defence of estoppel, I do not think there is a particle of evidence to support it. Our judgment must, therefore, be for the plaintiff.

Appeal allowed.

Solicitor for the appellant, *Grayston.*

Solicitor for the respondent, *J. E. Lickfold.*

High Court of Justice.

[Chan. Div. North, J.] June 10.

KEMP *v.* GOLDBERG. (*a.*)

Mortgage—Action for reconveyance or redemption—Counter-claim admitting sums received on account—Particulars.

In an action by a mortgagor for reconveyance or redemption of the mortgaged property, the defendant by his counter-claim alleged that a certain specified sum was due to him, partly secured on bills of exchange accepted by the plaintiff and partly on open account, and that he had received divers sums in respect of the bills of exchange and other sums in respect of the moneys due on open account, but that a large balance was due to him; and he claimed an account and foreclosure or sale.

Held, on a summons by the mortgagor, that he was entitled to particulars from the defendant of the sums admitted to have been received by him in respect of the bills of exchange and the moneys due on open account.

Adjourned summons.

The plaintiff in the action was mortgagor of certain real estate in Jersey, four policies of life assurance, and a bond. He alleged in his statement of claim that the mortgage debt had been repaid, and claimed reconveyance of the mortgaged property, or if the court should hold that all moneys due on the security of the mortgaged property had not been paid off, then an account and redemption.

The defendant, in his defence, stated that the mortgage debt had not been repaid, and that large sums were still owing on the security of the mortgaged property. By his counter-claim he alleged to be due to him a sum of £547 for commission on a sale effected by him and secured on the mortgaged property, and a sum of £5,063 17s. for moneys advanced, partly secured by bills of exchange accepted by the plaintiff, and partly due on open account, and claimed an account and foreclosure or sale.

The sixth paragraph of the counter-claim stated that "All the said bills of exchange have become due, and the defendant has, since the date of the said sale, received divers sums in respect thereof, and other sums in respect of moneys due to him on open account as aforesaid, but after giving credit for all moneys so received a large balance is still due and owing from the plaintiff to the defendant, together with interest at the rate of £5 per cent. per annum on the balance from time to time owing."

This was a summons by the plaintiff asking for particulars of the payments alleged in that paragraph.

H. E. M. Stutfield (*H. A. Forman* with him), for the summons.—The plaintiff asks for particulars of the sums which the defendant alleges he received on account, in order that he may know the amount of the balance claimed and have an opportunity of paying it off without further proceedings.

D. L. Alexander, for the defendant.—The defendant asks for an account, and declines to anticipate the account by giving particulars. That is not the practice: *Augustinus* v. *Nerincka*, 29 W. R. 225, 16 Ch. D. 13; *Blackie* v. *Osmaston*, 33 W. R. 158, 28 Ch. D. 119.

NORTH, J.—I think that the plaintiff should have particulars of the sums admitted to have been received in the sixth paragraph of the counter-claim for this reason. The counter-claim is not for a mere balance alleged to be due, but for a definite sum; and the only ground for saying that it is not for a definite sum is that the defendant has received divers sums on account, and declines to state what those sums are. He asks for an account; but what right has he to oblige the plaintiff to have an expensive account taken. It seems to me that common sense requires that the defendant, who alone has the means of knowing, should state what he has received. The plaintiff will then have the opportunity of paying the balance claimed. The cases referred to do not apply to the present case.

It is not a matter of course that particulars should be given. If an account is asked for by a claim or counter-claim, and the court sees an account will be necessary, there may be good reasons for deciding that no particulars shall be given, so that the account shall not be given twice over. But it does not seem to me that particulars should be refused merely because an account is asked for. If in a simple foreclosure action the plaintiff had been in receipt of rents and profits, and the defendant alleged that he did not know what to pay or tender, the fact that the plaintiff asked for an account would not be a sufficient reason for his refusing to give particulars. I think this is a case in which the particulars asked for in respect of the sums mentioned as received in the 6th paragraph of the counter-claim should be given.

Summons allowed.

Solicitors, *H. G. Smallman; H. Bentwitch.*

Q. B. Div. (Mathew and A. L. Smith, JJ.) Jan. 23.

TURNER & CO. *v.* CULPAN. (*a.*)

Bill of sale — Evidence — Certificate of registration omitting to state the filing of affidavit—Covenant to produce receipts for rent, &c.—"Without reasonable excuse"—Bills of Sale Act, 1878 (41 & 42 *Vict.* c. 31), *s.* 10—*Bills of Sale Act,* 1882 (45 & 46 *Vict.* c. 43), *s.* 7 (4).

The production, at the hearing of an interpleader issue, of a bill of sale, together with a certificate of registration, is no evidence that the proper affidavit was also filed in accordance with the Bills of Sale Act, 1878, *s.* 10, *but the proper course is to adjourn the hearing for the production of evidence, and not hold the bill of sale void merely on this ground.*

A bill of sale contained an unqualified covenant by the grantor to produce receipts for rent, without the addition of words corresponding to the words "without reasonable excuse" in section 7 (4) *of the Bills of Sale Act,* 1882; *but contained a proviso that the chattels assigned*

(*a.*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

should not be liable to seizure by the grantee for any cause other than those specified in section 7 of that Act.

Held, that the insertion of this covenant did not render the bill of sale void as not being in accordance with the form in the schedule to the Bills of Sale Act, 1882.

Appeal on an interpleader issue by the execution creditor from a decision of his Honour Judge Russell at the Manchester County Court, declaring a bill of sale valid.

W. E. Hume Williams, for the execution creditor.—The bill of sale is void on two grounds. It was proved at the hearing of the interpleader issue only by the production of the original bill itself, together with a certificate of registration, which certificate omits to state that the affidavit required by the Act of 1878 was filed, and that the copy of the bill filed was a true copy. Such a certificate has been held to be no evidence that an affidavit was filed, under provisions in the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), s. 1, which are practically identical with those of the Bills of Sale Act, 1878, s. 10, sub-section 2: *Mason* v. *Wood*, 24 W. R. 41, 1 C. P. D. 63, followed in *Emmett* v. *Marchant*, 3 Q. B. D. 555, where, however, the court said that an adjournment ought to have been granted.

C. A. Russell, for the bill of sale holder, was called upon as to the first point.—The certificate of due registration involves the filing of the affidavit. Even if the certificate be not conclusive, it is *primâ facie* evidence that all things required by the statute have been done, and casts the burden of proving the insufficiency of the registration on the other side: *Waddington* v. *Roberts*, 16 W. R. 1040, L. R. 3 Q. B. 579. The affidavit was, in fact, filed, and I am ready to send for it now.

Mathew, J.—This is a purely technical point, and one which should not be taken unless there were some presumption that it would decide the rights of the parties. The proof of the bill of sale was insufficient; but this is not a case for a new trial, which is the most that can be asked for. The case must stand over for a week to enable the parties to examine the affidavit filed, in the event of our holding the bill of sale not void on the second ground.

A. L. Smith, J., concurred.

W. E. Hume Williams then argued the second point.—The bill of sale is void because it is not in accordance with the statutory form. It contains a covenant that the grantor will pay all rent, taxes, outgoings, &c., and take receipts, "and will, on demand in writing, produce the receipts," thus omitting the words "without reasonable excuse," which are found in section 7, sub-section 4, of the Act of 1882, although it contains a proviso in accordance with the form in the schedule that there shall be no seizure for any cause other than those specified in section 7 of that Act.

It would be a breach of this covenant to fail to produce a receipt which had been accidentally lost, and though no express power to seize is contained in the bill of sale, one must be implied from the statutory proviso that there shall be no seizure except for certain specified causes: *per* Lord Esher, M.R., and Lopes, L.J., *Ex parte Official Receiver, In re Morritt*, 35 W. R. 277, 18 Q. B. D. 222. This covenant, therefore, gives a right to seizure in excess of the right given under section 7, sub-section 4, of the Bills of Sale Act, 1882; and a covenant which thus transgresses against the Act cannot be justified as a covenant "for the maintenance of the security" permitted by the form in the schedule: *per* Fry, L.J., *Davis* v. *Burton*, 32 W. R. 423, 11 Q. B. D. 537, at p. 542, in which case, as in the present one, there was no express power to seize.

He also cited *Stanford* v. *Barber*, 34 W. R. 507, 17 Q. B. D. 259.

C. A. Russell, for the bill of sale holder.—Even if it be admitted that the bill of sale is bad on the principle laid down by Fry, L.J., in *Davis* v. *Burton*, yet a bill of sale containing an unqualified covenant to produce receipts has since been held valid by the Court of Appeal: *Goldstrom* v. *Tallerman*, 35 W. R. 68, 18 Q. B. D. 1, in which case *Davis* v. *Burton* was cited, though no decision on the point appears in the reports. And a covenant exactly similar to the covenant now in question has been considered good by Sir J. Hannen: *Furber* v. *Cobb*, 35 W. R. 398, 18 Q. B. D. 494, at p. 506. Assuming that a power to seize must be inserted by implication in this bill of sale, that power cannot be extended beyond the words from which it is implied—*i.e.*, by the words of section 7, sub-section 4, of the Act of 1882, which are incorporated in the bill of sale. Even if a general power to seize arises on breach of the unqualified covenant in the bill to produce receipts, yet this general power must be taken subject to the restrictions imposed by the special words contained in the proviso.

He also cited *Bianchi* v. *Offord*, 17 Q. B. D. 484, 35 W. R. Dig. 27; *Lumley* v. *Simmons*, 35 W. R. 422, 34 Ch. D. 698.

Gore, as *amicus curiæ*, cited *Real and Personal Advance Co.* v. *Clears*, *ante*, p. 256.

Mathew, J.—There would seem to be abundant authority for us to decide this case either way; but in my opinion the judgment of the county court judge must be upheld. The covenant in question is certainly a covenant for the maintenance of the security, and it is one that is most useful in practice. As to the omission of the words "without reasonable excuse," it may be asked how is the bill of sale holder, who asks for the production of the receipts for rent, to know whether the excuse given for their non-production is reasonable? If he seizes the goods and is wrong in so doing, the grantor may apply, under section 7 of the Act of 1882, to a judge in chambers for an order restraining the sale, if he can satisfy the judge that there was a reasonable excuse. It was, no doubt, intended that there should be a right to seize the goods under this bill of sale, though it is not expressly given; but it must be taken to be a right as qualified by the express words of the Act. This view is supported by the authorities which would most influence us in arriving at our decision—viz., *Goldstrom* v. *Tallerman* and *Furber* v. *Cobb*.

A. L. Smith, J.—The question for us to answer is whether this bill of sale is rendered void by reason of the covenant whereby the grantor agrees to produce receipts for rent on demand in writing. Is this a covenant for the maintenance of the security? I think it is. I wish to add nothing to the remarks of Sir J. Hannen in *Furber* v. *Cobb*. It is here said that the bill is void because the covenant is absolute; but at the end of the bill there is a proviso that there shall be no seizure but for one of the five causes specified in section 7 of the Act of 1882. Therefore I think that on the true construction of this bill of sale the grantee could not seize the goods for a breach of the unqualified covenant. As to the authorities, in *Davis* v. *Burton* the bill of sale was held void because of its complex provisions. In *Goldstrom* v. *Tallerman* a bill of sale which contained the very covenant now before us was held good by the Court of Appeal, though it is true the point now taken was not argued. But in *Furber* v. *Cobb* the Court of Appeal held this very covenant good. In *Stanford* v. *Barber* the Court of Appeal thought that the insertion of such a covenant did not invalidate the bill of sale because there was no power of seizure on breach of the unqualified covenant.

Judgment affirmed.

Solicitors for the claimants, *Bower, Cotton, & Bower*, for *Rylance & Son*, Manchester.

Solicitors for the execution creditor, *Johnson, Harris, & Dowding*, for *Sims*, Manchester.

I agree, therefore, in thinking that this appeal must be allowed.

Lopes, L.J.—In this case the findings of the jury were clearly right, and that brings it within *Shepherd* v. *Conquest*, as to which I will add nothing to what has been said. As to the defence of estoppel, I do not think there is a particle of evidence to support it. Our judgment must, therefore, be for the plaintiff.

Appeal allowed.

Solicitor for the appellant, *Grayston.*

Solicitor for the respondent, *J. E. Lickfold.*

High Court of Justice.

[Chan. Div. North, J.] June 10.

Kemp v. Goldberg. (*a.*)

Mortgage—Action for reconveyance or redemption—Counter-claim admitting sums received on account—Particulars.

In an action by a mortgagor for reconveyance or redemption of the mortgaged property, the defendant by his counter-claim alleged that a certain specified sum was due to him, partly secured on bills of exchange accepted by the plaintiff and partly on open account, and that he had received divers sums in respect of the bills of exchange and other sums in respect of the moneys due on open account, but that a large balance was due to him; and he claimed an account and foreclosure or sale.

Held, on a summons by the mortgagor, that he was entitled to particulars from the defendant of the sums admitted to have been received by him in respect of the bills of exchange and the moneys due on open account.

Adjourned summons.

The plaintiff in the action was mortgagor of certain real estate in Jersey, four policies of life assurance, and a bond. He alleged in his statement of claim that the mortgage debt had been repaid, and claimed reconveyance of the mortgaged property, or if the court should hold that all moneys due on the security of the mortgaged property had not been paid off, then an account and redemption.

The defendant, in his defence, stated that the mortgage debt had not been repaid, and that large sums were still owing on the security of the mortgaged property. By his counter-claim he alleged to be due to him a sum of £547 for commission on a sale effected by him and secured on the mortgaged property, and a sum of £5,063 17s. for moneys advanced, partly secured by bills of exchange accepted by the plaintiff, and partly due on open account, and claimed an account and foreclosure or sale.

The sixth paragraph of the counter-claim stated that "All the said bills of exchange have become due, and the defendant has, since the date of the said sale, received divers sums in respect thereof, and other sums in respect of moneys due to him on open account as aforesaid, but after giving credit for all moneys so received a large balance is still due and owing from the plaintiff to the defendant, together with interest at the rate of £5 per cent. per annum on the balance from time to time owing."

This was a summons by the plaintiff asking for particulars of the payments alleged in that paragraph.

H. E. M. Stutfield (*H. A. Forman* with him), for the summons.—The plaintiff asks for particulars of the sums which the defendant alleges he received on account in order that he may know the amount of the balance claimed and have an opportunity of paying it off without further proceedings.

D. L. Alexander, for the defendant.—The defendant asks for an account, and declines to anticipate the account by giving particulars. That is not the practice. *Augustinus* v. *Nerinckx*, 29 W. R. 225, 16 Ch. D. 267; *Blackie* v. *Osmaston*, 33 W. R. 158, 28 Ch. D. [illegible]

North, J.—I think that the plaintiff should have particulars of the sums admitted to have been received in the sixth paragraph of the counter-claim for [illegible] The counter-claim is not for a mere balance [illegible] be due, but for a definite sum; and the [illegible] saying that it is not for a definite sum [illegible] fendant has received divers sums on [illegible] clines to state what those sums are. [illegible] account; but what right has he to [illegible] have an expensive account taken. [illegible] common sense requires that the [illegible] has the means of knowing, should [illegible] ceived. The plaintiff will then [illegible] paying the balance claimed. T[illegible] not apply to the present case.

It is not a matter of course [illegible] be given. If an account is [illegible] counter-claim, and the cou[illegible] be necessary, there may be [illegible] that no particulars shall be given. [illegible] shall not be given twice over. [illegible] me that particulars should be ret[illegible] account is asked for. If in a [illegible] the plaintiff had been in receip[illegible] the defendant alleged that he [illegible] or tender, the fact that the pla[illegible] would not be a sufficient r[illegible] particulars. I think this is a [illegible] lars asked for in respect of [illegible] ceived in the 6th paragraph [illegible] be given.

Summons allowed.

Solicitors, *H. G. Smallman*, [illegible]

Q. B. Div. (Mathew and [illegible] A. L. Smith, JJ.)

Turner & [illegible]

Bill of sale—Evide[illegible] omitting to state t[illegible] produce receipts f[illegible] excuse"—Bills of [illegible] s. 10—Bills of Sa[illegible] s. 7 (4).

The production, at [illegible] issue, of a bill of s[illegible] registration, is no ev[illegible] also filed in accordan[illegible] s. 10, but the proper [illegible] the production of em[illegible] void merely on this gr[illegible]

A bill of sale cont[illegible] grantor to produce re[illegible] of words correspondi[illegible] able excuse" in secti[illegible] 1882; *but contained* [illegible]

(*a.*) Reported by J. Trustram, Esq., Barrister-at-Law.

(*a.*) Reported by Spe[illegible]

should not be liable to seizure by the [illegible]
cause other than those specified in section [illegible]
Held, that the insertion of this covenant [illegible]
the bill of sale void as not being in [illegible]
form in the schedule to the Bills of Sale Act, [illegible]

Appeal on an interpleader issue by the [illegible] creditor from a decision of his Honour Judge [illegible] the Manchester County Court, declaring a bill [illegible]

W. E. Hume Williams, for the execution [illegible] The bill of sale is void on two grounds. It was [illegible] at the hearing of the interpleader issue only by the production of the original bill itself, together with certificate of registration, which certificate [illegible] state that the affidavit required by the Act of 1882 was filed, and that the copy of the bill filed was a true [illegible] Such a certificate has been held to be no evidence [illegible] an affidavit was filed, under provisions in the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), s. 1, which are practically identical with those of the Bills of Sale Act, 1878, s. 10, sub-section 2: *Mason* v. *Wood*, [illegible] 41, 1 C. P. D. 63, followed in *Emmett* v. [illegible] 3 Q. B. D. 555, where, however, the court said that an adjournment ought to have been granted.

C. A. Russell, for the bill of sale holder, [illegible] upon as to the first point.—The certificate of the registration involves the filing of the affidavit. Does the certificate be not conclusive, it is *primâ facie* [illegible] that all things required by the statute have been [illegible] and casts the burden of proving the insufficiency of the registration on the other side: *Woddington* v. [illegible] 16 W. R. 1040, L. R. 3 Q. B. 579. The affidavit was [illegible] in fact filed, and I am ready to send for it now.

MATHEW, J.—This is a purely technical point, and [illegible] which should not be taken unless there were any [illegible] exception that it would decide the rights of the parties [illegible] effect of the bill of sale was insufficient; but [illegible] a case for a new trial, which is the most [illegible] ask for. The case must stand over for a [illegible] the parties to examine the affidavit filed [illegible] our holding the bill of sale not void [illegible] proof.

[illegible], J., concurred.

W. E. Hume Williams then argued the [illegible] —The bill of sale is void because it is not [illegible] ance with the statutory form. It contains [illegible] that the grantor will pay all rent, taxes, [illegible] and take receipts, and will, on demand [illegible] produce the receipts, " thus omitting the [illegible] *sub-section 4, of the Act of 1882,* which are found [illegible] *a proviso in accordance with the form* [illegible] *that there shall be no seizure for* [illegible] *other specified in section 7 of that Act.* [illegible] *It would be a breach of this covenant* [illegible] *due a receipt which had been* [illegible] *though no express power to seize* [illegible] *of sale, one must be implied from* [illegible] *that there shall be no seizure* [illegible] *cases: per Lord Esher, M.R.,* [illegible] *Official Receiver, In re Morris,* [illegible] Q. B. D. 122. This covenant [illegible] to seizure in excess of the [illegible] sub-section 4, of the Bills [illegible] *covenant which thus tra[illegible] not be justified as a covenant* [illegible] *the security" permitted* [illegible] *per Fry, L.J., Davis* [illegible] Q. B. D. 537, at p. 542. [illegible] *Lord* [illegible] *case, there was no exp[illegible] ions "* [illegible]

He also cited *Stan[illegible]* Q. B. D. 259.

C. A. Russell, [illegible] he admitted that [illegible]

defendant's business, and that vice in the [illegible] *" defect in the condition of the plant" within* [illegible] *of section 1.*

[illegible] Lord Esher, M.R., *and* Lindley, L.J. (Lopes, [illegible] *ting), that there was evidence of negligence on* [illegible] *of the defendant's foreman, and it was not* [illegible] *y shown that the risk was voluntarily incurred* [illegible] *intiff.*

[illegible] *v.* Quartermaine, 35 *W. R.* 555, 18 *Q. B. D.* [illegible] *tinguished.*

[illegible] *by* Lopes, L.J., *that there was no evidence for a* [illegible] *find for the plaintiff, as the facts showed that the* [illegible] *ff had elected to continue in the defendant's em-* [illegible] *ent with full knowledge of the risk which he ran* [illegible] *doing.*

[illegible] his was an appeal from a decision given in the City [illegible] London Court.

[illegible] The action was brought under the Employers' [illegible] ability Act, 1880 (43 & 44 Vict. c. 42). The plaintiff [illegible] was employed by the defendant, a wharfinger and warehouseman, to take charge of a horse and trolley, it [illegible] being part of his duty to load and unload the trolley [illegible] for the delivery of goods to consignees, and to bring back the horse and trolley to the defendant's premises when his work was done. During this employment, in August, 1886, the defendant bought a new horse, which was placed under the plaintiff's control by the defendant's stable foreman. The horse proved to be a kicker and a jibber, and altogether unfit for driving. The plaintiff complained of it to the foreman and objected to driving it, but the foreman always replied that he must continue to drive and that if an accident occurred the defendant would be responsible. The plaintiff went on driving the horse for more than two months when, on November 12, while he was sitting in his proper place upon the trolley, the horse kicked out without any provocation and, striking the plaintiff on one of his legs, broke it. There was no evidence that the defendant himself knew of the horse being vicious as described.

The defendant, at the trial, maintained that the plaintiff was not entitled to sue under the Employers' Liability Act, as he was not a "workman" under the Act, nor was the horse "plant," nor the vice of the horse "defect in the condition of plant," and that the plaintiff voluntarily incurred the risk of accident, and was therefore not entitled to recover according to the decision in *Thomas* v. *Quartermaine*, 35 W. R. 555, 18 Q. B. D. 685. The plaintiff also must have contributed to the accident by his own negligence.

The judge held that the plaintiff was a "workman" and that the horse was "plant" within the Act, but he further held that the case came within the decision of *Thomas* v. *Quartermaine*, so that the plaintiff could not recover because he had continued to drive the horse after he was aware of its vicious nature, and therefore assented to incurring the risk attending the service. He therefore gave judgment for the defendant.

The plaintiff appealed.

July 26.—*W. E. Hume Williams*, for the plaintiff.—The case does not come within *Thomas* v. *Quartermaine*, because in that case the plaintiff made no complaint, whereas in this case the plaintiff objected to the risk and only incurred it rather than lose his place. A master is bound to take all reasonable precautions to protect his workmen: *Paterson* v. *Wallace*, 1 Macqu. 748, and when notice has been given him of defect in machinery he is liable for an accident due to the defect if the workman was not negligent: *Clarke* v. *Holmes*, 7 [illegible] & N. 937. The plaintiff brought himself within [illegible] on 3 of section 2 by the notice which he gave [illegible] man.

[illegible] *d*, for the defendant.—The plaintiff was not [illegible] within the Act, because he was a driver, and in

Cook v. *North Metropolitan Tramways Co.*, 35 W. R. 577, 18 Q. B. D. 683, a driver was held not to be a workman within the Employers and Workmen Act, 1875. The word "plant" is confined to inanimate objects such as fixtures and other chattels used in a business, and was never used before to describe a living creature. Even assuming the horse to be "plant," the plaintiff voluntarily continued in the dangerous employment, and cannot therefore recover: *Thomas* v. *Quartermaine.* The fact that he objected cannot do away with the fact that he continued when he might have given up his employment. In the words of Cockburn, C.J., in *Woodley* v. *Metropolitan District Railway Co.*, 25 W. R. 155, 2 Ex. D. 389, "if a man, for the sake of the employment, takes it or continues in it with a knowledge of its risks, he must trust to himself to keep clear of injury."

Cur. adv. vult.

Aug. 11.—Lord ESHER, M.R.—In this case the plaintiff was in the employment of the defendant, who was a wharfinger, and for the purposes of his business the owner of carts or trolleys and horses. Amongst these was a horse which was of an extraordinarily vicious nature and wholly unfit, so far as is stated to us, to be driven even by the most careful driver. The plaintiff objected to drive him, and told the foreman of the stable that the horse was unsafe to drive, whereupon the foreman said: "You have to drive him, and if any accident happens we (meaning the employer) will be responsible." The plaintiff continued to drive the horse, and whilst so doing, sitting on a part of the trolley where it is said to be usual and not improper for the driver to sit, the horse kicked out and broke the plaintiff's leg. The plaintiff thereupon sued the owner of the horse, his employer. The judge of the City of London Court did that which I believe many county courts have done since the decision of the Court of Appeal in *Thomas* v. *Quartermaine.* The moment it was proved before him that the plaintiff knew the horse to be vicious, but continued to drive him, the judge said it was useless to inquire further, for that alone disentitled him to recover upon an application of what is called the maxim of *Volenti non fit injuria.* The judge acted upon the notion that that was the effect of the decision of the majority of the Court of Appeal in *Thomas* v. *Quartermaine*, and, as I am given to understand, many county court judges have from the time that case was reported supposed that to be the effect of it. We are called upon now to say whether that is the true effect of the decision. My own position in the matter is extremely delicate, because I dissented from the decision of the rest of the court. I thought, and after mature consideration I have still the strongest conviction, that if that is really the effect of it the decision in that case was absolutely wrong; but I hope I have loyalty enough to say that if I thought that the decision of the majority of the judges there did mean what the county court judges have supposed it to mean, I should at once bow to it. The question we have now to consider is whether that was the real meaning of the majority—whether the judgment was not to a less rigid effect than that, and whether it does not leave open certain questions which must still be tried.

The first question here is whether this case is within the Employers' Liability Act at all. If it be not, then, according to the old law, if that Act had not existed, I have no doubt this plaintiff could not have recovered. He would have been a servant in the employment of the master, a part of whose machinery for carrying on his business was defective—in such a state that it would be a culpable want of care for the safety of his servants on the part of the employer to permit a necessary part of the machinery for carrying on his business to remain. But that was no concern of the jury. At all events, it was a thing which was patent, so that any person in the employ could know and see it. The horse here in question was not accidentally or suddenly vicious, but inherently vicious and known to be so. Under the old law it would have been said: "You" (the servant) "have entered into or continued in this employment where this thing of which you complain is open and palpable, and therefore it is an implied condition of your contract of service that you take upon yourself the risks of accidents therefrom, and consequently you have no remedy against your employer." As between master and servant that was the way the immunity from liability was always stated. The maxim *Volenti non fit injuria* was not wanted as between master and servant. It was only wanted, if at all, where no such relation as that of master and servant existed. That being so, then comes the question, what is to be the effect of the Employers' Liability Act? Does that Act apply to the present case?

Now the first question must be whether the plaintiff was a "workman" within the definition given in the Employers and Workmen Act, 1875. I cannot entertain a doubt upon that. He is a man who drives a horse and trolley for a wharfinger. We must take into account what his ordinary duty was. He has to load and unload the trolley. That is manual labour. His duty may be compared to that of a lighterman who conducts a barge or lighter up and down the river. The driving the horse and trolley, and the navigating of the lighter, form the easiest part of the work; his real labour, that which tests his muscles and his sinews, is the loading and unloading of the trolley or the lighter.

Then comes the question which is somewhat more difficult, Can a horse be considered "plant" within section 1 of sub-section 1 of the Employers' Liability Act? It is suggested that nothing that is animate can be plant; that is, that living creatures can in no sense be considered plant. Why not? In many businesses, horses and carts, wagons, or drays, seem to me to form the most material part of the plant; they are the materials or instruments which the employer must use for the purpose of carrying on his business, and without which he could not carry it on at all. The principal part of the business of a wharfinger is conveying goods from the wharf to the houses or shops or warehouses of the consignees; and for this purpose he must use horses and carts or wagons. They are all necessary for the carrying on of the business. It cannot, for a moment, be contended that the carts and wagons are not "plant." Can it be said that the horses, without which the carts and wagons would be useless, are not? If, then, this horse was part of the plant, it had a defect, that is, it had the constant habit, whether in a stable or harnessed to a trolley, of kicking whatever was near it, whether a human being or a brick wall. In short, it was a vicious beast that could not be managed or controlled by the most careful driver. The plant, therefore, was defective. There was no evidence that the master (the defendant) knew of the defect. But the foreman who had the management of the stable, and under whose directions the horse was used, knew it; and after having repeatedly been told that it was unsafe, he said what practically amounted to this: "I care not whether the horse is vicious or not; you have got to drive him; and it matters nothing to you for, if you meet with an accident, the master will be responsible." The foreman, probably, had no power to bind his master to that; but it is, at all events, conclusive to show that he realised the fact that the plant was defective; and nothing was done to remedy the defect. Was this negligence on the part of the foreman for which the master was responsible? If the master had any duty at all to take care of his workmen, then allowing this imperfect plant to continue to be used was surely a breach of that duty. But it is said he may have had that duty, and may have neglected it as to those of his workmen who did not

know of, or were not affected by, the particular defect, but not as to the plaintiff, who, knowing of the defect, still continued to drive the horse, and therefore comes within the maxim referred to. I confess that has always seemed to me to be not a bad way of illustrating the result; but it is, to my mind, a horrible way of stating the duty to say that a master owes no duty to a servant who knows that there is a defect in machinery, and, having pointed it out to one in authority, goes on using it. It seems cruel and unnatural, and, in my view, utterly abominable. It may be that the breach of this duty gives no right of action—that it is what is called a duty of imperfect obligation. Although the employer does not himself know of the defect, if he has put a person in his place to do what he ought himself to do, he is responsible for the negligence of that person.

Before the Employers' Liability Act there was this condition in the contract of hiring—that if there was a defect in the premises or machinery which was open and palpable, whether the servant actually knew it or not, he accepted the employment subject to the risk. That is the doctrine which is embodied in the maxim *Volenti non fit injuria*. I need hardly repeat that I detest the attempt to fetter the law by maxims. They are almost invariably misleading; they are for the most part so large and general in their language that they always include something which really is not intended to be included in them. I do not doubt that, if we put this maxim in plain English, part of it is true—that is to say, that if a thing is put before a workman and he is told, "Now, I do not ask you to do this unless you like; but I will give you more wages if you do. You see what it is. There is a rotten ladder—it is ten to one that it will break under you; but if you choose to run that risk I will give you higher wages." If the workman, seeing the risk, elects to incur it, no one could doubt that he would be precluded from recovering damages against his employer for any injury he might sustain from the breaking of the ladder. The same result would follow if the injured person was not a workman for hire. But does the maxim *Volenti non fit injuria* go this length—that the mere fact of the workman knowing that a thing is dangerous and yet using it is conclusive to show that he voluntarily incurs the risk? The answer to that depends (so far as this court is concerned) upon whether or not *Thomas* v. *Quartermaine* has so decided. I never entertained a doubt that the Employers' Liability Act does not prevent the proper application of the maxim *Volenti non fit injuria*; and I can only say, as an excuse for the part I took in *Thomas* v. *Quartermaine*, that that doctrine had never been mentioned on the argument of that case, but was for the first time suggested in the judgment of my brother Bowen. For myself I cannot help thinking that whether or not a workman has voluntarily agreed to incur the risk of defective machinery is a question of fact, and that, in my opinion, would have made the decision in *Thomas* v. *Quartermaine* wrong, for the majority of the judges there took upon themselves to decide the question of fact, whereas, in my opinion, they had no right to decide it; the utmost they properly could do was to send it back to the county court. They held in that case that the facts were conclusive to show that the plaintiff did voluntarily—in the sense in which they understood the word—accept the risk. This revives the whole difficulty as to contributory negligence in cases of railway accidents (*Davey* v. *London and South-Western Railway Co.*, 11 Q. B. D. 213). I have always protested that it is not for the judge to say whether or not a plaintiff (or the deceased in case of death) has been guilty of contributory negligence; he (the judge) has no right to hold that the evidence of it is conclusive; it should be left for the decision of the jury.

Now comes the other question, whether the Employers' Liability Act has done away with the old doctrine that a workman impliedly contracts or consents to incur a risk which is a visible and palpable one, and one which therefore he is to be taken to know of, or, if you please, which he does know of, or whether it applies only to the risks incident to common employment. For a time I was under the impression that the judgment in *Thomas* v. *Quartermaine* was that the Act only absolved the employer from liability for any injury resulting from the negligence of a fellow-workman. But upon looking at the matter more carefully I do not think they meant to say that. It was not necessary for them to say it, because they held that, inasmuch as the case was conclusively within the maxim *Volenti non fit injuria*, no other question arose in the case.

Now let us go back to the statute. We must look once more at section 1, sub-section 1, "where, after the commencement of this Act, personal injury is caused to a workman by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer, the workman shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer nor engaged in his work." Here I say there was such defect and consequent personal injury. Read with this sub-sections 1 and 3 of section 2. Sub-section 1 provides that the workman shall not be entitled under this Act to any right of compensation or remedy against the employer under sub-section 1 of section 1, "unless the defect therein mentioned arose from, or had not been remedied owing to, the negligence of the employer, or of some person in the service of the employer and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in a proper condition," and sub-section 3 that "In any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer already knew of the said defect or negligence," the workman shall in like manner be disentitled to any right of compensation or remedy. Here the defect arose from the negligence of a person in the service of the employer and intrusted by him with the duty of seeing that the plant was in proper condition, and who had notice of the defect, and failed to take steps to avert injury.

To my mind it is clear that this was negligence with regard to the safety of his workmen for which the employer is responsible. But then it is said there may be that which prevents the workman from recovering compensation for an injury sustained by him in consequence of that negligence. The implied contract which I have adverted to under the old law did prevent it. Where there is no duty, it is said, there can be no negligence, or, in other words, there may be negligence which is not actionable negligence. It is very difficult to give a sensible construction to sub-section 3 of section 2. The workman who discovers the defect is to give notice of it, or he cannot recover. From that I infer that if he does give notice, and the defect is not remedied, he may recover. When is he to give notice? And what if the defect is not immediately remedied? Is the workman at once to refuse to incur the risk and quit the employ? That is a dilemma to which it never could have been intended to reduce the workman. I cannot help thinking that it is clearly enacted in the 3rd sub-section of section 2 that if the workman gives notice of the defect, and the employer fails to remedy it, the workman's claim for compensation is valid, unless he is brought clearly within the maxim *Volenti non fit injuria*. Does the judgment of Bowen, L.J., in *Thomas* v. *Quartermaine*—for that is the judgment which is adopted by Fry, L.J.—mean to say that the mere knowledge of the

workman and his continuing in the employ is fatal to him?

If I thought the judgment in *Thomas* v. *Quartermaine* really did mean that, whatever my own private opinion might be, I should unhesitatingly bow to it. I have been trying to construe that judgment fairly. At p. 697 of the report the learned judge, after referring to *Law* v. *Corporation of Darlington*, 28 W. R. 221, 5 Ex. D. 78, and *Winch* v. *Conservators of the Thames*, 22 W. R. 879, L. R. 9 C. P. 378, says: "The defendant in such circumstances does not discharge his legal obligation by merely affecting the plaintiff with knowledge of a danger which but for a breach of duty on his own part would not exist at all. But where the danger is one incident to a perfectly lawful use of his own premises neither contrary to statute nor common law, where the danger is visible and the risk appreciated, and where the injured person, knowing and appreciating both risk and danger, voluntarily encounters them, there is, in the absence of further acts of omission or commisson, no evidence of negligence on the part of the occupier at all. Knowledge is not a conclusive defence in itself. But when it is a knowledge under circumstances that leave no inference open but one—viz., that the risk has been voluntarily encountered—the defence seems to me complete." I must confess I do not like that way of putting it. I think there is a duty, though I agree that there is no actionable breach of that duty if the person injured, knowing and appreciating the danger, voluntarily elects to encounter it. In the preceding page the learned judge says: "It is no doubt true that the knowledge on the part of the injured person which will prevent him from alleging negligence against the occupier must be a knowledge under such circumstances as lead necessarily to the conclusion that the whole risk was voluntarily incurred. The maxim be it observed is not '*Scienti non fit injuria*' but '*Volenti*.' There may be a perception of the existence of the danger without appreciation of the risk; as where the workman is of imperfect intelligence." So that a dull man may recover damages where a man of intelligence may not. Both knew of the danger, but one is imperfectly informed as to its nature and extent.

Taking the whole of that judgment together, it seems to me to amount to this, that mere knowledge of the danger will not do; there must be an assent on the part of the workman to accept the risk, with a full appreciation of its extent, to bring the workman within the maxim *Volenti non fit injuria*. If so, that is a question of fact. Here the judge of the court below has come to the conclusion that the moment it appeared that the plaintiff knew and appreciated the danger, and did not at once quit the defendant's employ, he came within the maxim, and was therefore, upon the authority of *Thomas* v. *Quartermaine*, disentitled to recover. He did not bring his mind to bear upon the motives which induced the plaintiff to act as he did, whether he relied upon the foreman's statement that the employer would be responsible in case of an accident, or whether he was influenced by the fear of being thrown out of employ if he disobeyed the foreman's orders. All that was for a jury, and the judge ought to have applied his mind to it. I see nothing in the decision in *Thomas* v. *Quartermaine* to prevent the plaintiff from recovering in this case, unless the circumstances were such as to warrant a jury in coming to the conclusion that the plaintiff, freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it. For these reasons I think this case ought to go down for a new trial.

LINDLEY, L.J.—The first question is whether the plaintiff is a "workman" within the meaning of the Employers' Liability Act. In my opinion he is. His duty was not only to drive, but also to load and unload the goods which had to be transported on the trolley which it was his business to drive. This loading and unloading requires bodily labour and exertion, and brings the plaintiff within the statutory definition of a workman (38 & 39 Vict. c. 90, s. 10).

The next question is whether the horse which injured the plaintiff is "plant" within the meaning of section 1, sub-section 1, of the Act. There is no definition of plant in the Act, but in its ordinary sense it includes whatever apparatus is used by a business man for carrying on his business—not his stock-in-trade, which he buys or makes for sale, but all goods and chattels, fixed or movable, live or dead, which he keeps for permanent employment in his business (see *Blake* v. *Shaw*, 8 W. R. 410, Johns. 732). The word "defect" and the words "way and machinery," which occur in the section, throw some doubt on whether plant can include horses, but I do not think the doubt sufficient to require the court to hold that plant cannot include horses or to hold that plant must be confined to inanimate chattels. The defendant in this case has a number of horses for use in his business; they were part of his plant, not only in the ordinary sense of the word, but also, in my opinion, in the sense in which the word "plant" is used in section 1, sub-section 1, of the Employers' Liability Act.

The next question is whether vice in a horse can be a defect in the condition of plant. Here, again, I think it can. I take defect to include anything which renders the plant, &c., unfit for the use for which it is intended, when used in a reasonable way and with reasonable care, and if a horse intended for drawing trolleys is from any cause unfit for such work, and a person is driving him with reasonable care, and is injured by reason of the unfitness of the horse for his work, such person may be properly said to be injured by reason of a defect in plant.

Having cleared the ground thus far, it is necessary to consider whether the defect "arose from or had not been discovered or remedied owing to the negligence of the defendant, or of some person in his service and intrusted by him with the duty of seeing that the plant was in proper condition" (see section 2, sub-section 1). The defect—*i.e.*, the unfitness of the horse—did not arise from the negligence of the defendant, nor, in truth, of anyone, nor is there any evidence that the defendant himself knew of such defect. But his stable foreman did know of it, and he, nevertheless, took no steps to prevent the horse from being used for a purpose for which he knew it was unfit, for he told the plaintiff to go on driving it, and said if anything happened "we"—*i.e.*, his master—"must take the consequence." This, I think, is evidence of negligence on the part of the stable foreman for which the defendant can properly be held accountable unless his liability is excluded upon the ground that the plaintiff not only knew of the defect, but also took the risk upon himself.

This is the point which presents the greatest difficulty in the case, and which requires careful consideration. It must be taken as settled by *Thomas* v. *Quartermaine* that the words at the end of section 1 do no more than "remove such fetters on a workman's right to sue as had been previously held to arise out of the relation of master and workman"; that section 2, sub-section 3, does not extend the master's liability beyond that imposed by section 1 and section 2, sub-section 1; that in each of the cases specified in section 1 the maxim *Volenti non fit injuria* is applicable, and that if a workman, knowing and appreciating the danger and the risk, elects voluntarily to encounter them, he can no more maintain an action founded upon the statute than he can in cases to which the statute has no application. Those principles are, in my opinion, perfectly sound; but the proper application of them is by no means always easy. The question whether in any particular a plaintiff was *volens*

or *nolens* is a question of fact and not of law. Bowen, L.J., was careful to point out that the mere fact that the plaintiff knew of the danger and yet incurred it is not conclusive. He says: "The maxim, be it observed, is not *Scienti non fit injuria*, but *Volenti non fit injuria*. He further points out that there may be cases in which a non-workman who knew of a danger and incurred it might nevertheless maintain an action against the person exposing him to it. The question in each case must be, not simply whether the plaintiff knew of the risk, but whether the circumstances are such as necessarily to lead to the conclusion that the whole risk was voluntarily incurred by the plaintiff.

The learned judge who tried the present case thought he was bound by *Thomas* v. *Quartermaine* to decide it in favour of the defendant. In this respect I differ from him. The principles laid down in that case are no doubt to be accepted and followed, and, if I may say so, I entirely concur in them; but it is not, in my opinion, correct to regard that case as deciding this. The facts there and the facts here are materially different. In *Thomas* v. *Quartermaine* the facts were all one way; there was evidence that the plaintiff was *volens* and not merely *sciens*; he was not even directed to do what led to his injury; he did it voluntarily of his own accord; there was no evidence that the plaintiff was *nolens*; the plant was not defective or dangerous to persons engaged in the ordinary course of their employment; the plaintiff had never complained of it; the injury was the result of a pure accident, and the case might well have been decided on that ground alone. In the present case the horse was vicious, the plaintiff was constantly complaining of it to the defendant's foreman, the foreman told the plaintiff to go on driving it, and the plaintiff did so rather than run the risk of dismissal; nor is it possible to regard this case as one of accident. Under these circumstances, the question is whether the plaintiff, with knowledge and appreciation of both the risk and the danger, voluntarily took the risk upon himself. The plaintiff was not engaged to drive vicious horses, and the conversation with the foreman, though not evidence against the defendant of any promise by him to take the risk, is, in my opinion, admissible to explain the conduct of the plaintiff, and to rebut the inference that he voluntarily took the risk upon himself.

To hold that this case is concluded by *Thomas* v. *Quartermaine* is, I think, to carry that case further than is warranted by the principle on which it was decided; it is to do the very thing Bowen, L.J., so carefully pointed out the danger of doing—viz., to treat *sciens* as equivalent to *volens*. The Act cannot, I think, be properly construed in such a way as to protect masters who knowingly provide defective plant for their workmen, and who seek to throw the risk of using it on them by putting them in the unpleasant position of having to leave their situations or submit to use what is known to be unfit for use. *Thomas* v. *Quartermaine* is no authority for any such construction of the statute.

If in any case it can be shown as a fact that a workman agreed to incur a particular danger, or voluntarily exposed himself to it, and was thereby injured, he cannot hold his master liable. But in the cases mentioned in the Act, a workman who never, in fact, engaged to incur a particular danger, but who finds himself exposed to it, and complains of it, cannot, in my opinion, be held, as a matter of law, to have impliedly agreed to incur that danger, or to have voluntarily incurred it because he does not refuse to face it, nor can it, in my opinion, be held that there is no case to submit to a jury on the question whether he has agreed to incur it or has voluntarily incurred it or not, simply because, though he protested, he went on as before. The facts of each particular case must be ascertained and considered. If nothing more is proved than that the workman saw danger, reported it, but on being told to go on, went on as before in order to avoid dismissal, a jury may, in my opinion, properly find that he had not agreed to take the risk, and had not acted voluntarily in the sense of having taken the risk upon himself. Fear of dismissal rather than voluntary action might properly be inferred. *A fortiori*, might the jury properly come to such a conclusion if it was proved that the workman was told by his superintendent not to mind, and that if any accident happened the employer must make it good? Such an additional circumstance would go far to negative the inference that the complaining workman took the risk upon himself.

I cannot construe the Act as shutting out such considerations as these, and as the learned judge did not think himself at liberty to entertain them, and decided in favour of the defendant upon what I consider a misconception of *Thomas* v. *Quartermaine*, I think there ought to be a new trial.

LOPES, L.J.—This is an important and difficult case, and I regret that I am unable to agree with the decision of the rest of the court.

The action was brought under the Employers' Liability Act, 1880, but the judge of the court below has not decided the case on any question arising under that Act apart from the law as it existed before the passing of that Act, but has given judgment for the defendant on the ground that the plaintiff knew all the facts, was well acquainted with the character of the horse, and voluntarily encountered the risk, and that therefore there was no evidence of negligence arising from any breach of duty which the defendant owed the plaintiff entitling the plaintiff to recover.

It is to be observed that section 1, sub-section 1, and section 2, sub-section 1, of the Act—which must be read together—effect no change in the law as regards the liability of the employer, except in certain specified cases, by identifying a "person in the service of the employer and intrusted by him with the duty of seeing that the ways, works, machinery, or plant are in proper condition" with the employer, and taking him out of the category of fellow servants and rendering the employer responsible for his negligence. There is nothing here to affect the doctrine of *Volenti non fit injuria* if it applies; nor is that doctrine touched by anything in section 1, sub-section 3; but of that presently. The doctrine of *Volenti non fit injuria* is exhaustively dealt with in the cases of *Woodley* v. *Metropolitan Railway Co.* and *Thomas* v. *Quartermaine*. Both these cases were in the Court of Appeal, and the judgments of the majority of the court are not only binding on us sitting as a divisional court, but are binding on the Court of Appeal itself. The question, therefore, is whether the present case is governed by these cases, or either of them?

To determine this it is essential to state shortly the facts of the present case. The plaintiff was the driver of a trolley, and at the time of the accident had been about four years in the employ of the defendant, who was a wharfinger. This accident happened in November, 1886. In the previous August a horse had been purchased by the defendant, which was, by Tomlin, the defendant's stable foreman, assigned to the plaintiff to drive in his trolley. The plaintiff's duty was to clean, take care of, and drive the horse in his trolley, and to go with his trolley where ordered by Tomlin, who had the superintendence of the horses, and to load and unload as instructed. From the first the horse was vicious and troublesome—so vicious and troublesome that it was said to have broken down a brick wall, and generally to be a kicker and a jibber. The plaintiff had constantly complained of this horse to Tomlin, and had been told by him to go on driving the horse, and that his employer would be responsible for anything the horse did. The plaintiff, though daily, as he said, complaining, continued in the defendant's service driving the horse. On

the 12th of November the plaintiff was driving the horse sitting on the trolley with his legs hanging down behind the horse. There was no other place on the trolley provided for him where he could sit to drive. The horse kicked violently, broke the plaintiff's leg and injured him severely. In these circumstances he brings his action against the defendant. The case came on to be tried in the City of London Court without a jury, and the judge, considering it undistinguishable from *Thomas* v. *Quartermaine*, and that the doctrine of *Volenti non fit injuria* applied, stopped the case and gave judgment for the defendant.

Is this a case where the employer is absolved from liability because the plaintiff voluntarily exposed himself to the risk within the principle contained in the cases to which I have referred? In *Woodley* v. *Metropolitan District Railway Co.*, the plaintiff was a workman, not in the employment of the defendants, but in that of a contractor employed by them. He had to work in a dark tunnel, rendered dangerous by trains constantly passing. After he had been working for a fortnight he was injured by a passing train. The jury found that the defendants were negligent, and gave a verdict for the plaintiff for £300. A rule to set aside this verdict was discharged, and on appeal it was held by the majority of the Court of Appeal that the plaintiff, having continued in his employment with full knowledge, could not make the defendants liable for an injury to which he voluntarily exposed himself.

The only distinctions that I can find between that case and the present are the following:—Woodley was hired to do dangerous work, and knew its dangerous character and attendant risks. Yarmouth was hired to do work not dangerous—viz., amongst other work, to drive horses, which most frequently are manageable. The horse which did the mischief was intrusted to his care after he entered on the employment, and it was then first he learned its propensities, but long after he had been made aware of its vicious nature he continued to drive it. There was no evidence that Woodley ever made any complaint to his employer. Yarmouth, on the contrary, complained, but continued in the employment. Having regard to the judgments of the majority of the court, I do not think that what I have suggested furnishes any substantial ground for distinction. Cockburn, C.J., says:—"With a full knowledge of the danger, he (Woodley) continued in the employment, and had been working in the tunnel for a fortnight when the accident happened. If he becomes aware of the danger which has been concealed from him, and which he had not the means of becoming acquainted with before he entered on the employment, or of the want of the necessary means to prevent mischief, his proper course is to quit the employment. If he continues in it, he is in the same position as though he had accepted it with a full knowledge of its danger in the first instance, and must be taken to waive his right to call upon the employer to do what is necessary for his protection, or, in the alternative, to quit the service. If he continues to take the benefit of the employment, he must take it subject to its disadvantages. If a man chooses to accept the employment, or to continue in it with a knowledge of the danger, he must abide the consequences, so far as any claim to compensation against the employer is concerned. Morally speaking, those who employ men on dangerous work, without doing all in their power to obviate the danger, are highly reprehensible, as I certainly think the company were in the present instance. The workman who depends on his employment for the bread of himself and his family is thus tempted to incur risks to which, as a matter of humanity, he ought not to be exposed. But, looking at the matter in a legal point of view, if a man, for the sake of the employment, takes it or continues in it with a knowledge of its risks, he must trust to himself to keep clear of injury." This judgment, in which the majority of the court concurred, covers the present case, and, subject to the provisions of the Employers' Liability Act, disposes of the only distinction which I am able to suggest.

The point that Yarmouth was not engaged to drive a dangerous horse is met by the fact that he continued in the service after he knew the horse was dangerous, and his constant complaints may be regarded as evidence of his thorough appreciation of the risk he was incurring, and of his willingness to incur that risk rather than relinquish his employment. After complaining, he remains in the service for a long time, knowing the risk, and knowing that no steps had been taken to prevent its continuance. This is more consistent with his acquiescence in a disregard of his complaints, and with a willingness to incur the risk, than with the contrary view.

In *Griffiths* v. *London and St. Katharine Docks Co.*, 32 W. R. 831, 12 Q. B. D. 493, on appeal 13 Q. B. D. 259, 32 W. R. Dig. 129, it was held that in an action brought by a servant against his master for personal injury resulting from the unsafe state of the premises upon which the servant was employed, the statement of claim must allege, not only that the master knew, but that the servant was ignorant of the danger. The present Master of the Rolls said:—"If the danger is one which was known to the master and not to the servant, the knowledge of the master and the want of knowledge of the servant make together a cause of action, and as it is necessary that these two things should exist in order to form a *primâ facie* cause of action, it is necessary that they should be shown to exist in the statement of claim" (13 Q. B. D., at p. 260). And Bowen, L.J., at p. 261 in the same case, says, "Both these allegations are material, because without them there is no cause of action."

It is, therefore, abundantly clear that as the danger was known to the servant (the plaintiff) he could not recover before the Employers' Liability Act.

It is said, however, that *Woodley* v. *Metropolitan District Railway Co.*, *Griffiths* v. *London and St. Katharine Docks Co.*, and other cases do not govern the case before the court. It is said that the law has been altered in cases to which the Employers' Liability Act applies; and I assume for the purposes of this case that the Employers' Liability Act applies to the case of this plaintiff. It is suggested that there is something in the Employers' Liability Act which qualifies the defence of *Volenti non fit injuria*—a defence which would have been available for the master before the Act. It is said that a workman who can bring himself within one of the five clauses of section 1 of the Act is not to be treated as *volens*, although he thoroughly appreciated the risk he was incurring, complained of it, and for a long time continued in the service preferring the risk to quitting the service, and this although he would have been treated as *volens* before the Act.

I cannot accede to this view. It is opposed to the case of *Thomas* v. *Quartermaine*. The third sub-section of section 2 is relied upon. Bowen, L.J., in *Thomas* v. *Quartermaine* deals with that clause. He says, "The object of that clause is to limit the employer's liability, not to enlarge it." I read it thus:—Although under section 1 the workman, with certain exceptions, is to be placed in a position as advantageous as, but not better than, the rest of the world who use the master's premises in his business, the workman is not to have this advantage if, knowing of any defect or negligence, he does not inform the employer, as provided in that section. The object of this is to give the employer the opportunity of remedying the mischief. In fact, the workman is not to have the advantages of the Act unless he performs the condition precedent of making the master aware of his cause of complaint. This leaves the employer's

defence of *Volenti non fit injuria* untouched by the Act if he can prove it. It is said that such a construction would make the Act nearly a dead letter. But this is not the case. In all cases where the workman is ignorant of the defect or negligence, and is injured by a fellow workman's negligence, "common employment" is no longer a defence for the master in the cases specified in section 1, as it would have been before the passing of the Act.

It is said that the object of the Act was to exclude in the specified cases the two legal inferences which were before the Act to be drawn against the workman from the mere fact of his employment—viz., first, the inference that he accepted the risk of his fellow servants' negligence; and, secondly, the inference that he accepted the risks which were involved in the execution of his employer's orders, if he in fact ran them, rather than refuse to do so, and thereby incur the risk of dismissal. I agree that it was the object of the Act to exclude the first inference, and in the specified cases to destroy the defence of "common employment." But what authority there is for the contention that it was intended to extinguish the second inference I fail to be able to discover.

The true construction of the 3rd sub-section of section 2, in my opinion, is that, whereas, before the Act, knowledge would have disentitled the workman to recover, now knowledge in the specified cases is no longer to create a disability, provided the workman gives information; but if, after giving information, he continues in the employment, knowing the danger he is incurring, the same inference arises as heretofore—viz., the inference that he voluntarily runs the risk—and any evidence of negligence arising from any breach of duty on the part of the employer is by the workman's conduct displaced.

I agree with the decision of the majority of the court in *Thomas* v. *Quartermaine*, and with the construction they place on the Employers' Liability Act. That Act only removes such obstacles to a workman's right to sue as had been held to arise from the relation of master and servant. It leaves the doctrine of *Volenti non fit injuria* untouched. Now, as before the Act, to use the words of Bowen, L.J. (18 Q. B. D., at p. 699), "one man cannot sue another in respect of a danger or risk not unlawful in itself, that was visible, apparent, and voluntarily encountered by the person." The present case seems a stronger case of voluntary exposure to danger than that of *Thomas* v. *Quartermaine*. In the latter case there is little, if any, evidence that Thomas knew of or appreciated the danger; but in the present case the evidence is strong to show that Yarmouth thoroughly understood the danger to which he was exposing himself. With a knowledge of the danger, though complaining, he continues in the service, indicating thereby a willingness to incur the risk rather than give up his employment.

In my opinion the case of *Thomas* v. *Quartermaine* decides that every defence (except, in specified cases, the defence of "common employment") is still open to the employer; thus leaving the law, except in the case of "common employment" in the specified instances, as it was laid down in *Woodley* v. *Metropolitan District Railway Co.* It was for the plaintiff here to make out that the defendant was negligent towards the plaintiff in conducting himself as admittedly he did. I can see no evidence of any negligence arising from any breach of duty which the defendant owed the plaintiff.

The plaintiff deposed that when he complained Tomlin told him to go on driving the horse, and that his employer would be responsible. There is no evidence that Tomlin was authorized by the defendant to make this statement. The judge below disregarded this evidence, and I think rightly; it was not admissible as evidence against the master (the defendant); I am unable to see any substantial difference between the present case and the cases to which I have referred, and I think the judge was right in giving judgment for the defendant.

I am also of opinion that the judge was right in holding that the plaintiff was a person to whom the Employers and Workmen Act, 1875, applied, and, therefore, in that respect entitled to sue under the Employers' Liability Act, 1880. The case of *Cook* v. *North Metropolitan Tramways Co.* is an authority for this. Holding as I do it is unnecessary to decide whether a horse is "plant" within section 1, sub-section 1, for, assuming it in the plaintiff's favour, in my opinion he cannot recover. I wish to be understood as not expressing any opinion on this. The appeal will therefore be allowed.

Appeal allowed.

Solicitor for the plaintiff, *H. R. Newson.*

Solicitors for the defendant, *Dawes & Sons.*

Prob. Div. & Adm. Div. Probate. } July 13.

In the Goods of Bolton. (*a.*)

Probate—Practice—Two wills—English will disposing of English estate—Belgian will disposing of Belgian estate—Probate of both wills to English executor—Law of Belgium.

An English testator died in Belgium, having there made a will in English form disposing of his English estate, and a will in Belgian form disposing of his property in Belgium. The executor appointed by the Belgian will having renounced and consented to the present application, the court on motion granted probate of the two wills, as together constituting the last will of the deceased, to the English executor.

Motion for probate of two wills of the testator, the Rev. W. W. Bolton, as together constituting the last will of the deceased.

The deceased was an Englishman by birth. He had resided for many years as English Chaplain at Frankfort-on-the-Main, and for fifteen years prior to his death, which took place on the 6th of May, 1887, at Bruges, in the kingdom of Belgium. He had frequently expressed his intention of returning to England.

At the time of his death he was possessed of a house at Bruges and shares in a banking company there. He was also entitled to money lent in Canada and on mortgage in England, and to a fund in the High Court of Justice in England.

On the 9th of September, 1885, he duly executed at Bruges a will prepared in England bequeathing all his personal property in England and Canada to his sister and three nieces, and he appointed Mr. Freeman, his solicitor in London, sole executor.

At the time of the execution of this will he informed Mr. Freeman that he intended to make a will in Belgian form disposing of his Belgian property. By the Belgian law a Belgian will must be dictated to a notary in the presence of witnesses.

On the 29th of September, 1886, the testator executed a will at Bruges in accordance with Belgian law. It commenced with a statement by the notary that it was dictated in the presence of four witnesses, and that the testator had requested the notary to prepare and witness the execution of his will in reference to his property situate in Belgium, and after the gift of various legacies, all payable out of property situate in Belgium,

(*a.*) Reported by J. Gerard Laing, Esq., Barrister-at-Law.

I agree, therefore, in thinking that this appeal must be allowed.

LOPES, L.J.—In this case the findings of the jury were clearly right, and that brings it within *Shepherd* v. *Conquest*, as to which I will add nothing to what has been said. As to the defence of estoppel, I do not think there is a particle of evidence to support it. Our judgment must, therefore, be for the plaintiff.

Appeal allowed.

Solicitor for the appellant, *Grayston.*

Solicitor for the respondent, *J. E. Lickfold.*

High Court of Justice.

[Chan. Div. North, J.] June 10.

KEMP *v.* GOLDBERG. (*a.*)

Mortgage—Action for reconveyance or redemption—Counter-claim admitting sums received on account—Particulars.

In an action by a mortgagor for reconveyance or redemption of the mortgaged property, the defendant by his counter-claim alleged that a certain specified sum was due to him, partly secured on bills of exchange accepted by the plaintiff and partly on open account, and that he had received divers sums in respect of the bills of exchange and other sums in respect of the moneys due on open account, but that a large balance was due to him; and he claimed an account and foreclosure or sale.

Held, on a summons by the mortgagor, that he was entitled to particulars from the defendant of the sums admitted to have been received by him in respect of the bills of exchange and the moneys due on open account.

Adjourned summons.

The plaintiff in the action was mortgagor of certain real estate in Jersey, four policies of life assurance, and a bond. He alleged in his statement of claim that the mortgage debt had been repaid, and claimed reconveyance of the mortgaged property, or if the court should hold that all moneys due on the security of the mortgaged property had not been paid off, then an account and redemption.

The defendant, in his defence, stated that the mortgage debt had not been repaid, and that large sums were still owing on the security of the mortgaged property. By his counter-claim he alleged to be due to him a sum of £547 for commission on a sale effected by him and secured on the mortgaged property, and a sum of £5,063 17s. for moneys advanced, partly secured by bills of exchange accepted by the plaintiff, and partly due on open account, and claimed an account and foreclosure or sale.

The sixth paragraph of the counter-claim stated that "All the said bills of exchange have become due, and the defendant has, since the date of the said sale, received divers sums in respect thereof, and other sums in respect of moneys due to him on open account as aforesaid, but after giving credit for all moneys so received a large balance is still due and owing from the plaintiff to the defendant, together with interest at the rate of £5 per cent. per annum on the balance from time to time owing."

This was a summons by the plaintiff asking for particulars of the payments alleged in that paragraph.

H. E. M. Stutfield (*H. A. Forman* with him), for the summons.—The plaintiff asks for particulars of the sums which the defendant alleges he received on account, in order that he may know the amount of the balance claimed and have an opportunity of paying it off without further proceedings.

D. L. Alexander, for the defendant.—The defendant asks for an account, and declines to anticipate the account by giving particulars. That is not the practice: *Augustinus* v. *Nerinckx*, 29 W. R. 225, 16 Ch. D. 13; *Blackie* v. *Osmaston*, 33 W. R. 158, 28 Ch. D. 119.

NORTH, J.—I think that the plaintiff should have particulars of the sums admitted to have been received in the sixth paragraph of the counter-claim for this reason. The counter-claim is not for a mere balance alleged to be due, but for a definite sum; and the only ground for saying that it is not for a definite sum is that the defendant has received divers sums on account, and declines to state what those sums are. He asks for an account; but what right has he to oblige the plaintiff to have an expensive account taken. It seems to me that common sense requires that the defendant, who alone has the means of knowing, should state what he has received. The plaintiff will then have the opportunity of paying the balance claimed. The cases referred to do not apply to the present case.

It is not a matter of course that particulars should be given. If an account is asked for by a claim or counter-claim, and the court sees an account will be necessary, there may be good reasons for deciding that no particulars shall be given, so that the account shall not be given twice over. But it does not seem to me that particulars should be refused merely because an account is asked for. If in a simple foreclosure action the plaintiff had been in receipt of rents and profits, and the defendant alleged that he did not know what to pay or tender, the fact that the plaintiff asked for an account would not be a sufficient reason for his refusing to give particulars. I think this is a case in which the particulars asked for in respect of the sums mentioned as received in the 6th paragraph of the counter-claim should be given.

Summons allowed.

Solicitors, *H. G. Smallman; H. Bentwitch.*

Q. B. Div. (Mathew and A. L. Smith, JJ.) Jan. 23.

TURNER & CO. *v.* CULPAN. (*a.*)

Bill of sale—Evidence—Certificate of registration omitting to state the filing of affidavit—Covenant to produce receipts for rent, &c.—"Without reasonable excuse"—Bills of Sale Act, 1878 (41 & 42 *Vict.* c. 31), *s.* 10—*Bills of Sale Act,* 1882 (45 & 46 *Vict.* c. 43), *s.* 7 (4).

The production, at the hearing of an interpleader issue, of a bill of sale, together with a certificate of registration, is no evidence that the proper affidavit was also filed in accordance with the Bills of Sale Act, 1878, *s.* 10, *but the proper course is to adjourn the hearing for the production of evidence, and not hold the bill of sale void merely on this ground.*

A bill of sale contained an unqualified covenant by the grantor to produce receipts for rent, without the addition of words corresponding to the words "without reasonable excuse" in section 7 (4) *of the Bills of Sale Act,* 1882; *but contained a proviso that the chattels assigned*

(*a.*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

should not be liable to seizure by the grantee for any cause other than those specified in section 7 of that Act.

Held, that the insertion of this covenant did not render the bill of sale void as not being in accordance with the form in the schedule to the Bills of Sale Act, 1882.

Appeal on an interpleader issue by the execution creditor from a decision of his Honour Judge Russell at the Manchester County Court, declaring a bill of sale valid.

W. E. Hume Williams, for the execution creditor.—The bill of sale is void on two grounds. It was proved at the hearing of the interpleader issue only by the production of the original bill itself, together with a certificate of registration, which certificate omits to state that the affidavit required by the Act of 1878 was filed, and that the copy of the bill filed was a true copy. Such a certificate has been held to be no evidence that an affidavit was filed, under provisions in the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), s. 1, which are practically identical with those of the Bills of Sale Act, 1878, s. 10, sub-section 2: *Mason* v. *Wood*, 24 W. R. 41, 1 C. P. D. 63, followed in *Emmett* v. *Marchant*, 3 Q. B. D. 555, where, however, the court said that an adjournment ought to have been granted.

C. A. Russell, for the bill of sale holder, was called upon as to the first point.—The certificate of due registration involves the filing of the affidavit. Even if the certificate be not conclusive, it is *primâ facie* evidence that all things required by the statute have been done, and casts the burden of proving the insufficiency of the registration on the other side: *Waddington* v. *Roberts*, 16 W. R. 1040, L. R. 3 Q. B. 579. The affidavit was, in fact, filed, and I am ready to send for it now.

Mathew, J.—This is a purely technical point, and one which should not be taken unless there were some presumption that it would decide the rights of the parties. The proof of the bill of sale was insufficient; but this is not a case for a new trial, which is the most that can be asked for. The case must stand over for a week to enable the parties to examine the affidavit filed, in the event of our holding the bill of sale not void on the second ground.

A. L. Smith, J., concurred.

W. E. Hume Williams then argued the second point.—The bill of sale is void because it is not in accordance with the statutory form. It contains a covenant that the grantor will pay all rent, taxes, outgoings, &c., and take receipts, "and will, on demand in writing, produce the receipts," thus omitting the words "without reasonable excuse," which are found in section 7, sub-section 4, of the Act of 1882, although it contains a proviso in accordance with the form in the schedule that there shall be no seizure for any cause other than those specified in section 7 of that Act.

It would be a breach of this covenant to fail to produce a receipt which had been accidentally lost, and though no express power to seize is contained in the bill of sale, one must be implied from the statutory proviso that there shall be no seizure except for certain specified causes: *per* Lord Esher, M.R., and Lopes, L.J., *Ex parte Official Receiver, In re Morritt*, 35 W. R. 277, 18 Q. B. D. 222. This covenant, therefore, gives a right to seizure in excess of the right given under section 7, sub-section 4, of the Bills of Sale Act, 1882; and a covenant which thus transgresses against the Act cannot be justified as a covenant "for the maintenance of the security" permitted by the form in the schedule: *per Fry, L.J., Davis* v. *Burton*, 32 W. R. 423, 11 Q. B. D. 537, at p. 542, in which case, as in the present case, there was no express power to seize.

He also cited *Stanford* v. *Barber*, 34 W. R. 507, 17 Q. B. D. 259.

C. A. Russell, for the bill of sale holder.—Even if it be admitted that the bill of sale is bad on the principle laid down by Fry, L.J., in *Davis* v. *Burton*, yet a bill of sale containing an unqualified covenant to produce receipts has since been held valid by the Court of Appeal: *Goldstrom* v. *Tallerman*, 35 W. R. 68, 18 Q. B. D. 1, in which case *Davis* v. *Burton* was cited, though no decision on the point appears in the reports. And a covenant exactly similar to the covenant now in question has been considered good by Sir J. Hannen: *Furber* v. *Cobb*, 35 W. R. 398, 18 Q. B. D. 494, at p. 506. Assuming that a power to seize must be inserted by implication in this bill of sale, that power cannot be extended beyond the words from which it is implied—*i.e.*, by the words of section 7, sub-section 4, of the Act of 1882, which are incorporated in the bill of sale. Even if a general power to seize arises on breach of the unqualified covenant in the bill to produce receipts, yet this general power must be taken subject to the restrictions imposed by the special words contained in the proviso.

He also cited *Bianchi* v. *Offord*, 17 Q. B. D. 484, 35 W. R. Dig. 27; *Lumley* v. *Simmons*, 35 W. R. 422, 34 Ch. D. 698.

Gore, as *amicus curiæ*, cited *Real and Personal Advance Co.* v. *Olcars*, *ante*, p. 256.

Mathew, J.—There would seem to be abundant authority for us to decide this case either way; but in my opinion the judgment of the county court judge must be upheld. The covenant in question is certainly a covenant for the maintenance of the security, and it is one that is most useful in practice. As to the omission of the words "without reasonable excuse," it may be asked how is the bill of sale holder, who asks for the production of the receipts for rent, to know whether the excuse given for their non-production is reasonable? If he seizes the goods and is wrong in so doing, the grantor may apply, under section 7 of the Act of 1882, to a judge in chambers for an order restraining the sale, if he can satisfy the judge that there was a reasonable excuse. It was, no doubt, intended that there should be a right to seize the goods under this bill of sale, though it is not expressly given; but it must be taken to be a right as qualified by the express words of the Act. This view is supported by the authorities which would most influence us in arriving at our decision—viz., *Goldstrom* v. *Tallerman* and *Furber* v. *Cobb*.

A. L. Smith, J.—The question for us to answer is whether this bill of sale is rendered void by reason of the covenant whereby the grantor agrees to produce receipts for rent on demand in writing. Is this a covenant for the maintenance of the security? I think it is. I wish to add nothing to the remarks of Sir J. Hannen in *Furber* v. *Cobb*. It is here said that the bill is void because the covenant is absolute; but at the end of the bill there is a proviso that there shall be no seizure but for one of the five causes specified in section 7 of the Act of 1882. Therefore I think that on the true construction of this bill of sale the grantee could not seize the goods for a breach of the unqualified covenant. As to the authorities, in *Davis* v. *Burton* the bill of sale was held void because of its complex provisions. In *Goldstrom* v. *Tallerman* a bill of sale which contained the very covenant now before us was held good by the Court of Appeal, though it is true the point now taken was not argued. But in *Furber* v. *Cobb* the Court of Appeal held this very covenant good. In *Stanford* v. *Barber* the Court of Appeal thought that the insertion of such a covenant did not invalidate the bill of sale because there was no power of seizure on breach of the unqualified covenant.

Judgment affirmed.

Solicitors for the claimants, *Bower, Cotton, & Bower*, for *Rylance & Son*, Manchester.

Solicitors for the execution creditor, *Johnson, Harris, & Dowding*, for *Sims*, Manchester.

Q. B. Div. (Wills and Grantham, JJ.) Dec 14.

JAMES v. RICKNELL. (a.)

Solicitor—Retainer—Extent of authority—Interpleader contested without special instructions.

A retainer given to a solicitor to take proceedings to recover a debt does not give him authority to engage in interpleader proceedings, without special instructions, after judgment has been obtained and execution issued.

Appeal from the Lord Mayor's Court.

The plaintiff, a solicitor, had been instructed by the defendant to take proceedings for the recovery of a debt. Judgment having been obtained, and execution issued against the debtor, the goods were claimed under a bill of sale. The trial of an interpleader issue was ordered which the plaintiff unsuccessfully contested. The plaintiff paid the sheriff's charges, and then brought this action against his client to recover the costs and disbursements incident to the proceedings in interpleader. The jury found that beyond his original retainer to take proceedings for the recovery of the debt, the plaintiff had received no special instructions to contest the interpleader issue. The deputy judge held that the plaintiff had no authority from the defendant to engage in interpleader proceedings, and gave judgment for the defendant.

W. E. Hume Williams and *L. Pearson*, for the plaintiff.—No special instructions were necessary to enable the plaintiff to contest the interpleader issue. Interpleader proceedings form a part of the original action. A solicitor who is retained to conduct an action is entitled to pursue it to its termination, and to do anything to recover the fruits of a judgment, and there can be no termination of an action until all its parts have been disposed of, and the fruits of the judgment are recovered.

The following cases were cited:—*Lady de la Pole* v. *Dick*, 33 W. R. 585, 29 Ch. D. 351; *Lawrence* v. *Harrison*, 2 Styles, 426; *Jarmain* v. *Hooper*, 6 M. & Gr. 827; *Bevins* v. *Hulme*, 15 M. & W. 88; *Hamlyn* v. *Betteley*, 29 W. R. 275, 6 Q. B. D. 63.

Rose-Innes, for the defendant, was not called upon.

WILLS, J.—I am of opinion that this appeal must be dismissed. Authority is given to a solicitor to recover a debt, and to proceed with all ordinary steps for carrying out the machinery for such recovery. But this authority does not extend to substantially embarking on fresh litigation in order to recover the fruits of a judgment. I should require very strong authority to support the plaintiff's contention, and I can find none. There is no authority to show that the original retainer extends beyond execution. Mr. Hume Williams says that, technically, interpleader is part of the proceedings in an action. This seems to me to be immaterial. Rights and wrongs are not determined by names. An authority to conduct an action to its lawful end cannot carry with it authority to engraft upon it new litigation, which may continue to any extent, and at any cost, and with respect to which the client is entitled to exercise his own judgment as to whether he will contest it or not.

GRANTHAM, J.—I am of the same opinion. If it be true that there are no cases which decide whether or not an interpleader is within the authority of an original retainer, I am ready to lay it down as law that it is not. *Hamlyn* v. *Betteley* decides quite a different point. The question there was whether an interpleader could be tried by a judge without a jury, and the Lord Chief Justice said that as regards procedure it was not sufficiently a fresh action to come within the rules for a new trial.

Appeal dismissed.

Solicitor for the plaintiff, *R. Robinson.*

Solicitor for the defendant, *H. P. Cobb.*

(a.) Reported by G. K. PALEY, Esq., Barrister-at-Law.

Q. B. Div. (Lord Coleridge, C.J., and A. L. Smith, J.) May 17.

WHITE v. BYWATER. (a.)

Health—Adulteration—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 6—*Pharmacy Act*, 1867 (31 & 32 *Vict. c.* 121), *s.* 15—*Opium—Test of British Pharmacopœia.*

A man who sells tincture of opium which is not up to the standard laid down in the British Pharmacopœia is liable to be convicted of selling "a drug which is not of the nature, substance, and quality demanded" under section 6 *of* 38 & 39 *Vict. c.* 63, *although the purchaser did not specify any particular standard.*

Case stated by stipendiary magistrate under 20 & 21 Vict. c. 43.

George Bywater, a chemist at Sheffield, was charged by Sinclair White, the medical officer of health, for selling to him a certain drug—to wit, 3ozs. tincture of opium—which was not of the nature, substance, and quality of the article demanded by him, contrary to the Sale of Food and Drugs Act, 1875.

The complainant stated that he went to the defendant's shop and asked for 3ozs. of tincture of opium. The defendant in person supplied him with the opium, for which he paid one shilling. In accordance with section 14 of the Act of 1875 one-third of the quantity was left with the defendant, one-third was kept by the complainant, and one-third sent to be analyzed.

The result of the analysis was as follows:—On a comparison with the description of tincture of opium given in the British Pharmacopœia—

	Sample.	Brit. Pharm. Tincture.
Alcoholic strength shown in degrees of proof spirit .	56·8	100·0
Morphia	0. 23°/.	75°/.
× 10 Opium . . .	2·3	7·5

Showing that the proportion of opium in the sample was less than one-third of that contained in the Pharmacopœia, while the proportion of alcohol was somewhat more than a half of the proper quantity.

At the hearing it was contended that the magistrate ought to convict the defendant because the analysis showed that the tincture of opium was not in accordance with the British Pharmacopœia of 1885.

On the part of the complainant evidence was given that "tincture of opium" was a well-understood term in the trade, and that the material sold by the defendant was not of the nature, substance, and quality of tincture of opium as generally understood by persons dealing with it, and that the British Pharmacopœia was the only one recognised generally by the medical profession and pharmacists.

No evidence was offered by the defendant, but he stated that he got the tincture of opium from the same firm as that from which his predecessor had got it.

The magistrate dismissed the complaint on the ground that in the absence of any special request to be supplied with tincture of opium according to the recipe in the British Pharmacopœia the complaint made did not

(a.) Reported by CECIL CHAPMAN, Esq., Barrister-at-Law.

lie, inasmuch as the purchaser did get what he asked for —namely, tincture of opium.

The question for the court was whether or not, under the circumstances, the magistrate ought to have convicted the defendant.

Wormald, for the appellant.—The article supplied was not the article of commerce known as tincture of opium. That is well known in the trade and is defined in the British Pharmacopœia. By the Pharmacy Act, 1867 (31 & 32 Vict. c. 121), s. 15, medicines of the British Pharmacopœia are prohibited from being compounded except according to the formularies there laid down. No specific demand was necessary unless something other than the article as defined was required. The magistrate was therefore bound to convict because the case showed a distinct breach of section 6 of the Act of 1875.

The respondent did not appear.

Lord COLERIDGE, C.J.—The question referred to us is, I think, disposed of by what is stated in the case. The evidence of three competent witnesses shows that the article supplied to the purchaser was not of "the nature, substance, or quality" of the article demanded by him. It was proved or admitted that the tincture of opium supplied by the respondent was not in accordance with the standard quality prescribed by the British Pharmacopœia. I am, therefore, though somewhat reluctantly, bound to come to the conclusion that the respondent ought to have been convicted of the offence with which he was charged, and that the case must go back to the magistrate with our opinion to that effect.

A. L. SMITH, J.—I am of the same opinion. The customer asks for "tincture of opium." That must mean the article known in commerce as tincture of opium. The thing supplied to him was not tincture of opium of commerce, but an article of very inferior substance and quality. That being so, the respondent was guilty of the offence charged, and ought to have been convicted.

Case remitted.

Solicitors for the appellant, *Richard, Smith, & Wilmer*, *for Yeomans*, Town Clerk of Sheffield.

Q. B. Div. (Lord Esher, M.R., and Lindley and Lopes, L.JJ., sitting as a Divisional Court). } Aug. 11.

YARMOUTH v. FRANCE. (a.)

Negligence—Employers' Liability Act, 1880 (43 & 44 Vict. c. 42)—*Driver employed by wharfinger—Vicious horse—Risk incurred after notice—"Workman"—"Defect in condition of plant"*—Volenti non fit injuria.

The plaintiff was employed as a driver by the defendant, who was a wharfinger. The foreman of the defendant's stables told the plaintiff to drive a horse which was so vicious as to be unfit to be driven by anybody. The plaintiff objected to driving the horse, but was ordered to do it notwithstanding. While driving in the performance of his duty, and guilty of no negligence in driving, he was injured by a kick from the horse.

Held, by Lord Esher, M.R., Lindley *and* Lopes, L.JJ. (*sitting as a Divisional Court*), *that the plaintiff was a "workman" within the definition in section* 8 *of the Employers' Liability Act.*

Held, by Lord Esher, M.R., *and* Lindley, L.J. (Lopes, L.J., *expressing no opinion*), *that the horse was "plant" used in the defendant's business, and that vice in the horse was a "defect in the condition of the plant" within the meaning of section* 1.

Held, by Lord Esher, M.R., *and* Lindley, L.J. (Lopes, L.J., *dissenting*), *that there was evidence of negligence on the part of the defendant's foreman, and it was not conclusively shown that the risk was voluntarily incurred by the plaintiff.*

Thomas *v.* Quartermaine, 35 *W. R.* 555, 18 *Q. B. D.* 685, *distinguished.*

Held, by Lopes, L.J., *that there was no evidence for a jury to find for the plaintiff, as the facts showed that the plaintiff had elected to continue in the defendant's employment with full knowledge of the risk which he ran in so doing.*

This was an appeal from a decision given in the City of London Court.

The action was brought under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42). The plaintiff was employed by the defendant, a wharfinger and warehouseman, to take charge of a horse and trolley, it being part of his duty to load and unload the trolley for the delivery of goods to consignees, and to bring back the horse and trolley to the defendant's premises when his work was done. During this employment, in August, 1886, the defendant bought a new horse, which was placed under the plaintiff's control by the defendant's stable foreman. The horse proved to be a kicker and a jibber, and altogether unfit for driving. The plaintiff complained of it to the foreman and objected to driving it, but the foreman always replied that he must continue to drive and that if an accident occurred the defendant would be responsible. The plaintiff went on driving the horse for more than two months when, on November 12, while he was sitting in his proper place upon the trolley, the horse kicked out without any provocation and, striking the plaintiff on one of his legs, broke it. There was no evidence that the defendant himself knew of the horse being vicious as described.

The defendant, at the trial, maintained that the plaintiff was not entitled to sue under the Employers' Liability Act, as he was not a "workman" under the Act, nor was the horse "plant," nor the vice of the horse "defect in the condition of plant," and that the plaintiff voluntarily incurred the risk of accident, and was therefore not entitled to recover according to the decision in *Thomas* v. *Quartermaine*, 35 W. R. 555, 18 Q. B. D. 685. The plaintiff also must have contributed to the accident by his own negligence.

The judge held that the plaintiff was a "workman" and that the horse was "plant" within the Act, but he further held that the case came within the decision of *Thomas* v. *Quartermaine*, so that the plaintiff could not recover because he had continued to drive the horse after he was aware of its vicious nature, and therefore assented to incurring the risk attending the service. He therefore gave judgment for the defendant.

The plaintiff appealed.

July 26.—*W. E. Hume Williams*, for the plaintiff.—The case does not come within *Thomas* v. *Quartermaine*, because in that case the plaintiff made no complaint, whereas in this case the plaintiff objected to the risk and only incurred it rather than lose his place. A master is bound to take all reasonable precautions to protect his workmen: *Paterson* v. *Wallace*, 1 Macqu. 748, and when notice has been given him of defect in machinery he is liable for an accident due to the defect if the workman was not negligent: *Clarke* v. *Holmes*, 7 H. & N. 937. The plaintiff brought himself within sub-section 3 of section 2 by the notice which he gave to the foreman.

Wood Hill, for the defendant.—The plaintiff was not a workman within the Act, because he was a driver, and in

(a). Reported by CECIL CHAPMAN, Esq., Barrister-at-Law.

Cook v. *North Metropolitan Tramways Co.*, 35 W. R. 577, 18 Q. B. D. 683, a driver was held not to be a workman within the Employers and Workmen Act, 1875. The word "plant" is confined to inanimate objects such as fixtures and other chattels used in a business, and was never used before to describe a living creature. Even assuming the horse to be "plant," the plaintiff voluntarily continued in the dangerous employment, and cannot therefore recover: *Thomas* v. *Quartermaine.* The fact that he objected cannot do away with the fact that he continued when he might have given up his employment. In the words of Cockburn, C.J., in *Woodley* v. *Metropolitan District Railway Co.*, 25 W. R. 155, 2 Ex. D. 389, "if a man, for the sake of the employment, takes it or continues in it with a knowledge of its risks, he must trust to himself to keep clear of injury."

Cur. adv. vult.

Aug. 11.—Lord ESHER, M.R.—In this case the plaintiff was in the employment of the defendant, who was a wharfinger, and for the purposes of his business the owner of carts or trolleys and horses. Amongst these was a horse which was of an extraordinarily vicious nature and wholly unfit, so far as is stated to us, to be driven even by the most careful driver. The plaintiff objected to drive him, and told the foreman of the stable that the horse was unsafe to drive, whereupon the foreman said: "You have to drive him, and if any accident happens we (meaning the employer) will be responsible." The plaintiff continued to drive the horse, and whilst so doing, sitting on a part of the trolley where it is said to be usual and not improper for the driver to sit, the horse kicked out and broke the plaintiff's leg. The plaintiff thereupon sued the owner of the horse, his employer. The judge of the City of London Court did that which I believe many county courts have done since the decision of the Court of Appeal in *Thomas* v. *Quartermaine.* The moment it was proved before him that the plaintiff knew the horse to be vicious, but continued to drive him, the judge said it was useless to inquire further, for that alone disentitled him to recover upon an application of what is called the maxim of *Volenti non fit injuria.* The judge acted upon the notion that that was the effect of the decision of the majority of the Court of Appeal in *Thomas* v. *Quartermaine*, and, as I am given to understand, many county court judges have from the time that case was reported supposed that to be the effect of it. We are called upon now to say whether that is the true effect of the decision. My own position in the matter is extremely delicate, because I dissented from the decision of the rest of the court. I thought, and after mature consideration I have still the strongest conviction, that if that is really the effect of it the decision in that case was absolutely wrong; but I hope I have loyalty enough to say that if I thought that the decision of the majority of the judges there did mean what the county court judges have supposed it to mean, I should at once bow to it. The question we have now to consider is whether that was the real meaning of the majority—whether the judgment was not to a less rigid effect than that, and whether it does not leave open certain questions which must still be tried.

The first question here is whether this case is within the Employers' Liability Act at all. If it be not, then, according to the old law, if that Act had not existed, I have no doubt this plaintiff could not have recovered. He would have been a servant in the employment of the master, a part of whose machinery for carrying on his business was defective—in such a state that it would be a culpable want of care for the safety of his servants on the part of the employer to permit a necessary part of the machinery for carrying on his business to remain. But that was no concern of the jury. At all events, it was a thing which was patent, so that any person in the employ could know and see it. The horse here in question was not accidentally or suddenly vicious, but inherently vicious and known to be so. Under the old law it would have been said: "You" (the servant) "have entered into or continued in this employment where this thing of which you complain is open and palpable, and therefore it is an implied condition of your contract of service that you take upon yourself the risks of accidents therefrom, and consequently you have no remedy against your employer." As between master and servant that was the way the immunity from liability was always stated. The maxim *Volenti non fit injuria* was not wanted as between master and servant. It was only wanted, if at all, where no such relation as that of master and servant existed. That being so, then comes the question, what is to be the effect of the Employers' Liability Act? Does that Act apply to the present case?

Now the first question must be whether the plaintiff was a "workman" within the definition given in the Employers and Workmen Act, 1875. I cannot entertain a doubt upon that. He is a man who drives a horse and trolley for a wharfinger. We must take into account what his ordinary duty was. He has to load and unload the trolley. That is manual labour. His duty may be compared to that of a lighterman who conducts a barge or lighter up and down the river. The driving the horse and trolley, and the navigating of the lighter, form the easiest part of the work; his real labour, that which tests his muscles and his sinews, is the loading and unloading of the trolley or the lighter.

Then comes the question which is somewhat more difficult, Can a horse be considered "plant" within section 1 of sub-section 1 of the Employers' Liability Act? It is suggested that nothing that is animate can be plant; that is, that living creatures can in no sense be considered plant. Why not? In many businesses, horses and carts, wagons, or drays, seem to me to form the most material part of the plant; they are the materials or instruments which the employer must use for the purpose of carrying on his business, and without which he could not carry it on at all. The principal part of the business of a wharfinger is conveying goods from the wharf to the houses or shops or warehouses of the consignees; and for this purpose he must use horses and carts or wagons. They are all necessary for the carrying on of the business. It cannot, for a moment, be contended that the carts and wagons are not "plant." Can it be said that the horses, without which the carts and wagons would be useless, are not? If, then, this horse was part of the plant, it had a defect, that is, it had the constant habit, whether in a stable or harnessed to a trolley, of kicking whatever was near it, whether a human being or a brick wall. In short, it was a vicious beast that could not be managed or controlled by the most careful driver. The plant, therefore, was defective. There was no evidence that the master (the defendant) knew of the defect. But the foreman who had the management of the stable, and under whose directions the horse was used, knew it; and after having repeatedly been told that it was unsafe, he said what practically amounted to this: "I care not whether the horse is vicious or not; you have got to drive him; and it matters nothing to you for, if you meet with an accident, the master will be responsible." The foreman, probably, had no power to bind his master to that; but it is, at all events, conclusive to show that he realised the fact that the plant was defective; and nothing was done to remedy the defect. Was this negligence on the part of the foreman for which the master was responsible? If the master had any duty at all to take care of his workmen, then allowing this imperfect plant to continue to be used was surely a breach of that duty. But it is said he may have had that duty, and may have neglected it as to those of his workmen who did not

know of, or were not affected by, the particular defect, but not as to the plaintiff, who, knowing of the defect, still continued to drive the horse, and therefore comes within the maxim referred to. I confess that has always seemed to me to be not a bad way of illustrating the result; but it is, to my mind, a horrible way of stating the duty to say that a master owes no duty to a servant who knows that there is a defect in machinery, and, having pointed it out to one in authority, goes on using it. It seems cruel and unnatural, and, in my view, utterly abominable. It may be that the breach of this duty gives no right of action—that it is what is called a duty of imperfect obligation. Although the employer does not himself know of the defect, if he has put a person in his place to do what he ought himself to do, he is responsible for the negligence of that person.

Before the Employers' Liability Act there was this condition in the contract of hiring—that if there was a defect in the premises or machinery which was open and palpable, whether the servant actually knew it or not, he accepted the employment subject to the risk. That is the doctrine which is embodied in the maxim *Volenti non fit injuria*. I need hardly repeat that I detest the attempt to fetter the law by maxims. They are almost invariably misleading; they are for the most part so large and general in their language that they always include something which really is not intended to be included in them. I do not doubt that, if we put this maxim in plain English, part of it is true—that is to say, that if a thing is put before a workman and he is told, "Now, I do not ask you to do this unless you like; but I will give you more wages if you do. You see what it is. There is a rotten ladder—it is ten to one that it will break under you; but if you choose to run that risk I will give you higher wages." If the workman, seeing the risk, elects to incur it, no one could doubt that he would be precluded from recovering damages against his employer for any injury he might sustain from the breaking of the ladder. The same result would follow if the injured person was not a workman for hire. But does the maxim *Volenti non fit injuria* go this length—that the mere fact of the workman knowing that a thing is dangerous and yet using it is conclusive to show that he voluntarily incurs the risk? The answer to that depends (so far as this court is concerned) upon whether or not *Thomas* v. *Quartermaine* has so decided. I never entertained a doubt that the Employers' Liability Act does not prevent the proper application of the maxim *Volenti non fit injuria*; and I can only say, as an excuse for the part I took in *Thomas* v. *Quartermaine*, that that doctrine had never been mentioned on the argument of that case, but was for the first time suggested in the judgment of my brother Bowen. For myself I cannot help thinking that whether or not a workman has voluntarily agreed to incur the risk of defective machinery is a question of fact, and that, in my opinion, would have made the decision in *Thomas* v. *Quartermaine* wrong, for the majority of the judges there took upon themselves to decide the question of fact, whereas, in my opinion, they had no right to decide it; the utmost they properly could do was to send it back to the county court. They held in that case that the facts were conclusive to show that the plaintiff did voluntarily—in the sense in which they understood the word—accept the risk. This revives the whole difficulty as to contributory negligence in cases of railway accidents (*Davey* v. *London and South-Western Railway Co.*, 11 Q. B. D. 213). I have always protested that it is not for the judge to say whether or not a plaintiff (or the deceased in case of death) has been guilty of contributory negligence; he (the judge) has no right to hold that the evidence of it is conclusive; it should be left for the decision of the jury.

Now comes the other question, whether the Employers' Liability Act has done away with the old doctrine that a workman impliedly contracts or consents to incur a risk which is a visible and palpable one, and one which therefore he is to be taken to know of, or, if you please, which he does know of, or whether it applies only to the risks incident to common employment. For a time I was under the impression that the judgment in *Thomas* v. *Quartermaine* was that the Act only absolved the employer from liability for any injury resulting from the negligence of a fellow-workman. But upon looking at the matter more carefully I do not think they meant to say that. It was not necessary for them to say it, because they held that, inasmuch as the case was conclusively within the maxim *Volenti non fit injuria*, no other question arose in the case.

Now let us go back to the statute. We must look once more at section 1, sub-section 1, "where, after the commencement of this Act, personal injury is caused to a workman by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer, the workman shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer nor engaged in his work." Here I say there was such defect and consequent personal injury. Read with this sub-sections 1 and 3 of section 2. Sub-section 1 provides that the workman shall not be entitled under this Act to any right of compensation or remedy against the employer under sub-section 1 of section 1, "unless the defect therein mentioned arose from, or had not been remedied owing to, the negligence of the employer, or of some person in the service of the employer and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in a proper condition," and sub-section 3 that "In any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer already knew of the said defect or negligence," the workman shall in like manner be disentitled to any right of compensation or remedy. Here the defect arose from the negligence of a person in the service of the employer and intrusted by him with the duty of seeing that the plant was in proper condition, and who had notice of the defect, and failed to take steps to avert injury.

To my mind it is clear that this was negligence with regard to the safety of his workmen for which the employer is responsible. But then it is said there may be that which prevents the workman from recovering compensation for an injury sustained by him in consequence of that negligence. The implied contract which I have adverted to under the old law did prevent it. Where there is no duty, it is said, there can be no negligence, or, in other words, there may be negligence which is not actionable negligence. It is very difficult to give a sensible construction to sub-section 3 of section 2. The workman who discovers the defect is to give notice of it, or he cannot recover. From that I infer that if he does give notice, and the defect is not remedied, he may recover. When is he to give notice? And what if the defect is not immediately remedied? Is the workman at once to refuse to incur the risk and quit the employ? That is a dilemma to which it never could have been intended to reduce the workman. I cannot help thinking that it is clearly enacted in the 3rd sub-section of section 2 that if the workman gives notice of the defect, and the employer fails to remedy it, the workman's claim for compensation is valid, unless he is brought clearly within the maxim *Volenti non fit injuria*. Does the judgment of Bowen, L.J., in *Thomas* v. *Quartermaine*—for that is the judgment which is adopted by Fry, L.J.—mean to say that the mere knowledge of the

workman and his continuing in the employ is fatal to him?

If I thought the judgment in *Thomas* v. *Quartermaine* really did mean that, whatever my own private opinion might be, I should unhesitatingly bow to it. I have been trying to construe that judgment fairly. At p. 697 of the report the learned judge, after referring to *Lax* v. *Corporation of Darlington*, 28 W. R. 221, 5 Ex. D. 78, and *Winch* v. *Conservators of the Thames*, 22 W. R. 879, L. R. 9 C. P. 378, says: "The defendant in such circumstances does not discharge his legal obligation by merely affecting the plaintiff with knowledge of a danger which but for a breach of duty on his own part would not exist at all. But where the danger is one incident to a perfectly lawful use of his own premises neither contrary to statute nor common law, where the danger is visible and the risk appreciated, and where the injured person, knowing and appreciating both risk and danger, voluntarily encounters them, there is, in the absence of further acts of omission or commisson, no evidence of negligence on the part of the occupier at all. Knowledge is not a conclusive defence in itself. But when it is a knowledge under circumstances that leave no inference open but one—viz., that the risk has been voluntarily encountered—the defence seems to me complete." I must confess I do not like that way of putting it. I think there is a duty, though I agree that there is no actionable breach of that duty if the person injured, knowing and appreciating the danger, voluntarily elects to encounter it. In the preceding page the learned judge says: "It is no doubt true that the knowledge on the part of the injured person which will prevent him from alleging negligence against the occupier must be a knowledge under such circumstances as lead necessarily to the conclusion that the whole risk was voluntarily incurred. The maxim be it observed is not '*Scienti non fit injuria*' but '*Volenti*.' There may be a perception of the existence of the danger without appreciation of the risk; as where the workman is of imperfect intelligence." So that a dull man may recover damages where a man of intelligence may not. Both knew of the danger, but one is imperfectly informed as to its nature and extent.

Taking the whole of that judgment together, it seems to me to amount to this, that mere knowledge of the danger will not do; there must be an assent on the part of the workman to accept the risk, with a full appreciation of its extent, to bring the workman within the maxim *Volenti non fit injuria*. If so, that is a question of fact. Here the judge of the court below has come to the conclusion that the moment it appeared that the plaintiff knew and appreciated the danger, and did not at once quit the defendant's employ, he came within the maxim, and was therefore, upon the authority of *Thomas* v. *Quartermaine*, disentitled to recover. He did not bring his mind to bear upon the motives which induced the plaintiff to act as he did, whether he relied upon the foreman's statement that the employer would be responsible in case of an accident, or whether he was influenced by the fear of being thrown out of employ if he disobeyed the foreman's orders. All that was for a jury, and the judge ought to have applied his mind to it. I see nothing in the decision in *Thomas* v. *Quartermaine* to prevent the plaintiff from recovering in this case, unless the circumstances were such as to warrant a jury in coming to the conclusion that the plaintiff, freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it. For these reasons I think this case ought to go down for a new trial.

LINDLEY, L.J.—The first question is whether the plaintiff is a "workman" within the meaning of the Employers' Liability Act. In my opinion he is. His duty was not only to drive, but also to load and unload the goods which had to be transported on the trolley which it was his business to drive. This loading and unloading requires bodily labour and exertion, and brings the plaintiff within the statutory definition of a workman (38 & 39 Vict. c. 90, s. 10).

The next question is whether the horse which injured the plaintiff is "plant" within the meaning of section 1, sub-section 1, of the Act. There is no definition of plant in the Act, but in its ordinary sense it includes whatever apparatus is used by a business man for carrying on his business—not his stock-in-trade, which he buys or makes for sale, but all goods and chattels, fixed or movable, live or dead, which he keeps for permanent employment in his business (see *Blake* v. *Shaw*, 8 W. R. 410, Johns. 732). The word "defect" and the words "way and machinery," which occur in the section, throw some doubt on whether plant can include horses, but I do not think the doubt sufficient to require the court to hold that plant cannot include horses or to hold that plant must be confined to inanimate chattels. The defendant in this case has a number of horses for use in his business; they were part of his plant, not only in the ordinary sense of the word, but also, in my opinion, in the sense in which the word "plant" is used in section 1, sub-section 1, of the Employers' Liability Act.

The next question is whether vice in a horse can be a defect in the condition of plant. Here, again, I think it can. I take defect to include anything which renders the plant, &c., unfit for the use for which it is intended, when used in a reasonable way and with reasonable care, and if a horse intended for drawing trolleys is from any cause unfit for such work, and a person is driving him with reasonable care, and is injured by reason of the unfitness of the horse for his work, such person may be properly said to be injured by reason of a defect in plant.

Having cleared the ground thus far, it is necessary to consider whether the defect "arose from or had not been discovered or remedied owing to the negligence of the defendant, or of some person in his service and intrusted by him with the duty of seeing that the plant was in proper condition" (see section 2, sub-section 1). The defect—*i.e.*, the unfitness of the horse—did not arise from the negligence of the defendant, nor, in truth, of anyone, nor is there any evidence that the defendant himself knew of such defect. But his stable foreman did know of it, and he, nevertheless, took no steps to prevent the horse from being used for a purpose for which he knew it was unfit, for he told the plaintiff to go on driving it, and said if anything happened "we"—*i.e.*, his master—"must take the consequence." This, I think, is evidence of negligence on the part of the stable foreman for which the defendant can properly be held accountable unless his liability is excluded upon the ground that the plaintiff not only knew of the defect, but also took the risk upon himself.

This is the point which presents the greatest difficulty in the case, and which requires careful consideration. It must be taken as settled by *Thomas* v. *Quartermaine* that the words at the end of section 1 do no more than "remove such fetters on a workman's right to sue as had been previously held to arise out of the relation of master and workman"; that section 2, sub-section 3, does not extend the master's liability beyond that imposed by section 1 and section 2, sub-section 1; that in each of the cases specified in section 1 the maxim *Volenti non fit injuria* is applicable, and that if a workman, knowing and appreciating the danger and the risk, elects voluntarily to encounter them, he can no more maintain an action founded upon the statute than he can in cases to which the statute has no application. Those principles are, in my opinion, perfectly sound; but the proper application of them is by no means always easy. The question whether in any particular a plaintiff was *volens*

or *nolens* is a question of fact and not of law. Bowen, L.J., was careful to point out that the mere fact that the plaintiff knew of the danger and yet incurred it is not conclusive. He says: "The maxim, be it observed, is not *Scienti non fit injuria*, but *Volenti non fit injuria*. He further points out that there may be cases in which a non-workman who knew of a danger and incurred it might nevertheless maintain an action against the person exposing him to it. The question in each case must be, not simply whether the plaintiff knew of the risk, but whether the circumstances are such as necessarily to lead to the conclusion that the whole risk was voluntarily incurred by the plaintiff.

The learned judge who tried the present case thought he was bound by *Thomas* v. *Quartermaine* to decide it in favour of the defendant. In this respect I differ from him. The principles laid down in that case are no doubt to be accepted and followed, and, if I may say so, I entirely concur in them; but it is not, in my opinion, correct to regard that case as deciding this. The facts there and the facts here are materially different. In *Thomas* v. *Quartermaine* the facts were all one way; there was evidence that the plaintiff was *volens* and not merely *sciens*; he was not even directed to do what led to his injury; he did it voluntarily of his own accord; there was no evidence that the plaintiff was *nolens*; the plant was not defective or dangerous to persons engaged in the ordinary course of their employment; the plaintiff had never complained of it; the injury was the result of a pure accident, and the case might well have been decided on that ground alone. In the present case the horse was vicious, the plaintiff was constantly complaining of it to the defendant's foreman, the foreman told the plaintiff to go on driving it, and the plaintiff did so rather than run the risk of dismissal; nor is it possible to regard this case as one of accident. Under these circumstances, the question is whether the plaintiff, with knowledge and appreciation of both the risk and the danger, voluntarily took the risk upon himself. The plaintiff was not engaged to drive vicious horses, and the conversation with the foreman, though not evidence against the defendant of any promise by him to take the risk, is, in my opinion, admissible to explain the conduct of the plaintiff, and to rebut the inference that he voluntarily took the risk upon himself.

To hold that this case is concluded by *Thomas* v. *Quartermaine* is, I think, to carry that case further than is warranted by the principle on which it was decided; it is to do the very thing Bowen, L.J., so carefully pointed out the danger of doing—viz., to treat *sciens* as equivalent to *volens*. The Act cannot, I think, be properly construed in such a way as to protect masters who knowingly provide defective plant for their workmen, and who seek to throw the risk of using it on them by putting them in the unpleasant position of having to leave their situations or submit to use what is known to be unfit for use. *Thomas* v. *Quartermaine* is no authority for any such construction of the statute.

If in any case it can be shown as a fact that a workman agreed to incur a particular danger, or voluntarily exposed himself to it, and was thereby injured, he cannot hold his master liable. But in the cases mentioned in the Act, a workman who never, in fact, engaged to incur a particular danger, but who finds himself exposed to it, and complains of it, cannot, in my opinion, be held, as a matter of law, to have impliedly agreed to incur that danger, or to have voluntarily incurred it because he does not refuse to face it, nor can it, in my opinion, be held that there is no case to submit to a jury on the question whether he has agreed to incur it or has voluntarily incurred it or not, simply because, though he protested, he went on as before. The facts of each particular case must be ascertained and considered. If nothing more is proved than that the workman saw danger, reported it, but on being told to go on, went on as before in order to avoid dismissal, a jury may, in my opinion, properly find that he had not agreed to take the risk, and had not acted voluntarily in the sense of having taken the risk upon himself. Fear of dismissal rather than voluntary action might properly be inferred. *A fortiori*, might the jury properly come to such a conclusion if it was proved that the workman was told by his superintendent not to mind, and that if any accident happened the employer must make it good? Such an additional circumstance would go far to negative the inference that the complaining workman took the risk upon himself.

I cannot construe the Act as shutting out such considerations as these, and as the learned judge did not think himself at liberty to entertain them, and decided in favour of the defendant upon what I consider a misconception of *Thomas* v. *Quartermaine*, I think there ought to be a new trial.

Lopes, L.J.—This is an important and difficult case, and I regret that I am unable to agree with the decision of the rest of the court.

The action was brought under the Employers' Liability Act, 1880, but the judge of the court below has not decided the case on any question arising under that Act apart from the law as it existed before the passing of that Act, but has given judgment for the defendant on the ground that the plaintiff knew all the facts, was well acquainted with the character of the horse, and voluntarily encountered the risk, and that therefore there was no evidence of negligence arising from any breach of duty which the defendant owed the plaintiff entitling the plaintiff to recover.

It is to be observed that section 1, sub-section 1, and section 2, sub-section 1, of the Act—which must be read together—effect no change in the law as regards the liability of the employer, except in certain specified cases, by identifying a "person in the service of the employer and intrusted by him with the duty of seeing that the ways, works, machinery, or plant are in proper condition" with the employer, and taking him out of the category of fellow servants and rendering the employer responsible for his negligence. There is nothing here to affect the doctrine of *Volenti non fit injuria* if it applies; nor is that doctrine touched by anything in section 1, sub-section 3; but of that presently. The doctrine of *Volenti non fit injuria* is exhaustively dealt with in the cases of *Woodley* v. *Metropolitan Railway Co.* and *Thomas* v. *Quartermaine*. Both these cases were in the Court of Appeal, and the judgments of the majority of the court are not only binding on us sitting as a divisional court, but are binding on the Court of Appeal itself. The question, therefore, is whether the present case is governed by these cases, or either of them?

To determine this it is essential to state shortly the facts of the present case. The plaintiff was the driver of a trolley, and at the time of the accident had been about four years in the employ of the defendant, who was a wharfinger. This accident happened in November, 1886. In the previous August a horse had been purchased by the defendant, which was, by Tomlin, the defendant's stable foreman, assigned to the plaintiff to drive in his trolley. The plaintiff's duty was to clean, take care of, and drive the horse in his trolley, and to go with his trolley where ordered by Tomlin, who had the superintendence of the horses, and to load and unload as instructed. From the first the horse was vicious and troublesome—so vicious and troublesome that it was said to have broken down a brick wall, and generally to be a kicker and a jibber. The plaintiff had constantly complained of this horse to Tomlin, and had been told by him to go on driving the horse, and that his employer would be responsible for anything the horse did. The plaintiff, though daily, as he said, complaining, continued in the defendant's service driving the horse. On

the 12th of November the plaintiff was driving the horse sitting on the trolley with his legs hanging down behind the horse. There was no other place on the trolley provided for him where he could sit to drive. The horse kicked violently, broke the plaintiff's leg and injured him severely, In these circumstances he brings his action against the defendant. The case came on to be tried in the City of London Court without a jury, and the judge, considering it undistinguishable from *Thomas* v. *Qartermaine*, and that the doctrine of *Volenti non fit injuria* applied, stopped the case and gave judgment for the defendant.

Is this a case where the employer is absolved from liability because the plaintiff voluntarily exposed himself to the risk within the principle contained in the cases to which I have referred? In *Woodley* v. *Metropolitan District Railway Co.*, the plaintiff was a workman, not in the employment of the defendants, but in that of a contractor employed by them. He had to work in a dark tunnel, rendered dangerous by trains constantly passing. After he had been working for a fortnight he was injured by a passing train. The jury found that the defendants were negligent, and gave a verdict for the plaintiff for £300. A rule to set aside this verdict was discharged, and on appeal it was held by the majority of the Court of Appeal that the plaintiff, having continued in his employment with full knowledge, could not make the defendants liable for an injury to which he voluntarily exposed himself.

The only distinctions that I can find between that case and the present are the following:—Woodley was hired to do dangerous work, and knew its dangerous character and attendant risks. Yarmouth was hired to do work not dangerous—viz., amongst other work, to drive horses, which most frequently are manageable. The horse which did the mischief was intrusted to his care after he entered on the employment, and it was then first he learned its propensities, but long after he had been made aware of its vicious nature he continued to drive it. There was no evidence that Woodley ever made any complaint to his employer. Yarmouth, on the contrary, complained, but continued in the employment. Having regard to the judgments of the majority of the court, I do not think that what I have suggested furnishes any substantial ground for distinction. Cockburn, C.J., says:—"With a full knowledge of the danger, he (Woodley) continued in the employment, and had been working in the tunnel for a fortnight when the accident happened. If he becomes aware of the danger which has been concealed from him, and which he had not the means of becoming acquainted with before he entered on the employment, or of the want of the necessary means to prevent mischief, his proper course is to quit the employment. If he continues in it, he is in the same position as though he had accepted it with a full knowledge of its danger in the first instance, and must be taken to waive his right to call upon the employer to do what is necessary for his protection, or, in the alternative, to quit the service. If he continues to take the benefit of the employment, he must take it subject to its disadvantages. If a man chooses to accept the employment, or to continue in it with a knowledge of the danger, he must abide the consequences, so far as any claim to compensation against the employer is concerned. Morally speaking, those who employ men on dangerous work, without doing all in their power to obviate the danger, are highly reprehensible, as I certainly think the company were in the present instance. The workman who depends on his employment for the bread of himself and his family is thus tempted to incur risks to which, as a matter of humanity, he ought not to be exposed. But, looking at the matter in a legal point of view, if a man, for the sake of the employment, takes it or continues in it with a knowledge of its risks, he must trust to himself to keep clear of injury." This judgment, in which the majority of the court concurred, covers the present case, and, subject to the provisions of the Employers' Liability Act, disposes of the only distinction which I am able to suggest.

The point that Yarmouth was not engaged to drive a dangerous horse is met by the fact that he continued in the service after he knew the horse was dangerous, and his constant complaints may be regarded as evidence of his thorough appreciation of the risk he was incurring, and of his willingness to incur that risk rather than relinquish his employment. After complaining, he remains in the service for a long time, knowing the risk, and knowing that no steps had been taken to prevent its continuance. This is more consistent with his acquiescence in a disregard of his complaints, and with a willingness to incur the risk, than with the contrary view.

In *Griffiths* v. *London and St. Katharine Docks Co.*, 32 W. R. 831, 12 Q. B. D. 493, on appeal 13 Q. B. D. 259, 32 W. R. Dig. 129, it was held that in an action brought by a servant against his master for personal injury resulting from the unsafe state of the premises upon which the servant was employed, the statement of claim must allege, not only that the master knew, but that the servant was ignorant of the danger. The present Master of the Rolls said:—"If the danger is one which was known to the master and not to the servant, the knowledge of the master and the want of knowledge of the servant make together a cause of action, and as it is necessary that these two things should exist in order to form a *primâ facie* cause of action, it is necessary that they should be shown to exist in the statement of claim" (13 Q. B. D., at p. 260). And Bowen, L.J., at p. 261 in the same case, says, "Both these allegations are material, because without them there is no cause of action."

It is, therefore, abundantly clear that as the danger was known to the servant (the plaintiff) he could not recover before the Employers' Liability Act.

It is said, however, that *Woodley* v. *Metropolitan District Railway Co.*, *Griffiths* v. *London and St. Katharine Docks Co.*, and other cases do not govern the case before the court. It is said that the law has been altered in cases to which the Employers' Liability Act applies; and I assume for the purposes of this case that the Employers' Liability Act applies to the case of this plaintiff. It is suggested that there is something in the Employers' Liability Act which qualifies the defence of *Volenti non fit injuria*—a defence which would have been available for the master before the Act. It is said that a workman who can bring himself within one of the five clauses of section 1 of the Act is not to be treated as *volens*, although he thoroughly appreciated the risk he was incurring, complained of it, and for a long time continued in the service preferring the risk to quitting the service, and this although he would have been treated as *volens* before the Act.

I cannot accede to this view. It is opposed to the case of *Thomas* v. *Quartermaine*. The third sub-section of section 2 is relied upon. Bowen, L.J., in *Thomas* v. *Quartermaine* deals with that clause. He says, "The object of that clause is to limit the employer's liability, not to enlarge it." I read it thus:—Although under section 1 the workman, with certain exceptions, is to be placed in a position as advantageous as, but not better than, the rest of the world who use the master's premises in his business, the workman is not to have this advantage if, knowing of any defect or negligence, he does not inform the employer, as provided in that section. The object of this is to give the employer the opportunity of remedying the mischief. In fact, the workman is not to have the advantages of the Act unless he performs the condition precedent of making the master aware of his cause of complaint. This leaves the employer's

defence of *Volenti non fit injuria* untouched by the Act if he can prove it. It is said that such a construction would make the Act nearly a dead letter. But this is not the case. In all cases where the workman is ignorant of the defect or negligence, and is injured by a fellow workman's negligence, "common employment" is no longer a defence for the master in the cases specified in section 1, as it would have been before the passing of the Act.

It is said that the object of the Act was to exclude in the specified cases the two legal inferences which were before the Act to be drawn against the workman from the mere fact of his employment—viz., first, the inference that he accepted the risk of his fellow servants' negligence; and, secondly, the inference that he accepted the risks which were involved in the execution of his employer's orders, if he in fact ran them, rather than refuse to do so, and thereby incur the risk of dismissal. I agree that it was the object of the Act to exclude the first inference, and in the specified cases to destroy the defence of "common employment." But what authority there is for the contention that it was intended to extinguish the second inference I fail to be able to discover.

The true construction of the 3rd sub-section of section 2, in my opinion, is that, whereas, before the Act, knowledge would have disentitled the workman to recover, now knowledge in the specified cases is no longer to create a disability, provided the workman gives information; but if, after giving information, he continues in the employment, knowing the danger he is incurring, the same inference arises as heretofore—viz., the inference that he voluntarily runs the risk—and any evidence of negligence arising from any breach of duty on the part of the employer is by the workman's conduct displaced.

I agree with the decision of the majority of the court in *Thomas* v. *Quartermaine*, and with the construction they place on the Employers' Liability Act. That Act only removes such obstacles to a workman's right to sue as had been held to arise from the relation of master and servant. It leaves the doctrine of *Volenti non fit injuria* untouched. Now, as before the Act, to use the words of Bowen, L.J. (18 Q. B. D., at p. 699), "one man cannot sue another in respect of a danger or risk not unlawful in itself, that was visible, apparent, and voluntarily encountered by the person." The present case seems a stronger case of voluntary exposure to danger than that of *Thomas* v. *Quartermaine*. In the latter case there is little, if any, evidence that Thomas knew of or appreciated the danger; but in the present case the evidence is strong to show that Yarmouth thoroughly understood the danger to which he was exposing himself. With a knowledge of the danger, though complaining, he continues in the service, indicating thereby a willingness to incur the risk rather than give up his employment.

In my opinion the case of *Thomas* v. *Quartermaine* decides that every defence (except, in specified cases, the defence of "common employment") is still open to the employer; thus leaving the law, except in the case of "common employment" in the specified instances, as it was laid down in *Woodley* v. *Metropolitan District Railway Co.* It was for the plaintiff here to make out that the defendant was negligent towards the plaintiff in conducting himself as admittedly he did. I can see no evidence of any negligence arising from any breach of duty which the defendant owed the plaintiff.

The plaintiff deposed that when he complained Tomlin told him to go on driving the horse, and that his employer would be responsible. There is no evidence that Tomlin was authorized by the defendant to make this statement. The judge below disregarded this evidence, and I think rightly; it was not admissible as evidence against the master (the defendant); I am unable to see any substantial difference between the present case and the cases to which I have referred, and I think the judge was right in giving judgment for the defendant.

I am also of opinion that the judge was right in holding that the plaintiff was a person to whom the Employers and Workmen Act, 1875, applied, and, therefore, in that respect entitled to sue under the Employers' Liability Act, 1880. The case of *Cook* v. *North Metropolitan Tramways Co.* is an authority for this. Holding as I do it is unnecessary to decide whether a horse is "plant" within section 1, sub-section 1, for, assuming it in the plaintiff's favour, in my opinion he cannot recover. I wish to be understood as not expressing any opinion on this. The appeal will therefore be allowed.

Appeal allowed.

Solicitor for the plaintiff, *H. R. Newson.*

Solicitors for the defendant, *Dawes & Sons.*

Prob. Div. & Adm. Div. Probate. } July 13.

In the Goods of Bolton. (*a.*)

Probate—Practice—Two wills—English will disposing of English estate—Belgian will disposing of Belgian estate—Probate of both wills to English executor—Law of Belgium.

An English testator died in Belgium, having there made a will in English form disposing of his English estate, and a will in Belgian form disposing of his property in Belgium. The executor appointed by the Belgian will having renounced and consented to the present application, the court on motion granted probate of the two wills, as together constituting the last will of the deceased, to the English executor.

Motion for probate of two wills of the testator, the Rev. W. W. Bolton, as together constituting the last will of the deceased.

The deceased was an Englishman by birth. He had resided for many years as English Chaplain at Frankfort-on-the-Main, and for fifteen years prior to his death, which took place on the 6th of May, 1887, at Bruges, in the kingdom of Belgium. He had frequently expressed his intention of returning to England.

At the time of his death he was possessed of a house at Bruges and shares in a banking company there. He was also entitled to money lent in Canada and on mortgage in England, and to a fund in the High Court of Justice in England.

On the 9th of September, 1885, he duly executed at Bruges a will prepared in England bequeathing all his personal property in England and Canada to his sister and three nieces, and he appointed Mr. Freeman, his solicitor in London, sole executor.

At the time of the execution of this will he informed Mr. Freeman that he intended to make a will in Belgian form disposing of his Belgian property. By the Belgian law a Belgian will must be dictated to a notary in the presence of witnesses.

On the 29th of September, 1886, the testator executed a will at Bruges in accordance with Belgian law. It commenced with a statement by the notary that it was dictated in the presence of four witnesses, and that the testator had requested the notary to prepare and witness the execution of his will in reference to his property situate in Belgium, and after the gift of various legacies, all payable out of property situate in Belgium,

(*a.*) Reported by J. Gerard Laing, Esq., Barrister-at-Law.

the residue was bequeathed, as in the prior will, to his sister and three nieces, and the testator appointed a solicitor in Bruges, M. Verstraete, his testamentary executor. The body of the will contained these words: "I revoke all wills and other testamentary dispositions which I have made previous to this day."

Searle asked for probate of both wills to the executor of the English will, and stated that the Belgian executor consented and was ready to file a renunciation. The clause revoking all prior wills is governed and made subject to the prior statement that the second will related to the testator's property in Belgium. That statement is a part of the will.

Hannen, P., granted probate to the executor of the English will subject to an affidavit being filed that by the law of Belgium the recital in the Belgian will that it referred to the testator's Belgian property formed part of the will, and that the Belgian executor renounced and consented to the grant asked for.

Motion allowed.

Solicitors, *Freeman & Bothamley.*

Consistory Court of London.

July 19.

In re Trinity Church, Stroud Green.

Ecclesiastical law—Side chapel—Communion table.

Although the rubric and the 82nd canon contemplate only one Communion table in a church, they do not expressly prohibit a second, and a faculty should be granted for the introduction of a second table where, on the ground of convenience and economy, it is desirable to introduce one in a side chapel as subsidiary to the performance of the service of the church as prescribed by law.

Application for a faculty for the construction of a side chapel at the east end of the south aisle of Holy Trinity Church, Stroud Green, and for the introduction of a Communion table into the chapel.

The rubric in the Book of Common Prayer and the 82nd canon, provide that there shall be one Communion table in a church, and the question was whether a second was forbidden.

The application was based upon the ground of convenience and economy. Dr. Linklater, the vicar, deposed that the church would accommodate 1,200 persons, and that at the early services perhaps not more than half a dozen would be present, and would be scattered over the church, which had, in winter, to be warmed and lighted throughout. It would be convenient if the small congregation could be brought together in the proposed side chapel, and by warming and lighting the chapel only a saving of £50 a year would be effected. The vestry approved of the application.

The application was heard by the Chancellor of the Diocese of London.

Beaufort, for the petitioners, referred to *Hudson* v. *Tooth*, 25 W. R. Dig. 107, 2 P. D. 125, and 1 Cardwell's Doc. Annals, pp. 94—101, and instanced the frequent cases of side chapels with communion tables in cathedral and parish churches.

Dr. Tristram, Q.C.—The application in this case is for a faculty to authorize the erection of a screen between the chancel and the east end of the south aisle of the church, and across the aisle, and the fitting up of the space inclosed by the screen as a chapel to be used for early daily prayer, and for the administration of early Holy Communion on week days and on Sunday mornings, when the congregation is a small one. For the latter purpose the court is asked to sanction the introduction of a Communion table into the chapel, there being, of course, one already in the chancel.

The application is based on convenience and the saving of expense. When the congregation is small, it is manifestly more convenient, both for the congregation and the officiating minister, that the former should be assembled within the limited space of the chapel, instead of being scattered over a large church; and, according to the evidence, the difference of the cost in lighting and heating the chapel in the present case, instead of the church for such services, is about £50 per annum in favour of the chapel.

On these facts the court would have no hesitation in granting the faculty, provided it may by law do so. The legal question for consideration is whether it is competent to the court, having regard to the wording of the rubric and the 82nd canon, ordering that there shall be one Communion table in a church, to authorise the introduction of a second within a parish church.

In the pre-Reformation period it was not unusual to have two or more altars in parish churches. These were removed under the injunctions as tending to superstition, and in their place was substituted one Communion table of wood. It is clear that the rubric and the 82nd canon contemplate there being only one holy table in a church, and if this had been an application to introduce one into the aisle simply, and not into what is to be practically a chapel, I am not prepared to say that the court would have been justified in granting it. But this question does not arise in the present case. I am aware that there are in the side chapels of many of our cathedrals holy tables, as there is here in St. Paul's, and my attention has also been directed to the fact that several of our bishops have consecrated churches with Communion tables in side chapels.

But these cases cannot be considered as having the force of legal precedents in this court; for, cathedrals not being within the jurisdiction of the Bishop's Court, alterations are made in them and ornaments introduced into them without the sanction of any judicial decision or a judicial order. In *Westerton* v. *Liddell*, Moore's Special Report, 21, 22, it was held that the fact of an ornament having been in a church at the time of its consecration did not necessarily legalize it or preclude its subsequent removal by faculty if the court were satisfied of its illegality.

The attention of the court has also been directed to the fact that faculties have issued in other dioceses for the introduction of holy tables in side chapels in parish churches.

But these, with the exception of one, which came before me, sitting as Chancellor of Ripon in January last, have not been the subject of a decision after a hearing in open court. The Ripon case was an application by the vicar and churchwardens of the parish church of Leeds for the introduction in a side chapel of a holy table for use and convenience, and having had an opportunity of then fully considering the question, I decreed the faculty to issue, and I adhere to that decision.

There is principle laid down by the Judicial Committee of her Majesty's Privy Council in *Westerton* v. *Liddell*, Moore's Rep., 187, which may safely guide the court in this case, and that is, that an ornament, though not prescribed by the rubrics or canons, may be introduced for use in a church if subsidiary to the performance of the service of the church as prescribed by law. On the ground a credence table was permitted to remain in a church. In the rubrics or canon there is no mention of provision made for side chapels in parish churches. But there is no provision against them, and I think their introduction with a holy table in the chapel may, in

change of circumstances owing to the demand in recent years for early morning services and for the celebration of early Holy Communion, be sanctioned by this court on the ground of convenience and saving of expense, and to meet the requirements of the times.

The court, therefore, decrees the faculty as prayed.

Proctor for the applicants, *Brooks*.

Court of Appeal.

From Chan. Div. Oct. 26, 27.

BROWNE v. LA TRINIDAD. (a.)

Company—Directors—Irregularity in the summoning board meeting—Effect of such irregularity on subsequent general meeting—Agreement prior to formation of company—Incorporation of such agreement in the articles—Agreement not thereby enforceable against company.

Mere irregularity in summoning directors to a board meeting—such as the mere non-issue of a notice to a particular director, or not giving him sufficient notice—though it may entitle that director to object and require another board meeting to be held, is not such an irregularity as to render the meeting, when held—of persons who are in fact directors and intend to act as a board—incompetent to authorize the calling of a special general meeting of shareholders, and cannot deprive the general meeting called in consequence—when, in all other respects, regularly summoned—from exercising the powers which are given it by the articles.

Harben *v.* Phillips, 31 *W. R.* 173, 23 *Ch. D.* 14, *explained.*

Before the incorporation of a company, an agreement was entered into between the plaintiff and a trustee for the intended company, stipulating (inter alia) *that the plaintiff should be a director and should not be removable till after* 1888. *This agreement was set out and adopted in the articles of association, but there was no other evidence of any contract being entered into between the plaintiff and the company adopting the agreement. After the formation of the company the plaintiff was appointed a director, and shares were allotted to him.*

In October, 1887, *at a special general meeting, a resolution was passed that the plaintiff should be removed from the directorate. The plaintiff brought an action to restrain the company and the other directors from acting on or confirming this resolution.*

Held, that the agreement as to the non-removal of the plaintiff from the directorate was not an agreement entered into with the company, and that, though the agreement was embodied in the articles, it did not thereby —in the absence of any other evidence to show that the company had entered into the agreement—become a contract between the plaintiff and the company, and therefore that the plaintiff was not entitled to the injunction sought.

Eley *v.* Positive Life Assurance Co., 24 *W. R.* 252, 338, 1 *Ex. D.* 88, *followed.*

Decision of Charles, J., *reversed.*

Appeal from Charles, J., sitting as Vacation Judge.

On November 28, 1884, the defendant company was registered. The memorandum of association stated that one of the objects of the company was to adopt and carry into effect an agreement of the 24th of November, 1884, for the sale by the plaintiff to a trustee for the intended company of a mining property in Mexico. This agreement contained a stipulation (clause (5)) that "upon assurance of the property, or earlier if the company shall require, the vendor shall become a director of the company and shall not be removed or bound to retire by rotation till 1888." The articles of association of the company provided (*inter alia*) (6) "The directors shall adopt on behalf of the company and carry into effect the agreement referred to in the memorandum of association dated the 24th of November, 1884, a copy whereof is set forth in the schedule hereto, with or without modification as they may think fit. Subject to such modification, if any, the said agreement is hereby confirmed, and the provisions thereof so far as are applicable to the company and remain to be performed are incorporated with and shall be construed a part of these presents." Clause (9) provided that any director who should become bankrupt, or insolvent, or lunatic, or should cease to attend the meetings of the board for three months without permission "shall thereupon be disqualified from being, and cease to be a director, and the vacancy thereby occasioned shall be filled up in manner hereinbefore provided.' Clause (91) provided that "The company may by special resolution, save as aforesaid, remove any director before the expiration of his period of office, and if they think fit appoint a qualified shareholder in his stead, and the director so appointed shall in all respects stand in the place of his predecessor."

By resolutions passed after the registration of the company the plaintiff was appointed a director of, and was allotted shares in, the company, but there was no evidence of any resolution passed at any general meeting of the company adopting the agreement of the 24th of November, 1884. Subsequently disputes arose between the plaintiff and the other directors, and on the 28th of September, 1887, at a meeting of directors, composed of a quorum of two—the plaintiff not being present—a resolution was passed that notice should be issued for an extraordinary general meeting of the shareholders to be held on the 12th of October, at which a resolution would be proposed (1) that in accordance with clause (91) of the articles of association the plaintiff should be removed from the directorate of the company; and (2) that the capital of the company should be increased.

The secretary accordingly, on the 1st of October, issued notices convening the extraordinary general meeting for the 12th of October, and the notices so issued were stated to be issued in pursuance of the order of the directors given at the board meeting of the 28th of September, and also stated the purposes for which the general meeting for the 12th of October was convened.

The plaintiff, on the 8th of October, issued the writ in this action, by which he sought an injunction against the company and the other directors to restrain them from holding the meeting of the 12th of October, or preventing the plaintiff acting as a director; and to have a declaration that the company had no power to remove him from the directorate till after the year 1888, and that the extraordinary general meeting for the 12th of October had not been duly convened.

The plaintiff alleged that the meeting of the board of directors held on the 28th of September was not a duly constituted board meeting, on the ground that he had not received due notice of it.

The evidence showed that the plaintiff received at his office a written notice that the meeting of the 28th of September was to be held at 3.30 p.m. at the offices of the company. The plaintiff alleged he only received this notice at 3.28 p.m. the same day, the defendants alleged he received it at 3.20 p.m. The plaintiff's office was within five minutes walk of the offices of the company.

The articles of association contained no regulation as to the mode of summoning board meetings, and it appeared from the evidence that it had been customary to call board meetings at very short notice. The previous

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

board meetings had, however, been held in the plaintiff's office. The plaintiff did not attend the meeting of the board of the 28th of September, nor did he make any objection at the time, or until he issued his writ on the 8th of October, to the shortness of the notice given him.

The plaintiff served notice of motion for an injunction, together with the writ, on the 8th of October, but the motion was not heard till the 19th of October, and meanwhile, on the 12th of October, the extraordinary general meeting was held, at which both resolutions were passed unanimously.

Charles, J., on the hearing of the motion, granted an injunction to restrain the company holding any meeting to confirm the first resolution passed at the meeting held on the 12th of October, and to restrain the other directors preventing the plaintiff acting as a director, on the ground that the plaintiff had not received proper notice of the meeting of the board of the 28th of September, and that that initial irregularity vitiated all the subsequent proceedings.

The defendants appealed.

Higgins, Q.C., *Latham, Q.C.*, and *P. F. Stokes*, for the appellants.—The plaintiff admits that he was served with a written notice of the intended board meeting of the 28th of September a few minutes before the meeting was held. He made no objection then to the shortness of the notice, and though he states in his evidence it was impossible for him to attend that meeting, he gives no reason why he could not do so. His office was so close by the offices of the company, at which the meeting was held, that he had sufficient time to attend the meeting if he had chosen to do so. The evidence shows that it was customary to convene meetings of the directors casually and on very short notice. The objection, therefore, as to the informality of the notice is a mere technical one. Then, as to the power of the company to remove a director before the expiration of his period of office, article 91 of the articles of association gives the company that power. It may be said that the words "save as aforesaid" in article 91 relate back to article 6, which confirmed the agreement of the 24th of November, 1884, which contained a stipulation that the plaintiff, when made a director, should not be removed till after 1888; but that agreement was not made with the company, because it did not then exist, and the articles only amount to a contract enforceable between the shareholders *inter se*: *Eley* v. *Positive Life Assurance Co.*, 24 W. R. 252, 338, 1 Ex. D. 88. There is no evidence of any resolution passed at any general meeting of the shareholders adopting the agreement of the 24th of November, 1884.

Marten, Q.C., and *D. L. Alexander*, for the plaintiff, the respondent.—The notice of the general meeting of the shareholders issued by the secretary on the 1st of October states that it is issued by order of the board, given on the 28th of September; but that meeting of the board was irregular, as the plaintiff, who was a director, and entitled to be present at it, had no proper notice of the meeting given him. That notice was, further, an intimation to the shareholders that by order of the board the plaintiff ought to be removed from being a director. [COTTON, L.J.—Suppose directors, intending to act as a board, but at no formal meeting of the board, direct the secretary to issue notices for a general meeting of shareholders, would the informality in the constitution of the board deprive the general meeting of powers which it otherwise would have had?] Yes; *Harben* v. *Phillips*, 31 W. R. 173, 23 Ch. D. 14, is an authority to that effect. Again, the general meeting of shareholders had no power to remove the plaintiff from the directorate. The only power of removing directors is that contained in article 91, and the words "save as aforesaid" in that article have no meaning unless they refer to article 6, which incorporates the agreement of the 24th of November, 1884, which stipulated that the plaintiff should not be removed from the directorate till after 1888. Power to remove the plaintiff from the directorate is therefore excepted out of the general power to remove directors given by article 91.

Higgins, Q.C., in reply, referred to *Collie's claim*, 19 W. R. 1022, L. R. 12 Eq. 246; *In re Empress Engineering Co.*, 29 W. R. 342, 16 Ch. D. 125; *In re Northumberland Avenue Hotel Co.*, 33 Ch. D. 16, 35 W. R. Dig. 38.

COTTON, L.J. [having briefly stated the nature of the action, continued:—] The case raises points of considerable importance. The meeting of shareholders was summoned, not only to determine whether the plaintiff should be removed from the position of director, but also to decide as to the authorization of an increase of capital. Only one point was decided by Charles, J. It was this, he thought there was an initial irregularity which prevented the meeting of the shareholders from being so called as to be capable to act, and he came to this conclusion because, as he considered, the plaintiff substantially had not been summoned to the board meeting which gave directions for the issuing of the notices summoning the meeting of shareholders. Was he right in that? [The Lord Justice here stated the facts with reference to the notice of the board meeting of September 28 given to the plaintiff, and continued:—] This notice was left a few minutes before the time fixed for the meeting, he received it before the meeting, and five minutes would have taken him to the place where the meeting was to be held. He did not go, nor until the commencement of this action, on the 8th of October—the meeting being summoned for the 12th—did he make any objection to the calling of the board meeting at such short notice. That is very material, because if he had at once given the other directors notice and said, "I object to the calling of the board on such short notice to consider this question," that might have altered the case. The other directors might then have called a fresh meeting of the directors and considered the question, and allowed him to state the objections he had to these resolutions being put before the special general meeting. There was time to do this, as only a seven days' notice of a general meeting was requisite. In my opinion, under the existing circumstances, it cannot be said that the board was not so summoned as to be able to act as a board. It is a very different question whether the other directors were quite right in acting as they did in giving such short notice. It was suggested by Mr. Marten in argument that it was done unfairly, in order to exclude the plaintiff, and prevent him from urging any reasons which he had against his being removed from the board of directors and against the increase of capital. There is nothing in the affidavits as to that, and it is not right that we should act upon a suggestion which is raised in that way, when the plaintiff does not swear to it, and when, so far as I see, there is nothing in the facts which can be relied on as supporting a suggestion of that sort. If the plaintiff had at once complained of the shortness of the notice of the board meeting before the board had summoned the general special meeting of the shareholders, it would have been a question whether the court ought not to have restrained the directors from calling the meeting without giving an opportunity to the plaintiff, as one of the then directors, to lay before the board his views in reference to the questions to be brought before the special general meeting. But the only question which we have now to consider is whether, even if there was such an informality that the court might have interfered before the board had summoned the special general meeting, that meeting can be said to have been called without authority, and to have been incompetent to act, though the resolution of the board had been passed at a meeting of the directors, of which

everybody except the plaintiff had sufficient notice, and he did not raise any objection as to the shortness of the time, nor does he now show that he could not have gone to the board meeting before the other directors had passed the resolutions.

In my opinion, if there was an irregularity at the board meeting, it was not such an irregularity as to vitiate the action of the board, and even if there had been an irregularity in the constitution of the board, it would not have deprived the general body of shareholders of the power of acting, when the notice was issued by the directors as such, and was signed in the usual way by the secretary as required in the articles on behalf of the directors. I think Charles, J., failed to give due consideration to the principle that a court of equity refuses to interfere where an irregularity has been committed, if it is within the power of the persons who have committed it at once to correct it by calling a fresh meeting, and dealing with the matter with all due formalities. But, in my opinion, there was a sufficient notice sent to the plaintiff to prevent him from contending now that the meeting of the board was a meeting of persons who were not competent to act as a board of directors. There was, therefore, nothing to make the issue of the notice irregular, and even if there was an irregularity in the board meeting which might have enabled the plaintiff to insist that it should be postponed and another board meeting called, that would not vitiate the special general meeting so as to prevent its exercising the powers which are given to it by the articles.

It was contended that in *Harben* v. *Phillips* it had been laid down that where there is an irregularity in the constitution of the board it cannot effectually call a general meeting. But I think that that case is not quite understood. The words "irregularity in the constitution of the board" did not mean some irregularity in summoning persons who were in fact directors, such an irregularity as the mere non-issue of a notice to a particular director, or not giving him sufficient notice. There the case was that the supposed board was a meeting of persons, two of whom were not directors at all, and the persons who met had excluded those who the court thought ought to have been admitted in the place of the two persons whom I have mentioned. That clearly is a very different case. There had been a meeting where some who were not legally directors were present, and some who were legally directors were excluded, and we decided that it was not a meeting which could discharge the duties of a board.

We now come to what may be called the substance of the case, and unfortunately, from the course the case took before Charles, J., we have not the benefit of his opinion upon it. The question is this, had the general meeting (assuming it to have been regularly called by the notice, as I hold it was) power to remove the plaintiff from being a director? That turns primarily on the 91st of the articles. [The Lord Justice read the clause, and continued:—]

A resolution for removing the plaintiff was passed, which is to be brought for confirmation before the meeting to-morrow, if that meeting can be held. But for the words "save as aforesaid," in clause 91, and the agreement referred to in the 6th clause of the articles, there would be no doubt that the company can, by a special resolution, remove any director. But those words, "save as aforesaid," undoubtedly cause a difficulty. [The Lord Justice then referred to the agreement of the 24th of November, 1884, and continued:—] That, of course, was a contract in no way binding the company, having been entered into before the company was formed. But the 6th article says:—[The Lord Justice here read article 6, and continued:—] It is contended on behalf of the plaintiff that "save as aforesaid" in article 91 refers to article 6, and refers, therefore, to the 5th clause in the agreement of the 24th of November, 1884, and that the proper meaning of article 91 is that, subject to the provisions in favour of the plaintiff contained in the agreement of November, 1884, the general special meeting may, by special resolution, remove any director. Is that the proper meaning to give to it? "Save as aforesaid" does not fit in very well, because this stipulation in favour of the plaintiff is nowhere recited in the articles, and it would be very strong, as a mere matter of construction, even if there was nothing else to which the words "save as aforesaid" could be referred, to say that they meant subject to the provisions of the agreement of the 24th of November, 1884. To my mind, any draftsman of ordinary skill drawing such an article as this would, if that had been the intention, have said "subject to the provisions of the agreement of the 24th of November." I think, however, that the words "save as foresaid" in article 91 are explained by reference to article 89, which, in certain events, requires the removal of directors from office. The difficulty of referring the words "save as aforesaid" to that clause is, that when a director comes under clause 89 he *ipso facto* ceases to be a director, and it is not necessary there should be any resolution to remove him. This prevents the words "save as aforesaid" from accurately fitting that previous provision, but to my mind there is very much less difficulty in supposing that "save as aforesaid" was intended to refer to clause 89 than in throwing it back to article 6 and to something which is not recited, but is only referred to in that clause. I think that the draftsman when he introduced a clause enabling the company by special resolution to remove a director was afraid that some question would be raised unless he put in something to show that it would not be necessary to have a special resolution in the events referred to in article 89, and so through over-caution introduced the words "save as aforesaid." In my opinion, therefore, the "save as aforesaid" does not limit the power of removing a director which is given to the company to be exercised at the general meetings, and does not help the case of the plaintiff.

But there is another point which we ought, I think, to consider. Assuming that an unlimited power is given to the meeting by article 91, ought we, having regard to the contract entered into by the memorandum of the 24th of November, 1884, and article 6, to interfere by injunction to restrain the company in general meeting from acting under that power? I do not give any opinion upon the question how far the court would have interfered by injunction in order specifically to enforce an agreement between the company and the plaintiff that he should be an irremovable director. That point raises questions upon which I should not like to give any opinion without having them fully discussed. In my opinion we ought not to interfere in the present case, because there is no such contract between the plaintiff and the company. The memorandum of agreement of the 24th of November, 1884, is in no way a contract between the plaintiff and the company. It is said that it was adopted and incorporated into the articles, but I cannot accede to that. The company by its directors acted upon the agreement, but that does not make it binding on the company. Then, is it incorporated into the articles in such a way as to entitle the plaintiff to say, I have such a contract between me and the company as can be enforced by a court of law, and as I might enforce in equity by way of specific performance? That point is clearly settled, I think, by *Eley* v. *Positive Life Assurance Co.* There two of the members of the court of first instance held, and the other member did not express dissent, that the articles are merely a contract between the shareholders *inter se*, and that though a person in whose favour a stipulation is made in the articles may afterwards have shares allotted to him, he is not by that means put into the same position as

if he had entered into a contract with the company. This decision was affirmed on appeal. There is, therefore, no contract between the plaintiff and the company that he shall not be removed from the office of director, and there is no ground for the court interfering by way of injunction to restrain the company from coming to such resolutions as they think fit at the meeting to-morrow. The appeal must be allowed, with costs here and below.

LINDLEY, L.J.—The appeal raises two questions, each of which is somewhat important. I will first address myself to the question of substance—whether it is, or is not, competent for the shareholders of this company to remove Mr. Browne from the position of director? His case is that upon the true construction of the articles of association and the contract set out at the end of them and embodied in clause 6, there is a contract between him and the company by virtue of which he is made irremovable until the end of the year 1888. It appears to me that, having regard to the authorities, which are now somewhat numerous, he fails to establish that position. Having regard to the construction put upon section 16 of the Companies Act of 1862 in the case of *Eley* v. *Positive Life Assurance Co.* and subsequent cases, it must be taken as settled that the contract upon which he relies is not a contract upon which he can maintain any action, either on the common law side or the equity side. There might have been some difficulty in arriving at that conclusion if it had not been for the authorities, because it happens that this gentleman has had shares allotted to him, and is, therefore, a member of the company. Having regard to the terms of section 16, there would be some force, or, at all events, some plausibility, in the argument that, being a member, the contract which is referred to in the articles has become binding between the company and him. Of course, that argument is open to this difficulty—that there could be no contract between him and the company until the shares were allotted to him, and it would be remarkable that, upon the shares being allotted to him, a contract between him and the company, as to a matter not connected with the holding of shares, should arise. There are difficulties in the construction of section 16 of the Act of 1862, but those difficulties have been removed by the authorities, which show that Browne has no contract with the company which he can enforce either at law or in equity. I do not lose sight of the fact that it is necessary to be cautious in this matter, because he has filed an affidavit at the last moment, in which he says that the contract of the 24th of November, 1884, has been adopted by the company without any modification. What that means is, to say the least of it, uncertain. He has not put in evidence any document or resolution showing that the company have entered into a contract with him to the effect of the contract set out in the schedule to the articles. If there is any such contract, the observations I have made fall to the ground, but I cannot, merely because a man swears that a contract not binding on the company has been adopted by the company, come to the conclusion that there is a contract binding the company. That may be only his inference of law. If his case is that, since the formation of the company, the company have contracted with him not to remove him from his directorship, he must prove it, and this he has not yet done. It appears to me, upon the materials before us, that he has no contract with the company.

Now, if that is the true view of the plaintiff's legal position, there is a great difficulty in holding that he is not removable under article 91. Construe "save as aforesaid" how you like, I doubt his being able to make out that he is not removable. If I am right in my first position, the real effect of "save as aforesaid" in that clause is, to say the least of it, obscure. I have looked at the articles to see if I could come to any conclusion upon it, and it appears to me, as it does to the other members of the court, that the true explanation is that which has been given by Cotton, L.J. If it had been intended to except Mr. Browne from the operation of that clause, I think that it would have been so stated in unmistakable language, and other words than those found would have been used. This disposes of the question of substance.

I now come to what I may now call the question of technicality—the alleged irregularity of the meeting. Mr. Browne says, whatever right the company may have to remove him by special resolution, they have no right to act upon the notice which was issued by the secretary to summon a general meeting. The objection is this:—It appears that on the 1st of October, 1887, Mr. Harvey, the secretary of the company, issued a notice convening an extraordinary general meeting of the members of the company for two purposes—for the purpose of passing a special resolution removing Mr. Browne from the board of directors, and for the purpose of passing a resolution authorizing the increase of the capital of the company. This notice convening the meeting purports to be issued by order, which, I suppose, means by order of the board of directors. The plaintiff contends that it has been issued without proper authority, for that Mr. Harvey, the secretary, issued it, not by the order of the board of directors, but by the order of two of the directors not duly assembled. If that is so, then he says it is not competent for the shareholders to pass this resolution, and what they do at a meeting thus irregularly called will be invalid, and ought to be stopped.

Now let us look at the facts. In the first place, Mr. Browne in his notice of motion does not seek to restrain the company from increasing the capital. He does not ask that all proceedings under this alleged irregular notice shall be stopped. He confines his application to the first part of it, and asks the court to restrain the shareholders from passing any resolution removing him. If there were anything in his objection he would be entitled to go on and ask the court to restrain the shareholders from passing any resolution at all. Now let us look a little more closely at this matter. It appears that the directors of this company had been in the habit of holding meetings at short notice, convened without any, or, if any, without much, formality. It appears that before the meeting of the 28th of September the meetings of the directors were usually held at the office of Mr. Browne himself, and he never raised any objection to the shortness of the notice before this. The meeting is quarrelled with upon the ground that sufficient notice was not given to all the members of the board to assemble and hear what was proposed to be done. The power of the board to convene a meeting of the shareholders is contained in clause 56 of the articles, and runs thus:—"The directors may, whenever they think fit, call an extraordinary meeting," and then it provides that they shall be bound to do so upon such requisition as therein mentioned. "The directors may, whenever they think fit." That means, I apprehend, that the directors may do it at a meeting properly convened. I do not think it means that any directors may, without consulting the others, call an extraordinary meeting. I think that, so far, Mr. Marten's argument is right, and if the plaintiff had complained that the meeting of directors convened at such a short notice was not duly convened, and had sought the interference of the court to prevent the directors from acting on a resolution passed at it, I can understand that he would have had a plausible case. But he did nothing of the kind. He took no notice of the matter. He did not say that it was inconvenient for him to attend, and he did not ask the directors to adjourn it. He does nothing at all until this notice convening the extraordinary meeting has been issued and circulated, nor until four days before the meeting. His contention now

is that what he calls this irregularity in serving the notice upon him renders it incompetent for the shareholders to pass the resolution to consider which they have had notice to meet. It appears to me that, if we gave effect to such an argument as this, we should be paralyzing the whole course of business of these companies. It is competent for directors to call meetings, it is competent for shareholders to pass resolutions, and the most that can be said here is that there is or may be some irregularity, but an irregularity (if such it be) which can be cured at any moment. In such cases the court never interferes. I think it is most important that the court should hold fast to the rule upon which it has always acted, not to interfere for the purpose of forcing companies to conduct their business according to the strictest rules, where the irregularity complained of can be set right at any moment. I am not at all sure, having regard to the mode in which, and the short notice upon which, those meetings of directors were held, that this gentleman could have complained of this meeting of directors as irregular, but I will assume that he could. If, at the time of receiving the notice of the board meeting, he had said to the secretary that he could not attend as the notice was too short, he might have had some case. I am not prepared, however, to say that, in consequence of the shortness of that notice, the shareholders were incompetent to pass the special resolution they were convened to consider. If they confirm it to-morrow it appears to me that their doing so will be entirely valid, and I am of opinion that this injunction ought not to have been granted.

Lopes, L.J.—I entirely concur, and I can add nothing to what has been said.

Appeal allowed.

Solicitors for the appellants, *Parker, Garrett, & Parker.*

Solicitors for the plaintiff, *W. F. Tarn.*

From Chan. Div. July 29, 30; Aug. 3.

In re Clarke.

Coombe *v.* Carter. (*a.*)

Mortgage—Assignment of future property by way of mortgage—Contract enforceable in equity—Property on coming into existence bound.

A mortgagor assigned by way of mortgage (inter alia) *property not then in existence, comprising "all moneys . . . to which the mortgagor . . . may, during this security, become entitled under any settlement, will, or other document, either in his own right or as next of kin of . . . any . . . person or persons," and "also all . . . personal property . . . of, to, or in which the mortgagor, . . . during this security, shall become beneficially possessed, entitled, or interested for any vested, contingent, or possible estate or interest." Subsequently to the execution of the mortgage, but during the continuance of the security, the mortgagor became entitled to a share of a testator's residuary estate.*

Held, that, with regard to all property non-existent at the date of the mortgage, the mortgage was to be treated in equity as a contract for valuable consideration received; that the contract here was divisible in its terms; that, at all events, with respect to moneys to which the mortgagor might become entitled under any will, the contract would be enforced in equity; and therefore that the share in the testator's residuary estate to which the mortgagor had become entitled was bound by the contract and was effectually charged in favour of the mortgagee.

(a.) Reported by M. J. Blake, Esq., Barrister-at-Law.

Holroyd *v.* Marshall, 11 *W. R.* 171, 10 *H. L. Cas.* 191, *and* Bennett *v.* Cooper, 9 *Beav.* 252, *discussed and followed.*

Belding *v.* Read, 13 *W. R.* 867, 3 *H. & C.* 955, *not followed.*

Official Receiver *v.* Tailby, 35 *W. R.* 91, 18 *Q. B. D.* 25, *distinguished.*

Per Cotton *and* Bowen, L.JJ.—*No distinction can be drawn on the question of "vagueness" between contracts in marriage settlements and contracts in other instruments relating to future property.*

Decision of Kay, J. (35 *W. R.* 388, 35 *Ch. D.* 109), *affirmed.*

Appeal from a decision of Kay, J., reported 35 W. R. 388, 35 Ch. D. 109.

The material facts and documents will be found fully set out in the report of the case in the court below (35 W. R. 388).

By a mortgage deed dated January 18, 1876, the mortgagor, in consideration of the sum of £800 then paid him by the mortgagee, assigned to the mortgagee by way of mortgage (*inter alia*) all moneys of or to which the mortgagor then was or might during the security become entitled under any settlement, will, or other document, either in his own right or as next of kin of his father or any other person or persons. The mortgage deed also contained a "general words" clause purporting to sweep in all personal property of, to, or in which the mortgagor then was, or during the security should become, beneficially possessed, entitled, or interested for any vested, contingent, or possible estate or interest.

In 1881 the mortgagor filed a petition for liquidation, and the present appellant was the trustee in liquidation of the mortgagor. In 1884 the mortgagor, while still a liquidating debtor, became entitled under the will of the testator in the action to a share of the testator's residuary estate. An originating summons was taken out by the plaintiff, the executor of the testator's will, to have the question determined whether this share was or was not bound by the mortgage.

Kay, J., held that the share in question was bound by the mortgage, and passed, therefore, to the mortgagee. The trustee in liquidation of the mortgagor appealed.

Begg, for the appellant.—The principle on which an assignment of future property is enforced is that of specific performance of a contract: *Collyer* v. *Isaacs*, 30 W. R. 70, 19 Ch. D. 342. The effect of the mortgage here is to include all property which the mortgagor might acquire during the continuance of the mortgage security. A contract of that kind is too vague to be specifically performed: *Official Receiver* v. *Tailby*, 35 W. R. 91, 18 Q. B. D. 25. The contract here is not divisible (*Belding* v. *Read*, 13 W. R. 867, 3 H. & C. 955), and therefore cannot be enforced: *In re D'Epineuil*, 30 W. R. 702, 20 Ch. D. 758. Covenants to settle all future property in marriage settlements have always been treated favourably in equity for the purpose of protecting the wife: *Hardey* v. *Green*, 12 Beav. 182; *Lewis* v. *Maddocks*, 8 Ves. 149.

E. Widdrington Byrne, for the respondent, the mortgagee. — First the covenant contained in the general words of the mortgage to bring into the security all future-acquired property is perfectly valid and can be enforced; and, secondly, if it be necessary to do so, I say the covenant can be read distributively, and the words "all moneys of or to which" the mortgagor "may, during this security, become entitled under any . . . will," are sufficient to comprise this particular share in question without relying on the general words at all. On the second point, *Bennett* v. *Cooper*, 9 Beav. 252, is a distinct authority in my favour. On the first point there is no distinction in principle between

contracts to settle future property in marriage settlements and the same contracts in other instruments. As to *Official Receiver* v. *Tailby*, it was a decision that went merely on the construction of the words in the particular document there, and is not binding generally. *Belding* v. *Read* is not reconcilable with *Holroyd* v. *Marshall*, 11 W. R. 171, 10 H. L. Cas. 191, nor with *Clements* v. *Matthews*, 11 Q. B. D. 808, 31 W. R. Dig. 23. [BOWEN, L.J., referred to *Reeves* v. *Barlow*, 32 W. R. 672, 12 Q. B. D. 436.]

Begg replied.

Yate-Lee, for the executor of the testator.

Cur. adv. vult.

Aug. 3.—COTTON, L.J.—This is an appeal by one of the defendants from a judgment of Kay, J., who held that, as between the mortgagee and the trustee in bankruptcy of the mortgagor, the mortgagee is entitled to a legacy bequeathed to the mortgagor. [The Lord Justice then stated shortly the terms of the mortgage deed, and continued:—] It is clear that an assignment cannot at law pass future property, but it may be made effectual against future property on the ground that a court of equity will, in a suitable case, enforce it as a contract.

It is necessary, first, to consider the principle on which an assignment of property not in existence at the time is made effectual. The principle is that such an assignment, as regards the non-existing property, amounts to a contract for value, which a court of equity will specifically perform. That was laid down by Lord Westbury in *Holroyd* v. *Marshall*, and I should not have gone back to this were it not that there seems to be a misunderstanding as to the application of the doctrine of specific performance in these cases. The ordinary application of the doctrine of specific performance is to compel a vendor or a purchaser to complete a contract for sale or for purchase, a contract which is wholly executory. Where such a contract relates to goods the court will not in general decree specific performance. Why is this? Because the court considers that in general damages are a sufficient remedy, and the proper remedy for a breach of contract to sell or purchase goods; but that does not apply to a breach of contract relating to land.

The question in the present case is whether this assignment gave the mortgagee an effectual charge upon a share of the residuary estate of the testator in this action, which came to the mortgagor in 1884 on the death of the testator. In the present case the contract is not wholly executory. The mortgagee has performed his part of it by advancing his money on the faith of it, and the principle that damages are a sufficient remedy does not apply. Still there may be grounds which will induce a court of equity to refuse specific performance. It may be that the court cannot ascertain the property; in that case it will refuse to enforce the contract on the ground of vagueness. That the property cannot be identified at the time the contract is made does not signify if it can be identified at the time when the court is asked to carry the contract into effect. Again, a contract might be so wide that the court might consider it wrong to enforce it—wrong on the ground that if fully carried into effect it would prevent the party from paying his debts and deprive him of the means of subsistence. Such an objection was adverted to in *In re D'Epineuil*. Having stated these general principles, I will proceed to consider whether the present contract is open to objections which would make it right to refuse specific performance of it.

In my opinion the decision that this legacy is effectually charged in favour of the mortgagee is right. This, in my judgment, is a divisible contract. The general words at the end of the assignment are so wide that a court of equity might say they were too wide to be enforced. I do not decide that point, because, in my opinion, it is not necessary to do so. We have here a distinct assignment of legacies, and that is not too wide to be enforced. Is it too vague? As I have said, vagueness comes to nothing if the property is definite at the time when the court is asked to enforce the contract. Legacies are capable of being as readily identified as anything that can be mentioned. Light is thrown on this subject by the cases on covenants in marriage settlements to settle the wife's future property. It is said that marriage settlements are favoured instruments, and that the cases on them furnish no guide as to other instruments. I cannot agree with that. It is true that an agreement to settle a wife's future property is not open to the second objection I have mentioned, for an agreement to settle upon a wife and her children all property that comes to her during the marriage cannot be considered unreasonable. But, as regards the other objection, it appears to me impossible to hold that a covenant which is not too vague to be executed when it is found in a marriage settlement is too vague to be executed when found in a mortgage. In *Bennett* v. *Cooper* Lord Langdale held that a collateral security very similar in its nature to the present ought to be enforced. The description there was: "All sums of money then or thereafter to become due to him, and all legacies and bequests which had already or might thereafter be given or bequeathed to him or his wife by any person whomsoever," and it was held that legacies subsequently bequeathed to the mortgagor were bound. That disposes of the present case, but I will refer to some of the cases cited to us.

In *Belding* v. *Read* the court appears to me to have gone wrong on the construction of the instrument. Instead of treating it as a divisible contract to assign the effects to be in or upon the assignor's premises at Reedham, and also to assign all the personal estate to which he should be entitled anywhere in Great Britain, the court treated it as one indivisible contract, and as too vague to be enforced. Perhaps if the contract had been one indivisible contract a court of equity might have said that it ought not to be enforced because it would be almost impossible to ascertain what was included in it, and because, if enforced, it would take away the assignor's whole means of livelihood.

Mr. Begg contended that the judges did not treat it as one indivisible contract, but it appears to me that they did, and I expressed my view to that effect in *Clements* v. *Matthews*. In the case of *Official Receiver* v. *Tailby* the Master of the Rolls seems to have thought that in *Clements* v. *Matthews* I expressed an opinion that the general words alone would not have bound the future property. I did not mean to give an opinion one way or the other on that point, which it was not necessary to decide. I thought that the contract was divisible, and that the contract in question came within that branch of it to which no objection on the ground of vagueness could be raised and was therefore bound, so that it was unnecessary to consider whether it would have been bound if the contract had only contained the general words. The case of the *Official Receiver* v. *Tailby* was much pressed on us by the appellant. It is a decision of the Court of Appeal, and if it were the same as the present case we should be bound by it. But that case was very different. It turned on an assignment of "all the book debts due and owing or which may, during the continuance of the security, become due and owing to the said mortgagor."

We have not here the difficulty which the Court of Appeal had in that case. The contract here refers to property capable of being identified. I am not certain on what grounds the Court of Appeal arrived at their decision in that case, for they do not lay down any principle, and whatever the grounds were, I think the

the case does not apply to the very different terms of the present instrument. The appeal in my opinion fails.

BOWEN, L.J.—I am of the same opinion and take the same view as Cotton, L.J. The time will come when the Court of Appeal will have to consider the law as to assignments of future property, and to lay down—if it can—for the guidance of the profession some more definite rule than is to be gathered from the cases since *Holroyd* v. *Marshall*. As it seems to me, language has been used in some of them which tends to confuse the two distinct ideas of vagueness in the contract and vagueness which arises from the difficulty of identifying future property. "Vagueness" is a misleading term. A contract may be so vague in its terms that it cannot be understood, and in that case it is of no effect at law or in equity. There is another kind of vagueness which arises from the property not being ascertained at the time of the contract: but if at the time when the contract is sought to be enforced the property has come *in esse*, and is capable of being identified as that to which the contract refers, I cannot see why there is in it any such vagueness as to prevent a court of equity from enforcing the contract. Even then there may be something in the contract which will prevent its being enforced. I will not attempt to define what will have that effect. It is suggested that, as distinct from vagueness, there may be such wideness in a contract that it ought not to be enforced by a court of equity. Thus it is said that a contract by a man to assign all the property that shall come to him would be too wide to be enforced. I will give no opinion on that point till it comes before us for decision.

A contract, of course, may be one of which a court of equity cannot decree specific performance, because it relates to nothing specific—*e.g.*, a contract to supply a given quantity of goods of a particular description. That is a case where the subject-matter cannot be ascertained. And even where the subject-matter is ascertained there may be cases where a court of equity will not interfere. The uncertainty of the subject-matter at the time when the contract is entered into does not seem to me to be an adequate ground, however, for declining to interfere if the subject-matter has become ascertained when the court is asked to enforce the contract. I am aware there may be an important distinction between a case where the contract is wholly executory and a case where the whole consideration has been paid. I only wish to say that in my opinion the subject is one of great difficulty, that it does not appear to me to have been exhaustively considered, and that there is a good deal of obscurity in the language often used about it. I retain the same doubts as I expressed in *Clements* v. *Matthews*.

In *Holroyd* v. *Marshall* Lord Westbury says:—"If a vendor or mortgagor agrees to sell or mortgage property real or personal of which he is not possessed at the time, and he receives the consideration for the contract and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a court of equity would compel him to perform the contract, and that the contract would in equity transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a court of equity would decree specific performance. If it be so, then immediately on the acquisition of the property described, the vendor or the mortgagor would hold it in trust for the purchaser or mortgagee according to the terms of the contract. For if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained."

I must express my concurrence with Cotton, L.J., as to the difficulty of making a distinction between contracts on marriage and other contracts as regards the question of vagueness. As to the cases cited, I think that in *Belding* v. *Read* the court construed the agreement wrongly, and that the case cannot stand with *Clements* v. *Matthews*, as I intimated in *Reeves* v. *Barlow*. I ought to add that I am not satisfied that the judges in *Belding* v. *Read* altogether appreciated the observations of Lord Westbury in *Holroyd* v. *Marshall*.

Official Receiver v. *Tailby* is a peculiar case. In *Holroyd* v. *Marshall* it was laid down that, when the property comes into possession, you must see whether the subject-matter of the contract is such that the court would decree specific performance. In *Official Receiver* v. *Tailby* the court laid down no principle as to what contracts can be specifically performed; they only said that the contract before them could not, and I am not sure how they construed it. The present contract is entirely different. According to *Clements* v. *Matthews* it can be divided, and I see no reason for saying that a contract to assign all legacies which shall be bequeathed to the mortgagor is one which a court of equity will not perform. It is, therefore, unnecessary to go into the question whether, if the assignment had contained only the sweeping general words, the property would have been bound. I agree, therefore, that the appeal fails.

FRY, L.J.—I agree in thinking the decision of Kay, J., is right, but, as the question is one of general importance, I will add a few words.

We have not to consider the cases where an assignment of future property is made effectual by what Lord Bacon calls "*novus actus interveniens*." There is another class of cases where an assignment of future property will have effect given to it as a contract to give security on future property—viz., where the consideration has been received and the property has come into existence. That there are cases in which the court will enforce such a contract is not in dispute. I think there may be cases where the court will not do so, owing to the nature of the subject-matter of the contract, and the authorities seem to indicate the existence of such a class of cases. *Belding* v. *Read* indicates it, though I think that in that case the court drew a wrong boundary line, and were in error in holding that in such a case a court of equity would not decree specific performance. In *Official Receiver* v. *Tailby*, where the contract was indivisible, the court held it was one which could not be enforced, and I, considering myself bound by *Belding* v. *Read*, came to the same conclusion in *In re D'Epineuil*. There may, I think, be contracts of such a nature that the court will not decree specific performance of them. It might say that a contract by a man to assign all his future property by way of mortgage was one which ought not to be enforced, because it would deprive the assignor of the means of livelihood, and would tend to a multiplication of actions for getting in the different parts of the property which the assignor would be bound to assign from time to time. But in the present case we have not to draw the line between contracts which the court will enforce and contracts which it will not.

The cases where the contract is wholly executory on both sides differ materially from a case like the present, where the contract on one side has been performed. Wherever the boundary line is to be drawn I am satisfied that the present falls within the class of cases where the contract will be enforced. It is a contract relating to several subject-matters, one being all real and personal estate to which the mortgagor may become entitled under any will. I see no reason for not specifically performing that contract as to any property that comes to the mortgagor under a will. He has received the consideration and ought to perform his part

of the contract. Such a contract was enforced by Lord Langdale in *Bennett* v. *Cooper*, and, though we are not bound by his decision, I think it one which ought to be followed.

The appellant very properly pressed upon us the case of *Official Receiver* v. *Tailby*, where the court came to the conclusion (and it may be a right conclusion) that a contract to assign all book debts which should be owing to the mortgagor was too vague to be enforced. If the case had been in point we should have submitted to it. The court seemed inclined to hold that the agreement included, not only all debts entered in the assignor's books, but all debts which ought to be so entered, in which case it might be held that the uncertainty made the contract one which the court could not enforce. There is no such difficulty here; the contract is quite different, and, as I cannot find that the court in that case laid down any principle, I do not think it is any authority against our decision.

Appeal dismissed.

Solicitors, *Storey & Cowland*, for *Crick & Freeman*, Maldon; *Paterson, Snow, & Co.*, for *F. T. Veley*, Chelmsford; *Duffield & Bruty*.

From Q. B. Div. Jan. 17, 23.

WILSON *v.* GLOSSOP. (*a.*)

Husband and wife—Adultery of wife—Connivance of husband—Wife living separate from husband—Liability of husband for necessaries supplied to wife.

A husband who has turned his wife out of doors without any means of support on account of adultery committed by her with his connivance is liable for necessaries supplied to her.

Judgment of the Queen's Bench Division (ante, *p.* 77), 19 *Q. B. D.* 379, *affirmed.*

Appeal from the judgment of the Queen's Bench Division.

The action was brought in the Sheffield County Court to recover £40 for forty weeks' maintenance of the defendant's wife. It appeared that the defendant, on account of his wife's adultery, turned her out of doors without any means of support. She thereupon went to her mother, the plaintiff, who supplied her with board and lodging. The defendant filed a petition for dissolution of marriage, and on the trial of the petition the jury found that the wife had committed adultery, but that the defendant had connived at it. The petition was accordingly dismissed.

The defence relied upon in this action (the claim being admitted to be for necessaries) was the adultery of the wife. The answer was that the defendant's connivance precluded him from relying upon this defence.

The Divisional Court, reversing the judgment of the county court judge, gave judgment for the plaintiff (see *ante*, p. 77, 19 Q. B. D. 379).

The defendant appealed.

Moorsom, Q.C., for the defendant.—When a husband has turned his wife away for adultery, she carries with her no implied authority to pledge his credit for necessaries, and the same rule applies where she commits adultery while living apart from him: *Manby* v. *Scott*, 2 Sm. L. C., 9th ed., 525, 535; *Cooper* v. *Lloyd*, 6 C. B. N. S. 519, 7 W. R. C. L. Dig. 42; *Cox* v. *Kitchin*, 1 B. & P. 338; *Rex* v. *Flintan*, 1 B. & Ad. 227; *Govier* v. *Hancock*, 6 T. R. 603. In this last case the husband was guilty of gross misconduct, and yet he was held not liable. He had brought a mistress into the house with his wife, treated his wife with cruelty, and finally turned her out of doors. The wife then committed adultery, and the husband was held not liable for necessaries supplied to her. Connivance of the husband at the wife's adultery is another form of misconduct, and cannot affect the doctrine that adultery of the wife destroys any implied authority to pledge the husband's credit while living separate. *Norton* v. *Fazan*, 1 B. & P. 226, may seem to militate against this contention, but that case, as Buller, J., said in his judgment, was an anomalous one. A wife who has committed adultery with her husband's connivance and has been turned out of doors cannot get restitution of conjugal rights: *Drew* v. *Drew*, 1 Notes of Cases, 315; *Dennis* v. *Dennis*, cited in a note to *Turton* v. *Turton*, 3 Hagg Ecc. 348, 353.

H. Reed, for the plaintiff.—The old cases would seem to go this length—that a husband who turns away his wife for any cause remains chargeable for necessaries for her: *Robinson* v. *Gosnold*, 6 Mod. 171; *per* Hale, C.B., in *Manby* v. *Scott*, Bac. Abr., Baron & Feme (H.); *Etherington* v. *Parrot*, 1 Salk. 118. The modern cases, however, show that if the wife is turned away for adultery she carries no authority to pledge her husband's credit: *Ham* v. *Toovey*, Selw. N. P. 228; *Hardie* v. *Grant*, 8 C. & P. 512; *Culley* v. *Charman*, 29 W. R. 803, 7 Q. B. D. 89. The question always is, was the husband justified in turning his wife away? A husband who connives at his wife's adultery and then turns her away does so without lawful excuse, and she carries with her authority to pledge his credit for her maintenance. As to a wife losing her claim to dower by adultery, he cited Co. Litt., 32b., and *Manby* v. *Scott*, 2 Sm. L. C., 9th ed., at p. 536. As to whether connivance was a bar to a claim for restitution of conjugal rights, he cited *Holmes* v. *Holmes*, 2 Lee, 116; *Hope* v. *Hope*, 1 Sw. & Tr. 94, 6 W. R. Dig. 15; *Seaver* v. *Seaver*, 2 Sw. & Tr. App. 2, p. 665.

Moorsom, Q.C., replied.

Cur. adv. vult.

Jan. 23.—Lord ESHER, M.R.—In this case the plaintiff must be taken to be in the position of a stranger who has supplied certain articles necessary for the sustenance of a married woman who is living apart from her husband. In proceedings in the Divorce Court by the husband for dissolution of marriage, the jury found that though the wife had committed adultery, the husband had connived at it—that is to say, that he was an accomplice in what she had done. Notwithstanding that finding, the husband has, after the decision of the Divisional Court against him, brought this appeal, and contends that he is not liable by reason of the adultery of his wife. A man who marries is bound by law to maintain his wife, unless she offends by committing adultery. A man is bound by every moral tie to protect his wife against infamy, and to shield her from her own weakness. Instead of that, this defendant has been a willing accomplice in his wife's adultery. The argument on his behalf necessarily goes to this extent, that if he had forced his wife to commit adultery and had lived on the wages of her prostitution he could afterwards for that very adultery throw her on the streets without any means of support, and be free from all liability to pay for her maintenance. Nothing could induce me to say that such is the law of England, unless I were bound by a superior authority so to hold. If there had been such an authority I should have bowed before it with regret. I do not care to consider whether a wife can, under the circumstances, claim restitution of conjugal rights. A husband who turns his wife out of doors on account of her adultery without any means of

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

support is guilty of a harsh and cruel act; but to say that a husband, who has been a willing accomplice in his wife's adultery, can throw her on the streets without any means of support, and without incurring any liability for her maintenance, is to state that which is shameful. There is no authority, nor any vestige of an authority, in support of such a proposition; and, therefore, I am of opinion that the defendant is liable, and that this appeal should be dismissed.

FRY, L.J.—If a husband turns his wife away without any means of support for any cause not justifiable in law she carries with her the right to pledge his credit for her maintenance. Is adultery committed by a wife with the connivance of her husband a justification for the husband turning her away from his house so as to relieve him from any liability in respect to her maintenance? In answer to that inquiry no direct authority can be given. To say that it would be a sufficient justification would, in my opinion, be both morally and socially abominable. I say that neither morally nor legally is it any justification. The cause for which the defendant turned his wife away was not a justifiable one, and it followed that she carried with her the right and the power to pledge his credit for her maintenance. The wife has received maintenance from the plaintiff, and the plaintiff can recover the expenses so incurred.

LOPES, L.J.—The facts in this case are not in dispute, and may be shortly stated as follows:—The wife committed adultery with the connivance of her husband; the husband subsequently turned her out of doors without any means of support; the plaintiff supplied her with the necessary means of support, and now seeks to make the husband liable for the money so expended.

During cohabitation there is a presumption (though a rebuttable one) arising from the circumstance of cohabitation, that the wife is in certain circumstances the agent of the husband, and entitled to pledge his credit. But when the wife is living apart from her husband at the time of making the contract, the presumption is the other way, and it lies on the creditor to show that the wife is living apart under such circumstances as give her an implied authority to bind him. If she is turned away by her husband without any justifiable cause, and without the means of supplying herself with necessaries, the husband is bound by any contract she makes for necessaries suitable to her degree and estate; per *Bayley, J.*, in *Montague* v. *Benedict*, 2 Sm. L. C. 9th ed., at p. 507. Again, in *Eastland* v. *Burchell*, 27 W. R. 290, 3 Q. B. D. 432, Lush, J., says:—"The authority of a wife to pledge the credit of her husband is a delegated, not an inherent, authority. If she binds him, she binds him only as his agent. This is a well-established doctrine. If she leaves him without cause, and without his consent, she carries no implied authority with her to maintain herself at his expense. But if he wrongfully compels her to leave his home, he is bound to maintain her elsewhere, and if he makes no adequate provision for this purpose, she becomes an agent of necessity to supply her wants upon his credit." Apply the law so laid down to the present case. A husband, who has consented to the adultery of his wife, turns her out of doors without the means of providing herself with necessaries. Does he not wrongfully compel her to leave his home? What right has he to complain of that to which he has been a willing party, and what justification can it afford for his turning his wife out of doors without the means of supplying herself with necessaries? *Harris* v. *Morris*, 4 Esp. 41, relied upon in the court below, seems to proceed on the ground that the husband's liability revives if he takes the adulteress back into his house, and that when he turned her out again, he turned her out with power to pledge his credit for necessaries. That case does not seem to assist in the decision of the case now before the court. Lord Kenyon seems to found his judgment on the fact that she was *sponte retracta*. I think the judgment of the court below right, and that this appeal should be dismissed.

Appeal dismissed.

Solicitors for the plaintiff, *Munton & Morris*, for *Parker & Brailsford*, Sheffield.

Solicitors for the defendant, *Hickin, Graham, & Fox*, for *W. J. Clegg & Sons*, Sheffield.

From Q. B. Div. Jan. 11, 16, 23.

SHRAPNEL v. LAING. (a.)

Practice—Costs—Claim and counter-claim—Defendant recovering on counter-claim a larger sum than plaintiff on claim—Event.

Where, in a trial by jury, there is a claim and a counter-claim, which is not a set-off, but is in the nature of a cross-action, and the plaintiff succeeds on the claim and the defendant on the counter-claim, the plaintiff should get the general costs of the claim, to be taxed as though it were an independent action, and the defendant the general costs of the counter-claim, to be taxed as though it were another independent action, and the allocatur for costs should be given for the balance due to the party in whose favour such balance is.

Appeal from a divisional court (Stephen and Charles, JJ.).

The action was brought for damages for breach of contract, and there was a counter-claim for work done under the contract. At the trial an agreement was come to between the parties, which was indorsed on the briefs of counsel in the following terms:—"Verdict for the plaintiff on the claim for £50, and for the defendant on the counter-claim for £80. Costs as in the ordinary practice in trial by jury with such a result. Judgment accordingly." The judgment was entered "that the plaintiff recover £50 against the defendant, and that the defendant recover £80 against the plaintiff, and costs to be taxed." The taxing master gave the plaintiff the costs of the action, except such as related to the counter-claim, and gave the defendant the costs of the counter-claim only.

The defendant objected to the taxation because the master had allowed to the plaintiff all such items as he would have been entitled to if he had a right to the general costs of the action, to which the defendant denied his right, and because the master had disallowed to the defendant items to the allowance of which he considered that he was entitled as the party entitled to the general costs of the action.

The Divisional Court refused to interfere with the taxation.

Hugh F. Boyd, for the appellant.—By ord. 21, r. 17, the judge may enter judgment for the balance on claim and counter-claim. The judgment in this case ought to have been entered for the balance. The costs in this case would follow the event by ord. 65, r. 1. The balance, which is in the appellant's favour, is the event, and he is therefore entitled to the general costs of the action: *Baines* v. *Bromley*, 29 W. R. 706, 6 Q. B. D. 691. *Lund* v. *Campbell*, 33 W. R. 510, 14 Q. B. D. 821, is directly in point. [LOPES, L.J., referred to *Hewitt & Co.* v. *Blumer & Co.*, 3 *Times* L. R. 221.] The decisions are conflicting. *Ward* v. *Morse*, 31 W. R. 936, 23 Ch. D. 377, assumes to follow *Saner* v. *Bilton*,

(a.) Reported by A. P. PERCIVAL KEEP, Esq., Barrister-at-Law.

27 W. R. 472, 11 Ch. D. 416, and *Mason* v. *Brentini*, 29 W. R. 126, 15 Ch. D. 287, which are in direct contrast to *Baines* v. *Bromley*.

Kisch, for the respondent.—The judgment was properly drawn up, and the master has taxed accordingly. He has apportioned the costs of common items as in *Ward* v. *Morse*.

Boyd replied.

Cur. adv. vult.

Jan. 23.—Lord ESHER, M.R.—In this case there was a motion for review of taxation, and the Divisional Court have refused to review it. Upon a summons to review taxation the person taking out the summons must show that he has taken objections to the taxation, and by those objections he is bound and those objections only can be considered. In this case there was a claim and counter-claim proper—that is to say, an independent counter-claim which is not in the nature of a set-off. The plaintiff recovered on the claim and the defendant on the counter-claim, the defendant recovering a larger amount altogether than the plaintiff. Judgment was entered according to terms arranged by the counsel. As to the form in which the judgment was entered, I think for the purposes of taxation it is immaterial whether it was entered for the balance or not. It is therefore unnecessary to determine what was the proper form in which, in accordance with the arrangement, it ought to have been entered. It is, in my opinion, a matter for the discretion of the judge under ord. 21, r. 17, whether in such a case the judgment should be entered for so much for the plaintiff on the claim and for so much for the defendant on the counter-claim, or whether it should be entered for the balance. I should suppose, unless there were reason to the contrary, that the usual course would be for the judge to direct judgment to be entered for the balance. But, however the judgment be entered, the rule as to the taxation of costs in such a case is the same. The fundamental ground of that rule is that the claim, with its issues, is a cause by itself, and the counter-claim, with its issues, is also an independent cause by itself. They are, in fact, cross-actions founded on different circumstances and very often arising from different transactions. The taxation of costs must therefore be conducted on that footing. The costs of the claim must be taxed as though the claim were a cause by itself. If there are issues on the claim and the plaintiff succeeds on the claim, but fails on some of the issues, the plaintiff will get the costs of the cause, but the defendant will get the costs of the issues on which he has succeeded. So, where there is a wholly independent counter-claim, the costs must be taxed as though it were an independent action. If the defendant succeeds on the counter-claim, but fails on some of the issues raised by it, he will get the general costs of the counter-claim, less the costs of those issues on which he has failed, and on which the plaintiff, who is the defendant in the counter-claim, has succeeded. The taxing master's allocatur will therefore show this, but it will show either that the costs of the claim exceed those of the counter-claim, or *vice versâ*, and the amounts will be set off. The only difficulty is one which can be easily dealt with by the master. Sometimes the means of arriving at the result are the same, although the actions are different. For instance, there may be only one brief for each party on claim and counter-claim. Then that one brief must be treated by the master as if it were two. He must look through it and divide it, so much as necessary for the claim, so much as necessary for the counter-claim. The same will be the case as to the fee on the brief and as to any other such items which may be common to both actions. I do not think there are many such common items. The writ may, perhaps, be a common item, and possibly interrogatories, but it is not necessary to decide that now.

The only objection that has been taken to this taxation is that, because the defendant recovered more than the plaintiff on a balance, he ought to have the general costs of the action. I do not think that objection can be sustained. I wish to follow entirely what I said in *Hewitt & Co.* v. *Blumer & Co.* That judgment, which is binding on us, appears perfectly right, and I adopt it again now. It follows that this appeal fails. I wish to add that nothing that I have said derogates from the absolute right of a judge who tries a case without a jury to direct how the costs shall go.

FRY, L.J.—I also think that this appeal must be dismissed. The application to us is twofold—to reform the judgment, and to review the taxation. I think that the judgment has been drawn up in the proper form. I agree with the Master of the Rolls that ord. 21, r. 17, gives the judge a discretionary power as to the form of entering up a judgment, but I think that is immaterial, because the costs have to follow the event here. The plaintiff, therefore, is entitled in this case to the costs of the claim and the defendant to the costs of the counter-claim. The only question raised by the objections is whether a defendant who succeeds on his counter-claim for a larger sum than is recovered by the plaintiff on his claim is entitled to the general costs of the action. I think he is not. We have nothing now to do with proportioning common items. They are referred to in *Hewitt & Co.* v. *Blumer & Co.* and in *Ward* v. *Morse*, but they do not concern us now, and I wish to guard myself from expressing any opinion about them.

The result, then, is that the plaintiff will get the general costs of the claim and the defendant the general costs of the counter-claim.

LOPES, L.J.—It is, I think, immaterial to consider the form in which the judgment was entered. The case appears to me to be absolutely governed by the case of *Hewitt & Co.* v. *Blumer & Co.* I think, therefore, that the appeal must be dismissed.

Appeal dismissed.

Solicitor for the appellant, *Henry F. Kite.*

Solicitors for the respondent, *Harding & Co.*

From Q. B. Div. Dec. 19.

UNDERHAY v. READ. (a.)

Mortgage—Subsequent lease by mortgagor—Payment of rent to mortgagee under compulsion—Validity of payment as against mortgagor—Appointment of receiver.

Where a tenant holding under a lease, granted by the mortgagor subsequent to the mortgage, pays to the mortgagee the amount due for rent under threat of legal proceedings and in consequence of the default of his lessor, the tenant can set up such payment in answer to a claim for the rent by the mortgagor, or by anyone claiming under him.

Johnson v. Jones, 9 *A. & E.* 809, *followed.*

Appeal from the Queen's Bench Division, *ante*, p. 75.

The facts were as follows:—

In February, 1886, the defendant mortgaged a house to two persons, and on the 11th of March, 1886, he demised this house to one Butler, who had no knowledge of the mortgage, at an annual rent payable quarterly.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Butler paid the quarter's rent due in June, 1886, to the defendant, but on the 7th of July the mortgagees gave him notice to pay to them the rent then or thereafter accruing due and to pay it to no other person. On the 10th of September Butler received notice of a transfer of the mortgage to a company, and the company by notice required Butler to pay the rent to them.

The plaintiff, having recovered judgment against the defendant, and this judgment being unsatisfied, on the 14th of December, 1886, Field, J., at chambers, made an order appointing the plaintiff receiver of the rents then due or to become due to the defendant in respect of two houses, one of which was the house let to Butler and mortgaged to the company, the appointment to be without prejudice to the rights of any prior incumbrancers upon the said premises who might think proper to take possession of the same by virtue of their respective securities. Notice of this order was served upon Butler.

On the 25th of January, 1887, default having been made in payment of the mortgage debt and interest thereon being in arrear, Butler was required by the company, the transferees of the mortgage, under threat of legal proceedings, to pay to them the half-year's rent due at Christmas, 1886, and thereupon he paid it to them. Application was then made by the receiver for an order directing Butler to pay to him the quarter's rent due at Michaelmas, notwithstanding that Butler had already paid it to the mortgagees. Pollock, B., made the order, but the Divisional Court discharged it: see *ante*, p. 75.

The receiver appealed.

A. Powell and *Ingpen*, for the receiver.—The Divisional Court were wrong in saying that the assent of the tenant to the notice by the mortgagees to pay the rent to them created a new tenancy between them. The notice did not alter the tenancy: *Evans* v. *Elliot*, 9 A. & E. 342; *Brown* v. *Storey*, 1 M. & G. 117; *Hickman* v. *Machin*, 4 H. & N. 716, 7 W. R. C. L. Dig. 57; *Moss* v. *Gallimore*, 1 Sm. L. C., 9th ed., 604. A mortgagee, who has taken a mortgage prior to the lease by the mortgagor, cannot claim rent from the tenant, there being no privity between him and the tenant. It differs in that from a lease made prior to the mortgage: *Moss* v. *Gallimore*. The mortgagor remains the landlord entitled to the rent until the mortgagees have evicted the tenant by their title paramount or done what is equivalent to eviction. The eviction here, at any rate, did not take place until the notice of the 25th of January, 1887, and payment of the rent to the mortgagees. But this attornment did not relate back, and so the prior rent was still payable to the mortgagor. The receiver stands in the same position as the mortgagor, and therefore can claim this rent. As to the question of pressure by the mortgagees, they had no power on the 25th of January to interfere with the prior rights of the mortgagor. To support a plea of payment by the tenant, the tenant must have been liable to distress at the suit of the mortgagees, which was not the case here. The case of *Johnson* v. *Jones*, 9 A. & E. 809, is wrong and ought to be overruled. There was no such compulsion here as would justify a plea of payment: *Wilton* v. *Dunn*, 17 Q. B. 294; *Cambell* v. *Beedle*, 7 M. & G. 386; *Pope* v. *Biggs*, 9 B. & C. 245; *Carpenter* v. *Parker*, 6 W. R. 98, 3 C. B. N. S. 206, were also referred to. Further, the tenant was guilty of a contempt of court in interfering with the receiver, and in not paying the rent to him under the order appointing the receiver. 1 Seton on Decrees, 4th ed., 414, was referred to.

Gore, for the tenant, Butler, was not called upon.*

* It should be mentioned that section 18 of the Conveyancing Act, 1881 (as to leases by mortgagor), was expressly excluded by the mortgage deed.

FRY, L.J.—This is an appeal from the Divisional Court, setting aside the order of the judge at chambers directing Butler to pay one quarter's rent to the receiver. Butler was brought before the court in this way:—The plaintiff had obtained judgment against the defendant, and the plaintiff was himself appointed receiver of the rents of two houses belonging to the defendant, one of which Butler held as tenant to the defendant. Butler had paid the rent to the defendant's mortgagees, and the receiver also claimed payment of a quarter's rent from Butler, notwithstanding that Butler had already paid it to the mortgagees, and thereupon the receiver applied for an order to that effect.

We have not to consider whether the above procedure is in proper form. I will assume for present purposes that it is correct. His lordship, having stated the facts, proceeded:—

In the first place, it is said that, a receiver of the rents having been appointed, the court will not allow any interference with him and with his right to receive the rents, and that Butler, by his conduct in not paying him the rent, has interfered with the receiver, and has therefore committed a contempt of court. The order, however, appointing the receiver is expressly made without prejudice to prior incumbrancers. It seems to me that the company are prior incumbrancers within the meaning of that order, and they have thought proper to obtain possession of the premises—that is, they have done all they could to obtain possession by getting the rents paid to them. The form of the order is designed to allow payment to prior incumbrancers of any sums which they are entitled to receive, and they may enforce their rights without committing a contempt of court. No doubt this form of order, as applied to equitable execution, is modern; but there is an old form of order for the appointment of a receiver at the instance of a second mortgagee where the prior mortgagee is not in possession, the order being made without prejudice to the rights of any prior mortgagees, or so as not to affect any prior incumbrancers who might think proper to take possession under their security. Therefore it appears to me that the prior mortgagees are entitled to insist upon their rights without committing a contempt of court.

That being so, we are driven to inquire whether, under their rights, the mortgagees had a right to receive this sum of money. In other words, whether Butler, by paying it to the mortgagees, could successfully plead payment in answer to a claim by the defendant, the lessor. This point was raised and decided by the Court of Queen's Bench as long ago as 1839 in *Johnson* v. *Jones*. The headnote there states "to an avowry for rent the tenant may plead payment of it to a mortgagee to whom the premises had been mortgaged in fee before the demise to the plaintiff, and who had demanded payment from the plaintiff, and threatened to put the law in force in case of refusal. Such plea is, in substance, a plea of payment." The circumstances in that case were very similar to those here. In the present case the mortgagees had demanded the amount due from Butler to the mortgagor for rent, and threatened eviction in case of refusal, and thereupon Butler paid it to them. The plea in that case, which was held good, shows that the tenant, being under that compulsion, and being under that compulsion by the default of the lessor, was entitled to treat that payment as payment to the lessor. Lord Denman, C.J., said: "This is a plea, not *of nil habuit in tenementis*, but of payment; and the defect of the lessor's title is shown only as a medium of proof that the payment was for the benefit and by reason of the default of the lessor himself. *Sapeford* v. *Fletcher*, 4 T. R. 511, and *Taylor* v. *Zamira*, 6 Taunt. 524, are therefore authorities to show that the plea is, in substance, good." And Littledale, J., said: "The plaintiff does not deny that he holds as tenant to the defendant; but he shows that the lease was made subject to a prior charge,

namely, the mortgage, which he was compelled to pay. The payment was of money not claimed as rent, but as due upon the loan by way of mortgage." Mr. Powell contended that that case was wrongly decided, that there was no compulsion there, and that notice to pay the rent to the mortgagees under such a threat did not amount to compulsion, and that it differed from the case of a rent-charge where the rent-charge owner might distrain upon the property. But the interest upon the mortgage debt is charged upon the property, and to my mind it is an immaterial distinction whether the tenant is liable to distress or eviction; both may be described as a compulsion to pay; and if he pays to the mortgagees under that compulsion the sum due to his lessor, he may set up that payment as against a claim by his lessor. That case has stood for nearly fifty years, and has been approved in *Cambell* v. *Boodle*, and by Bramwell, B., in *Hickman* v. *Machin*. I think, therefore, that that case is good law and ought to be followed, and that the decision applies to the present case. The judgment of the Divisional Court must be affirmed.

BOWEN, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitor for the receiver, *A. H. Crowther*.

Solicitors for Butler, *Peacock & Goddard*, for *Trevanion, Curtis, & Ridley*, Bournemouth.

High Court of Justice.

Chan. Div. } Kekewich, J. } June 7, 8.

COLLINS v. CASTLE. (a.)

Vendor and purchaser—Building scheme—Restrictive conditions—Right to enforce—Absence of mutual covenant.

In 1856 *the owner of an estate had a scheme prepared for laying it out as a building estate, and sold a few plots in* 1857. *In* 1882 *other portions were offered for sale, by the trustees of the late owner, in lots, some of which were subject to various restrictive conditions, and the others of which were free from any restriction. The plaintiff B. H. C. bought several of the free lots and one of those subject to a condition.*

In 1883 *another sale took place of the various lots left unsold in* 1882 *together with further lots, some free from restriction; and the latter were bought by the plaintiffs. In* 1885 *the defendant bought certain lots originally left unsold in* 1882, *and which were subject to the condition of building thereon houses of the value of* £1,200 *each, and entered into a covenant in the required terms with the vendors. The plan on the conditions showed the houses built on certain of the lots sold in* 1857. *The defendant intended to build houses of less value than* £1,200 *each on the lots so purchased by him.*

Held (*following* Nottingham Patent Brick and Tile Co. v. Butler, 34 *W. R.* 405, 16 *Q. B. D.* 778), *that, though the plaintiffs could not sue on the covenant entered into by the defendant with the trustees, the inference from the circumstances was that the restrictions as to building houses of a certain value were for the benefit of all the purchasers of lots on the estate, and therefore that the plaintiffs were entitled to an injunction to restrain the defendant from building houses of less value than* £1,200 *each.*

(a.) Reported by J. W. GREIG, Esq., Barrister-at-Law.

Trial of action.

The Marquis of Camden, in 1856, being the owner of the Camden Estate, near Tunbridge Wells, had plans prepared for the purpose of laying it out for building, and sold a few plots, the purchasers of which had to enter into a covenant as to the character of the houses to be built on the land.

The Marquis of Camden died in 1875, having, by his will, devised his real estate to trustees. No further sale took place until 1882, when a portion of the estate, together with other property situated at Pembury, some two miles away, was offered for sale by auction. The conditions provided that purchasers of certain of the lots were to enter into a covenant with the trustees of the will of the Marquis of Camden, their heirs, successors, and assigns, and other the person or persons for the time being entitled to the rents and profits of the unsold part of the Camden Estate, similar to that entered into by the purchasers from the marquis in 1856, and also to erect only one dwelling-house on an acre, and to expend in the erection of each house £1,200 at the least. The purchasers of certain other lots were to enter into a like covenant to build only one house on each lot, and to expend on it £1,200; and the purchasers of certain other lots were to build houses costing £1,000 each. The remaining lots were to be sold free of restriction. The lots sold at that time were those free from restriction, which were, with one exception, bought by the plaintiff B. H. Collins, who also bought one of the lots subject to the restriction of building thereon a house worth £1,000, and this was the only lot subject to a restriction that was sold at that sale.

In July, 1883, the unsold portions of the estate were again put up, together with other land not previously offered. The plan attached to the conditions showed the lots which had been sold. Some of the lots were to be subject to a restriction as to building houses worth £1,000 each and £1,200, as the case might be. The rest were free from restriction, and were bought by the two plaintiffs, B. H. Collins and J. S. S. Douglas.

In 1884 the defendant bought the lots originally left unsold in 1882, and which were subject to restrictions as to building, and subject to the conditions of 1883. The lots were conveyed to him in 1885.

By an indenture of the 4th of June, 1885, and made between the trustees of the Camden Estate, of the one part, and the defendant, of the other part, the defendant covenanted with the trustees, their appointees, heirs, and assigns, and the person or persons for the time being entitled to the receipt of the rents and profits of such of the lands then or theretofore part of the Camden Park Estate as had not been sold since the death of the Marquis of Camden, to erect only one dwelling-house on each of the lots bought by him at a cost of £1,200 for each house.

This was an action brought by B. H. Collins and J. S. S. Douglas alleging that the defendant intended to build on the land bought by him houses of less value than £1,200 each, and claiming an injunction to restrain him from dealing with his land in breach of the restrictive conditions affecting the same and the covenants entered into by him.

Warmington, Q.C., and *Chadwyck Healey*.—This case falls within the principle of *The Nottingham Patent Brick and Tile Co.* v. *Butler*, 15 Q. B. D. 261, and 34 W. R. 405, 16 Q. B. D. 778. There was a general scheme of building, to the advantage of which all the purchasers have a right. It makes no difference that the land may have been parted with at different times. The defendant was aware of the previous attempted sales.

Barber, Q.C., and *Heath*.—There are express covenants entered into by the defendant with certain covenantees. If liable at all it must be to those covenantees

who do not include the plaintiffs. There are no mutual covenants here as in previous cases: *Western* v. *MacDermott*, 15 W. R. 265, L. R. 2 Ch. 72; *Keates* v. *Lyon*, 17 W. R. 338, L. R. 4 Ch. 218; *Master* v. *Hansard*, 25 W. R. 570, 4 Ch. D. 718.

Kekewich, J.—It is quite clear that the plaintiffs cannot maintain this action on the ground of the express covenant entered into by the defendant with the trustees of the Camden Estate, as they purchased before the covenant was entered into, and are consequently neither appointees, heirs, nor assigns of those trustees. The case, in fact, resolves itself into the question whether, under all the facts and circumstances, the plaintiffs can be held entitled to the benefit of the restrictions imposed on other parts of the property of which they have purchased a portion. The recent case of the *Nottingham Patent Brick and Tile Co.* contains an apt statement of the law by Wills, J., on questions of this kind which has been approved by the Court of Appeal. The case applied the principles of the courts of equity in the Queen's Bench Division. That statement of the law is binding on me, and is as follows:—"Where the same vendor selling to several persons plots of land, parts of a larger property, exacts from each of them covenants imposing restrictions on the use of the plots sold, without putting himself under any corresponding obligation, it is a question of fact whether the restrictions are merely matters of agreement between the vendor himself and his vendees imposed for his own benefit and protection, or are meant by him, and understood by the buyers, to be for the common advantage of the several purchasers. If the restrictive covenants are simply for the benefit of the vendor, purchasers of other plots of land from the vendor cannot claim to take advantage of them. If they are meant for the common advantage of a set of purchasers, such purchasers and their assigns may enforce them *inter se* for their own benefit."

The Master of the Rolls and Lord Justice Lindley substantially adopt that statement of the law, and the latter makes this remark:—"I wish to add that I think the way in which Wills J., has treated *Keates* v. *Lyon* and that class of case is correct, and that it is an inference of fact in each case whether the purchasers are bound *inter se* by such covenants."

There is, therefore, no necessity for me to endeavour to deduce the principle from the cases for myself. In applying the *Nottingham case* I am not so much extending the principle as applying it to a set of facts perhaps not contemplated by the judge who decided it. The doctrine has not yet been fully elaborated, and many questions must be left undecided—as, for instance, what remedy (if any) the plaintiffs would have had if the vendors had acceded to the request the defendant made and relieved him from the restrictions. I have come to the conclusion that, applying the law as laid down by Wills, J., the restrictions attached to this land were for the common benefit of all the purchasers, and that the plaintiffs bought on the faith of getting the advantage of them.

One difficulty in the application of the doctrine is this, does it apply as well to cases where the common vendor is putting up for sale the whole of his property as to cases where he either retains or declares his intention of retaining a portion.

The latter alternative is not the case I have now to decide, which is one where the vendor is desirous of selling the whole, though not all at once. The doctrine is not to be narrowed to a case where all the property is put up for sale once for all according to a scheme not to be departed from. The property in question was originally laid out in 1856, and the gradual sale of portions was apparently contemplated, and in 1882, when the Camden trustees put the bulk of it up for sale, the plan attached to the conditions showed certain houses as built on plots sold in 1857. One of the plaintiffs bought at that sale. In 1885 the defendant bought some lots, the conditions of 1883 being made applicable; and on the plan attached to the conditions those houses built on the lots sold in 1857 are marked, and two lots are marked as sold, one being that sold to the plaintiff Collins.

That was notice to the defendant, that the property had been laid out for building according to a scheme, and that the vendor's intention was to sell portions as found convenient.

It has been argued that the inclusion in the sale in 1882 of certain property at Pembury precludes the application of the doctrine, as it would be difficult to say to which property the benefit of the conditions was to belong. I am, however, not dealing with a covenant which would have to be strictly construed, but have to discover the intention of the parties, and my conclusion is that the conditions are applicable, as between purchasers of the Camden Park Estate, for the benefit *inter se* of those purchasers.

I am further of opinion that it makes no difference that the conditions were different as regards different lots, and that some were sold free from any restrictions Such variations are usual and expedient in laying out a building estate, and ought not to prevent a man who has bought subject to one set of conditions, or, may be, free from any, from enforcing different ones attaching to other lots.

This case is, as I have said, not one of covenant, where proof of damage would be unnecessary, as it would be a question of strict right, but here such proof is necessary. Irrespective, however, of direct evidence, I should hold that a man who has bought land on the condition that on neighbouring land only houses worth £1,200 each are to be built, suffers damages if houses of less value are built. Evidence has, in fact, been given of damage—namely, that deterioration in value of the plaintiff's property has been caused by the threatened action of the defendants.

Under these circumstances, I hold that the plaintiffs are entitled, not to sue the defendant on the covenant contained in his purchase-deed, but to enforce that covenant so far as it is in accordance with the conditions subject to which he bought, and subject to which the plaintiffs knew that he must buy if the vendors did their duty, and also that they have shown sufficient damage in case the defendant is not restrained to justify them in suing in this court.

Injunction granted.

Solicitors for the plaintiffs, *Sole, Turner, & Knight*, agents for *Cripps & Sons*, Tunbridge Wells.

Solicitors for the defendant, *Smith, Stenning, & Croft*, agents for *Pearless & Beeching*, Tunbridge Wells.

Q. B. Div. (Day and Wills, JJ.) June 16.

Scovell *v.* Bevan. (*a.*)

County court jurisdiction—Collision in the Thames—Admiralty cause—Damages under £50—County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *ss.* 3, 5.

By the County Courts Admiralty Jurisdiction Act, 1868, *s.* 3, *county courts having admiralty jurisdiction were empowered to try* (inter alia) *actions for damage by collision where the amount claimed did not exceed* £300.

(*a.*) Reported by A. H. Todd, Esq., Barrister-at-Law.

By section 5 of that Act courts appointed by Order in Council are alone to have jurisdiction in each district in any admiralty cause.

Held, that this statute did not take away from county courts not having admiralty jurisdiction the power to try actions for damages for collision between vessels where the amount claimed was under £50.

Appeal from an order of Huddleston, B., refusing to order a writ of prohibition to issue to the judge of the Southwark County Court to prohibit him from trying an action for damages done to the plaintiffs' barge in the Thames by a collision with the defendants' barge, owing to the alleged negligence of the defendants. The amount sought to be recovered was £5 15s. The grounds for the application to Huddleston, B., was that this was an admiralty action, and such a cause came within the jurisdiction of the City of London Court under an Order in Council made under 31 & 32 Vict. c. 71, s. 5.

Gaskell, for the defendants.—This is an admiralty cause within the meaning of section 3 of the County Courts Admiralty Jurisdiction Act (31 & 32 Vict. c. 71). In *Reg.* v. *Southend County Court (Judge of)*, 32 W. R. 754, 13 Q. B. D. 142, the county court was held to have jurisdiction by virtue of 32 & 33 Vict. c. 51, s. 2. That was not an admiralty cause.

Back, for the plaintiffs, was not called upon.

DAY, J.—I think this appeal must be dismissed. The county court had jurisdiction to try such a case as this before the Act of 1868, and there is nothing in the Act to show that the Legislature had any intention to take away that jurisdiction.

WILLS, J.—I am of the same opinion. The Act of 1868 gave the county courts a new jurisdiction, and did not take away the old one which they had under the original Act of 1846 (9 & 10 Vict. c. 95). If it were necessary to resort to the remedies and powers which the Act of 1868 gave to the county court, then, no doubt, the case would come within the class of admiralty causes to deal with which special courts have been nominated in the Privy Council Order. That is not necessary in the present case.

Appeal dismissed.

Solicitor for the plaintiffs, *Farnfields.*

Solicitors for the defendants, *Keane, Marsland, & Boyden.*

Q. B. Div. (Lord Coleridge, C.J., and Denman, J.) June 11.

HOWARTH *v.* BREARLEY. (*a.*)

Medical Act, 1858 (21 & 22 *Vict.* c. 90), *ss.* 31, 32—*Apothecaries Act* (55 *Geo.* 3, c. 94), *ss.* 20, 21—*Unqualified practitioner acting as assistant—Right to recover for services rendered—Registration.*

A qualified medical practitioner cannot recover for the services rendered or medicine given by his unqualified and unregistered assistant at a branch establishment, the qualified practitioner not being consulted on the case in question by the unqualified man.

This was an appeal from the judge of the Hundred Court at Salford.

J. L. Fitzmaurice was a duly qualified medical practitioner, registered under the Medical Acts, and residing at Bury. His brother, A. Fitzmaurice, who was not qualified to practise medicine or surgery, nor certificated to act as an apothecary, managed a branch establishment at Elton on his behalf. A. Fitzmaurice had consulted his brother in difficult cases, but had alone rendered the services and supplied the drugs in the case in question, and had not consulted his brother in any way. All the drugs and medicines at the Elton branch were bought and paid for by J. L. Fitzmaurice. The plaintiff, as assignee of the creditors of J. L. Fitzmaurice, brought an action to recover from the defendant charges for medical attendance and services rendered to him, and for the cost of medicines and drugs supplied to him.

The judge nonsuited the plaintiff on the ground that the Medical Act, 1858 (21 & 22 Vict. c. 90), and the Apothecaries Act (55 Geo. 3, c. 94) barred the right to recover.

T. W. Chitty moved on behalf of the appellant.

C. A. Russell, for the respondent, was stopped by the court.

Lord COLERIDGE, C.J.—The question whether the learned judge was right in nonsuiting the plaintiff depends on the relation between J. L. Fitzmaurice and his brother, A. Fitzmaurice. This relation has not been very clearly defined; they were either partners, or master and servant. Then J. L. Fitzmaurice, who is the qualified practitioner, sues for services which he has not personally rendered, but which have been rendered by his brother. J. L. Fitzmaurice gave no advice whatever in regard to, and never even saw, the defendant. If he had given advice, and his brother (the unqualified man) had been merely the ministering hand under his directing brain, I should be prepared to hold that the services were his. I think this view is consistent with common sense. Further, we have to consider an Act of Parliament the provisions of which put an end to the plaintiff's right to sue. The Act says, "no person shall be entitled to recover any charge in any court of law for any medical or surgical advice, attendance, or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied unless he shall prove upon the trial that he is registered under this Act." The qualified man has brought this action, has proved that he was registered, but he sued for medical attendance which he, personally, did not render at all. None of the services sued for were rendered by the plaintiff, and therefore he cannot recover for services which were rendered, without any reference to himself, by another man who stood in an indefinite relation towards him. It is immaterial, I think, what that relation was, perhaps we may consider it as that of master and servant, and say that the master cannot recover for services with no part of which he had anything to do. I do not think that any of the cases cited are in conflict with this view. A case which is the converse of this, *De la Rosa* v. *Prieto*, 16 C. B. N. S. 578, shows strongly what the opinion of the court would have been in the present case. As to the earlier cases of *Turner* v. *Reynall*, 11 W. R. 700, 14 C. B. N. S. 32[illegible] and *Haffield* v. *Mackenzie*, 10 Ir. C. L. R. 289, if they are in conflict with the later cases I prefer to follow the latter. As a judge sitting at *Nisi Prius* I should always have been extremely reluctant to follow *Turner* v. *Reynall*, for it seems to me to lay down the law contrary to the intent of the Act, as is pointed out in *Leman* v. *Houseley*, 23 W. R. 235, L. R. 10 Q. B. 66. The later cases are more satisfactory than the earlier ones. For the above reasons, upon the plain words of the statute and upon the facts as found by the learned judge—viz. that the services were not rendered by the qualified man—I think that the nonsuit was right.

DENMAN, J.—I am of the same opinion. I need [illegible]

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

add more than that I concur in what my lord has said about *Turner* v. *Reynall* and *Haffield* v. *Mackenzie*. It is for the plaintiff to prove that the medical services were rendered by a duly qualified practitioner. This he has not proved. He has only shown that another person, without in any way consulting him, rendered them. The work was not done for the patient by the qualified man, and his assignee cannot recover as for work done by the servant of the qualified man. Looking at the Act, I think that a registered practitioner cannot give a roving authority to an unqualified person to practise in his name without consulting him or taking his advice and then sue for the services rendered by such person. The services rendered by A. Fitzmaurice were in no way the services of J. L. Fitzmaurice.

Motion dismissed.

Solicitors for the plaintiff, *Pritchard, Englefield, & Co.*, for *Butcher*, Bury.

Solicitors for the defendant, *Chester & Co.*, for *Richardson*, Bury.

IN BANKRUPTCY.

Q. B. Div. (Cave, J.) Jan. 11.

Ex parte Brown.
In re Suffield & Watts. (*a.*)

Solicitor's lien for costs—Action for dissolution of partnership—Bankruptcy—Transfer to Bankruptcy Court—Claim of landlord for rent—Preference—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 102—*Costs.*

On April 6, 1887, an order was made directing the receiver appointed in an action for dissolution of partnership, which had been transferred to the Bankruptcy Court, to pay over the balance of moneys in his hands to the solicitor in the action in respect of his costs. At this time the court was not informed that a claim had been previously made to the receiver by the landlord of the bankrupt's premises for rent due which had not been paid. The order of April 6 had not been complied with, and the receiver now applied to the court for directions.

Held, that the order of April 6 must be modified to the extent that the amount due to the landlord should be paid to him, and the remainder to the solicitor, and that the receiver, being the person responsible for the difficulty which had arisen, must be personally liable for costs.

Application by the receiver appointed in an action for dissolution of partnership for directions.

In 1886 an action for dissolution of partnership was commenced by the debtors in the Chancery Division, one Bradshaw Brown being appointed receiver in that action. In consequence of the bankruptcy of both partners the action was subsequently transferred to the Bankruptcy Court and afterwards stayed, and on April 6, 1887, an order was made that certain moneys in the hands of the receiver should be paid by him to Mr. Pullen, the solicitor in the partnership action, in respect of his costs. It was alleged, however, that on this occasion the attention of the court was not called to the fact that on March 19 a claim had been made upon the receiver by the landlord of premises occupied by the bankrupts for rent, and the order of April 6 not having been complied with application was now made by the receiver for directions The amount in the receiver's hands was £84; the claim of the landlord amounted to £49; and the solicitor's bill of costs to over £100.

H. Lynn, for the receiver.—At the motion on April 6, when the order was made for the receiver to pay over the balance in his hands to the solicitor in respect of his costs in the action, the receiver was not separately represented, and the attention of the court was not called to the fact of the landlord's notice of claim of March 19. Under the circumstances the receiver asks the court for directions.

F. C. Willis, for the landlord.—If on April 6 the court had had any knowledge that any sum was owing to the landlord for rent it would not have made the order it did, and I ask that it may be varied.

Dundas Gardiner, for the solicitor.—Any order made on April 6 must be binding on the receiver, and he had no right to disobey it. If he neglected to tell the court of the landlord's claim he must bear the loss. Further, I say that the landlord has no right as against the solicitor to the money recovered in the action. A lien is given to the solicitor, and the interest of every party is liable to pay his costs. There is a first charge to the solicitor on money recovered in the action.

Cave, J.—This is an application on the part of the receiver in an action of *Suffield* v. *Watts* for directions with regard to the payment of moneys in his hands as receiver. On April 6 application was made to me for an order that the receiver be discharged, and I made an order that the receiver pay over the balance of moneys in his hands to the solicitor in the action, it being then stated to me that the costs exceeded the amount in his hands. But it was not stated that a sum was due and owing to the landlord for rent, of which he had given notice to the receiver on March 19. Had I known that there was that claim I should not have made the order I did make. It is clear that a solicitor's lien extends only to the net proceeds recovered in an action, and he has no right to the gross proceeds. It might just as well be said that he would have the right to the gross proceeds of the sale of the stock in trade without having regard to auctioneer's charges, &c. If I had known of this claim in April, I should have made an order that the receiver should first pay the claim of the landlord, and that the balance, being the net proceeds, should be handed to the solicitor for his costs. The money has not been handed over, and the landlord applies that the rent may be paid, and I think he was quite justified in asking for it. The business was carried on in the premises in question and the rent is due. Consequently the order of April 6 must be modified to this extent, and the receiver must be ordered to pay the £49 to the landlord, and the remainder will go to the solicitor. Then with regard to the costs. The landlord clearly ought to have his costs. He gave notice to the receiver on March 19, and my attention ought to have been called to that notice. There remains, however, the solicitor and the receiver. Mr. Pullen, the solicitor, has sworn that he had not notice of this claim of the landlord, and although the receiver says that the solicitor or his clerk was informed of the receipt of the landlord's letter of March 19, his statement is not to my mind altogether satisfactory. That being so, the person who has brought about all the difficulty is the receiver, and he has brought it about simply by not stating that the claim had been made. He had money in his pocket, and I cannot see why he did not pay the landlord. So on the order of April 6 being made he kept the money in his pocket and paid neither the solicitor nor the landlord, and it is not until July 12 that he comes to the court

(*a.*) Reported by C. F. Morrell, Esq., Barrister-at-Law.

for directions. Therefore the receiver must pay the costs of the landlord and the costs of the solicitor, and he must pay them out of his own pocket, and not out of the fund, which would not be fair on the solicitor, and he must, of course, pay his own costs.

Order accordingly.

Solicitors for the receiver, *Baker & Nairne.*

Solicitors for the landlord, *Jennings & Sons.*

Solicitor for the solicitor, *T. J. Pullen.*

Q. B. Div. (Cave and Grantham, JJ.) Jan. 24.

Ex parte Earl of Strathmore.
In re Riddell. (*a.*)

Bankruptcy notice—"Final judgment"—Order dismissing action in Chancery Division, with costs—Bankruptcy Act, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (g).

The plaintiff in an action in the Chancery Division claimed to be entitled to estates belonging to the defendant, but, in default of a proper statement of claim, an order was made dismissing the action for want of prosecution, with costs. A bankruptcy notice was subsequently served on the plaintiff in respect of such costs.

Held, that the order in question was not a "final judgment" within the meaning of section 4, *sub-section* 1 (g), *of the Bankruptcy Act,* 1883, *upon which a bankruptcy notice could be founded.*

Appeal from a decision of the registrar of the county court at Newcastle dismissing a petition for a receiving order.

The case raised the question whether an order dismissing an action in the Chancery Division of the High Court with costs was a "final judgment" within the meaning of section 4, sub-section 1 (*g*), of the Bankruptcy Act, 1883, so as to constitute the failure to comply with the terms of a bankruptcy notice founded upon such order an act of bankruptcy upon which a petition could be presented against the debtor.

An action had been commenced in the Chancery Division against the Earl of Strathmore by the debtor Riddell, who claimed to be entitled to large estates now held by the Earl in Yorkshire and Durham. The plaintiff, however, appeared unable to frame a proper statement of claim, although leave to amend was given on two or three occasions, and on the 10th of June, 1887, an order was made by North, J., ordering that the action do stand dismissed for want of prosecution, and the costs to be paid by the plaintiff. These costs were taxed at £53, and not being paid a bankruptcy notice was issued against the debtor, but the petition for a receiving order was dismissed by the county court registrar on the ground that the order in question was not a "final judgment" within the meaning of section 4, sub-section 1 (*g*), of the Bankruptcy Act, 1883.

The Earl of Strathmore now appealed.

Napier Higgins, Q.C., and *Stephen,* for the appellant.—The order put an end to the action. It had all the elements of finality and was in effect a judgment.

They referred to *Ex parte Schmitz, In re Cohen,* 32 W. R. 812, 12 Q. B. D. 509; *Ex parte Chinery, In re Chinery,* 32 W. R. 469, 12 Q. B. D. 342; *Ex parte Moore, In re Faithfull,* 33 W. R. 438, 14 Q. B. D. 627.

J. L. Walton, for the debtor.—The registrar was bound by the authorities, and could make no other order than he did. This order was made under ord. 27, r. 1, R. S. C., 1883, and the only jurisdiction of the court was to make an order as distinguished from a judgment. That view is confirmed by the wording of the forms in the appendix to the general rules. A distinction is recognized between a judgment and an order in an action. Where judgment is obtained the litigation is at an end, and no person can revive it. Here there is nothing to preclude the plaintiff from bringing another action on the same claim. There has been no adjudication on the *litis contestatio.*

Cave, J.—I am of opinion that the appeal must be dismissed. We have to decide whether the order made in this case, by which, in default of a statement of claim, the action was dismissed for want of prosecution, is a "final judgment" within section 4, sub-section 1 (*g*), of the Bankruptcy Act, 1883. I adopt the interpretation given by Lord Selborne in the case of *Ex parte Moore, In re Faithfull,* where he says, "To constitute an order a final judgment nothing more is necessary than that there should be a proper *litis contestatio* and a final adjudication between the parties to it on the merits." That carries the case, I think, to the extent of saying that this order is a judgment, and if there were no such word as "final" in the section it might be that a bankruptcy notice could be founded on it. But the word "judgment" is qualified by the word "final," and Lord Selborne says, "a proper *litis contestatio* and a final adjudication between the parties to it on the merits." Here there has not been a final adjudication on the merits. The order is so far final that this particular order cannot be re-opened, but it is not a final adjudication of the matter between the litigants. The matter in dispute was the title to certain estates, and with regard to that it is not a final adjudication. It is open to the plaintiff Riddell, provided that he can find someone sufficiently skilful to frame for him a proper statement of claim, to bring a fresh action in which the question would have to be adjudicated upon, and when that is done in such a way as to prevent another action, there then would be a final adjudication.

Grantham, J.—I am of the same opinion, and practically I think the case of *Ex parte Schmitz, In re Cohen,* is binding on us, where it was held that the fact that an order had been made against the defendant requiring him to pay the taxed costs in an action within a specified time did not constitute such order a "final judgment" within the meaning of the section.

Appeal dismissed.

Solicitors for the appellant, *Western & Son.*

Solicitor for the respondent, *Stanford,* Newcastle.

(*a.*) Reported by C. F. Morrell, Esq., Barrister-at-Law.

Court of Appeal.

From Chan. Div. May 4, 5.

In re LANCASHIRE COTTON SPINNING CO. *Ex parte* CARNELLEY. (*a.*)

Company—Winding up—Distress for rent—Leave of court—Attornment clause in mortgage—Companies Act, 1862, *ss.* 87, 163.

The L. Co. mortgaged certain cotton mills and the machinery therein to W. The deed contained a clause by which the L. Co. attorned tenants to W. at an annual rent. A winding-up order was subsequently made against the company, and the official liquidator remained in possession of the mills with a view to selling them as a going concern. He expended money in keeping up the mills and machinery, but he did not actually work them. The mortgagees, who were the executors of C., to whom W. had transferred the mortgage, acquiesced in this arrangement, believing it to be for the benefit of all parties interested.

The mortgagees applied to the court for leave to distrain for one year's rent due under the attornment clause which had accrued since the winding-up order.

Held, that such leave must be refused, as no special equity in favour of the mortgagees had been proved, and that, on the evidence, it was shown that the premises remained in the occupation of the liquidator for the joint benefit of the company and the mortgagees.

A mortgagee with an attornment clause does not stand in so favourable a position as an ordinary landlord.

In re Exhall Coal Mining Co., 13 *W. R.* 219, 4 *De G. J. & S.* 377, *followed.*

Decision of North, J., *affirmed.*

Appeal from a decision of North, J., in chambers.

By an indenture of mortgage dated the 28th of October, 1878, the Lancashire Cotton Spinning Co. (Limited) conveyed to R. Whittaker in fee simple certain cotton mills at Royton, in the county of Lancashire, and the warehouses and buildings held therewith, and assigned to him the machinery and fixtures therein by way of mortgage for securing the repayment of £22,000, with interest at six per cent. The indenture contained a clause by which the company attorned tenants to the mortgagee at an annual rent of £1,595.

The mortgage was transferred by Whittaker to J. Clegg. He died in June, 1885, having by his will appointed W. Carnelley and three other persons his executors.

In November, 1885, an order was made to wind up the company, and the official liquidator remained in possession of the mills with a view of selling them as a going concern. He expended money in keeping up the mills and the machinery, but he did not actually work them. The mortgagees acquiesced in this arrangement, believing it to be for the benefit of all parties interested. The mortgagees applied to North, J., in chambers for leave to distrain for one year's rent due, under the attornment clause, on the 31st of December, 1886, and he refused the application.

From this decision the mortgagees appealed.

Buckley, Q.C., and *W. P. Beale*, for the appellants.—The appellants ought to be allowed to distrain for the rent which has accrued since the order for winding up. North, J., was of opinion that the possession by the liquidator was for the joint benefit of the company and the mortgagees, and therefore that the doctrine laid down in *In re Bridgwater Engineering Co.*, 12 Ch. D. 181, 27 W. R. Dig. 46, applied, and that leave to distrain ought not to be given. But the evidence does not show any request by the mortgagees to the liquidator to retain possession. The principle which underlies all the cases on this point is that a liquidator after a winding up order has been made must discharge in full every obligation undertaken by him for the benefit of the estate of a company. In the present case the object of the liquidator in retaining possession after the winding up order was that he might thereby be entitled to sell the property more advantageously..

They referred to *In re Oak Pits Colliery Co.*, 30 W. R. 759, 21 Ch. D. 322; *In re Progress Assurance Co.*, L. R. 9. Eq. 370, 18 W. R. Ch. Dig. 57; *In re North Yorkshire Iron Co.*, 26 W. R. 367, 7 Ch. D. 661; *In re Brown, Bayley & Dixon*, 30 W. R. 5, 18 Ch. D. 649; *In re Lundy Granite Co.*, 19 W. R. 609, L. R. 6 Ch. 462; *Ex parte Voisey*, 31 W. R. 19, 21 Ch. D. 442; *Ex parte Williams*, 26 W. R. 274, 7 Ch. D. 138; *In re Exhall Coal Mining Co.*, 13 W. R. 219, 4 De. G. J. & S. 377.

Higgins, Q.C., and *Chadwyck Healey*, for the liquidator.—Before the court will grant a landlord leave to distrain after a winding up order has been made, he must show that there is some reason which renders it inequitable that the company should avail themselves of the fetter imposed by section 163. This the appellants have failed to do in the present case. The evidence shows that the liquidator retained possession of the premises of the company for the joint benefit of the company and the mortgagees. Besides, the case of a mortgagee with an attornment clause is not within the cases which have been cited on behalf of the appellants. Leave to distrain should therefore be refused.

They referred to the Companies Act, 1862, ss. 87, 163; *In re Bridgwater Engineering Co.; In re Exhall Coal Mining Co.; In re Progress Assurance Co.; In re Oak Pits Colliery Co.; In re Lundy Granite Co.*

Buckley replied.

COTTON, L.J.—This is an application, by way of appeal, for liberty for the mortgagees, who have an attornment clause and claim to have the right of a landlord, to distrain unless the liquidator pays them the rent which has accrued since the commencement of the winding up. The application is very properly limited to that.

Now section 163 of the Act of 1862, if it stood by itself, and I may also say in the absence of decisions, would have been conclusive against the application, because that section, as I understand it, is clear. It is this: "Where any company is being wound up by the court or subject to the supervision of the court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void to all intents." That seems a very clear section, and that is the great difficulty, notwithstanding another section and decisions upon it in the way of the applicants.

But it has been decided that that section must be read subject to the provisions of section 87, which says that "When an order has been made for winding up a company under this Act, no suit, action, or other proceeding shall be proceeded with or commenced against the company, except with the leave of the court, and subject to such terms as the court may impose." Undoubtedly Turner, L.J., in *In re Exhall Coal Mining Co.*, said that you must read those two together, notwithstanding the precise words of section 163; and that the court had power to authorize a distress, which came within the word "proceeding" in section 87. To my mind it is doubtful whether, having regard to the express words of section 163, which says "That any distress shall be void," it was right to say that section 87 included distress among the "proceedings" which

(*a.*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

the court might allow. There are other proceedings in the nature of actions and modes of enforcing claims against the company which undoubtedly would satisfy section 87 without including in the word "proceeding" a distress, which is in terms dealt with under section 163.

But it would be wrong for us to depart from the decisions which have followed that judgment of Turner, L.J., in *In re Exhall Coal Mining Co.*, as long ago as 1864, and, following those decisions, we have to consider what is the rule which has been laid down not inconsistent with those cases. It is this, that it lies upon the landlord who applies to put in a distress, to show that there are circumstances which justify the court in depriving the company and the creditors of the company of the benefit of the express provision of section 163.

The question, therefore, is whether that has been done in the present case. It is unfortunate, perhaps, that a good many of the cases on these two sections, and on applications like this, have not dealt with the matter as directly as they might have done. In one authority which has been referred to, *In re Lundy Granite Co.*, the question really did not arise, and it was only some general observations of James, L.J.—which, with all respect, were not applicable to the case before him—which are relied on as laying down what the doctrine is. We have had cases cited where retaining possession as against the landlord was for the benefit of the company, and in those cases the court has allowed the landlord to exercise his right of distress. Then there have been cases when it has been for the joint benefit, and there it has been said that the landlord cannot, under those circumstances, exercise his right of distress. There are other cases probably where it has been held that the working, or the possession, being beneficial for the winding up of the company, the rent has been considered as part of the expenses of winding up. What principle are we to say underlies these cases? In my opinion, the landlord coming to ask the court to exercise the power which, according to the decisions, has been given by section 87, must show one of two things, either that it is inequitable for the company or its liquidator to insist on section 163—that there is some special equity which entitles the landlord to ask the court to relieve him of the burden of section 163; or that it is a case in which the court will allow distress to be put in so as to recover the rent, which ought to be paid as one of the expenses of winding up. But the matter must be brought within one or the other of those heads in order to justify the court in disregarding the express provisions of section 163, which in terms are clear.

Now what is there here? The judge below decided this case on the ground that what had been done had been done for the joint benefit of the company and the mortgagees. I in no way differ from him, and I think probably he was right in coming to that conclusion. It is very true that the liquidator delayed selling in order to get a better price, and in the hope that he would get something after paying the mortgagees. That looks as if the delay in selling was for the benefit, not of the mortgagees in any way coming here as landlords, but for the benefit of the company. But we must remember what the position of the mortgagees was. They were executors, and were very largely interested in this company, one of them in his own right, and all of them in respect of shares which had belonged to the testator. They were anxious to get up a new company, and one of the objects of postponing the sale was to do what was necessary in order to start a new company in which one of the executors was to take a very large share. So that the mortgagees delayed to exercise their power of sale as mortgagees in order to enable that to take place which was for the benefit, not only of the company, but of themselves, who were interested in the company. I do not think the judge was wrong in the conclusion which he arrived at, and it cannot, in my opinion, be considered as in any way inequitable for the company, on behalf of its creditors, to insist on the provisions of section 163; and, in my opinion, there is nothing which would justify us in dealing with the interest payable to the mortgagees as part of the expenses of winding up this company when that interest accrued under the circumstances to which I have referred.

I have dealt with this case as if it were the case of a landlord coming here in respect of rent due to him for the enjoyment of the land by the company; but I cannot think that the mortgagee stands in as good a position as a landlord would. If a landlord were minded to take possession, and could do so, he would be free to deal with the property as he might think fit. But a mortgagee would stand in a different position. If he takes possession he puts himself into that very awkward position of being mortgagee in possession subject to accounts, and also with the liability of taking charge of the machinery and spending a considerable sum for the purpose of protecting it. I cannot think that here, if the mortgagees had not assented to what was done, they would have taken possession, and I doubt whether it would be right to allow rent to be paid, or to allow distress to be put in for rent, when the effect of the payment of the rent would be, not to prevent the mortgagee from taking possession, but to prevent him from exercising an entirely different right—namely, the right of selling. It is not necessary in the present case to decide that, but I must express my opinion that a mortgagee who has this attornment clause, and asks for liberty to distrain under it, does not come in as favourable a way as a landlord whose right would be to take the land and deal with it as he thought fit, whether he exercises his power of taking possession or receives possession of it from the liquidator. This appeal, therefore, fails, and must be dismissed, with costs.

LINDLEY, L.J.—I am of the same opinion. In dealing with the cases on this subject, which are numerous and not altogether consistent, the cardinal point is not to lose sight of the provisions nor of the object of the Act of Parliament. The court certainly did, in 1864, shortly after this Act passed, put a construction on section 87 which I think was a little forced; notwithstanding the peremptory words of section 163, that no distress or execution shall be levied against the assets of the company, the court held that section 87 gave the court a power to allow such execution and distress to issue. I think that construction was rather forced; but I accept it. It has now been followed so often that the construction of the two sections which Turner, L.J., was the first to put on them must now be adopted; nevertheless we must fall back on the section and see on what grounds a person who asks to be allowed to issue a distress or execution can escape from the peremptory provision contained in section 163. That there are circumstances which may entitle him to do so is conceded, having regard to the construction which has been put on the section; but the burden is always on him who wishes to issue execution to show why he should be entitled to do it. This rule has not been lost sight of in modern cases, even if it was a little at first. Now what are the grounds on which these mortgagees rely for liberty to do that which is forbidden? Have they been induced to do anything by the liquidator which renders it inequitable on the part of the company, through him, to protect themselves, or to protect the creditors, it being a creditors' question more than a shareholders' question, by insisting on the application of section 163? Has anything happened which renders it unjust to give effect to that section? If there is, I conceive, upon authority and upon principle, that that section would not apply. I cannot see anything here which approaches such a

case as that. I cannot say that anything has been said or done, or omitted to be done, by the liquidator to alter the rights of the parties. It is said by Mr. Buckley that the liquidator has bought delay and must pay for it. But I am satisfied from the evidence that the mortgagees waited as much for their own benefit as for the benefit of the liquidator. They were interested in getting up this new company, and it was for their advantage that the liquidator should do his best, and have reasonable time to do it; and I cannot think, under those circumstances, that there is the slightest ground for saying there has been anything which renders it unjust on the part of the company to claim the benefit of section 163.

The only other ground which the mortgagees could suggest was that this rent ought to be paid as part of the costs of the winding up. That is another ground altogether. If the liquidator, on behalf of the company, continues to carry on the business of the company, all charges, costs, and expenses properly incurred must be paid, notwithstanding section 163, which really has nothing to do with a question of that kind. But I do not think this case is brought within that principle; I agree with the reasons given by Cotton, L.J. It appears to me that the whole of the delay has been quite as much in the interests of the mortgagees as in the interests of the company. I think the decision of North, J., was right, and that the appeal must be dismissed, with costs.

Bowen, L.J.—I am of the same opinion. The difficulty seems to arise very much from the construction that was put twenty-three years ago upon section 87. Section 163 is precise that any distress put in shall be void. Section 87, which is a distinct section, says that "*no suit*, action, or other proceeding, shall be proceeded with or commenced against the company, except with the leave of the court, and subject to such terms as the court may impose." Now if it stood alone, apart from decisions, I should have the greatest possible difficulty in seeing how a distress could be a proceeding under section 87. The language would lead one to a different conclusion, and the fact that distress is forbidden by section 163 would drive one still further. But the opposite view has been taken by the courts, and it would be, not only wrong, but I think it would be a monstrous disregard of authorities of the past if we were to try to be wiser than the courts have been for twenty-three years. We must, therefore, do the best we can to harmonize these two sections, difficult as it is, for me in particular, and I think for the other members of the court to do it. It seems to me the true principle to be applied is that which Mr. Chadwyck Healey has urged on us, that it must rest on the landlord to show why he should escape the fetters of section 163, and should be afforded that leave which we will assume, in accordance with the decisions, can be granted to him in proper cases under section 87. I do not see how, in reason, there can be any except two principles upon which such leave can be granted to escape from the fetter imposed by statute. It seems to me the first inquiry must be whether anything has happened since the winding up which renders it inequitable that the company in possession should be allowed to shelter itself against distress by virtue of the statute; or, if that inquiry results in a negative answer, and there is nothing to show that it is inequitable that the company should be sheltered by section 163. The next inquiry must be, has anything happened which renders the rent in respect of distress properly chargeable among the costs, charges, and expenses of the winding up. If so, the rent ought to be paid, and it may well be that the court ought to allow the landlord to distrain as one of the natural means of obtaining his rent.

In applying these two principles the court have dealt in many instances, which it is not necessary to review, with the case where the occupation was retained by the liquidator after the winding up for the benefit of the company, or for the joint benefit of the landlord and the company, in such a way as to create what I think Hall, V.C., called a sort of mixed occupation. Those two cases seem to me to be applications of one or other of the two principles which I have mentioned, and it is true that in applying them the courts have not always put on paper the two principles and applied them *eo nomine*. But whenever there has been a decision upon that class of case, the decision can only be justified and rendered intelligible by referring to one or other of those two principles. Dealing with the present case, and taking these two principles *seriatim*, we have first to see whether there is anything here which renders it inequitable that the company should be allowed to shelter itself against distress by section 163. I cannot see that the landlord's case has been altered for the worse by anything that has been done. It seems to me the judge below was right in thinking it was for the mutual benefit of the company and the landlord that time should be given to the company, and I do not think that the time can be said to have been purchased, as Mr. Buckley puts it. I think it was a concession of time for mutual convenience, and that it was no part of the terms by which that time should be purchased that rent should be payable and distress put in. There was an attempt being made to form a company.

If that is so as to the first principle, I think it also follows that the second principle does not apply, and that the rent cannot be considered as one of the expenses of the winding up, and that for that reason the distress ought to be enforced. It also seems to me that what Cotton, L.J., has said deserves the greatest attention, though it is not necessary to discuss it further—namely, that it does not follow that a mortgagee is in the same position as a landlord. I think that, as soon as you arrive at the two principles which the Lord Justices and I have endeavoured to expound, the decision in every case becomes a question of fact whether the circumstances of the case justify the application of the principle in favour of the landlord or in favour of the company; and the decisions with regard to benefit or mixed benefit appear to be decisions in the nature of mixed law and fact as to the application of the two principles I have named.

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From Chan. Div. Feb. 25, 26; March 12

Reichel v. Bishop of Oxford.

Ecclesiastical law—Resignation of benefice—Revocation before acceptance—Resignation on condition.

A deed of resignation of a benefice executed and sent to the bishop is valid though not made before a notary public, the bishop having power to dispense with that formality.

A resignation sent at the bishop's request is valid without any formal acceptance by the bishop.

The bishop may fix a future time for the acceptance and operation of a resignation without transgressing the rule that a resignation, except in the case of an exchange, must be made purè, spontè, absolutè, et simpliciter.

A resignation made at the request of the bishop to avoid scandal is valid.

A resignation accepted by the bishop, but postponed by him so as to enable the clerk to receive the next payment of tithe rent-charge, is not invalid as simoniacal.

In 1885 the plaintiff, who had been vicar of Sparsholt-cum-Kingston-Lisle, Berkshire, in the diocese of Oxford, since 1870 was publicly charged with immoral conduct, and in consequence of the scandal the bishop called upon him to take proceedings to clear his character. Accordingly, at the Reading Easter Assizes in 1886, he indicted the person who had made the charges, but failed to obtain a conviction. The bishop then suggested to the plaintiff that he should resign his benefice a once, and after some correspondence Mr. Wellings, rural dean, wrote on the 26th of May, 1886, at the instance of the bishop, that if the plaintiff would place his formal resignation in the hands of the bishop, acceptance of it would not be signed till a date to be agreed upon, and that the plaintiff would be allowed to absent himself from his parish during the interval. On the 28th of May the plaintiff replied:—

"My dear Lord Bishop,—I desire herewith to place in your hands my resignation of this benefice of Sparsholt-cum-Kingston-Lisle, conformably with your lordship's wish, and at the same time I gratefully accept your kind proposal to postpone acceptance of my resignation until a date to be agreed upon, your lordship meantime permitting me to be absent."

This letter was on the 31st of May, with the bishop's authority, replied to by Mr. T. M. Davenport, his secretary, and deputy-registrar of the diocese, in the following words:—

"Sir,—The Bishop of Oxford desires me to send you a deed of resignation, and to inform you that his lordship proposes to date his formal acceptance of it on the 1st October next, and not to declare your benefice vacant until that date, if the deed is at once executed by you and submitted to me, and if his lordship also receives in the meantime an assurance of satisfactory arrangements for the cure and duties of the parish during your absence. The deed requires to be executed by you before two witnesses, and if you are unable to obtain the attestation of a notary public in London it may be remitted to me attested by two persons."

It appeared that the 1st of October was named so that the plaintiff might not be deprived of the tithe rent-charge. With that letter Mr. Davenport sent the following printed form of resignation with the names added in writing:—

"In the name of God, Amen. Before you a notary public and credible witnesses here present, I, the Rev. Oswald Joseph Reichel, vicar of Sparsholt with Kingston Lisle, in the county of Berks and diocese of Oxford, for certain just and lawful causes me thereunto especially moving, without compulsion, fraud, or deceit, do purely, simply, and absolutely resign and give up my said vicarage and parish church of Sparsholt with Kingston Lisle, with all their rights, members, and appurtenances into the hands of the Right Rev. Father in God, John Fielder, by Divine permission Lord Bishop of Oxford, or to any other whomsoever having or that shall have power to admit this my resignation. And I totally renounce my right, title, and possession of, in, and to the same vicarage and church, with all their rights, members, and appurtenances heretofore had and hitherto belonging to me, and quit them and expressly recede from them by these presents. And that this my resignation may have its full effect I do hereby nominate and appoint Thomas Marriott Davenport, of the city of Oxford, notary public, my proctor or substitute, to exhibit this my resignation to the said Right Rev. Father, and in my name to pray that his lordship would graciously vouchsafe to accept thereof, and to pronounce, decree, and declare the vicarage and church of Sparsholt with Kingston Lisle aforesaid void and to be void of my person to all intents of law that may follow thereupon, and to decree, if requisite, that intimation of the said avoidance may be issued to the patron thereof."

This instrument was dated the 2nd of June, 1886, and was executed by the plaintiff, and was, with the attestation thereto of two witnesses (neither of whom was a notary public), forwarded by him to Mr. Davenport from Weymouth on the 2nd of June with the following letter:—

"Sir,—I have executed the enclosed resignation on the understanding that the bishop will postpone acceptance thereof until 1st October next. If you cannot dispense with my appearing before a notary public I will endeavour so to do. Unfortunately both of them in this place happen to be absent at this moment."

On receiving the deed Mr. Davenport signed the memorandum of surrender on it after striking out the statement that the plaintiff had personally appeared before him. The bishop signed the memorandum of acceptance and returned the document to Mr. Davenport, who shortly afterwards had it stamped. The stamps bore the date 26th July, 1886.

Meanwhile the plaintiff had, on the 16th of July, delivered to Mr. Davenport a formal withdrawal of resignation and two letters of that date to Mr. Davenport and to the bishop stating that he had cancelled and revoked his resignation and his appointment of Mr. Davenport as his proctor and permission to exhibit the resignation to the bishop.

The withdrawal of resignation, dated the 10th of June, 1886, and witnessed in the same manner as the resignation, ran thus:—

Whereas I, Oswald Joseph Reichel, vicar of Sparsholt with Kingston Lisle, in the county of Berks and diocese of Oxford, have executed a certain instrument, dated the 2nd day of June, 1886, purporting to be a resignation of my said benefice, and therein purporting to appoint Thomas Marriott Davenport my proctor for the purpose of exhibiting the same to the Lord Bishop of Oxford. And, whereas the said instrument has not been executed by me voluntarily, freely, and unconditionally, but under pressure and by the request and desire of the said Lord Bishop, and conditional upon its not being accepted before the 1st day of October, 1886, and without legal advice. And whereas I have not appeared personally before a notary public for the purpose of appointing the said Thomas Marriott Davenport to act as my proctor in the matter of my said pretended resignation. And whereas I am now advised that the said instrument is null and void, and of no force whatever to affect the resignation of my benefice, not having been made freely, and voluntarily, and unconditionally, and that the pretended appointment of the said Thomas Marriott Davenport is also of no force or validity, not having been made by me personally before a notary public. Now I, the said Oswald Joseph Reichel, hereby cancel and revoke the said instrument and pretended resignation of my said benefice of Sparsholt with Kingston Lisle, declaring it to be my intention not to resign my said benefice, and I also annul and cancel the pretended appointment of the said Thomas Marriott Davenport to act as my proctor, hereby withdrawing from him all authority to act as such, and strictly forbidding him from acting as such proctor, and from exhibiting to the said bishop my said pretended resignation, or otherwise taking action in the matter on my behalf.

After some further correspondence the plaintiff commenced his action for a declaration that he was still vicar of Sparsholt. The Provost and Scholars of Queen's College, Oxford, the patrons of the living, having been added as defendants, the action was tried on the 13th of December, 1886. The college did not appear, desiring to remain neutral in the proceedings.

Cozens-Hardy, Q.C., and *Alexander Young*, for the plaintiff.

Jelf, Q.C., *Muir Mackenzie*, and *Mackarness*, for the bishop.

Jan. 12, 1887.—North, J., dismissed the action.

The plaintiff appealed.

Jenne and *A. Young*, for the appellant, cited *Kemp* v. *Wickes*, *Ffytche's case*, 2 Phil. Eec. Law, p. 1121; *Fletcher* v. *Lord Sondes*, 3 Bing. 501; *Martin* v. *Mackonochie*, 16 W. R. 604, L. R. 2 Ad. & Eec. 116; 26 Hen. 8, c. 3, ss. 21, 22; 31 Eliz. c. 6; 34 & 35 Vict. c. 44, s. 9, sched. B.; Gibson's Codex, ed. 1761, p. 821; Burn's Eccl. Law, 9th ed., vol. 3, pp. 541, 542; Ayliffe's Parergon, pp. 467, 468; Watson's Clergyman's Law, p. 28; Reiffenstuel's Jus Canonicum, lib. 1, tit. 9, pp. 268, 281, 282; Reformatio Legum Ecclesiasticarum, Cardwell's Edit., p. 71; Registrum Brevium Originalium, p. 306; Corpus Juris Canonici, edit. Leipsic 1869; Decretales, book 2, tit. 19, ch. 11; Oughton's Ordo Judiciorum, vol. 2, p. 221; Constitutions of Othobon, 1 Phil. Eccl. Law, p. 510.

Charles, Q.C., and *Mackarness*, for the defendant, referred to *Reyes* v. *Exeter College, Oxford*, 12 Ves. 336; *Bowell* v. *Bishop of London*, 14 Moo. P. C. 395; *Grey* v. *Hesketh*, Ambl. 268; *Rumsey* v. *Nichol*, 2 C. P. D. 179; Van Espen's Jus Ecclesiasticum Universum, vol. 1, part 2, sect. 3, tit. 10, c. 3, p. 814; John the Devout, Institutiones Canonicæ, edit. 1852, vol. 1, p. 322, sect. 11; Stillingfleet's Ecclesiastical Cases, vol. 1, p. 60; Godolphin's Repertorium Canonicum, 3rd ed., p. 282.

Alexander Young replied

Cur. adv. vult.

March 12.—COTTON, L.J.—This action was instituted for the purpose of obtaining a declaration that the plaintiff is still vicar of Sparsholt-cum-Kingston-Lisle, and to have an instrument of resignation which he executed, dated the 2nd of June, 1886, declared null and void; that it should be cancelled, and that an injunction should be granted to restrain the defendant, the bishop, from in any way acting upon or treating the resignation as valid, from declaring the benefice vacant, and from instituting another person.

In May, 1886, the plaintiff was undoubtedly vicar of Sparsholt; but before that time—namely, in 1885—a charge, seriously affecting his character and position in the parish, had been made openly against him by a woman. He took criminal proceedings against her for the purpose of vindicating his character, but those proceedings entirely failed. In one case the woman was acquitted, and in the other case the indictment was withdrawn. Thereupon the bishop, feeling that the plaintiff's position in the parish was such that it was not advisable that he should continue to hold the benefice, wrote to him, and a correspondence took place between him and the bishop, and the most material letters are those of the 26th and 28th of May, 1887. The letter of the 26th of May was not written by the bishop, but by a clergyman acting by his authority. The plaintiff's letter says he places in the hands of the bishop his resignation, but that, of course, was without having complied with the usual formalities; and very shortly afterwards, Mr. Davenport, the secretary of the bishop, sent the plaintiff a deed of resignation, to be executed by him and to be sent on to the bishop. Stopping there, I do not consider that there was any contract or bargain between the bishop and the plaintiff; but I do understand from the letters that there was a sort of intimation by the bishop that it would be necessary for him to take proceedings in the Ecclesiastical Court in consequence of the charge which had been brought against the plaintiff unless he prevented any further scandal in the parish by resigning. Then, as I understand, there was an intimation by the bishop, at the instance of the plaintiff, that he would not act on the resignation, if put into his hands, by immediately declaring that the benefice was void, but would allow the plaintiff still to continue in his position of vicar of Sparsholt till the 1st of October, though as from that time he would act on the resignation by declaring the benefice void.

The deed which was sent to the plaintiff by Mr. Davenport was, to a great extent, in the ordinary form. It was a printed form, slightly varied. It was signed, sealed, and delivered by the plaintiff on the 2nd of June, and was sent by him to Mr. Davenport. Mr. Davenport immediately sent it on to the bishop, who received it on the 3rd of June. I will consider the objections that have been raised to the deed both as to form and substance.

The first question which I shall consider is, Was there, as regards the act to be done by the plaintiff, an effectual resignation of this benefice? The deed was signed by him. But he says in his evidence that neither by him nor by the bishop was it ever intended that the instrument should be a deed effectual for the resignation of the benefice — that it should be put into the bishop's hands as something which he might show, but not really to be acted on by him. That is directly contrary to all the correspondence which took place between the plaintiff and the bishop, or those who were acting for the bishop, before the deed was executed. It is obvious that the bishop, in declining to grant an interview to Mr. Reichel, and saying that it was necessary he should resign, intended to have an actual resignation of the benefice from Mr. Reichel; and, although Mr. Reichel does—and I regret it—swear that it was never intended by him, or by the bishop, that the deed should be anything but form, the bishop states that that was not his intention, but that he always intended that it should be an actual resignation. With those remarks I leave that point.

But was the deed itself good and effectual as a resignation on the part of the plaintiff? The great objection urged to this deed, as regards the mere deed, was that it had not been executed before a notary public. But why was it not so executed? It was, as originally framed, intended, undoubtedly, to be executed before a notary public; but Mr. Davenport, thinking that it might be difficult for the plaintiff to execute the deed before a notary public, told him that if he had such a difficulty he need not execute it before a notary public. Therefore, it was for the convenience of the plaintiff that the officer of the bishop intimated to him that the formality of executing this deed before a notary public would not be insisted on by the bishop. If we were to hold this objection good, it would come to this, that because this ordinary formality was, for the convenience of the plaintiff, and with the assent of the bishop, not insisted upon, the plaintiff could afterwards take advantage of that concession made to him by the bishop and his advisers, and say that that deed, signed as his solemn deed of resignation, was to be considered as null and void. Unless there is some positive law—some statute, or something equivalent to it—requiring us to come to such a conclusion, I shall be unable to do so. Does the canon law require us so to decide? In my opinion no authorities have been referred to or quoted (and every possible authority was quoted to us for the appellant) which force us to come to that conclusion. The passage most relied on, and which seemed most like an authority that the resignation to be effectual must be by a deed executed before a notary public, was a passage from Gibson's Codex (2nd ed. 1761, p. 822) about resignation. But what is he there considering? He is considering the question whether, as some suppose, there could be a resignation by an attorney or proxy; and dealing with that he says: "I take it (in practice) there is no way of resigning, but either to do it by personal appearance before the ordinary, or, at least, to do it elsewhere before a public notary, by an instrument directed immediately to the ordinary and attested by the said notary, in order to be

presented to the ordinary by such proper hand as may pray his acceptance." It is not said there that a deed really and in fact executed by the clerk desiring to resign, if not executed before a notary public, is to be regarded as null and void where there is no question at all whether in fact he did execute it. In my opinion, this formality of execution before a notary public was a formality to protect the bishop—to prevent him from accepting as a deed of resignation that which was in fact never executed by the clerk who was supposed to be desirous of resigning his benefice—and if the bishop is satisfied *aliunde* that the instrument is that of the clerk and is willing to waive that formality, no objection can be taken to the effect or validity of the deed on the ground that a formality for the protection of the bishop was not adopted. In my opinion, that objection entirely fails.

The next question was, whether this deed of resignation was effectually revoked or recalled by the plaintiff? It appears that on the 10th of June the plaintiff did execute a deed revoking the prior deed of resignation which he had executed, and he did not notify that to the bishop or Mr. Davenport, the secretary of the bishop, till the 16th of July. The deed of resignation had given a mandate to Mr. Davenport to present this deed to the bishop, and it was contended, on behalf of the appellant, that Mr. Davenport had no business to present the deed to the bishop till the 1st of October; that this deed of revocation was made before the mandate or authority given to Mr. Davenport was at an end, and that he could not further deal with the deed of resignation. In fact, Mr. Davenport had acted on the authority, given him in absolute terms by the deed without any restriction of time, by sending the deed to the bishop, so that the bishop ceived it on the 3rd of June; and, in my opinion, Mr. Davenport was fully justified in so doing. All that the bishop promised was, that he would not sign the formal acceptance of the resignation till the 1st of October; but, according to the evidence, there is no restriction on the authority given to Mr. Davenport so as to make it wrong for him, as soon as he received the deed, to send it on to the bishop, whatever the consequence may be. Then it was said—and this was the principal argument—that a deed of resignation of his benefice by a clerk may be revoked at any time before acceptance. Before I consider the actual terms in which that objection was taken I will deal with the question, which really is one of substance, as to the act of the clerk and the act of the bishop with regard to resignation.

Undoubtedly no resignation is effectual until it has been assented to—approved—by the bishop. And why is this? The clerk has received the benefice from the bishop, the bishop has intrusted him with the cure of the souls in the parish, and it would be wrong, and contrary to principle, to allow a clerk who had received that charge from the bishop to give up his charge without the sanction of the bishop to his so doing. It is a case of a subordinate discharging himself, without the assent of his superior, from duties which the superior has committed to him. Till the bishop or the ordinary, whichever he may be, has assented, and in that sense accepted the resignation, the resignation may be a nullity; and till it is assented to by the bishop it is not effectual. That is really what is meant—one clearly sees the distinction in a passage from Lyndwood quoted by Gibson in the chapter I have already referred to (p. 823). Lyndwood lays down that, although where there is a cure of souls the resignation cannot be effectual without the assent of the ordinary, yet where the resignation is of a sinecure the deed of resignation will itself avoid the sinecure, because nobody is prejudiced except the person who resigns. But he says—and I shall have to refer to the words on another part of the case—that where there is a cure of souls there is necessity then for the *ratihabitio episcopi*, that is, the assent of the bishop. That is the obvious substance of the matter; where that which is resigned involves a cure of souls committed to the clerk by the bishop, the clerk cannot give up that cure without the assent of the bishop. But then the appellant's counsel urged that there was a revocation before there was any acceptance; that the bishop had said he would not sign the formal acceptance till the 1st of October; that such signature was the acceptance; and that the revocation was long before that time. A great many passages from canonical authors were referred to for the purpose of enforcing this argument, and in particular a passage from Gibson in which are the words "until the acceptance of the bishop." But what is really meant by the authorities which were referred to? I will take John the Devout, one of the authorities quoted, because there it is stated that there is *locus pœnitentiæ* up to a certain point, but that when *facta et probata resignatio* there is no *locus pœnitentiæ*. *Facta* means where the clerk has executed the deed of resignation; *probata* where the bishop has approved of it. So up to the time when the clerk has executed the instrument of resignation or come in person to express his intention to resign, there is still time for revocation; but when the bishop has approved, *probata*, there is no longer an opportunity for revocation. Then, in another passage, there is the expression *admissio* of the bishop. And it was argued that that meant acceptance. But *admissio* is not acceptance in the sense of signing the formal instrument which was signed by the bishop, I looked at one of the best lexicons, and I found that *admissio* had the meaning of "grant or permission, or approval." So that, in my opinion, all that is meant is that there is no room for revocation when the bishop has either approved or admitted in the sense of *admissio*. As long as the resignation has not become binding by the assent of the bishop or ordinary, so long can there be a revocation of the complete act; but as soon as the resignation is complete by the assent of the bishop, then there is no *locus pœnitentiæ*; there is no power to recall. In my opinion, there was no power, on the 16th of July, for the plaintiff to recall his resignation if, previously to that time, there had been an assent or approval of the bishop to his resignation.

Now one must consider here—and this point was very much argued—whether any form of assent on the part of the bishop is necessary. I use the word "assent," not "acceptance," because the latter is a word the doubtful meaning of which has given rise to great difficulty. I cannot find that any form is required. It could not be intended that any form should be required when a clerk came in person to the bishop and said, "I wish to resign." The bishop says, "I assent to that," and that is all. But it is said that, when the resignation is by deed and not by a clerk in person, signature at least must be necessary; and reliance was placed on the decree of the 4th Lateran Council, which gave certain directions as to the judicial act of the bishop being reduced into writing. I doubt very much whether the acceptance by a bishop of the resignation of a clerk can be properly called a judicial act. In one sense it is a judicial act; because, when the resignation is presented to the bishop, he must consider, not arbitrarily, but reasonably, whether the resignation is for good ground, whether he is willing to receive it. He may think for some reason or other that it is not proper for him to accept the resignation. It may be made for simoniacal or other reasons, and then it is his duty, if he knows that, to refuse to accept it. In that way it is a judicial act. It is an act in respect of which he is to exercise a judicial discretion. The case of *Gray* v. *Hesketh* was referred to. When that case was in the King's Bench, Ryder, C.J., is reported to have said: "The ordinary is a judicial officer,

and is intrusted with a judicial power to accept or refuse resignations as he shall think proper": Phill. Eccl. Law, p. 1121. That, in my opinion, means that he has a discretion to be exercised judicially, not arbitrarily, but with a due regard to all the circumstances of the case.

In *Heyes* v. *Exeter College, Oxford*, 12 Ves., at p. 345, there is an expression which strongly confirms my view, because Lord Erskine, C., is there reported to have said:—"The only doubt arises upon this, that having made the resignation before a notary duly qualified to receive it, the defendant did not leave it to him, nor did he mean himself to carry it to the bishop, but he constitutes two other notaries to signify it to the bishop. I found, however, upon conversing with a person of great eminence in the Ecclesiastical Court, that this act of the bishop is considered, not a judicial, but a domestic act, the law confiding to him that he will not permit resignation for improper purposes." If this is not to be considered a judicial act, that passage in the decree of the 4th Lateran Council, in my opinion, has no application to this case, and anyhow ought not to bind us to hold that any particular form of assent is necessary; for what the decree is dealing with is the question, what is, in ordinary circumstances, the proper form to be adopted by the ordinary in conducting his judicial proceedings? But the fact that any proceedings of the kind have been omitted would be a mere impropriety, an irregularity, not vitiating the act if otherwise effectually done. Moreover, I have heard nothing to satisfy me that the particular decree referred to has ever been adopted and acted upon in England as binding on the courts, or as part of the law of the land. Then it was urged that *Heyes* v. *Exeter College, Oxford*, did lay down that at least the signature of the bishop was necessary in order to show his assent. In my opinion it does nothing of the kind. In that case, as in this, there was the signature of the bishop to a formal document of acceptance, which also declared the benefice to be void, and when that was proved to be his signature, and that it was given at a particular time, that decided the question whether the clerk had been presented by Exeter College to the living to which he could not have been presented if he had held any other benefice at the time, and settled the question that the benefice had become void. But it is in no way laid down in that case that signature is necessary; though when it was shown there was a signature to a formal acceptance, the question whether the bishop had assented was, of course, at an end.

Before I leave this part of the case I ought to refer to the Constitution of Othobon (1 Phill. Eccl. Law, p. 510), which was pressed upon us both in the opening and in the reply. That, in my opinion, is entirely inapplicable to the present case. It deals merely with the evidence which was required to be presented to a bishop in order to show that the benefice was void before the patron could present, before the bishop could institute a clerk, and does not in any way deal with the particular formalities required as to the assent of the bishop to a resignation. Mr. Young, in reply, showed that this would have a bearing on the bishop instituting another clerk; but here, if judicial declaration be required, we have a declaration by the bishop that on the 1st of October the benefice was avoided by the resignation of the present plaintiff. Mr. Young, however, contended that, as the deed of resignation was executed in the diocese of Salisbury, therefore the declaration of the Bishop of Salisbury, and not that of the Bishop of Oxford, would be necessary in order to enable Queen's College to present, or the bishop to introduce a new clerk as on the avoidance of the living. But the whole argument on the part of the appellant was that the same deed was ineffectual till assented to by the bishop. But I think it became effectual by the assent of the bishop, and that the resignation was in the diocese of Oxford and not Salisbury.

I have also come to the conclusion that no particular form of assent is necessary. Was there an assent by the bishop before the 16th of July? In my opinion, if the assent does not require any special form, there can be no doubt in the present case that there was perfect assent on the part of the bishop to the plaintiff's resignation when he, without objection, received the deed of resignation on the 3rd of June. Before the 3rd of June, at the bishop's suggestion, assented to by the plaintiff, the deed of resignation had been executed by the plaintiff. When that deed of resignation was received by the bishop without objection, it being sent in at his suggestion, yielded to by the clerk, in my opinion the bishop fully expressed his assent to the resignation of the plaintiff.

Then there was another objection which I must deal with before I leave this part of the case. Undoubtedly, the bishop did not then declare the benefice to be void; and he refrained from doing so out of kindness to the plaintiff. The plaintiff's counsel say that in all the authorities the time when the power of revocation is at an end is the time when the benefice becomes avoided, and, therefore, that, until that time, the power of revocation continues, and that here the bishop, according to his promise, did not attempt to avoid the benefice till the 1st of October. I will deal presently with the question whether the act of the bishop in that respect was good; but, in my opinion, the authorities do not support the contention that the power of revocation continued till the 1st of October in this case. The authorities referred to deal with the case of a resignation to be acted on at once by the bishop by declaring the benefice to be at once and from that time vacant, and, therefore, they do say that when the bishop's assent has been given to the resignation the benefice is void, and the *locus pœnitentiæ* is gone. But it is the assent of the bishop, and not the avoidance of the living, which puts an end to the power of recalling the resignation. In my opinion, therefore, as far as we have gone, the objections do not prevail. There was a good deed of resignation, there was no power of revocation, and the resignation was assented to by the bishop.

But I must deal with the other objections raised, which are of a more serious and substantial character It is said that, under the circumstances of this case, the resignation and the assent of the bishop were void. The ground of that contention, as I understand it, was that the instrument of resignation sent in by the plaintiff was subject to a condition—namely, that contained in the promise of the bishop that the benefice should not be declared void till the 1st of October—and it was said that made the resignation entirely void. Undoubtedly in one sense that may be called a condition; and, undoubtedly, it is English law that a resignation must not be subject to condition, except certainly, in one instance, where it is for the purpose of an exchange of livings. But, in my opinion, this is not a condition which is touched by the rule of law that resignation must not be subject to condition. The rule means that a resignation must not be subject to anything which will render it, on the happening or non-happening of any event, null and void. But here there was no condition in that sense. Here there was merely a postponement, not by bargain of the bishop, but by his kind intimation of what he would do—a postponement of the effect of the resignation. It was a suspension of the avoidance in consequence of the resignation made by the clerk, and accepted by him; and, in my opinion, that in no way affects the resignation, nor does it make what took place between the bishop and the plaintiff liable to any of the objections which have been raised.

The case was said to be like that of a contract to resign, which is bad. In my opinion,

that is not so. The resignation was put into the hands of the bishop, but the bishop simply said he was willing not to declare the benefice void till a future period. That was an arrangement, if you like to call it so, but it was not a contract. By the statute 31 Eliz. c. 6, there can be no bargain about a resignation, and not simply no bargain, but no corrupt bargain. Section 7 provides that, "if any incumbent of any benefice with cure of souls, after the end of the said forty days, do or shall corruptly resign or exchange the same, or corruptly take for, or in respect of, the resigning or exchanging of the same, directly or indirectly, any pension or sum of money," then "as well the giver as the taker of any such pension, sum of money, or other benefit corruptly, shall lose double the value of the sum so given, taken, or had." It is impossible to suggest that what was done by the bishop out of kindness to the plaintiff was in any way corrupt. He thought it necessary for the parish, and those committed to the care of the plaintiff, that the plaintiff should resign his benefice; but there was no corruption. What was done was done quite honestly, without any intention of providing any benefit to the bishop. It was done simply to allow this plaintiff, for various reasons, to continue up to the 1st of October, he promising to absent himself in the meantime. But could the avoidance be declared by the bishop in this way? In my opinion it could. It is curious that, although the Incumbents' Resignation Act (34 & 35 Vict. c. 44) does not expressly give, or purport to give, any power to the bishop to make a resignation to take effect at a future time effectual by making the benefice void, a form is given in schedule B. of a declaration by the bishop accepting the resignation and declaring the benefice void on and after a certain day. And in the 9th section of the Act there are these words:—"If the patron shall have declared his assent, or have not refused it as aforesaid, or if the archbishop shall decide that the resignation shall be accepted, the bishop shall cause a declaration as in schedule B. to be prepared, inserting therein the amount of pension so allowed out of the revenues," "and the day, not being less than one month after the date of the declaration, when the incumbency shall be void." So that it is there recognized that the bishop can make the avoidance take place from a day after the time when the resignation is made—after the day when he has declared his acceptance.

It would be difficult to come to the conclusion—even if there were more authorities, or any authorities, in favour of the appellant (for I do not think there are any)—when an Act of Parliament is framed in that way, that it would be wrong or invalid on the part of the bishop to suspend for a time the effect of a resignation or to declare that the benefice was void as from a future day. In my opinion there is nothing wrong in it. This court, in making orders, often directs them not to be drawn up for a particular time. That is suspending an order, which has its effect as from the time it is pronounced. Such a power might be exercised corruptly if one could suppose that a bishop could do such a thing. An arrangement as to suspending the operation or suspending the time from which the benefice was to be void might be come to improperly; but in this case there is not the slightest ground for contending that such was the case.

There is only one other point to which I need refer. It was suggested, during the course of the argument, that the intention of the bishop to accept the resignation, so as to avoid the public scandal of taking proceedings in the Ecclesiastical Court against the plaintiff, was contrary to law and public policy. In my opinion it was not. The resignation would have the same effect as the highest penalty which the Ecclesiastical Court could have imposed, and, in my opinion, it cannot in any way be said to be contrary to public policy if the offending clerk is removed from the cure of souls to avoid the public disclosure of the act in reference to which the bishop thinks it right that he shall be removed. In my opinion all these objections to the deed of resignation fail, and the appeal must be dismissed.

LINDLEY, L.J.—Before proceeding to notice the various points of law raised by the appellant, it will be convenient to allude to one or two questions of fact. The correspondence warrants the inference, and I infer that there was an understanding, although no express promise, that if the plaintiff resigned no proceedings against him should be taken by the bishop. The correspondence also shows that it was agreed between the plaintiff and the bishop that the plaintiff's resignation should not be accepted so as to avoid the living before the 1st of October, 1886. The legal consequence of this will be examined hereafter. It was further arranged that the plaintiff should have leave of absence until the 1st of October, and, although no formal leave of absence was asked or given, the plaintiff, in fact, left the parish on the faith of this arrangement. It is perfectly clear from the correspondence in May that the plaintiff sent in his resignation at the request of the bishop in order that further scandal and hostile proceedings against the plaintiff might be avoided. It is also plain that the resignation required by the bishop was one on which he could act on the 1st of October, and that a resignation which might be revoked by the plaintiff before that date would have been useless for the purpose for which alone it was required.

The plaintiff has sworn that he never intended to resign absolutely and finally without retaining the power of revoking his resignation before the time fixed for its acceptance, and he appeals to his execution of a deed of revocation and to his going before a notary (10th and 11th of June) in proof of this contention. I have read this part of the plaintiff's evidence with pain, for even if when he sent in his resignation he did not intend it to be final and absolute (which I cannot bring myself to believe), it is clear that no hint of any such understanding was conveyed to the bishop. In dealings between man and man unexpressed beliefs, meanings, or intentions can only be regarded (if at all) when they are consistent with good faith and with the expressed intentions and objects of both parties, and it would, in my judgment, be contrary to sound legal principles to give effect to the plaintiff's belief or understanding that he was to be at liberty to revoke his resignation before the 1st of October, even if his evidence on this point could be believed. The plaintiff has also deposed that he sent his resignation to the bishop's secretary with instructions not to lay it before the bishop till the 1st of October. This is denied by the bishop's secretary, and is not supported by the written authority signed by the plaintiff, nor by the correspondence, and cannot be accepted as true.

The points of law relied upon by the plaintiff were mainly two—viz., first, that the resignation was wholly void; and secondly, that it was revocable, and had been revoked before it had been accepted by the bishop. The contention that the resignation was void was based on two grounds, one of form and one of substance. The objection to the resignation in point of form was, that it was not attested by a notary. It is laid down in books of authority, *e.g.*, Gibson's Codex, p. 822, and 3 Burn's Ecclesiastical Law, p. 541, that, "in practice there is no way of resigning, but either to do it by personal appearance before the ordinary, or at least to do it elsewhere before a public notary." But, although it may be quite true that the bishop may decline to receive a resignation made in any other way, no authority was cited to show that a bishop cannot dispense with these formalities, and accept a resignation of the genuineness of which he is satisfied by other evidence.

In this particular case the bishop's secretary, in his letter of the 31st of May (which accompanied the form of resignation to be executed by the plaintiff) expressly informed the plaintiff that attestation by a notary would not be insisted upon. Under these circumstances, and finding no authority to the effect that the bishop cannot lawfully waive the observance of the formalities usually required, I am of opinion that it is competent for him to do so, and that the plaintiff's resignation cannot be held invalid on the ground of its non-attestation by a notary. The objection to the resignation in point of substance was, that it was accompanied by an agreement or understanding, or by a condition or qualification which rendered it void in point of law. I have already stated what those were. It is contended that every resignation must be made *purè, sponte, absolutè, et simpliciter*, and that the plaintiff's resignation was not of this nature. It is to be observed that the instrument of resignation is in the nature of a deed poll. Resignation is the act of the incumbent; the instrument is his deed; the words of it are his words. The words are: "I, ——, for certain just and lawful causes me thereunto especially moving without compulsion, fraud, or deceit, purely, simply, and absolutely resign and give up my vicarage," &c. Those words are the incumbent's solemn assurance to his bishop that the resignation is one which the bishop may safely and properly accept, and that there is nothing simoniacal or otherwise improper in the transaction.

Now, the bishop was insisting on an unconditional resignation; the plaintiff knew this, and he sent in his resignation accordingly in the form in which he was required to make it. He cannot now turn round and obtain relief on the ground that his resignation was not in truth what he solemnly declared it to be: see *Rumsey v. Nichol*. This action is one in which the plaintiff is asserting rights based on a transaction to which he was a party, and which he now impeaches on the ground of illegality. It is contrary to well-settled legal principles to give relief in such a case. No doubt, if he were being sued by others, it would be competent for him to defend himself by showing the illegality of the transaction on which their right to relief was founded, and the plaintiff would not be estopped by his own deed from proving such illegality: *Collins* v. *Blantern*, 1 Sm. L. C., 9th ed., p. 398. ut the position of a plaintiff seeking relief is wholly different, and to grant to the plaintiff equitable relief in the shape of an injunction upon the ground that his resignation was illegal and void is quite out of the question. It would not, however, be satisfactory to dispose of the question of illegality on the ground that, assuming it to be established, the plaintiff could not take advantage of it.

Having regard to the frame of the action and the argument addressed to the court upon it, the court in my opinion, ought to declare what the rights of the parties really are, and decide the question really in dispute between them—viz, whether the plaintiff's living did or did not become void on the 1st of October, 1886. The decision of this question renders it necessary to determine whether the plaintiff's resignation really was void or not. The determination of this point involves the solution of the following questions—viz., 1. What was the effect of the arrangement between the plaintiff and the bishop that he should not accept the plaintiff's resignation before the 1st of October, 1886? 2. What was the effect of the understanding that if the plaintiff resigned the bishop would not proceed against him under the Church Discipline Acts? In my opinion, neither of these understandings affected the validity of the resignation. It was said that they made it conditional, and therefore void. But, as already pointed out, the resignation does not express, or purport to express, or negative any agreement with the bishop; and I am by no means satisfied that the rule which requires resignations to be absolute excludes all terms and conditions of whatever nature which the incumbent may make with his bishop. In the next place, these so-called conditions are not conditions in the legal sense of the word. A promise not to proceed under the Church Discipline Act, assuming such promise to have been made, would be a mere collateral promise, not a condition affecting the resignation itself. Such a promise neither postpones the resignation nor defeats it. Nor would a breach of the promise render the resignation inoperative; still less is the postponement of the time for avoidance a condition in the proper sense of the term. The difference between annexing a condition to an act such as a promise or resignation, and fixing a term at which it is to take effect, is familiar to every lawyer. A promise to pay a sum of money at a future time is not a conditional promise; nor is a resignation to take effect at a future named day a conditional resignation. The resignation is absolute, although its operation is deferred. It would not, however, be satisfactory to dispose of this part of the case on any merely technical ground. It is desirable to examine the matter further, for collateral promises or even honourable understandings, if contrary to law, may make a resignation void. They may show that the resignation was really part of a transaction which was simoniacal or corrupt within the meaning of the statute 31 Eliz. c. 6, ss. 4—8. But I can find nothing in this case either simoniacal or corrupt. The bishop had to consider his duty to the plaintiff's parishioners and to the Church, and he came to the conclusion that it would be best for them if the plaintiff resigned without scandal. He also came to the conclusion that it was not necessary immediately to avoid the living, and that he could, consistently with his duty, postpone the avoidance of the living until the 1st of October if the plaintiff desired it, which he did. No authority has been cited to show that the bishop could not properly or lawfully act as he did. If he could secure the removal of the plaintiff from the parish, and could also avoid further scandal, there is no legal reason why he should not do so. There is no law which compels him to proceed against the plaintiff under the Church Discipline Act. The promise to postpone the avoidance of the living for a few months did not, in my judgment, in any way affect the validity of the resignation. The postponement was a kind concession to the plaintiff, and was injurious to no one. It is impossible to bring such a transaction as this within either the words or the spirit of 31 Eliz. c. 6, s. 7, and equally impossible to treat it as simoniacal.

There is no authority to show that a bishop cannot, for good and sufficient reasons, lawfully postpone the coming into operation of a resignation which he has received, and which he has approved. On the other hand, there is evidence that such a practice is common in the diocese of Oxford. It has obvious conveniences, and it is permitted by the Incumbents' Resignation Act (34 & 35 Vict. c. 44), s. 9, and schedule B. Such a power may undoubtedly be abused, but its liability to abuse does not show that the power does not exist. In the absence of authority, I cannot hold that a resignation is invalid because it is made on the understanding or faith of a promise by the bishop that it shall not come into operation the moment it is made. The decisions on resignation bonds do not touch this point, nor do the principles on which they proceed apply to a case like the present. A promise or understanding of the kind in question may, in some circumstances, be corrupt or simoniacal, and will, if corrupt or simoniacal, render a resignation on the faith of it illegal and void, but there is nothing of the sort in this case. Where, as here, the avoidance of the living is promised to be postponed by the bishop for a reasonable time, and *bonâ fide*, with a view to the interest of all parties concerned, a resigna-

tion made on the faith of such promise, in order to avoid scandal and legal proceedings under the Church Discipline Act, is, in my opinion, legal and unimpeachable.

There remains for consideration the question whether the resignation sent in by the plaintiff was revocable before the 1st of October, which was the time from which it was to take effect. Speaking generally, a resignation is revocable until it has been accepted by the bishop, and when it is accepted by him the living becomes void. But the authorities cited in support of this proposition are not addressed to the question whether an incumbent can revoke a resignation sent in by him to his bishop, at the bishop's request, and in order to avoid scandal and possible legal proceedings. I can find no authority which requires the bishop's approval to be signified in any particular form, although, in order to avoid disputes, the acceptance is usually put into writing and signed by the bishop. A resignation sent in under the circumstances now supposed is, in fact, approved before it is sent in, and in the case supposed no further approval appears to me necessary in order to render the resignation irrevocable. There is an ambiguity about the word "acceptance" which is apt to mislead. I am not at all sure that the words, *admissio, approbatio, consensus*, and the like, used by Von Espen and other canonists, mean such an acceptance of a resignation as avoids a living. It no doubt very often happens that all these expressions mean the same thing. But I am not aware of any authority which shows that an approval of a resignation is necessarily such an acceptance of it as immediately avoids the living contrary to the intentions as well of the incumbent as of the bishop. If, however, the law were as the plaintiff contends, the only effect would be that his living would necessarily have become void earlier than he intended. But this would not help him in this litigation. If he were right, both he and the bishop would have made a mistake on a matter of law; and such a mistake would not entitle the plaintiff to relief. In the view here taken of the facts and of the law it is unnecessary to determine exactly when the bishop affixed his signature to the acceptance of the plaintiff's resignation; whether the acceptance was signed before or after the attempted revocation is, in my opinion, immaterial. It is plain, as a matter of fact, that the bishop never intended his signature to operate as such an acceptance of the plaintiff's resignation as then and there to avoid the living. The acceptance in this sense was never intended to come into operation until the 1st of October, when it was formally announced. To hold that, under the circumstances of this case, the plaintiff could legally withdraw his resignation after he had sent it in, would be to hold that the plaintiff could lawfully commit a gross breach of faith, and, in the absence of any authority which requires the court to hold that he has a right so to act, he ought to be held not to have it. For the reasons above stated I am of opinion that the plaintiff's appeal fails, and ought to be dismissed, with costs. But the order of the court ought, in my opinion, to be prefaced by a declaration that the benefice of Sparsholt became void on the 1st of October, 1886, by reason of the resignation thereof by the plaintiff on the 2nd of June, 1886, with the approval and consent of the Bishop of Oxford, and his acceptance thereof as on and from the 1st of October, 1886, and that the attempted revocation by the plaintiff of such resignation, after the receipt thereof by the bishop, was invalid and void.

LOPES, L.J.—At the time the correspondence between the appellant and the bishop commenced, the appellant had, by his misconduct, rendered himself liable to be proceeded against under the Church Discipline Act; and the bishop, having regard to the grave scandal occasioned by that conduct unless the appellant at once resigned his benefice, would have failed to discharge his duty if he had not directed such proceedings to be taken. In these circumstances a correspondence took place, the meaning and effect of which is most important to consider. A careful and anxious consideration of that correspondence has led me to the conclusion that there was an absolute and unconditional resignation of his benefice by the appellant in June, subject only to an understanding that the benefice was not to be avoided until the 1st of October. The resignation was suggested by the bishop, acquiesced in by the appellant, and approved of by the bishop when received by him. The resignation was, in my opinion, *facta et probata* when the bishop received it on the 2nd of June. This resignation, I am of opinion, the appellant had no power afterwards to withdraw. It was intended both by the appellant and the bishop that it should be absolute and irrevocable. Directly it was received by the bishop the resignation was complete, subject only to an understanding that the effect and the consequence of the resignation were to be suspended until the 1st of October. There was much argument with regard to the word *admissio*. In my opinion, *admissio* and *probatio* are equivalent terms, both meaning acquiescence or approval.

I will now shortly consider the grounds on which the appellant seeks to impeach his resignation. It is said that the deed of resignation is invalid because it was not executed before a notary public. There are several ways in which a valid resignation may be made. All these modes appear to have for their object the protection of the bishop, and are intended to secure him from the consequences of a mistake in avoiding a benefice. One of these modes is the execution of a deed of resignation before a notary public. I am of opinion that the execution of such a deed before a notary public is a formality for the protection of the bishop which he may waive if he thinks fit. The bishop waived this formality, and, in my opinion, the deed is not on this ground invalid. It was also contended that the resignation was illegal because a collateral condition was attached. The appellant says: "I resigned on the understanding that the benefice was not to be avoided until the 1st of October." Excepting only the case where the resignation is made for the sake of effecting an exchange, it is undoubted law that the resignation must be *pure, spontè, absolutè, et simpliciter*, and no collateral condition, by which in certain events the resignation may be defeated, can be annexed. The object was, no doubt, to exclude all corrupt or indirect bargains for money or any other valuable consideration. The object the bishop had in view, when he undertook not to give effect to the resignation and not to avoid the benefice until the 1st of October, is too clear for controversy. It was done in mercy and out of extreme leniency towards the appellant. The understanding, therefore, relied upon cannot be impeached on the ground that it was prompted by any indirect motive. It must be regarded, as, in truth, it was, as an honest stipulation. But was it in any sense of the word a condition by which the resignation was to be defeated? The bishop, according to my view, had, in June, in the most unequivocal way, accepted the resignation of the appellant, and would not have permitted it in any circumstances to be defeated or superseded. Out of extreme kindness he suspended its operation until the 1st of October. I know of no authority or law which prevents the bishop from so doing for honest and good reasons. In certain circumstances it would be highly inconvenient if the ordinary could not postpone for a reasonable time the avoidance of a benefice after he has approved the resignation of a clerk, and such postponement cannot, in my opinion, be said to be a condition annexed to the resignation, and cannot, either on authority or principle, be held to make the appellant's resignation invalid. I feel it unnecessary,

after the judgments which have been delivered, to go into the matter at greater length, as the other members of the court have so exhaustively dealt with it. I should only be repeating what they have said, with all of which I agree.

Appeal dismissed, with costs.

Solicitors for the appellant, *Hyde, Tandy, & Mahon.*

Solicitors for the defendant, *Cunliffes & Davenport*, for *T. M. Davenport*, Oxford.

From Q. B. Div. Feb. 1.

JONAS *v.* LONG. (*a.*)

County court — Equitable jurisdiction — Interlocutory order—Appeal—County Courts Equitable Jurisdiction Act, 1865 (28 & 29 *Vict. c.* 99), *s.* 18.

An appeal upon a question of law lies under section 18 *of the County Courts Equitable Jurisdiction Act*, 1865, *from an interlocutory order of a county court in a proceeding within its equitable jurisdiction.*

Appeal from the Queen's Bench Division.

An action for dissolution of partnership was brought in the Lambeth County Court, and an order was made dissolving the partnership and that the partnership accounts should be taken, and the plaintiff was appointed receiver. On the 10th of May, 1887, an order was made that the defendant Harris should pay into court, within fourteen days, the sum of £65 14s. 6d., being moneys belonging to the partnership admitted to be in his hands, and that he should, within seven days, deliver to the receiver certain books and documents.

On the 2nd of August, 1887, the county court judge, upon the application of the receiver, made the following order (omitting formal parts):—"The court being of opinion, upon consideration of the facts disclosed, that the defendant Harris, in his fiduciary capacity as manager of the partnership business, has been guilty of a contempt of this court by neglecting to obey the order of the 10th of May, doth order that the said defendant Harris do stand committed to her Majesty's prison at Wandsworth for his said contempt."

Harris appealed from this order to the Queen's Bench Division, the ground of his appeal being that the judge was wrong in law in holding that Harris was a trustee or acting in a fiduciary capacity. Stephen and A. L. Smith, JJ., held that, as the appeal was from an interlocutory order of the county court, they had no jurisdiction to hear it. Harris appealed.

T. H. Richmond, for Harris.—The order of committal of the 2nd of August is an interlocutory order in a proceeding under the equitable jurisdiction of the county court. The order was made under section 4, sub-section 3, of the Debtors Act, 1869, the county court having now, by section 89 of the Judicature Act, 1873, power to grant relief in the same manner as the High Court, which power extends to interlocutory as well as to final orders: *Richards* v. *Cullerne*, 7 Q. B. D. 623, 30 W. R. Dig. 103. It has been decided that no appeal lies under section 14 of the County Courts Act, 1850 (13 & 14 Vict. c. 61), from an interlocutory order of a county court in a common law action: *Carr* v. *Stringer*, E. B. & E. 123, 6 W. R. C. L. Dig. 31. Section 18 of the County Courts Equitable Jurisdiction Act, 1865, which gives a right of appeal from the decision of a county court judge in any matter of equity, is wider in its terms than section 14 of the earlier Act. It speaks of "any matter of equity," and it empowers the Court of Appeal to make such final "or other decree or order as it shall think fit." Those words show that the court has power to deal with interlocutory orders in equity cases. The legislation as to appeals from county courts in common law actions is different from the legislation as to appeals in equity cases, because in common law cases, where the amount does not exceed £20, an appeal can only be brought by leave: 30 & 31 Vict. c. 142, s. 13; whereas in equity cases there is no such limit. Considering that county courts have jurisdiction in equity to the amount of £500, and that by sections 1 and 2 of the County Courts Equitable Jurisdiction Act, 1865, the judge has all the powers of a judge of the Court of Chancery, the Legislature must have intended to give an appeal from interlocutory orders, which are far more important in proceedings in equity than in common law actions.

He also cited *Williams* v. *Williams*, 37 L. J. Ch. 855, 16 W. R. Ch. Dig. 34; *Cooper* v. *Busbridge*, 16 L. T. N. S. 5, 15 W. R. Ch. Dig. 31; and *Reg.* v. *County Court Judge of Croydon*, 33 W. R. 68, 13 Q. B. D. 963.

Johnston Watson, for the plaintiff.—The words of section 18 of the County Courts Equitable Jurisdiction Act, 1865, are not wide enough to confer a right of appeal from interlocutory orders. The words, "may make such final or other decree or order," enable the court to deal with a final judgment of the county court either by making some final order upon it or by making an order which will not finally dispose of the matter, as by granting a new trial. This construction would bring the section into harmony with section 14 of the County Courts Act, 1850. The order of committal here was made under section 89 of the Judicature Act, 1873, for the purpose of enforcing obedience to an order of the court. There is no reason why an appeal should be allowed from an order of committal in an equitable matter and not from an order of committal in a common law action. The proper course to pursue in either case is to move for a prohibition.

He cited *Draycott* v. *Harrison*, 17 Q. B. D. 147.

Richmond replied.

Cur. adv. vult.

Feb. 1.—FRY, L.J.—In this case a question was raised in the nature of a preliminary objection, whether an appeal lies from the county court in this case. In the county court proceedings were taken for the purpose of winding up a partnership. The county court judge found that the defendant Harris owed a sum of money to the partnership, and, after hearing the evidence, the judge ordered him to pay this sum into court and to deliver up certain documents to the receiver. Harris neglected to obey this order, and an attachment was ordered to issue against him under the powers conferred upon county courts by section 89 of the Judicature Act, 1873, the order of committal stating that Harris had disobeyed the order while acting in a fiduciary capacity as manager of the partnership business. The question sought to be raised by this appeal is whether Harris was acting in a fiduciary capacity within the meaning of section 4, sub-section 3, of the Debtors Act, 1869. It is plain that those proceedings were taken under the equitable jurisdiction conferred upon county courts by the County Courts Equitable Jurisdiction Act, 1865. It is plain that the order of committal was an interlocutory order, and the question we have to determine is whether an appeal will lie from an interlocutory order made by the county court when exercising its equitable jurisdiction.

It will be convenient, before coming to the Act of 1865, to state the law at the time of the passing of that Act. The County Courts Act, 1850 (13 & 14 Vict. c. 61), is the principal Act giving jurisdiction to county courts, and section 14 of that Act enacts that "if either party

(*a*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

in any cause of the amount to which jurisdiction is given to the county courts by this Act shall be dissatisfied with the determination or direction of the said court in point of law, or upon the admission or rejection of any evidence, such party may appeal from the same to any of the superior courts of common law . . . and the said Court of Appeal may either order a new trial on such terms at it thinks fit, or may order judgment to be entered for either party." It is obvious from that that the nature of the relief which the Act allowed the court to give upon the appeal was not applicable to interlocutory proceedings, but was only applicable to final judgments in the county courts. Accordingly it was decided in 1858 in *Carr* v. *Stringer* that no appeal lay from interlocutory orders of county courts, and that point was finally decided by that case. That being the state of things, the Legislature, by the County Courts Equitable Jurisdiction Act, 1865, gave county courts jurisdiction in matters of equity up to £500, a very extensive jurisdiction and far wider than the jurisdiction in common law actions, and having conferred that jurisdiction the Legislature naturally thought fit to give an appeal. Section 18 giving an appeal is modelled upon the form of the section in the earlier statute giving an appeal in common law cases. The section says: "If any party in a suit or matter under this Act shall be dissatisfied with the determination or direction of a judge of a county court on any matter of law or equity, or on the admission or rejection of any evidence, such party may appeal from the same to the Vice-Chancellor (now to the Divisional Court) . . . . and the said Court of Appeal may make such final or other decree or order as it shall think fit." We must contrast the power there given to the Vice-Chancellor with the power given to the court by the earlier statute in common law matters. The court by the earlier statute has power to order a new trial or to enter judgment for either party. The Vice-Chancellor by the later statute has power to make such final or other decree or order as he shall think fit. The language of the later enactment was obviously intended to be far wider than that used in the earlier enactment; and, as it seems to me, was intended to include interlocutory orders. Therefore, looking at the language of section 18 alone, or contrasting it with the language used in the earlier Act, a right of appeal in matters arising under the equitable jurisdiction of county courts was not confined to final orders, but extended to interlocutory orders. It is said that the Legislature must have intended the same result to follow in both statutes. I cannot say that the Legislature had any such intention, considering the difference in the language. Moreover, the reason of the thing is obvious. The greater importance of interlocutory orders in matters of equity, and the larger amount which may be in question, are strong to show that the Legislature may well have intended to give an appeal from interlocutory orders in equity. I think, therefore, that an appeal does lie from this order of the county court judge.

LOPES, L.J.—The question now raised is whether there is an appeal from interlocutory orders of a county court in equity cases, a question upon which there does not seem to have been any previous decision. In my opinion an appeal lies in such cases, and I come to that conclusion looking at the very general character of the words in section 18 of the County Courts Equitable Jurisdiction Act, 1865. I can put no other meaning upon the words "the Court of Appeal may make such final or other decree or order as it shall think fit" than that they include interlocutory orders. Such a construction is eminently reasonable, because in equity cases the jurisdiction of the county court is very much larger than in common law cases, and interlocutory proceedings may be of more importance. Then if we turn to section 14 of the County Courts Act, 1850, which gave an appeal in common law cases where the amount was over £20, the language of that section is strong to show that the construction which I have placed upon section 18 of the later statute is the true one. The words are, "the Court of Appeal may either order a new trial on such terms as it thinks fit, or may order judgment to be entered for either party." They clearly refer to the final determination of the action in the county court. It was accordingly rightly decided in *Carr* v. *Stringer* that no appeal lay from an interlocutory order in a common law action. I have, therefore, come to the conclusion that there is an appeal from an interlocutory order of a county court in equity cases, and that this objection ought to be overruled.

Objection overruled.

The COURT, however, declined to hear the appeal upon the ground that the point of law raised by the appeal was not taken before the county court judge, and that no request was made to him to take a note of the evidence relating to the point, and that no note of such evidence had in fact been taken.

Solicitors for the plaintiff, *Robinson & Co.*

Solicitor for the defendant, *George Johnson.*

High Court of Justice.

Chan. Div. } Feb. 4.
Kay, J. }

In re MOSS'S TRUSTS. (*a.*)

Trustees—Appointment—Separate trustees of part of trust property—Trustee Act, 1850 (13 & 14 *Vict. c.* 60), *s.* 32—*Conveyancing Act,* 1882 (45 & 46 *Vict. c.* 39), *s.* 5—*Practice—Petition under Trustee Acts—Reference to sections relied on.*

The court has power, under the Trustee Act, 1850, *to allow trustees to retire from a part of the trusts, and to appoint new trustees of that part whenever it is expedient so to do, this power being independent of that conferred by section* 5 *of the Conveyancing Act,* 1882.

Savile v. Couper, 35 *W. R.* 829, 36 *Ch. D.* 520, *distinguished.*

Petitions under the Trustee Acts should contain in the last paragraph a statement indicating the particular sections of the Acts under which it is proposed that the order prayed for should be made.

Petition.

The testator, who died in February, 1887, by his will dated the 1st of April, 1879, appointed S. F. Widdrington, R. J. Cust, and Sir C. L. Cust to be his executors and trustees, and bequeathed to them two sums of £8,000 upon trust to invest and pay the income thereof to G. D. Bourne for life, and after his death to appropriate one of these sums, or the investments representing the same, as a portion for Hannah M. Bourne, upon trust for her for life, and after her death for her issue, and to appropriate the other sum as a portion for Louisa Bourne upon similar trusts in favour of her and her issue; and the testator directed that, in default of failure of their issue, these sums were to sink into his general personal estate. And he devised all his freehold estates to the use of Sir C. L. Cust for life, with remainder to his first and other sons in tail, with remainders over in favour of B. O. Cust and L. P. E. Cust and their sons, with an ultimate remainder to his own

(*a.*) Reported by H. F. AMEDROZ, Esq., Barrister-at-Law.

right heirs. The will contained the usual powers of sale and a declaration that the moneys arising thereby should be invested in hereditaments to be settled to the same uses; and the testator bequeathed all the residue of his personal estate, after payment of his debts and legacies, to his trustees upon the trusts before declared concerning the moneys to arise by the exercise of the power of sale. The will empowered the surviving or continuing trustees or trustee for the time being to appoint a new trustee or new trustees in the place of any trustee or trustees desiring to be discharged or refusing or becoming incapable to act.

Sir C. L. Cust renounced and disclaimed the offices of executor and trustee under the will, which was proved by the other two executors. All the above-named beneficiaries were unmarried. The two sums of £8,000 were duly appropriated, and were represented by two sums of Consols. S. F. Widdrington and R. J. Cust were desirous of being relieved of the trusts of the will, so far as they related to these two sums, as they were likely to continue for many years and were of a complicated character, but were willing to continue trustees of the real estate and of the residuary personal estate. Accordingly this petition was presented by the above-named beneficiaries and by Sir T. E. Moss, who was the heir-at-law of the testator, praying that two persons named might be appointed trustees of the will for the purposes of the two sums of £8,000, and that the two existing trustees might be at liberty to transfer to them the sums of Consols representing the same, and that the two existing trustees might be re-appointed, or might continue trustees of the will for all purposes other than the trusts of the two sums of £8,000.

The petition contained no statement indicating the particular sections of the Trustee Acts under which it was proposed that the order should be made, and the court observed that it would be convenient that the recommendation recently made by the Court of Appeal, that all petitions under the Trustee Acts should contain such a statement in the last paragraph thereof, should be followed (see 32 S. J., p. 17).

Marten, Q.C., and *Cust*, for the petitioners.—In *Savile* v. *Couper*, 35 W. R. 829, 36 Ch. D. 520, North, J., held that an appointment of a separate set of trustees of part of the trust property under section 5 of the Conveyancing Act, 1882, could only be made when new trustees of the whole trust property were being appointed. In this case a new trustee for the general purposes of the will can be appointed in the place of the one who has disclaimed. [KAY, J.—That would be a mere device to evade the effect of the decision, which is binding upon me, although personally I might have been inclined to give a wider interpretation to the section.] Separate sets of trustees were appointed in *In re Hetherington's Trusts*, 35 W. R. 285, 34 Ch. D. 211. [KAY, J.—There new trustees of the whole were appointed.] Independently of the Conveyancing Act, 1882, the court can appoint separate trustees of separate shares of the trust property under section 32 of the Trustee Act, 1850: *In re Cotterill's Trusts*, W. N., 1869, p. 183, and *In re Cunard's Trusts*, 27 W. R. 52. The decision in *Savile* v. *Couper* was not under this Act, but on an originating summons to determine the trustees' powers under section 5 of the Conveyancing Act, 1882.

F. H. L. Errington, for the trustees of the will.

KAY, J.—I think I may do what is now asked, and that in the present case I am not bound by the decision of North, J., in *Savile* v. *Couper*. This application for the appointment of trustees is made under the Trustee Acts, and it seems from the cases which have been cited to me that even before the Conveyancing Act, 1882, the court was accustomed to allow trustees to retire from a part of the trusts, and to appoint new trustees of that part wherever it was expedient so to do. Here, therefore, I think I am at liberty, under the powers of the Trustee Acts, independently of section 5 of the Conveyancing Act, 1882, to allow these trustees to retire from that part of the trusts which has reference to the portions, and which is quite distinct from the other part of the trusts having reference to the residue of the property; and I do so without requiring the appointment of a new trustee to act in the trusts of the residue, because I do not wish to limit the power of the court in doing that which I think it has the power to do. The decision of North, J., in *Savile* v. *Couper*, as I understand it, was that under the powers given by section 5 of the Conveyancing Act, 1882, or under a power of appointing new trustees such as that which is contained in the will of this testator, trustees are not at liberty, without the authority of the court, to retire from one part only of the trusts, and appoint new trustees of that part to act in their place. But that is a very different thing from an appointment with the authority of the court under the Trustee Acts. I think, therefore, I am at liberty to make the order which is asked for by this petition, but the petition must be amended by inserting a reference to section 32 of the Trustee Act, 1850.

Solicitors, *Ingram, Harrison, & Ingram.*

Chan. Div. } Jan. 17, 18.
Kay, J. }

HATTEN *v.* RUSSELL. (*a.*)

Vendor and purchaser—Specific performance—Mutuality—Repudiation of contract—Sale by tenant for life—Absence of trustees—Defect of title or of conveyancing—Settled Land Act, 1882 (45 & 46 *Vict.* c. 38), *ss.* 3, 22, 45 *sub-sections* 1, 3.

The contract on a sale of the fee by a tenant for life under the Settled Land Act, 1882, *fixed the date for completion on the 29th of September, but the court held, on the conditions of sale, that, in this respect, time was not of the essence of the contract. On examining the abstract, the purchaser took the objection, on the 25th of August, that there were no proper trustees for the purposes of the Act, whereupon the vendor, after some further correspondence, on the 6th of October, took out a summons for the appointment of trustees, and informed the purchaser that he had done so. The purchaser replied, on the 8th, that he repudiated the contract. On the 29th the order appointing trustees was made. They waived the notice of sale which should have been given to them by the tenant for life, and notice of the order and waiver was given to the purchaser. He, on the 3rd of November, commenced an action for return of the deposit.*

Held, that the purchaser had nothing to do with the trustees except to pay them his purchase-money; that, before completion, there must be trustees for the purposes of the Act to receive the purchase-money, or to enable the tenant for life to direct payment into court under section 22; *but that the absence of trustees was a defect of conveyancing only, not a defect of title, and the purchaser had no right to repudiate the contract. Even if it had been a defect of title, he ought to have given notice to remove the defect within a reasonable time, and not have put an end to the contract* brevi manu.

Trial of action.

This was an action by a purchaser for return of the deposit by the vendor (a tenant for life) and the questions involved were whether the absence of trustees for the purposes of the Settled Land Act was a defect of title,

(*a.*) Reported by H. C. ROPER, Esq., Barrister-at-Law.

and whether, under the circumstances, the purchaser was justified in repudiating the contract without notice.

On the 28th of July, 1886, the plaintiff bought the property at an auction for £565 and paid £56 5s. deposit

The defendant purported to sell part of the property as equitable tenant for life under the will of his mother, and on the 29th of July he gave notice to the trustees of the will of his intention to sell. The conditions of sale provided that the purchase should be completed on the 29th of September, 1886, and that if from any cause whatever the purchase should not be completed on that day, the purchaser should pay interest to the vendor at the rate of five per cent. per annum on the remainder of his purchase-money, or that the vendor should at his option be entitled to the rents and profits until completion; and, further, that all objections and requisitions in respect of the title should be stated in writing and sent to the vendor's solicitors within fourteen days from the delivery of the abstract, and that all objections and requisitions not so sent should be considered to be waived, and that in that respect time should be of the essence of the contract. On examining the abstract, which was delivered on the 12th of August, the plaintiff discovered that there was no power of sale in the will, and therefore that the trustees were not trustees for the purposes of the Settled Land Act, and consequently that no notice had been given of the intention to sell; and on the 25th he wrote to the vendor's solicitors stating his objection.

On the 21st of September the vendor's solicitors wrote to the plaintiff contending that the trustees of the will were trustees for the purposes of the Settled Land Act. The plaintiff insisted on the objection and on the 6th of October the vendor's solicitors wrote to him "We have taken out a summons in the Chancery Division for the appointment of two trustees for the purposes of the Settled Land Act. This we think will remove your only objection to the title."

On the 7th of October the plaintiff wrote "I cannot concur that the application to the court will remove all my objections to the title, and looking at it as a whole I think it will be best that the purchase should be considered to be at an end," and asked for a return of the deposit. On the next day, the 8th, he wrote that he would not trouble them to endeavour to perfect the title, and continued "I wish you thoroughly to understand that, as a good title has not been shown, and the day for completion has passed, the purchase is at an end."

On the 9th the vendor's solicitors wrote that they could not agree to cancelling the agreement.

On the 11th the purchaser wrote "Neither at the date of the contract nor since has the proposed vendor had the right or power to sell under statute or otherwise, and I must decline to wait while he obtains such right or power," and begged that they would not make any application to the court on his account.

The correspondence continued till the 29th of October, when the order was made appointing the trustees of the will trustees for the purposes of the Settled Land Act. On the same day the trustees waived, under the Settled Land Act, 1884, s. 5, sub-section 3, notice of sale by the vendor; and notice of the appointment and of the waiver was sent to the plaintiff.

On the 3rd of November the plaintiff issued his writ asking for repayment by the auctioneer of the deposit, and costs and damages against the vendor. The vendor counter-claimed specific performance of the contract.

Renshaw, Q.C., and *Dauney*, for the plaintiff.—The vendor could not make a title at the time fixed for completion, so we had a right to repudiate the contract: *Hoggart* v. *Scott*, 1 Russ. & My. 293; *Forrer* v. *Nash*, 14 W. R. 8, 35 Beav. 167; *Brewer* v. *Broadwood*, 31 W. R. 115, 22 Ch. D. 105; *Wylson* v. *Dunn*, 35 W. R. 405, 34 Ch. D. 569. [KAY, J.—It would be sufficient if he could make a title when the conveyance was tendered: *Ellis* v. *Rogers*, 29 Ch. D. 661, 32 W. R. Dig. 237.] The opinions of the Lords Justices in that case were pronounced only as *dicta*. The absence of trustees for the purposes of the Settled Land Act, 1882, was a defect of title. By section 45 a tenant for life has to give the trustees a month's notice of his intention to sell; by section 5, sub-section 1, of the Settled Land Act, 1884, that notice may be notice of a general intention to sell, but notice is still necessary, and here we discovered from the abstract that there were no trustees at all. The trustees could waive notice under sub-section 3, but they did not do so in time. By section 45, sub-section 3, of the Act of 1882, a person dealing in good faith need not inquire about the notice, but that does not apply when he knows that there are no trustees: *Duke of Marlborough* v. *Sartoris*, 35 W. R. 55, 57, 32 Ch. D. 616, 623, 624; *Parkinson* v. *Hanbury*, 8 W. R. 575, 1 Dr. & Sm. 143. The tenant for life can sell under sections 3, 20, but the purchase-money must be paid to trustees: section 22. So the purchaser cannot get a good title where there are none. He cannot pay his money into court under that section, as the tenant for life can only exercise his option where there are trustees. Without trustees the tenant for life can make no title, except to the life estate. By section 53 he is placed in the position of a trustee, and a sale of the fee by him without trustees would be a breach of trust, of which we had notice so that we should not be protected by section 45, sub-section 3. By section 44 provision is made for the reference to the court of differences between the trustees and the tenant for life, which shows that they have other duties besides that of receiving the purchase-money—for instance, to take care that he exercises his power of sale properly.

Millar, Q.C., and *C. Lyttelton Chubb*, for the vendor.—The conditions of sale show that in respect of the date fixed for completion, time was not of the essence of the contract: *Patrick* v. *Milner*, 25 W. R. 790, 2 C. P. D. 342. The plaintiff could not repudiate the contract in this way. Even if there had been improper delay he could only have fixed a reasonable time for completion: *Green* v. *Sevin*, 13 Ch. D. 589, 599, 28 W. R. Dig. 172. If he could have done so, he has waived his right by continuing negotiations after the day fixed for completion: *Webb* v. *Hughes*, 18 W. R. 749; L. R. 10 Eq. 281. Under the Settled Land Act, 1882, the tenant for life is the only person who can sell, and he can sell alone, without trustees. The exception in the case of a mansion-house shows this: section 15. It is the scheme of the whole Act: sections 20, 21, 22, 31, 38, 45.

Dauney, in reply.—We did not continue negotiations after we took the objection. We had a right to refuse to be bound by the contract: *Williams* v. *Glenton*, 14 W. R. 294, L. R. 1 Ch. 200, 207.

KAY, J.—The principal action in this case is for rescission of the contract, and for return of the deposit, which can only be granted in case the contract has been rescinded or is now to be rescinded. The counter-claim asks for specific performance. The sale was by auction on the 28th of July, 1886, subject to conditions of sale which provided, amongst other things, that the remainder of the purchase-money should be paid on the 29th of September next—*i.e.*, in 1886—and that if, for any cause whatever, the purchase should not be completed on that day the purchaser should pay interest to the vendor at five per cent. from that day until completion. Condition 7 is to the effect that all objections and requisitions are to be delivered within fourteen days, and that in this respect time shall be of the essence of the contract. The obvious inference is that the day fixed for completion, the 29th of September, was not of the essence of the contract.

The vendor was tenant for life and was selling under the powers conferred by the Settled Land Act, 1882, and a very important question has been raised under that Act. [His lordship referred to the correspondence concluding with the letter of the 11th of October, and continued.] Now the first question is whether or not that view of the case is correct. Was it the case that the absence of trustees, I should rather say the non-existence of trustees, for the purposes of the Settled Land Act, put the tenant for life in such a position that he had no power to sell? On the Act I do not come to that conclusion. The scheme of the Act seems to me to be that the tenant for life *qua* tenant for life is to have an absolute and (except in certain instances pointed out by the Act) unfettered right to sell.

It is true that the person to receive the purchase-money is not the tenant for life, but the trustees—either the trustees with power of sale of the settlement or trustees who are appointed by the court for the purposes of the Act; or, at the option of the tenant for life, he can direct the purchaser to pay it into court. The trustees have the right to give receipts, and a purchaser paying to them, unless otherwise directed by the tenant for life, would be quite safe; or if there were trustees and he was told to pay the money into court he would in that case also be quite safe; but in no case can he pay the purchase-money to the tenant for life himself.

The consent of the trustees is not required by the Act to anything except a sale of the mansion-house under section 15. I observe that in section 3, which gives to the tenant for life power to sell, in section 6, which confers on him powers of leasing, in section 13, which gives him power to accept surrenders of leases, and in section 31, which confers power to enter into contracts, there is not a word about the consent of the trustees being wanted, nor, indeed, any mention of them. But in section 15 it says, "The principal mansion-house, &c., shall not be sold or leased by the tenant for life without the consent of the trustees of the settlement or an order of the court." *Expressio unius est exclusio alterius.* If in that case it is expressly stated that the consent of the trustees is necessary, the obvious conclusion is that in other cases it is not necessary.

I turn to the clauses concerning trustees, section 38, which gives power to appoint new trustees, and the subsequent sections, and there I find a power given to them by section 40 to give receipts; section 41 limits their liabilities; section 42 is in these terms [His lordship read the section as to the protection of trustees generally, and continued:—]; and in section 44 there is this provision, "If at any time a difference arises between a tenant for life and the trustees of the settlement respecting the exercise of any of the powers of this Act, or respecting any matter relating thereto, the court may, on the application of either party, give such directions respecting the matter in difference and respecting the costs of the application as the court thinks fit." That the expression, "the trustees of the settlement," includes trustees appointed for the purposes of the Act is obvious from section 38, for trustees appointed by the court are to become and be, for the purposes of the Act, the trustees of the settlement; and the definition clause provides—section 2, sub-section 8—that the trustees of a settlement with power of sale are to be trustees for the purposes of the Act; and, finally, by section 38, if at any time there are no trustees of the settlement within the definition of the Act, the court may appoint trustees who are to become and be the trustees of the settlement.

The position of the trustees, therefore, with regard to the question now before me is this. They have no such duty cast upon them of controlling the tenant for life as would make them personally liable if the sale was improper. At the same time it would be quite right of them if they thought it improper to submit the question to the court under the section I read last—section 44; but, except in such a case, the trustees, as I read the Act, have nothing to do with sales by the tenant for life and no power to exercise any discretion, and, therefore, their consent being quite unnecessary, and a purchaser having nothing to do with them except to pay his purchase-money to them, the fact that there were no trustees at the date of the contract, and, consequently, that no notice was given to them under section 45 of the tenant for life's intention to sell, is not a defect of title.

As to the notice, there is an express provision in section 45, sub-section 3, that "a person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of any such notice as is required by this section." But it is said that that does not apply where the purchaser knows that no notice has been given, and that in that case he might be liable if he completed the purchase and paid his money, though he knew that no notice had been given. With that question at present I have nothing to do, and I do not intend to give any opinion upon it. The fact that there were no trustees and no notice given was not a defect of the vendor's title to sell. The tenant for life had the right to sell, and the defect as between him and the purchaser was that there was no one to whom the latter could pay the purchase-money; and I say that advisedly, for under the Act—section 22—it appears that a purchaser cannot properly pay the money into court at the direction of the tenant for life where there are no trustees for the purposes of the Act. The section says that capital-money shall "be paid either to the trustees of the settlement or into court at the option of the tenant for life." The meaning of that is that he can choose between the two; but the option cannot be exercised where there are no trustees.

By section 53 a tenant for life is put in the position of a trustee. The clause says: "a tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position, and to have the duties and liabilities of a trustee for those parties." Looking back to the powers, I find in the first power of all the power of sale, that section 4 contains the usual provisions which we find in a power of sale, best price, best consideration, and so on, so that I take the meaning of this 53rd section to be that, for the security of the remaindermen, as between the tenant for life and them, he, in the exercise of these powers, shall be treated as a trustee and have all the liabilities of a trustee exercising such powers. The consequence is that, if a purchaser knows that the tenant for life is acting improperly and committing a breach of trust, he has a right to refuse to treat with him any more. For instance, if the tenant for life asks him to pay the purchase-money to him he can refuse to do so, as it would be a breach of trust. The question is really not a question of title so much as a question, when the sale comes to be completed, whether the purchaser can properly pay the money to the trustees or into court at the option of the tenant for life.

The vendor, being at first wrong as he admits, proceeded at first to sell under the mistaken impression that the trustees of the will were trustees for the purposes of the Act. When his attention was called to the mistake he did not refuse to set the matter right, but he took out a summons on the 6th of October to appoint trustees under the Act, and it was not till after he had done that and given notice of it to the plaintiff that the latter repudiated the contract. Therefore the defect being, as I have said, rather one of conveyancing than of title, the question is whether the plaintiff acted within his rights in so doing, or whether

his more proper course would not have been to say "I give you notice to remedy the defect, and if you do not remedy it within a reasonable time I shall repudiate the contract."

In my opinion that would have been the proper course for him to take, and if he were a willing purchaser that is what he would have done. It would have taken but little time, and, in fact, the order appointing trustees was actually made on the 29th of October; on the same day the trustees waived notice; and on the same day notice was given to the plaintiff that the defect was remedied. Up to that time he had taken no steps except repudiation by letter, and it was not till the 3rd of November that he issued his writ. He can only justify that course by saying that the time fixed for completion was of the essence of the contract, and that, as the vendor was not ready then to give him a receipt for the purchase-money he cannot insist on the contract now.

There are cases in which, where the defect is a defect of title, the purchaser is not compelled to wait for an indefinite time, but that doctrine has never been carried beyond a defect of title. That is why I have taken pains to show that the absence of trustees was not a defect of title, but a defect of conveyancing which could be remedied in a short time. But if it were a defect of title, there is a whole series of cases in which it is settled that a purchaser cannot, even then, *brevi manu*, put an end to the contract, but that he must give a reasonable time. Accordingly I think the purchaser is in the wrong, and as he did this deliberately after he knew that the defect was actually remedied and the vendor could give him a perfect conveyance and a perfect receipt for his money, I must dismiss his action and lay the costs upon him. There will be judgment on the counterclaim for specific performance, with costs.

Action dismissed, with costs.

Solicitors, *Harries, Williamson, & Raikes; Russell, Son, & Scott.*

Chan. Div.
Chitty, J. } Feb. 3.

HOLLAND *v.* DICKSON AND CRYSTAL PALACE CO. (*a.*)

Company—Inspection of register—Companies Clauses Act, 1845 (8 *Vict. c.* 16), *ss.* 45, 63—*Jurisdiction—Injunction*—Mandamus.

A company is bound, under sections 45 *and* 63 *of the Companies Clauses Act,* 1845, *to allow a holder of stock and debentures to inspect the whole of its register, and has no right to require him to state his reasons for inspection. The proper remedy in case of a refusal to allow inspection is an injunction, not a* mandamus.

Rex *v.* Wilts and Berks Canal Co., 3 *A. & E.* 477, *explained.*

Motion.

A holder of debentures and consolidated stock in the above-named company moved for an *interim* injunction to restrain the company and its directors from impeding him in the exercise of his statutory right to inspect and take copies from the company's register of shareholders. The defendants assented to the plaintiff's request to inspect the registers, so far as they related to his own stock, and permitted him to ascertain the names of the stock-holders, but declined to permit him to ascertain the amounts of their holdings.

Romer, Q.C., and *Beale*, for the motion, relied on section 45 and section 63 of the Companies Clauses Act, 1845.

They also referred to sections 10 and 28 of the same Act.

Whitehorne, Q.C., and *Rowden*, for the defendants.—The plaintiff must state his reasons for desiring inspection. His proper remedy is by writ of *mandamus.*

They cited *Rex* v. *Wilts and Berks Canal Co.*, 3 Ad. & E. 477; *Glossop* v. *Heston, &c., Local Board*, 28 W. R. 111, 12 Ch. D, 102; *North London Railway Co.* v. *Great Northern Railway Co.*, 31 W. R. 490, 11 Q. B, D. 30.

CHITTY, J.—It is said by the defendants that a stockholder is not entitled to ask to see the register unless he states his reasons, and if he does not do so the company are entitled to refuse him access to the register. However, what the defendants did in the present case was to refuse point blank, without raising the contention they have raised at the bar. Neither in section 45 nor in section 63 of the Companies Clauses Act, 1845, is contained anything supporting the defendants' contention. Section 45 says the register may be perused at all reasonable times, and section 63 that the register or "the book" shall be accessible at all seasonable times. The accessibility to be given is to the book, and not to part of the book or part of the register. The defendants have cited the case of the Wilts and Berks Canal Co. as an authority in their favour. In that case a point of fact was raised—namely, whether there had been a sufficient refusal of inspection so as to entitle the plaintiff to a *mandamus.* I am satisfied that the observations of the judges as to any necessity that the applicant desiring to inspect should state the object of the proposed inspection related to the point of fact, and were not intended to import into a statute a stipulation which had never been enacted. The defendants, in my opinion, have no right to require the plaintiff to state his reasons for inspecting when the statute contains no such stipulation, nor have they a right to refuse him inspection of a part when the statute speaks of inspection of the whole. The defendants have said that the plaintiff's remedy was by *mandamus* in the Queen's Bench Division. The case here, however, is that of a private individual who has a statutory right. In the case of interference with a statutory right the Court of Chancery had always, independently of the Judicature Act, jurisdiction to grant an injunction. The plaintiff is, therefore, entitled to an injunction in the terms of the notice of motion, but the words "at all reasonable or seasonable times" must be added to the terms of the injunction.

Solicitors, *Sydney Morse; Kimber, Elliott, & Co.*

Chan. Div.
North, J. } Dec. 3.

DE STACKPOOLE *v.* SEYMOUR. (*a.*)

Marriage of female ward of court—Costs of settlement—Payment out of corpus *of settled property.*

The costs of a settlement of the property of a female ward of court, made upon her marriage with the sanction of the court, were ordered to be paid out of the corpus *of the settled property.*

Anonymous, 4 *Russ.* 473, *followed.*

Petition.

This was a petition by Mrs. De Trafford, the wife of G. A. Cathcart De Trafford, by her next friend, and by the trustees of her marriage settlement, asking that,

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

(*a.*) Reported by G. E. JEFFERY, Esq., Barrister-at-Law.

subject to the payment of costs, certain funds in court in certain specified actions might be transferred to the trustees.

Mrs. De Trafford was at the time of her marriage, on the 20th of August, 1887, and was still, an infant. The marriage was with the sanction of the court, and the settlement, which comprised only her property, including the funds in question, was an ante-nuptial settlement made under the Infants' Settlement Act of 1855 with the approval of the court.

By the settlement the first life interest was given to the wife and the second to the husband. The settlement did not contain any provision as to the payment of the costs of its preparation.

Cookson, Q.C., and *Dauney*, for the petitioners.

R. F. Norton, for the husband.—The conveyancing costs of the settlement ought to be included in the costs which are to be paid out of the fund in question. The foundation of the rule that these costs were payable by the husband was that by the old law the husband was liable for the debts of his wife contracted before marriage: *Helps* v. *Clayton*, 13 W. R. 161, 17 C. B. N. S. 553; *Haywood* v. *Fiott*, 8 C. & P. 59; Davidson's Conveyancing, 3rd ed., vol. 3, p. 728. But now, by virtue of section 14 of the Married Women's Property Act, 1882, a husband is liable for the debts of his wife contracted before marriage only to the extent of her property to which he has by his marriage become entitled. The reason for the old practice, therefore, no longer exists.

He also referred to *Anonymous*, 4 Russ. 473; and Wolstenholme's Conveyancing Acts, 4th ed., p. 331.

Dunning and *J. W. Williamson, jun.*, for other respondents.

North, J.—I think the *Anonymous case*, cited from Russell, comes sufficiently near the present case for me to act upon it. I will order that the costs of all parties of the settlement (including the costs of the husband) be paid out of the *corpus* of the funds which are to be transferred to the trustees.

Solicitors, *Street & Poynder; Mander & Watson; Mind, Hervie, & Smith.*

Chan. Div. North, J. } Dec. 14.

In re Haynes.

Kemp *v.* Haynes. (*a.*)

Settled Land Act, 1882 (45 & 46 *Vict. c.* 48), *s.* 51—*Tenant for life—Condition of forfeiture on non-residence—Validity.*

A testator gave to his wife an annuity of £200, and also devised his mansion-house and five cottages upon trust to permit her to occupy the mansion-house and receive the rents of the cottages until (amongst other things) she should fail to comply with certain directions, one of which was that she should reside in the mansion-house, and not absent herself for more than three calendar months in any year, otherwise the annuity of £200 and her interest in the mansion-house and cottages were to cease. The widow remained away from the mansion house, nursing an invalid daughter, for more than three calendar months, but did not, as tenant for life of the property, let or sell the mansion-house before the expiration of that period.

Held, that the condition of forfeiture on non-residence was valid, except so far as it would prevent the widow, as tenant for life, from leasing or selling the property, and that, as she had broken the condition, the forfeiture took effect.

Adjourned summons.

Richard Haynes by his will bequeathed to his wife, Alice Woollery Haynes, a legacy of £100 and an annuity of £500 during her life, and also, in the event of there being a child of his living at his decease, a further annuity of £200 until, among other things, she should fail to comply with the directions thereinafter given in respect to her residence and conduct, in which cases the annuity of £200 was to cease. And the testator devised his real estate to trustees for the term of 1,000 years upon certain trusts, and, subject thereto, to his only daughter, Margaret C. A. H. Haynes in strict settlement, with remainders over. And the testator declared the trusts of the term of 1,000 years to be, as to his dwelling-house at Downend and five cottages, in the event of there being any child of his living at his decease, to permit his wife to occupy the dwelling-house and to receive the rents of the cottages until her death or marrying again, or until the death of all his children under twenty-one years, or until the youngest should attain that age or marry, or until his wife should fail to comply with the directions thereinafter given in respect of her residence and conduct, in which case the trust in her favour should cease. And after the determination of her interest, upon trust to permit his dwelling-house at Downend to be kept as a residence for his child or children until the youngest should attain twenty-one years or marry. And the testator directed that his wife should, during the continuance of her interest, reside at his dwelling-house at Downend, and should not absent herself for more than three calendar months in any year, or for more than three calendar months continuously at any one time, and that in case his wife should disobey the directions her interest in the dwelling-house and in the annuity of £200 should cease. And the testator appointed his wife, during her widowhood, guardian of his infant child or children.

The testator died on the 16th of February, 1887, leaving his wife, Alice W. Haynes, and one child, Margaret C. A. H. Haynes, an infant of the age of ten years, and an invalid.

Shortly after the death of the testator the widow, Alice W. Haynes, was advised by her medical advisers that it was absolutely necessary that Margaret C A. H. Haynes should leave the testator's dwelling-house at Downend, which was unhealthy, and go and live at Brighton, and Alice W. Haynes thereupon left Downend and took up her residence at Brighton, as her attendance was indispensable to her daughter's existence.

In June, 1887, before Alice W. Haynes had been absent from Downend for three calendar months, an application was made by her by summons in chambers for leave for her to absent herself from Downend for a limited time without forfeiting the interest in the dwelling-house at Downend and five cottages and the legacy of £200, notwithstanding the provisions of the will, and the judge decided that he had no power to give the leave asked for, but made an order declaring that Alice W. Haynes was trustee of the dwelling-house at Downend and the cottages within the meaning of the Settled Land Act, 1882, and was entitled to demise the same in accordance with the provisions of the Act, notwithstanding the provisions in the will as to her residing in the house.

No tenant, however, could be found for the dwelling-house at Downend before the expiration of three calendar months from the time when Alice W. Haynes left Downend for Brighton, but she, nevertheless, decided to remain with her daughter at Brighton and allow the three calendar months to expire.

The summons was taken out by the trustees for a

(a.) Reported by J. Trustram, Esq., Barrister-at-Law.

declaration whether, in the events which had happened, the annuity of £200 bequeathed to Alice W. Haynes had ceased, and also whether, in the events which had happened, the trusts in the testator's will contained to allow Alice W. Haynes to occupy the dwelling-house at Downend, and to receive the rents of the five cottages at Downend, had ceased.

Higgins, Q.C., and *A. L. Ellis*, for the summons.—We submit that the provisions in the will of the testator providing for the forfeiture of Mrs. Haynes' life interest in the dwelling-house at Downend and five cottages, and of the annuity, in the event of her non-residence in the house for more than three calendar months is void as tending to prevent her from exercising her powers as tenant for life under the Settled Land Act, 1882, and that she has not forfeited them by residing with her daughter at Brighton for more than three calendar months.

They referred to the Settled Land Act, 1882, s. 51; *In re Paget's Settled Estates*, 33 W. R. 898, 30 Ch. D. 161.

Giffard, Q.C., and *Heath, contrà*, were not heard.

NORTH, J.—It would not have been lawful for the testator to impose such a condition as to residence in his dwelling-house at Downend as would preclude the tenant for life from exercising the absolute power of disposition given by the Legislature, inasmuch as that would be taking away that power which the Legislature gives, notwithstanding any device of the settlor. It is clear that before the Settled Land Act, 1882, a residence clause was good. Section 51 of that Act provides shortly that any device which purports or attempts to forbid or prevent a tenant for life from exercising any of the powers under the Act, so far as it purports, or attempts, or tends, or is intended to have, or would or might have, such operation, shall be deemed void. It is void from the time at which the sale or disposition which it prevents from taking place is attempted. This is in accordance with the judgment of Pearson, J., in *In re Paget's Settled Estates*. I asked counsel in what way a provision for residence until the property is disposed of could fetter the absolute power of disposition of a tenant for life. It does not seem to me that a direction that the tenant for life should occupy the property until it is disposed of does fetter her power of disposition. The tenant for life has admittedly committed a breach of the condition in the will, which, so far as it does not in any way interfere with her power of disposition, is good; and, the condition not having been complied with, her interest has ceased. I must declare that, in the events which have happened, the annuity of £200 has ceased, and that the trusts as to the dwelling-house at Dowend and the five cottages in favour of Mrs. Haynes have also ceased.

Solicitors, *Bowcliffes, Rawle, & Co.; Philps, Sedgwick, & Co.*

Chan. Div. } June 28, 29, 30; July 5; Aug. 9.
Stirling, J. }

LEEDS ESTATE BUILDING, &c., SOCIETY *v.* SHEPHERD. (*a.*)

Company—Directors—Manager of company—Auditor—Dividend not payable out of capital—Balance-sheet—Violation of articles in preparation of balance-sheets—Over-estimate of assets.

The directors of the company lent money on mortgage on the terms that the money lent, together with an addition representing interest, should be repaid by equal monthly instalments, extending over a period of years.

The directors delegated the preparation of the balance-sheets to the manager.

The articles prohibited the payment of dividends out of capital, and enjoined their payment out of profits arrived at upon estimates of account.

The manager, in preparing the balance-sheets, omitted to prepare, as prescribed by the articles, a statement of the income and expenditure of the company. He fixed the amount of dividend to be paid, and justified its payment on the accounts in which it was provided for by estimating future instalments as presently repayable, without proper discount. The valuation of some freehold property, part of which was used as the company's offices, was increased.

The auditor of the company, who stated that he did not look at the articles, although he knew of their existence, approved the accounts and dividends.

The directors relied entirely upon the manager and auditor, and declared dividends in accordance with the above accounts.

Large sums were expended in dividend under the above state of things which were attributable to capital.

Held, that the manager, auditor, and directors were liable for these sums so expended in dividend from time to time while they respectively held these posts.

Oxford Building case, 35 *W. R.* 116, 35 *Ch. D.* 502, *followed.*

This was an action by the Leeds Estate Building and Investment Co. (Limited) (now in liquidation) against certain of the former directors of the company (including the present secretary), the legal personal representatives of a deceased director, the present manager and secretary, Crabtree, who in 1870 ceased to be a director and was appointed manager and secretary, and the auditor, seeking to render them liable for various breaches of duty.

The company was formed in 1869, under the Companies Act, 1862, and went into voluntary liquidation on the 31st of October, 1882. It was insolvent, and the present action was brought for the benefit of its creditors. Among the breaches of duty charged against the directors, manager, and auditor were the alleged payment of dividends out of capital, wherewith this report is alone concerned.

The material articles were as follows:—

63. "The remuneration of the directors for the services performed previously to the first general meeting shall be determined by the company at the first general meeting. After such general meeting they shall be remunerated as follows:—When and so long as the company shall pay a dividend amounting to £5 per centum per annum, every director present at the weekly meeting of the board shall receive the sum of 10s. for every meeting which he shall attend; and when and so long as the company shall pay a greater dividend than five per cent. upon the paid-up capital, there shall be added to the above rates of remuneration the further sum of 2s. 6d. for every additional one per cent. of dividend, and fractional parts of one per cent. in any dividend shall, for the purposes of this clause, be carried to the credit of succeeding dividends."

79. "The directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to their shares. Such dividend may be declared either annually or half-yearly, as the directors may see fit to propose to the company in general meeting, and may be declared upon such estimates of account as the directors may see proper to recommend."

80. "No dividend shall be payable except out of the profits arising from the business of the company; but this clause shall not prevent the declaration of a dividend upon any such estimate of account as aforesaid."

(*a.*) Reported by HENRY T. LAW, Esq., Barrister-at-Law.

86. "The directors shall cause true accounts to be kept of the estate and property of the company, of the sums of money received and expended by the company, and the manner in respect of which such receipt and expenditure takes place, and of the credits and liabilities of the company. The books of account shall be kept at the registered office of the company, and, subject to any reasonable restrictions as to the time and manner of inspecting the same that may be enforced by the company in general meeting, shall be open to the inspection of the members during the hours of business."

87. "Once at least in every year the directors shall lay before the company in general meeting a statement of income and expenditure for the past year or the past half-year, made up to a date not more than one month before such meeting."

88. "The statement so made shall show, arranged under the most convenient heads, the amount of gross income, distinguishing the several sources from which it has been derived, and the amount of gross expenditure, distinguishing the expenses of the establishment salaries and other like matters. Every item of expenditure fairly chargeable against the year's income shall be brought into account, so that a just balance of profit and loss may be laid before the meeting; and in cases where any item of expenditure which may in fairness be distributed over several years has been incurred in any one year the whole amount of such item shall be stated, with the addition of the reasons why only a portion of such expenditure is charged against the income of the year."

89. "A balance-sheet shall be made out in every year, and laid before the company in general meeting, and such balance-sheet shall contain a summary of the property and liabilities of the company, arranged under the heads appearing in the form annexed to Table B. of the Companies Act, 1862, or as near thereto as circumstances admit. In that balance-sheet one of the heads is 'Profit and Loss, showing the disposable balance for the payment of dividends,' &c."

90. "Once at least in every year the accounts of the company shall be examined, and the correctness of the balance-sheet ascertained, by one or more auditor or auditors."

99. "Every auditor shall be supplied with a copy of the balance-sheet, and it shall be his duty to examine the same, with the accounts and vouchers relating thereto."

100. "Every auditor shall have a list delivered to him of all books kept by the company, and shall at all reasonable times have access to the books and accounts of the company. He may at the reasonable expense of the company employ accountants or other persons to assist him in investigating such accounts, and he may, in relation to such accounts, examine the directors or any other officer of the company."

101. "The auditors shall make a report to the members upon the balance-sheet and accounts, and in every such report they shall state whether, in their opinion, the balance-sheet is a full and fair balance-sheet containing the particulars required by these regulations, and properly drawn so as to exhibit a true and correct view of the state of the company's affairs, and in case they have called for explanation or information from the directors, whether such explanation or information has been given by the directors, and whether it has been satisfactory; and such report shall be read, together with the report of the directors, at the ordinary meeting."

The facts, with the exception of the following letter, appear from the judgment:—

In 1871 Locking (the auditor) wrote to the directors a letter with reference to the "Stock Account." "The making of this account devolves more particularly on yourselves and the manager than the auditors. At the same time the items were fully explained by Mr. Crabtree, and I do not consider the estimate overdrawn or likely to give any shareholder cause to object. Of course, it would have been better if the parties had agreed to divide nothing for a few years till a good accumulation had taken place, but a dividend is, no doubt, a necessity.

Sir H. Davey, Q.C., Buckley, Q.C., and *W. Baker*, for the plaintiff company.—As to Crabtree, he is guilty of fraud on his own admission. The case against the directors is covered by *In re Oxford Building Society*, 35 W. R. 116, 35 Ch. D. 502. As to Locking, even if he acted in good faith, he did not use ordinary diligence in the fulfilment of the duties imposed upon him by the articles. The loss incurred by the company in making unauthorized payments out of capital is the direct result of his breach of duty: Mayne on Damages, 3rd ed., p. 468; Story on Agency, 9th ed., 217; that, therefore, is the measure of damages, and Locking is liable for that amount, except so far as he is protected by the Statute of Limitations.

Sir Henry James, Q.C., and *E. W. Byrne*, for one of the directors.—None of the directors were supposed to possess actuarial skill; they were obliged to employ competent agents, and are not liable for the mistake, negligence, or fraud of the agents: *Rance's case*, 19 W. R. 291, L. R. 6 Ch. 104. A director is not liable for mere imprudence, but only for *crassa negligentia: Grimwade* v. *Mutual Society*, 52 L. T. N. S. 409, 416, 33 W. R. Dig. 44; *Overend, Gurney, & Co.* v. *Gibb*, L. R. 5 E. & I. App. 480. In this case it was within the powers of the directors to declare dividends out of the estimated profits, and if, in so doing, they acted under a mistake or through wrong advice, they are not liable as for an act done *ultrâ vires*. There is no suggestion of any want of good faith or of any sinister motive on the part of the directors. The only authority relied upon by the plaintiffs is the *Oxford case*. We contend, first, that that case is distinguishable on the ground that there the directors were authorized to pay dividends out of realized profits only; and, secondly, that it is inconsistent with the earlier authorities, and ought not to be followed.

Pearson, Q.C., and *Swinfen Eady*, for another director, referred to *In re Denham & Co.*, 32 W. R. 487, 25 Ch. D. 752; *Stringer's case*, 17 W. R. 694, L. R. 4 Ch. 475.

Finlay, Q.C., and *Farwell*, for the personal representatives of the deceased director.—Directors cannot be made liable on the basis of payment of dividends out of capital without knowledge and *crassa negligentia: Turquand* v. *Marshall*, 17 W. R. 935, L. R. 4 Ch. 376. [They referred, as to errors of judgment on the part of directors, to Lindley on Partnership, 4th ed., vol. 1, p. 594.] Only an action for negligence was maintainable, and that has died with the individual director.

Graham Hastings, Q.C., and *Ashton Cross*, for Crabtree.—Crabtree was the servant of the directors. His responsibility for the balance-sheets ends with their preparation, and is a question between him and the directors. With the duty of the directors in declaring a proper dividend and laying the balance-sheets before the shareholders he had nothing to do. He is not liable for the fees paid to the directors, which he did not receive. Even if the dividends were not justified, the money paid in respect of the fees is not recoverable any more than money paid to the shareholders.

Bardswell, for one of the directors.

Decimus Sturges, for Locking, the auditor.—Locking was a servant of the directors, and not of the company: *Spackman* v. *Evans*, L. R. 3 E. & I. App., at p. 236, and

fraud is not proved against him. Really the only case against him is for negligence; but this action contains no claim for damages. The only duty of an auditor is to see that the balance-sheets correspond with the books. I submit, first, that the duties imposed by the articles were reasonably and properly fulfilled by Locking, having regard to his remuneration; and, secondly, that the damage to the company is too remote.

Ingle Joyce (*Tindal Atkinson, Q.C.*, with him), for Whitaker.—Whitaker stands in a different position from the other directors, as his connection with the company lasted for little more than a year, and at the most he can only be made liable for one dividend. A summons under section 165 of the Companies Act would have sufficed, and Whitaker ought not to be compelled to pay the additional costs caused by the plaintiffs' mode of procedure.

Sir H. Davey in reply.—*Spackman* v. *Evans* only shows that an auditor is not an agent of the shareholders for the purpose of binding them so as to deprive them of relief on the ground of acquiescence. Putting Locking's duty as low as possible, it was his business to see whether the balance-sheets could be framed from the books without violating the articles, which he ought to have looked at. If directors have performed their duty, and have been badly advised, they may escape liability: *London Financial Association* v. *Kelk*, 26 Ch. D. 167, 32 W. R. Dig. 41; but here the directors took no steps to inform themselves, and delegated their duties to Crabtree, and they are liable according to the test supplied by the decision in *Rance's case*.

Aug. 9.—Stirling, J.—It is settled by decisions of the House of Lords and the Court of Appeal that the capital of a company formed under the Companies Act, 1862, can be legally applied only for the purposes specified in the memorandum of association, and creditors and other persons dealing with the company are entitled to act in the faith that no part of the capital will be applied for any other purpose, and, in particular, that no part of the capital will be returned to the shareholders except in the cases and under the safeguards in and under which a reduction of capital is permitted by the various Acts of Parliament.

If (as is alleged) the directors paid dividends out of capital, their acts in that respect were beyond the powers of the company and contrary to law.

It was contended on behalf of the defendants, and I think rightly, that upon the true construction of article 80 dividends were payable (not, as in the *Oxford case*, out of realized profits, "or profits tangible for the purpose of division," but as in *Stringer's case*, out of estimated profits. In the words of Lord Justice Giffard, in the last-mentioned case, the dividends were to be paid "out of profits, although those profits were not profits in hand." The articles of association contain provisions with reference to the mode in which the accounts were to be prepared and made up for the purpose of being submitted to the shareholders.

The law as regards the case with respect to the payment of dividends out of capital is, perhaps, not yet properly settled. It follows from the decisions in *In re National Funds Assurance Co.* and *Flitcroft's case* that directors who make such payments, either with actual knowledge that the capital of the company is being misappropriated, or with knowledge of the facts that establish the misappropriation, are liable as for a breach of trust. The present case does not fall within those which I have just mentioned, for I am unable, on the evidence before me, to arrive at the conclusion that the directors had actual knowledge of the real state of the company's affairs.

I have, however, the guidance of the recent judgment of Kay, J., in *In re Oxford Benefit Building and Investment Society*, a case which was almost exclusively relied on by counsel for the plaintiff, and which, although it is not precisely identical with the present, nevertheless closely resembles it in many of its features. The judgment was given after an elaborate argument by a very eminent counsel, and after full consideration by the learned judge who decided it, and it is certainly an authority not to be departed from by a judge of co-ordinate jurisdiction except on the clearest grounds. In that case, as in the present, it was contended that directors, who had continually paid dividends out of capital, could not be made liable unless their conduct amounted to fraud. "From that proposition," says the learned judge, "I must express my dissent," and he accordingly held that directors who had omitted to lay before the shareholders proper accounts of income and expenditure and balance-sheets, and who acted negligently or carelessly as regards the ascertaining of the profits which they professed to divide, were jointly and severally liable to repay the sums improperly paid out of capital by way of dividend.

It was, however, contended on behalf of the defendants that the case of the Oxford Benefit Building Society was inconsistent with previous decisions which were binding on me, and in support of that proposition there were cited *Overend Gurney* v. *Gibb*, *Turquand* v. *Marshall*, and other cases of the same class. These, however, are distinguishable on the ground that, as I have already endeavoured to point out, that they relate to acts within the powers of the directors, and not to acts (such as payment of dividend out of capital) which are beyond the legal powers of the directors as of the company. The law prohibits the payment of dividend out of capital, and it may well be that directors are called upon to exercise greater care when they are in danger of violating such prohibition than when they apply the capital for purposes unquestionably within the objects of the company. So if a company were formed for the purpose of working a mine, it might be the duty of those engaged in superintending its operations to exercise greater care when they approach the neighbours' property, and are in danger of committing a trespass, than when the scene of action is undeniably within the boundaries of the company's property.

Another case cited, and one which undoubtedly is in point, is *Rance's case*, decided in 1870. It was there sought to compel a director to refund a dividend or bonus alleged to have been improperly paid out of capital, and the application came in the first instance before Lord Romilly, who in his judgment laid it down that "In order to make directors liable in a case like this there must be either proof of distinct fraud, or else of such gross and wilful negligence as is equivalent to fraud"; and he held that in the particular case the director was not liable. If this statement of the law had been adopted by the Court of Appeal (who reversed Lord Romilly's decision) it would no doubt have been a strong authority in favour of the defendants, but neither of the very eminent judges who then constituted the Court of Appeal appears to me to take that view of the law. [The learned judge here referred in detail to the judgments of the Lord Justices in *Rance's case*, and continued:—] It seems to me that the views expressed by the learned judges who decided *Rance's case* are consistent with the proposition that directors who are proved to have in fact paid a dividend out of capital, fail to excuse themselves if they have not taken reasonable care to secure the preparation of estimates and statements of account such as it was their duty to prepare and to submit to the shareholders, and have declared the dividends complained of without having exercised thereon their judgment as mercantile men on the estimates and statements of account submitted to them, and if this be so the *Oxford case* does not in my opinion conflict with *Rance's case*. It was in

my opinion the duty of the auditor not to confine himself merely to the task of verifying the arithmetical accuracy of the balance-sheet, but to inquire into its substantial accuracy, and to ascertain that it contained the particulars specified in the articles of association (and consequently a proper income and expenditure account), and was properly drawn up so as to be a true and correct representation of the state of the company's affairs. The preparation of these statements of account and balance-sheets was entirely intrusted to the defendant Crabtree, who was originally a director, but who became secretary and manager of the company at the salary of £200, out of which he was to pay a clerk. The terms of his employment were subsequently altered by resolutions of the directors.

On the 14th of May, 1872, a resolution was passed whereby the directors, "in consideration of the success which has attended the company's operations during the past year in enabling the directors to declare a dividend of six per cent.," granted to their manager and secretary, Crabtree, £100, being at the rate of £50 for each half per cent. dividend above five per cent.; this grant being also for his extra services in superintending the brickmaking. On the 24th of the same month it was proposed, "That the directors shall pay to the manager and secretary, Mr. James Crabtree, a salary of £275 per annum, out of which he shall find and pay the salaries of all clerks and assistants, and when and as often as it shall appear by the annual balance-sheet that the company has in any one year actually realized sufficient net profits that will pay to the shareholders a dividend or dividends exceeding £5 per cent., the manager and secretary shall have an additional sum of £25 for every one per cent. of such profits available for dividend over and above five per cent. per annum." There is another similar resolution in April, 1874.

Of the history of Crabtree previously to his connection with the company we only know that he had been manager of a flax mill in France. Of his qualification to make "estimates of account" mentioned in the articles of association there is no evidence; but all such estimates as were in fact made were made by him. He was prevented by illness from being examined before the court. A witness skilled in actuarial calculations says of him that, judging by the mode in which he kept the books of the company, he was not competent to make such calculations. He seems, however, to have been perfectly acquainted with the ordinary book-keeping, and accounts prepared under his directions in the years 1880 and 1882 convince me that he perfectly understood the nature of an ordinary profit and loss account, and was capable of framing such an account of income and expenditure as is required by articles 87 and 88.

The accounts were from 1870 to 1880 audited by the defendant Locking, who was, at the time of his original appointment as auditor, a clerk in a bank, and has since become the manager of a branch of the same bank. As to his qualifications the chairman of the company said: "As far as I knew Locking was sufficiently skilled to act as auditor; we believed him to be a man of fair ability, and well qualified to fulfil the duty placed in his hands." For the performance of that duty he received, at first, a fee of five guineas, then seven, then twelve.

The business of the company consisted, to a very considerable extent, of lending money on mortgage on the terms that the money lent, together with an addition representing interest, should be repaid by equal monthly instalments extending over a period of years. Thus one of the first transactions of the company was the advance of a sum of £600 on mortgage, in order to receive the sum of £744, payable in six years by monthly instalments of £10 6s. 8d. Such advances were termed "long loans." All the balance-sheets presented by the directors to the general meetings are in the same form. They purport to consist of a "share account," a "cash account," a "stock account," and a "profit and loss account." The first contains merely a statement as to the issued and unissued shares. The second, or "cash account," is merely an account of receipts and payments in which capital and income are mixed up together, and is plainly not such a statement of income and expenditure as is prescribed by articles 87 and 88. The "stock account," on some of the details in which I shall presently comment, appears to be in the nature of an estimate of account, prepared with a view to showing a profit. "The profit and loss account" is not such an account as one would expect to be so designated, but simply shows the proposed mode of application of the balance appearing from the stock account. There is nowhere contained any such statement of income and expenditure as the articles require, and this must have been obvious to any man of business who considered the matter. Taking the first statement of account—that for 1870—we find in the stock account an item, "moneys lent, £933." This does not represent, as *primâ facie* it might be taken to do, the sum total of advances made by the company to borrowers, but includes prospective interest in respect of long loans expected to be received by the company to the amount of £150 7s. 8d. This interest is taken at its full numerical value, although the payment of it is spread over five or six years, and both it and the principal sum advanced are assumed to be fully secured. By taking this interest in this way, the stock account is made to show a surplus of £116 6s. 7d., of which there is divided as profit £113 3s. 4d., and a sum of £3 1s. 3d. (which alone represents anything in the shape of discount) is carried over. It is plain that this dividend was partly, at least, paid out of capital. The balance-sheets for 1871, 1872, 1873, and 1874 contain similar items for moneys lent, the amounts being arrived at in precisely the same way as in the balance-sheet for 1870. In the balance-sheets for 1874 and 1875 there is a difference. The item, "moneys lent," computed in the same way as before, continues to appear in the account, but there are some items under the head of "deferred interest" on the debit side. Those items do not, however, comprise the whole of the deferred or prospective interest on the long loans. Thus the item of deferred interest in 1874 is £3,030, whereas the total prospective interest then expected to be received by the company was £5,386 7s. 8d.; and in 1875 the amount appearing in the accounts was £4,155, the actual amount being £6,969 5s. 3d. From 1876 to 1880 the item of deferred interest falls out of the accounts, and we find simply the item of "moneys lent" on the credit side. This item no longer represents the full nominal amount of the principal and interest, but in each year a deduction (falling short of the total amount of prospective interest) is made. Thus in 1876 the total amount of prospective interest secured by the company being £9,594 2s. 11d., the deduction is £7,150. Beyond the deductions so made no allowance or provision was ever made for bad debts or losses or contingencies of any kind. All securities taken by the company appear to have been treated as sufficient to provide for the whole of the moneys (whether principal or interest) purported to be thereby secured. No such sums as those deducted in respect of prospective interest appear in the books of the company. Two expert witnesses examined on behalf of the plaintiffs state that these deductions are purely arbitrary, and cannot be referred to any principle. They are so contrived, however, that in each year a dividend of ten per cent. is paid, and a small sum under £50 carried forward. No attempt to explain the nature of these deductions has been made by any expert evidence on the part of the defendants, and I have come to the conclusion that they were simply made for the purpose of showing a profit sufficient for the payment of such a dividend as I have mentioned.

As against Crabtree this is established beyond question, by means of a deposition made by himself, which is evidence against him, though not against the other defendants. Being examined he says, "The principle on which we ascertained the sum of £4,855 18s. 10d. as margin was that we first ascertained the amount required for dividend and then left the balance of deferred interest as a margin. We did so in the subsequent year up to our stoppage. We first declared a dividend of ten per cent. and then treated the difference between the dividend declared and the deferred interest as a margin. In making up our balance-sheet, we first took ascertained items on both sides, then we calculated the amount required for dividend, and filled in the amount of moneys lent so as to balance the two sides. In my judgment these balance-sheets were prepared by Crabtree simply and solely with the view to the declaration of the dividend, and not with the object of exhibiting a true and correct view of the state of the company's affairs. It is to be observed throughout that no statement of income and expenditure, such as prescribed by articles 87 and 88, was ever submitted to the directors or shareholders. The accounts already mentioned as having been prepared under Crabtree's direction 1880 and 1882 show that the preparation of such statements was perfectly feasible. The reason why they were not submitted to the shareholders is not, in my judgment, far to seek. The accounts prepared for 1880 and 1882 show loss, and the researches of the official liquidator prove that every such statement, except for the year 1876, must (according to the system of book-keeping adopted by Crabtree) have shown a large loss.

Such being the balance-sheets, I now turn to the certificates of the auditor. That for 1870 is as follows:—"I certify that I have examined the above accounts and find them to be a true copy of those shown in the books of the company. The vouchers and receipts correspond in all cases with the payments debited. I have gone carefully into the items as shown in the stock account, and consider the dividend which it is proposed to declare a just and fair division."

I have heard such explanations as Mr. Locking gave with reference to the certificate given in 1870, but I am unable to accept them. I do not believe that he, a bank clerk, and who may therefore be presumed to have known something of discount, could have failed to see that the balance-sheet of 1870 did not truly represent the state of the company's affairs. Indeed, the spirit in which Mr. Locking approached the balance-sheets may be inferred from the letter addressed by him to the directors in 1871. The auditor's reports are not in any sense such reports as are prescribed by article 101. It is true, in one sense, as stated in them, that the accounts to which the certificates are appended are copies of those shown in the books of the company, for, in each year, there was inserted in the ledger of the company a share account, a cash account, and a profit and loss account, as shown in the printed balance-sheet. But, except in this most literal sense, the certificates are not in accordance with fact; no such items as "Money lent, £21,289 9s. 8d.," or "Deferred Interest Account, £3,030," which occurs in the stock account for 1874, are to be found in the books of the company, and similar remarks apply to similar items to be found in the subsequent balance-sheets. The defendant Locking stated in his evidence that he did not, during the period of his auditorship, see the articles of association of the company. This statement, if true, seems to afford no excuse for him, for he admitted he knew of their existence, but it would afford some evidence as to the degree of care which the directors bestowed on the instructions given to him. Mr. Locking stated in his evidence that he did not consider it part of his duty to ascertain whether the deductions made by Crabtree were sufficient, or upon what principle they were made, and he admitted them to be arbitrary deductions which Crabtree considered sufficient. As regards the securities on which the moneys were lent, he appears to have simply asked whether they were considered to be fully equal to the amount stated, and to have accepted the statement that they were not only equal, but were worth much more than the amount placed against them. It appears, therefore, from his own evidence, that the duties of the auditors, as defined by the articles of association, were not in reality discharged by him.

Now the directors were all men of business, and appear to have regularly attended both the board meetings and general meetings of the company. Each of the directors, parties to this action, says that he was ignorant of the mode in which the balance-sheets were prepared, and of the inaccuracies contained in them, and that he trusted entirely in Crabtree and Locking. I see no reason to doubt these statements. Still the fact remains that they did not require either that Crabtree should present accounts or that Locking should report upon them in the form and manner prescribed by the articles of association, and I cannot but attach considerable importance to this circumstance, for if the annual accounts of income and expenditure had year after year shown (in accordance with the fact) that no profit was earned, it is almost impossible to suppose that the attention of members and possibly creditors of the company would not have been directed to the question whether or not dividends could, under the circumstances, have been properly paid; and the crisis in the company's affairs, which actually occurred in 1882, would, in all probability, have arisen at a much earlier period with the probable result that either a sounder mode of carrying on business would have been adopted, or else that the company would have been wound up before so great a loss was incurred. But the case does not rest there. In, or subsequently to, the year 1874 the attention of the directors was called to the item "Deferred Interest" which appeared in the stock accounts of 1874 and 1875: and they either then learned, or must be taken to have learned, that in each of the years 1870 to 1873 the item "Moneys lent" included not merely principal sums owing to the company, but the full nominal amount of the sums payable to the company in respect of future interest. The directors, as mercantile men, must have been aware that this particular asset was over-valued for each of the previous years, and that the accounts presented to the general meeting of the shareholders were erroneous, yet they take no step to ascertain the amount of the errors nor call on the auditor to explain how he came to report on them as he did. The defendant Shepherd, in his re-examination, stated that he believed the item "Deferred Interest" in the account for 1874 included all "Deferred Interest," so as to put the accounts right in previous years, but he did not profess that this belief was founded on any inquiry or examination; and indeed he admitted in his cross-examination that after 1876 he accepted Crabtree's figures for moneys lent and did not inquire how those moneys were arrived at or on what principle, and that he never formed any judgment of his own as to the correctness of the figures, but simply took them as correct. The same thing appears to be true of the other directors. I cannot believe that if they had been dealing with their own private business, and had throughout to make payments in respect of profits, they would, without any inquiry, have accepted the statements of a clerk, however able, as to the amount of those profits, more particularly if that very clerk had a direct interest in making out that a profit existed sufficient for the payment of a five per cent. dividend.

But there is another matter on these balance-sheets, which was much dwelt upon in argument on behalf of the plaintiffs, and which appeared to throw a light on

the mode in which the directors dealt with the accounts presented to them by Crabtree. In the stock account for 1879-80 the freehold property of the company is entered at the value of £25,453 6s. 2d.; in the stock account for the following year 1880-81 the freehold property is entered at £28,043 17s. 5d., being an increase of £2,590 11s. 3d., of this difference £2,000 is, according to the evidence of the defendant Shepherd, attributable to an increase of value placed on certain freehold property know as the Albion-street property, part of which was occupied as the office of the plaintiff company. This property had, previously to 1880, been valued at £3,180, the amount of the cost price as it appeared in the books of the company. In 1879 or 1880 the company obtained from an insurance company a loan of £3,400 on the security of this property. No fresh valuation of the property was made on behalf of the plaintiff company, but it was stated to the directors by Crabtree that it had been valued by one Newsome on behalf of the insurance company at £5,000. On this mere statement, without requiring Crabtree to produce the valuation, which apparently Crabtree himself never saw, or even procuring any copy of it or communicating in any way with Newsome, the directors considered themselves justified in presenting to the shareholders the accounts in which the value of the property, previously taken at £3,180, was increased by £2,000; with the result that the company was thereby enabled to show an amount of profit for the year of £212 5s. No evidence has been given as to the existence of Newsome's valuation or the amount or terms of it. Now I do not say that a trading company, formed as this was for the purpose of engaging in speculative dealings with land, may not from time to time have valuations of the properties which it has acquired in the course of its operations, and I do not stop to inquire whether the permanent office of the company stands in any different position from other property. Neither do I say that where the articles of association authorize (as in the present case) the payment of dividends upon an estimate of accounts, the directors may not, in proposing or recommending dividends, act upon the valuation so made from time to time. The present case appears to me to be widely different. No real estimate of the value of the property was made, and I cannot think that the directors acted as prudent men of business, or as they would have done in conducting their own private affairs, in acting on the unsupported statement of their secretary as to the existence of a valuation which he never saw, and thus converting accounts which would have otherwise shown a loss into accounts showing a profit available for the payment of a dividend of five per cent. [His lordship having read some of the evidence continued:—]

The conclusion at which I have arrived upon a consideration of the whole evidence is that the directors never exercised any judgment at all with reference to these accounts, but accepted, without inquiry or verification, whatever Crabtree and Locking told them. In this respect they failed to perform the duty cast upon them by the articles of association. That duty was to cause estimates of accounts to be prepared and upon these estimates to recommend a dividend. In the performance of that duty they were no doubt entitled to avail themselves of the advice and assistance of their secretary and manager, and to obtain by that advice and assistance such materials as were proper for the purpose of enabling them to recommend a dividend; but, having so done, they were bound to exercise their judgment as mercantile men on the materials which they had obtained. This, in my opinion, they never did, but in truth delegated to Crabtree the exercise of that judgment and discretion which it was their duty to take upon themselves. Upon the whole, although the directors were, I believe, ignorant of the true state of the company's affairs, and although I find no trace of their having acted with the view of obtaining an improper benefit for themselves, I feel compelled to hold that they have fallen short of that standard of care which, having regard to the *Oxford case*, they ought to have applied to the affairs of the company in the following respects: (1) They never required the statement of accounts and balance-sheets to be made out in the manner prescribed by the articles; (2) they failed properly to instruct the auditor, or at all events to require him, to report on the accounts and balance-sheets in the mode prescribed by the articles; and (3) they were content throughout to act on the statements of Crabtree, without inquiry and verification of any kind, other than the imperfect audit of the accounts by Locking. Those accounts and balance-sheets did not truly represent the state of the company's affairs; and, that being so, I think that, according to what is laid down in *Rance's case*, the *onus* is laid on them to show that the dividends which they paid were paid out of profits. This, upon the evidence before me, they fail to do. The liquidator has made out a series of balance-sheets and profit and loss accounts such as ought to have been prepared by the directors in accordance with the articles of association. In those accounts the figures (with the exception of those relating to long loans) are taken from the books and accounts of the company. The instalments received in respect of long loans have been dealt with in the same way as similar payments were dealt with in the *Oxford case*—that is, the first instalment is treated as applied in payment, in the first place, of the interest up to the time of payment on the whole principal sum advanced, and next in payment of part of the principal. The second instalment is treated as applied in payment, in the first place, of the interest on the reduced principal, and the next in payment of a further portion of the principal, and so on. The rate of interest has been ascertained in each case by an actuarial calculation in which the principal sum lent by the company is taken to be the present value of the monthly or other instalments agreed to be paid by the borrower for a term of years. In this way, according to the expert evidence on behalf of the plaintiffs (which has not been met by any expert evidence whatever on the part of the defendants), the very utmost sum which could be properly treated as income has been ascertained. The result is that in every year a loss appears to have been incurred, and consequently in every year the dividend was paid out of capital. It was admitted by the plaintiffs' expert witnesses that these calculations were of considerable difficulty, and required actuarial skill which the directors of the company did not, and could not be expected to, possess; and it was contended on their behalf that the making of an estimate of accounts for the purpose of declaring a dividend was a piece of work which could not be done by themselves, but could only be done upon the advice of skilled persons; that they took and accepted in good faith the advice of such skilled persons—namely, Crabtree and Locking; and that even if it turned out that such advice was erroneous, the directors ought not to be held liable. In order that this argument might prevail it would seem to me to be necessary that stronger evidence than was adduced by the defendants should have been given of the fitness of Crabtree and Locking for the task assigned to them; but, in truth, it does not appear to me that there was any such difficulty as suggested in dealing with the accounts of the company from a business point of view. It possibly may have been a task of some difficulty to ascertain with mathematical accuracy the precise sum which in any year could be treated as profits, just as (to recur to an illustration which I have already made) it might be difficult in working a mine underground to ascertain with precise geometrical accuracy the boundary which corresponded in the underground workings to one defined on the surface; never-

theless it would be easy in the case of the mine to make sure practically that the mining operations were confined within the proper limits; and possibly this result might be attained in more ways than one. In the present case the evidence convinces me that there was no difficulty at all in forming (possibly in various ways) estimates of those profits which would have been perfectly sufficient for the purpose of business men, and would have prevented the payment of dividends out of capital. Not one of the directors has applied his mind to the formation of any such estimates. Everything was left in the hands of Crabtree, with the result that, according to the balance-sheets prepared by the liquidators in a manner most favourable to the directors, a sum of £3,394 18s. 10d. has been paid out of the capital of the company in the shape of dividends. The several defendants who were directors at the time when these dividends were respectively paid are, in my judgment, jointly and severally liable for the amounts improperly paid away in each year of their directorship, and must (as in the *Oxford case*) be ordered to repay such amounts, with interest at 4 per cent.

It is further sought to make the directors liable for sums amounting to £540 2s. 6d. paid to themselves as remuneration, and the sums amounting to £900 paid as bonuses to Crabtree under the resolutions to which I have referred. The directors were not entitled to any remuneration nor was Crabtree entitled to any bonus unless the company paid a dividend of five per cent. The balance-sheets prepared by the liquidator show that in no year could any such dividend have been properly paid, and in accordance with the decision in the *Oxford case*, I must hold that the directors are liable to make good the sums in question.

I have next to consider the liability of Crabtree. It was his duty, as the secretary and manager, to prepare balance-sheets such as were required by the articles, and exhibiting a true and correct view of the state of the company's affairs. He never prepared any account of income and expenditure at all, and the balance-sheets prepared by him did not and were not intended to represent truly the state of the company's affairs; and, as I have already stated, I think that if proper accounts had been prepared either the company's course of business would have been altered or its career brought to an earlier close. It was hardly contended that he was not liable for the bonuses which were paid to him on the faith of the accounts and balance-sheets which he prepared; and it further appears to me that, as the balance-sheets were prepared for the purpose of showing that a dividend was payable, and on the face of them treated the dividends which were actually paid as properly payable, the payment of those dividends was the natural and immediate consequence of the breach of duty on Crabtree's part, and he is liable for damages to the amount of the dividends so paid.

Locking, the auditor, also appears to me to have been guilty of a breach of duty to the company. He has, however, pleaded the Statute of Limitations by way of defence, and the plaintiffs, without arguing the question, have admitted the validity of the plea, which will cover all the accounts except those for the years 1878-9 and 1879-80. In each of those years Locking certified that the accounts were a true copy of those shown in the books of the company. That certificate would naturally be understood to mean that the books of the company showed (for example) that on the 30th of April, 1879, the company were entitled to "moneys lent" to the amount of £29,515 16s. This was not in accordance with fact, and the accounts in this respect did not truly represent the state of the company's affairs, and it was a breach of duty on Locking's part to certify as he did in reference to them. The payment of the dividends actually paid in those years appears to be the natural and immediate consequence of such breach of duty, and I hold Locking liable to the amount of dividends so paid.

His lordship made an order as to the general costs against the directors, Crabtree, and Locking. As to Whitaker, limited to such costs as the plaintiffs would have been entitled to if the case against him had only referred to the one dividend in 1882 declared while he was a director. The order in the *Oxford case* to be followed.

Solicitors, *Bell, Brodrick, & Gray*, for *Hoppe & Bedford*, Leeds; *Torr, Janeways, Gribble, & Addie*, for *Middleton & Sons*, Leeds; *Blair & W. B. Girling; Torr & Co.* for *T. Simpson*, Leeds; *Richard Smith & Wilmer; Hamlin, Grammar, & Hamlin*, for *Pullan*, Leeds; *Hamlin & Co.*, for *Dunn & French*, Leeds; *Speechley, Mumford, & Co.*, for *Rooke & Midgley*, Leeds.

Chan. Div. } June 11, 13, 14, 15.
Kekewich, J. }

EVANS v. MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY CO. (a.)

Canal company — Subsidence due to mine-owner — Injury by percolation to adjacent owner—Liability for damage.

A canal company, under the powers of a special Act, constructed a canal, which subsequently became vested in a railway company, subject to the same rights and duties as the canal company had held it. A mill was built close to the canal, and, by reason of the owner of the mines and minerals under the canal working them, the mill and canal subsided, but the railway company retained the canal at the original level by elevating the banks on both sides. Water percolated through the banks and damaged the mill.

Held, that the company were liable for negligence in not preventing the water from percolating, and that the fact that the mine-owner's working the mines was the ultimate cause of the injury did not affect their liability.

Held, further, that, as the subsidence could not have been prevented, and could not be prevented in the future, no injunction ought to be granted, but the plaintiff must claim compensation under the provisions in the special Act.

Trial of action.

By the Act 34 Geo. 3, c. xxvi., a company was incorporated under the name of "The Company of Proprietors of the Peak Forest Canal," with power to make and maintain a canal called "The Peak Forest Canal." The canal was made, and in pursuance of subsequent Acts became vested in the defendants, the Manchester, Sheffield, and Lincolnshire Railway Co., with all the powers and subject to all the duties and liabilities of the Canal Co.

The Act incorporating the company contained the following clauses relating to damage caused by the canal.

Section 15. "If any injury or damage shall happen to be done to the owner or occupier of any mill, edifice, lands, or hereditaments by the breach of any reservoir to be made for the purpose of the said intended canal or cut or any of the locks or works of the said navigation, or by the water flowing from the said canal or cut or any such reservoir, or from any other accident, then and in every such case full compensation shall be made to the owner and occupier of and all other persons interested in any such mill, edifice,

(a.) Reported by J. W. GREIG, Esq., Barrister-at-Law.

lands, or hereditaments by the said company of proprietors for all such injury and damage, which injuries and damages, and the compensation to be made in respect thereof, shall be settled and determined or assessed by the ways and means herein directed with respect to other damages to be done by making and completing the said navigation.

Section 27 provided for the appointment of commissioners to ascertain the amount of such damages.

Section 51 provided that if the owner of any mine should work near the canal so as to endanger or damage the same, it should be lawful for the company to treat with the owner of the mine, and, in case the company and the owner disagreed, the commissioners or jury were to assess what satisfaction the mine owner ought to receive from the company, on payment of which the owner was to be perpetually restrained from working the mine within the limits for which satisfaction extended. In the year 1849 the Union Mill, Dukinfield, was built contiguous to the canal, and eventually became vested in the plaintiff, the executor under the will of Miss Anne Evans. The plaintiff alleged that, owing to the defective construction or present state of the canal of the defendant company immediately adjoining to the Union Mill, considerable quantities of water had, by reason of the negligence of the defendant company, flowed from the canal into the Union Mill, and caused damage thereto, and that if such passage of water were allowed to continue, the mill would be greatly injured, and its letting value seriously diminished. The owner of the minerals under the canal had commenced to work the minerals, causing a subsidence under the mill as well as under the canal. The defendant company, in order to maintain their canal at its original level, raised the banks, and the mill continuing to sink bodily was, at the date of the action being brought, some nine feet below the canal instead of being above it.

The other facts sufficiently appear from the judgment.

Barber, Q.C., Jeune, and *Farwell,* for the plaintiff.—A public body is bound to take all reasonable precautions, whether under their powers by common law or under their statutory powers, to secure the rights of other persons from injury: *Geddis* v. *Proprietors of the Bann Reservoir,* 3 App. Cas. 430, 26 W. R. Dig. 259. There was no express liability in that case on the proprietors to cleanse the Muddock, but Lord Hatherley clearly indicated they were so liable. *Rylands* v. *Fletcher,* L. R. 3 E. & I. App. 330, 17 W. R. H. L. Dig. 17, also lays down the rule quite clearly. If the railway company, or, rather, their predecessors, had exercised proper precautions, they could have prevented the escape of the water, but they merely bought the surface owner's rights without making arrangements which would have prevented the owner of the minerals from working them so as to lower the canal. Unless it can be shown that what has happened would necessarily have happened when they carried out the statutory obligation on them of bringing the water where it was, then, on the principle of those cases, they are liable. It comes to this, according to *Fletcher* v. *Rylands,* if you bring a wild beast upon your premises, you insure and guarantee that he will be kept there safely, negligence or no negligence; but if an Act of Parliament permits you to bring the wild beast there, then the person who complains has to show that you have not performed your duty in keeping him there: *Dunn* v. *The Birmingham Canal Co.,* 20 W. R. 573, L. R. 7 Q. B. 244, 21 W. R. 266, L. R. 8 Q. B. 42; *Bagnall* v. *The London and North-Western Railway Co.,* 10 W. R. 232, 7 H. & N. 423; *Sellors* v. *The Local Board of Health for Matlock, Bath,* 14 Q. B. D. 928, 33 W. R. Dig. 127; *Flower* v. *The Local Board of Low Leyton,* 25 W. R. 423, 5 Ch. D. 347. It does not relieve the defendants that it was a third party who actually caused the injury by working the mines: *Dunn* v. *The Company of Proprietors of the Birmingham Canal Navigation,* 21 W. R. 266, L. R. 8 Q. B. 42. If the plaintiff shows negligence a right of action arises, and this is not a case for the application of the compensation clauses. [Kekewich, J.—As I understand the case cited, the neglect to purchase the mines, which certainly might have been done, was not negligence, and as at present advised I should not see my way to holding that neglect to buy the mines was negligence. "Neglect at your own peril" and "negligence" are two very different things.] The existence of a compensation clause does not make any difference to our right of action: *The Managers of the Metropolitan Asylum District* v. *Hill and others,* 29 W. R. 617, 6 App. Cas. 193. The *ratio decidendi* there is that a small-pox hospital may be established without being a nuisance, and therefore it shall be so established. The last case on this kind of question is *The Gas Light and Coke Co.* v. *Vestry of St. Mary Abbott's, Kensington,* 33 W. R. 892, 15 Q. B. D. 1. The company here are, no doubt, expressly authorized to raise the canal, if there is a subsidence, so as to keep the canal open for navigation. It would be no answer to an action for damages for the company to refer to an Act of Parliament if they simply turn their water down the bank on either side. They have piled water on the top of water without any banks on either side.

Henn Collins, Q.C., and *Sampson,* for the defendants.—The plaintiff must establish negligence against the defendants. Compensation under the 15th clause of the Act is the only remedy they have left. The main scheme of the Act was to form a convenient tribunal for assessing all species of injury which could be in any sense incidental to carrying out the undertaking. The real wrongdoer in this case was the mine-owner, who let down the surface by working his mines. The canal is there under a statutory power; hence the owners of it cannot be made liable for the negligence of a third person in reference to it. The plaintiff himself substituted a wall for the bank of the canal, and must, therefore, take the consequences of any percolation.

Barber, Q.C., in reply.—There ought to be an injunction granted in this case, as the damage is irremediable. There should also be an inquiry. It is for the canal company at their own expense and risk to keep the water in, and that liability is clear on the Act. Then, as to whether the plaintiff should have retained the mines, the defendants might have purchased them when they heard they were to be worked. *Charles* v. *Finchley Local Board,* 31 W. R. 717, 23 Ch. D. 767, shows that even if the damage is caused by a third party that makes no difference, the persons directly responsible can be sued. If the defendants succeed it would be saying that on every subsidence the mill-owners ought to raise the bank, and not the canal owners.

Kekewich, J.—I have always thought, and still think, that it would be a very great advantage to the public (by which I mean that portion of the public which happens for the time being to be represented by suitors in the High Court) if there were some summary method of determining what points in a complicated case ought to be tried before the court itself at the trial, and what points, whether of law or fact, should be determined beforehand, so that directions might be given for inquiries on the spot if necessary, and for the settlement of the case, stating the facts, and, if necessary stating the issues. Some progress has been made of late years towards that end; but practically it has amounted to very little. I remember hearing so experienced a judge as the late Lord Justice Lush say that something

of the kind ought to be done, and regret the waste of time and money occasioned by the inability of the court to deal with cases in the way which I have suggested; but, notwithstanding his regret, and, no doubt, his anxious endeavour to bring about the desired result, it has never yet been done, and no one knows better than myself that there are enormous difficulties in the way of doing anything of the kind. Still, I cannot neglect the opportunity of expressing my opinion that, in the interests of the public, it is extremely desirable something of the kind should be done.

It seems to me there are several questions of fact to be decided in this case—practically four. [The learned judge here specified the four questions of fact, and held on the evidence, first, that there was water on the plaintiff's premises, coming from the canal; secondly, that this was caused, in the first instance, by the subsidence occasioned by mining works under the canal and the mill; thirdly, that this water caused some damage to the plaintiff, but there was no satisfactory evidence to show that this damage was more than nominal; fourthly, that the injury occasioned by the presence of water coming from the canal was not preventible in the past, and would not be preventible in the future, by any reasonable means and at any reasonable cost. The learned judge proceeded as follows:—]

The first question of law I have to consider is this—Are the defendants liable for damages in the past, and will they be so in the future? It is the same question. If they are liable for the damages in the past, they will be liable for the damages in the future, if it occurs.

As to the legal principles applicable to the facts, generally speaking, every man may use his own property as pleaseth him best, but this use must be such as not to cause injury to his neighbour—that is, harm or loss of that kind which is regarded by English law as the subject of civil action. If, therefore, he chooses to bring on to his own land water, stench, or filth, he must keep it there at his own peril. If it escapes, he is liable for the injury caused, and it is no answer to say, "I could not help it; I took the best advice, I employed the best workmen, and I have done everything that modern science could suggest, but the circumstances have been too much for me, and the injury has been caused against my will and against my best endeavours."

The injured neighbour is entitled to reply, "You should have thought of this before you exercised your right of property, as you were entitled to do; and the consequences are also yours." That is an imperfect summary of the case of *Fletcher* v. *Rylands*, which is a case of extreme interest to lawyers and also to the public, and all the more so because it went to the House of Lords, and the doctrine there established is established by that paramount authority, but the judgments in the House of Lords were not much more than an affirmation of the full and considered judgment of Blackburn, J., in the Court of Exchequer Chamber. In that judgment he uses that language which is referred to by Lord Cairns as being a statement of the true rule of law:—"He" (that is, the person who brings on his land a wild beast, or water, filth, or stench, and allows it to escape) "can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was due to *vis major* or the act of God." Of course, it will be an answer to a plaintiff that he has contributed, or mainly contributed, to that which he is complaining of; but the only other two examples which the learned judge admits as possible are *vis major* and the act of God. That judgment of Blackburn, J.'s, which deserves to be read at length and studied, affirmed a judgment of Bramwell, B. Bramwell, B., dissented from the other barons of the Court of Exchequer in the court below; so that, even apart from the high authority of the House of Lords, it had that high authority that attaches to every judgment of Lord Bramwell's and the present Lord Blackburn. Of course, being a decision of the House of Lords, it could not be departed from properly; but, as far as I am aware, there has been no decision which in the slightest degree impugns the principle as laid down in that case—a principle which, it must be observed, is very neatly expressed in a headnote in the report of the case in the Exchequer of the judgment of Bramwell, B., (3 H. & C. 774):—"That the defendant was responsible on the ground that he had caused water to flow into the plaintiff's colliery, which, but for the defendant's acts, would not have gone there."

Then I have to consider, is this principle applicable to a railway or canal company, which is a body empowered by Act of Parliament to take land, and thereon to construct such and such works, or to employ such and such machines, that is to say, coming within the wild beast class. In some sense railway companies and canal companies exercise merely rights of ownership, but, on the other hand, much that they do is done by reason of their statutory powers, and what can be referred to those powers must be treated as done under those powers. There are many things in our ordinary experiences of everyday life that a railway company does which has nothing to do with their statutory powers. If they employ a cart to carry material, it can scarcely be said that their liability in consequence of improper drawing or any other carelessness has anything to do with their statutory power. They would be sued in such a case as the owner of the cart would be sued. These are not the cases which we have to deal with here. The greater part of their acts are necessarily and properly referred to their statutory powers. Lord Blackburn, in *Geddis* v. *The Proprietors of the Bann Reservoir*, says, "I take it that it is now thoroughly well established that no action will lie for doing that which the Legislature has authorized, if it be done without negligence, although it did occasion damage to anyone; that an action does lie for doing that which the Legislature has authorized, if it be done with negligence, and I think that, if by reasonable exercise of the powers either given by statute to the promoters or which they have at common law the damage can be prevented, it is within this rule negligence not to make such reasonable exercise of their powers." That is the distinction drawn there with reference to these companies, and, subject to one exception, I find no departure from that in other cases. The one exception is that which depends on *The King* v. *Pease* and *Vaughan* v. *The Taff Vale Railway Co.* In those two cases it was held that where the Legislature has authorized in an unqualified manner the use by a railway company of a certain machine, as, for instance, a locomotive engine, from which necessarily sparks are occasionally thrown out, the company are not liable for the ordinary use of that machine so authorized. There have been attempts from time to time to pass away those decisions, by holding in different cases that there has not been an unqualified authority given by the Legislature. A case of that class is *Jones* v. *The Festiniog Railway Co.*, where the railway company did not in the first instance contemplate the use of locomotives, and, therefore, the court saw its way to holding that as the damage was caused by a locomotive there was no acquired authority, and that the case did not fall within *The King* v. *Pease* and *Vaughan* v. *The Taff Vale Railway Co.* But Lord Bramwell more than once, I think I am right in saying, expressed his disapproval of those cases, and in the case of *Powell* v. *Fall*, 5 Q. B D. 597, he distinctly said they were wrongly decided. He said that the arguments he had heard in that particular case of *Powell* v. *Fall* hardened his previous conviction that *The King* v. *Pease* and *Vaughan* v. *The Taff Vale Railway Co.* were wrongly decided, and not

only did Baggallay and Thesiger, L.JJ., agree in the decision, but it was a decision which affirmed a decision of Mellor, J., and in which he managed to distinguish the two cases without overruling them, but evidently did not desire to follow them unless he was obliged to. Therefore, I think, we may regard those two cases now as practically out of the way, and consider the law laid down by Lord Blackburn in that case in the House of Lords as really stating the whole principle without any such exception as was introduced by those two cases. Has there been any negligence here on the part of the defendants?

In order to consider the difficult question of negligence I must consider what negligence means. Bowen, L.J., in a recent case, thus states it:—"The ideas of negligence and duty are strictly co-relative, and there is no such thing as negligence in the abstract. Negligence is simply neglect of some care which we are bound by law to exercise towards somebody." Now I have to consider what was the care which the defendants were bound by law to exercise towards the plaintiff. Applying the principle of *Fletcher* v. *Rylands*, the case seems to me to be plain enough. They were bound to prevent, if they could, the escape of water from their canal to the plaintiff's premises. They were bound to exercise that care, and if, unfortunately by reason of some unforeseen acts which they could not reasonably have so anticipated as to prevent, the escape of water has occurred, they are bound to make compensation for their negligence and for the result of that negligence. I find no difficulty, having regard to the principle laid down in these cases, in finding that that care was not properly exercised. Therefore, having the duty neglected, I have also the negligence. But, I repeat, the negligence, to my mind, is not that of preventing the subsidence or preventing the consequences of subsidence, which could not be sufficiently foreseen, but in not making good the damage when the damage occurred or in not preventing damage at the moment of the occurrence, which, of course, was far more possible and, it may be said, altogether possible—that is to say, by not damming up the water by proper and sufficient puddling or walls at the moment that the subsidence took place and before the water actually escaped. This, to my mind, is the position, this is the want of the exercise of care; therefore the negligence and therefore the responsibility falls on the defendants.

I hold that here, in accordance with Mr. Henn Collins' argument, the mine-owner under the canal (it only applies to land under the canal) was a wrong-doer when he worked the mines under the canal so as to cause the subsidence. But, having got so far (and I think it necessary to say so much because the point has been urged), I, for my part, do not see that it leads to any consequence whatever. The mine-owner may have been wrong. Mr. Henn Collins argued that, because the mine-owner was wrong, the present plaintiff cannot sue. I am sure he meant to put an argument which was intelligible, and on grounds which were tenable, or at least arguable. But I have been unable myself to see the connection between the mine-owner and the plaintiff, having regard to the title which has been put in before me, which would justify me in saying that because the mine-owner was wrong in working the plaintiff cannot sue. Then it is said that here there is a wharf wall, and that that wall was built by the millowner. The wharf wall must, however, have been the wall of the defendant company. Whether it was built for the convenience of the millowner, whether it was built by the millowner as a matter of employment of his workmen, or whether it was paid for by the millowner, seems to me to be immaterial. It is the retaining wall of the canal, and the owners of the canal are bound to have a proper retaining wall—that is to say, in the shape of stone or puddle or something else they are bound to keep the water in, and if they have been foolish enough, for the sake of getting somebody else to pay for the erection of the wall for his convenience to allow him to put in an inefficient wall, that is their fault and not his. If they have any contract with him they may sue him upon the contract, but the wall I must regard, by whomsoever constructed, as the wall erected by the defendants' company in discharge of their duty to prevent the escape of water of the canal; and the mere fact that it has been used by the millowner as a wharf or as a boundary to his mill seems to me to be utterly immaterial. I lay down the defendants are liable for damages in the past occasioned by the escape of water from the canal into the plaintiff's premises consequent on the subsidence of the ground, and that they will be liable for like damage if it happens in the future.

Now I come to a very practical question. That being so, finding the facts mainly in the plaintiff's favour, finding the law also in the plaintiff's favour, what is the remedy; I confess to having had considerable difficulty in arriving at a conclusion upon this point. No doubt it is negligence in the sense of something not authorized by the Act of Parliament or negligent use of the company's powers, *primâ facie*, that give rise to a right of action; and if there were no clause in this particular Act of Parliament in the way, I should certainly hold in this case that the plaintiff is entitled to maintain an action against the defendants for the damage occasioned, and that he would be entitled again whenever that damage recurs.

But then I turn to the Act of Parliament, and I find there is a clause—clause 15—which provides as follows:—[His lordship then read the clause set out above.] Now the question I have to consider is whether what has happened here has happened by the water flowing from the said canal or cut or any such reservoir, or from any other accident. It has happened by the water flowing from the canal. That is my finding in the plaintiff's favour. There is no doubt about that. But then it is said, not by water flowing by reason of accident, but by reason of negligence. Now it seems to follow, and it does to my mind follow, from my conclusion that they could not have prevented this subsidence, and therefore could not have prevented the cause of the escape—that is, the *causâ causans* of the damage is an accident. I think I have already said that negligence arises after, not before, the accident occurs, not when the subsidence takes place, but when the water escapes by reason of that subsidence. It was not argued, either in opening the case or in the reply, that the defendants were liable for this subsidence by reason of their having permitted the mines to be worked. The point was not tenable, and was very properly not urged. That being so, and following my own conclusion, I think I must further hold that what has happened here is an accident within the meaning of this clause—an accident for which they are responsible in damages, and damages which must be, if the parties cannot unfortunately agree, assessed in the manner provided by the Act of Parliament, and not by reference to the chief clerk or to the official or other referee.

I have been very much pressed to grant an injunction. If I am right in the view which I take of that clause, of course I should not grant an injunction. It is a case provided for by the section for which damages must be assessed from time to time as damages accrue. But I think it is as well to say that in no event should I have granted an injunction in this case. I suggested to Mr. Barber that an injunction really, in a case of this kind, is of little value as against the defendant company, who can only be reached by sequestration; but, apart from that, I think it would be wrong to enjoin a company or an individual from permitting that to be done which is

really beyond his control—not beyond his control in this sense, that there is a *vis major* or an act of God standing over him paramount, but beyond his control in the sense I have already mentioned, that it cannot be said that by any scientific means now available, by any precaution or by any works, he is able with any reasonable certainty to prevent that happening which all interested in the case contemplate as likely. I think it would be an extremely hard thing to move against a defendant for committal (and I must put it as if it were an individual defendant) because he has permitted that to be done—perhaps an escape of water suddenly in the night—which he could not foresee at that particular time, and could not reasonably prevent. My conclusion upon that part of the case, especially as regards the injunction, depends entirely upon my finding as regards the questions of fact which I mentioned at the commencement of my judgment. It may well be that, if my finding upon those questions are wrong, my conclusions as to the injunction are also wrong. The remedy ought to follow and ought to be made, as far as possible, commensurate with the right. The right depends upon the facts. I think that, because it would not be commensurate with the right, but would go far beyond that, I ought not, in any event, to grant an injunction, and if I am right in the construction I put upon this clause, I ought certainly not to grant an injunction.

The order will run that it is the opinion of the court that water has escaped from the canal to the plaintiff's premises, for which the defendant company are liable to make him compensation; and I see no reason, having regard to the evidence, why I should not further declare that the defendants are liable, and will be liable, to make good to the plaintiff any damage occasioned by the escape of water from the canal on to the plaintiff's premises consequent upon any further subsidence of the canal to the plaintiff's land. The evidence so clearly contemplates that further subsidence, and the question has been put in issue here, that I think there is no impropriety in doing that which is generally not desirable—namely, making a declaration with regard to the future.

I have only to deal with one more important subject, and that is the question of costs. I have on two important points decided in favour of the defendants. I have decided that they ought not to be enjoined, and I have also decided that the question of damages, which I must say again I look upon as a very trifling one, is to be determined in the way pointed out by the Act—the way which I suppose at present has no practical existence—and not by means of an inquiry; in other words, I have decided the question of construction of the Act on these points in their favour. But, on the other hand, I have looked through the pleadings carefully, and I am satisfied that, though every point was intended to be fairly raised on the pleadings to get the relative rights of the parties settled as far as they could be by the decision of the court, the defendants came here substantially to say, "We are not responsible to the plaintiff"; and they go even further than that, because they say, in the first place, there has been no injury done at all, and, further, we are not responsible to you if there has been any injury done. Upon these two questions, which are questions of substance, I have decided in favour of the plaintiff. I think the plaintiff has succeeded in the main, and that it is not a case in which I ought to distribute the costs; but having regard to the main question, and the result of the decision of the main question, the plaintiff is entitled to the costs of the action, and on the higher scale.

Solicitors for the plaintiff, *Pritchard, Englefield, & Co.*, for *Earle & Sons*, Manchester.

Solicitor for the defendants, *Ounliffes & Davenport*, for *R. B. Monk Lingard-Monk*, Manchester.

Q. B. Div. (Stephen and Wills, JJ.) July 15, 20.

COLQUHOUN v. BROOKS. (a.)

Income tax—Business in Australia—Partner resident in England—Liability—5 & 6 Vict. c. 35, ss. 100, 106, 108—16 & 17 Vict. c. 34, s. 2, schedule D.

A partner in a firm carrying on business solely at Melbourne himself resided wholly in England. A portion of this partner's share in the profits of the business was remitted to England, and was duly returned by him for assessment to income tax under schedule D. The larger portion, however, of his share was left in Australia, and had never been remitted to him in England, although standing to his credit in the books of the Australian firm. Upon appeal by the Crown,

Held, by Stephen, J. (dissentiente Wills, J.), *that the respondent was liable in respect of the whole of his share as being "profits or gains arriving or accruing to a person residing in the United Kingdom from a trade carried on in the United Kingdom or elsewhere" within the meaning of* 16 & 17 *Vict. c.* 34, *s.* 2, *schedule D.*

By Wills, J., *that the respondent's share of the profits not received by him in this country was "foreign property," and, as such, not liable under the Income Tax Acts.*

Case stated under 43 & 44 Vict. c. 19, s. 59, by the Income Tax Commissioners on the requisition of the Surveyor of Taxes, who was the present appellant. The present respondent, Brooks, was a person who resided in England, but was a partner in a firm which carried on business exclusively in Australia. The Income Tax Commissioners were of opinion that Brooks was only liable to be assessed in respect of his interest in the Australian firm on the sums from time to time received by Brooks in England in respect of that interest. The Surveyor of Taxes considered that Brooks was liable in respect of the whole of his share in the profits of the Australian firm, whether received here or not.

Sir E. Clarke, S.G., and *A. V. Dicey*, for the appellant.—The respondent is liable to pay income tax on profits earned outside the United Kingdom. *The Cesena Sulphur Co.* v. *Nicholson* and *The Calcutta Jute Mills Co.* v. *Nicholson*, 25 W. R. 71, 1 Ex. D. 428, are conclusive of this case. In those cases (as here) the profits were earned abroad; and about two-thirds of such profits were not received in England, yet all were held liable to income tax. Those cases were followed in *Imperial Continental Gas Association* v. *Nicholson*, 37 L. T. N. S. 717, 26 W. R. Dig. 102.

Charles, Q.C. (*Jeune* with him), for the respondent.—Profits which are earned abroad and are not received in the United Kingdom are not liable to income tax. In *Cesena Sulphur Co.* v. *Nicholson* and *Calcutta Jute Mills Co.* v. *Nicholson* the companies had a home in England, and the business was in fact carried on there by the directors. That case would apply if the present respondent carried on the business in Australia by means of his clerks, but it is in fact carried on by the partners who reside there. *Sulley* v. *Attorney-General*, 8 W. R. 472, 5 H. & N. 711, reversing *Attorney-General* v. *Sulley*, 7 W. R. 666, 4 H. & N. 769, shows that these profits are not liable to income tax. Section 5 of 16 & 17 Vict. c. 34 adopts the machinery for raising and levying income tax contained in 5 & 6 Vict. c. 35, and that Act provides no means of levying a tax on profits earned abroad and not received in the United Kingdom. The rules in section

(a.) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

100, 106, and 108 of 5 & 6 Vict. c. 35 limit the general language of schedule D., and are to be applied only to profits which are covered by schedule D. From section 106 of that Act it is clear that the business must be carried on either "wholly or in part in the United Kingdom," unless section 108 applies when the duty is to be "charged by the commissioners acting for the places at, or nearest to, which property shall have been first imported into the United Kingdom." These sections show that profits made abroad are to be taxed if and so far as they are sent into the United Kingdom. Moreover, by section 29 of 5 & 6 Vict. c. 35 the respondent is to be taxed on dividends, &c., arising out of foreign investments when payable in the United Kingdom. Why should profits arising from a foreign business be liable, whether payable in the United Kingdom or not?

Dicey, in reply.—If the respondent comes within the words of schedule D. that is enough, for the schedule lays down the principle, and the machinery by which that principle is to be carried out cannot restrict it. Where it is intended to limit the words of schedule II. it is done expressly. By the structure of the various provisions of 5 & 6 Vict. c. 35 it is plain that the Legislature meant to include every kind of property yielding income: per Martin, B., in *Attorney-General* v. *Black*, L. R. 6 Ex., at p. 85.

Wills, J.—The question to be decided is whether a person resident in this country, a member of a firm which carries on business exclusively in the colony of Victoria, is liable to be assessed to the income tax in respect of the whole of his share of the profits of that business, or only of that portion which he actually receives in this country. By 16 & 17 Vict. c. 34, s. 2, schedule D., the duty is payable "for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere, to be charged on every 20s. of the annual amount of such profits and gains." It is contended by the Crown that these words are amply large enough to cover the present demand. It is replied by the respondent that the provisions of 5 & 6 Vict. c. 35, applicable to schedule D., more especially sections 100, 106, and 108, show that there must be some limitation to be inferred to the effect that the duty is chargeable only on the amounts received in this country from the business carried on abroad by the person charged. Undeniably the generality of the words in the first portion of the schedule is cut down by the above enactments of 5 & 6 Vict. c. 35 specifically enacting that the computation of profits on securities and possessions out of the United Kingdom shall be made on the amount received in this country. Otherwise, unless section 6 of 16 & 17 Vict. c. 34 is to be construed as making persons taxable, liable to duties beyond those upon the profits of such possessions or securities received in the United Kingdom—which cannot be seriously argued—a person who had paid income tax upon the whole of his receipts in this country from profits in foreign or colonial securities or possessions would still be liable to a penalty for not returning the amount not remitted to this country. But it is urged by the Crown that, from the very fact that the Act does impose such limitation in the case of profits from such securities, no such limitation is to be inferred, as not being expressed in the case of the profits of a trade carried on abroad. The method of construction summarised in the maxim "*Expressio unius exclusio alterius*" is one that requires to be watched with great care. The application of such a rule varies so much, and is open to so many qualifications, that it rarely helps one to arrive at what is meant. A far more important inquiry, to my mind, is whether there is any general rule as to the extent to which English Acts of Parliament dealing with property in general are to be treated as applying to foreign property, using that word as including colonial property, and I mean by that property which, whether situate in England or elsewhere, is not, at the time to which the discussion relates, English property. It seems to me there is such authority, and that it runs in a well-defined current. "It is quite clear," says Lord Westbury, "that you cannot apply an English Act of Parliament to foreign property whilst it remains foreign property": *Attorney-General* v. *Campbell*, 21 W. R. 34, n, L. R. 5 H. L. 524, 530.

Nothing can be more general than the terms in the Succession Duty Act (16 & 17 Vict. c. 51), s. 2, by which the word "succession" is defined and the liability imposed, and the duties are imposed "in respect of every succession"; but all the law lords agree in that case that "it is quite clear you cannot apply an English Act of Parliament to foreign property whilst it remains foreign property; but after the purposes of administration have been answered, if a party taking a part distributed under the administration comes to this country and invests it upon trust, it assumes the character of a British settlement and property, and it is no longer to be dealt with as if it were merely a portion of a foreign testator's estate to be received in the course of administration." There are similar decisions on the Legacy Duty Acts: *Thomson* v. *Advocate-General*, 12 Cl. & F. 1; *The Attorney-General* v. *Jackson*, 2 Cl. & F. 48. The matter is fully discussed, too, in Mr. Dicey's very interesting work on Domicil, 1st ed., p. 318, but the essential principle does not seem to me to be touched, which is that the property to be operated on must be British property. The question in every instance seems to be one of fact: "Is the property sought to be affected British property or not?" The test of domicil is fully discussed in *In re Cigala's Trusts*, 26 W. R. 257, 7 Ch. D. 351; but it is admitted on all hands that domicil has nothing to do with the present question, and it seems to me that there is absolutely nothing to give a British character to the unremitted portion of the profits made in Melbourne by a business carried on in the colony of Victoria only.

It would be sufficient, in my opinion, to stop here, but it is worth while to point out that the Act provides for assessment of the firm jointly. If the profits of the foreign business had been assessable at all, the court would have been justified in holding, as they did in *Attorney-General* v. *Sulley*, that a partner resident in England in a firm carrying on business abroad was bound to make a return of the whole of the profits of the foreign firm of which he was a partner. That involved the consequence that he was liable to pay income tax upon the whole of the profits of a foreign business, though the question, however, was only as to his liability to make a return of the whole of the profits of the business, but this judgment was reversed in the Exchequer Chamber (5 H. & N. 711), and upon this point it is there laid down that "the profits which come home to this country as the share of the individual partner resident here are taxable; the profits which go into the pockets of the partners in America are not." The principle of the decision is, therefore, that profits of a business carried on abroad, and not in the United Kingdom—profits made abroad, and never remitted here—are not taxable; and the decision is in harmony with the view I have expressed, and the reasoning by which I have endeavoured to support it. They are not, in the language of Lord

Westbury and of Jessel, M.R., "British property." They lack, indeed, every element of British nationality. As to the cases of *Cesena Sulphur Co.* v. *Nicholson* and *The Calcutta Jute Co.* v. *Nicholson*, the Exchequer Division held, and, as it seems to me, rightly, that each of the companies was "resident" in the United Kingdom, and that the whole of their profits, and not merely the portion actually remitted to, and divided in, England, were liable to income tax. The greater part of the judgment is occupied with this question of whether they were "resident" in England or not. The determination of where the business is really carried on pretty nearly gives the answer as to the test of liability, although I do not think the Lord Chief Baron meant to lay that down as the actual test; but in those cases, England being, as it were, the natural and only home for those profits to come to, the profits were of English nationality, and were, again, English property, and the decision in those cases also is in harmony with the principle I have laid down. It is clear that, so far as the profits derived from foreign or colonial securities or possessions are concerned, the Act itself proceeds upon the same principle. I can conceive no reason why a distinction should have been made in favour of the profits of foreign securities as compared with those of foreign business, and why the profits of the business should be taxable, whether remitted to the partner resident or not, whilst the profits of foreign securities or possessions should escape taxation unless remitted. No ground of principle for such a distinction has been, or can be, suggested. There is no reason, therefore, why the maxim, *Expressio unius exclusio alterius*, should apply; whereas the provisions made in respect of the tax upon the profits of foreign possessions or securities are in strict accordance with what I have shown to be a recognized principle of English law. It is far easier to suppose that the omission of any special mention of the case of a person resident here, and not receiving the whole or part of the profits of a business carried on abroad by a firm of which he is a partner, is an accident, than that there should, in respect of an isolated case of this kind, be a departure, without express words, from a well-established principle regulating the application of Acts of Parliament in general, and, as has been shown, repeatedly recognized and acted upon in respect of fiscal statutes. The provisions relating to the profits of foreign securities are, however, important as pointing out what, for the purposes of this Act, effects the conversion of foreign into British property, and thus renders it liable to taxation, though probably the same conclusion might have been arrived at without their help. The profits of the foreign trade, like the trade of foreign securities, become British property, and, as such, become liable to the operation of the Acts of Parliament when they are received in this country, and not till then.

I am of opinion, therefore, that in this case the respondent is entitled to our judgment.

STEPHEN, J.—In this case I have the misfortune to be unable to agree with the judgment of my brother Wills. I have, however, had the advantage of reading it, and I fully agree with the way in which he has stated the facts of the case and the questions that arise upon them. I also think that the cases which he has referred to contain the grounds upon which the decision of the present case ought to proceed. The difference between us lies in the view which we take of them. I shall thus be enabled by his judgment to state very shortly the grounds on which I have arrived at a different conclusion. Shortly, my opinion is that the words of schedule D. cover the facts of the present case, and that the authorities to which my brother Wills refers do not warrant the restriction which he would put on those words. The relevant words are "in respect of the annual profits and gains arising out or accruing to any person residing in the United Kingdom from any . . . trade . . . whether the same shall be carried on in the United Kingdom or elsewhere." To this my brother Wills would add such words as these, "except such part of those profits and gains as the person entitled thereto may not bring into the United Kingdom." The reasons for adding this exception are, firstly, that in the case of *Attorney-General* v. *Campbell*, which was decided in 1872, a principle is laid down which is thus expressed by Lord Westbury (at p. 530): "You cannot apply an English Act of Parliament to foreign property whilst it remains foreign property." This principle, it is suggested, would be violated if the proposed exception were not made, because the property in this case is "foreign property." I do not understand the case in the same manner. Lord Westbury's words seem to me to mean by "foreign property" only the property of a person domiciled abroad at the time of his death, and his reference to statutes appears to me to be limited to statutes imposing duties on property, when by the the death of its owner it changes hands. To understand the meaning and application of this principle to the case of *Attorney-General* v. *Campbell* it should be read in connection with the earlier cases of *Thomson* v. *Advocate-General*, decided in 1845, and *Wallace* v. *Attorney-General*, L. R. 1 Ch. 1, decided in 1865. My brother Wills has stated the facts of these cases; I will state the principle which applies to them all as I understand it. It is stated most authentically and forcibly in *Thomson* v. *Advocate-General*, a case of the highest possible authority, as it was the unanimous decision of the House of Lords, founded upon a unanimous opinion of the judges whom they consulted, and it is as follows:—

The personal property of a deceased person is considered by English law as subject to the law of the domicil of the deceased. Therefore the property of a deceased person domiciled in Demerara, though situated in England, is not liable to English legacy duty, but is treated as if it were in Demerara: *Thomson* v. *Advocate-General*. Neither is the property of a deceased person domiciled in France liable to succession duty, though it is situated in England, but is treated as if it were in France, the difference between succession duty and legacy duty being nominal rather than substantial in reference to this matter: *Wallace* v. *Attorney-General*. If, however, such property is, by the will of a person domiciled abroad, made the subject of an English settlement, the trustees of which are English, and the subject of which is stock in the English funds, and if, under the provisions of that settlement persons wherever domiciled receive a benefit on the death of a living person, the *cestui que trustent* are liable to succession duty because their rights are dependent on English law. A man domiciled in Portugal creates by his will a trust in England to secure his sister an annuity for life, and directs that after her death the moneys appropriated to that purpose shall be distributed amongst his children, to whom he had left the rest of his property. On the sister's death the children's shares are chargeable with legacy duty. It was with reference to this doctrine that Lord Westbury stated the principle which I have quoted. It appears to me to have no relation to this case, in which there is no question of domicil. I think that the question of British property and foreign property does not arise in this case at all. The Act is directed to taxation of persons, not to distribution or management of things, and I see no reason why an Act which in terms taxes residents in England for the profits of trade carried on abroad should be cut down by implication so as to apply to those parts only of the profits which are brought home.

The two cases of *Cesena Sulphur Co.* v. *Nicholson* and *Calcutta Jute Mills Co.* v. *Nicholson* appear to me

to be direct authorities to show that the Act has the effect contended for by the Crown. In each case the court held that the company was in the position of a person resident in England, and was, as such, liable to be taxed upon all its profits, though a large part of those profits was never brought to England at all. In the case of *The Attorney-General* v. *Sulley* the contention was that the shares of the American partners ought to be returned by the English partners to be taxed here, but the trade was held not to be carried on in this country. It was not disputed that the defendant's share was to be taxed, and it appears to have been assumed that it was sent home to him here. It does not touch this case.

With respect to the sections of the Act of 1842, which are referred to in support of the defendant's contention, two remarks will be sufficient. Agreeing with much that is said by my brother Wills of the maxim about the expression of one thing being the exclusion of others, I think that in this case the mention of a particular way of computing the profits of foreign securities and possessions adds something to the silence of the Act about foreign trade. At all events, it makes rather against the defendant than for him. But the really important matter, in my mind, is the language of schedule D. It is nothing like so general as the language of the Succession Duty Act, or the schedule imposing legacy duties. These Acts, taken literally, would impose duties on all persons being entitled to legacies or successions all over the world, and whether British subjects or not, which, of course, would be absurd. Some limitation being required, the limitation as to domicil was natural. I see no reason for any limitation of the plain words of schedule D. in the present case; language could hardly be more specific. The words are "annual profits arising to any person residing in the United Kingdom from any trade carried on in the United Kingdom or elsewhere." These, with other words which I need not quote, are specific as to the time when, and the persons to whom, schedule D. applies, as to the places where the income referred to is to be made, and the person chargeable is to reside, and I do not see what further particulars could be given or required. I think, therefore, that the appellant is entitled to judgment.

Wills, J., as junior judge, withdrew his judgment, in accordance with the old practice in the Court of Exchequer.

Judgment for the appellant, the Crown.

Solicitor for the appellant, *Solicitor for Inland Revenue.*

Solicitors for the respondent, *Shepheards & Sons.*

(Q. B. Div. (Hawkins and A. L. Smith, JJ.) April 5.

Kellard v. Rooke. (a.)

Negligence—Employers' Liability Act, 1880 (43 & 44 *Vict.* c. 42), *s.* 1, *sub-sections* 2, 3; *s.* 8—*Person intrusted with superintendence or entitled to give orders—Foreman of a gang of labourers.*

K. was employed with other workmen in stowing bales of wool into the hold of a ship. He was one of a gang of labourers of which B. was the foreman. B. was himself a labourer, but stood at the top of the hatchway to signal to the men below when the bales were being lowered. K. was injured by one of the bales, which fell upon him in consequence of his not being warned by B. of its coming. K. sued his employer under section 1 *of the Employers' Liability Act for compensation.*

Held, that K. could not recover, as there was no evidence that his injuries were due to the negligence of a person who had "any superintendence intrusted to him whilst in the exercise of such superintendence," or to "the negligence of any person to whose orders the plaintiff was bound to conform while conforming to the said orders."

This was an appeal from a decision in the county court of Southwark.

The action was brought to recover compensation for injuries under the Employers' Liability Act, 1880, under the following circumstances. The plaintiff was employed with other workmen by the defendant to assist in stowing bales of wool on board the ss. *Albatross* in St. Katharine's Dock. The workmen were divided into, and employed in, gangs with a foreman to each gang. The foreman of the plaintiff's gang was one Bodfield. At the time when the accident occurred the bales were being hauled to the hatchway and dropped down for the purpose of being stowed, while Bodfield, who was at work on deck, gave signals to the men below before the bales were dropped. The plaintiff was struck by a bale, which, he said, was dropped into the hold without any warning.

The judge nonsuited the plaintiff, on the ground that there was no evidence that Bodfield was a person who had superintendence intrusted to him within the definition of section 8 of the Employers' Liability Act.

The plaintiff appealed.

Ellis (*Cock, Q.C.*, with him), for the plaintiff.—Bodfield was a fellow-workman "intrusted with superintendence," and the accident occurred owing to his negligence "while he was superintending." The plaintiff, as one of the gang, was bound to obey his orders, and was doing so when the accident occurred. It was so held in the case of a carman and a boy attending him in *Millward* v. *Midland Railway Co.*, 33 W. R. 366, 14 Q. B. D. 68. The principle there laid down applies here.

Tatlock, for the defendant.—The "superintendence" referred to in section 1 of the Act is shown by section 8 to be that of one "whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour." Bodfield was a labourer and engaged at the time of the accident upon the same work as the plaintiff. The accident was not due to compliance with any order given to the plaintiff by Bodfield.

Hawkins, J.—I am of opinion that this nonsuit ought not to be disturbed. With reference to the sub-section which has been relied on (sub-section 2 of section 1), and which entitles a workman to compensation for an injury caused to him "by reason of the negligence of any person in the service of the employer who has any superintendence intrusted to him, whilst in the exercise of such superintendence," I made this observation in the course of the argument. Supposing Bodfield (the person who is said to have been intrusted with superintendence) to be for any purpose a superintendent, there is no question at all that he was also engaged in manual labour—that is to say, he was engaged in hauling and throwing these bales of wool into the ship's hold; and the injury was sustained by the plaintiff in consequence of a bale put in motion by Bodfield, in the exercise of a duty that was cast upon him, as an ordinary workman engaged in such manual labour, falling upon the plaintiff. Assuming that to be so, it comes to nothing more than this, that the man who was a superintendent for some purposes, and who

(a.) Reported by Cecil Chapman, Esq., Barrister-at-Law.

was also an ordinary workman engaged in the work in which the plaintiff was likewise engaged, was guilty of negligence, whereby his fellow-workman was injured. But how can that be said to be an injury caused by Bodfield whilst he was in the exercise of such superintendence? The negligence of Bodfield was whilst in the exercise of the manual labour in which he was engaged (see section 8), and not in the exercise of superintendence at all. I think that disposes of the 2nd sub-section of section 1. With regard to sub-section 3, the words of which are, "By reason of the negligence of any person in the service of the employer to whose orders or directions the workman, at the time of the injury, was bound to conform and did conform, where such injury resulted from his having so conformed," supposing I were to concede, for the purpose of the discussion (which I by no means do), that Bodfield was a person in the service of the employer to whose orders or directions the plaintiff at the time of the injury was bound to conform, I fail to see any order which was given by him to which the plaintiff was bound to conform. And, if Bodfield gave him no order, the injury the plaintiff complains of could not have resulted from his having conformed to an order which was never given.

A. L. SMITH, J.—I am of the same opinion. In this case the plaintiff must bring himself within either sub-section 2 or sub-section 3 of section 1. He must allege and prove that the accident occurred to him by reason of the negligence of a person in the service of the employer who had superintendence intrusted to him, whilst in the exercise of such superintendence, or, in the alternative, he must allege and prove that the injury occurred by reason of the negligence of a person in the service of the employer to whose orders or directions he, at the time of the injury, was bound to conform and did conform, and that such injury resulted from his having so conformed.

Now, it must be patent to anyone reading these two sub-sections that the Legislature only intended to fix the master with liability for the negligence of two classes of persons—viz., one a person who has what may be termed superintendence, and another a person to whose orders the workman is bound to conform. This accident, as it is alleged, took place by reason of the negligence of Bodfield, a person in the service of the defendant, who had superintendence intrusted to him, he having, whilst in the exercise of such superintendence, thrown down a bale of wool into the hold of the ship where the plaintiff was working and injured him. At the close of the plaintiff's case it was submitted for the defendant that Bodfield did not come within the description of superintendence mentioned in the Act, or, in other words, that the case did not come within sub-section 2 of section 1; that "superintendence" in that sub-section must refer to a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour. That is the definition of the expression given in section 8 of the Act. If you have a person whose sole or principal duty it is to superintend the work of others, the master will be liable for injuries to those who act in obedience to his orders, even though such superintendent should himself casually do manual labour. But how can it be said that a "ganger," the foreman of a gang of labourers, who is working with his hands all the day, is a person whose sole or principal duty is superintendence, and who is not ordinarily engaged in manual labour?

It is only necessary to state the proposition to show that the case is not within section 1, sub-section 2. That, as it seems to me, was the only ground taken before the learned judge of the county court. But it is now said that the county court judge ought not to have nonsuited the plaintiff, because Bodfield, if not intrusted with general superintendence, was at all events a person to whose orders the plaintiff was bound to conform within sub-section 3 of section 1. I doubt if that point is open to the plaintiff upon this appeal, but I will assume that it is; and if I thought there was evidence upon which the learned judge might have given judgment for the plaintiff I should have been disposed to send the case down for a new trial, the plaintiff bearing all the costs up to the present time. But, upon the evidence which was before him, I am satisfied that the judge ought not to have found that Bodfield was a person within the sub-section; and for this reason a mere foreman of a gang of labourers will not do: the master is to be liable where the injury is caused "by reason of the negligence of any person in the service of the employer to whose orders or directions the workman, at the time of the injury, was bound to conform." That is the person for whose negligence the master is responsible. But sub-section 3 does not stop there, it goes on "and did conform, where such injury resulted from his having so conformed." The meaning of sub-sections 2 and 3 in my judgment is this—the employer is to be liable for the negligence of one whom he places in the position of being intrusted with the giving of orders, where the workman is injured by reason of his having conformed to an order or direction which he receives from such person. But where is the evidence here that Bodfield (assuming him to have been so intrusted) did give any orders by conforming to which the plaintiff sustained injury? There is no such evidence. But the plaintiff's counsel relied upon *Millward* v. *Midland Railway Co.* as an authority to show that an order may be implied from the circumstances. The *ratio decidendi*, however, in that case was, that the plaintiff was acting under the orders of a person whose directions he was bound to obey, and was doing, with the knowledge of that person, what it was the ordinary course of business for him to do; whereas here the injury sustained by the plaintiff was caused by the inadvertent act of Bodfield whilst in the execution of his duty as a fellow-labourer of the plaintiff.

The judgment of nonsuit must be upheld.

Appeal dismissed.

Solicitors for the plaintiff, *Keene, Marsland, & Brydon.*

Solicitors for the defendant, *Watson, Sons, & Room.*

House of Lords.

From C. A. (England). Feb. 15, 17; July 14, 1887.

Thames and Mersey Marine Insurance Co. v. Hamilton, Fraser, & Co. (a.)

Marine insurance—Insurance on ship and machinery—Perils insured against—General words—Words ejusdem generis—Bursting of donkey-engine used for pumping up the boilers.

By a policy of marine insurance on a steamship and machinery, including donkey-engine, boilers, pumps, and all connections, the perils insured against were the usual perils—namely, of the seas, men-of-war, fire, &c.—and all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the subject-matter of the insurance. For the purposes of the voyage it was necessary to pump water into the main boilers by means of the donkey-engine and pump in the usual way; but, owing to a check-valve being stopped, the air-chamber in the pump became filled with water, and split.

Held, that the damage, whether caused by negligence or not, was not covered by the words "perils of the seas," or by the general words.

Decision of the Court of Appeal (*reported* 34 *W. R.* 674, 17 *Q. B. D.* 195) *reversed.*

West India and Panama Telegraph Co. *v.* Home and Colonial Marine Insurance Co., 29 *W. R.* 92, 6 *Q. B. D.* 51, *disapproved.*

This was an appeal from a decision of the Court of Appeal (*Lindley* and Lopes, L.JJ., Lord Esher, M.R., dissenting) affirming a decision of the Queen's Bench Division (Mathew and A. L. Smith, JJ.).

The questions were argued upon a special case, the necessary facts in which are fully stated by Lord Herschell in his judgment.

Feb. 15, 17.—*Sir R. E. Webster, A.G., Sir Charles Russell, Q.C.* (*French, Q.C.*, and *Synnott* with them), for the appellants.—"Perils of navigation" are not specifically insured against, and are not covered by the words "perils of the seas." In order to make the underwriters liable under this policy there must be a "peril of the seas" or one *ejusdem generis*. It has never been held that the value of a broken screw-shaft can be recovered under the words "perils of navigation," much less could it be under "perils of the sea": *Phillips* v. *Barber*, 5 B. & Ald. 161; *Fletcher* v. *Inglis*, 2 B. & Ald. 315; *Cullen* v. *Butler*, 5 M. & S. 461; *Butler* v. *Wildman*, 3 B. & Ald. 398; *Bishop* v. *Pentland*, 7 B. & C. 219; *De Vaux* v. *l'Anson*, 5 Bing. N. C. 519; *Davidson* v. *Burnand*, 17 W. R. 121, L. R. 4 C. P. 117; *Merchants' Trading Co.* v. *Universal Marine Insurance Co.*, 2 Maritime Law Cases, N. S. 431, cited in *Dudgeon* v. *Pembroke*, 22 W. R. 914, at p. 918, L. R. 9 Q. B. 581, at p. 596. It may be that a thing would be a "peril of the seas" if it happened during the voyage, and would not be if it happened at another time. The principle of *ejusdem generis* must be applied; it was departed from in *West India and Panama Telegraph Co.* v. *Home and Colonial Marine Insurance Co.*, 19 W. R. 52, 6 Q. B. D. 51—at all events in the judgment of Lord Selborne, and the decision in that case should be reversed. *Taylor* v. *Dunbar*, 17 W. R. 382, L. R. 4 C. P. 206, should be followed.

Cohen, Q.C., and *Myburgh, Q.C.* (*J. Gorell Barnes* with them), for the respondents.—The case finds that "for the purposes of the voyage it was necessary to pump up the main boilers by means of the donkey-pump and engine in the usual way, and it follows that this was a peril of navigation, whether a peril of the seas or not. First, the case comes under the general words, which do not include only perils *ejusdem generis*. In all cases where the principle of *ejusdem generis* is applied there is some one characteristic common to all the enumerated things. Here there is no common characteristic: *Fenwick* v. *Schmalz*, 16 W. R. 481, L. R. 3 C. P. 313; *Bishop* v. *Pentland*; Maxwell on Statutes, p. 303. Secondly, the loss comes under "perils of the seas," which includes all accidents of and incident to navigation: *Carruthers* v. *Sydebotham*, 4 M. & S. 77. If this loss is not covered by the word "perils" it is by the word "adventures," which means something different to perils. "Adventures and perils" include every accidental circumstance, not the result of wear and tear, or delay, or caused by the act of the assured himself, happening and incidental to the navigation of the ship.

Sir R. E. Webster, A.G., replied.

July 14.—Lord Halsbury, C.—In this case a policy of marine insurance for twelve months was effected upon, among other things, a pump on board *The Inchmaree* steamer.

The adventures and perils which the capital stock and funds of the defendant company were made liable to by the policy of insurance were of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, and quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the aforesaid subject-matter of insurance or any part thereof.

It is certain that a loss or misfortune has happened to the pump while the pump was being used for the purpose of filling the boilers of *The Inchmaree*, and the sole question is whether the loss or misfortune which did happen was one of the losses or misfortunes against which the insuring company agreed to indemnify the owners of *The Inchmaree*.

If understood in their widest sense, the words are wide enough to include it; but two rules of construction, now firmly established as part of our law, may be considered as limiting those words. One is that words, however general, may be limited with respect to a subject-matter in relation to which they are used. The other is that general words may be restricted to the same *genus* as the specific words that precede them.

There is, perhaps, a third consideration which cannot be overlooked, and that is that where the same words have for many years received a judicial construction it is not unreasonable to suppose that parties have contracted upon their belief that their words will be understood in what I will call the accepted sense. And it is to be remembered that what courts have to do in construing all written documents is to reach the meaning of the parties through the words they have used.

Now the facts here are very simple. A part of the pump was burst because a valve which should have let the water into the boiler was stopped up while the pump was being worked by a donkey-engine. On the one side it is said that filling the boiler was necessary to enable the ship to prosecute her voyage; on the other it is said that the accident, peril, or misfortune had nothing to do with the sea, and was in no sense of the like kind with any of the perils or misfortunes specifically enumerated.

In the long line of cases quoted at the bar there was only one (with which I will attempt to deal presently) which enunciated any different principles of construction from those I have endeavoured to set forth above, al-

(a. Reported by C. G. Napier Trollope, Esq., Barrister-at-Law.

though I think there is some difficulty in reconciling the facts with respect to which some of them are decided with the principle upon which they profess to be decided—conspicuously, I think, *De Vaux* v. *P'Anson*, where Tindal, C.J., rests upon authorities which, as applicable to the particular facts of the cases to which he refers, hardly support the decision there arrived at.

The great difficulty I have had in this case is the decision of Lord Selborne, C., and Cockburn, C.J., in the case of *The West India and Panama Telegraph Co.* v. *Home and Colonial Marine Insurance Co.* I cannot agree with the Master of the Rolls that that case does not, as matter of reasoning, cover the present case. With the utmost respect I can draw no real distinction between the explosion of the boiler and the bursting of the air-chamber of the pump, nor can any real distinction depend upon whether it was steam generated by fire which caused the explosion, or air and water forced into the chamber by ordinary mechanical action. But before your lordships that case is open to review, and I cannot think that that case is reconcileable with the principles upon which policies of marine insurance have hitherto been construed. It introduces analogy as the guide by which you are to ascertain the *genus* to which the different species are to be attributed; so that in the future one must introduce as the true exposition of general words not the *genus* you find as applicable to the species enumerated, but any analogous *genus*. Sea perils or the like become enlarged into perils whose only connection with the sea is that they arise from machinery which gives motive power to ships.

I cannot think that, even were the analogy perfect—which I do not think it is—this is a satisfactory mode of ascertaining what the parties meant by the words they have used; and, as I have said, this is the real function of a court in construing an instrument. It might be reasonable for the parties to provide for such a peril, and one knows that "dangers of and incident to steam navigation" are words which have been used to provide for such casualties. But I cannot think that such casualties were in the contemplation of the parties when using the old familiar words of this policy. I think the subject-matter, marine risks, limits the meaning of the general words. I think the *genus* "perils of the sea" limits the meaning. I think the meaning attributed to these words for more than half a century, by decision, makes it probable that the parties used them in that accepted sense. I, therefore, think the judgment of the Court of Appeal wrong, and I move your lordships that it be reversed.

Lord Bramwell.—I cannot agree with the judgment in this case. The donkey-engine was insured. The adventures and perils which the defendants were to make good specified a great many particular perils, and "all other perils, losses, and misfortunes that shall come to the hurt, detriment, or damage of the aforesaid matter of insurance, or any part thereof." Words could hardly be more extensive, and if the question, I ought to say a question on them, arose for the first time, I might, perhaps, give them their natural meaning, and say they included this case. But the question does not arise for the first time. It has arisen from time to time for centuries, and a limitation has always been put on the words in question. Definitions are most difficult, but Lord Ellenborough's seems right: "all cases of marine damages of the like kind with those specially enumerated, and occasioned by similar causes." I have had given to me the following definition or description of what would be included in the general words: "Every accidental circumstance not the result of ordinary wear and tear, delay, or of the act of the assured, happening in the course of the navigation of the ship, and incidental to the navigation, and causing loss to the subject-matter of insurance." Probably a severe criticism might detect some faults in this. There are few definitions in which that could not be done. I think the definition of Lopes, L.J., in *Pandorf* v. *Hamilton*, 34 W. R. 488, 16 Q. B. D. 629, very good. "In a seaworthy ship damage to goods caused by the action of the sea during transit not attributable to the fault of anybody" is a damage from a peril of the sea.

I have thought that the following might suffice: "All perils, losses, and misfortunes of a marine character, or of a character incident to a ship as such."

I put it forward with distrust, but it would comprehend all the cases cited where the assured has recovered, save perhaps the *West India Telegraph Co.* v. *Home and Colonial Insurance Co.* For example, it would include the case of the ship blown over while in dock, of the ship damaged by its moorings giving way, of the ship fired into by a ship. It would not include the cases put by Lord Esher, M.R., nor the case I put of the captain seized with giddiness dropping the chronometer into the hold; nor would it include the present case. The damage to the donkey-engine was not through its being in a ship or at sea. The same thing would have happened had the boilers and engines been on land if the same mismanagement had taken place. The sea, waves, and winds had nothing to do with it.

As a matter of principle and reasoning I think the decision wrong. I think the judgment in the *West India and Panama Telegraph Co.* v. *Home and Colonial Marine Insurance Co.* wrong on the reasoning I have used. With most sincere respect, though it is true that what the winds are to a sailing vessel steam is to a steamer, that does not decide the question, for it is not every damage to sails that would be covered by the policy. Suppose damage by rats or mildew to spare sails. As to Lord Esher's judgment in that case, I concur in his criticism on it in the present case. And I agree with Lopes, L.J., that the word "fire" in the policy will not sustain that judgment. The Lord Justice puts the case of a spar falling on the deck, while getting under sail, and being broken, and says it would be within the policy. Perhaps; but if it would it would be because it was a loss in navigation, a loss which could not have happened except on a ship. But suppose the spar was being used to erect an awning on deck to give shelter to dancers, or the like, and was broken, the case would not be covered by the policy. It would not be a marine loss, not a loss with which the sea, or navigation, or the ship, as a ship, had anything to do.

I do not like cutting down the natural meaning of words; there is always great difficulty in saying what should be substituted. But it is admitted that some limit must be put on those in question here. I think a proper limit would exclude this loss. So that the judgment of Lord Esher, M.R., is, I think, right, and that of the other judges wrong, and their decision should be reversed.

Lord Herschell.—This action undoubtedly raises an important question. It turns on the construction to be put upon the general words which follow the specific enumeration of the risks against which the insurance is effected in an ordinary marine policy.

The policy sued on was a time policy for twelve months, from the 20th of August, 1883, to the 20th of August, 1884, and the subject-matter of insurance, "the hull, masts, spars, sails, boats, materials, and all stores, valued at £20,000; and machinery, shafting, propellers, boilers, and connections, including donkey-engines and boilers, pumps, and all connections, valued at £11,000.

The facts lie in a narrow compass. They are set out in a special case, stated by agreement between the parties. On the 2nd of March, 1884, *The Inchmaree* (the vessel insured) was at anchor off Diamond Island, awaiting orders, and for the purposes of the voyage i was necessary to pump up the main boilers,

by means of a donkey-pump and engine, in the usual way. A pipe led from the donkey-pump to the boilers, and at its junction with one of the boilers there was a check-valve, capable of being opened or closed by a screw, which ought to have been kept open and clear when the boilers were being pumped up. This valve had either been left closed or had become salted up when the donkey-pump was set to work off Diamond Island, so that the water could not pass into the boiler. The consequence was, that when the donkey-pump was set to work, the pipes and water-chamber in the donkey-pump, and the air-chamber therein, became overcharged, and the water was forced up into the air-chamber, which in consequence split, and the pump was thereby damaged.

It was admitted for the purposes of the case that the check-valve was either allowed to remain closed or to become salted up by the negligence of one of the engineers, or was accidentally salted up without being noticed, though reasonable care was taken by the engineers. It was also admitted that the closing or salting up, and accident, were not due to ordinary wear and tear.

The costs of replacing the pump was about £72 10s. The ship and freight were warranted free from average under three per cent. unless the ship were stranded. But as she did become stranded during the voyage, the loss was not excluded from the warranty. The parties were unable to agree as to whether there was negligence in allowing the check-valve to remain closed or to become salted up; but as the plaintiffs contended that the defendants were liable, whether there was negligence or not, it was agreed to leave that question for trial (if material) after the decision of the case.

The questions stated for the opinion of the court were, whether the defendants were liable under the policy in respect of the loss, (1) if it could have been avoided by proper care and occurred through negligence; (2) if it occurred accidentally without negligence.

The Queen's Bench Division gave judgment for the plaintiffs, and this judgment was affirmed by the majority of the Court of Appeal (Lindley and Lopes, L.JJ.), the Master of the Rolls dissenting.

It was not contended at the bar on behalf of the respondents that the loss was within any of the specific risks enumerated. Reliance was placed exclusively upon the general words, "All other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matter of this insurance, or any part thereof."

It cannot be denied that, if these words are to be taken without any limitation, a loss or misfortune did come to the damage of a part of the subject-matter of the insurance. But it is contended on behalf of the appellants that these general words, following a specific enumeration, must be limited to perils *ejusdem generis* with those specified, or, to put it in another way, that they must be construed with reference to the scope and purpose of the instrument in which they occur—viz., a policy of marine insurance. If the matter now presented itself for consideration for the first time, untouched by authority, I should not myself be inclined to construe these general words without some limitation. Indeed, the learned counsel for the defendants themselves did not contend for so wide an interpretation. The view which they put before the House was, that they should be confined to accidents happening to the subject-matter of the insurance in the course of and incidental to the navigation.

I think it will be found upon examination of the authorities that the general words in a marine policy have received from the courts, for a long series of years, a construction to which your lordships would do well to adhere. The instrument is one in daily use, and if your lordships were to put a new construction upon it you would be likely to defeat, and not to give effect to, the intention of the parties. Nothing would be more dangerous, in my opinion, than to depart from a construction which the authorities have put upon words in common use in a mercantile instrument, even if the propriety of the decision might originally have been open to question.

In a case which came before the Court of King's Bench as long ago as 1816, Lord Ellenborough, C.J., in delivering the judgment of the court, in clear and unambiguous terms expressed their view as to the meaning of the words in question. I refer to the case of *Cullen* v. *Butler*. It was an action on a policy of insurance where the ship and goods had been sunk at sea by another ship firing upon her in mistake for an enemy. The court inclined to the opinion that the loss was not one by "perils of the sea," but held that it was covered by the general words. Lord Ellenborough said:—"The extent and meaning of the general words have not yet been the immediate subject of any judicial construction in our courts of law. As they must, however, be considered as introduced into the policy in furtherance of the objects of marine insurance, and may have the effect of extending a reasonable indemnity to many cases not distinctly covered by the special words, they are entitled to be considered as material and operative words, and to have due effect assigned to them in the construction of the instrument, and this will be done by allowing them to comprehend and cover other cases of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes."

No case was cited at the bar from the date when this opinion was expressed (unless it be the recent case of *West India and Panama Telegraph Co.* v. *Home and Colonial Marine Insurance Co.*, to which I will presently advert) which has proceeded upon a construction of the policy different from that enunciated by Lord Ellenborough.

I will briefly review the subsequent authorities. The first is *Butler* v. *Wildman*. There the captain of a ship had thrown a large quantity of dollars overboard to prevent their falling into the hands of an enemy by whom he was pursued. It was held that, if not a loss by jettison, it was covered by the general words. Abbott, C.J., says:—"If not, strictly speaking, jettison, it is *ejusdem generis*, and therefore falls within the general words." The other judges concurred in this view, Holroyd, J., saying that the general words include "all losses of the same nature with those described in the enumerated risks." Next in order of time comes *Phillips* v. *Barber*. A vessel placed in a graving dock for repair was, by the violence of wind and weather, thrown over on her side, whereby she struck the ground with great violence and was bilged. Abbott, C.J., in a judgment holding that the underwriters were liable, after quoting the general words contained in the policy, said, "These general words are, indeed, restrained in construction to perils *ejusdem generis* with those more particularly enumerated in the policy. In this case, however, the loss was occasioned by the violence of the wind and weather in port, and it seems to me, therefore, to have been produced by a peril *ejusdem generis* with those specified, and to fall within the general words of the policy."

The next case, *De Vaux* v. *l'Anson* was much relied on by the counsel of the respondents. But though I feel some difficulty in explaining the grounds of that decision, it certainly purported to be based upon the antecedent authorities, and not upon any different view of the law. The ship had, in that case, been put into a dry dock for repairs. These being completed, preparations were made for getting her afloat; she was for this purpose made fast by four cables, whilst the workmen removed the sand which was under the vessel, and which consolidated the shores upon which the ship was resting. The cables strained the vessel, forcing in the

ribs. The stanchions of the keelsons having all fallen from the force of the lower masts upon the keel, the garboard streak gave way, and when at last the ship was no longer upon the shores she sank into a muddy sand. At the time of her sustaining the injury the depth of water in the dock was about four feet. She was abandoned as a constructive total loss, and the question arose whether she was lost by perils insured against. Tindal, C.J., in delivering the judgment of the court, held that she was. He said, "It is to be observed the words in the policy are very large; the policy not only enumerates 'perils of the sea,' but 'all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the subject-matter of the insurance.' And the cases cited and relied on by the plaintiffs, *Carruthers* v. *Sydebotham*, *Fletcher* v. *Inglis*, and *Phillips* v. *Barber*, are sufficient authority to show that a loss occasioned by the endeavour to get the vessel afloat from the dock in which she had just been repaired was a loss within the policy." It is not easy, I confess, to see how the authorities referred to were sufficient to establish the propositions they are supposed to support. In *Carruthers* v. *Sydebotham* the pilot navigating a vessel had fastened her to the pier of a dock basin in the Mersey by a rope to the shore. She took the ground, and when the tide left her fell over on her side and bilged, in consequence of which when the tide rose she filled with water and her cargo was wetted. It was held that this was a stranding entitling the assured to recover for an average loss upon the goods. After a careful perusal of the judgments in this case, I am unable to see its bearing upon the point which had to be determined in *De Vaux* v. *I'Anson*. Nor do I see the application of *Fletcher* v. *Inglis*. A vessel insured for twelve months was in a habour with a hard uneven bottom; the tide having left the vessel, on its return there was a considerable swell in the harbour and the ship struck the ground hard several times and was found to be considerably injured. It was held that this was a loss by peril of the sea. Still less am I able to perceive the applicability of *Phillips* v. *Barber*, to which I have referred above. There was nothing in *De Vaux* v. *I'Anson* that I can see corresponding with the wind and weather in port which was held in *Phillips* v. *Barber* to be *ejusdem generis* with a storm at sea. It is unnecessary to inquire whether the decision in *De Vaux* v. *I'Anson* was correct. It cannot be regarded as throwing any doubt upon the canon of construction laid down by Lord Ellenborough and more than once recognized and acted upon by Lord Tenterden. Nor is it possible to evolve any principle from it applicable to other cases. No reasons are given for the judgment, which is based solely on prior authorities, and when these authorities are examined they only determine, the one, that a ship damaged by a storm when in dry dock is damaged by causes similar to perils of the seas, the others, that vessels injured by ceasing to be waterborne, and being driven against the ground by the action of the tide, are injured by "perils of the sea."

The last case to which I need refer on this point is *Davidson* v. *Burnand*, where Willes, J., expressly recognised the rule of construction laid down in *Cullen* v. *Butler*. He said: "The question is not whether the loss here was strictly one occasioned by the perils of the sea, but whether it was such other loss within the policy, which, of course, must be a loss of the same or a similar kind to one happening from the perils of the sea."

I think, therefore, that the case now before your lordships must be determined by a consideration of the question whether the loss falls within the general words as construed by Lord Ellenborough—that is, whether it is a case "of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes." When the facts are borne in mind, it seems necessary only to state the question in this way to see that the answer must be in the negative. To which of the specially-enumerated perils is it similar? The only one that could be suggested is "perils of the sea." The damage here arose from the air-chamber of the donkey-pump giving way under an excessive pressure of water, owing to the proper outlet being closed. It is, I think, impossible to say that this is damage occasioned by a cause similar to "perils of the sea" on any interpretation which has ever been applied to that term. It will be observed that Lord Ellenborough limits the operation of the clause to "marine damage." By this I do not understand him to mean only damage which has been caused by the sea, but damage of a character to which a marine adventure is subject. Such an adventure has its own perils, to which either it is exclusively subject, or which possess, in relation to it, a special or peculiar character. To secure an indemnity against these is the purpose and object of a policy of marine insurance.

The respondents placed their main reliance upon the case of *West India Telegraph Co.* v. *Home and Colonial Insurance Co.*, and naturally so, because the majority of the Court of Appeal thought the present case undistinguishable from it. Lord Selborne, C., and Cockburn, C.J., in that case held that the damage done by the explosion of the boiler of a steamer was covered by the general words of a marine policy. Lord Selborne, after referring to the effect given to these words in *De Vaux* v. *I'Anson*, said:—"I think it is at least as proper to hold that in the case of a steamship they cover damage occasioned by the explosion of the boiler in which the motive power necessary to her navigation is generated. What the winds are to a sailing vessel, steam is to a steamer; and it is as reasonable that marine insurers should bear the risks incident to a navigation by that kind of power, whether from excess of pressure in the boilers, or from defects of safety-valves, or from neglect or mismanagement, making that dangerous which otherwise would not be so, as that they should bear losses occasioned by excessive pressure of wind and defects, or mismanagement of a ship's sail or tackle." I have already given my reasons for doubting whether *De Vaux* v. *I'Anson* involved any principle which could possibly be extended by analogy to a case not precisely similar in its facts. Moreover, it is to be observed that in *De Vaux* v. *I'Anson* the damage done was done to the ship as such. It arose from her being constructed for the purpose of being waterborne, and thus needing some substituted support, if the support of the water was withdrawn; and the damage to the ship was due to her grounding, and the failure to keep her safely supported. It is on this view alone, I think, that the case can be sustained. But the explosion of the boiler on board *The Panama* had no marine character at all. It might have happened in precisely the same way and done the same kind of damage if the steam-engine had been in use for the purpose of moving manufacturing machinery on shore. The real ground of Lord Selborne's judgment appears to have been the analogy between damage done by the excessive pressure of the winds in the case of a sailing vessel and the excessive pressure of steam in the boiler when the motive power used to propel the vessel is steam. I am not satisfied that this analogy is a sound one; but, even if it be so, I am unable to see how it can be treated as an authority in the present case, still less as concluding it. The water in the donkey-engine, the over-pressure of which caused the damage, was certainly not to the steamer "what the winds are to a sailing vessel," and the damage was not, as it seems to me, in any way similar to the injury done to a sailing vessel by a storm of wind.

The present Master of the Rolls, although he concurred in the judgment of the majority of the court in *The West India Telegragh Co.* v. *Home and Colonial*

Insurance Co., differed in his reasons. He based his judgment solely on the ground that the explosion was *ejusdem generis* with fire, and therefore the loss was within the general words. In the case now under appeal he intimated that this reasoning was somewhat fanciful, and that he should not be sorry to see it dissented from. I am certainly disposed to prefer the latter view of the learned judge; but it is not necessary to discuss the point, as it is obvious that such a ground of decision can have no bearing upon the case we have to deal with. I may add, however, that since the term "fire" has been added to the specially-enumerated risks (which has taken place in comparatively recent times), I think the general words may properly be extended to similar risks which would not have been included before.

Upon the whole, I have come to the conclusion that the judgment of the Master of the Rolls in the court below was correct. I believe it not only to have been in accordance with the authorities, but in harmony with the common understanding of those who enter into contracts of marine insurance. Several instances were put in the course of the argument of disasters which are of common occurrence and would seem to be just as much within the general words as that which is now in question, but in respect of which it has never been suggested that the underwriters are liable. I accordingly concur in the judgment which has been moved.

Lord Macnaghten.—In March, 1884, *The Inchmaree* was off Diamond Island lying at anchor and about to prosecute her voyage. It was necessary to fill up her boilers. There was a donkey-engine and a donkey-pump on board, and the donkey-engine was set to pump up water from the sea into the boilers. Those in charge of the operation did not take the precaution of making sure that the valve of the aperture leading into one of the boilers was open. This valve happened to be closed. The result was that the water, being unable to make its way into the boiler, was forced back and split the air-chamber, and so disabled the pump. That was the beginning and the end of the misfortune.

At this time *The Inchmaree*, with her machinery, including the donkey-engine, was insured by a time policy.

The question is, was the loss which resulted from this mishap covered by the policy or not? The policy contained the common clause describing the risks which the underwriters were content to bear. The clause begins in the usual way by specifying certain particular cases—perils of the seas and other well-known risks—to which the indemnity was to extend. Then follow general words, apparently providing for every conceivable loss or misfortune that could happen to the subject-matter of the insurance.

It was not contended that the mishap in question fell within any of the particular cases enumerated. The argument turned on the effect of the general words. According to the ordinary rules of construction these words must be interpreted with reference to the words which immediately precede them. They were, no doubt, inserted to prevent disputes founded on nice distinctions. Their office is to cover in terms whatever may be within the spirit of the cases previously enumerated, and so they have a greater or less effect as a narrower or broader view is taken of those cases. For example, if the expression "perils of the seas" is given its widest sense, the general words have little or no effect as applied to that case. If, on the other hand, that expression is to receive a limited construction, as apparently it did in *Cullen* v. *Butler*, and loss by perils of the seas is to be confined to loss *ex marinæ tempestatis discrimine*, the general words become most important. But still, ever since the case of *Cullen* v. *Butler*, when they first became the subject of judicial construction, they have always been held or assumed to be restricted to cases "akin to" or "resembling" or "of the same kind" as those specially mentioned. I see no reason for departing from this settled rule. In marine insurance it is above all things necessary to abide by settled rules and to avoid anything like novel refinements or a new departure.

It was objected by Mr. Cohen that the rule of *ejusdem generis* does not apply unless you can find a common characteristic running through or underlying the previous words. I do not know that this is so, at any rate where several cases are enumerated leading to a common result or intended to be met by a common remedy. A familiar instance occurs in the Companies Act, 1862, and the earlier Act of 1848, in the sections which provide for winding up. There are several sub-sections specifying various cases in which a winding-up order may be made, and then there is a sub-section providing that the court may make an order whenever it thinks it just and equitable. Under both Acts those general words have always been held to be restricted to cases *ejusdem generis* with those previously mentioned, and not to give the court a general power to make an order whenever it thinks right to do so.

Your lordships were asked to draw the line and to give an exact and authoritative definition of the meaning of the expression "perils of the seas" explained or enlarged by, or in connection with, the general words. For my part I decline to attempt any such task. I do not think it is possible to frame a definition which would include every case proper to be included, and no other. I think that each case must be considered with reference to its own circumstances, and that the circumstances of each case must be looked at in a broad common-sense view, and not by the light of strained analogies and fanciful resemblances.

In the present case, although the Court of Appeal has properly treated the general words as restricted to cases *ejusdem generis* with those specially enumerated, the majority of the court has held the accident within the policy. I am unable to adopt their conclusion. The accident, in my opinion, was not due to the "perils of the seas," using that expression in the widest sense that I can give to it, nor did it result in sea damage of any kind.

I am therefore of opinion that the view of the Master of the Rolls is correct, and that the judgment of the Court of Appeal must be reversed.

Order appealed from reversed; the respondents to pay the costs of the appellants in the courts below and in this House.

Solicitors for the appellants, *Gregory, Rowcliffes, & Co.*, for *Hill, Dickinson, & Co.*, Liverpool.

Solicitors for the respondents, *T. W. Rossiter*, for *Hoyle, Shipley, & Hoyle*, Newcastle-on-Tyne.

Court of Appeal.

From Chan. Div. Feb. 8, 17.

In re WEST DEVON GREAT CONSOLS MINE. (*a.*)

Practice—Appeals from Stannaries Court—Deposit by appellant—Stannaries Act, 1869 (32 & 33 *Vict. c.* 19), *s.* 32—*Judicature Act,* 1873, *s.* 18, *sub-section* (3) —*R. S. C.,* 1883, *ord.* 58, *r.* 15—*Appeal set down—Dismissal of appeal by consent of all parties—Application to court necessary — Counsel — Implied authority to compromise—Undertaking not to appeal.*

The provision in section 32 *of the Stannaries Act,* 1869, *requiring a deposit of £20 to be made with the registrar of the Stannaries Court on appeals from the Vice-Warden, is not abrogated by the Judicature Acts or by any of the rules made thereunder, and is still in force.*

An undertaking not to appeal given, after the delivery of judgment on the matter at issue, but before the judge had decided the question of costs, by counsel on behalf of the unsuccessful litigant, on condition of his client not being required to pay the costs of the successful litigant, is within the implied authority of counsel, and cannot be withdrawn in the absence of misapprehension or surprise inducing the undertaking.

An appeal once set down cannot be withdrawn by the appellant on merely obtaining the written consent thereto of the respondent, but an application to the court for leave to withdraw the appeal is necessary.

Appeal from an order of the Vice-Warden of the Stannaries Court.

The West Devon Great Consols Mine Co. was being wound up in the Stannaries Court, and the registrar of that court was the official liquidator. In 1886 H. L. Phillips, the late "Purser" of the company and the defendant in an action of *Simmons* v. *Phillips*, was directed by an order of the Court of Appeal, reversing a judgment of A. L. Smith, J., (*inter alia*) to pay the costs of that action.

Phillips and his solicitors having paid these costs, claimed in the winding up to be repaid the same out of the assets of the company. This claim was opposed by certain contributories of the company, and the matter was referred to the Vice-Warden for his decision. The official liquidator meantime sanctioned a call being made to provide for certain debts of the company, including this claim, and the contributories gave notice of motion before the Vice-Warden to discharge the order for a call. Both the motion to discharge the order for a call and the adjourned summons to admit the validity of the claimants' claim came on together for hearing by the Vice-Warden, first on August 30, 1887, and the hearing was then adjourned till October 21. On October 21 the Vice-Warden gave judgment in favour of the greater portion of the claim being admitted on the ground that the terms of a certain resolution, passed at a meeting of certain shareholders of the company on October 10, 1885, and which the Vice-Warden considered was binding on the company, authorized Phillips as defendant in the action of *Simmons* v. *Phillips* to claim his costs in that action out of the assets of the company. After the delivery of the judgment, but before the Vice-Warden had given any decision on the question of the costs of the applications before him, a discussion took place between the counsel who then appeared for the contributories and the counsel then appearing for the claimants. The result of which, as it appeared from the evidence, was that the then counsel for the contributories gave an undertaking on behalf of his clients not to appeal against the order of the Vice-Warden in consideration of counsel for the claimants agreeing not to press for payment by the opposing contributories personally of the costs of the applications before the Vice-Warden, but that the costs of all parties of, and incidental to, the hearing of the said claims should be paid out of the assets of the company. This undertaking was embodied as follows in the minutes prepared of the order of October 21:—"And the . . . opposing contributories undertaking, by their counsel, not to appeal or to raise any objection in the winding up as to bearing their respective shares of the said claims, it is further ordered that the taxed costs of all parties of, and incidental to, the hearing of the said claims be paid out of the assets of the company." Only one of the opposing contributories was personally present when the undertaking in question was given by their then counsel, and that contributory assented to the undertaking; the other opposing contributories who were not present had not authorized counsel to give the undertaking, and, objecting to it before the order of October 21 was drawn up, passed, and entered, they moved the Vice-Warden to vary the order by striking out the words relating to the undertaking given by their then counsel. The Vice-Warden, on November 25, 1887, refused this motion, with costs.

The contributories appealed from this order of refusal.

On the appeal being opened,

Stock, for the registrar of the Stannaries Court, who was also official liquidator of the company, and as such had been served with notice of the appeal, took the preliminary objection that the appeal ought not to proceed until a deposit of £20 should be made by the appellant in the hands of the registrar of the Stannaries Court. —The Stannaries Act, 1869 (32 & 33 Vict. c. 19), s. 32, provided that, in cases of appeals from an order of the Vice-Warden of the Stannaries Court, a deposit of £20 should be made in the hands of the registrar, to be paid to the opposite party when the order is not reversed unless the Vice-Warden should otherwise direct. The Judicature Act, 1873, s. 18, sub-section (3), transferred the jurisdiction of the Court of the Lord Warden on appeals from the Vice-Warden to the Court of Appeal; but there is no section of the Judicature Acts nor any order or rule under them by which the provision as to deposit contained in section 32 of the Stannaries Act, 1869, has been abrogated, and that section remains unrepealed. Section 23 of the Judicature Act, 1873, provides that where no specific provision is made in the Act or Rules with reference to the exercise of the jurisdiction transferred, then that jurisdiction "shall be exercised as nearly as may be in the same manner as the same might have been exercised by the respective courts from which such jurisdiction shall have been transferred.

He referred to *Lee* v. *Nuttall*, 27 W. R. 805, 12 Ch. D. 61.

Higgins, Q.C., and *Grosvenor Woods*, for the appellants.—The old procedure on appeals from the Vice-Warden of the Stannaries Court was by way of petition, and it was in connection with that procedure that the deposit of £20 was required, just as it was required in the old procedure in the Chancery Court on petitions of appeal. The intention of the Judicature Act was to put all appeals on the same footing, and establish one system of procedure, and as it abolished the old system of appeal by way of petition to the Lord Warden, it, by implication, did away with the right of claiming a deposit. R. S. C., 1883, ord. 58, r. 1. Since the passing of the Judicature Act, 1873, it never has been the practice to require a deposit to be paid on an appeal from the Vice-Warden. In any case it is now too late to raise this objection, as this appeal was in the paper and came

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

on for hearing on January 11 of this year, and no such objection was taken, but the case stood over on the application of counsel for the claimants (the present respondents) for leave to file further affidavits, and the registrar of the Stannaries Court, as official liqidator, has taken advantage of that and filed a further affidavit.

The COURT, on the undertaking of the appellants' solicitor to pay the £20 deposit in case the court should be of opinion that, under the present practice, payment of the deposit was still necessary, allowed the appeal to proceed.

Higgins, Q.C., and *Grosvenor Woods*, for the appellants.—Counsel had no express authority from the present appellants to give the undertaking he gave. No doubt *Matthews* v. *Munster*, *ante*., p. 178, decides that counsel conducting a cause in court has implied authority to consent to a compromise upon terms, and that an undertaking, deliberately given without misapprehension or surprise by counsel acting under such implied authority, cannot afterwards be withdrawn. But there is a difference between an order made by consent of counsel stopping the trial, and this case, where the judgment was delivered before any undertaking was given, and the undertaking itself was only by way of an addition with reference to costs: SOLICITORS' JOURNAL, 1876, p. 542. Again, the undertaking here given was induced by misapprehension and surprise. Counsel, after hearing the Vice-Warden's judgment, assumed that the resolution of October 10, 1885, was a ratification by the company of the course pursued by the claimant Phillips in defending the action of *Simmons* v. *Phillips*, but, in fact, that resolution was nothing like such a ratification. Counsel had no opportunity of verifying the Vice-Warden's statement, as the "costs book" of the company was not then in court. There is also a discrepancy between the terms of the undertaking embodied in the order and the undertaking actually given. *Harvey* v. *Croydon Union Sanitary Authority*, 32 W. R. 389, 26 Ch. D. 249; *Rogers* v. *Horn*, 26 W. R. 432; *Holt* v. *Jesse*, 24 W. R. 879, 3 Ch. D. 177, were referred to.

Buckley, Q.C., and *Bramwell Davis*, for the respondents.—The "costs book," though not in court on October 21, 1887, was in court when the case first come on before the Vice-Warden on August 30, and the counsel then appearing for the present appellants had therefore opportunity of reading the resolution of October 10, 1885. It is well within the implied authority of counsel to agree not to appeal, and on grounds of public policy it is necessary he should have such authority. [They were stopped by the court.]

COTTON, L.J.—This is an application by way of appeal to withdraw a consent given by counsel on the hearing of two motions before the Vice-Warden.

It is now well settled—by the Court of Appeal in *Harvey* v. *Croydon Union Sanitary Authority*, notwithstanding a dictum of the late Master of the Rolls to the contrary—that, even though the order made by consent has not been drawn up, the consent given cannot be withdrawn, unless made under some misapprehension or error. Have the appellants here shown any misapprehension or error so as to be relieved from the consent? It was suggested that the consent was not given in the terms embodied in the order. But the appellants have not sworn that, and therefore it must be taken that, as a matter of fact, this undertaking was given in the terms embodied in the order. There were two applications before the Vice-Warden, the first to discharge the order for calls, and the second to admit the claims of the claimants. The Vice-Warden gave his decision in favour of the claims being admitted. But the matter was not over until he had decided what should be done with respect to costs. Then this compromise was entered into—counsel for the present appellants gave an undertaking not to appeal or to raise any objection in the winding up as to his clients bearing their respective shares of the claimants' claims, and the costs of all parties of and incidental to the application were directed to be paid out of the assets of the company.

The questions raised by the appellants are, whether counsel had power, under his implied authority, to agree not to appeal, and whether counsel had power to do so after the judgment of the court had been delivered on the main question.

In my opinion every compromise of a litigation by counsel involves the point that there shall be no appeal, as the compromise is drawn up by consent, and therefore it is not beyond the authority of counsel to undertake not to appeal on condition of being allowed the costs of an unsuccessful litigation, and the rest of the undertaking here is well within the authority of counsel.

But has the undertaking here been given under any misapprehension or mistake? If that were shown, of course the court would relieve the appellants by allowing the undertaking to be withdrawn. It may be that counsel relied too much on what the Vice-Warden said as to the nature of the resolution of October 10, 1885, and as to what would be done in the winding up; but, in my opinion, that is not a misapprehension which would relieve counsel from the undertaking given. I see no evidence to justify the court in coming to the conclusion that counsel entered into this arrangement under any misapprehension or mistake of fact.

Then, as to the point raised as to a deposit of £20 being required on an appeal under section 32 of the Stannaries Act, 1869. It was contended that that requirement was done away with by the Judicature Acts, and that security for costs on an appeal is now only required to be given under special circumstances, and on an application for that purpose to the Court of Appeal. In my opinion, however, section 32 of the Stannaries Act, 1869, gave to the litigant who was successful before the Vice-Warden a special protection by requiring this deposit of £20 to be made in case of an appeal, and that protection has not been done away with by the Judicature Acts, nor by any of the Rules of the Supreme Court—even if the Rule Committee had power to make a rule doing away with such special protection, as to which I express no opinion. In my opinion, therefore, on appeals from the Vice-Warden a deposit of £20 must be made.

As to the point of waiver, the registrar of the Stannaries Court, who is also the official liquidator of this company, did not appear when the application was made by the other respondents for this appeal to stand over, and though he afterwards filed further affidavits, he was entitled to do so without depriving himself of the right to raise this preliminary objection now. But all the registrar, as official liquidator, can claim is his costs of the unsuccessful appeal, and if he desires it the court will require the solicitors of the appellants to undertake that the costs of the official liquidator be paid. As to the respondents represented by Mr. Buckley, they, not having raised this objection on the former occasion, must be taken to have waived it, and therefore cannot now insist on it.

LINDLEY, L.J.—I entirely agree.

BOWEN, L.J.—I am of the same opinion. On the point as to payment of the deposit it seems to me that the maxim "*Generalia specialibus non derogant*" is applicable, and that the rules referred to under the Judicature Acts are not to be construed as going the length of depriving a litigant of any special protection given him by statute. I feel almost certain that there is a decision of

the Court of Appeal on that very point with reference to appeals from county courts.*

Application dismissed, with costs.

Feb. 17.—*Grosvenor Woods*, for the appellants, applied for leave to withdraw the appeal from the final judgment in this matter.—This appeal had been set down for hearing, but owing to the above decision of the Court of Appeal on the interlocutory application refusing to allow the appellants to withdraw the undertaking not to appeal given by counsel, it had become necessary for the appellants to submit to an order dismissing their appeal on the main question with costs. Counsel said that the appellants were willing that such an order should be made, but that the respondents had refused to give a written consent thereto, on the ground that the consent of the court was required. Under these circumstances he made the present application, but submitted that the respondents were not entitled to the costs of this application.

Bramwell Davis, for the respondents, submitted that an appeal once set down could not be withdrawn without the consent of the court, and therefore that this application was necessary, and that the respondents were entitled to be paid the costs of this application.

COTTON, L.J.—During the ten years I have been in the Court of Appeal I have never known an appeal once set down to be dismissed by consent of the parties merely and without an application to the court. The appeal will be dismissed with costs, including the costs of this application.

Solicitors for the appellants, *Snell, Son, & Greenip.*

Solicitors for the respondents, *Kirby, Son, & Verden.*

Solicitors for the official liquidator, *Lorde, Kingdon, & Cotton.*

From Chan. Div. June 17, 18, 20, 22.

In re MARRETT.

CHALMERS *v.* WINGFIELD. (*a.*)

Domicile—Domicile of choice—Abandonment—Intention.

In order to lose the domicile of choice once acquired and to revive the domicile of origin, it is not only necessary that the person should form an intention to leave his domicile of choice, but he must have left it with the intention of leaving it permanently.

Decision of Stirling, J., *affirmed.*

Appeal from a decision of Stirling, J.

This was an action for the administration of the estate of G. W. Marrett.

The testator was born in India about the year 1813, his father being an officer in the service of the East India Co. He was himself an officer in that service, and he never left India until the year 1870. He left the service in 1868, and from that time till his death he was in receipt of a Government pension. Early in 1871 he left Hyderabad and went to reside at Darmstadt. He purchased a house there in 1873, and lived there until the time of his death, with the exception of short visits to England in each of the years 1871, 1872, 1873, and 1874; a visit to India in 1874 for the purpose of obtaining a pension from the Nizam; and some short visits to friends in Germany. His will was made in 1874, on the occasion of a visit by him to Wiesbaden. It was in the English form, and by it he gave his property to his grandchildren, to the exclusion of his children, whom, by the German law, it is not competent for a testator to disinherit.

On the 2nd of June, 1881, an order was made directing the usual accounts, and an inquiry as to the domicile of the testator at the date of his will and at the date of his death.

The chief clerk found that the testator was domiciled in Hesse Darmstadt at both these dates.

On the 27th of January, 1887, the plaintiff, the executor, applied to vary the certificate.

A good many witnesses deposed to their belief that the testator was dissatisfied with Germany and desirous to live in England.

Stirling, J., refused the application.

The plaintiff appealed.

Pearson, Q.C., and *Carson*, for the appellant.—The evidence shows that the testator never intended permanently to reside in Germany, and he therefore never lost his original domicile. Assuming, however, that he did, and that he acquired a German domicile, we say that that domicile was relinquished by him, and that his domicile of origin thereupon revived. An intention to relinquish a domicile of choice is sufficient to revive the domicile of origin without actual change of residence.

They referred to *Brown* v. *Smith*, 15 Beav. 444; *Bell* v. *Kennedy*, L. R. 1 H. L. Sc. 307; *Udny* v. *Udny*, L. R. 1 H. L. Sc. 441, 17 W. R. H. L. Dig. 5; *In re Patience, Patience* v. *Main*, 33 W. R. 500, 29 Ch. D. 976; *In the Goods of Raffenel*, 11 W. R. 549, 3 Sw. & T. 49.

Hastings, Q.C., and *Farwell*, for the respondent.—A mere intention to relinquish a domicile of choice is not sufficient; there must also be an actual change of residence, with an intention of permanently relinquishing that domicile. The evidence here is sufficient to show that the testator acquired a German domicile.

They referred to *Attorney-General* v. *Pottinger*, 9 W. R. 578, 6 H. & N. 733; *Douglas* v. *Douglas*, 20 W. R. 55, L. R. 12 Eq. 617; *In re Steer*, 3 H. & N. 594, 7 W. R. C. L. Dig. 50.

Carson replied.

COTTON, L.J.—This is an appeal on the question what was the domicile of the testator at the time of his death and at the time of making his will. Those are two distinct periods, and must be dealt with separately.

The facts are not brought before us very satisfactorily, for we have only affidavit evidence, and very little of the correspondence which must have passed between this gentleman and his friends and members of his family is before us, but we must decide, as best we can, upon the evidence as it stands.

It is an admitted fact that the testator's domicile of origin was Anglo-Indian. The question is whether he had, before either of those two periods, acquired a domicile of choice, and whether he retained the domicile of choice at either of those two periods.

The law, as I understand it, is this, that the domicile of origin clings to a man unless he has acquired a domicile of choice by residence in another place with an intention of making it his permanent place of residence

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*Matthews v. Ovey, 13 Q. B. D. 403, 32 W. R. Dig. 57, is the case referred to; it was decided in 1884, and subsequently by R. S. C., December, 1885, ord. 59, rr. 9—17, new rules were made dealing with the mode of procedure on appeals from county courts; see also *Hughes* v. *Finney*, 35 W. R. 807, 19 Q. B. D. 522, which shows that even the rules made in 1885 do not apply to appeals from county courts in cases where the issues have been remitted to the county court for trial, and that on appeals in such cases the old practice of applying for a rule *nisi* still obtains.

(*a.*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

If a man loses his domicile of choice, then without anything more, his domicile of origin revives; but in my opinion, in order to lose the domicile of choice once acquired, it is not only necessary that a man should be dissatisfied with his domicile of choice, and form an intention to leave it, but must have left it with the intention of leaving it permanently. Unless he has done that, unless he has left it both *animo et facto*, the domicile of choice remains. It may be lost *animo et facto*, and if lost, then the domicile of origin, there being no other domicile, revives and attaches again; but the mere fact that a man when he has once acquired a domicile of choice begins to doubt whether he has done right or wrong, whether it would not have been better for him not to have taken up his residence in that country, does not destroy the effect of the residence taken up with the intention of permanently residing there. The fluctuations of a man's mind during his residence in a particular place are important in considering whether he ever, during his residence there, had a settled intention to make it his permanent residence; but if we arrive at the conclusion that he had, the subsequent fluctuations do not, in my opinion, if unaccompanied by change of residence, destroy the effect of the residence with intention permanently to reside there.

Lord Westbury, in *Bell* v. *Kennedy*, which is a remarkable case, says this (at p. 321):—"The true inquiry, therefore, is, had he this settled purpose the moment he left Jamaica or in course of the voyage of taking up a fixed and settled abode in Scotland?" To gain a new domicile the testator must have resided in the country with a fixed and settled purpose to make a permanent residence there; but if subsequent fluctuations of intention are to be taken into account, it would be almost impossible ever to determine whether a domicile of choice was acquired. The case of *Bell* v. *Kennedy* was a very curious case, because, although the gentleman went to Scotland, and did, in fact, reside with his mother-in-law, his letters and conduct showed that he had not at all made up his mind whether he should buy an estate to live on in Scotland, or whether he should buy an estate in England for the same purpose. The point in that case was the death of the wife, when there was a dissolution of the community of goods which was effected by the marriage, and up to that time, on the evidence, he had a very doubtful state of mind as to whether he should fix himself in England or Scotland.

Having stated what I understand to be the law applicable to the case, I will proceed to consider the facts. [His lordship then stated the facts and his reasons for coming to the conclusion that the testator had acquired a German domicile, and continued:—] In my opinion the finding that at the time of his will and at the time of his death the testator was domiciled at Darmstadt, in Germany, is correct.

BOWEN, L.J.—On the law, as it has been stated by the Lord Justice, I have little to add.

We are considering a case of change of domicile, and the question we have to determine is whether the domicile of origin can be shown to be abandoned, and a domicile of choice substituted for it. When a man takes up his residence in a new country the problem which has to be solved is whether there has been such a fixed and settled intention permanently to reside in the new country as, concurring with the actual residence there, amounts to an adoption of a domicile of choice instead of the domicile of origin. That being the inquiry, the various fluctuations in the man's intention about a permanent residence which take place after the residence in the new country has been taken up are very material as throwing light on the question whether there has been at any time that fixed and settled intention of residence in the new country which is a necessary element to the idea of domicile. But when you have once arrived at the conclusion that there has been a fixed and settled intention of permanently residing in a new place, coupled with an actual residence in that new place, then the change of domicile is effected, and change of domicile once effected will not be undone by mere subsequent fluctuations of opinion on the part of the settler as to whether his choice of the new residence has been wise, or by expressions which lead one to think that he entertained vague and floating ideas of going to reside elsewhere. [His lordship then referred to the evidence, and expressed his concurrence with the conclusion arrived at by the Lord Justice.]

FRY, L.J.—I am of the same opinion, and I shall endeavour to be short in stating the conclusions I have arrived at. [His lordship then dealt with the evidence, and stated his conclusion that the testator intended to make Germany his permanent home.]

Appeal dismissed.

Solicitor for the appellant, *H. W. Chatterton.*

Solicitor for the respondent, *F. Romer.*

Bankruptcy. Jan. 20, 30.

Ex parte BYRNE.
In re BURDETT. (*a.*)

Bill of sale—Avoidance in part—Assignment of chattels other than personal chattels—Severance of covenants—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 6, 9—*Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *ss.* 4, 5.

A bill of sale not made in accordance with the statutory form purported to assign, along with personal chattels, certain machinery, being property other than personal chattels.

Held, that, as the legal part of the security could be severed from the illegal, the security was good as to the machinery.

Davies v. Rees, 34 *W. R.* 573, 17 *Q. B. D.* 408, *distinguished.*

Appeal from the decision of the Divisional Court (Cave and A. L. Smith, JJ., reported *ante*, p. 128) affirming the decision of the county court judge declaring a bill of sale void.

The relevant facts of this case were as follows:—On June 25, 1886, Burdett executed to Byrne & Furze a deed of security. By this deed, in consideration of goods of the value of £50 to be immediately delivered to Burdett by Byrne & Furze, and of £150 due from Burdett to them for money lent, Burdett assigned to Byrne & Furze certain chattels described in the schedule as security for £200 and interest, and by the deed the borrower declared that he would pay the £200 and interest by certain instalments. It was admitted on the one hand that the bill of sale did not comply with the terms of the Bills of Sale Act, 1882, and, on the other, that amongst the property described in the schedule there was trade machinery within the exception in the 5th section of the Act of 1882, and therefore, not personal chattels for the purposes of that Act.

Robson, for the bill of sale holder.—The bill of sale may be void as far as the personal chattels are concerned, but the machinery which is here separately assigned is not to be considered personal chattels by section 4 of the Bills of Sale Act, 1878: *Roberts* v. *Roberts*, 32 W. R. 605, 13 Q. B. D. 794. The bill of sale is good as mort-

(*a.*) Reported by A. H. TODD, Esq., Barrister-at-Law.

gage of the machinery: *In re O'Dwyer*, L. R. 1 Ir. 19. The case of *Davies* v. *Rees*, 34 W. R. 573, 17 Q. B. D. 408, is distinguishable. So a bill of sale for transferring the property in a ship by way of mortgage was held void for want of reciting the certificate of registry, yet the mortgagor was liable to be sued upon his personal covenant in the same to repay the money lent: *Kerrison* v. *Cole*, 8 East 231; *Davenport* v. *Whitmore*, 2 Myl. & Cr. 177.

R. T. Reid, Q.C., and *Herbert Reed*, for the trustee.—This bill of sale is void under the case of *Davies* v. *Rees*, there is one assignment of the personal chattels and machinery which are comprised in one schedule; the covenants are not separable, and the avoidance, being by statute, destroys the validity of the whole security: *Payne* v. *Mayor of Brecon*, 6 W. R. 801, 3 H. & N. 572; *Pickering* v. *Ilfracombe Railway*, 16 W. R. 458, L. R. 3 C. P. 235, 250.

Robson replied.

Jan. 30.—FRY, L.J., read the judgment of the COURT (Lord EHER, M.R., and FRY and LOPES, L.JJ.). After stating the facts as above, and saying that the bill of sale was plainly void under section 9 of the Bills of Sale Act, 1882, so far as regarded the personal chattels, his lordship proceeded:—We will first consider the question as to whether the bill of sale is equally void as regards the properties which are not personal chattels upon principle. In our judgment, clauses in statutes avoiding transactions or instruments are to be interpreted with reference to the purpose for which they are inserted, and when open to question are to receive a wide or limited construction, according as the one or the other will best effectuate the purpose of the statute (per Turner, L.J., in *Jortin* v. *South-Eastern Railway Co.*, 3 W. R. 190, 6 De G. M. & G. 275). Furthermore, we adopt the language of Willes, J., in *Pickering* v. *Ilfracombe Railway Co.*, 16 W. R. 458, L. R. 3 C. P. 235, 250, where he said that "the general rule is that when you cannot sever the illegal from the legal part of a covenant the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good."

What, then, was the object and purpose of the Legislature in enacting, by section 9 of the statute of 1882, that all bills of sale not in accordance with the scheduled form should be void? It was to impose certain conditions and terms on instruments by which securities were created on personal property without the transfer of the property. The Legislature were not concerned, and the statute is not concerned, with the borrowing on real estate or on chattels real, or on chattels excepted from its operation by section 5, or with the forms of the instruments by which such borrowing may be effected. We ought, therefore, in our opinion, if the language of the statute be open to that construction, to lean towards construing the statute as affecting securities on personal chattels only, and not securities on other kinds of property. Now, in our opinion, not only do the words of the statute make this construction possible, but they lean towards it, for what is avoided is the bill of sale, and not any instrument, however complicated or comprehensive its nature, of which a bill of sale is part. But then arises the question, Can the illegal part of the security be severed from the legal? In our opinion the nature of the instrument in question permits such a severance to be made, because a security given on properties A, B, and C is a security for the whole amount on each of the three properties, and on every part of each of them. The excision of one property, in law, by a statute, or, in fact, by an earthquake, effects a separation between the properties and withdraws one of them from the operation of the instrument, but leaves the instrument intact and still operative as regards the rest. In our opinion, therefore, the elimination of the personal chattels from the security leaves it good as to the machinery, which is not a chattel for the purposes of the Bills of Sale Act.

On principle, therefore, we think the decision of the court below is not correct. But that decision proceeds, not upon principle, but on the authority of the case of *Davies* v. *Rees*, which was binding on the Divisional Court and is binding on this court. In that case the court decided that, where a bill of sale contained a covenant to pay, and an assignment of chattels personal and of no other property, and was bad under the statute as an assignment, the covenant to pay was also avoided by the 9th section of the statute. The court decided that the whole of the instrument then in question was void, not that the whole of every instrument in which a void bill of sale may be embodied is also necessarily void. The principle of that decision we take to be this: that the 9th section made the whole of a bill of sale, as those words were used in the section, and not merely the assignment contained in it, void, as was shown by a comparison of the language of the 8th and 9th sections; that the same 9th section showed, by its reference to the schedule, what it meant by a bill of sale; and that on reference it appeared that a covenant to pay was an integral part of the form, and, therefore, of a bill of sale within that section. There were three possible areas over which the avoidance might operate—viz. (1) the assignment of chattels only, or (2) everything which appeared as part of a bill of sale in the scheduled form, or (3) every part of every instrument in which a bill of sale might be contained. The court rejected the first as too narrow, but did not accept the third, which, we think, would have been too wide.

For these reasons we are of opinion that the deed in this case was not avoided by the statute as regards the chattels excepted from its operation by the 5th section of the Act, and that the appeal should be allowed.

Solicitor for the bill of sale holder, *Burney*.

Solicitors for the trustee, *Thomson & Ward*.

Bankruptcy. Jan 20.

In re LONG.

Ex parte CUDDIFORD. (*a*.)

Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), *s.* 6—*Petitioning creditor's debt—Amount of—Costs of abortive execution.*

The costs of an abortive execution cannot be added to a judgment debt so as to make up the amount necessary to enable a creditor to petition under section 6 *of the Bankruptcy Act*, 1883.

This was an appeal by the debtor from a receiving order made by Mr. Registrar Haslitt.

The petitioning creditors had obtained a judgment for £49 8s. They issued execution by way of *fi. fa.* which proved abortive, the costs of issuing execution amounted to £1 5s., making the petitioners' debt £50 13s.

Channell, Q.C., and *Yelverton*, for the debtor.—By section 6 of the Bankruptcy Act, 1883, "a creditor shall not be entitled to present a bankruptcy petition against a debtor unless . . . (6) the debt is a liquidated sum payable either immediately or at some future time." The costs of issuing an execution are not "a liquidated sum payable" by the debtor. Such costs

(*a*). Reported by A. H. TODD, Esq., Barrister-at-Law.

are not a debt for which an action can be brought. They are only recoverable out of the proceeds of the execution, and if there is a return of *nulla bona* the costs are not recoverable at all Ord. 42, r. 15, of the Rules of Court is equivalent to section 123 of the Common Law Procedure Act of 1852, which deals with the power of retaining the costs out of the levy. The interpretation put upon that section in *Marquis of Salisbury* v. *Ray*, 8 W. R. 462, 8 C. B. N. S. 193, which decided that the expenses of a previous abortive *fi. fa.* cannot be taken under a ca. sa. is in our favour.

They also cited *Howes* v. *Young*, 24 W. R. 738, 1 Ex. D. 146.

H. Real, for the judgment creditors.—There is no distinct authority on the point, but *Bayley* v. *Potts*, 8 Ad. & El. 272, seems to show that the debtor is under a liability to pay these costs. The statute 43 Geo. 3, c. 46, gave the plaintiff power to recover them, and though that statute has been repealed, ord. 42, r. 15, seems to cover the case. In *Ex parte Liverpool Loan Co., In re Bullen*, 20 W. R. 1028, L. R. 7 Ch. App. 732, where the sheriff levied for a debt, and the sum taken, including the costs of the execution amounted to over £50, though the debt itself was less than that sum. Section 87 of the Bankruptcy Act of 1869 applied, there having been an "execution for a sum exceeding £50 in respect of a judgment."

Lord Esher, M.R.—It seems to me that the case of *Lord Salisbury* v. *Ray*, which has been cited to us, is conclusive to show that the costs of an execution cannot be recovered otherwise than out of the proceeds of the levy. *If that is so*, those expenses cannot be added to the amount mentioned in the statute as necessary to constitute a sufficient petitioning creditor's debt. The appeal must be allowed.

Fry and Lopes, L.JJ., concurred.

Solicitor for the appellant, *R. Davies*.

Solicitors for the respondents, *Gresham & Davies*.

High Court of Justice.

Chan. Div.
Chitty, J. — Jan. 28.

In re Steamship "Titian" Co. (Limited). (*a.*)

Practice—Joint-stock company—Voluntary winding up—Special resolution—Stay of proceedings—Petition by liquidator—Companies Act, 1862 (25 & 26 *Vict.* c. 89), *ss.* 89, 138.

The court has, under sections 89 *and* 138 *of the Companies Act*, 1862, *jurisdiction to stay proceedings in the voluntary winding up of a company.*

The shareholders of the above-named company passed a special resolution for the voluntary winding up of the company, and a liquidator was duly appointed.

It was afterwards desired to stay proceedings in the voluntary winding up, and this petition was presented for that purpose by the liquidator. The evidence showed that all creditors consented, but no one was served with the petition.

Romer, Q.C., and *F. B. Palmer*, for the petition, referred to the Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 89, 138.

Chitty, J., made the order upon the petition as asked.

Solicitors, *Duncan, Gibson, & Metcalf*.

(*a.*) Reported by A. D. Maclaren, Esq., Barrister-at-Law.

Chan. Div.
Stirling, J. — Dec. 9, 15.

In re Llewellin.
Llewellin *v.* Williams. (*a.*)

Tenant for life—Growing timber—Application of "capital money"—Payment of "costs incidental to the exercise of any power" under the Settled Land Act—Difference between party and party and solicitor and client costs—Settled Land Act, 1882, *s.* 21, *sub-sections* 9, 10.

A tenant for life was authorized by the will to fell timber beginning to decay and sell the same for his own benefit.

Held, upon a sale, under the Settled Land Act, of the land and the timber, some of which was decaying, but had never been severed, that the tenant for life had never become absolutely entitled to any of the timber, and was not, therefore, entitled to any part of the purchase-money of the timber, either by virtue of the will or the Settled Land Act.

Costs properly incurred by a tenant for life in defending an action to restrain the exercise of his power of sale are costs incidental to the exercise of his powers, in discharge of which capital money may be applied under section 21, *sub-section* 9, *of the Settled Land Act*, 1882.

An action by remaindermen to restrain trustees and the tenant for life from exercising a power of sale under a will was dismissed, with costs. While the proceedings were pending, the Settled Land Act came into operation, and the property was subsequently sold under the powers of that Act.

Held, that the tenant for life was entitled to have paid to him out of the purchase-money the difference between his party and party and solicitor and client costs of so much of the action as related to the exercise of his powers under the Act.

Certain freehold and copyhold hereditaments were devised by the will of the Rev. Henry Llewellin, who died in 1838, to the use of E. T. Llewellin during his life, with divers remainders over, and the will gave the trustees, at the request of the tenant for life, power to sell the same.

The will also contained a declaration that no tenant for life in possession of the real estate should have power to commit any manner of waste, spoil, or destruction upon the same or any part thereof, except that he or she might fell and cut any timber or other trees which might begin to decay, or which might materially injure the underwood, and might sell and dispose of the same and apply the produce to his or her own use.

In the year 1881 the trustees, at the request of the tenant for life, determined to exercise their power of sale. An action (*Thomas* v. *Williams*, 31 W. R. 943, 24 Ch. D. 558) was thereupon commenced by the remaindermen against the trustees and the tenant for life to restrain them from selling. The action was dismissed with costs on the 21st of March, 1883, and on the 21st of May, 1884, an appeal from that decision was also dismissed. The tenant for life accordingly became entitled to party and party costs of that action.

On the 15th of December, 1885, the Settled Land Act having in the meanwhile come into operation, the property was sold by auction under the combined powers of that Act and of the will, one of the conditions of sale being that the timber was to be purchased at a valuation. The purchase-money of the land was £18,000 and the valuation of the timber amounted to £1,404 12s.

Of this £1,404 12s. the tenant for life claimed £787 18s. 8d., as representing timber which at the time of the sale had begun to decay and was materially

(*a.*) Reported by L. S. Brizrowe, Esq., Barrister-at-Law.

injuring the underwood, and he also claimed to be entitled to a further sum of £154 3s. 4d., being one quarter of the balance of the purchase-money of the timber, under section 35 of the Settled Land Act. The tenant for life further claimed to be paid out of the said purchase-moneys the difference between his party and party and solicitor and client costs of the action of *Thomas* v. *Williams*, and any party and party costs which it might be found impossible to obtain from the plaintiffs in that action.

An originating summons was taken out by the tenant for life to determine these questions and for other purposes. The summons was adjourned into court, and now came on for hearing.

Section 35 of the Settled Land Act is as follows:—"Where a tenant for life is impeachable for waste in respect of timber and there is on the settled land timber ripe and fit for cutting, the tenant for life, on obtaining the consent of the trustees of the settlement or an order of the court, may cut and sell that timber or any part thereof. Three fourth parts of the net proceeds of the sale shall be set aside as and be capital money arising under this Act, and the other fourth part shall go as rents and profits."

Pearson, Q.C., and *Mulligan* (*C. Gurdon* with them), argued, as to the question with regard to the costs, that section 53 of the Settled Land Act constituted the tenant for life a trustee, and that, consequently, he had the same rights as a trustee would have to be indemnified out of the trust estate for every liability as to costs.

They cited *Sebright* v. *Thornton*, W. N., 1885, p. 176.

B. B. Rogers, for the trustees.

Hastings, Q.C., and *C. James*, for remaindermen, cited, with regard to the question as to the timber, *Cockerell* v. *Cholmelley*, 10 B. & C. 564, 1 R. & M. 418, 1 Cl. & F. 60; *Cholmelley* v. *Paxton*, 3 Bing. 207; *Wolf* v. *Hill*, 2 Sw. 149n.; *Doran* v. *Wiltshire*, 3 Ib. 699.

Pearson, Q.C., replied.

[Stirling, J., in the course of the argument, referred to *Walters* v. *Woodbridge*, 26 W. R. 469, 7 Ch. D. 504.]

Stirling, J. (after stating the facts, proceeded)—There were not in this case separate sales of the land and of the timber. The conditions of sale provided that the highest bidder should take the land, and pay for the timber at a valuation. The amount of the valuation was really an addition to the price, and must, I think, be treated as capital money under section 21 of the Settled Land Act. The tenant for life can, therefore, only claim it if he can make out that he is entitled under sub-section 9 of that section, which provides that capital money arising under the Act may be applied "in payment to any person becoming absolutely entitled." Was, then, the tenant for life, when he sold, absolutely entitled to the timber? I think he was not. Many cases have been cited to show that growing timber is part of the inheritance, and I need only refer in addition to *Swinburn* v. *Ainslie*, 33 W. R. 910, 30 Ch. D. 485. In that case Cotton, L.J., said:—"Trees which are severed from the soil are personal estate, and trees which are not severed belong to the inheritance. The life and growth certainly afford no test as to whether a tree is or is not affixed to the soil." Even trees which are dead, so long as they remain affixed to the soil, form part of the inheritance. So long, therefore, as timber remains unsevered, the tenant for life is not absolutely entitled to it. In the present case the timber had not been severed at the date of the sale, nor, as regards the Settled Land Act, had the tenant for life obtained the consent of the trustees to the severance. All he had obtained was their consent to the sale. He is, therefore, in the position which a tenant for life, impeachable for waste, selling under a power, occupied under the old law, a position which is exemplified by *Doran* v. *Wiltshire*. He never became absolutely entitled to any part of the timber, and the first claim, therefore, fails.

The question whether the tenant for life is entitled to the difference between his party and party and solicitor and client costs of the action of *Thomas* v. *Williams* depends upon the Settled Land Act. It was contended that, by virtue of section 53, the tenant for life is a trustee, and as such entitled to his costs. It is not necessary to decide this point, but my view is rather against it, for I regard section 53 as casting upon a tenant for life the responsibilities of a trustee rather than as conferring any rights upon him. The question in this case seems really to depend upon section 21, sub-section 10, of the Act, which allows capital money to be applied in payment of costs, charges, and expenses of or incidental to the exercise of any of the powers or the execution of any of the provisions of the Act. I have to consider what force is to be given to the word "incidental." It seems to me that the meaning is that the tenant for life is to have, not merely costs, charges, and expenses which directly and necessarily arise out of the exercise of the powers or provisions of the Act, but also those which are incurred casually and incidentally in the course of that exercise. The costs now in question may be described as incidental to the exercise of the power of sale. They were incurred in removing an obstacle improperly placed in the way of the exercise of the power of sale by the remaindermen. A trustee is entitled in an ordinary case to recover the costs of an action properly defended by him. That is illustrated by *Walters* v. *Woodbridge*. That is not entirely this case, because here the action was brought against both the tenant for life and the trustees, and was before the Settled Land Act came into operation. The tenant for life is not, I think, entitled to all the costs, for that would be contrary to section 55, sub-section 3. The taxing master must tax the costs of so much of the action as related to the exercise of the power under the Act, and then ascertain what are the party and party costs which have been paid to the tenant for life and are attributable to the same subject-matter, and the difference will be paid to the tenant for life as incidental to the exercise of his power of sale under the Act.

Solicitors, *James Neal*; *Ridsdale & Son*, for *Grover & Grover*, Cardiff; *H. A. Stephens*, for *Francis James*, Swansea.

Chan. Div. Stirling, J. — Nov. 26.

In re Horner.

Eagleton *v.* Horner. (*a.*)

Will—Construction—"Children"—Illegitimate children—"Representatives."

A testator, by his will, dated in 1868, after giving his residuary real and personal estate to trustees on trust for sale, conversion, and investment, directed his trustees to stand possessed of a certain share in the trust fund upon trust to pay the income thereof "to my sister C., the wife of T. H.," during her life, and, after her death, to pay and divide the share unto and between all "her children who should be living at her decease, and the "representatives" of such of them as should have died in her lifetime leaving issue living at her decease, who should have attained the age of twenty-one years, "equally

(*a.*) Reported by C. Herbert Brown, Esq., Barrister-at-Law.

share and share alike, but so, nevertheless, that the representative or representatives of such of them so dying shall take only the share to which the deceased child would have been entitled had he or she survived" C.

C. was not the wife of T. H. at the date of the will or at any other time. T. H. was, previously to 1845, married to another woman, who was, at the date of the will, living and his lawful wife. In 1845 C. went to live with T. H., with whom she cohabited from that time down to her death in 1886. Of this union several children were born. The testator knew all the circumstances of the case, visited his sister, was on intimate terms with T. H., and recognized the children as his nephews and nieces.

Held, that the illegitimate children of C. and T. H. were intended and were entitled to take under the will.

Hill v. Crook, 22 *W. R.* 137, 6 *E. & I. App.* 265, *discussed and followed.*

Held, also, that the word "representatives" must be construed as next of kin or as descendants (which of the two was not, in this case, material), and not as "executors or administrators."

Adjourned summons.

Charles Palmer Horner, by his will dated the 21st of January, 1868, devised and bequeathed his residuary real and personal estate to trustees upon trust to sell and convert the same into money, and to invest the proceeds thereof as therein mentioned, and he directed his said trustees to stand possessed of the said moneys and investments as to one-third part thereof to pay the income to his brother, William Horner, for life, and after his decease "to pay and divide the said third part unto, between, and amongst all his children who shall be living at the time of his decease, and the representatives of such of them as may have died in his lifetime, who shall have attained the age of twenty-one years, equally, share and share alike, but so, nevertheless, that the representative or representatives of such of them so dying shall take only the share to which the deceased child would have been entitled had he or she survived the said William Horner, and, if there shall be but one such child, then I give and bequeath the whole of such third part to such only child. And I direct my said trustees to stand possessed of one other third part of my said residuary estate upon the like trusts for the benefit of my sister Charlotte, the wife of Thomas Horner, and her child or children, as are hereinbefore expressed concerning my said brother, William Horner, and his child or children, and to stand possessed of one other third part of my said residuary estate upon the like trusts for my sister, Sarah Carpenter, widow, and her child or children. And I direct that the interests of each of my said sisters under this my will shall be paid to, and taken by, her for her sole and separate use, free from marital control and without power of anticipation, and that her sole receipt shall be a sufficient discharge for the same."

The testator died on the 22nd of February, 1870. His will was proved shortly afterwards. Charlotte Horner was not the wife of Thomas Horner at the date of the will or at any other time. Thomas Horner was married before the year 1845 to another woman, who was living and his lawful wife at the date of the will. In the year 1845 Charlotte Horner left her father's house, and from that time to her death, which happened on the 20th of November, 1886, she cohabited with Thomas Horner. Of this connection there were four children, two of whom were alive at the date of the will, and survived the testator, and the youngest of them was born in the year 1850. The testator knew all the circumstances of the case, was in the habit of visiting his sister, was on intimate terms with Thomas Horner, and recognized their children, though illegitimate, as his nephews and nieces.

Two questions arose for decision—namely (1) whether the children of Thomas and Charlotte Horner were entitled under the will, notwithstanding that they were illegitimate; and (2) what was the meaning of the word "representatives" in the gift.

A. Whitaker, for the executors and trustees of the will.

Pearson, Q.C., and *Humber*, for the children of Charlotte and Thomas.—On the first question, the word "children" may denote a class including illegitimate children when that is the plain and clear intention of the testator: *Hill* v. *Crook*, 22 W. R. 137, 6 E. & I. App. 265. There are two classes of cases where the *primâ facie* meaning of legitimate children is departed from—(1) where it is impossible from the circumstances that any legitimate children could take under the bequest, as in the case of a bequest to the children of a deceased person who had no legitimate children; (2) where there is on the face of the will a clear intention to include illegitimate children; and in order to interpret the words of the will it is the duty of the court to have regard to the knowledge of the testator as to the state of the family (*per* Lord Cairns in *Hill* v. *Crook*). In *Hill* v. *Crook* as in this case, the testator, having full knowledge of the facts, described the mother of the illegitimate children as the wife of the reputed father. These children take under the will as *personæ designatæ*.

They cited also *Dorin* v. *Dorin*, 23 W. R. 570, L. R. 7 E. & I. App. 568, 573; *In re Brown's Trust*, 21 W. R. 721, L. R. 16 Eq. 239; *In re Humphries, Smith* v. *Millidge*, 24 Ch. D. 691; *In re Bryon, Drummond* v. *Leigh*, 30 Ch. D. 110, 34 W. R. Dig. 218; *In re Haseldine, Grange* v. *Sturdy*, 34 W. R. 327, 31 Ch. D. 511.

Ingle Joyce, for the Attorney-General, adopted this argument, and cited *Perkins* v. *Goodwin*, W. N., 1877 p. 111.

Graham Hastings, Q.C., and *T. Dale Hart, contrà.*—The word "children" means legitimate children, unless some repugnancy or inconsistency would result from that interpretation—*per* Lord Selborne in *Dorin* v. *Dorin*. The mere fact that the testator has described his sister as the wife of Thomas Horner is not sufficient to deprive the word "children" of its ordinary legal meaning: *In re Ayles' Trusts*, 24 W. R. 202, 1 Ch. D. 282. [*Pearson, Q.C.—Hill* v. *Crook* was not cited in that case.] *Hill* v. *Crook* went upon the ground that a form of marriage had been gone through which the testator recognized as constituting a valid marriage; and it is so explained in *Megson* v. *Hindle*, 28 W. R. 866, 15 Ch. D. 198, and *In re Haseldine, Grange* v. *Sturdy*. *Perkins* v. *Goodwin* is distinguishable on the same ground. The result of the cases is that very strong circumstances are required to displace the rule in favour of legitimate children. And the mere improbability of the existence of future children does not entitle illegitimate children to take: *In re Overhill's Trust*, 1 W. R. 208, 1 Sm. & G. 362; *Paul* v. *Children*, 19 W. R. 941, L. R. 12 Eq. 16. [Stirling, J., referred to Theobald on Wills, 3rd ed., p. 219, and *Ellis* v. *Houston*, 27 W. R. 501, 10 Ch. D. 236.]

Pearson, Q.C., replied.

Stirling, J.—The first question which I have to decide in the present case is, Who are the persons to take under a gift in the testator's will to the children of his sister Charlotte, described as the wife of Thomas Horner, she not having been the wife of Thomas Horner at the date of the will or at any other time. [After reading the clauses in the will as above stated, his lordship proceeded as follows:—] The facts are shortly these: The testator was born in 1807 and his sister Charlotte in 1812. The testator made his will in 1868.

Thomas Horner was married previously to the year 1845, and at the date of the will his wife was still living. In 1845 Charlotte went to live with Thomas Horner, and from that time until her death cohabited with him. There was not any marriage or ceremony of marriage between them. A ceremony of marriage would have rendered Thomas Horner liable to criminal proceedings for bigamy. Of this connection four children were born, two of whom died in the testator's lifetime, and two survived him. In 1868 the youngest of them was nineteen years of age. All these facts were known to the testator, who frequently visited his sister and was on intimate terms with Thomas Horner. It is clear, from the evidence, that he recognized the children as his nephews and nieces, and that they had acquired the reputation of being Charlotte's children.

The leading case on this subject is *Hill* v. *Crook*. In that case the testator spoke in his will of John Crook as his "son-in-law," and gave certain property to trustees for the use of his "daughter Mary, the wife of John Crook," for her life, for her separate use, independently of the debts or control of "her present or any after-taken husband," and, after her death, in trust for "the child, if only one, or all the children, if more than one, of my said daughter, Mary Crook." The testator died, leaving John and Mary Crook him surviving. John had gone through the ceremony of marriage with Mary Crook; but, as he had formerly been married to her sister, the union was not a lawful marriage. Two children were born of that union before the date of the will, and were recognized by the testator as his grandchildren. Other children were afterwards born, but Mary Crook never had any legitimate children. The House of Lords held that there was a sufficient designation of the children of Mary born before the will as the intended objects of the testator's bounty, and that they took under the gift in the will. [The learned judge then read passages from the judgments of Lords Chelmsford and Colonsay in that case, and continued:—]

And Lord Cairns in that case thus states the law: "I have referred to a long line of cases, not with the view of finding a will exactly parallel with the present, for that indeed would be a hopeless task, but for the purpose of extracting any principle which appeared to be the *ratio decidendi* of those various cases. And what appears to me to be the principle which may fairly be extracted from the cases on the subject is this—the term 'children' in a will *primâ facie* means legitimate children, and if there is nothing more in the will the circumstance that the person whose children are referred to has illegitimate children will not entitle those illegitimate children to take. But . . . that *primâ facie* interpretation is departed from where there is upon the face of the will itself, and upon a just and proper construction and interpretation of the words used in it, an expression of the intention of the testator to use the term 'children' not merely according to its *primâ facie* meaning of legitimate children, but according to a meaning which will apply to, and which will include, illegitimate children." And, after speaking of the knowledge possessed by the testator in that case as to the state of his family, Lord Cairns proceeds as follows:—"It appears to me that the terms 'husband' and 'wife,' 'father' and 'mother,' and 'children' are all correlative terms. If a father knows that his daughter has children by a connection which he calls a 'marriage' with a man whom he calls her 'husband,' terming the daughter the 'wife' of that husband, I am at a loss to understand the meaning of language if you are not to impute to that same person when he speaks of the 'children' of his daughter this meaning, that as he has termed his daughter and the man with whom she was living 'wife' and 'husband,' so also he means to term the offspring born of that so-called 'marriage' the children according to that nomenclature. That is all that your lordships have to find. If you find that that is the nomenclature used by the testator, taking his will as the dictionary from which you are to find the meaning of the terms he has used, that is all which the law, as I understand the cases, requires. Treating the cases as establishing the proposition to which I have referred, I am of opinion that there is clearly upon the face of this will, reading it simply with the knowledge which we are told to impute to the testator, a statement by him in his own words that he meant to make a provision for the family already born of that union which he styles a 'marriage.'"

Now, applying these statements of the law to the present case, we find the testator describing Charlotte as the "wife," although he knew that she was not and could not be the wife, of Thomas Horner. He uses the word "wife" therefore, not in its strict legal meaning, but as describing a person who passed as the wife, and in the same way he speaks of the connection between her and Thomas Horner as though it were a marriage. And, adopting the mode of interpretation laid down by Lord Cairns, I hold that "wife" and "children" being correlative terms, and "wife" being used to describe a person who passed as wife, "child" or "children" must be intended in this will to describe those who passed as such or were reputed as such.

It has been said that in this case there was no form of marriage between Charlotte and Thomas Horner. That is so. But I should be narrowing the principle of interpretation laid down in *Hill* v. *Crook* if I were to hold that principle to apply only to a case agreeing in all particulars with that case. [His lordship then referred to *Dorin* v. *Dorin*, pointing out that in that case no disapprobation was expressed of anything laid down in *Hill* v. *Crook*, and, after discussing the cases cited in the course of the argument, proceeded as follows:—] There is, therefore, no authority in my way in applying to this case the principles laid down in *Hill* v. *Crook*. There are here sufficient circumstances to show that the illegitimate children of Charlotte were the persons described in the will, and they are entitled to take accordingly.

Pearson, Q.C., and *Humber*, on the second question—viz., as to the meaning of the word "representatives" in the gift.—The word "representatives" read with the context does not mean executors and administrators, for the testator uses the latter words in their proper sense in another part of the will, when wishing to describe legal personal representatives. "Representatives," therefore, means descendants.

They cited *Walker* v. *Marquis of Camden*, 16 Sim. 329; *Lyon* v. *Coward*, 15 Sim. 287; *Hempel* v. *Watson*, 3 Ves. 383; *Styth* v. *Monro*, 6 Sim. 49; *Atherton* v. *Crowther*, 19 Beav. 448.

Ingle Joyce, for the Attorney-General.—The word "representatives" must be read in their proper legal signification of legal personal representatives; the words "equally share and share alike" being applicable to "children," not to "representatives."

The cases of *Attorney-General* v. *Fletcher*, L. R. 13 Eq. 128, 20 W. R. Ch. Dig. 138; *Hodges* v. *Grant*, 15 W. R. 607, L. R. 4 Eq. 140; and *King* v. *Cleaveland* 7 W. R. 602, 4 De G. & J. 477, were also referred to.

STIRLING, J., after reading the gift in the will, said:—*Primâ facie* the word "representatives" means executors and administrators—*i.e.*, legal personal representatives. But it is a flexible term, and its *primâ facie* meaning will give way to what appears from the will to be the meaning assigned to it by the testator. In this gift the clause "but so, nevertheless, that the representative or representatives of such of them so dying shall take only the share to which the deceased child would have been entitled had he or she survived the said William Horner" would be surplusage if the word

"representatives" in the former part of the gift meant executors and administrators.

Now, as effect ought to be given, so far as possible, to all the words of the will, and as nothing appears elsewhere in the will to show such a construction to be open to objection, I hold "representatives," not to mean executors and administrators, but either "next of kin" or "descendants"; which, it is not in this case necessary for me to decide.

Solicitors, *Eagleton & Son; Sewell & Edwards; The Solicitor to the Treasury.*

Q. B. Div. (Huddleston, B., and Manisty, J.) Feb. 8, 9.

Lemon v. Simmons. (a.)

Slander—Imputation of indictable offence—Larceny by husband of wife's property—Married Women's Property Act, 1882 (45 & 46 *Vict.* c. 75), s. 12.

In an action for slander the words complained of were to the effect that the plaintiff robbed his wife of £75 before her removal to a lunatic asylum, and was anxious to get rid of her in order that he might take the remainder of her money.

Held, that as such words did not impute to the plaintiff that he stole his wife's money while they were living apart, or when he was about to leave or desert her, they were not actionable, inasmuch as they did not, even under the Married Women's Property Act, 1882, *impute an indictable offence.*

Motion by the defendant for a new trial or for judgment.

The action was for slander, and the trial took place before Day, J., and a common jury. The words complained of were spoken under the following circumstances. The plaintiff's wife, who was possessed of £150 of her own money, became lunatic, and was removed from the plaintiff's house to the workhouse of Stepney Union. At a subsequent meeting of the board of guardians the defendant, who was a relative of the plaintiff's wife, but was not a guardian or even a ratepayer, said "Mrs. Lemon's insanity has been brought about by her husband's violence. Mr. Lemon, previous to his wife's removal, in conjunction with his sister, broke open a box belonging to his wife in her room, and robbed her of a sum of about £75. He was most anxious to get rid of her in order that he might take the remainder of her money." The defendant pleaded that the occasion on which the words were spoken was privileged, and that the words did not impute an indictable offence. Day, J., held that the occasion was not privileged, and he left it to the jury to say whether the words imputed a criminal offence. The jury found a verdict for the plaintiff for £25.

The terms of the notice of motion asked for judgment for the defendant on the ground (*inter alia*) that the words were not capable of meaning that the plaintiff had feloniously stolen money from his wife or had committed any other indictable offence, or for a new trial on the ground of misdirection on the part of a learned judge in omitting to direct the jury as to what would amount to a felonious stealing by a husband from his wife.

Bonanquet, Q. C. (*Stephens* with him), for the defendant.—At common law it was not possible under any circumstances for a husband to be indicted for taking his wife's property; and now it is only possible under the circumstances mentioned in section 12 of the Married Women's Property Act, 1882—*i.e.*, it is necessary that the husband and wife should be living apart, and that the property should have been taken by the husband while they were living apart, or at a time when the husband was deserting, or about to desert, his wife. In the present case the husband and wife were at the time living together, and there is no evidence that he was about to desert her. Neither do the words suggest that such was the case. The statement that he was anxious to get rid of his wife is a very different thing from saying that he was intending to desert her. Therefore, the words, not imputing an indictable offence, are not actionable: *Jackson* v. *Adams*, 2 Bing. N. C. 402; *Williams* v. *Stott*, 1 C. & M. 675. The learned judge ought to have entered judgment for the defendant; or, at least, he ought to have explained to the jury under what circumstances taking a wife's money would amount to an indictable offence.

F. J. Lowe, for the plaintiff.—The defendant must be taken to have meant that the plaintiff had done that which, according to the Married Women's Property Act, amounts to a larceny. In each of the cases cited the plaintiff could not, being what he was, have committed the offence imputed to him. The churchwarden could not steal the bell ropes of his own church; neither could a man, who was neither a clerk nor a servant, have committed embezzlement. Here the plaintiff might possibly have committed a larceny of his wife's money. And the defendant having said he did, his words are actionable.

Huddleston, B.—It was contended at the trial that the occasion on which the words were spoken was privileged; but the judge held it was not. It does not sufficiently appear on the notes what were the circumstances under which the statement was made, nor what was the nature of the inquiry before the guardians, to enable us to say whether the learned judge was right on that point, though for my own part I have some doubt whether this was not a privileged communication. However, leaving out the parts of the claim which were not urged at the trial, the real question is whether the words which accuse the plaintiff of robbing his wife impute an indictable offence.

The substance of the statement seems to be this, that the plaintiff had married a woman with £150, that he had robbed her of £75 while living with her, and being anxious to have the other £75 had had her removed to a lunatic asylum. Do these words impute an indictable offence? At common law a husband could not be guilty of an indictable offence towards his wife in respect of her property. But under the Married Women's Property Act, 1882, he can be, in certain circumstances. What those circumstances are is to be seen from the proviso to section 12, "Provided always that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together as to or concerning any property claimed by her, nor while they are living apart as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife." Now do the words complained of impute to the plaintiff that he stole his wife's money while they were living apart or when he was about to leave or desert her? On the contrary, they impute that he stole the first sum of money while they were living together; and they do not suggest any intention on the part of the husband to desert his wife, but merely impute some artifice in having his wife removed in order that he might get the rest of her money. If the words had been merely that the plaintiff robbed his wife, then the

(a) Reported by F. G. Rucker, Esq., Barrister-at-Law.

jury possibly might have thought that that meant when they were living apart, or when he was about to desert her.

But we must take the whole of the words together, and, thus taken, they do not amount to an imputation of an indictable offence.

The two cases which have been cited bear out this view. It is clear that the action cannot be sustained; and therefore there must be judgment for the defendant.

Manisty, J.—I concur. There is no innuendo in the statement of claim to the words alleging that the plaintiff robbed his wife of £75 previous to her removal. If there had been, it must have been this—meaning that he took the money when leaving or deserting, or about to leave or desert, his wife. And the plaintiff would have had to show that that was the meaning of the words. Really the words come to this, "You took your wife's money." But that is not imputing an indictable offence; and therefore the words are not actionable.

Judgment for the defendant.

Solicitor for the plaintiff, *D. A. Romain.*

Solicitor for the defendant, *Nordon.*

Q. B. Div. (Mathew and A. L. Smith, JJ.) Jan. 27.

Topley *v.* Crosbie. (*a.*)

Bill of sale—Covenant necessary for maintenance of security—Absence of power to seize in default—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 7.

A bill of sale contained a covenant that the grantor would keep insured and in repair the chattels assigned, provided that, if default were made by the grantor, the grantee might insure and repair and enter for that purpose on the premises where the chattels were stored, the expenses so incurred, with interest at five per cent., to be a charge on the chattels; and it was further agreed that it should be lawful for the grantee to seize upon the happening of any of the events mentioned in the Bills of Sale Act, 1882, *s.* 7.

Held, that the bill of sale was good.

This was an appeal from the county court of Norwich.

The respondent claimed to be entitled under a bill of sale to certain goods taken in execution for a judgment debt.

The bill of sale in question contained a covenant to the following effect—viz., that the grantor would, "during the continuance of the security, keep the chattels specifically described in the schedule in good and substantial repair, and in perfect working order, and insured against loss or damage by fire in the sum of £58 6s. 8d. at the least, and would duly and punctually pay all premiums and moneys necessary for effecting and keeping up the insurance on the first day on which the same ought to be paid, and would, on demand, produce to the grantee the policy or policies of insurance and the receipt for every payment; and that, if default should at any time be made by the grantor in effecting or keeping up such insurance, or in keeping the chattels or any part thereof in good and substantial repair and in perfect working order, it should be lawful for the grantee to insure and keep insured the chattels or any part thereof in any sum not exceeding £58 6s. 8d., to repair and keep in repair the same, and to put the same in perfect working order, and to enter upon the premises on which the chattels might be for the time being for that purpose; and that all moneys expended by the grantee for such purpose, together with interest at the rate of £5 per cent. per annum from the time of the same having been expended, should, on demand, be repaid to the grantee by the grantor, and, until such repayment, should be a charge upon the chattels; and it was agreed and declared that, upon the happening of any one or more of the events mentioned in section 7 of the Bills of Sale Act (1878) Amendment Act, 1882, it should be lawful for the grantee at any time thereafter to enter and seize the chattels, and, after the expiration of five clear days from the days on which the chattels should be seized, to sell the same, and, out of the proceeds of such sale, to pay the expenses incurred in such sale and the principal sum of £58 6s. 8d., and interest thereon, then owing to the grantee on the security, and to pay the surplus (if any) to the grantor. Provided that the chattels thereby assured should not be liable to seizure or to be taken possession of by the grantee for any cause other than those specified in section 7 of the Bills of Sale Act, 1882."

The deputy judge held that the bill of sale was valid, and gave judgment for the claimant, the holder of the bill of sale.

The execution creditor appealed.

Beddall, for the appellant.

Gore, for the respondent.

Mathew, J.—This appeal must be dismissed. Either the provision in question is necessary for the maintenance of the security within the meanng of the Act, or it is not. If it is, the bill of sale is in exact conformity with the Act, and does not sin against it in any particular. If it is not, then it is a covenant which the parties have agreed to treat as one for the maintenance of the security, and they have been careful not to insert a right to seize the goods for a breach of it. That being so, upon the authority of the cases of *Bianchi* v. *Offord*, 17 Q. B. D. 484, 35 W. R. Dig. 27, and *Real and Personal Advance Co.* v. *Clears*, *ante*, p. 256, the insertion of that proviso does not invalidate the bill of sale, the power to seize being limited to cases permitted by section 7 of the Act. In each of the cases referred to the court dwelt on the necessity of so limiting the power to seize, and decided that, if the provisions for the maintenance of the security only became so by agreement between the parties, the mention of a power to seize upon breach of it avoids the bill of sale, but without that condition that effect does not follow.

A. L. Smith, J.—I think that this bill of sale is good. By the form in the schedule to the Act it is made clear that the parties to the bill of sale may agree upon provisions for the maintenance of the security, and in doing so, if they are following the prescribed form, they are not sinning against the Act. For example, suppose that there is a proviso that the grantor should not remove the goods from the premises, it cannot be doubted that this is a provision for the maintenance of the security. Again, suppose there is a stipulation that the grantor should, upon demand made by the grantee, produce a receipt for the last quarter's rent of the premises upon which the goods are. That is also a stipulation for the maintenance of the security. Now both these provisions are excluded from the terms of section 7, for there can be no right to seize in the one case unless the removal is fraudulent and in the other unless the receipt for rent is kept back without sufficient reason. Yet both these provisions, as I have stated them, are for the maintenance of the security. The Act provides that such conditions may be inserted if the parties agree upon them. Then why, although they do not come within section 7, should they vitiate the bill of sale

(*a.*) Reported by A. H. Todd, Esq., Barrister-at-Law.

when the Act expressly provides for their insertion? It seems to me to be settled by the cases that if the parties agree that there should be a power of execution on breach of such a provision, notwithstanding the terms of section 7, that will vitiate the bill of sale. It may be that, as has been suggested, the right canon of construction is that when a power to seize in default is attached to a covenant not necessary for the maintenance of the security it offends against section 9, because it gives a power to seize for causes other than those mentioned in section 7. But whether that be so or not the matter is now settled by authority. It is equally settled by authority that when a proviso for the maintenance of the security is agreed upon which is not within the terms of section 7, and no power to seize the goods upon breach of its provisions is attached, it does not vitiate the bill of sale: *Goldstrom* v. *Tallerman*, 35 W. R. 68, 18 Q. B. D. 1; *Furber* v. *Cobb*, 35 W. R. 398, 18 Q. B. D. 494. The cases of *Bianchi* v. *Offord* and *Real and Personal Advance Co.* v. *Clears* make this matter still clearer, for in each of them there was a covenant that the sum expended by the grantee upon repairs, &c., was to be added to the security, and was made recoverable in the same manner as the principal sum secured, and the court held that the bill of sale was bad, as a power was there given for a cause not included in section 7. I think that the power of seizure given in the present case does not extend to matters not included in section 7, and, therefore, does not offend against the Act.

Appeal dismissed.

Solicitor for the appellant, *J. R. Pakeman.*

Solicitor for the respondent, *C. F. Martelli*, for *Turner & Prior*, Norwich.

House of Lords.

From C. A. (England) March 17; July 14, 1887.

Wilson v. Owners of Cargo per "The Xantho." (*a*.)

Shipping—Bill of lading—Perils of the sea—Collision—Negligence.

Loss of cargo caused by collision is within the words "dangers and accidents of the sea" in the excepted perils in a bill of lading, and is an answer to an action brought for non-delivery of the cargo, if the collision occurs without negligence in the carrying ship.

Decision of the Court of Appeal (35 *W. R.* 23, 11 *P. D.* 170) *reversed.*

Woodley v. Michell, 31 *W. R.* 651, 11 *Q. B. D.* 47, *overruled.*

This was an appeal from a decision of the Court of Appeal (Lord Esher, M.R., Bowen and Fry, L.JJ.) affirming a decision of Sir J. Hannen.

The facts are fully stated in the judgment delivered by Lord Herschell.

March 17.—*Sir R. E. Webster, A.G.*, and *Sir W. Phillimore, Q.C.* (*Aspinall* with them), for the appellants.—This is really an appeal from the decision in *Woodley* v. *Michell*, 31 W. R. 651, 11 Q. B. D. 47. As the law now stands, "perils of the seas" covers collision caused by negligence of the non-carrying ship in policies of insurance, but not in bills of lading. Collision is *primâ facie* a peril of the seas; the *onus* is on the owner of the goods to prove negligence of the carrier, which would be an answer to the exception. [They cited *Grill* v. *General Iron Screw Collier Co.*, 14 W. R. 893, L. R. 1 C. P. 600; s. c., on appeal, 16 W. R. 796, L. R. 3 C. P. 476; *Phillips* v. *Clark*, 5 W. R. 582, 2 C. B. N. S. 156; *Lloyd* v. *General Iron Screw Collier Co.*, 12 W. R. 882, 3 H. & C. 284; *Czech* v. *General Steam Navigation Co.*, 16 W. R. 130, L. R. 3 C. P. 14; *Pickering* v. *Barkley*, 2 Roll. Abr. 248; *Smith* v. *Scott*, 4 Taunt. 126; *Owners of The Norway* v. *Ashburner*, 13 W. R. 1085, 3 Moo. P. C. N. S. 245; *The Helene*, 15 W. R. 202, L. R. 1 P. C. 231; *The Haswell*, Br. & Lush. 247; *Hall* v. *Washington Insurance Co.*, 2 Story's Rep. 176.] The *dictum* of Brett, M.R., in *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*, 31 W. R. 445, 10 Q. B. D. 521, is the only authority in the respondents' favour.

Hollams (*Sir C. Russell, Q.C.*, with him), for the respondents.—Collision is not *primâ facie* a peril of the seas; the shipowners, to relieve themselves of liability, must prove that there was no negligence on their part; thus, whether *Woodley* v. *Michell* is right or wrong, the decision in this case should be affirmed.

He referred to *Taylor* v. *Liverpool and Great Western Steam Co.*, 22 W. R. 752, L. R. 9 Q. B. 546; Angell on Carriers, 202; Story on Bailments, 512; *Buller* v. *Fisher*, 3 Esp. 67.

Sir R. E. Webster, A.G., replied.

July 14.—Lord Herschell.—In order to render clear the exact point which has to be determined in this case, it will be necessary to state with some minuteness the pleadings and the course which the case took at the trial.

The owners of cargo by the steamship *Xantho*, who were the plaintiffs in the action, by their statement of claim alleged that they had suffered damage by breach of the contract contained in the bills of lading of goods shipped at Cronstadt on board the defendants' vessel *Xantho* for carriage to Hull, that the bills of lading were indorsed to the plaintiffs, to whom the property in the goods passed by such indorsement, and that the goods were not delivered. The statement further alleged, alternatively, that the plaintiffs had suffered damage from the loss of their goods whilst on board the defendants' vessel by a collision with the steamship *Valuta*, caused by the negligent navigation of the defendants' servants.

The statement of defence denied the contract and the breach, and also that the bills of lading were indorsed to the plaintiffs, and that the property in the goods thereby passed to them. In answer to the alternative claim it is admitted that *The Xantho* came into collision with *The Valuta*, but denied that the collision was caused by the negligent navigation of *The Xantho*, and it is alleged that it was solely caused by the negligent navigation of *The Valuta*. The defence further alleged that the loss was occasioned by perils which were excepted by the bill of lading.

The action came on for trial before the President of the Probate and Admiralty Division. The learned counsel for the plaintiffs put in as his only evidence the bills of lading and admissions that the property in the goods and the right to sue on the bills of lading had passed to the plaintiffs, and that the goods had not been delivered. The bills of lading, which were in the usual form, contained an exception in these terms:—"The act of God, Queen's enemies, fire, machinery, boilers, steam, and all and every other dangers and accidents of the sea, rivers, and steam navigation of whatever nature and kind soever excepted."

In opening his case the plaintiffs' counsel stated that *The Xantho* was lost by reason of a collision which took place between that vessel and *The Valuta* in a fog, and submitted that, whether the collision arose from the

(*a*) Reported by C. G. Napier Trollope, Esq., Barrister-at-Law.

negligence of those navigating *The Xantho* or of those navigating *The Valuta*, or from the negligence of both combined, the loss of the goods did not fall wit hin the exception contained in the bill of lading, and that the plaintiffs were in either case entitled to recover. He relied, in support of this contention, upon the case of *Woodley* v. *Michell*.

The learned counsel for the defendants admitted that, if *Woodley* v. *Michell* were good law, he could not resist this view, that, even if he proved that no negligence was to be imputed to *The Xantho*, and that the disaster was solely due to the negligence of *The Valuta*, as he could not prove that it arose from an inevitable accident, the result must be a decision for the plaintiffs. He considered, therefore, that the only course open to the defendants was to test the law laid down in *Woodley* v. *Michell* by appeal to your lordship's House.

The learned President thereupon gave judgment for the plaintiffs.

I think the defendants' counsel was perfectly correct in the course which he took. If he had proved to demonstration that his vessel was free from blame, and that the other vessel's negligence alone caused the disaster, he would have established no defence so long as *Woodley* v. *Michell* stood. He accordingly wisely abstained from the idle task of attempting to prove facts which the Court of Appeal had held to be wholly immaterial.

It appears to me that the only question which arises for your lordships' determination in this case is whether the decision in *Woodley* v. *Michell* can be sustained. In that case an action was brought on a bill of lading. The goods were lost owing to a collision between the defendants' vessel and another vessel. The jury found that there was no negligence on the part of the master or crew of the carrying vessel. The Court of Appeal held that the defendants were not protected by the exception of "perils of the sea" contained in the bill of lading, and gave judgment for the plaintiffs. The Master of the Rolls said: "What I think it necessary in this case to say (and I repeat it without any doubt) is that although a collision, when brought about without any negligence of either vessel, is or may be a peril of the sea, a collision brought about by the negligence of either of the vessels, so that without that negligence it could not have happened, is not a peril of the sea within the terms of that exception in a bill of lading." And Cotton, L.J., thus expresses himself: "There is no decision that is binding upon us that a collision occasioned by the negligence of one of the ships is a peril of the sea. Looking, then, upon it with reference to decided cases, and according to the ordinary interpretation of words, I cannot see how, if there was no peril from sea or wind, and an accident is caused by the negligent act of one of the two ships which come into collision, that can be said to be a peril of the sea."

The question as to what comes within the term "perils of the sea" (and certainly the words "dangers and accidents of the sea" cannot have a narrower interpretation) has been more frequently the subject of decision in the case of marine policies than of bills of lading. I will first notice the decisions pronounced with regard to the former instrument, and then inquire how far a different interpretation is to be applied in the case of the latter.

I think it clear that the term "perils of the sea" does not cover every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril "of" the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves which results in what may be described as wear and tear. There must be some casualty—something which could not be foreseen—as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which *may* happen, not against events which *must* happen. It was contended that those losses only were losses by perils of the sea which were occasioned by extraordinary violence of the winds or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities or by common understanding. It is beyond question that, if a vessel strikes upon a sunken rock in fair weather and sinks, this is a loss by perils of the sea. And a loss by foundering, owing to a vessel coming into collision with another vessel, even when the collision results from the negligence of that other vessel, falls within the same category. Indeed, I am aware of only one case which throws a doubt upon the proposition that every loss by incursion of the sea, due to a vessel coming accidentally (using that word in its popular sense) into contact with a foreign body, which penetrates it and causes a leak, is a loss by a peril of the sea. I refer to the case of *Cullen* v. *Butler*, where a ship having been sunk by another ship firing upon her in mistake for an enemy, the court inclined to the opinion that this was not a loss by perils of the sea. I think, however, this expression of opinion stands alone, and has not been sanctioned by subsequent cases.

But it is said that the words "perils of the sea" occurring in a bill of lading or other contract of carriage must receive a different interpretation from that which is given to them in a policy of marine insurance; that in the latter case the *causa proxima* alone is regarded; whilst in the former you may go behind the *causa proxima* and look at what was the real or efficient cause. It is on this view that the Court of Appeal acted in *Woodley* v. *Michell*.

Now, I quite agree that in the case of a marine policy the *causa proxima* alone is considered. If that which immediately caused the loss was a peril of the sea, it matters not how it was induced, even if it were by the negligence of those navigating the vessel. It is equally clear that in the case of a bill of lading you may sometimes look behind the immediate cause, and the shipowner is not protected by the exception of perils of the sea in every case in which he would be entitled to recover on his policy, on the ground that there has been a loss by such perils. But I do not think this difference arises from the words "perils of the sea" having a different meaning in the two instruments, but from the context or general scope and purpose of the contract of carriage, excluding in certain cases the operation of the exception. It would, in my opinion, be very objectionable, unless well settled authority compelled it, to give a different meaning to the same words occurring in two maritime instruments. The true view appears to me to be presented by Willes, J., in his judgment in *Grill* v. *General Iron Screw Collier Co.* The question there arose whether, when a vessel was lost by a collision caused by the negligence of those navigating the carrying ship, the case fell within the exception of "perils of the sea." It was held that it did not. Reference having been made to cases on policies of insurance, and the interpretation there put upon these words, Willes, J., said, "I may say that a policy of insurance is an absolute contract to indemnify for loss by perils of the sea and it is only necessary to see whether the loss comes within the terms of the contract and is caused by peril of the sea; the fact that the loss is partly caused by things not distinctly perils of the sea does not prevent its coming within the contract. In the case of a bill of lading it is different, because there the contract is to carry with reasonable care, unless prevented by the excepted perils. If the goods are not carried with reasonable care, and are consequently lost by perils of the sea it becomes necessary to reconcile the two parts of the instrument, and this is done by holding that if the loss through perils of the sea is caused by the previous

default of the shipowner, he is liable for this breach of his covenant."

So far as I am aware, until the case of *Woodley* v. *Michell* was decided, there was no authority for saying that a loss, the proximate cause of which was a peril of the sea, and which did not result from the act or default of the carrier, was not within the exception. In the case of the *Chartered Mercantile Bank of India* v. *The Netherlands India Steam Navigation Co.*, the present Master of the Rolls suggested a view that a loss by a collision due to the negligence not of the carrying, but of the other vessel, was not a loss by perils of the sea. He said: "If the collision is caused without any fault on the part of the carrying ship, but is caused by reason of the negligence of those who are conducting the other ship, it cannot be called an accident of the sea. An accident is that which happens without the fault of anybody, and consequently a collision which is the fault of somebody is not an accident of the sea." This was a *dictum* certainly not necessary for the decision of that case. But in *Woodley* v. *Michell* it was repeated and adopted as the ground of judgment. With the greatest respect for that learned judge, the weight of whose opinion on any question of maritime law I fully recognize, I am unable to perceive why a loss occasioned by an inroad of the sea owing to a casualty over which the shipowner and his servants had no control should not be held to be within the exception. If the distinction pointed out by Willes, J., between the rules governing the construction of policies of marine insurance and bills of lading be the true one, it is certainly not applicable to such a case. I am unable to concur in the view that a disaster which happens from the fault of somebody can never be an accident or peril of the sea; and I think it would give rise to distinctions resting on no sound basis if it were to be held that the exception of perils of the seas in a bill of lading was always excluded when the inroad of the sea which occasioned the loss was induced by some intervention of human agency. Take the case which I put in the course of the argument, of a ship which strikes upon a rock and is lost, because the light which should have warned the mariner against it has become extinguished owing to the negligence of the person in charge. Why should this not be within the exception, whilst a similar loss arising from a vessel coming into contact with a rock not marked upon the chart admittedly would be? And what substantial distinction is there between this latter case and that of a vessel foundering through collision with a ship at anchor left at night without lights? For these reasons I have arrived at the conclusion that the case of *Woodley* v. *Michell* cannot be supported.

It was contended by the learned counsel for the appellants that if your lordships should take this view, the judgment ought to be entered for them. I cannot concur in this. With the authority of *Woodley* v. *Michell* in their favour, when once it was admitted that the accident was not inevitable, it was as fruitless for the respondents to give evidence of the negligence of the appellants as it was for the appellants to seek to cast the blame on the other vessel. Much argument was addressed to your lordships on the question whether, when the plaintiffs had proved that the goods had not been delivered, thus throwing the *onus* on the defendants of excusing their non-delivery, proof by them that the vessel had been sunk in a collision would be sufficient to shift the *onus* and render it incumbent on the plaintiffs to establish that the collision was due to the defendants' negligence, or whether the defendants, to bring themselves within the exception, must show that the loss was not due to a cause induced by their own negligence. I do not think that this point is now before your lordships for decision. Arguments of weight have been adduced in support of either view. I certainly must not be understood as deciding that the mere proof of loss by collision under circumstances as consistent with its resulting from the negligence of the carrying ship as from any other cause would exonerate the defendants.

I move your lordships that the judgment appealed from be reversed, and that there be a new trial of the action.

Lord Bramwell.—My noble and learned friend has been kind enough to read his opinion first in consequence of its containing a fuller statement of the facts than what I am about to read to your lordships.

The plaintiffs' statement of claim is for the non-delivery of goods according to a bill of lading, with an alternative claim for loss of the goods therein mentioned, owing to the negligence of the defendants. It was admitted at the trial by the defendants that the goods had not been delivered according to the bill of lading. It was admitted by the plaintiffs that the vessel sank owing to damage received in a collision. It was admitted by the defendants that that collision was not the result of inevitable accident—*i.e.*, of winds, waves, or other natural causes. The plaintiffs' contended, on the authority of *Woodley* v. *Michell*, that that being so, they were entitled to judgment, whether the collision was attributable to the negligence of the defendants with or without negligence on the other ship, or wholly to the negligence of that other. The President so ruled, considering himself bound by *Woodley* v. *Michell*. That case decided that a damage, including foundering occasioned by collision, was not a loss by perils of the sea within those words of exception in a bill of lading, unless occasioned by action of sea or wind or inevitable accident; and, therefore, that a collision occasioned, whether by the negligence of the one ship or the other or both, was not a loss by such perils. The now defendants appealed, but the ruling was upheld, the court giving reasons for their opinion, and also relying on the case of *Woodley* v. *Michell*. With great respect I cannot agree. I think that case wrongly decided, and differ from the reasons given in support of the judgment in that and in this case. Was it by a peril of the sea that the defendants' ship foundered? The facts are, that the sea water flowed into her through a hole, and flowed in such quantities that she sank. It seems to me that the bare statement shows she went to the bottom through a peril of the sea. If the hole had been small, there being a piece of bad wood, a plank starting, or a similar cause, it would be called a leak, and no one would doubt that she foundered from a peril of the sea. Does it make any difference that the hole was large, and occasioned by collision? I cannot think it does. It is admitted that if the question had arisen on an insurance against loss by perils of the sea this would have been within the policy a loss by perils of the sea. Are the words to have different meanings in the two instruments? Why should they? Different consequences may follow. The insurer may be unable to defend himself, on the ground that the loss was brought about by the negligence of the crew, while the freighter may maintain an action on the ground that it was. But how is the loss a loss by perils of the sea in one case and not in the other? The argument is, that wind and waves did not cause the loss, but negligence in someone. But surely, if that were so, a loss by striking in calm weather on a sunken rock not marked on the chart would not be a loss by perils of the seas within the bill of lading, or striking on a rock from which the light had been removed, or an iceberg, or a vessel without lights. I cannot bring myself to see that such cases are not losses by perils of the sea Is not the chance of being run against by a clumsy rider one of the perils of hunting? It would be strange if an underwriter on cargo suing in the name of the cargo owners on the bill of lading should say, "I have paid for a loss by perils of the sea, and claim on you because the loss was not by perils of the sea." The Court of Appeal,

with great respect, argued as though the collision caused the loss. So it did in a sense. It was a *causâ sine quâ non*, but it was not the *causa causans*. It was *causa remota*, but not *causa proxima*. The *causa proxima* of the loss was foundering. It would be strange if a plank started, and the vessel went to the bottom in consequence, that it should be held, "Oh, the loss is not by peril of the seas, but by bad carpentering." Let there be no doubt. I do not say that in such case the freighter might not complain that his goods were carried in an unseaworthy ship. All I say is, that the loss would be by perils of the seas.

It is only necessary for this House to say that if the foundering was occasioned by a collision, with no blame on the defendants, they ought to have succeeded. For this is what they offered to prove, and were told that it was useless to do so. Mr. Hollams argued that they ought to have insisted on their right to prove their case. I am clearly of a different opinion. I think, when the judge says, "I shall decide against you, though you prove what you say," the party must acquiesce for the time, and seek his remedy by appeal. I think that the judge might properly refuse to hear the evidence, for he might truly say that, in his opinion, this evidence is irrelevant to any issue on the record; no one giving it would be liable to the penalty of perjury. The practice, in my experience, has always been in conformity with what I am now saying.

The judgment, then, must be set aside. The Attorney-General contended that it should be entered for the defendants. That also is impossible. It could not have been done before the Judicature Act, and that Act does not authorize it. It would be most unjust to the plaintiffs. They, relying on the law as it had been laid down, proved what was a sufficient case, and did not give what would have been irrelevant evidence if the law had been rightly laid down. I say nothing about burthen of proof. All I say is, that if the collision was in no way the fault of the defendant's crew, they are entitled to judgment.

As to costs, I do not remember whether my noble and learned friend made any mention of costs, but I will merely read what I have written—namely, that as to costs it seems to me that neither party is to blame, and that, consequently, the costs of the former trial, of the appeal in the court below and in this House, should be costs in the cause for either party. I do not know whether that will meet your lordship's view in the matter, but that can be settled afterwards.

Lord Macnaghten.—In this case the bill of lading on which the question arises is in common form. In the usual terms it states the engagement on the part of the shipowner to deliver the goods intrusted to his care. At the same time it specifies, by way of exception, certain cases in which failure to deliver those goods may be excused. So much for the express terms of the bill of lading. But the shipowner's obligations are not limited and exhausted by what appears on the face of the instrument. Underlying the contract, implied and involved in it, there is a warranty by the shipowner that his vessel is seaworthy, and there is also an engagement on his part to use due care and skill in navigating the vessel and carrying the goods. Having regard to the duties thus cast upon the shipowner, it seems to follow as a necessary consequence that, even in cases within the very terms of the exception in the bill of lading, the shipowner is not protected if any default or negligence on his part has caused or contributed to the loss.

Turning now to the facts of the case, we find that it was admitted at the trial that the vessel with the goods on board foundered at sea in consequence of a collision. The exception in the bill of lading includes "dangers and accidents of the sea." Is shipwreck by collision a danger or accident of the sea? I should say undoubtedly it is. Then comes the question, How was the collision brought about? Of that we know nothing, except that it was not due to inevitable accident. So much was admitted. It follows from that admission that one or both of the vessels that came into collision must have been to blame.

In that state of things I should have thought that the issue between the parties was reduced to this question, Was the carrying vessel in fault? If it was not, the shipowner is protected; if it was, though the loss occurred through one of the excepted perils, the shipowner cannot rely on the exception.

Unfortunately that simple issue was obscured, and the trial of the action was rendered abortive by reason of the decision in *Woodley* v. *Michell*. In the face of that decision it would have been idle for the parties to have gone into the facts at the trial. It would have been a work of supererogation on the part of the plaintiffs to have proved that the carrying vessel was in fault. The defendants would have been no nearer winning if they had established by the clearest evidence that up to the moment of the collision they had performed every duty cast upon them. Under these circumstances the parties have been compelled to come to your lordship's House, appealing in form against the judgment of the Court of Appeal in the present case, but in reality against the decision in *Woodley* v. *Michell*.

Your lordships are therefore called upon to determine whether the rule laid down in *Woodley* v. *Michell* can be supported on principle or authority. Authority in its favour there is none. The industry of counsel could not produce any passage from any recognized treatise or from any reported judgment countenancing the doctrine, except one observation in *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*, which was not necessary for the decision.

It seems to me to be equally difficult to support the rule in *Woodley* v. *Michell* on principle. If the accident is brought about by the negligence of the owner of the carrying vessel or his servants, it would be contrary to common sense and against all sound principle to allow one who was the author of the mischief to avail himself of his own wrong. But if the carrying shipowner is free from all blame, why should he suffer from the errors or misconduct of those over whom he has no control? As far as he and his vessel are concerned, what difference can it make in that case whether the collision is caused by a sunken rock or by an iceberg or by another vessel, or whether that other vessel is or is not in fault?

It seems to me, if I may say so with all deference, that the error of the Court of Appeal in the present case is to be found in this: They start with the assumption that the same words have different meanings when used in policies of assurance and when used in bills of lading. For that assumption there is not, I venture to think, any foundation. Different considerations, no doubt, apply to the two contracts, a contract of indemnity, and a contract of carriage—and the same event may have a different result in the one case from what it would have in the other; but in mercantile contracts so closely connected the same words must have the same meaning. Whatever the expression "perils of the sea" means in a policy of assurance, it means neither more nor less in a bill of lading.

The result, in my opinion, is that the appeal must be allowed, and the litigant parties must begin over again.

Orders appealed from reversed, and a new trial ordered; the costs of the trial already had to be costs in the cause; and the costs in the Court of Appeal and in this House to be the defendants' costs in the cause.

Solicitors for the appellants, *Lowless & Co.*

Solicitors for the respondents, *Hollams, Son, Coward.*

Court of Appeal.

From Lancaster Ct. of Chan. July 20, 21, 22.

CHALLENDER *v.* ROYLE. (*a.*)

Patent—Threats by patentee of legal proceedings—Injunction—"Due diligence"—Validity of patent—Patents, Designs, and Trade-Marks Act, 1883, *s.* 32.

The proviso contained in section 32 *of the Patents, Designs, and Trade-Marks Act*, 1883, *will be satisfied if an action to test the validity of the patent or the fact of infringement is honestly brought with reasonable diligence against the person or persons to whom the threats have been made.*

In considering whether such an action has been commenced with reasonable diligence, regard must be had to the time when the threats were first issued, and not to the time when the plaintiff first heard of the infringement.

In an action under section 32 *of the Patents Act*, 1883, *to restrain the issue of threats, the plaintiff may put in issue the validity of the defendant's patent.*

Kurtz *v.* Spence, 36 *W. R.* 26, 33 *Ch. D.* 579, *disapproved.*

Appeal from a decision of the Vice-Chancellor of the Palatine Court.

The defendant Royle was the owner of a patent, granted in 1879, for a "tap union," and ever since 1879 he had manufactured and sold the patented article, and until recently, as he alleged, he had not been aware of any infringement of his patent.

In March, 1887, he discovered that a number of tap unions not being made by himself were being sold, and he considered that those articles were infringements of his patent. These articles were manufactured by Challender, the plaintiff, who had taken out a patent in 1886. Royle, thereupon, in March, 1887, issued the following circular:—

"ROYLE'S PATENTS!!

"It having come to our knowledge that certain of our patents are being infringed—notably Royle's Patent Tap Unions and Patent Archimedean Egg-Beaters, we hereby caution our numerous friends against purchasing these imitation goods. It cannot be too generally known that all parties who handle a patented article, from the maker to the user, including also importers, are liable to the patentee. Our patent solicitor has instructions to take proceedings against all infringers.—JOHN J. ROYLE."

This circular was aimed at the tap union made by Challender, and was circulated among customers of his.

In April Challender wrote to Royle challenging him to take legal proceedings to restrain the alleged infringement of his patent.

On the 24th of May a person employed by Royle purchased from a company called the Manchester Plumbing Co. a tap union manufactured by Challender, and warned the company that it was an infringement of Royle's patent, and that Royle would proceed against them if they continued to sell it.

On the 15th of June Royle served the company with a writ in an action to restrain them from infringing his patent.

The writ in the present action was issued on the 11th of June, but not served till the 16th. By it the plaintiff claimed an injunction to restrain Royle from threatening, by circulars or otherwise, any person with legal proceedings or liability in respect of the manufacture, use, sale, or purchase of the plaintiff's tap union.

(*a*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

Bristowe, V.C., granted an interlocutory injunction. Royle appealed.

By section 32 of the Patents, Designs, and Trade-Marks Act, 1883, "Where any person claiming to be the patentee of an invention, by circular, advertisement, or otherwise, threatens any other person with any legal proceedings or liability in respect of any alleged manufacture, use, sale, or purchase of the invention, any person or persons aggrieved thereby may bring an action against him, and may obtain an injunction against the continuance of such threats, and may recover such damages (if any) as may have been sustained thereby, if the alleged manufacture, use, sale, or purchase to which the threats related was not, in fact, an infringement of any legal rights of the persons making such threats. Provided that this section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent."

Moulton, Q.C., and *S. Hall*, for the appellant.—The circular issued by the appellant was not a "threat" within the meaning of section 32, but was merely a warning to the public. Section 32 was aimed at a definite threat of legal proceedings addressed to an individual in respect of an alleged past infringement of a patent. It is not necessary that the "action for infringement" mentioned in the proviso at the end of the section should be brought against the "person aggrieved" mentioned in the former part of the section; it is sufficient if it is brought against some other alleged infringer if it raises the same question which would be raised against the "person aggrieved" if he were the defendant. The action against the Manchester Plumbing Co. is, therefore, sufficient to exclude section 32, and that action has been commenced with "due diligence."

Finlay, Q.C., and *Bousfield*, for the respondent.—The appellant did not commence his action with "due diligence," and the respondent's action cannot, therefore, be thereby defeated. The action brought by the appellant ought to be one in which the validity of his patent might be put in issue. This cannot be done in the action brought by him, as the respondent is not a party to it. In *Kurtz* v. *Spence*, 35 W. R. 26, 33 Ch. D. 579, it was held that in an action under section 32 the question of the validity of the patent could not be raised. The authority of this case has, however, been doubted in *Walker* v. *Clarke*, 4 Rep. Pat. Cas. 111.

Moulton replied.

COTTON, L.J. (after describing the nature of the patent and stating the facts, continued:—) Now, what was the law independently of the Act of 1883, on which the plaintiff relies, and on which the Vice-Chancellor based the injunction? It is thus stated by the late Master of the Rolls in *Halsey* v. *Brotherhood*, 29 W. R. 9, 15 Ch. D. 514, 519: "It is quite clear that Mr. Justice, now Lord Justice, Blackburn, in delivering judgment considered that to support the action" (which was an action for similar threats to these) "the allegations must not only assert the statement to be untrue, but that it was made without reasonable and probable cause. That is the judgment of the full court, and it appears to me to be the substance of the law. A man merely giving notice that his rights are being infringed, believing that they are infringed, is not to be subjected to an action for giving that notice . . . even although he does not follow up that notice by bringing an action at law for the infringement." I take that to be a correct statement of the law as it existed at the time of the passing of the Act, and if it were not for the Act I do not see that the plaintiff here could have any reasonable ground for commencing this action or for applying for an injunction. The defendant had been in possession of his patent since the year 1879, and had made and sold the articles manufactured in accordance with it, and those

manufactured by the plaintiff are so similar to them that certainly there was reasonable ground for the contention that the articles made by the plaintiff were an infringement of the defendant's patent.

The question, however, turns on the 32nd section of the Patents, Designs, and Trade-Marks Act, 1883. That section consists of two parts; it contains directions as to what circumstances will enable a person who is in the same position as the plaintiff here to obtain judgment in an action, and then it contains a proviso which excepts from the section cases which come within the proviso. If, then, a case comes within the proviso it must be dealt with as if this section did not exist—that is to say, it must be dealt with under the old law.

As the first part of the section has been a good deal discussed, it may be desirable to give our opinion upon it without regard to the proviso. First of all, this appears on the section, that what it contemplates is the final judgment to be given in the action if the circumstances bring the case within the Act. That appears from this that the section states that an injunction may be granted, and also damages, which evidently could not be obtained on an interlocutory application. Although undoubtedly the right of the plaintiff to an interlocutory injunction will depend on what judgment he could get at the hearing of the action, yet we must remember that the object of the section is to provide for judgment to be given at the trial of the action. First of all it says that when a person claiming to be entitled under a patent threatens any other person with legal proceedings or liability in respect of the patented invention, then any person aggrieved may bring an action against him.

In the present case, though it is very questionable whether the circular was a threat within the meaning of this section, the defendant undoubtedly did, before this action commenced, threaten with action and legal liability those who were using the instruments made by the plaintiff. He, therefore, has done that which is pointed at by the section. Who, then, can apply to restrain him? Any person aggrieved. And there is no doubt here that the plaintiff is a person aggrieved, because he was making that which was said to be an infringement; and, of course, these threats or notices would stop the sale of the instrument which he made. Then the section goes on to say what may be granted—an injunction, and damages if the alleged manufacture, use, sale, or purchase to which the threats related was not, in fact, an infringement of any legal rights of the person making such threats.

Now I think that, at the trial of such an action as this, the court, before it can grant relief, must be satisfied that the article in respect of which the threats were made is not an infringement. I do not go into the question as to where the burden of proof will lie; that will depend upon the circumstances of each case. *Primâ facie* the plaintiff would have the burden thrown upon him. He may easily rebut that in a particular case and throw the burden of proof on the defendant. But, in my opinion, in order to act upon this section, the court must be satisfied at the hearing of the action that the articles in respect of which the threats were made are not "an infringement of any legal rights of the person making such threats." The question, therefore, whether the patent of the person making the threat is a valid patent must, in my opinion, come into consideration if the plaintiff in the action seeks to have it considered, because I cannot see how, if the patent is invalid, there can be any act done in infringement of a legal right of the patentee. I mention that, because, as I understand, though the case is not before us on appeal, Chitty, J., has intimated an opinion that the question of the validity of the patent could not come in question in an action like this. In my opinion, and after the discussion we have had I am bound to state it, the validity of the patent could come in question. In order that the court may be satisfied whether there is or is not an infringement of any legal right, one of the questions must be, if the plaintiff chooses to raise it, whether the defendant's patent is or is not valid.

That is the view of the statute which I take as regards the rights of the parties at the hearing, independently of the proviso.

I think, however, that before going to the proviso I ought, having regard to the judgment of the Vice-Chancellor, to state my opinion as to how the matter ought to be dealt with on an interlocutory application. As far as I understand the Vice-Chancellor, he seems to have considered that he could not enter, at this stage of the cause, into the question whether the sale of the plaintiff's tap unions was an infringement of the defendant's patent, or whether that patent was a valid patent, and that all he need consider was the balance of convenience and inconvenience as between these parties in granting or refusing the interlocutory injunction. I must express my dissent from that view. It is very true that in all cases of interlocutory injunction the court does consider and ought to consider the balance of convenience and inconvenience in granting or refusing an injunction. But there is another very material question to be considered, has the plaintiff made out a *primâ facie* case? That is to say, if the evidence remains as it is, is it probable that at the hearing of the action he will get a decree in his favour? Therefore, although I quite agree that the court ought not on an interlocutory injunction to attempt finally to decide the question whether the act complained of is an infringement or (if the question of the validity of the patent is raised) whether the patent is a valid one or not, yet, in my opinion, it ought to be satisfied that on one or both of those two points the plaintiff in the action has made out a *primâ facie* case, and unless the court is so satisfied it would be wrong to grant an injunction merely on the ground that it cannot do the defendant any harm. Injunctions ought to be granted only on a case made out entitling the plaintiff to that particular remedy. I have thought it right to express my opinion on this point, having regard to the judgment of the Vice-Chancellor and to the judgment of Kay, J.,* on which he appears to have relied. In the present case, if it were necessary to consider the point, I should say that no doubt there was *primâ facie* evidence on behalf of the defendant that this was an infringement. The question is also raised by the plaintiff that the patent is a bad one, and that, therefore, there can be no infringement. If I had not come to the conclusion that the case is entirely taken out of the section by means of the proviso, I should have had to consider whether the plaintiff had made out a *primâ facie* case that the patent is invalid. I have not considered the evidence on that point in such a way as to make it right to give any opinion on its effect, as I think the proviso in this case settles the matter.

Now what is the proviso. "Provided that this section shall not apply" (that is, that the old law alone shall apply to such actions) "if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent." Now what has been done here? [His lordship then stated his reasons for coming to the conclusion that the action was commenced with due diligence and was an honest action.]

Then we come to what is really the main difficulty of the proviso, the question against whom an action must be brought to bring it within this proviso. It was contended by the plaintiff that it ought to be brought against the person aggrieved—that is to say, against the person applying for an injunction under this section—and that Royle's action, having been brought only against one

* *Walker* v. *Clarke*.

who is buying from the plaintiff, and selling to retail purchasers, does not satisfy the requirements of the proviso. In my opinion, it is not necessary that the action should be brought against the person aggrieved. As I pointed out, and I did not get any answer which satisfied me, it would not always be possible that an action should be brought as against the person aggrieved. The patentee of a rival machine would necessarily be, as the plaintiff here is, a person aggrieved within the meaning of the section, but supposing he does not himself manufacture or sell, but only licenses the manufacture and sale, I do not know any means of bringing an action against him. It might be argued that his taking out a patent was proof that he threatened and intended to use his invention; but in my opinion that would not be sufficient ground for an application for an injunction; and how could damages be obtained from him? I am disposed to think that what the section points at is a case where some act has been actually done which can be tested as to whether or not it is an infringement, for the words "if the alleged manufacture, use, sale, or purchase, to which the threats related was not in fact an infringement of any legal rights of the person making such threats," clearly point to an article having been made which has been alleged to be, but as a matter of fact is not, an infringement of the patent of the person issuing the threat. In my opinion the mere fact that, where the owner of a rival patent is the aggrieved person it is in many cases impossible that an action for infringement should be brought against him, precludes us from confining the action mentioned in this proviso to an action against the aggrieved party. In my opinion the proviso is satisfied if an action to test the validity of the patent or the fact of infringement is honestly brought with reasonable diligence against the person or any of the persons to whom the threats have been made. I am not satisfied that the Legislature did not intend to lay down the following up of the threats by action as a sort of test whether the threats were *bonâ fide*, as Malins, V.C., did in *Axmann* v. *Lund*, 22 W. R. 789, L. R. 18 Eq. 330.

In that case an action was brought to restrain threats, and the Vice-Chancellor asked the defendant, who was issuing these threats, whether he would undertake to bring an action for infringement. He declined to do so, and the Vice-Chancellor granted an injunction, it being recited in the order that the defendant declined to bring an action following up the threats. I think that is very likely what the Legislature intended; but what we have to do is to see what is required by this proviso. In my opinion it is not required that the action should be brought against the aggrieved person; it is sufficient if the action is brought against any person to whom the threat has been made. That is the case here. I see no ground for supposing that the action is collusive, or that it will not be defended in a proper manner. If it is not, another application can be made, for we are not now at the trial of the action, but are only asked to grant an interlocutory injunction on the facts before us, and before the rights of the parties have been decided

On the facts before us I say that *primâ facie* there is such an action as, by virtue of the proviso, takes the case out of that section. Therefore, in my opinion, the order made was wrong, and must be discharged.

BOWEN, L.J.—I am of the same opinion. This is an action brought under section 32 of the Patents, Designs, and Trade-Marks Act, 1883. We have, in the first place, to construe the proviso in order to determine whether an action which has been instituted against the Manchester Plumbing Co. is an action which satisfies the description given in the proviso of an action commenced with due diligence for the infringement of the defendant's patent. It seems to me that, in order to construe the proviso, we must form an intelligent view of the whole section, and although the construction which I put on the earlier part of the section may, perhaps, upon another occasion, be called in question, I desire to say that, in my view, it throws a distinct light upon the construction of the proviso. The section gives, for the first time, a new right of action—a right of action to a person who is aggrieved by a threat proceeding from a patentee against somebody in respect of an alleged manufacture, use, sale, or purchase of the patentee's invention. I think those words indicate that the threat, which is the subject-matter of the action, must not be merely a warning about something which is going to be done, but must be a threat about an act done, a threat of legal proceedings or liability in respect of an alleged manufacture, use, sale, or purchase of the invention, not in respect of a proposed manufacture, use, sale, or purchase. It seems to me that that interpretation is confirmed by the subsequent language of the section, where the words employed are that an injunction and damages may be obtained if the alleged manufacture, use, sale, or purchase was not, in fact, an infringement, the condition imposed under the word "if" pointing, it seems to me, to an act done which is alleged by the patentee to be an infringement, but which also may not really be an infringement. Again, when you come to the proviso, you find that an action for infringement of the patent is to be the means by which the section may be avoided, implying, I think, that there has been something done which is asserted to be an infringement of the patent. I think, then, that threats would not fall within the section if they were mere threats or warnings as to something which might be done in the future. Everybody, it seems to me, has still a right to issue a general warning to pirates not to pirate, and to infringers not to infringe, and to warn the public that the patent to which the patentee is entitled, and under which he claims, is one which he intends to enforce. But my language upon this point must not be misunderstood. It does not follow that because a threat is so worded as grammatically to apply only to the future, therefore, it may not in any particular case be, in substance and in fact, applicable to what has been done. Supposing that a manufacturer is making and issuing machines which the patentee considers to be an infringement of his patent, and the patentee issued a threat really directed against the manufacture and sale of those machines, I do not think he could escape from the section by wording his notice in such terms that, according to the letter, it was only a general warning to all persons not to infringe his patent.

Now, I am not satisfied (though I give no final opinion on the point, as its investigation would require further evidence) that the circular which has been issued was directly addressed to the sale of this particular instrument of which the defendant now complains. I think it is very probable that it was, but I do not pronounce judgment on the basis that that circular is a threat on which this action can be founded. But there was a very distinct and definite threat, which puts the matter beyond all question, addressed to the Manchester Plumbing Co., who, though not the plaintiffs in the action, are persons who sell the very instruments which the plaintiff has patented, and the sale of which is complained of by the defendant. This threat to the Manchester Plumbing Co. was addressed to people who had done something which was complained of as an infringement. The true view of the proviso seems to me to be that an action will satisfy the words of the proviso if it is a *bonâ fide* action, brought with due diligence and without collusion against a person to whom the threat has been addressed in respect of the act to which the threat referred. I do not express any opinion as to whether any other sort of action would or would not satisfy the proviso. It is sufficient for me to say that, in my opinion, such an action would be enough to bring the case within it.

It was urged upon us that the action must be against the person aggrieved, and that it will not do if it is merely brought against a person who is threatened. I think that construction can hardly be put upon the section. The person aggrieved may have done nothing which could be alleged to be an infringement; he may be only a person who is intending to manufacture, or, what is still more probable, he may be a person who is dealing with his own patented invention through the medium of licences to others. It can hardly be said that a patentee who intends to grant licences to make and sell his inventions is not seriously aggrieved if persons who have contracted or negotiated with him for licences are deterred by the threats of another from utilizing his invention. Yet he cannot be sued for infringement, and if the proviso were held to apply only to actions brought against the person aggrieved, the proviso would have no application at all in an action brought by him for an injunction against threats.

On the ground, therefore, that this action against the Manchester Plumbing Co. is an action brought with due diligence against persons who were threatened in respect of an act done by them which is alleged by the defendant to be an infringement of his patent, and is an action brought in respect of the very class of goods which are made by the plaintiff, it seems to me that the defendant's action takes the case out of the section. But I think it also right, as the matter has been discussed, and as the Vice-Chancellor's judgment proceeds upon another ground, to express my concurrence in what the Lord Justice has said, first, as to the necessity, in matters of this sort, that those who apply for an *interim* injunction should fulfil the requirements of the law and make out a *primâ facie* case—not merely a *primâ facie* case of the balance of convenience and inconvenience, but a *primâ facie* case of a right which is infringed. The right conferred by this section is a right not to be threatened if the manufacture which is complained of was not, in fact, an infringement, and I think a person applying for an injunction against threats ought to make out a *primâ facie* case that the matter to which the threats related was not, in fact, an infringement.

I also wish to add that, though I am extremely reluctant to travel one hair's breadth out of the case before us, I think it is necessary to express an opinion (not a final judgment) that in an action of this nature the question of the validity of the defendant's patent may be raised. Chitty, J., seems to have come to a different conclusion; but I think it is well worthy of consideration, how it is possible to decide the question, whether a manufacture was an infringement of legal rights of a patentee, without considering whether he had any legal rights at all. I therefore, as at present advised, do not feel able to follow Chitty, J.'s view on that point. These two matters, I think, it is necessary to mention in consequence of the judgment of the Vice-Chancellor, and of the course which the argument before us has taken; but we decide this case on the ground that an action brought against the Manchester Plumbing Co. is a sufficient action to satisfy the proviso, and so to take the case out of the 32nd section.

Solicitors for the appellant, *Shaw & Tremellen*, for *A. M. Blair*, Manchester.

Solicitors for the respondents, *Bolton, Robbins, Bush, & Co.*, for *C. R. Hardman*, Manchester.

From Q. B. Div. Feb. 10, 11.

TUNNICLIFFE *v.* OVERSEERS OF BIRKDALE. (a.)

Poor rate—Certified reformatory school—Rateability—Reformatory Schools Act, 1866 (29 & 30 *Vict. c.* 117).

A reformatory school, the managers of which have been granted a certificate under 29 & 30 *Vict. c.* 117, *is rateable to the relief of the poor.*

Sheppard *v.* Bradford, 12 *W. R.* 867, 16 *C. B. N. S.* 369, *overruled.*

Appeal from the judgment of the Queen's Bench Division upon a case stated by justices at quarter sessions on appeal against a poor rate.

The appellants were the managing committee of the Birkdale Farm reformatory school for youthful offenders of the Roman Catholic religion. The school was certified under the Reformatory Schools Act, 1866. Boys were sent to it and detained there by order of justices under section 14 of that Act, and such order formed part of the sentence of the court. No boys were received there except those sent by such orders, but the committee might refuse to receive any such boy into the school (section 8 of the Act), and it was customary for justices to inquire what reformatory school would take the boy before sending him. The county, by agreement with the committee, contributed towards the expense of keeping boys sent there by the county justices. The premises consisted of school buildings, where the boys were trained in various trades, and a farm of twenty-seven acres, used for the instruction of the boys in agriculture. A profit was derived from the cultivation of the farm and also from the trades carried on in the school. This training and instruction were carried on under rules approved by the Secretary of State.

The appellants having been assessed to the relief of the poor in respect of the school premises and farmlands, the quarter sessions confirmed the rate subject to a case.

The Queen's Bench Division affirmed the order of sessions (35 W. R. 731, 19 Q. B. D. 280).

The committee of management appealed.

Sir C. Russell, Q.C., and *Segar*, for the appellants.—Detention in a reformatory school is part of the punitive system of the country. Youthful offenders in reformatory schools are convicted criminals, and, as every criminal is supposed to be in the custody of the Crown, they are detained in a place in the nature of a prison, which is used for the purposes of the administration of law in the country. The managers of the school, therefore, in detaining the boys as prisoners, are acting for the Crown, and the school is exempt from rating: *Jones* v. *The Mersey Docks*, 13 W. R. 1069, 11 H. L. Cas. 443. The officers of the school have all the powers of constables: section 13. The expense of conveying the boys to the school is borne by the prison authority by section 23; and the Treasury may contribute towards the expenses of the school: section 24. *Sheppard* v. *Bradford*, 12 W. R. 867, 16 C. B. N. S. 369, is an express authority that reformatory schools are not rateable. They are not like industrial schools, which were held rateable in *Reg.* v. *West Derby*, L. R. 10 Q. B. 28, 23 W. R. Dig. 153. School boards can establish industrial schools, but not reformatory schools.

They also cited *Reg.* v. *Shepherd*, 1 Q. B. 170.

Aspland, Q.C., and *Melsheimer*, for the respondents.—The reason why the Crown is not rateable in respect of the occupation of land is that it is not mentioned in the statute 43 Eliz. c. 2, and so is not bound by it. The true test of exemption is, would the Crown be liable to be rated in respect of the property if anyone was? This would depend upon whether the Crown had the right to

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

occupation: *Jones* v. *Mersey Docks; Commissioner of Leith* v. *Inspectors of the Poor*, L. R. 3 H. L. Sc. 17, 14 W. R. H. L. Dig. 10. Reformatory schools are charitable institutions, detention there being for the purpose of reformation, and not punishment. The managers are not servants of the Crown, and their occupation is not the occupation of the Crown. *Sheppard* v. *Bradford* was wrongly decided, and is overruled by *Jones* v. *Mersey Docks*. Blackburn, J., in *Reg.* v. *West Derby*, treats that case as overruled. County buildings, such as assize courts, police stations, county courts, and prisons, are *in consimili casu* to buildings occupied by the Crown, and have been held not rateable: *per* Blackburn, J., in *Jones* v. *Mersey Docks*, 13 W. R., at p. 1070, 11 H. L. Cas., at p. 464; *Comber* v. *Justices of Berkshire*, 32 W. R. 525, 9 App. Cas. 61; *Justices of Lancashire* v. *Stretford*, E. R. & E. 225.

They also referred to *Gambier* v. *Lydford*, 2 W. R. 226, 3 E. & B. 346, 7 W. R. C. L. Dig. 80.

Sir C. Russell, Q.C., in reply, cited *Lord Amherst* v. *Lord Somers*, 2 T. R. 372; *Nicholson* v. *Holborn Union*, 35 W.R. 230, 18 Q. B. D. 161.

Lord ESHER, M.R.—In this case the question for our decision is whether a reformatory school, which is as to certain matters regulated by the Reformatory Schools Act, 1866, is or is not rateable to the relief of the poor. It was urged that it was not rateable because it was, in effect, a prison, and part of the means for the public administration of law and order in the country. The question, to my mind, is not whether this is a prison, but whether *this* is a prison occupied by the servants of the Crown so as to bring it within the exemption. In *Jones* v. *Mersey Docks* it was shown that the statute 43 *Eliz. c. 2* had been partially misconstrued and misapplied in the courts, and the House of Lords brought the courts back to the true construction of the statute. Under that statute every occupier of lands, houses, &c., where the occupation could, in the hands of the present occupier or of any other person, be made beneficial, is rateable to the relief of the poor. There is only one exemption, and that is in favour of the Crown, the exemption arising from the fact that the Crown is not named in the statute, and therefore not bound by it. Everyone else in the position I have stated is liable to be rated. The law was so stated in *Jones* v. *The Mersey Docks*, where Lord Westbury said, at p. 501:—"The only occupier exempt from the operation of the Act is the King, because he is not named in the statute, and the direct and immediate servants of the Crown, whose occupation is the occupation of the Crown itself, also come within the exemption." The statement of Lord Cranworth, at p. 508, is usually accepted as the most exact upon the subject:—"To avoid all misconception, I wish to add that there are certain cases to which the observations I have made do not apply. The Crown, not being named, is not bound by the Act. It follows, therefore, that lands or houses occupied by the Crown or by servants of the Crown for the purposes of the Crown are not liable to be rated; and I conceive that it is from a confusion between property occupied for public purposes and property occupied by servants of the Crown that this mistake has arisen." The statement as to the occupation by servants of the Crown seems to me a mere expansion of the phrase "occupied by the Crown." It disposed of any question as to the occupation of the Crown being limited to the personal occupation of the sovereign. It seems to me to mean that lands occupied by servants of the Crown for the purposes of the Crown are occupied by the Crown in the same way as lands occupied by the servants of a private individual are occupied by the master. I take it, therefore, to mean that any lands occupied by the Crown in its sovereign capacity are not rateable. Blackburn, J., in delivering the opinion of the majority of the judges, said the same thing at pp. 463, 464:—"The Crown, not being named in the statute of Elizabeth, is not bound by it; and, consequently, the overseers cannot impose a rate upon the sovereign in respect of lands occupied by her Majesty, nor on those occupied by her servants for her Majesty." The learned judge, having thus stated the principle, goes on to enumerate cases which had been decided to see whether they were within that rule: "So far the ground of exemption is perfectly intelligible, but it has been carried a good deal farther, and applied to many cases in which it can scarcely be said that the sovereign or the servants of the sovereign are in occupation. Long series of cases have established that where property is occupied for the purposes of the Government of the country, including under that head the police and the administration of justice, no one is rateable in respect of such occupation. And this applies, not only to property occupied for such purposes by the servants of the great departments of State, such as the Post Office, the Horse Guards, or the Admiralty, in all which cases the occupiers might strictly be called the servants of the Crown, but also to property occupied by local police, to county buildings occupied for the assizes and for the judge's lodgings, or occupied as a county court, or for a jail. In these latter cases it is difficult to maintain that the occupants are, strictly speaking, servants of the sovereign, so as to make the occupation that of her Majesty; but the purposes are all public purposes of that kind which, by the constitution of this country, fall within the province of government, and are committed to the sovereign, so that the occupiers, though not, perhaps, strictly servants of the sovereign, might be considered *in consimili casu*." That is an attempt to bring those latter cases within the rule of exemption.

Those cases must not be considered as establishing any new rule, but they must be brought within the rule laid down in *Jones* v. *The Mersey Docks*. Whenever, therefore, a case of any such buildings arises the courts must consider whether it is within the rule. If a co-ordinate court has held it to be within the rule, the court will follow that decision. If a long series of decisions, acted upon all over the country, have held that the case is within the rule, no court will overrule those decisions. Short of that, however, the court will consider whether the case comes within the rule, and if any case decided before *Jones* v. *The Mersey Docks* is not brought within the rule it must now be considered as overruled. The true test is this: if anyone were to be rated would it be the Crown? If so, as the Crown cannot be rated, no one else can. The servants of the Crown are not rateable because they are not occupiers, just as the servants of a private individual cannot be rated, because their master occupies and not the servants. That enunciation of the rule enables us to see whether any particular case falls within it.

It is said, however, that the rule has been enlarged. In *Reg.* v. *West Derby* an industrial school was held liable to be rated, and Blackburn, J., in giving judgment, quotes the language of Lord Cranworth in *Jones* v. *The Mersey Docks* which I have already referred to. In *Comber* v. *Justices of Berkshire* the question was whether the county assize courts were liable to income tax, and the question was said to be the same as their liability to the poor rate. I cannot see that any new rule was there laid down, or that the old rule was enlarged. Lord Blackburn, in giving his opinion, quotes the language of Lord Westbury in *Jones* v. *The Mersey Docks*, that the public purposes to make an exemption "must be such as are required and created by the Government of the country, and are therefore to be deemed part of the use and service of the Crown." Lord Blackburn did not, I think, mean to lay down a new rule as to a building required for the service of the country. He used that argument to see whether the

building came within the rule as being "occupied by the Crown." Lord Watson says:—"The precise language of that definition satisfies me that the noble and learned lord (Lord Westbury) meant to affirm, and did affirm, that the exemption extended not only to the immediate and actual servants of the Crown, but to all other persons, not being servants of the Crown, whose occupation was ascribable to a bare trust for purposes required and created by the Government of the country." May I say with great deference that that language is not quite accurate? The immediate and actual servants of the Crown, if they use land for the service of the Crown, do not "occupy" it. There can be no question of their exemption as they do not occupy. What is meant is that where a building is a public building used for the purposes of the government of the country by servants of the Crown, so that the occupation is the occupation of the Crown, that building is exempt.

Having stated the exemption, we must now consider whether it applies to the present case. There is the case of *Sheppard* v. *Bradford*, decided before *Jones* v. *The Mersey Docks*, in which a certified reformatory school was held not to be rateable. That case was not one of a long line of decisions or where there had been a long-continued, recognized practice acted upon and not contested. It seems to me, therefore, to be a case that is overruled by *Jones* v. *The Mersey Docks*, if it does not come within the rule as to exemption. In *Reg.* v. *West Derby* Lord Blackburn seemed to be of opinion that it was overruled. Does the present case come within the rule? Speaking for myself, I think it may be rightly said that this place is in the nature of a prison. It is used solely for the purpose of dealing with young persons convicted of crimes, who are detained there by a sentence which is part of the sentence passed upon them on their conviction. If the old rule, acted upon before the decision in *Jones* v. *The Mersey Docks*, were still in existence—namely, that it was sufficient to show that the building was used for public purposes in order to bring it within the exemption—this case would come within it. However, it is not now sufficient to show that the building is used for public purposes. The question is, Is this a case of occupation by the Crown, where the Crown would be rated if anyone could be? In my opinion it is not such a case. There are many circumstances stated during the argument which are conclusive to show that these premises are not occupied by the Crown through its servants. The school is carried on by benevolent people. The persons in charge can be dismissed by them, and are their servants. The Crown has no control in the management of the school. The statute gives it no right of possession, and the building cannot be said to be in the occupation or possession of the Crown. The persons who carry on the school occupy it by their servants. The ground, therefore, upon which this school is rateable is that it comes within the general enactment of 43 Eliz. c. 2, and is not taken out of that general enactment by being in the occupation of the Crown. For these reasons I am of opinion that this appeal should be dismissed.

FRY, L.J.—I am of the same opinion, and for the same reasons. The effect of the decision in *Jones* v. *The Mersey Docks* was to recall the courts to the very words of the statute, 43 Eliz. c. 2. Wherever lands which are capable of beneficial occupation are occupied, the lands are rateable, there being only one exemption—namely, lands in the occupation of the Crown, which cannot be assessed. To see if the case comes within the exemption the question always is, Is the land in the occupation of the Crown? The occupation of the Crown may be either the personal occupation of her Majesty or occupation by servants of the Crown, which is, in reality, the occupation of the Crown. Therefore, to gain exemption, the lands must be occupied by the Crown.

That being so, we must see who are the persons here claiming exemption. They are a committee of management of a reformatory school. The school was founded by charitable persons as a benevolent institution, and the committee of management are elected by them to carry it on. The committee are authorized to receive contributions from the county funds towards the expenses, and the committee are clothed with the power of detaining children in the school where the sentence states that they are to be so detained. For my part I should be sorry to call a reformatory school a prison; the object of it is not punishment, but reformation. But whether it is a prison or not is immaterial. The managers are appointed by the subscribers and not by the Crown. They are not paid by the Crown, nor can they be dismissed by the Crown. They are not, therefore, servants of the Crown. It was then urged that they occupy a public position and are the persons delegated by the justices to carry out the sentence of the court, and are exempt upon that ground. No doubt that is true, but it must be borne in mind that the power to sentence young persons to be detained in a reformatory school was given by the Legislature for the purpose of taking advantage of the existence of these voluntary schools, and it is not in any way like an ordinary sentence known to the law. I can find nothing to show that the occupation of these persons is the occupation of the Crown. If any loss occurs it will not fall upon the Crown, but must be borne by the subscribers. It only remains to deal with the case of *Sheppard* v. *Bradford*, where it was held that a reformatory school was not rateable. The ground of the decision there was that the school was a building devoted to public purposes, and Byles, J., mentions another ground, that the institution was devoted to purposes of public charity. At that time those grounds were considered sufficient to exempt the building from rating. Since the decision in *Jones* v. *The Mersey Docks* I do not think that decision can stand. We are therefore bound to say, though I say it with regret, that this school does not come within the exemption.

LOPES, L.J.—I am of opinion that the appellants are rateable in respect of this school. In the case of *Jones* v. *The Mersey Docks* the House of Lords placed a construction upon 43 Eliz. c. 2 which was inconsistent with the view previously held by the courts. The principle underlying the decision in that case is that the Crown, not being named in the statute of Elizabeth, is not bound by its provisions, and therefore lands occupied by the Crown, or by its servants for the purposes of the Crown, are not rateable. "The general principle," said Lord Cairns in *Greig* v. *University of Edinburgh*, L. R. 1 H. L. Sc. 348, at p. 350, "as I understand it, approved of by your lordships in these cases is this, that the Crown, not being named in the English or Scotch statutes on the subject of assessment, and not being bound by statute when not expressly named, any property which is in the occupation of the Crown, or of persons using it exclusively in and for the service of the Crown, is not rateable to the relief of the poor." It is necessary to apply that principle to the present case and to see whether this school is exempt from rating as being in the occupation of the Crown. The school was originally created by private efforts. The land belongs to private persons, and the management is under their control. No one over whom the Crown has any control occupies it. The persons who occupy it can be dismissed by the committee of management, and are their servants. The managers may, by section 7, upon giving six months' notice, resign the certificate and cease to continue receiving youthful offenders without the permission of the Crown. By section 8 they may decline to receive any particular boy proposed to be sent to them. Therefore, in no one sense can it be said

that the school is in the occupation of the Crown. It does not seem to me to be in the nature of a prison, if that is at all material to the present inquiry. I am unable to distinguish this case from that of a certified industrial school, which was held in *Reg.* v. *West Derby* to be rateable. Nor can I distinguish it in principle from a private lunatic asylum where lunatics are sent and detained. With regard to the case of *Sheppard* v. *Bradford*, it is only necessary to say that it was decided before *Jones* v. *The Mersey Docks*, and cannot now be considered as an authority.

Appeal dismissed.

Solicitors for the appellants, *Rowcliffes, Rawle, & Co.*, for *Threlfall*, Southport.

Solicitors for the respondents, *Bower, Cotton, & Bower*, for *Parr, Sadler, & Dickinson*, Ormskirk.

From Q. B. Div. Feb. 6.

KELLY *v.* KELLOND. (*a.*)

Bill of sale—Assignment of after-acquired property—Form in schedule—Validity—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 *&* 46 *Vict. c.* 43), *ss.* 4, 5, 9.

By a bill of sale the grantor assigned as security for the payment of money the chattels specifically described in the schedule thereto annexed, "together with all other chattels and things the property of the mortgagor now in and about the said premises, and also all chattels and things which may, at any time during the continuance of the security, be in or about the same or any other premises of the mortgagor (to which the said chattels or things or any part thereof may have been removed), whether brought there in substitution for, or renewal of, or in addition to, the chattels and things hereby assigned."

Held, that the bill of sale was void under section 9 *of the Bills of Sale Act*, 1882, *as not being in accordance with the form in the schedule.*

The rule of construction laid down in Ex parte Stanford, 34 *W. R.* 507, 17 *Q. B. D.* 257, *is the test of what constitutes substantial divergence from the statutory form.*

Roberts *v.* Roberts, 32 *W. R.* 605, 13 *Q. B. D.* 794, *discussed.*

Appeal from a judgment of the Divisional Court in favour of the execution creditor in an interpleader issue.

By a bill of sale, dated the 24th of August, 1886, the defendant assigned to Thomas, the claimant in the interpleader issue, as security for the payment of money, the chattels "specifically described in the schedule hereto annexed or hereinafter written, together with all other chattels and things the property of the mortgagor now in and about the premises known as 119, Shirley-road, Paddington, in the county of Middlesex, and also all chattels and things which may at any time during the continuance of this security be in or about the same or any other premises of the mortgagor (to which the said chattels or things, or any part thereof may have been removed), whether brought there in substitution for, or renewal of, or in addition to, the chattels and things hereby assigned."

The plaintiff having recovered judgment against the defendant, seized the goods in execution, and they were claimed by Thomas under the bill of sale. Since the date of the bill of sale certain goods not enumerated in the schedule had been brought upon the premises, but the claimant made no claim to them.

Upon the trial of an issue in the Marylebone County Court the judge held that the bill of sale was void, as not being in accordance with the form, and gave judgment for the execution creditor. The Divisional Court (Lord Coleridge, C.J., and Denman, J.) affirmed this judgment.

The claimant appealed.

McClymont and *H. Reed*, for the claimant.—An assignment of after-acquired property does not render the bill of sale void under section 9 of the Bills of Sale Act, 1882, as not being in accordance with the form: *Roberts* v. *Roberts*, 32 W. R. 605, 13 Q. B. D. 794. The rule laid down in *Ex parte Stanford*, 34 W. R. 507, 17 Q. B. D. 259, as to what is a material departure from the form, does not conflict with *Roberts* v. *Roberts*. The only effect of including after-acquired property in the assignment is to render the assignment void in respect of such after-acquired property except as against the grantor: sections 4 and 5 of the Bills of Sale Act, 1882. Many bills of sale containing a similar clause have been before the courts since *Roberts* v. *Roberts*, and the point has not been taken, it being generally assumed that *Roberts* v. *Roberts* was conclusive.

They referred to *Goldstrom* v. *Tallerman*, 35 W. R. 68, 18 Q. B. D. 1; *In re Morritt*, 35 W. R. 277, 18 Q. B. D. 222; *Lumley* v. *Simmons*, 35 W. R. 422, 34 Ch. D. 698; *Furber* v. *Cobb*, 35 W. R. 398, 18 Q. B. D. 494; *Levy* v. *Polack*, 52 L. T. N. S. 551, 33 W. R. Dig. 32; *Crosser* v. *Maxwell*, W. N., 1885, p. 95; *Bouchette* v. *Attenborough*, 3 *Times* L. R. 813.

Lumley Smith, Q.C., and *Rose-Innes*, for the execution creditor, were not called upon.

Lord ESHER, M.R.—We must construe each bill of sale that comes before us according to the rule of construction laid down by this court after the most careful consideration. Now before the case of *Ex parte Stanford* we had endeavoured to state the rule of construction, but that rule was not considered by some judges sufficiently effective for universal application. Accordingly, on account of the numerous cases that arose upon bills of sale, this court, with the assistance of all its members, laid down a rule of construction in that case more easy of application, and more accurate in its application, than the rule previously laid down. It followed that if we did alter the form of the rule of construction, the new rule would take the place of any former rule, and might alter the effect of previous cases, so that if any of the previous cases which had been decided under the old rule would have been decided differently under the new rule, they must now be considered as overruled.

In *Ex parte Stanford* the old rule was considered not to be a good working rule, but one that would have an effect varying according to different men's minds, and so a new rule of construction was there laid down, which it was supposed would be intelligible to every man's mind—to conveyancers and to men of business alike. The judgment says:—"A bill of sale is surely in accordance with the prescribed form if it is substantially in accordance with it, if it does not depart from the prescribed form in any material respect. But a divergence only becomes substantial or material when it is calculated to give the bill of sale a legal consequence or effect either greater or smaller than that which would attach to it if drawn in the form which has been sanctioned, or if it departs from the form in a manner calculated to mislead those whom it is the object of the statute to protect." There is the rule laid down in its most general form. "We must take the form interpreted by the light of the Act on the one hand, the instrument to be discussed upon the other; and we must then consider whether, but for the avoidance inflicted by section

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

9 of the statute, the instrument as drawn will, in virtue either of addition or omission, have any legal effect which either goes beyond or falls short of that which would result from the statutory form, or whether the instrument in respect of such variance would be calculated reasonably to deceive those for whose benefit the statutory form is provided. If so, the variance is material, and the bill of sale is not in substantial accordance with the statutory precedent. Whatever form the bill of sale takes, the form adopted by it in order to be valid must produce, not merely the like effect, but the same effect—that is to say, the legal effect, the whole legal effect, and nothing but the legal effect—which it would produce if cast in the exact mould of the schedule. Such a test as this contains no element of uncertainty, is one which every lawyer throughout the kingdom is competent to apply, and is based upon a method of interpretation familiar to our courts." That is the rule of construction laid down, and if that rule would have made any decision before *Ex parte Stanford* wrong, then we must say that such decision is no longer an authority. The court has now to take the rule so laid down, and apply it to every bill of sale that comes before it.

We must now deal with the case of *Roberts* v. *Roberts*. If the above rule, when applied to the bill of sale in that case, makes that decision incorrect, then *Roberts* v. *Roberts* must be considered as having been wrongly decided. Although it is not usual for this court to overrule one of its own decisions, yet this is a court consisting of six judges, and I take it that if at any time a decision of a lesser number of the court is called in question, and a difficulty arises about the accuracy of it, this court is entitled, sitting as a full court, to say whether they will continue to adopt a decision which has been come to by a lesser number of them. Therefore if *Roberts* v. *Roberts* is at variance with the decision of the full court, it must be considered as overruled. For myself I do not hesitate to say that if *Roberts* v. *Roberts* had to be considered under that rule, it must have been differently decided, and therefore *Roberts* v. *Roberts* must be considered as overruled by *Ex parte Stanford*.

The question, therefore, is whether in the body of this bill of sale there is or is not such a divergence from the statutory form as brings the case within the rule and avoids the bill of sale under section 9. Applying the test laid down in the rule, does the bill of sale produce "the same effect—that is to say, the legal effect, the whole legal effect, and nothing but the legal effect—which it would produce if cast in the exact mould of the schedule"? Has the bill of sale "a legal consequence or effect, either greater or smaller, than that which would attach to it if drawn in the form"? It is obvious to my mind that it has a greater legal effect than it would have if it were drawn in the form. It includes other goods besides those specifically described in the schedule. It applies to goods not described in the schedule at all, and not capable of being described, because they were non-existent at the time the bill of sale was executed. It has a greater legal effect, because that which is attempted to be given as the security is a larger security than could possibly be given by a bill of sale drawn in the statutory form. Accordingly the bill of sale is void under section 9.

It is argued, however, that section 9 is not to have the effect of avoiding such a bill of sale, defective as regards the body of the instrument, because the avoidance in section 9 is cut down in this particular case by sections 4 and 5. That is to say, that sections 4 and 5 are inconsistent with the full application of section 9, and that the more specific enactments in sections 4 and 5 are to limit the wide and plain construction of section 9. I think that the suggestion of Fry, L.J., during the argument has shown us that there is no real inconsistency at all. Sections 4 and 5 do not in terms apply to the body of the bill of sale. They apply to the schedule and to the schedule only. If that is so, the form of the bill of sale may be perfectly correct, yet the schedule may have a description of goods not sufficiently specific. Then with regard to those goods not sufficiently described, the bill of sale is avoided except as against the grantor. Upon this view section 9 remains intact, and will have its full force notwithstanding anything contained in sections 4 and 5. Applying the rule laid down in *Ex parte Stanford*, I find that the body of this bill of sale is not in accordance with the form, and is void under section 9. The appeal, therefore, fails.

FRY, L.J.—I am of the same opinion. By the bill of sale in the present case the mortgagor assigned to the mortgagee the chattels and things specifically described in the schedule, "together with all other chattels and things the property of the mortgagor now in and about the premises, and also all chattels and things which may during the continuance of this security be in or about the same or any other premises of the mortgagor," &c. The first inquiry is whether that bill of sale is in accordance with the form in the schedule to the Bills of Sale Act, 1882. The Master of the Rolls has already pointed out that the proper rule of construction was laid in *Ex parte Stanford*. The judgment there lays this down: that if the bill of sale, read independently of the avoidance in section 9 of the Act, goes in its legal effect to any extent beyond the effect of the form in the schedule, it is void under section 9 as not being in accordance with the form. Taking the bill of sale now in question on the one hand, and taking, on the other hand, the bill of sale in the schedule, I cannot doubt that the bill of sale now in controversy does go in its legal effect far beyond the bill of sale in the schedule. The clause as to the other chattels and things, besides those specifically described in the schedule, is an addition to the form in the schedule, and would convey property which never could be touched by an instrument in the scheduled form. I come to the conclusion therefore that, according to the rule of construction laid down in *Ex parte Stanford*, this bill of sale is void.

Now I do not desire to say anything as to the power of the full Court of Appeal to overrule decisions of any lesser number of its members. If I had to decide that point I should prefer to take time to consider. I desire to express no opinion upon it, because it appears to me that in *Roberts* v. *Roberts* the point now raised was not determined. No doubt it was argued that the bill of sale was void under section 9 as not being in accordance with the form, but the point of divergence was that the words "by way of security" were omitted. That was the point of divergence with which the judgments dealt; the insufficient description in the schedule was dealt with as being a question under sections 4 and 5. Therefore in my judgment the precise point was not determined in *Roberts* v. *Roberts*, and we are bound to determine it by the rule laid down in *Ex parte Stanford*.

There remains another argument to be dealt with. It is said that section 9 is subject to an exception where the divergence from the form is in the description of the goods in the schedule annexed to the bill of sale, and that sections 4 and 5 limit section 9 to that extent. It appears to me, however, that the true reading of the sections is this—section 9 deals with the form of the bill of sale, and avoids an instrument which materially differs from the statutory form as regards both the grantor and everybody else; sections 4 and 5 deal with a departure from the proper description in the schedule, and do not deal with the form of the body of the bill of sale. Supposing there was a bill of sale precisely in the statutory form, followed by a schedule describing the chattels assigned, but with regard to some of the chattels containing no specific description,

and also containing a specific description of a chattel of which the grantor was not, at the time of the grant, the true owner. The bill of sale would be within the scheduled form, and not capable of being avoided by section 9. There would be, however, a want of specific description within sections 4 and 5 which would avoid the bill of sale against everybody except the grantor in respect of the chattels not specifically described, and in respect of the chattel of which the grantor was not, at the time of the grant, the true owner. That appears to me to prevent any inconsistency between the limited avoidance in sections 4 and 5, and the absolute avoidance in section 9.

LOPES, L.J.—I am of the same opinion. The words which are objected to in this bill of sale are contained in the body of the deed. The question for our decision is whether this bill of sale has a different legal effect from the statutory form. The case which lays down the rule of construction upon which we are to act is *Ex parte Stanford*. I do not desire to express any opinion as to what power the full Court of Appeal has with regard to any previous decision of a court composed of two or three of its members. But the full court was summoned in that case to reconsider any previous decisions bearing upon the question then before the court. Do the words objected to in this bill of sale "give the bill of sale a legal consequence or effect greater than that which would attach to it if drawn in the statutory form"? The answer to that question appears to me to be obvious, because this bill of sale deals not only with goods specifically described in the schedule annexed thereto, but deals with other chattels and things the property of the mortgagor.

With respect to the case of *Roberts* v. *Roberts*, I do not think it necessary to express any opinion as to what was decided there, because I am perfectly clear that it is inconsistent with *Ex parte Stanford*. There were other cases referred to where the same objection might have been taken as was taken in the present case; but as the objection was not taken, those cases are no authority upon the point.

With regard to sections 4 and 5, it is said that they are not consistent with section 9, nor with the decision at which we have arrived. Speaking for myself, I must say that I felt some difficulty with regard to this point, but I think that the view suggested by Fry, L.J., removes that difficulty. It appears to me that section 9 deals with the form of the deed and the statutory form in the schedule of the Act; whereas sections 4 and 5 deal only with the schedule to the deed, and deal with any objection as to the chattels not being specifically described therein. I think, therefore, that this appeal should be dismissed.

Appeal dismissed.

Solicitors for the claimant, *Cooper & Sons.*

Solicitors for the execution creditors, *Montagu, Scott, & Baker.*

From Q. B. Div. Dec. 19.

HIRE PURCHASE FURNISHING CO. *v.* RICHENS. (*a.*)

Company—Voluntary winding up—Subsequent contract —"For the beneficial winding up of the company"—Onus of proof—Companies Act, 1862 (25 & 26 *Vict.* c. 89), *s.* 131.

In an action by a company in voluntary liquidation upon a contract made after the commencement of the winding up, and which, but for the winding up, would have been in the ordinary course of its business, the onus *of proving that the contract was not for the beneficial winding up of the company within section* 131 *of the Companies Act*, 1862, *lies upon the defendant.*

Appeal from the judgment of Grantham, J.

The action was for arrears of instalments alleged to be due under a hiring agreement. The defence was that the plaintiff company were being voluntarily wound up and that the agreement was entered into after the commencement of the winding up, and was void under section 131 of the Companies Act, 1862, as not being for the beneficial winding up of the company.

At the trial no evidence was given, but the following admissions were made:—The plaintiffs were a company incorporated for the purpose of selling furniture on the hire purchase system—that is, the price of the furniture was to be paid by instalments, and upon payment of all the instalments the furniture was to become the property of the hirer. On the 5th of February, 1885, a resolution was passed to wind up the company voluntarily, and this resolution was duly confirmed and registered. On the 19th of March, 1885, the agreement in question was entered into, by which the company sold certain furniture to the defendant upon the hire purchase system, to be paid for by monthly instalments. Some of the instalments being in arrear, the company brought this action. Grantham, J., gave judgment for the plaintiff upon the authority of *Bateman & Co.* v. *Ball*, 56 L. J. Q. B. 291, 35 W. R. Dig. 43.

The defendant appealed.

Companies Act, 1862, s. 131.—"Whenever a company is wound up voluntarily, the company shall from the date of the commencement of such winding up cease to carry on its business, except in so far as may be required for the beneficial winding up thereof, and all transfers of shares, except transfers made to or with the sanction of the liquidators, or alteration in the *status* of the members of the company, taking place after the commencement of such winding up, shall be void, but its corporate state and all its corporate powers shall, notwithstanding it is otherwise provided for by its regulations, continue until the affairs of the company are wound up."

W. E. Hume Williams (*B. F. Williams, Q.C.*, with him), for the defendants.—This contract is void, as it was not incidental to the beneficial winding up of the company, and so no action can be brought upon it. Section 131 is imperative. *Bateman & Co.* v. *Ball*, 56 L. J. Q. B. 291, 35 W. R. Dig. 43, ought to be overruled.

He referred to *Ince Hall Rolling Mills Co.* v. *Douglas Forge Co.*, 30 W. R. 442, 8 Q. B. D. 179; *British Wagon Co.* v. *Lea*, 28 W. R. 349, 5 Q. B. D. 149; *Drew's case*, 15 W. R. 1057; *In re Wreck Recovery and Salvage Co.*, 29 W. R. 266, 15 Ch. D. 353; and section 95 of the Companies Act, 1862.

R. O. B. Lane, for the plaintiffs.—The *onus* lies upon the defendant, who seeks to avoid the contract to prove his case. The plaintiff relies upon a contract *primâ facie* valid; the defendant must show by evidence that it is invalid. Further, in any case this contract is not void under section 131, and the decision in *Bateman & Co.* v. *Ball* is right.

W. E. Hume Williams replied.

Cur. adv. vult.

Dec. 19.—BOWEN, L.J.—The plaintiff company are in voluntary liquidation, and after the winding up had commenced they entered into a contract with the defendant for the sale of furniture to him on the hire purchase system. The defendant kept the furniture for a considerable time, when instalments fell into arrear, and the plaintiffs now sue for those arrears. The defence is that the company, being in liquidation, had no power to enter into this agreement, by reason of section 131 of the Companies Act, 1862, and so could not recover the

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

arrears due under the agreement. No evidence was given as to the particular circumstances under which the hiring agreement was entered into. The plaintiffs relied upon the case of *Bateman & Co.* v. *Ball*, where Pollock, B., held that the section did not affect persons outside the company who had entered into a contract with the company. It is not, under the circumstances, necessary to decide whether the view of Pollock, B., is correct or not. We certainly express no opinion that that view is wrong. Assuming, however, that the section prohibits the contract, the question remains, upon whom the *onus* of proof lies as to the nature of the contract. It was contended for the defendant that the *onus* lay on the plaintiffs to show that the contract was for the beneficial winding up of the company. I am of opinion, however, that the *onus* rests on the defendant to show that the agreement is prohibited by the section. The broad principle recognized by courts of law is that when a plaintiff proves a *primâ facie* case, and where the facts proved are equally consistent with the transaction being legal or illegal, it lies upon the defendant, who seeks to upset the transaction, to prove that it is illegal. The law presumes against illegality. For this principle it is only necessary to refer to Best on Evidence, 7th ed., p. 327, and Best on Presumptions, p. 64 *et seq.* A case in point is *Rodwell* v. *Redge*, 1 C. & P. 220, which was an action against a performer for not performing in a licensed theatre. The point was taken for the defence that the licence of the theatre was not proved; but Abbott, C.J., said that he would presume the licence from the fact that the performances went on. There is a very good note to the report of that case, in which the reporter says that if the theatre was not licensed that was matter of defence to excuse the breach of the agreement, and it lay on the defendant to show it as his defence; and he goes on to give a common sense and practical illustration: "You might just as well, in an action for not accepting goods sold, which were foreign produce (such as brandies and the like), call on the plaintiff to prove that the brandies had paid the custom house duties; for that, if they had not paid the duties, the contract for the sale of them was illegal." The truth is that those who rely upon illegality must prove it. The objection in the present case, it seems to me, if it does not amount to illegality, amounts to nothing; it strikes at the root of the contract. The law seems to me to be clear, and this appeal must be dismissed. I am authorized by the Master of the Rolls to say that he entirely concurs in the above view.

Fry, L.J.—I entirely agree. An analogous illustration of the general rule of law upon which we rely for our decision may be found in *The Shrewsbury and Birmingham Railway Co.* v. *North-Western Railway Co.*, 6 H. L. Cas. 113, where the Lord Chancellor says at p. 135:—"When the Legislature constitutes a corporation it gives to that body *primâ facie* an absolute right of contracting. But this *primâ facie* right does not exist in any case where the contract is one which, from the nature and object of incorporation, the corporate body is expressly or impliedly prohibited from making; such a contract is said to be *ultrà vires*." The contract in the case before us is colourless in itself—that is, it does not show on its face whether it was entered into for the beneficial winding up of the company or not. That being so, it lay upon the defendant to prove that it was not, and not having done so they must fail.

Appeal dismissed.

Solicitors for the plaintiffs, *Law & Worssam.*

Solicitor for the defendant, *R. R. Newson.*

High Court of Justice.

Chan. Div. } Jan. 14.
Chitty, J. }

In re Silva's Trusts. (*a.*)

Lunatic not so found by inquisition—Jurisdiction of court—Fund in court—Provision for lunatic—Trustee Relief Act, 1847 (10 & 11 *Vict. c.* 96).

Where the share in a fund to which a person of unsound mind had become absolutely entitled was paid into court in the Chancery Division by the trustees of the fund, the court, upon the application of such person by his next friend, under the circumstances of the case, and without requiring the appointment in Lunacy of a guardian directed the entire income to be paid to the wife of such person during his life, or until further order, for his maintenance, comfort, and support.

This was a petition for the payment out of court of the income of a share in a fund to which Emanuel John Silva, a person of unsound mind not so found by inquisition, had become entitled in possession upon the death of his parents, both of whom died in July, 1885.

The petition was presented by E. J. Silva by his next friend, Charles Henry Silva, a brother, and asked that the income of the fund might be paid to the wife of E. J. Silva for his maintenance and support.

The petition stated the facts mentioned in the affidavit made by the trustees of the fund upon payment into court of E. J. Silva's share. It appeared from such statement that E. J. Silva was married to his wife, Ada Mary Silva, on the 14th of November, 1870; that there had not been any issue of such marriage; and that for many years past E. J. Silva had been strange in his manner, and for several years prior to the deaths of his parents was entirely supported by them; that the moneys supplied by them for his support were paid by them to his wife, because any moneys of which E. J. Silva might become possessed would be spent in drink or got rid of in some useless way; that in consequence of the mental condition and behaviour of E. J. Silva he was, in the year 1883, taken to a lunatic asylum, where he remained for seven months; that towards the end of 1884 his mental condition and behaviour again necessitated his removal to an asylum, and that he was confined accordingly until the beginning of 1885; that from the month of September, 1885, the mental condition and behaviour of E. J. Silva again showed increasing unsoundness of mind and incapacity to manage himself or his affairs, and that early in 1886 proceedings were commenced in lunacy for an inquiry as to his mental state, and to have provision made accordingly for the management of his property; that such proceedings were supported by the affidavits of the trustees of the fund, and of C. H. Silva, and of a medical practitioner; that inasmuch as the rules of the Lunacy Office require such an application to be supported by the affidavits of two medical practitioners, the application was delayed for the purpose of obtaining the necessary further affidavit; that since then E. J. Silva, owing to the care taken of him by his wife, had conducted himself so quietly that the affidavit of a second medical practitioner founded on a personal interview could not be obtained; that since the death of E. J. Silva's father the trustees of the fund had from time to time paid various sums of money on account of the share of E. J. Silva in the trust funds, and such sums, when they came to the hands of E. J. Silva's wife, had been duly applied by her for his and her own maintenance and support; that on e

(*a.*) Reported by A. D. Maclaren, Esq., Barrister-at-Law.

occasion when such sums as aforesaid came to the hands of E. J. Silva they had been applied by him in such a manner as to show that he was in no way responsible for his actions; that E. J. Silva was, in the opinion of the trustees of the fund, by reason of his mental condition, quite incompetent to understand any formal payment or transfer of money or securities to him, or the circumstances under which his share in the trust fund had become payable and transferable, or the accounts, calculations, and manner in which such share had been arrived at, or to give a valid receipt and discharge for the same.

The petition further stated that E. J. Silva's wife had continued to exercise her care and control of him with the beneficial effect of preventing the recurrence of such a state of mind as would necessitate his removal to an asylum; that he was a person of unsound mind and unable to manage himself or his affairs, but that so long as his mental condition continued as at present it was not intended, nor was it necessary, that any proceedings in lunacy should be taken; that it would be for E. J. Silva's benefit that no part of his share in the trust fund or the income thereof should be paid into his own hand, but that proper provision should be made by the court; that A. M. Silva, the wife of E. J. Silva, was a fit person for the court to pay the income to and to act as the court thought fit; that the entire annual income of E. J. Silva's share in the trust fund amounted to £212 or thereabout, and that not less than the whole income should be applied for his maintenance and support.

G. Brooke Freeman, for the petitioner, referred to *Vane* v. *Vane*, 24 W. R. 453; *In re Bligh*, 27 W. R. 876, 12 Ch. D. 364.

Jeafreson, for the respondents, the trustees of the fund.

Chitty, J.—I do not think it necessary that any person should be appointed as guardian. It is sufficient that I should direct the entire annual income to be paid to Mrs. Silva during the life of her husband, or until further order; and upon her undertaking to apply the income for his maintenance, comfort, and support I make that order.

Solicitors, *Haines & Clutton*.

Q. B. Div. (Mathew and Charles, JJ.) Dec. 12.

Charleston v. London Tramways Co. (*a*.)

Master and servant—Liability of tramway company for acts of their servants—Scope of employment—Implied authority—Passenger charged by conductor with uttering counterfeit coin—False imprisonment—Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *ss.* 51, 72.

Section 52 of the Tramways Act, 1870, *which enacts that "it shall be lawful for any officer or servant of the promoters or lessees of any tramway" to detain any person defrauding the company of his fare, must be construed as limited to any officer or servant appointed for that purpose.*

A tramway company gave to their conductors printed instructions, in which it was ordered that, except in cases of assault, conductors were not to give passengers into custody without the authority of an inspector or timekeeper. The conductor of a car in which the plaintiff was a passenger detained the plaintiff and gave her into custody on a charge of passing bad money.

Held, in an action for false imprisonment against the company, that the defendants were not liable.

Motion by the defendants for a new trial or for judgment.

(a.) Reported by F. G. Rucker, Esq., Barrister-at-Law.

The action was for false imprisonment. The plaintiff was a passenger in one of the defendant's tram-cars. On arriving at her destination she gave the conductor a half-crown, and received from him two shillings and fourpence, the fare being twopence. When she was about to leave the car the conductor stopped her, and told her she could not leave as she had given him a bad half-crown. He detained her in the car until they arrived at a police-station, when he gave her into custody on a charge of uttering counterfeit coin. The police pronounced the half-crown to be a good one, and the plaintiff was released. The action was tried by Stephen, J., with a special jury, who gave a verdict for the plaintiff for £100.

Kemp, Q.C., and *MacClymont*, for the defendants.—We move on the ground that there was no evidence to go to the jury of the defendants' liability for the acts of their conductor, and that the judge ought to have directed the jury that the conductor was not acting within the scope of his employment, and that the defendants were not liable, as the conductor acted in contravention of the defendants' express orders and to protect his own interests. The printed "instructions to conductors in case of disputes with passengers" show that what the conductor did was not within the scope of his employment. Rule 11 is as follows:—"Passenger offering bad money in payment of fare.—Coin must be kept quite apart from other money, and in the presence of passenger tested. If bad, and passenger refuses good coin, having other money in his possession, he may be charged under the authority of an Inspector or Timekeeper." Rule 16 is:—"Except in cases of assault, conductors are not to give passengers into custody without the authority of an Inspector or Timekeeper." Neither had the conductor any implied authority to act as he did: *Allen* v. *London and South-Western Railway Co.*, 19 W. R. 127, L. R. 6 Q. B. 65; *Edwards* v. *London and North-Western Railway Co.*, 18 W. R. 834, L. R. 5 C. P. 445; *Bank of New South Wales* v. *Owston*, 4 App. Cas. 270, 27 W. R. Dig. 156; *Poulton* v. *London and South-Western Railway Co.*, 16 W. R. 309, L. R. 2 Q. B. 534. The fraud, if there had been any, would have been on the conductor. He would have had to pay the company twopence, and he would have lost the two and fourpence.

Murphy, Q.C. (*Cooper Wylde* with him), for the plaintiff.—The company cannot relieve themselves of responsibility by written instructions of which the public know nothing, any more than they could by general verbal instructions: *Limpus* v. *London General Omnibus Co.*, 11 W. R. 149, 1 H. & C. 526. The conductor had an apparent authority to act as he did, and he acted in the interests of the company: *Bayley* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, L. R. 8 C. P. 148, 21 W. R. Dig. 148; *Seymour* v. *Greenwood*, 7 H. & N. 355, 10 W. R. Dig. 55. It was a case where prompt action was necessary, and no one but the conductor was near who could act: *Goff* v. *Great Northern Railway Co.*, 3 E. & E. 672, 9 W. R. C. L. Dig. 36. The decision in *Poulton's case* went on the ground that the company itself had no power to do the act. Here clearly the company could do the act themselves. Further, the conductor was acting within the scope of his authority under section 52 of the Tramways Act, 1870. Section 51 of that Act imposes a penalty on any person travelling on a tramway who avoids payment of his fare, or commits other similar offences. Then section 52 enacts: "It shall be lawful for any officer or servant of the promoters or lessees of any tramway, and all persons called by him to his assistance, to seize and detain any person discovered either in or after committing or attempting to commit any such offence as in the next preceding section is mentioned, and whose name or residence is unknown to such officer or servant,

until such person can be conveniently taken before a justice or until he be otherwise discharged by due course of law."

Kemp, Q.C., in reply.—The sections of the Tramways Act do not apply. They deal only with cases of refusing or avoiding payment. The plaintiff here was charged with quite a different offence—viz., that of passing bad coin.

MATHEW, J.—This is a motion for a new trial or for judgment on the ground that there was no evidence of any authority on the part of the conductor to do what he did. Now, if we look at the rules of the company, as shown in the printed instructions given to their conductors, it is quite plain that it is not within the course of a conductor's employment to give a person into custody on such a charge as that of passing bad money, except under the authority of an inspector or timekeeper. If the rules were all, the jury ought to have been directed that there was no evidence of authority. But it is said that these instructions have a character of secrecy, and do not relieve the company of their responsibility, and, further, that the evidence shows that the plaintiff was being detained for non-payment of her fare, and that the conductor had authority so to detain her under sections 51 and 52 of the Tramways Act, 1870. [His lordship read the sections.] But it is clear that the latter section must be read subject to some limitation. I think it ought to be construed as meaning any officer or servant appointed for that purpose. The section, therefore, does not help the plaintiff, and we must give judgment for the defendants.

CHARLES, J.—The question is whether this was within the scope of the conductor's employment. If it was, then Mr. Murphy rightly says that secret instructions will not avail the defendants. But the initial question is whether it was within the scope of employment. I agree that section 52 must be construed as limited to any officer or servant authorized by the company to do that particular act. Thus the only evidence as to scope of employment is the rules. And it is clear that they do not authorize a conductor to arrest persons who refuse to pay, or who pass bad money. This case differs from *Poulton's case*. Here I will assume that the company would have had power to arrest. But that does not touch the fact that it was beyond the scope of the conductor's employment.

Judgment for the defendants.

Solicitors for the plaintiff, *Johnson, Budd, & Johnson.*

Solicitors for the defendants, *J. O. Jacobs.*

Prob. Div. & Adm. Div. Probate. } Dec. 1.

WOODHOUSE *v.* BALFOUR. (*a.*)

Probate—Holograph codicil—Signature of witnesses on opposite preceding page—Witnesses unable to remember transaction—Grant.

A holograph codicil was written on the third side of a sheet of foolscap, of which the first contained the will, drawn up by a solicitor and duly executed. The attestation clause to the codicil was in due form, but reached to the bottom of the page, the signatures of the witnesses to it being opposite to it on the second page, and preceded by the word "Witness." The witnesses, who were clerks in the testator's employment, and in the habit of witnessing papers for the testator, admitted their signatures, but had no recollection of the transaction. The residuary legatee was one of the executors.

The court granted probate to the executors of the codicil as being duly executed.

Application for grant of probate of will and codicil of E. S. Woodhouse to the executors named in the will.

The will was perfectly regular and not in dispute; it had been drawn up by the testator's solicitor, and was written on and occupied the whole of the first side of a sheet of foolscap. The codicil was written on the third side, entirely in the testator's handwriting. The attestation clause was in due form, and reached to the end of the page, leaving no space for any writing below it; the testator had signed his name opposite to this at the foot of the codicil. The signatures of the two attesting witnesses were on the second page, opposite to the attestation clause, and were preceded by the word "witness." This was the only writing on that page. One of the executors was the widow of the testator, and she was also residuary legatee. The next of kin had appeared in the action, but offered no opposition. The attesting witnesses, who were clerks in the testator's employment and frequently witnessed papers for him, were called and admitted their signatures, but had no recollection of having written them or of having seen the will or codicil.

Deane, for the executors, cited *Blake* v. *Blake*, 30 W. R. 505, 7 P. D. 102, and *Wright* v. *Sanderson*, 31 W. R. 560, 9 P. D. 149.

HANNEN, P.—The document of which probate is asked is a holograph codicil. The testator's signature is at the end with a regular attestation clause, so that it is plain that the testator knew the requirements of the law as to due execution and attestation. There is no room for the signatures of the witnesses on that page, and, as might be expected, their signatures are on the opposite page, preceded by the word "witness." It is a familiar principle that all things are presumed to have been rightly done unless there is reasonable ground for doubt. Why should I doubt here? This is not the case which frequently occurs, where alleged witnesses recollect the transaction, but say that, as far as their memory goes, they did not see the testator sign. These two persons were in the habit of witnessing the deceased's signature, and do not recollect this particular transaction. That is quite consistent with the thing having been properly done. It was not even necessary that they should be told what they were witnessing, and, notwithstanding their defective memory, I think they did witness this codicil, and I shall therefore admit it to probate.

Grant as prayed.

Solicitors, *Le Brasseur & Oakley.*

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

House of Lords.

From C. A. (England). May 12, 13; July 14.

Hamilton, Fraser, & Co. v. Pandorf & Co. (a.)

Shipping—Bill of lading—Charter-party—"Dangers and accidents of the seas"—Sea water let in by rats.

Where a cargo was damaged by sea water which entered through a hole made by rats,

Held, that this was a danger or accident of the seas within the exception in the charter-party and bills of lading.

Decision of the Court of Appeal (35 *W. R.* 70, 17 *Q. B. D.* 670) *reversed.*

This was an appeal from a decision of the Court of Appeal (Lord Esher, M.R., and Bowen and Fry, L.JJ.), reversing a decision of Lopes, L.J., sitting without a jury (reported 34 W. R. 488, 16 Q. B. D. 629).

The respondents shipped rice on a vessel of the appellants' for carriage from Akyab to Bremen. The exceptions in the charter-party and bills of lading material to the present case were "all and every other dangers and accidents of the seas of whatever nature and kind soever."

In the course of the voyage rats gnawed a hole in a pipe which brought water from the sea to a bath, and the sea water leaked into the ship and damaged the rice.

It was assumed, for the purpose of this appeal, that there was no negligence on the part of the shipowners or the crew.

Lopes, L.J., held that the damage was covered by the words of the exceptions. The Court of Appeal reversed this decision, and the appellants appealed to the House of Lords.

May 12, 13.—*Bigham, Q.C.*, and *J. G. Barnes*, for the appellants.—The damage was caused by an accident of the sea; it occurred by the incursion of the sea, and no one was negligent. Perils of the seas means the same thing in policies as in bills of lading, except that in the case of a policy the underwriter undertakes to indemnify against sea peril, and cannot set up negligence of shipowner as a defence, whereas in bills of lading the carrier undertakes to carry with reasonable care—*i.e.*, without negligence.

They referred to *Dale* v. *Hall*, 1 Wils. 281; *Pickering* v. *Barkley*, 2 Roll. Abr. 248; *Garston Sailing Ship Co.* v. *Hickie, Borman, & Co.*, 35 W. R. 33, 18 Q. B. D. 17; *Woodley* v. *Michell*, 31 W. R. 651, 11 Q. B. D. 47; *Reid* v. *Parr*, 1 Esp. 444; *Hunter* v. *Potts*, 4 Camp. 203; *Hazard's Administrator* v. *New England Marine Insurance Co.*, 8 Peters' Rep., U.S., 557; *The Reeside*, 2 Sumner, U.S., 567; *Laveroni* v. *Drury*, 1 W. R. 55, 8 Ex. 166; *Kay* v. *Wheeler*, 15 W. R. 495, L. R. 2 C. P. 302: *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*, 31 W. R. 445, 10 Q. B. D. 521; *Dixon* v. *Sadler*, 5 M. & W. 405; *Busk* v. *Royal Exchange Assurance Co.*, 2 B. & Ald. 73; *Laurie* v. *Douglas*, 15 M. & W. 746; *Grill* v. *General Iron Screw Collier Co.*, 14 W. R. 893, L. R. 1 C. P. 600; s.c., on app., 16 W. R. 796, L. R. 3 C. P. 476; *Buller* v. *Fisher*, 3 Esp. 67; *Garrigues* v. *Coxe*, 1 Binney, Penns. Rep. 592; Carver on Carriage, p. 92; 1 Parsons on Shipping, ed. 1869, p. 258; 1 Parsons on Insurance, ed. 1868, p. 545.

Sir C. Russell, Q.C., and *Joseph Walton*, for the respondents.—There must be something extraordinary to constitute a peril of the sea. Damage by the incursion of sea water without negligence, is not necessarily a peril of the sea.

(a.) Reported by C. G. Napier Trollope, Esq., Barrister-at-Law.

They cited *Merchants' Trading Co.* v. *Universal Marine Insurance Co.*, 2 Asp. Mar. Cas. N. S. 431; *The Chasca*, L. R. 4 A. & E. 446, 23 W. R. Dig. 212; *Magnus* v. *Buttemer*, 11 C. B. 876; *Cullen* v. *Butler*, 5 M. & S. 461; *Taylor* v. *Curtis*, 6 Taunt. 608; *Fletcher* v. *Inglis*, 2 B. & Ald. 315; 1 Phillips on Insurance, p. 678.

Bigham, Q.C., replied.

July 14.—Lord Halsbury, C.—In this case the admissions made at the trial reduce the question to this, whether in a seaworthy ship the gnawing by rats of some part of the ship so as to cause sea water to come in and cause damage is a danger and accident of the sea. That this happened without any negligence of the shipowner is material in determining the rights of the parties in this particular case, but, in my judgment, has no relevancy to the question whether the facts, as I have stated them, constituted a danger or accident of the seas.

With all respect to Bowen and Fry, L.JJ., they have not accepted the hypothesis of fact which the admissions at the trial render essential. It is admitted that the ship was seaworthy, and that there was no negligence, and these admissions are absolutely inconsistent with the reasoning of the Lords Justices, which suggests important difficulties in deciding those questions of fact to which I have referred, but seems beside the question if these facts are proved or admitted, as I think it is clear they were.

The other question with which the Master of the Rolls dealt is one which must be determined upon the ordinary rules of construction, whatever the document is the meaning of which is under debate; and it must be admitted that words may receive a limited meaning by reason of the other words with which they are associated, or by reason of the subject-matter with which they deal, or by reason of the mode in which they are commonly used.

It is clear that the parties do not mean, by such an instrument as we are construing, to except all accidents of any kind or description whatsoever which may happen during the particular voyage which both parties are looking forward to.

Some effect must be given to the words "perils of the sea." A rat eating a cheese in the hold of a vessel is not a peril of the sea; the sea, or the vessel being on the sea, has nothing to do with the destruction of the cheese.

This was the decision of the Court of Exchequer in *Laveroni* v. *Drury*. In the *Law Journal Report* of that case Pollock, C.B., and Alderson, B., distinctly pointed out, after the judgment of the court had been given, that the decision at which the court had arrived did not touch the question of whether the sea being let in by a hole made by a rat was an accident or danger of the sea. One of the dangers which both parties to the contract would have in their mind would, I think, be the possibility of the water from the sea upon which the vessel was to sail in accomplishing her voyage getting into the vessel, it would not necessarily be by a storm, the parties have not so limited the language of their contract; it might be striking on a rock, or by excessive heat, so as to open some of the upper timbers; these and many more contingencies that might be suggested would let the sea in, but what the parties, I think, contemplated was that any accident (not wear and tear, or natural decay) which should do damage by letting the sea into the vessel, should be one of the things contemplated by the contract.

A subtle analysis of all the events which lead up to, and in that sense cause a thing, may doubtless remove the first link in the chain so far that neither the law nor the ordinary business of mankind can permit it to be

treated as a cause affecting the legal right of the parties to a suit. In this case the existence of the rats on board, their thirst, the hardness of their teeth, the law of gravitation, which caused the water to descend upon the rice, the ship being afloat, the pipe being lead, and its capacity of being gnawed, each of these may be represented as the cause of the water entering, but I do not assent to the view that this contract can have a different meaning attached to it according as you regard each step in the chain of events as the origin out of which the damage ultimately arises.

In the class of contract where the shipowner's negligence or misconduct prevents perils of the sea being relied upon, it is not that perils of the sea are different, or that the words ought to have a different meaning attached to them, but because in those cases an additional term exists in the contract, which makes the negligence of the shipowner, or of those for whom he is responsible, a material element; but it is also necessary to give effect to the words dangers and accidents of the seas.

Now cases have been brought to your lordships' attention in which the decision has turned, not, I think, upon the question of whether it was a sea peril or accident, but whether it was an accident at all. I think the idea of something fortuitous and unexpected is involved in both words, "peril" or "accident"; you could not speak of the danger of a ship's decay; you would know that it must decay, and the destruction of the ship's bottom by vermin is assumed to be one of the natural and certain effects of an unprotected wooden vessel sailing through certain seas.

One ought, if it is possible, to give effect to all the words that the parties have used to express what this bargain is, and I think in this case it was a danger, accident, or peril, in the contemplation of both parties, that the sea might get in and spoil the rice. I cannot think it was less such a peril or accident because the hole through which the sea came was made by vermin from within the vessel, and not by a sword-fish from without—the sea water did get in.

I am therefore of opinion that the judgment should be reversed, and I move your lordships accordingly.

Lord Watson.—The respondents sue for damages in respect of injury sustained, during transit, by a cargo of rice, which was carried in the appellants' steamship *Inchrhona* from Akyab to Bremen. The appellants plead, in defence, that the injury was occasioned by a danger or accident of the sea within the meaning of the exception in the charter-party and bills of lading, which are in the usual terms. In point of fact, the rice was damaged by sea water, which found its way into the hold of *The Inchrhona* through a hole, gnawed by a rat, in a leaden pipe connected with the bath-room of the vessel.

If the respondents were preferring a claim under a contract of marine insurance, expressed in ordinary terms, I should be clearly of opinion that they were entitled to recover, on the ground that their loss was occasioned by a peril of the sea within the meaning of the contract. When a cargo of rice is directly injured by rats, or by the crew of the vessel, the sea has no share in producing the damage, which, in that case, is wholly due to a risk not peculiar to the sea, but incidental to the keeping of that class of goods, whether on shore or on board of a voyaging ship. But in the case where rats make a hole, or where one of the crew leaves a port hole open, through which the sea enters and injures the cargo, the sea is the immediate cause of mischief, and it would afford no answer to the claim of the insured to say that, had ordinary precaution been taken to keep down vermin, or had careful hands been employed, the sea would not have been admitted, and there would have been no consequent damage.

Your lordships have now disapproved of the novel doctrine that, in a contract of sea carriage, a meaning must be attached to the expression "dangers and accidents of the seas" different from that which it bears in a contract insuring cargo against sea risks; that, in the case of a charter-party or bill of lading, the court ought to look to what has been termed the remote, as distinguished from the proximate, cause of damage, whereas, in the case of a policy, the proximate cause can alone be regarded. The expression has precisely the same significance in both cases; but there is this difference between them, that when a shipowner, who is bound, by the implied terms of his contract, to carry with ordinary care, claims the benefit of the exception, the court will, if necessary, go behind the proximate cause of damage, for the purpose of ascertaining whether that cause was brought into operation by the negligent act or default of the shipowner or of those for whom he is responsible. As Lord Blackburn said in *Steel* v. *State Line Steamship Co.*, 3 App. Cas. 72, 26 W. R. Dig. 216:—"Although the things perished by a peril of the sea, still, inasmuch as it was the negligence of the shipowner and his servants that led to it, they cannot avail themselves of the exception."

I am of opinion that the appellants must prevail, because it has not been shown that the peril which was the immediate and efficient cause of damage owed its existence to their negligence. In the course of the trial before Lopes, L.J., it does appear to have been, at one time, suggested that the appellants' servants failed to exercise due diligence in extirpating the rats, and also that the bath-room pipe ought not to have been of lead, but of some other material which a rat could not or would not gnaw. Neither of these points was submitted to the jury, who negatived the only charge of negligence which was ultimately insisted in by the respondents. I accordingly concur in the judgment which has been moved.

Lord Bramwell.—I am of opinion that this judgment must be reversed. This is the third case in which this House has had to consider whether a peril of the sea or other peril within the general words was shown. The arguments and discussions in all three have been very useful in helping to a conclusion. As I have said elsewhere, I think the definition of Lopes, L.J., very good. "It is a sea damage occurring at sea, and nobody's fault." What is the "peril"? It is that the ship or goods will be lost or damaged; but it must be "of the sea." Else would not be a peril of the sea; so loss or damage from it would not be insured against by the general words. So of lightning. In the present case the sea has damaged the goods. That it might do so was a peril that the ship encountered. It is true that rats made the hole through which the water got in, and if the question were whether rats making a hole was a peril of the sea, I should say certainly not. If we could suppose that no water got in, but that the assured sued the underwriter for the damage done to the pipe, I should say clearly that he could not recover. But I should equally say that the underwriters on goods would be liable for the damage shown in this case. Then I am of opinion that "perils of the seas" is a phrase having the same meaning in bills of lading and charter-parties as in policies of insurance. I repeat my illustration, if underwriters paid this loss as through a peril of the sea, how would they, in the name of the assured, claim from the shipowner, because it was not a peril of the sea. I do not go through the cases; I say there is none opposed to this opinion. The doubt or hesitation expressed in the case, *Cullen* v. *Butler*, where the ship was sunk by being fired into is certainly a doubt the other way, but only a doubt.

An attempt was made to shew that a peril of the

sea meant a peril of what I feel inclined to call the sea's behaviour or ill-condition. But that is met by the argument that if so, striking on a sunken rock on a calm day, or against an iceberg, and consequent foundering, is not a peril of the sea or its consequence.

No question of negligence exists in this case. The damage was caused by the sea in the course of navigation with no default in anyone. I am, therefore, of opinion that the damage was caused by peril of the sea within the meaning of the bill of lading, that Lopes, L.J., was right, and that the judgment must be reversed.

Lord Fitzgerald.—The damage to a portion of the cargo of rice carried by the defendants' ship was not occasioned either remotely or immediately by any negligence of the defendants as alleged in the statement of claim; but they may, nevertheless, be liable; and the real question is whether the defendants have established that it arose from a peril of the sea coming within the exception contained in the charter-party and in the bill of lading. I agree with Lord Watson that the exception "peril of the sea" has the same meaning whether it occurs in a marine policy or in a charter-party or bill of lading, and is to be so interpreted; but that when the action is on the contract of carriage you may look behind the proximate or immediate cause for the purpose of ascertaining whether the remote cause may not have been the negligence of the carrier; and, indeed, the carrier is usually under the necessity of establishing that no negligence of his had led to the calamity. Thus, for instance, if a ship is cast on the rocks by force of the winds or sea, that is a loss by a peril of the sea within the exception; but in an action against the carrier it would be open to consider whether the ship being placed in that position did not originate in negligent navigation.

At the close of the argument I was slightly inclined to the opinion that the loss in question might be more accurately described as arising from a peril of the ship than caused by a peril of the sea; but, on consideration of the very careful and elaborate judgments in the Court of Appeal and the authorities referred to, and looking at the reason of the thing, I have come to a conclusion in accord with that announced by my noble and learned friends, adopting the reasons and the decision of Lopes, L.J.

The accident was fortuitous, unforeseen, and actually unknown until the ship reached her destination and commenced unloading. I do not, however, mean to suggest that to constitute a peril of the sea the accident or calamity should have been of an unforeseen character. The remote cause was, in a certain sense, the action of the rats on the lead pipe; but the immediate cause of the damage was the irruption of sea water from time to time through the injured pipe caused by the rolling of the ship as she proceeded on her voyage.

There having been no negligence on the part of the defendants, I am of opinion that they have brought the case within the exception, and are protected.

Lord Herschell.—I have so recently expressed, in the case of *Wilson & Co.* v. *The Owners of Cargo* per *The Xantho*, *ante*, p. 353, 11 App. Cas. 503, my views upon the interpretation to be put upon the words "dangers and accidents of the seas," occurring in a bill of lading, that I need trouble your lordships with but few observations in this case.

I take the facts to be that the damage occurred by the sea entering through a leak caused by rats, without any neglect or default on the part of the shipowner or those for whom he was responsible, and that this was not an ordinary incident of the voyage which he was bound to anticipate. In saying so I am differing from the ground upon which two of the learned judges in the Court of Appeal, Bowen and Fry, L.JJ., based their judgment. But when those learned judges say that "it was consistent with the findings that the mischief done to the pipe, and the incursion of sea water which followed, would never have happened but for either a defect in the condition of the ship or some want of prudence in the shipowner." I think they overlook the course which the case took at the trial. It was suggested during the trial by the learned counsel for the plaintiffs that due care had not been taken to exclude or exterminate the rats, and that if the pipe had been made of some other material the accident would not have happened. But I think these points were distinctly and unequivocally abandoned by him. If intended to be insisted upon, they raised questions upon which the opinion of the jury ought to have been taken, and, with the assent of the plaintiffs' counsel, the only questions put were upon a totally different point. The Master of the Rolls rested his judgment altogether upon another ground. He considered that the rats were the real cause of the damage, and that it was therefore not due to a danger or accident of the seas.

I quite concur with the view expressed in *Laveroni* v. *Drury*, that injury done to a vessel or its cargo by rats is not damage by perils of the sea. But in that very case Pollock, C.B., said:—"If, indeed, the rats had made a hole in the ship, through which water came and damaged the cargo, that might very likely be a case of sea damage." The Master of the Rolls says that the distinction is a very fine one between damage done by rats, which, it may be, so eat into the timbers of a ship as to render it unfit to proceed to sea, and the loss of the vessel owing to the incursion of water when its sides have been completely penetrated by the same cause. I own I think the distinction a substantial one, and it seems to me obvious that Pollock, C.B., shared this view.

It has been held in the United States, in the case of *Garrigues* v. *Coxe*, that a leak occasioned by the eating of rats, without negligence on the part of the shipowner, was a risk covered in a marine policy by the words "perils of the seas." Taking the facts of this case to be as I have stated them, I entertain no doubt that the loss was one which would in this country be recoverable under a marine policy as due to a peril of the sea. It arose directly from the action of the sea. It was not due to wear and tear, nor to the operation of any cause ordinarily incidental to the voyage, and, therefore, to be anticipated. And, inasmuch as it was not the result of any act or default on the part of the shipowner or his crew, I think, for the reasons I have given in my opinion in the case already alluded to, that it is within the exception in the bill of lading. I accordingly concur in the motion which has been made.

Lord Macnaghten.—I agree. The goods which were carried under the bill of lading were damaged during the voyage by the incursion of sea water. The water came in through a hole gnawed by rats in a pipe connecting the bath-room with the sea. At the trial various charges and suggestions were made of negligence on the part of the shipowner. But they were all either withdrawn or negatived by the jury. Under these circumstances it seems to me that the accident which caused the damage was one of the excepted perils or accidents, and there was no reason why the shipowner should not avail himself of the exception. It was an accidental and unforeseen incursion of the sea that could not have been guarded against by the exercise of reasonable care.

I agree, therefore, with the judgment of Lopes, L.J. I do not think the case could be summed up better than it was by him in the words which have already been quoted: "Sea damage occurring at sea and nobody's fault." I concur in the motion which has been made.

Order appealed from reversed; order of Lopes, L.J.,

restored; the respondents to pay to the appellants the costs in both courts below and of the appeal to this House; cause remitted to the Queen's Bench Division.

Solicitors for the appellants, *W. A. Crump & Son.*

Solicitors for the respondents, *Hollams, Son, & Coward.*

Court of Appeal.

From Chan. Div. Feb. 1, 8, 9.

In re MERSEY RAILWAY CO. (*a.*)

Railway company—Judgment creditor—Appointment of receiver of "undertaking"—Priorities—Railway Companies Act, 1867 (30 & 31 *Vict. c.* 127), *s.* 4.

A judgment creditor of a railway company who obtains a receivership order under section 4 of the Railway Companies Act, 1867, *does not thereby obtain any priority over other creditors.*

A receiver appointed under this section will not be discharged until every judgment creditor of the company—whose judgment has been recovered either in an action on a contract entered into after the passing of the Act (20th of August, 1867), *or in an action not on contract, brought after that date—has been satisfied; and therefore the section neither contemplates nor permits the making of successive receivership orders.*

Order of Kekewich, J., *discharged.*

Appeal from an order of Kekewich, J. (reported 32 SOLICITORS' JOURNAL, 166).

The question raised by this appeal was whether, on the true construction of section 4 of the Railway Companies Clauses Act, 1867 (30 & 31 Vict. c. 127), after a receivership order had been made against a railway company on the application of a judgment creditor, a subsequent judgment creditor could obtain a second receivership order without prejudice to the former order, and thereby obtain priority over other creditors.

Section 4 of the Act is as follows:—"The engines, tenders, carriages, . . . materials, and effects constituting the rolling stock and plant used or provided by a company for the purposes of traffic on their railway, or of their stations and workshops, shall not, after their railway or any part thereof is open for public traffic, be liable to be taken in execution, at law or in equity, at any time after the passing of this Act, when the judgment on which execution issues is recovered in an action on a contract entered into after the passing of this Act, or in an action not on a contract commenced after the passing of this Act; but the person who has recovered such judgment may obtain the appointment of a receiver, and, if necessary, of a manager of the undertaking of the company on application by petition . . .; and all money received by such receiver or manager shall, after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking, be applied and distributed under the direction of the court in payment of the debts of the company and otherwise according to the rights and priorities of the persons for the time being interested therein; and on payment of the amount due to every such judgment creditor as aforesaid the court may if it thinks fit discharge such receiver or such receiver and manager."

The following are the material facts:—

On December 14, 1887, Messrs. Waddell, the contractors of the company, recovered judgment against the Mersey Railway Co., and on December 20 obtained the usual receivership order under section 4 of the Act over the "undertaking" of the company. On December 24 the Corporation of Birkenhead, the present respondents, recovered judgment also against the company, and afterwards presented a petition for the appointment of a receiver.

On January 11, 1888, Kekewich, J., made a second receivership order on this petition, without prejudice to the former order, and directed that the receiver under the second order should do nothing under that order without the leave of the court.

The railway company appealed from this order of January 11.

Buckley, Q.C., and *Phipson Beale,* for the appellants.—Section 4 of the Railway Companies Act, 1867, does not give the court power to make successive orders appointing successive receivers. Before the Act the court had no power to appoint a receiver over the undertaking of a railway company: *Gardner* v. *London, Chatham, and Dover Railway,* 15 W. R. 325, L. R. 2 Ch. App. 201; the effect of section 4 is, that when once a receivership order has been made it operates as an administration order in favour of all creditors of the company: *In re Manchester and Milford Railway Co.,* 14 Ch. D. 645, 28 W. R. Dig. 190.

Graham Hastings, Q.C., and *E. Ford,* for the respondents.—The power of obtaining a receiver given by the statute is a remedy by way of substitution for the ordinary right of a judgment creditor to take the chattels of the debtor in execution, and therefore has the same incidents with regard to priorities as the remedy for which it has been substituted. The words of the section expressly contemplate priorities, and so also does the general order made under the Act, order 31, General Orders, January, 1868, L. R. 3 Ch. App., introduction p. 42. [BOWEN, L.J.—What construction do you put on the words "every such judgment creditor"?] They mean a judgment creditor who has obtained a receivership order under the section. The observations of Jessel, M.R., in the case of *In re Manchester and Milford Railway Co.* show that we are entitled to a receivership order, without prejudice, of course, to the former order.

Farwell, for the judgment creditors who had obtained the first receivership order, said they did not claim to have obtained any priority thereby.

Buckley Q.C., in reply—There is a radical difference between the nature of the possession of a sheriff who has seized goods under a *fi. fa.*, and the possession of a receiver appointed under this section; the possession of the sheriff is for the benefit only of the judgment creditor who has issued the *fi. fa.*, but the possession of the receiver is for the benefit, not merely of the petitioner but of all other creditors. The Act was passed on August 20, 1867, and section 4 only applies to judgment creditors who either sued on a contract entered into after that date or who, if not suing on a contract at all, had begun their action after that date; the words "payment of every such judgment creditor" therefore mean every judgment creditor who is bound by section 4, and who, under that section, could have obtained a receivership order.

COTTON, L.J.—This is an appeal by the railway company against an order of Kekewich, J., appointing a receiver on the application of a judgment creditor, and after a previous receivership order had been made.

It does not appear that this judgment creditor will get any benefit by this second receivership order, as the railway company is insolvent; at all events no benefit has been obtained by this judgment creditor.

Section 4 of 30 & 31 Vict. c. 127 provides that

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

rolling stock of a railway company cannot be taken in execution by a judgment creditor, and instead of the common law remedy of levying execution it substitutes, as it were, another remedy—viz. it enables a judgment creditor to obtain an order for the appointment of a receiver, and, if necessary, of a manager, of the "undertaking" of the company, that is, of the proceeds of the business carried on by the company.

In my opinion this section gives no priority to the particular judgment creditor who gets the receivership order by the fact of his obtaining the order, but gives a common benefit to all judgment creditors.

But it is said that priority must have been intended to be given by this section, on the ground that as it prevents the rolling stock being taken in execution, and as some other remedy is substituted therefor, the priority which would have been obtained by execution ought to be obtained also by the receivership order; but the substituted benefit is not with respect to the same thing as that which, were it not for the section, could have been taken in execution; what is given to the judgment creditor is something entirely and essentially different from that which he could have taken in execution.

It is well known that a *fi. fa.* does not bind the debtor's goods until it is executed. In my opinion this section does, though not in terms, in effect prevent a judgment creditor gaining priority, because it prevents these chattels being taken in execution.

Does the section give priority to those judgment creditors who with due diligence obtain a receivership order? [The Lord Justice read the section, and continued]. It is said the direction that the moneys received by the receiver shall be applied in payment of the debts of the company according to the rights and priorities of the persons for the time being interested therein, recognizes the fact that a judgment creditor gets priority by obtaining a receivership order; that is a mistake. It recognizes the fact that priorities may exist, *e.g.*, any existing prior mortgages, such as debentures, and provides that the receivership order should not disturb those. Then it is said that the words "on payment of the amount due to every such jugdment creditor as aforesaid the court may discharge . . . the receiver," showed that a priority should be given to such judgment creditor as had obtained a receivership order. In my opinion that is not the true construction of those words. They refer, not to a judgment creditor who has obtained a receivership order, but to every judgment creditor of the class mentioned in the first part of the section—viz., who has recovered judgment either in an action brought on a contract entered into after the passing of the Act, or in an action, not on contract, brought after the passing of the Act.

The section contemplates that when and if the whole of the judgment creditors who could get the benefit of this Act are paid, then and not till then will the receiver be discharged. This does not contemplate the appointment of more than one receiver, and it would be strange if it did, as the subsequent receivers would be persons who could do nothing, and the order under appeal in fact directs that. The first receivership order cannot be discharged until all creditors who have obtained the benefit of the Act are satisfied.

In my opinion a judgment creditor does not under this section gain any additional security by getting the appointment of a second receiver, and therefore in my opinion it was wrong to make this order, no priority and no additional security being thereby obtained. The order of Kekewich, J., will be dismissed without costs however, as it would not be right to make the judgment creditor pay the costs of his debtor, the railway company.

LINDLEY, L.J.—The question really is, What is the true construction of section 4 of the Act of 1867? The facts are simple. A judgment creditor got a receivership order under this section, the order being in the form adopted in the case of *In re Staffordshire and Uttoxeter Railway Co.*, and given in Seton, 4th ed., at p. 422. The receiver appointed under that order still exists—is still receiver. Then another judgment creditor presents a petition for the appointment of another receiver, not seeking, however, to disturb the former order. Kekewich, J., acceded to that application and appointed a second receiver without prejudice to the first, but decided nothing as to priorities. Now as to this second judgment creditor, it is obvious that, unless something was to be got by this second receivership order, it was only a useless expense. Mr. Hastings said that his client would, by having obtained that order, get priority over other creditors; and, if that were so, there would be some object in obtaining it. We must see what the section says. It is practically divided into three parts; the first part puts a stoppage on seizure under a *fi. fa.* of the rolling stock of a railway company. The effect of that is that it is of no use to a judgment creditor to issue a *fi. fa.* unless there exists property other than rolling stock belonging to the company, because no judgment creditor can get any lien or charge on rolling stock under any *fi. fa.*, and therefore it deprives a judgment creditor of the power of getting priority by seizing the rolling stock. The second part of the section provides that a judgment creditor can get a receiver of the "undertaking" of the railway company. This is a new remedy, but hardly a substituted one, because it can be got whether there is or is not any rolling stock, and it is therefore an additional, rather than a substituted, remedy. The third part of the section shows what the receiver is to do with the money he receives, but it gives no indication of priorities at all. [The Lord Justice read this part of the section, and continued:—] This lets in all creditors of the company, whether judgment or simple contract creditors. I find no indication of intention to create priorities; such priorities as exist are to be respected, but that is all.

I think the words "every such judgment creditor as aforesaid" can only apply to the words used at the end of the first part of the section—that is, judgment creditors who have obtained judgment in an action on a contract entered into after the passing of the Act, or in an action, not on contract, brought after this Act.

It was urged that, inasmuch as it was impossible to pay off judgment creditors except *pari passu* with other creditors, that did create priorities; but that view is erroneous.

The section says that if the company can, by any method, get rid of such judgment creditors, then the court may discharge any receiver appointed.

But this section creates no priority in favour of anyone, and a judgment creditor has not, and does not, under this section, obtain any priority whatever. This second receivership order must therefore be discharged, but, as the question raised is a new one, the order will be discharged, without costs, and no costs will be allowed of the appeal.

BOWEN, L.J.—I agree.

Solicitors for the appellants, *Baxters & Co.*

Solicitors for the respondents, *F. Venn & Co.*

Solicitors for the judgment creditors who obtained the first receivership order, *Deacon, Gibson, & Medcalfe.*

From Chan. Div. Feb. 1.

In re JOHNSON & WEATHERALL. (*a*.)

Solicitor — Costs — Taxation — Country solicitor and London agent—Bill of agency charges—Taxation of part of bill—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 37.

The Solicitors Act, 1843, *gives the court no jurisdiction to order the taxation of part of an agent's bill of costs.*

The court has, however, under its general jurisdiction, power to order the taxation of a bill relating to court business whether the bill be an agent's bill or a bill delivered by a solicitor to his client; and to refer any part of a bill to taxation.

Appeal from a decision of North, J.

Messrs. Johnson & Weatherall, solicitors, in London, had for some years acted as the London agents of Messrs. Storer & Co., solicitors, at Manchester.

On the 3rd of January, 1886, Messrs. Johnson & Weatherall delivered to Messrs. Storer & Co. their yearly bill of agency charges for the year 1885. The bill contained charges in respect of a number of distinct actions and matters in which Messrs. Johnson & Weatherall had during that year acted as agents for Messrs. Storer & Co., the charges relating to each action or matter being stated separately under the head of that action or matter, forming what might be called a separate chapter in the bill.

One of the actions in respect of which charges were made was *Mellor* v. *Swire*.

On the 3rd of January, 1887, Messrs. Storer & Co. took out the present summons, asking for the taxation of that part of the bill which related to *Mellor* v. *Swire*. The summons was issued within a year from the delivery of the bill.

The London agents contended that the applicants could not have that part of the bill which related to *Mellor* v. *Swire* taxed without having the whole bill taxed, and this they were willing to have done.

By their affidavits filed in support of the summons, Messrs. Storer & Co. alleged that unnecessary charges had been incurred in *Mellor* v. *Swire* by reason of the negligence of Messrs. Johnson & Weatherall, and that on taxation those charges would be disallowed. No complaint was made of the charges in other matters comprised in the bill, nor was any undertaking given for their payment. Messrs. Johnson & Weatherall, by their affidavits in reply, entirely denied the truth of the allegations of negligence.

North, J., held that the bill delivered was one entire bill, and that the applicants were entitled to a taxation only on the terms of the whole bill being taxed.

Messrs. Storer & Co. appealed.

On the hearing of the appeal it appeared that a further bill of charges in *Mellor* v. *Swire* had been delivered by Messrs. Johnson & Weatherall to the appellants since the summons was taken out, and that a cash account had been delivered which showed a balance of £1,188 1s. 4d. to be due from the appellants to Messrs. Johnson & Weatherall.

Cookson Crackanthorpe, Q.C., and *Levett*, for the appellants.—The court has jurisdiction, apart from the Solicitors Act, 1843, to refer to taxation an agent's bill of costs on the application of the solicitor employing him: *Jones* v. *Roberts*, 8 Sim. 397; *Smith* v. *Dimes*, 4 Ex. 32; *In re Nelson, Son, & Hastings*, 33 W. R. 645, 30 Ch. D. 1. In an agency bill the charges relating to each matter comprised in it really form a separate bill, and it is not competent, therefore, for an agent, by stitching together a number of bills dealing with various matters, to present them as one bill for the purposes of taxation. If that were to be allowed, a London agent might escape from paying the costs of the taxation of a bill containing charges in one matter which were grossly excessive because the charges in the other matters could not be called in question. And at the same time, as between the country solicitor and his lay client, the charges in each of the actions or matters must be taxed separately. We admit that the order we ask for cannot be obtained as of course, but we submit that we have shown sufficient ground to justify the court in making the order in the present case.

They also referred to *Scougall* v. *Campbell*, 3 Russ. 545; *In re Tryon*, 7 Beav. 496; *Ward* v. *Eyre*, 28 W. R. 712, 15 Ch. D. 130; *In re Massey & Carey*, 32 W. R. 1068, 26 Ch. D. 459.

At the conclusion of the arguments for the appellants the court suggested that an order should be made in the following terms:—"If within four days the appellants undertake to pay over to the respondents, within ten days from this date (subject to an undertaking to refund what shall be disallowed on taxation), the sum of £1,188 1s. 4d., and the appellants consenting by their counsel to refer to taxation such further bills relating to *Mellor* v. *Swire* as have been delivered subsequently to the bill mentioned in the notice of appeal—order that so much of the delivered bill as relates to *Mellor* v. *Swire* be referred to taxation, the appellants to pay the costs in this court and in the court below; all other costs to be reserved. If no such undertaking be given, the appeal to be dismissed, with costs.

Cozens-Hardy, Q.C., and *Hamilton Humphreys*, for the respondents, agreed to an order in the above form, and were not called upon by the court.

COTTON, L.J.—We think that the appellants were wrong in the idea that they could come under the Act for an order to tax a part of a solicitor's bill. This would be contrary to the course of practice under the Act. No undertaking was offered by them to pay what was due. They insisted as a matter of right upon having part of the bill referred to taxation without offering any terms. I do not think that the Solicitors Act, 1843, gives any jurisdiction to tax part of an agent's bill, but I am of opinion that the court, under its general jurisdiction, can order taxation of bills relating to court business, whether the bill be an agent's bill or a bill delivered by a solicitor to his client, and also can refer part of a bill for taxation. In *In re Tryon* Lord Langdale, who had great experience in matters of taxation, directed taxation of part of an agency bill, reserving the costs. The court, in a proper case, will exercise this jurisdiction, taking care to impose such terms as will prevent any injustice being done. In the present case I think it reasonable that a taxation of so much of the bill as relates to *Mellor* v. *Swire* should be directed, but on the terms of the applicants paying the cash balance which is admitted to be due, subject to an undertaking to refund in case it shall ultimately appear that the respondents are not entitled to retain the whole of it. The rule as to the result of one-sixth being taxed off ought not to be followed. The costs will be left to be dealt with by the court. The agents must be allowed to include in the taxation their subsequent bill relating to *Mellor* v. *Swire*.

LINDLEY, L.J.—I am of the same opinion. I am not disposed to construe section 37 as depriving the court of its power to refer part of a bill to taxation, or any other power which it had before. I do not see anything to prevent the court, on a special case being made, from referring to taxation any particular class of items in a solicitor's bill. I agree that it should be done on the

(*a*.) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

terms proposed. If they are not complied with the appeal will be dismissed, with costs.

Bowen, L.J.—I also am of the same opinion, that the Act does not deprive the court of jurisdiction to refer part of a bill for taxation if circumstances make it right to do so.

Solicitors, *Rowley & Co.*, for *Storer & Co.*, Birmingham; *Johnson & Weatherall.*

From Ch. Div. Jan. 25.

Easton *v.* London Joint-Stock Bank. (*a.*)

Costs—Taxation—Refresher fees—Appeal from Chancery Division—R. S. C., 1883, *ord.* 65, *r.* 27, *sub-rules* 30, 37, 48.

On taxation an addition may, in the discretion of the taxing master, be made to the fees marked on the briefs of counsel, on appeals from the Chancery Division to the Court of Appeal, though no vivâ voce *evidence has been taken. Such addition may, if the taxing master think proper, be in the shape of a daily allowance.*

Svendsen v. Wallace, 34 *W. R.* 151, 16 *Q. B. D.* 27, *explained and held applicable to appeals from the Chancery Division.*

This was an appeal from a decision of North, J. (31 Solicitors' Journal, 812).

The question was whether refresher fees or fees in the nature of refresher fees can be allowed on the hearing of an appeal from the Chancery Division to the Court of Appeal.

In the present case the appeal had lasted four days, and the action had been dismissed with costs.

Ord. 65, r. 27, sub-rule 48, provides for the allowance of refreshers "when any cause or matter is to be tried or heard upon *vivâ voce* evidence in open court," but makes no reference to the hearing of an appeal. Sub-rule 30 provides that "As to any work and labour properly performed and not herein provided for, and in respect of which fees have heretofore been allowed, the same or similar fees are to be allowed for such work and labour as have heretofore been allowed." And by sub-rule 37 it is provided that "the rules, orders, and practice of any court whose jurisdiction is transferred to the High Court of Justice or Court of Appeal relating to costs and the allowance of the fees of solicitors and attorneys and the taxation of costs existing prior to the commencement of the principal Act shall, in so far as they are not inconsistent with the principal Act and these rules, remain in force and be applicable to the costs of the same or analogous proceedings, and to the allowance of the fees of solicitors of the Supreme Court, and the taxation of costs in the High Court of Justice and Court of Appeal."

On the taxation the defendants claimed refresher fees for their counsel for three days, relying on *Svendsen* v. *Wallace*, 34 W. R. 151, 16 Q. B. D. 27, a case decided since 1883, where it was held by a divisional court of the Queen's Bench Division that refreshers could be allowed on the hearing of an appeal from that division, though the taxing master had been of a contrary opinion.

The taxing master (Mr. Wainwright) held that the case of *Svendsen* v. *Wallace* did not apply to appeals from the Chancery Division, and disallowed the refreshers on the ground that he had no power to allow them, or discretion in the matter. He said: "In the Court of Chancery, before the oral examination of witnesses in that court, daily refreshers were not allowed nor paid. In *Harrison* v. *Wearing*, 27 W. R. 526, 11 Ch. D. 206, the decision and reasoning of Jessel, M.R., are quite opposed to the allowance of daily refreshers on appeals."

North, J., held that *Svendsen* v. *Wallace* applied, and that the taxing master had jurisdiction to allow refreshers. The order was drawn up in the following terms: "This court, being of opinion that the taxing master may, if he thinks fit, allow refreshers, doth order that it be referred back to the taxing master to vary his certificate accordingly."

The plaintiffs appealed.

Grosvenor Woods, for the appellants.

W. D. Rawlins, for the respondents.

By the desire of the Court of Appeal a report was furnished to them by one of the taxing masters (Mr. Ryland), after conferring with another taxing master in the Chancery Division and with Master Johnson, of the Queen's Bench Division, as to the former practice on taxation. Such report was as follows:— "The practice in the Court of Appeal in Chancery before 1875 in non-witness causes was uniform not to allow daily refresher fees, the only refresher fee being the usual sitting fee of £3 5s. 6d. to the leader and £1 3s. 6d. to the junior. Although it was not the practice to allow daily refresher fees, the Chancery taxing masters allowed what, in their discretion, were proper fees for the services rendered, and where the fee given on the brief when delivered was, in the masters' judgment, insufficient, they uniformly allowed an additional or further fee; but such additional or further fee was not in the smallest degree recognized by the masters as a daily refresher, but was considered by them purely and simply as part and parcel of the proper fee on the hearing of the appeal. The propriety of the practice of the Chancery masters of adding to the original fee in contradistinction to recognizing the allowance of daily refreshers is illustrated in, and countenanced by, *Edgington* v. *Fitzmaurice*, 33 W. R. 913. I have not forgotten *Smith* v. *Buller*, 23 W. R. 332, L. R. 19 Eq. 473 (decided by Malins, V.C.), which was, no doubt, for a short time, authority for the allowance of daily refreshers in non-witness actions. *Harrison* v. *Wearing*, 27 W. R. 526, 11 Ch. D. 206, which soon followed, dissented from it, and the latter case, being in accordance with the practice in the offices of the Chancery masters, has been followed by them. Before 1875 there were in the Court of Appeal in Chancery, or, in fact, in the Chancery court of first instance, very few witness actions. Occasionally there might be one (as an issue or patent case), but they were few and far between, and afforded little opportunity of establishing the practice on the subject, but, so far as I have been able to learn, daily refreshers were, in such cases—*i.e.*, where witnesses were examined—allowed both in the court of first instance and in the Court of Appeal. Between 1875 and 1883 non-witness causes were dealt with in exactly the same way as they were dealt with previously to 1875, but witness actions between those years were considered in the light of *Nisi Prius* actions, and daily refreshers were recognized and allowed. The practice in the Exchequer Chamber seems to have been much the same as the practice in the Chancery Division—viz., where it was, in the judgment of the master, proper to do so, he allowed such further or additional fee, either daily or otherwise, as in his discretion was with the fee marked on the brief a proper fee for the services rendered. I observe that in *Svendsen* v. *Wallace* Smith, J., in his judgment states that before the rules came into force it is conceded that refreshers were allowable upon the argument of special cases and otherwise in the Exchequer Chamber and afterwards in the Court of Appeal. Excepting as I have

(*a.*) Reported by C. Herbert Brown, Esq., Barrister-at-Law.

stated above, I am not aware of the authority for this. So far as I can learn, refreshers or further fees were always in the discretion of the master (*Turnbull* v. *Jansen*, 26 W. R. 815, 3 C. P. D. 264), and were never recognized as 'refreshers,' but were regarded as further or additional fees."

COTTON, L.J.—In my opinion this appeal must fail. I think that the order of North, J., has been misunderstood, and also the decision in *Svendsen* v. *Wallace*. It seems to have been considered that North, J., directed the taxing master to allow daily refreshers as a fixed sum. But, as I read it, the order says nothing of the kind. Daily refreshers were introduced into the Chancery Division when it became the practice to try actions with *vivâ voce* evidence or with the cross-examination of witnesses who had made affidavits. Refreshers were allowed on the principle that it could not be estimated beforehand how long the examination of the witnesses on either side would occupy, and it was thought desirable that the same fees should be allowed as were allowed in similar cases at common law. This principle does not apply to hearings in the Court of Appeal, because, as a general rule, witnesses are not examined there, although, in some cases, no doubt, the Court of Appeal does allow witnesses to be examined before it, and in such cases the ordinary rule as to witness actions does apply. In the present case the appeal was heard without witnesses, and the question is whether the taxing master has power to make any addition to the fees which were marked on the briefs before the hearing of the appeal began. The term "daily refresher" is well known. In the House of Lords and in the Privy Council daily refreshers are allowed as a fixed sum. But, as I understand, it was not the practice in the Court of Appeal in Chancery or in the Exchequer Chamber to allow daily refreshers as fixed sums. If the taxing master was satisfied that the fee originally marked on the brief was not adequate, he could make an addition to it. It is very desirable that solicitors should form an opinion before the hearing what, having regard to the nature of the case and the probable length of the argument, would be the proper fee to mark. In my opinion the order of North, J., properly interpreted, merely followed the old practice in the Exchequer Chamber of permitting the taxing master to exercise his discretion as to allowing what may be called a "refresher fee," but what is really an addition to the fee originally marked on the brief. This is really the effect of *Svendsen* v. *Wallace*. It is not, strictly speaking, an allowance of refresher fees; but the taxing master is not bound to disregard any suggestion of an addition to the fees marked. The court now knows, from the report of the taxing master, that in the Court of Appeal in Chancery the taxing master had a discretion to allow an addition to the fees marked. In my opinion all that North, J., decided was that the taxing master, though not allowing any fixed and definite daily sum as a refresher, has a discretion to allow an addition to the fee marked. The case must go back to the taxing master with an expression of the opinion of the court that he has this discretion.

BOWEN, L.J.—I am of the same opinion. Putting aside the practice in the House of Lords and in the Privy Council, the broad principle is that the solicitor must make up his mind, at the time when he delivers the brief, what is the proper fee, and must mark it then. But in actions in which witnesses are to be examined it is extremely difficult for the solicitor to judge how long the trial is likely to last; and, therefore, in fixing the fee in such cases, the solicitor is assumed to have contemplated, when he fixed it, that, if the trial was prolonged beyond the first day, daily refreshers would be allowed. This reason applies to witness cases n the Court of Appeal; but in other cases, where the argument is on questions of law or on mixed questions of law and fact, the solicitor must make up his mind, when he delivers the brief, what fee will recompense the attention which counsel will have to give to the case. The only ground, in such a case, for allowing an increase of the fee originally marked is that there has been a miscalculation by the solicitor when he fixed it, and that he has under-estimated it. If there has clearly been a miscalculation—a *bonâ fide* mistake by the solicitor—it would be very unjust not to allow it to be corrected afterwards. But the taxing master ought to be very jealous in seeing that there has been a mistake; for it is the business of the solicitor, when he fixes the fee, and of the counsel's clerk, when he accepts it, to see that it has been properly calculated. In my opinion North, J., made the right order, though it was unfortunate that he used the word "refreshers." The case will go back to the taxing master for him to consider whether there has not been some miscalculation by reason of something having happened which was not anticipated when the fees were marked. This would not be simply that the case was a heavy one. Cases in the Court of Appeal generally are heavy, and involve questions of law which it is very difficult to decide, and a solicitor ought to take this into consideration. The taxing master must look at the whole matter and see whether the proper fees have been marked; and, if he thinks that there has been any miscalculation at the time when they were marked, he ought to correct it. The court is really deciding in accordance with *Svendsen* v. *Wallace*, the only objection to which is the use of the word "refreshers." I wish to add that there is nothing in our decision to prevent the taxing master from adding to the fees in the shape of a daily allowance if he should think that a fairer way of setting right a miscalculation. In this sense he may allow "refreshers."

Solicitors, *West, King, Adams, & Co.; Clarke, Rawlins, & Co.*

From Chan. Div. [and North, J.] — April 5, 27; May 9; Nov. 21, 25; Dec. 3.

URQUHART v. BUTTERFIELD. (*a*.)

Customs Annuity and Benevolent Fund—Nature of interest of subscriber—"Nominee"—Nomination of trustee—Nomination of curator by Scotch court as nominee of lunatic subscriber—Jurisdiction of Scotch court—Question of fact—Admissions made by counsel as to matters of fact—Proof of facts disputed with by admission—56 Geo. 3, c. lxxiii., s. 9.

A subscriber to the Customs Annuity and Benevolent Fund (established under the Act 56 Geo. 3, c. lxxiii.) is not given, by the Act or the regulations made thereunder, any interest in the insurance fund as his estate or property, but only a power of disposition over it in certain particular ways. So held by North, J., *and by the* Court of Appeal.

Held, per North, J., *that, under the regulations, a "nominee" must be a person who is to take a beneficial interest in the fund, and that there cannot be a nomination of a person who is to take as trustee for others.*

The Court of Appeal, *under the circumstances of the case before them, abstained from giving any decision on that point, but expressed an opinion that a nomination need not state that the "nominee" is to take beneficially, and that the object of the regulations referred to was*

(*a*.) Reported by G. E. JEFFERY and M. J. BLAKE, Esqs., Barristers-at-Law.

merely to give the directors of the fund information in exercising their discretion as to admittance, as to the purposes for which a nomination was made, and as to the parties who were to receive the money.

At the trial of the action counsel for the defendant made an admission that an order made by the Court of Session in Scotland nominating the curator of a lunatic subscriber on behalf of the lunatic as "nominee," had the same effect as if it had been a nomination made by the subscriber himself (being sane).

North, J., *did not consider himself bound by that admission, and held that the Scotch court had no jurisdiction to appoint a "nominee" on behalf of the lunatic subscriber; but*

Held, by the Court of Appeal, *that, as the question of the jurisdiction of the Scotch court to make such an order was a question of fact, proof of which, like proof of other facts, might be dispensed with by the admission of counsel,* North, J., *was wrong in going into that question.*

Action.

In 1827 Lewis Robert Hoyes, who was then an officer in the Department of Customs in England, effected two insurances on his life in the "Customs Annuity and Benevolent Fund," which was a fund established by the 56 Geo. 3, c. lxxiii., for the benefit of the widows, children, or other relatives of officers and clerks employed in the Department of the Customs in England.

The Act appointed a body of directors to hold and manage the fund, and by section 16 gave them power to make rules for the regulation of the fund.

Section 9 of the Act provided "That the said directors shall and may, if they deem it expedient, admit any person or persons to be the nominee or nominees of any subscriber to the said fund who may not be a relative or relatives of the said subscriber; and the said nominee or nominees so admitted as aforesaid shall and are truly declared to have, and thereafter to continue to have, to all intents and purposes, the same and the like interest in the said fund and the advantages thereof as if the said nominee or nominees had been a relative or relatives of the said subscriber, under and subject in every respect to the rules and regulations approved and ratified as aforesaid."

Rule 23 of the rules made by the directors in force in 1827, as far as material, was as follows:—"The capital sum of money insured by a subscriber, together with the addition of profit which may have been made thereto, shall, in its disposal at his death, be subject to the following regulations" (*inter alia*): "in the event of a subscriber dying without leaving a widow the whole of the capital money shall be available in such manner and proportions as he may direct by any deed or instrument or by his will for the benefit of his widow, children, and relatives, and for such nominees who shall have been duly admitted by the directors . . . and where a subscriber dies intestate, and shall not have appointed such available capital money by any deed or instrument for the benefit of his widow, children, relatives, or nominees, the whole of such available capital money due at his decease by virtue of his insurance shall . . . if such subscriber leave no widow nor any child or children . . . be applied according to the Statute of Distributions. . . ."

In 1835 L. R. Hoyes, the subscriber in the present case, while in Scotland, became insane, and on the 28th of November, 1835, Hoyes was found to be a lunatic by the Court of Session in Scotland, and John Forsyth was appointed *curator bonis* of L. R. Hoyes. A will, executed by L. R. Hoyes, and dated the 18th of May, 1833, was found by the curator among the papers of L. R. Hoyes. L. R. Hoyes thereby, after bequeathing certain pecuniary legacies, gave all his residuary estate and effects to his uncle, L. Hoyes, and his heirs, and appointed the said uncle and two other persons executors. The will contained no reference either to the insurances in the Customs Fund or to any power of appointing them. The directors of the fund when applied to refused at first to admit either the curator or the executors named in the will or the legatees therein named as nominee or nominees of L. R. Hoyes, but stated that they would admit such "nominee" as should be sanctioned by the order of a competent court. Forsyth presented a petition to the Court of Session asking (*inter alia*) that he might be nominated "nominee."

On the 13th of July, 1841, the Court of Session made an order, on the hearing of that petition, whereby it nominated the petitioner Forsyth "nominee of L. R. Hoyes for behoof of the legatees under the will of that gentleman appended to this petition to his interest as a subscriber to the Customs Annuity and Benevolent Fund in terms of the statute and regulations," and directed that the petitioner Forsyth should "communicate the said appointment to the directors for their acceptance and admission, as parties interested in the fund, in the terms of the statute and regulations." Forsyth accordingly sent to the directors a copy of the petition and of the order made thereon, and subsequently, in 1842, obtained and submitted to the directors an opinion of one of the standing counsel to the directors of the fund, to the effect that the directors would be justified in admitting Forsyth as the nominee of L. R. Hoyes with reference to the insurance in the fund. The secretary of the board of directors then wrote to Forsyth that the directors had admitted Forsyth as nominee of L. R. Hoyes in the terms of the order of the Court of Session. The premiums on the policies were after this paid by Forsyth till 1849, when by the terms of the policies they ceased to be payable. On the 1st of June, 1853, an order was made by the Court of Session appointing the plaintiff Urquhart to be curator in the place of Forsyth; and on the 4th of January, 1855, Urquhart was admitted by the directors as nominee in the place of Forsyth. L. R. Hoyes continued a lunatic till his death; he died on the 26th of March, 1885. At the time of his death the sums payable in respect of the policies amounted to £5,864. The will of L. R. Hoyes had been proved in Scotland. L. R. Hoyes was never married, and, being himself illegitimate, died without having any next of kin. It appeared, also, that, before the trial of the present action, the pecuniary legacies bequeathed by the will of L. R. Hoyes had been paid. L. Hoyes, the residuary legatee named in the will of L. R. Hoyes, died in the lifetime of the testator. By the present action the plaintiff Urquhart claimed, as nominee of L. R. Hoyes, admitted by the directors, payment of the £5,864, with interest, out of the fund, and to have it declared that he was entitled to give a good discharge for the same. He also claimed, in the alternative, to have repayment of the premiums from time to time paid by L. R. Hoyes and by the former curator, Forsyth. Butterfield, the secretary to the fund—and, as such, the person authorized, under section 12 of the Act, to be sued on behalf of the directors—was the defendant in the action.

Giffard, Q.C., and *R. Campbell*, for the plaintiff.—By the terms of the Act the subscriber has a right to appoint a "nominee," and, when admitted, the "nominee" stands in exactly the same position as the subscriber. The nominee was appointed by the order of the Court of Session as "nominee" for the person named as legatee in the will. [*Cozens-Hardy, Q.C.*, for the defendant.—No doubt the nomination by the Court of Session is as effectual as it would have been if made by the subscriber himself (being sane). But I do not admit that the subscriber himself could have appointed a "nominee" to be a trustee for other persons.] The plaintiff, having been admitted "nominee" by the

directors, can give a good discharge for the money, and they are bound to pay him. Whether he will be accountable or not to other persons is quite another matter, but with that the directors have nothing to do. He is the person who can give a legal discharge: *In re Maclean's Trusts*, L. R. 19 Eq. 274; *In re Pocock's Policy*, 19 W. R. 801, L. R. 6 Ch. 445. Forsyth acted on the faith of representations made by the directors, and they are bound to make those representations good: *Hammersley* v. *De Biel*, 12 Cl. & F. 45. A new contract was, in fact, entered into between the curator and the directors, on the footing of which he paid the subsequent premiums. If the plaintiff is not entitled to the insurance moneys, he is entitled to have the premiums paid after 1842 repaid, on the ground that they were paid under a mistake of fact.

Cozens-Hardy, Q.C., and *G. Henderson*, for the defendant.—The subscriber has no property in the sum insured, but only a limited power of appointment over it in favour of his wife, children, relatives, or nominees duly admitted according to the rules: *Attorney-General* v. *Rowsell*;* *Attorney-General* v. *Abdy*, 1 H. & C. 266, 11 W. R. C. L. Dig. 751; *In re Phillips' Insurance*, 31 W. R. 511, 23 Ch. D. 235. The effect of a nomination is only to make the "nominee" an object of the power of appointment. In the present case the subscriber never made any appointment by his will in favour of the nominee. The persons named in the will are not objects of the power; and, as the lunatic was illegitimate, there could be no one to take under the Statute of Distributions. With regard to the premiums, if they were paid under any mistake it was a mistake of law, and they cannot, therefore, be recovered. If the lunatic had recovered he might have married and had children, or he might have made a new will. There was, therefore, consideration for the payment of the premiums.

Giffard, Q.C., in reply.—This case must be treated as if the lunatic had been sane, and had nominated the plaintiff. All that the rules require is that the nominee should be admitted during the lifetime of the subscriber: *In re Maclean's Trusts*. A person may be nominated merely as a trustee for other persons (per Malins, V.C., in *In re Pocock's Policy*). The fund was created by the lunatic's subscriptions, and if there are no relatives or nominees capable of taking, there is a

*Ex. May 6, 1844.

ATTORNEY-GENERAL v. ROWSELL.

This was a motion to make absolute a rule which had been obtained on behalf of the Attorney-General, calling on E. Rowsell, as the executor of his deceased brother, to show cause why he should not account for legacy duty in respect of the proceeds of an insurance effected by the testator on his life in the Customs Annuity and Benevolent Fund, which proceeds he had bequeathed by his will.

Erle, Rogers, and *Deane*, for the executor, showed cause.

Twiss and *Crompton*, for the Attorney-General.

POLLOCK, C.B.—I am of opinion that this fund is not liable to legacy duty, and I am quite willing to treat the case upon the principle proposed by Mr. Twiss in his argument. Assuming this to be merely an ordinary case of insurance, it lies between the case of an insurance of a sum of money to be paid to a particular person—a widow or a child—and that of an insurance of a sum of money to be paid to the executors of the assured and entirely under his control. Here it appears that the subscriber had one brother, and, having no wife and no children, the amount of the insurance is given by his will to that brother. I think this case is not within the definition of a "legacy" given in section 7 of 36 Geo. 3, c. 52—that is, a gift by will which shall have effect out of the personal estate of the testator or out of any personal estate which he shall have power to dispose of as he shall think fit. Now, I do not think this was personal estate of the present testator. The money arises from a subscription to a fund for particular purposes, over which the subscriber has, in some instances, no control at all, and, in any case, in which, where he has a control, it is only a limited control. If he appoints a nominee, the nominee can only be admitted "if the directors shall deem it expedient," and I cannot help thinking that the Act was passed and the rules were framed to accomplish the humane, charitable, and beneficial object of securing a fund for the benefit of the widows and children and other persons for whom officers of the Customs might be bound to provide, and especially to exclude the possibility of its becoming anything like a general insurance office for the officers. Viewing it in that light (and it appears to me that that is the true light in which it should be viewed), I think that this money cannot be considered as part of his personal estate, and he could not dispose of it as he pleased. I think it could not have been made available for the payment of his debts, if he had become bankrupt or insolvent during his life it could not have been attached. It seems to me that the fund has been placed out of his disposal, except among a particular class of persons, or in such a limited manner as not to bring it within section 7 of the Act. I think, therefore, that the rule ought to be discharged.

PARKE, B.—I am of the same opinion. The sole question is whether this gift by will falls within section 7 of the Act. It is quite clear that this money is not the personal estate of the testator, for he has paid his subscription from time to time upon the terms prescribed by the Act, and subject to the regulations which have been made in pursuance of the Act. The moment he paid the money to the trustees of the fund it ceased, I think, to be his money, and it was irrevocably placed in the hands of the trustees. Therefore it was no longer his personal estate. Was it, then, personal estate which he had power to dispose as he should think fit? It is perfectly clear that it was not, because by the terms of the rules, which have the force of an Act of Parliament, the destination of the fund is fixed. It is to go to his widow and children or relations or nominees. It seems to me, therefore, that the case is clearly and within section 7, and that no legacy duty is payable.

ALDERSON, B.—I am of the same opinion. It seems to me that this money is neither personal estate of the deceased nor is it personal estate of which he could dispose as he should think fit. This power of disposal was limited to a particular class out of which he might select.

ROLFE, B.—I am of the same opinion. The Act certainly meant to make legacy duty payable only in respect of legacies given either out of the personal estate of the testator, or out of personal estate of which he had unlimited power of disposal. The latter part of section 7 was introduced to prevent the evasion of the Act by a person placing a fund in the hands of trustees for himself during his life—after his death in trust for such persons as he might direct by his will. The present case has no resemblance whatever to that, for here the subscriber parts, not with a fund, but with a certain annual sum, in consideration of which he is to have the power of appointing to his widow and relations, or in certain specified events, to a nominee, a certain sum to be estimated in proportion to his subscription. It is quite clear to me that this is neither his personal estate nor a fund over which he has anything more than a limited and special control.

resulting trust for the lunatic. The premiums were paid under a mistake of fact, and the consideration for them has failed. They ought to be repaid if the court holds that the moneys insured cannot be recovered: *Cooper* v. *Phibbs*, 15 W. R. 1049, L. R. 2 H. L. 149, 170; *Bingham* v. *Bingham*, 1 Ves. sen. 126.

May 9.—North, J.—It has been stated by various judges before whom questions relating to this fund have come, and it is matter of history, that the reason for the institution of this fund was because the Customs Department, like many other public departments, was liable after the death of its employés to applications by their widows and other relations for assistance to enable them to live under circumstances, no doubt, very often involving great distress, difficulty, pain, and sorrow. To avoid such applications, which were equally difficult to assist or refuse, it was considered desirable to establish this fund, by contributing to which (the contributions being compulsory to a great extent) the persons employed in the Customs Department should effect insurance upon their lives, it being provided that the power of disposing of the sum insured, which an ordinary insurer in an ordinary company would have had, should not exist; but that the insurer should not be able to deprive the persons for whose benefit the fund was instituted of the benefit intended to be conferred upon them by it. [His lordship referred to the provisions of the Act and to rule 25 of the Rules of 1819, and continued:—] In my opinion, the word "like" in that rule refers to and takes up the word "such" two lines earlier; and the rule should be read in this way: "And also, under the admission of the directors, in such manner or proportions as he may think proper, and direct in his will for the benefit of his nominee or nominees." By that rule the application of the fund was, to a certain extent, fixed, and, to the extent to which it was not fixed, the fund was (to put it shortly) to go as the subscriber should direct by his will, and, subject thereto, according to the Statute of Distributions. There was nothing in the rule enabling him in any way to deal with the fund except by his will. [His lordship referred to the Act, and to certain rules in force prior to the Rules of 1827, and continued:—] The provision in rule 23 of the Rules of 1827, that the admission of a nominee should take place during the lifetime of the subscriber, was, as it seems to me, clearly within the powers of the Act, for the nominees are to be approved by the directors, and the directors had a right to say that their approval must be given in the lifetime of the subscriber. Upon rule 23 there are two remarks I wish to make. The first is that it gives the subscriber a greater power of selection than he had under the Rules of 1812. Under those Rules the power could be exercised by will only. Under the Rules of 1827 it can be exercised "by any deed or instrument, or by his will." Again, the direction is to be "for the benefit of his wife, children, and relatives, and for such nominees as shall have been duly admitted by the directors." I think that is the same as if it had said, "For the benefit of his widow, children, and relatives, and for the benefit of such nominees who shall have been duly admitted by the directors," or as if the word "of" had been used instead of the word "for." I think that is shown clearly by the following part of the same rule as well as by some of the other rules. [His lordship here referred in detail to rules made in 1836, and continued:—]

The 9th section of the Act, as I have already stated, enabled the directors to "admit any person or persons to be the nominee or nominees of any subscribers to the fund." It was argued that the effect of that section was simply this, that whereas the objects of the insurance were merely the widow, children, and other relations of the insured, this section enabled him, if the directors should approve, to add to that class any nominee, and that that power, if it were exercised, merely made the nominee one of the objects of the subscriber's power of selection, but did not give him any interest in the fund; and that for that purpose there must be some disposition in his favour giving him an interest in the fund after he had become qualified to receive such an interest. It seems to me that that argument is pushed too far. If there was nothing whatever but a nomination by the insured of a person to stand in the position of a relative, it does not seem to me there would be anything to point out what his interest was, and it may be that, if the insured died intestate and without making any other disposition, the nominee would be in the same position as a relative taking an interest in the fund. But, on the other hand, if the insured were to make a nomination, and at the same time to say that that nomination was to be for the benefit of the person named, it seems to me that then the nomination would be fulfilling the double purpose of bringing the person named within the objects of the power, and at the same time conferring a benefit upon him.

The next question is, what is the nature of the interest of the insured under such a power of appointment as this, and I think this question is settled very clearly by the authorities. The first authority is the important case of *The Attorney-General* v. *Rowsell* decided in the year 1844 by the Court of Exchequer. The question there was whether legacy duty was payable in respect of the proceeds of an insurance in the fund which the subscriber had disposed of by his will, and that depended upon the question whether the fund insured was the property of the insurer or not. [His lordship read the judgments of the Court of Exchequer, in that case, and continued:—] The matter came before the Court of Exchequer again in the case of *The Attorney-General* v. *Abdy*. The facts of that case were shortly these. The insured had no wife or children and he appointed no nominee. By a will made according to one of the forms given in the Notes to the Rules of 1836 he gave the fund to his sister, and the question was whether succession duty was payable. It was held that his interest in the fund was a special property created by his subscription, that he could dispose of it only in a particular way. Pollock, C.B., put it very neatly thus: "Then it is said that the subscriber has only a limited power over the sum assured. But if he has only power to leave it to a certain class of persons, and does leave it to one of them, that person is a successor within the meaning of the 2nd section of the Succession Duty Act because there is a disposition of property whereby he becomes beneficially entitled to property upon the death of another person. The officer, by payment of the premiums, created the power under which he acted, and therefore he is the predecessor." And the other barons gave judgments to the same effect. They held, therefore, that there was a "succession," that there was the relation of predecessor and successor between the insured and his sister; but they professed to act upon the authority of *The Attorney-General* v. *Rowsell*, and there is not a word in the judgments, from the beginning to the end, indicating that the insurer had anything but a power of appointing the fund, or that it was his property in any other sense. It is true that Bramwell, B., does say that the insurer's right was "property," but looking at the whole of his judgment it is quiet clear what he meant was that he had a right to dispose of "property."

Then there is the case of *Maclean's Trusts*. There an insurance had been effected in the same fund, and the insured, in August, 1872, executed and deposited with the directors an instrument by which, purporting to exercise the power conferred on him by the rules, he appointed that £1,400 out of the proceeds of his in-

surance should at his death be paid to five persons named and described as "The present life fund trustees of the Guardian Fire Insurance Co.," and he requested the directors to admit them "as my nominees for the purpose of this appointment," and he declared the appointment irrevocable except with the consent in writing of those persons. He represented to the directors of the fund that "the consideration for the appointment thus made was to be the loan to him by the Guardian Assurance Co. of a sum of money which he intended to apply in releasing or disincumbering some family property for the ultimate benefit of his family," and the directors, under those circumstances, duly admitted the persons named to be his nominees in respect of the sum of £1,400. The company then advanced him £900, and he covenanted that his heirs, executors, or administrators would, within three months after his death, pay to the company the sum of £1,220, with interest from his death until payment, and there was a declaration that the £1,400 coming to the trustees of the company under the appointment should be applied first in the payment of costs and then in satisfaction of the £1,220 and interest, and that the surplus should (subject to succession duty) be paid to the executors or administrators of the insured. After his death the persons interested in the estate of the insured disputed the claim of the insurance company, and the £1,400 was paid into court under the Trustee Relief Act. It was held by Jessel, M.R., that there was a proper appointment and nomination of the trustees, and that they were entitled to be paid the amount due to them out of the £1,400. The only point material to the present case is this: that there might have been a small surplus left after satisfying the £1,220, the interest, and the costs out of the £1,400, and the question arose how that surplus should go. The Master of the Rolls said: "It is suggested that because the real transaction between the testator and the Guardian Life Office was a mortgage and not an assignment out and out, that this was contrary to the principle of the Act, but I do not think it was. The principle of the Act was to allow the subscriber to dispose absolutely, and as he thought fit, of two-thirds of the capital if he had a wife and children. If he did not dispose of it, then it went according to the directions contained in his will—that is, it remained his absolute property. If he disposed of it by way of mortgage, in this court that would be a disposition *pro tanto*, and, therefore, whatever he did not thus dispose of—that is, his interest as mortgagor—would still remain his absolute property and be subject to the dispositions of his will. To that extent, therefore, the assignment would be a direction to pay to his nominees as trustees for his executors or administrators instead of to the executors or administrators direct; and why should he not in his lifetime direct the whole disposable share coming to him to be paid to nominees who were in a certain event to become trustees for his legal personal representatives? It seems that he had the power so to direct, and that there is no substantial objection to the mode in which that power has been exercised." The only case cited to the Master of the Rolls upon that point was *In re Pocock's Policy*, to which I shall have to refer presently. *Attorney-General* v. *Rowsell* and *Attorney-General* v. *Abdy* were not cited to him, though they were afterwards cited upon the second point which arose in the case—viz., whether the £1,400 was subject to succession duty or not. The Master of the Rolls held that it was not subject to succession duty because it had been assigned in the lifetime of the insured, and was therefore expressly exempted from succession duty by the terms of the 17th section of the Succession Duty Act, but he added at the end of his judgment "The fund will be applied in the first place in payment of what is due to the petitioners" (that is the Guardian Co.) "for principal, interest, and costs, including their costs of this petition. I suppose the fund will be ample for that purpose, but if it should not turn out to be sufficient, then the respondents who made the claim will have to pay personally. If there is any surplus it must be transferred to the suit for the adminstration of Mr. Maclean's estate, and of course that surplus will be liable to succession duty, but I am told that in fact the estate is insolvent." No doubt some of the observations of the Master of the Rolls do, so far as they go, treat the fund as the property of the insured, and as payable to his executors and administrators, and that is inconsistent with the two earlier cases to which I have referred, and which at that time had not been cited to the Master of the Rolls, but his observations amounted to no more than a general remark as to a very small possible surplus of a fund, when it was reasonably expected there might not be any. But whatever effect may be attributable to those observations of Jessel, M.R. (and certainly they are entitled to very great weight) their effect upon the law as declared in the earlier cases is now unimportant, because a similar case came before the Court of Appeal on a subsequent occasion when Jessel, M.R., was himself present. That case is *In re Phillips' Insurance*, and the point in it was shortly this. A subscriber to the fund died a widower leaving children. No nominee had been accepted by the directors in his lifetime. By his will he bequeathed the fund coming from his insurance to a stranger in blood—that is to say, a person who was not a relative and not a nominee. Bacon, V.C., held that the legatee was entitled. The Court of Appeal held that "the subscriber had no property in the fund, but only a limited power of appointment over it, and that this power could only be exercised in favour of his widow, children, blood relations, and nominees admitted by the directors in his lifetime, and that he had no power, therefore, to bequeath the fund to a stranger in blood who had not in his lifetime been accepted by the directors as a nominee, and that the fund therefore, belonged to the children."

It is clear, therefore, according to those cases that the insured has no property whatever in the fund. He has a limited special power of appointment in the mode, and in favour of the objects, pointed out by the rules, but he has nothing else. [His lordship then referred to the facts of the present case as above stated, and continued:—] The case which was stated in 1842 by Mr. Forsyth's solicitors for the opinion of the standing counsel of the Customs Fund was not a joint case. It was a case stated by them for the opinion of the standing counsel of the fund, as being the best authority to whom they could go for advice on the subject, and I have no doubt that the solicitor for the fund knew what was about to be done. What happened subsequently to the admission of Mr. Forsyth as a nominee seems to me altogether immaterial, except so far as the continued payment of the premiums is of importance.

Now what was the position of Mr. Forsyth under the appointment? It seems to me that the plaintiff in this case is in the same position as Mr. Forsyth was in every respect. In my opinion Mr. Forsyth was not duly appointed "nominee" by the order of the Court of Session. It is necessary to consider what the position of the parties was before that order was made. A will made by the lunatic was in existence, by which he gave his property in general terms to certain persons mentioned in it. In my opinion that will did not in any way affect or operate upon his interest in the insurance fund, and that for two reasons which are conclusive. In the first place the will does not contain any reference whatever either to the power which he had of appointing this fund or to the fund itself; neither the power nor the property is referred to. That being so, the will, as it stood then, could not in any way operate upon the fund. In the next place, none of the persons who were nominated by the will to take were objects of the

power, they were neither "widow, children, or relatives" of the testator, and they were not "nominees," because at that time no nomination of any sort had taken place. It seems to me that either of those reasons is sufficient to prevent the will from operating on the fund. What, then, was the power given by the rules? Under the Rules of 1827 it was a power to appoint "by any deed or instrument, or by his will," and under the Rules of 1836 it was a power to appoint "by any instrument in writing signed in the presence of one or more witness or witnesses and deposited with the directors, or by his will." It does not seem to me to matter much under which of those rules the case comes, because if the will itself did not operate upon the fund there was no other instrument such as is referred to in the rules which could affect it. There clearly was no instrument signed by Mr. Hoyes, and there could not have been any because, at that time, he was of unsound mind—he remained so during the rest of his life. The only instrument (if there be any) besides the will which could affect the fund, is the order of the Court of Session, which was made on the application of the committee. It seems to me that that order is not an instrument which in any way deals with the fund, and, moreover, the Court of Session having, as is admitted by both parties, the same jurisdiction in Scotland as the Lord Chancellor has in England to deal with the estates of lunatics, had, in my opinion, no power to make such nomination, just as the Lord Chancellor would have no power to make such a nomination in England.

I called the attention of counsel to the fact this morning that a certain admission was made by the counsel for the defendant which did not seem to me to be very clear or precise and to be capable of misconstruction, and for the purpose of clearing this up I allowed the counsel for the plaintiff this morning an opportunity of reading any further evidence which they had if they thought it desirable to do so. They have declined to do that, and it appears to me I must deal with the matter on the assumption that the court in Scotland had precisely the same (but no larger) power of dealing with the interest of the insured in this fund as if the insured had been domiciled in England, confined in a lunatic asylum in England, and the Lord Chancellor had been here dealing with the fund in England. It is very important to recollect that this fund was not the property of the lunatic. If it had been his property the matter would have stood, in my opinion, in a totally different position. But he had no property in it, he had only a special power of directing among which of a very limited class of objects the fund was to be divided. It appears to me that if this had been an English case it would be preposterous to suppose that the Lord Chancellor would have had any power to make a "nomination" on behalf of the lunatic; and it appears to me that the Court of Session in Scotland, exercising precisely the same powers and having precisely the same authority with regard to lunatics in Scotland, could not by anything which they did make a document a will which immediately before their adjudication was not a will operating in any way upon the lunatic's interest in the fund.

The case of *Ex parte Whitbread*, 2 Mer. 99, which was referred to in Mr. Forsyth's petition, and which I have no doubt, before the Court of Session, does appear to me to assist the plaintiff at all. That case, in my opinion, has no application whatever to one in which the property of the lunatic is not being dealt with at all. The question whether the persons named in his will could or could not take after his death was a matter which could not possibly affect the lunatic beneficially or otherwise; it was the case of a lunatic having a mere dry power of selection, and, in my opinion, such a power cannot be exercised by the Lord Chancellor on his behalf, or by any other court which has only the same jurisdiction which the Lord Chancellor has. There is no precedent that I am aware of for any such authority being vested in the Lord Chancellor.

Under these circumstances it seems to me that the nomination of Mr. Forsyth by the Court of Session had not the effect of making him a "nominee."

There is another difficulty in the way of the plaintiff which prevents my deciding in his favour. It appears to me that the nominee must be a person who is to take beneficially, and that he cannot take merely as a trustee for other persons. I have pointed out that the words "for the benefit of," in rule 23 of 1827, apply to nominees as well as to the widow, children, and relatives of the subscriber. It is admitted here that neither Mr. Forsyth nor the plaintiff took anything whatever beneficially, and that the plaintiff is at the utmost the hand to receive the money, which he would have to apply in the lunacy for the benefit of the persons interested under the will of the lunatic. It appears to me that a person who is not a beneficiary cannot be nominated according to the rules. Indeed, the Court of Session took precisely the same view of the rules that I am taking now, because their order nominated the petitioner "nominee of Hoyes for behoof of the legatees" under his will to his interest as a subscriber to the fund "in terms of the statute and regulations," and directed the petitioner to communicate the appointment to the directors "for their acceptance and admission as parties interested in the fund in terms of the statute and regulations." Therefore the order of the Court of Session contemplated that the persons to be admitted should be, not Mr. Forsyth, but the legatees. They are to be accepted and they are to be admitted, as parties interested. It seems to me beyond all question that that is the meaning of the order of the Court of Session.

Then it is said that there are two cases which to some extent conflict with the view which I have expressed. The first is *In re Maclean's Trusts*, to which I have already referred. It is said that in that case the direction to pay to the nominees of the insured was held not to be invalid although it made those persons to some extent trustees for the executors. I have already pointed out that the interest of the executors was so very slight that it cannot be said that there was any material decision upon that point. And I could not accept that decision as an authority upon that point, even if it were not displaced by the later case of *In re Phillips' Insurance*, because it is clearly inconsistent with the views of all the barons of the Court of Exchequer in *Attorney-General* v. *Rowsell*, and I think it is also inconsistent with the decision of the Court of Appeal in *In re Pocock's Policy*. In that case a subscriber to the fund settled the whole of his insurance fund on the marriage of his daughter, and he did so by an instrument which, beyond all question, referred to the fund and was a good exercise of the power of appointment so far as that went. The question was whether the mode in which it was exercised was valid. He executed an instrument in the form prescribed by the rules, by which he directed that the fund should be paid to the two trustees of the settlement, and this document was forwarded to the directors by the daughter's husband; and in reply the secretary wrote to Mr. Pocock advising him "to write to the directors to admit his son-in-law, Mr. W. C. Cobbold, his nominee for the purpose of the marriage settlement." Mr. Pocock, however, took no further steps in the matter, and no admittance of a nominee was made by the directors of the fund. The daughter died some years afterwards intestate, leaving one child. Her father died three years afterwards leaving one son, that son and the deceased daughter being his only children. The husband of the deceased daughter presented a petition for the payment of the fund (which had been paid into court) to the trustees for the purposes of the marriage settlement. The son opposed the petition, and claimed

that the fund belonged in equal moieties to himself and the child of his deceased sister. Malins, V.C., held that the trustees must be taken to have been properly nominated, and that as nominees they were entitled to the fund. He held that, the nomination having been communicated to the directors, it was their duty, if they had any objection to the nominees, to state their objection at once, and that, as they did not make any objection, the trustees must be taken to have been duly admitted as nominees. The Vice-Chancellor said: "I totally dissent from the argument that no person can be a nominee except one who is to take beneficially."

I must confess that it seems to me that this view is not only at variance with the decision of the learned barons in *The Attorney-General* v. *Rowsell*, but that it was overruled by the Court of Appeal in the very same case. The Vice-Chancellor having directed payment of the fund to the trustees of the settlement, the son of the insured appealed, and the Court of Appeal, though they affirmed the order, did so upon totally different grounds. James, L.J., said: "I am of opinion that the order of the Vice-Chancellor must stand, although not exactly on the same grounds as those on which the Vice-Chancellor has put it. The view which I take of the matter appears to me quite consistent with every word of the Act of Parliament and of the rules of the society." Then he pointed out that (to put it shortly) what the father had done amounted to a settlement in favour of the daughter. The daughter was beyond all question an object of the power. The settlement was made upon her marriage, and although it gave a life interest in remainder to her husband it was a settlement for the benefit of the daughter, and strictly within the powers conferred upon the insured by the rules. That that was the view taken by James, L.J., is clear from his judgment, for he pointed out that, although the husband might not be able to take under the appointment itself, yet the appointment for the benefit of the daughter was good, and the husband would take the fund for his life, as undisposed of by her and as her administrator. Mellish, L.J., took the same view. The grounds of those judgments seem to me entirely inconsistent with the grounds upon which the Vice-Chancellor had decided the case. They affirmed his order because the daughter was the person beneficially entitled. It was not necessary that she should be nominated, and the appointment in her favour was perfectly well effected by nominating the two trustees for her benefit.

Upon the authority of that decision of the Court of Appeal and of *Attorney-General* v. *Rowsell*, and having regard to the terms of the order of the Court of Session, I have no difficulty in giving effect to my own view of the true construction of the rules—viz., that the person who is to take beneficially, the person for whose benefit a nomination is made, is the person who must be approved and accepted by the directors, and not a person who is nominated as trustee for third persons who are not objects of the power. If, indeed, the person who is to take beneficially is effectually nominated if he is not a relation of the insured, or is effectually appointed if he is a relation, the appointment in his favour is not prejudiced by the fund being appointed to a trustee for his benefit. It seems to me, therefore, that the persons who ought to have been nominated and approved by the directors were the legatees under the will as the Court of Session intended, and not Mr. Forsyth or Mr. Urquhart. On these two grounds I hold that the nomination made by the Court of Session is of no effect.

But then it is said that, whatever the position of matters might have been but for what took place on the admission of Mr. Forsyth and Mr. Urquhart, the defendant is prevented by what then took place from saying that there was not a good nomination of Forsyth and Urquhart. In my opinion that is not so. From beginning to end the action was taken by Mr. Forsyth at the instance of the persons named as beneficiaries in the will of Mr. Hoyes for the purpose of securing the benefit of the insurance for them. The directors of the fund were willing, if they could, to give effect to that will, but so far from making any representation or any statement by which they are estopped or which casts any obligation upon them, in my view they simply acquiesced in the view which was put before them after a great deal of pressure from Mr. Forsyth. Therefore, the subsequent acts of the directors do not, in my opinion, cure the defect which arises from the fact that there was no proper nomination made before the admission.

But it is said that, even if the insurance money cannot be recovered, yet, at any rate, the premiums ought to be returned, because they have been paid under a mistake. In my opinion I cannot make any order directing the premiums to be returned. The matter was fairly and fully before the advisers of Mr. Forsyth, who took what they thought the best advice upon the subject. They went to the court for authority, and they got it. After it had been pointed out to them that there were difficulties in their way, they, of their own accord, with the sanction of the directors of the fund, took the opinion of the standing counsel to the fund, and they were fully advised as to what their position was. Under these circumstances it appears to me that if they did misunderstand what their position was it was their own fault; at any rate, it was not a fault attributable to the directors of the fund. If there was any mistake at all it was a mistake of law as to what the real position of the parties was, and not a mistake of fact which can give any claim to have the premiums returned. It was suggested that when Forsyth was admitted there was some novation, a new contract by which the directors were bound. In my opinion a new contract was the very last thing the parties were thinking about. They were considering what they could do to give effect to the existing contract and to the will which had already been made. If there had been a new contract it would have made it all the more difficult to support the will which had been previously executed, and to apply it to a fund arising under a contract not made by the testator, but made by his committee long after the execution of the will. Therefore, in my opinion, a novation was the very last thing in the contemplation of the parties, and there is no reference to it from beginning to end, either in the correspondence or in the petition to the Court of Session.

Nor can it, in my opinion, be said that there was any failure of consideration for the premiums paid after the admission of Mr. Forsyth, because, in point of fact, those premiums were doing their work, and they might have had the effect of securing the fund for the benefit of the person who had the power of directing how it should go. Suppose Mr. Hoyes had become of sound mind again and had married, and had died leaving a widow, the widow must, under the rules, have taken a part of the fund. Her interest could not be displaced. The premiums were earning the right to have that interest paid to the widow in case there should happen to be a widow in existence at his death. In the same way there might have been children, and they would have taken an interest in the fund. And if there had been no widow or children, Mr. Hoyes, if he had recovered his senses, might have revoked the will which he had made and have appointed the fund to some other nominee. For these purposes it was considered advisable by the curator, acting on behalf of the lunatic's family, that the premiums should be paid up and the policy kept up, and I cannot say that because none of the events contemplated as possible have, in fact, happened, those payments were made without consideration. It is quite true that, in the result, according to the view which I have taken, the insurer gets nothing

by the payment of the premiums; but it is only like any other case in which a man is content to pay money during his lifetime with a view to having, upon a given contingency, a power of dealing with the fund thereby created. If the contingency happens he has the benefit of the payments; if it does not happen the payments are thrown away.

Under these circumstances it appears to me that the plaintiff is not entitled to have the premiums repaid.

Some nice questions of domicil were mooted, but after the conclusions at which I have arrived it is not necessary that I should say anything about them. The action, in my opinion, fails altogether; but, having regard to all the circumstances, I dismiss it, without costs.

From this decision the plaintiff appealed; the appeal came on for hearing on November 21, 1887.

Gifford, Q.C., and *R. Campbell*, for the appellant.—The cases of *Attorney-General* v. *Rowsell*, *Attorney-General* v. *Abdy*, and *In re Phillips' Insurance*, which were relied on by the defendant's counsel in argument and by the judge in his judgment in the court below, are not applicable, because in all those cases there was in fact no nominee and no claim by anyone as nominee. In such a case as this, where the insured was not married and could not have any next of kin who would have been entitled in default of any appointment, he was entitled to nominate himself. Here there was a nomination. The instrument by which the nomination was made is not the will of L. R. Hoyes, but the order of the Court of Session. The directors are now estopped from saying that there was not a proper nomination, after having accepted and admitted the curators, Forsyth and Urquhart respectively, as nominees of L. R. Hoyes, and after that acceptance of the nomination has been acted on by the payment of premiums: *Caton* v. *Caton*, 14 W. R. 267, L. R. 1 Ch. 137. After the admission made by the defendant's counsel in the court below, we were not bound to produce evidence that the Court of Session in Scotland had jurisdiction to nominate the curator as nominee of L. R. Hoyes. [*Cozens-Hardy, Q.C.*, in reply to COTTON, L.J.:—"I admitted in the court below—and I stand by that admission now—that the nomination made by the Court of Session is to have the same effect, but no more, as if it were a nomination made by L. R. Hoyes himself (being sane) in his lifetime."]

In re Pocock's Policy, 19 W. R. 901, L. R. 6 Ch. 445, and *In re Maclean's Trusts*, L. R. 19 Eq. 274, were also referred to.

Cozens-Hardy, Q.C., and *G. Henderson*, for the respondent.—The effect of the nomination is only to include the nominee, when admitted as such by the directors, among the class of persons among whom the subscriber may appoint, but neither the nomination nor the admittance, taken either separately or together, constitute a disposition of the fund in favour of the nominee. Again, it would not have been competent for L. R. Hoyes to nominate a person to take, not beneficially, but as trustee for others (*In re Phillips' Insurance*), and therefore it was not competent for the Court of Session to do so. There was consideration for the payment of the premiums by the curator as the policies were thereby kept up, and that was for the benefit of the lunatic. If the premiums were paid by the curator under a mistake, which we do not admit, it was a mistake of law, not of fact.

Gifford replied.

Cur. adv. vult.

Dec. 3.—COTTON, L.J.—This is an appeal from the decision of North, J. [The Lord Justice then stated generally the subject-matter of the action and the representative character in which the plaintiff sued and in which the defendant was sued, and continued:—] The question is whether the plaintiff under the nominee clauses is not entitled to a claim on the fund in question. [The Lord Justice then referred to the Act under which the fund was formed—43 Geo. 3, c. 73—and read sections 9 and 16 of the Act, and also rule 23 of the Rules of the Directors in force in 1827, and continued:—] Now what was the interest of L. R. Hoyes in this fund? It was contended by the appellant that L. R. Hoyes had, subject to the power of appointment and direction given by the rules and the Act, an interest in this fund as his estate, and that therefore it went to him if it were not disposed of in accordance with the rules. I cannot accede to that. It is very true that the fund was composed of deductions made from time to time, under the Act and rules, from his salary, but the Act and rules do not give the appellant here a right to say that it was the property of L. R. Hoyes. The rules provide that if there is no appointment to or amongst the widow, children, or relatives of the insured, and if no nominee has been admitted, then the fund is to be disposed of having regard to the claims of the widow, and if she has no claim is to go to the children, and if there are no widow or children is to go to the next of kin of the insured, according to the Statute of Distributions. In my opinion—and it is supported by the cases which were referred to—we ought not to consider this fund—principally arising from contributions by the insured himself and other persons in a similar position—as the property of the insured, but that he merely had a right to dispose of it in certain particular ways.

L. R. Hoyes unfortunately became of unsound mind, and, being in Scotland at the time, the Court of Session declared him to be a person of unsound mind and appointed a curator. The question then arose as to the position of L. R. Hoyes in regard to this fund. He had subscribed for some years, and either he would have to go on subscribing or would forfeit the benefit to be obtained from the subscriptions he had already made. He had not, at the time he became of unsound mind, submitted to the directors any nominee whom he desired should be admitted, for it was not sufficient for the insured merely to submit a nominee to the directors, but it was necessary that the directors should also admit the person nominated.

A will of L. R. Hoyes', which has since been proved, was found among his papers at the time he became of unsound mind. A correspondence took place between the curator and the persons named in the will and the directors, and attempts were made to get either the curator or the legatees admitted as nominees of L. R. Hoyes. The directors said—and I think reasonably—"We cannot do this; the will was not a will in any way referring to the fund, and we shall not admit either the legatees or the curator unless we get some direction from a competent court to do so." A petition was accordingly presented to the Court of Session having jurisdiction. [The Lord Justice then referred in detail to this petition, and continued:—] On the 13th of July, 1841, an order was made on this petition. [The Lord Justice here read the order, and continued:—] After some considerable correspondence, the directors not only received this nomination, but they admitted the nominee to be appointed as nominee of L. R. Hoyes. Counsel on behalf of the defendant, the present respondent, very fairly admitted, both here and in the court below, that that nomination is to have the same effect—that is all they admit—as if it had been made by L. R. Hoyes himself.

Now what has been done by North, J.? Notwithstanding that perfectly plain admission, he—in my opinion erroneously—went into the consideration of the question whether the Court of Session had power to make any nomination. The powers of the Court of

Session are to be decided in this court as matters of fact on evidence. But when the defendant's counsel has admitted that the order made by the Court of Session has the same effect as a nomination made by L. R. Hoyes himself, that admission ought to be accepted as sufficient evidence of the fact that the Court of Session had the power, and, therefore, I think it is wrong to go into that question. But that does not settle the question, because I think that Mr. Cozens-Hardy is quite right in saying the order only has the same effect as if it were a nomination by L. R. Hoyes himself.

What is the effect of that? The admission by the directors follows the exact words of the order made on the petition. The first objection raised is that even if it had been a nomination made by L. R. Hoyes himself it would be a bad nomination, because, under the rules, the nominee is to be a person who is to take for his own benefit. In a qualified sense I do not think it can be said—though it is not necessary to decide this point—that the nomination must necessarily say that the money is to go into the pocket of the nominee. But I think it was necessary when any nomination was submitted to the directors that they should know for what purposes the nomination was made, and that they should be told who was really to receive and have the money. Here, although it may be said that the curator is a nominee, there is a distinct statement that he is to be a nominee for behoof of the legatees named in the will of L. R. Hoyes. If it be necessary that the nominee, under the rules and Act, should be a person to put the money in his own pocket, then I think the remarks of James, L.J., in *Ex parte Pocock* dispose of that when he says "If that be so, then this must be taken as a nomination in favour of the legatees named in the will."

Although I do not say that this was a regular nomination—an ordinary nomination—we have persons who were to take the money into their pockets submitted to the directors, and the directors approved of that by admitting the curator as on behalf of the legatees named in the will.

It is said that there has been no sufficient appointment. Now what was done here? The insured being incompetent at the time to make any nomination, and his will not being of itself a sufficient appointment of the fund, the directors take the order referred to, accompanied as it was with the will, as a sufficient nomination for the purpose of enabling the fund to be distributed among the legatees so as to supplement and make good their legacies, and the directors take the order and the will as sufficient instruments to point out to them how the fund was to be applied for the nominees—one may say either the legatees or the curator on their behalf. For many years the directors went on acting on that belief. They have now been advised they cannot properly act on that nomination. I think that is erroneous.

In my opinion therefore the decision of North, J., is erroneous; and although the nomination and direction as to enjoyment was not such as could have been forced upon the directors, yet as they have accepted it and raised no objection on the ground of irregularity, the mere irregularity (if there was any) of treating this as a nomination made by the insured himself does not justify them in resisting entirely the claim of the plaintiff in this action by saying there is no nominee nor sufficient direction as to how the fund is to be applied for the benefit of the nominee.

But then there is this. In my opinion it is only a nomination in favour of the legatees to the extent of the benefits which they are to take under the will, and it cannot be contended by the curator that he is entitled to take it without reference as to how far that sum of money is required for the purposes of the will. The legatees cannot by that nomination get an increase of their legacies. It may be that the legatees have been already paid out of the estate. In that case they will get nothing from the nomination and direction, because it is a direction to pay to the curator for the purpose of making good—the Scotch term would be, I think, implementing—the directions contained in the will. Here the residuary legatee, who, if he were alive would of course sweep off everything, died in the lifetime of the testator.

Then comes this question. If L. R. Hoyes, the testator, was domiciled in Scotland that would not make a lapse, because the heir of the residuary legatee would be put as legatee in place of the residuary legatee. But I understand there is a question about the domicile of L. R. Hoyes which has not yet been decided, and therefore if the directors require it there may be an inquiry on that point in order to enable us to see how far this plaintiff can, in the events which have happened, claim this fund or any part of it.

HANNEN, P.—I am of the same opinion. Before giving my reasons I will call attention to the fact that these transactions, the validity of which is now questioned, took place in 1841. The directors knew all the circumstances of the case, they saw the opinions given by eminent counsel, they themselves required and obtained the protection of a decision of a competent court, and the course recommended by counsel was deliberately adopted by the directors and has ever since been acted upon by the payment of large sums annually out of the estate of the insured.

Now in these circumstances I think the court ought not to be too astute in discovering reasons why this transaction should be defeated. On the contrary, if any reasonable construction can be put upon it by which it can be maintained, it is the duty of the court to adopt that construction. I think there is such a reasonable construction. [The President here referred to and read section 9 of the Act and rule 23 of the Rules of 1827, and continued:—] It is to be observed that rule 23 only shows that the insured is to direct by "deed or instrument," any form of instrument is therefore sufficient. No formalities are prescribed, and if there is anything which fulfils the description of an instrument by which the insured has conveyed his direction to the directors as to the nominee whom he desires to be admitted, and they accept him, the terms of the rule have been fulfilled. Now, the insured having become insane, it was undoubtedly impossible for him personally to put in force the powers given him by the Act and Rules, and in these circumstances an application was made to the Court of Session in Scotland to give that direction which should be a protection to the directors in any disposition of the fund. An admission was made in the course of the case that the order of the Court of Session should be deemed as effectual as if it were made by the subscriber himself, being sane, in his lifetime. North, J., considered that he was not bound by that admission. I think that that is incorrect. Questions of Scotch law are dealt with in English courts as matters of fact over which counsel have control—that is, in the sense of being entitled to dispense with proof of them, by admission. It appears to me, therefore, that the effect of that admission is that we must deal with the case precisely as though the substance of that order had been communicated to the directors by the insured himself. Now what would be the effect of that? It would have been a distinct intimation to the directors that he desired the person named to be admitted as his nominee, and not only that, but that he desired it to be for the benefit of the persons mentioned in the will.

Reserving for the moment the question whether or not any person could be appointed nominee, not for his own benefit, but for the benefit of anyone else, is it not

clear that that would have been effectual? Upon this point we do not differ from the opinion expressed by North, J. [The President here referred to the remarks of North, J., on that point, and continued:—] Then there only remains the question of whether or not a nominee must be a person taking solely in his own interest. In my opinion that is not the meaning of the language used in the rules. I agree that the directors must have the full opportunity of exercising their discretion whether they will admit the nominee or not, but if they know all the circumstances, if they see that the purpose for which the nominee is intended to be introduced is one of which they approve, then we are entitled and bound to couple the interests of the persons who are the ultimate objects of the bounty of the insured together with the individual who is named in their behalf; and that seems to me to be the view which the Court of Session took, and it makes clear the meaning of the language used in the order—viz., that Forsyth be appointed a "nominee of L. R. Hoyes for behoof of the legatees under that gentleman's will appended to this petition, and that the petitioner communicate the said appointment to the directors for their acceptance as parties interested in the fund in the terms of the statute and regulations," by which it is meant that the admission of Forsyth as nominee for these legatees would make—and the directors are requested on that footing to admit—these persons as parties interested in the fund in the terms of the statute and regulations. The directors have not altered the form; they have admitted Forsyth in the terms of the order. It seems to me, therefore, that the directors intended, as the Court of Session intended, that the nominee for behoof of the legatees and the legatees were to be treated as the nominee of the insured to take the interest which the insured himself had power of disposing of. Several cases have been referred to, but there is only one case—*In re Maclean's Trusts*—in which the question has really arisen. There the late Master of the Rolls held that a nominee could take as trustee for others. The only adverse comment on that decision was that in that case there was very little to deal with; but Sir George Jessel was not a judge to decide a case contrary to what he thought was the law because the amount in dispute was small. That is the only case in point, because in the other cases no nominee had been admitted by the directors.

For these reasons it appears to me the decision of North, J., cannot be maintained.

LOPES, L.J.—I agree, and have nothing to add.

COTTON, L.J.—Our judgment, therefore, is that the plaintiff is entitled to receive this fund, but only for the purpose of performing and giving effect to the purposes expressed in the testator's will.

Gifford, Q.C.—The pecuniary legacies have been paid, I understand. The only question remaining is as to the right of the residuary legatee to receive this fund.

COTTON, L.J.—If the will is to be governed by Scotch law, there is a residuary legatee; if by English law, there is no residuary legatee. That raises the question of domicile. [Some discussion followed as to what took place in the court below with reference to the question of domicile.] The appeal must stand over to be argued before us on the question of domicile.*

Solicitors for the plaintiff, *Ford, Ranken, Ford, & Ford.*

Solicitors for the defendant, *Foss & Ledsam.*

* On Dec. 9, after having had the question of domicile argued, the court gave judgment on that question, and held that on the facts, as shown by the evidence, the testator, L. R. Hoyes, had not acquired a Scotch domicile, and therefore that, though the nomination and admission were in themselves effectual, they became inoperative because the fund was not wanted for the purpose to which it was to be applied in accordance with the nomination—viz., "the behoof of the legatees." The appeal, therefore, was dismissed, but without costs.

From Chan. Div. Nov. 1.

In re FITZGERALD.
FITZGERALD *v.* WHITE. (*a.*)

Trust—Declaration of trust in voluntary settlement—Trust to arise after death of settlor—Rents to be accumulated to pay off mortgages—Mortgagees constituted cestui que trusts.

A settlor, by a voluntary settlement of real estate (which was subject to mortgages), created a trust term, to arise after his decease, for the accumulation of a fixed sum out of the rents each year during a period of twenty-one years, to pay off, either at the end of that period or from time to time during its continuance, as the trustees of the term should think fit, such mortgages as should then be charged on the estate; and the settlor then limited the estate by way of remainder expectant on the trust term in strict settlement, the person for the time being entitled to the immediate reversion to be paid the surplus rents.

Some years after the death of the settlor, a tenant in tail in possession under the settlement barred the entail, and applied to the court for a declaration that he, as owner of the estate, was entitled to receive the accumulations and to put an end to the trusts of the term. Mortgages to a considerable amount were still outstanding.

Held, that, as, under the deed of settlement, the trust term did not arise until after the death of the settlor, the deed was not a mere arrangement for vesting the property in trustees as agents for the settlor, but constituted a trust in favour of the mortgagees; and that, as the mortgagees, though not parties to, and not named in, the deed, were capable of being ascertained, they were entitled, as cestui que trusts, *to insist on and enforce the execution of the trust for accumulation against the applicant or any owner of the estate until they were paid off.*

Garrard *v.* Lord Lauderdale, 2 *Russ. & My.* 451, *distinguished.*

Per Cotton, L.J.—*Even if the mortgagees were not* cestui que trusts, *no person other than the settlor claiming under the deed of settlement would have any equity to set aside the provisions in the deed relating to accumulation.*

Order of North, J., *varied.*

Appeal from North, J.

John P. Fitzgerald in 1866 executed a voluntary settlement whereby certain estates of which he was then owner in fee, subject to certain mortgages, were limited, subject to the mortgages then affecting the same, to the use of the settlor for life, with remainder to the use of trustees for a term of 500 years from the death of the settlor, with remainder to the use of the eldest son of the settlor for life, with remainder to the first and other sons of such eldest son successively in tail male, with remainder to the use of the second son of the settlor for life, with remainder to the first and other sons of such second son successively in tail male.

The trusts declared of the term of 500 years were that the trustees should, after the death of the settlor, and thenceforth during a period of twenty-one years, raise each year out of the rents and profits the annual sum of £1,000, and accumulate the same and the income thereof during the twenty-one years, and on the ex-

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

piration of that period, or from time to time during its continuance, as they might think fit, should apply the annual sum of £1,000, and the accumulations thereof, "towards the satisfaction and discharge of all such mortgages . . . as should then be charged upon the hereditaments or any part of the same." The trustees were also to permit the person or persons for the time being entitled to the reversion immediately expectant on the term to receive the surplus of the rents and profits.

The settlor died on May, 4, 1879. The eldest son of the settlor died a bachelor on June 8, 1879, and on his death Gerald P. Fitzgerald, the eldest son of the settlor's second son (who predeceased the settlor), became tenant in tail in possession under the settlement, and he, after attaining twenty-one, executed on June 2, 1886, a disentailing deed, by which he limited the estates to the use of himself in fee simple, subject to the mortgages affecting the same, but freed (as expressed in the disentailing deed) from the trusts of the term of 500 years.

The trustees had accumulated a considerable sum of money, and mortgages amounting to £60,000 were still outstanding.

Gerald P. Fitzgerald in 1887 took out a summons that the trustees of the term of 500 years might be directed to abstain from accumulating the yearly sum of £1,000, and should transfer the sum already accumulated to the applicant.

The summons was served on the trustees of the term and the mortgagees.

North, J., on the hearing of the summons, declared that the mortgagees were in the position of *cestui que trusts*, and that the trustees held the accumulations for the benefit of the mortgagees; that the sum already accumulated was applicable to the payment off of the mortgages, and that the trustees would not be justified in paying it to the applicant, but that it should be offered to the mortgagees successively, and in case of refusal by any of the mortgagees to accept it in reduction of their mortgages, it should be applied by the trustees in payment off of any mortgage or accumulated under the trusts of the term as the trustees might think best. The judge also expressed an opinion that the trustees were bound to raise the annual sum of £1,000 during the remainder of the twenty-one years, and to offer it to the mortgagees successively, and that, if they should refuse to take it in reduction of their mortgages, the trustees might pay any sum of £1,000 so raised to the applicant.

The applicant, Gerald P. Fitzgerald, appealed.

Cookson, Q.C., and *Blakesley*, for the appellant, and also for the executors of the settlor.—The mortgagees are not *cestui que trusts* of the term. The trusts declared were for the convenience and benefit of the inheritance, and in the events that have happened the appellant is entitled to the benefit of the trusts declared. No bargain was made by the mortgagees with the settlor as to the creation of any trust in their favour. The deed, therefore, at most, is like an agency deed which can be revoked: *Garrard* v. *Lord Lauderdale*, 2 Russ. & My. 451. If the directions as to accumulation amount to a trust there must be a *cestui que trust*, and we say the appellant, not the mortgagees, is the *cestui que trust*: *Pearson* v. *Lane*, 17 Ves. 101; *Synnot* v. *Simpson*, 5 H. L. Cas. 121, 4 W. R. H. L. Dig. 243. Mere communication of the benefits conferred by the deed to creditors cannot make them *cestui que trusts* if they were not so before: *Mackinnon* v. *Stewart*, 1 Sim. N. S. 76; *Aston* v. *Woodgate*, 2 My. & K. 492; *Hughes* v. *Stubbs*, 1 Ha. 476; *Johns* v. *James*, 26 W. R. 821, 8 Ch. D. 744. North, J., had admitted the claim of the appellant as a *cestui que trust* by ordering the future rents to be paid him if the mortgagees would not receive them.

G. T. Borrett, for the respondents, was not called on.

Kenyon Parker, for the trustees of the term.

COTTON, L.J.—This is an appeal from a decision of North, J., who declined to authorize the trustees of a settlement executed in 1866 to cease to accumulate as directed by the settlement. [The Lord Justice here stated the facts of the case shortly, and continued:—] At the time when the trusts of the term for 500 years, which was to accumulate for the period of twenty-one years after the death of the settlor, arose there were successive tenants for life, and it is not disputed that during those successive tenancies for life there was a trust which could not be interfered with. But it is said that the sum which was in the hands of the trustees, invested by them pursuant to the directions contained in the settlement, during the successive lives of the tenants for life, is to be handed over to the present owner of the estate, and that the trustees are no longer, as directed by the settlement, to receive £1,000 a year and apply that in payment off of the mortgages, or, if the mortgagees will not take it, from time to time to accumulate it.

One point in the judgment of North, J., I cannot agree with, because he has stated that the trustees are in *futuro* to raise the £1,000, to offer it to the mortgagees successively, and if none of the mortgagees will take it, then they are to be at liberty to pay it over to the present applicant. I do not understand that. It is said that although he has upheld the trusts of the term for applying the money for the benefit of the mortgagees, he thinks in future it would be right and reasonable for the trustees to hand over what the mortgagees will not take to the owner of the estate, on the ground that if he does not get it he could raise a similar sum by mortgage. No doubt he might do so; but he would raise it subject to all the existing mortgages; and if the trust is for the benefit of the mortgagees I do not see why they are to be deprived of the benefit of the trust simply because the owner of the estate will be able to raise a similar sum by mortgage of the estates—that is, by adding mortgagees who are not within the trust.

Is it, then, right, that the trust should be considered as liable to be put a stop to by the owner of the estate? I think not. Even if we were to hold that the mortgagees are not to be considered in this case *cestui que trusts*, I should feel very great difficulty in authorising trustees to disregard their trusts, which are clearly declared by the settlement, at the instance, not of the settlor, but at the instance of a person who claims from the bounty of the settlor just as much as those trusts which are declared as regards the 500 years term originate in the bounty of the settlor. Even if the mortgagees were not *cestui que trusts*, I should myself feel it wrong as a judge of this court to direct, at the instance of a person claiming under the settlement, that the trustees appointed by that settlement should disregard what is imposed on them as a duty by the settlor in furtherance of the provisions of the settlement. But I do not decide the case on that ground, although that is my opinion.

But are the mortgagees here to be considered as *cestui que trusts*? North, J., thought they were; and though at first I thought it would be unnecessary for us to decide that point on the ground I have just stated, yet it has been argued very fully and very ably, and I think we ought to decide the question. It is said that the owner of an estate is entitled to say, "Hand over this to me, which can be for nobody else's benefit except mine, who am now the owner of the estate." If I were the owner of the mortgages—that is, if he had paid off the mortgages and got those vested in himself he might very well say that. He might say, "I have the mortgages and the estate, and as I am entitled to both I do not desire to have a portion of the rents, which I should

motive but for this trust, applied in payment of mortgages which are now vested in me." That is not the state of things. There are mortgages to the extent of £80,000 still remaining outstanding. He takes the estate by limitation, in obedience to the settlor, subject to this term. Is there a trust in favour of anybody else? It could not be denied that during the lifetime of the tenants for life there was a good trust. The appellant would say that it was a trust for his benefit ultimately; but, in my opinion, it would not only be that, though that was probably one of the objects of the settlor, but a trust also for the benefit of the mortgagees, so that they should not be put into the position of being obliged to become mortgagees in possession, which everyone knows is a most inconvenient and perilous position. In my opinion there is a declaration in this settlement that one of the objects of the settlor's bounty is that a provision should from time to time be made out of the rents to pay off, as far as it would pay, the mortgages on the estate without putting the mortgagees to the necessity of enforcing their rights by foreclosure or sale, or by becoming mortgagees in possession of the estate. We must observe that this trust is not a provision to take effect during the lifetime of the settlor as to how his property is to be dealt with during his lifetime, but a direction as to what is to be done with the estate after his death; and we find in it a benefit for the mortgagees just as much as a benefit for the tenants for life, and just as much as a benefit for the ultimate remainderman, which the appellant now is.

Lord Cranworth, in the case of *Synnot* v. *Simpson*, does intimate a doubt whether the doctrine of *Gaverard* v. *Lord Lauderdale*, that there are no *cestuis que trust*, because those who have the property vested in them may be looked on as agents for the settlor, will apply whereo trusts are to take effect only after the death of the settlor. In such a case it appears, from the mere fact that it is a direction to take effect when he is not able t recall the direction, that it is not intended that the trustees who have the estate should be mere agents; it is not intended that they should have no duty or trust for anyone else; because the trusts are to take effect when he is dead and is no longer able to call on the trustees to reconvey the property to him. I think this case is a good illustration of the doctrine, because here the trusts of the term are entirely to arise after his death. What does that show? It shows that he is intending a benefit in the first instance by way of accumulation of £1,000 a year for the benefit of all it could benefit—for the ultimate remainderman, so long as the estate is only in reversion, and also, both after and before the estate came into possession of the remainderman, for the benefit of the mortgagees.

In my opinion, therefore, we ought to say that these mortgagees are persons constituted by this settlement objects of the settlor's bounty; and if that is so they are to be considered as *cestuis que trust* under this deed. It is very true they are not named, but they are persons who can be ascertained, and, as that is so, no difficulty arises from the fact that they are a number of persons not named in the deed. Their position is indicated, so that when it becomes necessary to determine who are *cestuis que trust* they can be ascertained. If they are *cestuis que trust* then they would be entitled, if their trust was attacked, to insist on it and enforce it just as much as any other *cestuis que trust*.

In my opinion the decision of North, J., was right, subject to this qualification, that we ought to alter the latter part of the order and direct the trustees, if none of the mortgagees will receive the £1,000 a year, to invest it and accumulate it according to the trusts of the term of 500 years.

LINDLEY, L.J.—I am of the same opinion. [The Lord Justice, after referring to the facts of the case, continued:—] The present appellant has become entitled to the property, subject to the trusts of this term. He says the trusts of that term are trusts which are entirely for his benefit, and he wants them discharged. He says, "I do not want this accumulation to go on any longer; I want the £1,000; I will take care of the mortgages." Now, if it were true that he is the only *cestui que trust*, there would be some difficulty in saying that his position was not a tenable one. But to say that he is the only person interested in the trusts of the term begs the whole question. It appears to me that this is not like the case of *Gaverard* v. *Lord Lauderdale*, because these trusts are to commence only when the settlor is dead. The true view to take is that the *cestuis que trust* (I do not say the sole ones) are the mortgagees, and that they are really *cestuis que trust*, and entitled to the benefit of the trust. If the appellant could obtain the concurrence of the mortgagees, or could obtain a release by the mortgagees of their interest in this term, then, having got the consent of the representatives of the settlor and his own, he would be, as we are asked to say he is now, the only person interested in the matter. But the mortgages are outstanding, and, if the mortgagees desire to have the benefit of this term, they are entitled to it.

I confess I do not follow the view of North, J., when he made it a part of his order that the £1,000 might be paid to Mr. Fitzgerald if the mortgagees did not care to have it. I agree with Cotton, L.J., in the observations he made on that subject, and it appears to me the proper order to make is that the trusts must be carried out, and that part of the order of North, J., must be varied.

LOPES, L.J.—It is admitted in this case that if the mortgagees are *cestuis que trust*, the appellant fails. Now if the settlor intended to benefit the mortgagees, if he intended them to be the objects of his bounty, it is also admitted that they would be *cestuis que trust*. This case, therefore, depends entirely on what the true construction of this provision is. I think that what the settlor intended was not only to benefit the estate—although that probably may have been one of his main objects—I think he also intended to benefit the mortgagees, and I think if the effect of that provision is considered, it is pretty clear that must be so. What does he do by that provision? He provides that at the end of twenty-one years there shall exist a fund out of which these mortgage debts, or at any rate a considerable portion of these mortgage debts, should be paid. In point of fact he provides an additional security out of which these mortgage debts are to be paid. It seems, therefore, impossible to say that he did not intend to benefit, and did not benefit, the mortgagees. It is perfectly clear that he intended to, and did.

North, J., by his order, seems to have thought that if the mortgagees did not care to have this £1,000, which was to be raised out of the rents, it might then be applied to the purposes of the appellant. I venture to think he was wrong in that view. It seems clear that that sum could not be applied or handed over to the appellant, but that it must be accumulated according to the terms of the provisions of the deed. I think the appellant is not entitled to have this provision set aside, and that it ought to stand.

Solicitors for all parties, *White, Barrett, & Co.*

Bankruptcy. Jan 27.

Ex parte TILLY.
In re SCHARRER. (*a.*)

Examination of witness—Refusal to answer—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 27—*Practice—Appeal.*

A witness who, on being examined under section 27 *of the Bankruptcy Act,* 1883, *is held by the registrar to be justified in refusing to answer questions put to him, cannot be made a respondent to an appeal by the trustee against such ruling of the registrar.*

The answers of a witness examined under section 27 *of the Bankruptcy Act,* 1883, *must in the end be accepted by the trustee, but he is not bound to accept the first answer, and may cross-examine the witness thereon.*

In re Purvis, Ex parte Rooke, 56 *L. T. N. S.* 579, 35 *W. R. Dig.* 18, *explained.*

Appeal by the trustee from a refusal by Mr. Registrar Linklater to order F. T. Eggers, a witness, to submit himself for examination as to dealings with the property of the bankrupt under section 27 of the Bankruptcy, 1883.

The witness had answered questions relating to certain property belonging solely to the bankrupt, but had refused to answer other questions relating to property, which (as he alleged) was the property of the firm of Scharrer, Tiede, & Co., trading in Africa, of which firm the bankrupt was a partner. The witness had been made a respondent to the appeal, and the court raised the point that the appeal was, therefore, wrong in form.

Cooper Willis, Q.C., and *Yelverton,* for the trustee.—The witness first refused to answer, and his refusal was supported by the registrar. The witness is properly made a respondent, if there need be one; and, if not, the court can treat this motion as an *ex parte* application. The registrar cannot be made respondent: *Ex parte Izard, In re Moir,* 30 W. R. 861, 20 Ch. D. 703. The registrar discharged the witness from further attendance, because he felt himself bound by *Ex parte Rooke, In re Purvis,* 56 L. T. N. S. 579, 35 W. R. Dig. 18, to hold that the trustee must accept a witness's answer as correct at once, and cannot cross-examine him under section 27 of the Bankruptcy Act, 1883. The object of that section is to enable the trustee to force information out of an unwilling witness, and therefore *In re Purvis* cannot be supported. The witness cannot escape from answering by merely alleging that the property in question is not the property of the bankrupt.

They also cited *Ex parte Reynolds,* 30 W. R. 651, 20 Ch. D. 294.

The witness in person was not called upon.

Lord ESHER, M.R.—It is impossible that this appeal, in its present form, should succeed, because it asks for an order against the witness that he should answer certain questions. The next step in procedure would be to ask for an attachment against him. But the registrar, on his refusal to answer certain questions, declined to order him to answer; there was no final refusal by the witness, and he ought, therefore, not to have been made a respondent here. It is said, however, that we ought to make an order that the registrar should have allowed the questions to be put. Such an order cannot be made against the respondent to this appeal, and the appeal must be dismissed.

It is said that a difficulty was created by *In re Purvis,* and it is suggested that Cave, J., in that case held that the registrar, in the examination of a witness under section 27 of the Bankruptcy Act, 1883, was bound to accept the first answer of the witness, and could not allow any further questions to be put with a view of contradicting that answer; that consequently a witness could not be crossed examined as to his credit, and there could be no testing of the witness to see whether he would stand by his answer. Since the commencement of this argument I have spoken to Cave, J., and he says he is astounded at the supposition that such was the effect of his judgment. He meant that in the end of examination the answers of the witness must be accepted. This explanation gets rid of the difficulties presented by the case of *In re Purvis.* As to the proper construction to be put upon section 27 of the Bankruptcy Act, 1883, we have received no assistance from counsel on the other side. It is not necessary for us to put any construction upon that section, and it is, therefore, better that we should not do so. The appeal will be dismissed, without prejudice to any application to the registrar for the further examination of the witness.

FRY, L.J.—This is an application made under section 27 of the Bankruptcy Act, 1883, under which the court has power to examine a witness concerning the debtor, his dealings or property. The power to examine is vested in the court, and the witness is, therefore, not in the position of an ordinary witness called by litigants, but is the witness of the court. The practice is, no doubt, for the court to allow the trustee to put the questions. No doubt the power of examination under this section is not a mere formal one; it is a power to examine usefully and fruitfully. And the examination may, perhaps, go as far as the tribunal before whom it is conducted may think necessary. In this case the registrar refused to put the questions, and the witness, therefore, only obeyed the instructions of the court in not answering, and this application is that the witness may be ordered to state facts in answer to questions which the court has not allowed to be asked. It is said that we can make an order on the registrar, but I decline to depart from the terms of the application. This is, therefore, an improper application, and, without fettering the registrar's discretion on any reconsideration of the matter, we dismiss the appeal, with costs.

LOPES, L.J.—I could not agree with *In re Purvis* as reported, but I do agree with it as explained by Cave, J. I should be sorry to see a too limited construction put upon section 27 of the Bankruptcy Act, 1883. If the registrar was in any way fettered in the exercise of his discretion by *In re Purvis,* our decision relieves him from that difficulty.

Appeal dismissed.

Solicitor for the trustee, *Clarence Harcourt.*

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a.) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

High Court of Justice.

Chan. Div. Kay, J. } Jan. 30, 31; Feb. 1, 6.

Tennent v. Welch. (a.)

Vendor and purchaser—Husband and wife—Real estate of wife—Conveyance by husband and wife—Acknowledgment by wife—Ownership of purchase-money—Chose in action—Fines and Recoveries Act, 1833 (3 & 4 *Will.* 4, *c.* 74), *ss.* 77, 79, 80, 89—*Common Pleas Rules of Hilary Term,* 1834.

At the date of her marriage the wife was owner in fee of real estate; no settlement was executed, and the property was shortly afterwards sold by the husband and wife for £23,500, the latter acknowledging the conveyance after examination by the commissioners in the usual way. The husband received £18,000 of the purchase-money and applied it for his own purposes, and £5,500 was invested to meet an annuity, the trusts of the residue thereof being declared, by a deed of even date with the conveyance, to be in favour of the husband and wife respectively, according to their interests by law for the time being. The husband died in 1884, *but the annuitant was alive, so that the £5,500 was still outstanding.*

Held, that the Common Pleas rules for the examination of married women were not ultrà vires, *and that the effect of the examination of the wife and her acknowledgment of the conveyance was that she thereby gave up all her interest in the property and in the purchase-money, without having any provision made for her in return; that the whole purchase-money, therefore, became the absolute property of the husband; that no part of the £5,500 ever belonged to the wife, so that it never was her* chose in action, *and the doctrine of reduction into possession did not apply; that the declaration of trust did not alter the rights of the parties; and that the wife was not entitled to any interest in the £5,500.*

Special case.

This was a case stated by the Scotch court under the statute 22 & 23 Vict. c. 63 for the opinion of the English court upon certain points of law affecting the devolution of the proceeds of sale of real estate in England, and the chief question was as to the effect, upon a sale by husband and wife, of an acknowledgment by her of the deed of conveyance under the Fines and Recoveries Act, 1833, c. 74.

In 1876 the pursuer, Mrs. Tennent (then Mrs. Vidler), was entitled in fee simple to an estate in Shropshire called Overton, and negotiations were commenced for a sale of the estate by her to Lord Boyne.

On the 24th of March, 1877, she married a Scotch solicitor of the name of Welch, and he thereupon assumed the name of Tennent. No settlement was executed between Mr. and Mrs. Tennent. There were no children of the marriage, and in 1881 they separated.

Negotiations for the sale of Overton were continued, and on the 24th of July, 1877, a conveyance thereof was executed by the husband and wife, after it had been duly acknowledged by the latter before two commissioners. They certified that she was of full age and competent understanding, and had been examined by them apart from her husband and freely consented to the deed, and they further stated in an affidavit that they asked her whether she intended to give up her interest in the estate without having any provision made for her in its place, and that she replied in the affirmative.

The purchase-money was £23,500, of which the husband received £18,000, and £5,500 was invested to meet an annuity charged on the estate. A declaration of trust of the £5,500 was executed whereby the residue of the fund was to be held in trust for the husband and wife, their executors, administrators, and assigns, according to their rights and interests therein as by law from time to time for the time being determined or regulated.

The Scotch action was begun in 1883 by Mrs. Tennent against her husband, claiming repayment of the £18,000, and a declaration that she was entitled to the £5,500 on failure of the annuity.

The husband died on the 8th of October, 1884, and the action was continued against his executors and general disponee. The annuitant was still living.

The Scotch court referred the following questions for the decision of the Chancery Division of the High Court of Justice.

1. Whether, at the date of the marriage, there was a valid contract for the sale of Overton?

2. Whether such contract operated as a conversion of the estate into personalty?

3. Whether such contract was a *chose in action?*

(In the event of the court holding that there was no contract)

4. What, after their marriage, were the respective rights and interests of the pursuer and the original defender, as the husband of the pursuer by the law of England in the estate of Overton; and were these rights or interests, or either of them, saleable by them or either of them, and on what conditions?

5. On the conveyance of the estate, what were the original defender's right and interest by the law of England in the price thereof; and did such right and interest in the price pass to the original defender by the said conveyance or by his *jus mariti?*

6. Whether, under the trusts of the declaration of trust, the pursuer is entitled absolutely to the said sum of £5,500, she having survived her husband, or whether she is otherwise entitled to it as a *chose in action* not reduced into possession by the husband during his coverture.

The defender's case was opened first, as the *onus* was upon him to establish the contract and conversion.

Rigby, Q.C., and *C. B. MacLaren,* for the defender (after arguing that there was a contract for sale at the date of the marriage).—The effect of the examination of Mrs. Tennent by the commissioners, and of her acknowledgment of the deed of conveyance, was to preclude her from claiming any settlement or provision out of the fund: Fines and Recoveries Act, 1833, s. 77; Common Pleas Rules, 1834; Shelford's Real Property Statutes, p. 400. Therefore the purchase-money belonged to her husband, and the £5,500 was not her *chose in action.* It never formed part of her personal estate. There is nothing unreasonable in her agreeing to this, as the ownership of Overton was changed at the marriage, and her husband's life estate was probably worth more than her reversion.

Marten, Q.C., and *Hirst.*—The acknowledgment only protected the purchaser; it did not prejudice the wife's rights as against the husband. The Common Pleas Rules are *ultrà vires:* sections 80, 89. At all events she was entitled to a settlement out of such part of the purchase-money as represented her reversion. The £5,500 was her *chose in action,* and was not reduced into possession by the husband, and so it is now hers by survivorship.

Rigby, Q.C., replied.

Cur. adv. vult.

Feb. 6.—Kay, J., held that there was no completed contract at the time of the marriage, and continued:—Assuming that no valid and binding contract for the sale of Overton had been entered into before the marriage,

(a.) Reported by H. C. Roper, Esq., Barrister-at-Law.

there was no such contract until the conveyance was executed; and the next question is, What was the effect of that conveyance? By section 77 of the 3 & 4 Will. 4, c. 74, Mrs. Tennent was enabled by deed to dispose of the Overton estate as fully and effectually as she could do if she were a *feme sole*, "save and except that no such disposition . . . shall be valid and effectual unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed." By section 79 the deed, upon her executing the same, or afterwards, is to be "produced and acknowledged by her as her act and deed" before a judge, master in Chancery, or commissioners, who, before they receive such acknowledgment, are to "examine her apart from her husband touching her knowledge of such deed, and shall ascertain whether she freely and voluntarily consents to such deed"; otherwise they are not to permit the acknowledgment, and the deed, as to her execution, is void. Section 84 gives forms of a memorandum and certificate of acknowledgment, and section 89 provides that the Court of Common Pleas shall make orders and regulations touching the mode of examination by commissioners, and so on. Rules were made, the 3rd of which provides that the commissioners shall inquire of every married woman, separately from her husband and from the solicitors concerned in the transaction, whether she intends to give up her interest in the estate to be passed by such deed without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up such interest, and where such married woman, in answer to such inquiry, shall declare that she intends to give up such her interest without any provision, and the commissioners shall have no reason to doubt the truth of such declaration, and shall verily believe the same to be true, then they shall proceed to receive the acknowledgment; but if it appears to them that it is intended that a provision is to be made for the married woman, they are not to take the acknowledgment until the provision has been actually made or the terms of it reduced into writing, which they are to verify by their signatures.

In this case all those ceremonies seem to have been strictly observed, and Mrs. Tennent did not require any provision. The effect of the conveyance was to convert the estate into personalty upon the execution of the deed. Supposing the parties to have been domiciled in England, it would follow from the mere fact of such conversion that the husband by his marital right would become entitled at once to whatever interest the wife might have in such personal property. But after making such acknowledgment and declining any provision out of the purchase-money or otherwise, it is difficult to see how the wife could have any possible interest in such purchase-money. The land could not have been converted into money, even as to the wife's interest in it, without the concurrence of the husband in the deed, not merely because he had an estate in the property in his marital right, but because the statute expressly makes his concurrence an essential requisite to any disposition by the wife. The husband might have conveyed away the life estate which he acquired by marriage in the wife's land without her joining or consenting; Co. Litt., 326a (n); *Robertson* v. *Norris*, 11 Q. B. 916. But the wife is in a different position. She could not convey or bind in any way such interest as she had in the property unless the husband concurred in the deed. Consequently, when the sale by husband and wife of the wife's land has taken place, if it is competent to inquire on what condition the husband gave his concurrence, it seems impossible, where the wife has refused any provision on her separate examination, to come to any other conclusion than that the purchase-money was to belong altogether to the husband, and that the wife was not to have any interest in it either at law or in equity. If she could afterwards assert a right to any interest in it, her refusal of a provision would be altogether nugatory.

The statute and the rules obviously intend to put her in the position that she may decline to execute the deed, and the commissioners may prevent her execution or may refuse to receive the acknowledgment which alone could make her execution valid if a provision is not made for her in case she desires it. As to any purchase-money actually received by the husband, it is impossible, after declining any provision, that she could assert any claim against this, but it has been argued that the same considerations do not apply to the £5,500 which was set apart to answer the annuity. The trusts of this were declared, by a deed dated the 24th of July, 1877, to be, out of the income to pay the annuity of £200, and next the costs of the trustees, and the residue of the income to Mr. and Mrs. Tennent, or their executors, administrators, and assigns, according to their rights or interests therein as by law from time to time for the time being determined or regulated, and after the death of the annuitant the capital was to be applied in payment of succession duty and costs, and the residue was to be in trust for Mr. and Mrs. Tennent, their executors, administrators, and assigns, according to their rights or interests therein as by law from time to time for the time being determined or regulated. Mrs. Tennent having survived her husband and the annuitant having also survived him, the question is whether she is entitled to this money either under the provisions of this deed or as a *chose in action* not reduced into possession by the husband in his lifetime. The deed merely preserves such rights as she might have according to law, and obviously did not intend to confer upon her any right if in law she had none. The only right in law which she could have would be on the supposition that this £5,500 was her *chose in action* not reduced into possession by the husband.

In order to make this out it is essential to show that it was a *chose in action* originally belonging to the wife. This certainly was not the case as to the whole of it. Some part of it was the purchase-money of the husband's freehold interest in his wife's real property. Some part also must be treated as the price of his permitting the wife to sell her interest by concurring in the conveyance. How can it be ascertained how much of it was the wife's *chose in action*? These considerations seem to me to throw light on the intention of the Act and rules. Suppose all the purchase-money had been left outstanding on securities by way of mortgage given to the purchaser, the question would be the same. Could the wife surviving the husband claim that fund or any part of it against his executor? The answer to such claim would be, "When you were separately examined you relinquished all claim to a provision out of the purchase-money or otherwise. The effect was to make such purchase-money the absolute property of the husband. Your right by survivorship is only to a chose *in action* which belonged to you, and which your husband, by his marital right, might have reduced into possession, but did not; but the indefinite interest which you had in this purchase-money you entirely relinquished by declining to claim any provision, and therefore no part of this money ever was your *chose in action*." The truth seems to me to be that one of the essential purposes of the separate examination of the wife is to ascertain what is the bargain between her and the husband—that is, whether the purchase-money is to belong to him or not. If she declines to have any provision made for her, the arrangement must be that she gives up to her husband all claim upon the purchase-money, and the doctrine of reduction into possession does not apply.

For these reasons I am of opinion that, under the circumstances of this case, the £5,500 cannot be treated

as a *chose in action* to which the wife is entitled, but that, if the domicile of the husband and wife had been English, the whole would now belong to the executor of the husband.

It was argued that if this be the effect of the rules made by the Common Pleas they are *ultra vires*. That is not my opinion. By section 89 the court was to make rules "touching the mode of examination." By section 90 the commissioners are to examine the wife apart from her husband touching her knowledge of such deed, and shall ascertain whether she freely or voluntarily consents to such deed. These matters could not be ascertained satisfactorily, if at all, without bringing it clearly before the mind of the married woman that she might insist on having a provision made for her out of the purchase-money, or otherwise, before she consented to execution, and the questions which the commissioners are by the rule directed to put are apt for this purpose. The answers to the questions must be—(1) At the date of her marriage to the original defender—namely, March 24, 1877—no valid or binding contract of sale of Overton had been entered into by or on behalf of the pursuer as vendor and Lord Boyne or his trustees as purchasers. This makes it unnecessary to answer questions 2 and 3. The succeeding questions I answer thus:—(4) After the marriage the estate of Overton belonged to Mrs. Tennent in fee simple subject to a freehold estate of the husband therein during the continuance of the coverture (Co. Litt. 326a (n); *Robertson* v. *Norris*, 11 Q. B. 916); (5) these rights and interests were saleable by them, as to the husband's estate, without the concurrence of the wife (*ib.*); as to the wife's estate, only with the concurrence of the husband in an acknowledged deed under the conditions imposed by 3 & 4 Will. 4, c. 74, and the rules thereunder to which I have referred: (6) on the conveyance of the estate by the deed of July 24, 1877, the original defender by the law of England became absolutely entitled to the price thereof, such right and interest in the price passed to him by the conveyance and by the refusal by the wife upon her separate examination of any provision, rather than by the *jus mariti*; and (7) for the same reasons under the trusts of the indenture or trust deed of July 24, 1877, the pursuer is not entitled by the law of England to the sum of £5,000, either as having survived her husband or as a chose in *action* not reduced into possession by the husband during his coverture.

Solicitors, *C. Turner; Trinders & Co.*

Chan. Div. Kay, J. Dec. 2.

Haslam Foundry and Engineering Co. *v.* Goodfellow. (*a.*)

Patent—Infringement—Disclaimer—Terms upon which liberty will be given to apply for leave to amend specification by disclaimer—Costs—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict.* c. 57), *s.* 19.

The plaintiffs, in an action for infringement of patent, applied to the court for liberty to apply at the Patent Office for leave to amend their specification by way of disclaimer. The pleadings in the action had been completed, and they asked that the costs of such part thereof as might be used at the trial of the action might be reserved.

Held, that liberty ought to be granted upon the terms that the plaintiffs should pay the costs of the application and the costs of and occasioned by the amendment; that both plaintiffs and defendants should have leave to amend their pleadings; that the plaintiffs must undertake forthwith, after disclaimer, to amend their pleadings, confining the action to the amended specification, or to consent to the action being discontinued, with costs; and that, in the event of the action proceeding, all other questions of costs should be reserved.

Motion.

This was an application by the plaintiffs in an action for infringement of patent for liberty to apply at the Patent Office for leave to amend their specification by way of disclaimer, and the question was upon what terms the motion should be granted.

The statements of claim and defence, and the reply in the action, had been delivered, and the pleadings completed and closed, with the exception of joinder of issue.

Meanwhile, in another action by the plaintiffs, the second claim of their specification had been held by Stephen, J., to be invalid.

They now moved for liberty to apply for leave to amend their specification by striking out the second claim thereof and making such other alterations as should be rendered necessary thereby, upon the terms of the plaintiffs paying to the defendants all the costs incurred in the action in relation to the matters proposed to be struck out, or upon such other terms as the court should see fit to impose, and that, pending such application or further order, all further proceedings might be stayed.

Sir R. E. Webster, A.G., Aston, Q.C., and *Carpmael*, for the plaintiffs.—We do not object to a similar order to that made in *Fusee Vesta Co.* v. *Bryant & May*, 35 W. R. 267, 34 Ch. D. 458, except to this extent, that we ought not to be ordered to pay the costs now of any part of the pleadings that may be used at the trial of the action: *Singer* v. *Stassen*, 1 Rep. of Pat. Cas. 121.

Moulton, Q.C., and *W. R. Bousfield*, for the defendants, argued that they ought to have all the costs of the action up to the disclaimer in any event, and asked for a similar order to that in *Fusee Vesta Co.* v. *Bryant & May*.

Sir R. E. Webster, in reply, referred to *Allen* v *Doulton*, 4 Rep. of Pat. Cas. 377.

Kay, J.—This case differs from the *Fusee Vesta case* in this respect, that in the *Fusee Vesta case* very little had been done, but here I am told that the pleadings are completed, and that nothing remains but to prepare the evidence and bring the case on for trial. Now since this action was begun there has been a trial against another alleged infringer of the patent before Stephen, J., and he has decided that this patent, as to one of its claims, is bad. Of course that makes the patent bad altogether, and, of course, if that decision is acquiesced in and not reversed, this action, when it comes on for trial, must fail. Now the question is, what is right to be done when the application is made to the court for liberty to apply for leave to disclaim that part of the patent which Stephen, J., says is bad, and on what terms that leave ought to be granted? In the *Fusee Vesta case*, very little having been done, I thought that one of the terms ought to be that all the costs up to the time of the disclaimer should be paid by the plaintiff; but I did not think that he ought to have the expense of issuing a new writ, so that I allowed him to amend on certain terms, as very few proceedings had been taken, and to proceed upon the patent as amended by the disclaimer.

Now in this case I have to see what are the proper terms to be imposed where a good deal has been done, and I think it would be quite right that the plaintiffs should eventually pay all the costs of this action up to the time of the disclaimer, except only so far as the

(a.) Reported by H. C. Roper, Esq., Barrister-at-Law.

proceedings in the action may be utilized for the purpose of the trial upon the leave to amend which I propose to give, in case the plaintiffs should succeed at the trial. Supposing leave is given to amend by disclaimer, and the action goes on to trial upon the amended record, it may be that the plaintiffs on that amended record will succeed. So that they will, and the defendants will also, have the advantage of using all these pleadings for the purpose of the action as altered. Then so far as these pleadings are proper for the amended case the plaintiffs ought to get the costs of these proceedings, and so far as they are not useful the court will make them pay the costs. The effect of that will be that, if the proper distinction is made, instead of putting both parties to the expense of a new statement of claim, a new defence, and a new reply, I shall enable both of them to use for the purpose of the action the pleadings now put in subject to any amendment that may be thought proper. Therefore, I give the plaintiffs leave to amend their writ and statement of claim, and if necessary the reply after they have put in a disclaimer, and I give leave to the defendants also to amend their defence, and, that having been done, I think I must impose this other term, that the plaintiff must undertake forthwith, if he means to go on, to amend the action by stating the disclaimer, founding it simply upon the specification as amended, or consent to the action being discontinued with costs. Now, subject to that, the right order will be to reserve the costs according to the result, and if I have to deal with it I shall certainly not forget the intimation I have now given as to the mode in which the costs should be borne. I do not intend by this order to prejudice any of the rights of the parties.

The order made was to the following effect:—Application granted; the plaintiffs to pay the costs of this application and the costs of and occasioned by the amendment; the plaintiffs and the defendants to be allowed to make all necessary amendments of their pleadings after disclaimer; the plaintiffs to undertake forthwith after the disclaimer to amend their pleadings confining the action to the amended specification, or to consent to the action being discontinued, with costs to be paid to the defendants; in the event of the action proceeding all other questions of costs to be reserved.

Solicitors, *Wilson, Bristows, & Carpmael; Sharpe, Parkers, & Co.*

Chan. Div. North, J. — Jan. 13.

In re Balkis Consolidated Co. (*a*.)

Company—Transfer of shares—Deed—Seal—Validity.

By the articles of association of a company, transfers of its shares were to be made by deed. A., a shareholder, deposited certificates of certain of its shares with B., to secure a loan, and also signed and handed over to B. a blank transfer of the shares. There was no seal or wafer on the transfer opposite to A.'s signature, but only a circle printed on the paper inclosing the words "Place for a seal." The document purported to be attested by a witness as having been "signed, sealed, and delivered" in his presence, but there was no evidence proving that the document was signed, sealed, and delivered as a deed.

Held, that, in the absence of such evidence, the printed circle inclosing the words "Place for a seal," did not supply the place of a seal so as to make the document a deed, effectual to pass the shares.

(*a*.) Reported by J. Trustram, Esq., Barrister-at-Law.

Motion.

The articles of association of the Balkis Consolidated Co. provided that transfers of the shares of the company should be made by deed.

In April, 1887, A. J. Arnott, a shareholder of the company, deposited the certificates of 455 shares with his broker, F. Barnard, to secure the balance of his account, and at the same time signed and handed to him a blank transfer of the 455 shares.

In June, 1887, F. Barnard filled up the blank transfer with the name of L. Lehmann as transferee, and deposited the certificates and the transfer with him as security for a loan.

In October, 1887, F. Barnard sold the shares, and L. Lehmann, as transferee, executed the transfer and sent it to the offices of the company for registration to enable F. Barnard to complete the sale.

Thereupon A. J. Arnott gave notice to the company not to register the transfer of shares on the ground that his signature to the transfer had been improperly obtained. He also alleged that at the time of the deposit with L. Lehmann there was nothing due from him (Arnott) to F. Barnard, and that F. Barnard had no authority to make the deposit. The company also received notice that the transfer by A. J. Arnott had been executed in blank.

This was a motion by L. Lehmann under the 35th section of the Companies Act, 1862, to rectify the registrar of shareholders of the company by substituting his name as the holder of the 455 shares standing in the name of A. J. Arnott.

On the production of the tranfer by A. J. Arnott in court, it appeared that there was no seal or wafer in the place of a seal opposite to his signature, but merely a circle printed on the paper and inclosing the words "place for seal." The document was attested by a clerk as having been "signed, sealed, and delivered" in his presence by A. J. Arnott; but no affidavit by the attesting witness was produced on the motion. There was an affidavit by F. Barnard to the effect that A. J. Arnott, in executing blank tranfers of shares, invariably put his finger on the place for the seal and said, "I deliver this as my act and deed," and an affidavit by A. J. Arnott denying that he invariably did so.

Cozens-Hardy, Q.C., and *Grosvenor Woods*, for the summons.—The transfer by Arnott was effectual to transfer the shares. It was complete and valid on the face of it. In order to constitute the sealing of a deed it is not necessary that wax or a taper should be used, but only that there should be an intention to seal and deliver the document as a deed.

They referred to *In re Sandilands*, 19 W. R. 641, L. R. 6 C. P. 411; *Tayler* v. *Great Indian Peninsular Railway Co.*, 7 W. R. 737, 4 De G. & J. 559; *Hunter* v. *Walters*, 20 W. R. 218, L. R. 7 Ch. App. 75.

Higgins, Q.C., and *Boome*, for A. J. Arnott.—The rules of the company require that tranfers of shares should be made by deed, and the transfer by Arnott was not effectual, as it had not been sealed, and therefore was not a deed. The fact of a circle printed on the paper inclosing the words "place for a seal" indicates an intention that a seal should be placed there, but this was not done.

Cookson Crackanthorpe, Q.C., and *G. P. Macdonell* for the company, asked for costs.

North, J.—I am unable to give a decision on the materials before me in this case. There is no seal to the transfer by Mr. Arnott, but merely a round mark with a blank in the middle, in which are the words "place for a seal." The applicant's case is that a document was handed to him which, on the face of it, was a complete and valid transfer. Looking at the evidence I am not satisfied that the document was handed over to

Arnott sealed and delivered as his deed. In the case of *In re Sandilands* the question for decision was not whether the document in question was a deed, but whether it was to be received and filed as a deed acknowledged by married women, and the court held that there was no reason why it should not be so filed. I am not satisfied that the transfer was intended to be sealed by Arnott; and under the circumstances I must dismiss the application.

Motion dismissed.

Solicitors, *M. Abrahams & Co.; A. Pulbrook; Stretton, Billiard, Dale, & Newman.*

Chan. Div. North, J. } Dec. 20.

In re Mills' Trusts. (*a.*)

Copyholds—Devolution—Death of sole trustee between commencement of Conveyancing Act, 1881, and passing of Copyhold Act, 1887—Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 30—Copyhold Act, 1887 (50 & 51 Vict. c. 73), s. 45.

A sole surviving trustee of copyholds, who was tenant on the court rolls, died in 1884. His executors had not been admitted tenants to the property before the passing of the Copyhold Act, 1887.

Held, that, on the passing of that Act, the Conveyancing Act, 1881, ceased to have any application to copyholds, and that the copyholds were vested in and could be dealt with by the persons in whom they would have been vested if the Act of 1881 had never been passed.

Semble, if, before the passing of the Copyhold Act, the executors had been admitted to the copyholds, and had made a disposition of them, they would have been able to make a good title.

Petition.

Thomas Mills (who died in March, 1847) by his will dated the 14th of November, 1846, devised certain copyhold hereditaments to three trustees upon the trusts therein mentioned. In 1847 the trustees were duly admitted tenants of the copyholds upon the trusts of the will. The last surviving trustee died in March, 1861, and by an order of the Court of Chancery dated the 24th of June, 1871, three new trustees were appointed in the place of the three original trustees of the will. On the 9th of April, 1872, the new trustees were duly admitted tenants of the copyhold hereditaments. On the 1st of May, 1884, the last survivor of the three trustees appointed by the order of the 24th of June, 1871, died, having by his will appointed his wife and two executors thereof. The executors were never admitted tenants to the copyholds.

This petition was presented by the purchaser of the beneficial interest in the copyholds for a vesting order, and the question was raised whether the copyholds were vested in the executors of the last surviving trustee or in his customary heir.

Lewis, for the petitioner.—Having regard to section 30 of the Conveyancing Act, 1881, and section 45 of the Copyhold Act, 1887, it does not appear clear in whom the legal estate in the copyholds is now vested.

North, J.—The question in this case is in whom the legal estate in certain copyhold property devised by the will of Thomas Mills, who died in the year 1847, is now vested. In 1871 new trustees of the will were appointed by an order of the Court of Chancery in the place of the original trustees, who had all died. The last survivor of the new trustees died in the year 1884, having appointed two executors of his will. Sub-section 1 of section 36 of the Conveyancing Act, 1881, provides—to put it shortly—that where an estate of inheritance in any tenements or hereditaments is vested on any trust or by way of mortgage in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to, and become vested in, his personal representatives or representative from time to time in like manner as if the same were a chattel real vesting in them or him. By section 45 of the Copyhold Act, 1887, it is provided that the 30th section of the Conveyancing and Law of Property Act, 1881, shall not apply to land of copyhold or customary tenure vested in the tenant on the court rolls of any manor upon any trust or by way of mortgage. In this case the property was vested in the tenant on the court rolls upon a trust in the words of section 45, and, under these circumstances, the question arises as to the effect of that section upon sub-section 1 of section 30 of the Conveyancing Act, 1881, so far as it relates to copyholds. If the executors had made any disposition of the property between the passing of the Conveyancing Act, 1881, and the Copyhold Act, 1887, they could have made a good title to the property. But in September the Copyhold Act came into operation, and, therefore, as to the copyholds, from the date of that Act the Conveyancing Act ceased to have any application. The question is now asked whether the executors can dispose of the property. It seems to me that as to any disposition of the copyholds after the passing of the Copyhold Act it cannot be said that the executors have any power to deal with them. The persons in whom the copyholds are now vested, and who can now dispose of them, are the persons in whom they would have been vested and who would have been able to dispose of them if the Conveyancing Act had never been passed.

Solicitors, *Ashby & Compton.*

Chan. Div. North, J. } Oct. 27, 28.

In re Bowes.

Earl of Strathmore *v.* Vane. (*a.*)

Executor—Leasehold of testator—Liability for rent—Administration action—Summons—Fresh action.

An executor who takes possession of leasehold property of his testator becomes personally liable, as assign of the lease, for payment of rent in respect of the actual value of the property from the time of taking possession; the actual value is the aggregate of what he has actually received and what with reasonable diligence he might have received provided that such aggregate does not exceed the full amount of the rent; but he is not liable for rent beyond such value.

Adjourned summons.

The action was brought for the administration of the estate of John Bowes, deceased.

On the 19th of April, 1872, John Bowes obtained a lease of a piece of land containing about 260 acres, part of Langton Wold, Yorkshire, from year to year until the tenancy should be determined by notice as agreed upon between the parties, the rent being payable half-yearly, on the 11th of April and the 11th of October. He used the land for the purpose of training horses, and also let it out to other persons for the same purpose.

In 1881 the lessor died, and C. B. Norcliffe became entitled as tenant for life to the rents reserved by the lease.

(*a.*) Reported by J. Trustram, Esq., Barrister-at-Law.

(*a.*) Reported by G. E. Jeffery, Esq., Barrister-at-Law.

On the 9th of October, 1885, John Bowes died, and his executors, of whom E. Y. Western became the survivor, took possession of the piece of land and let it out to various persons for training horses and other purposes, and received rents from such persons as John Bowes had done, but did not themselves use it. It was uncertain whether the estate of John Bowes would prove solvent.

The tenancy was determined on the 6th of April, 1887, at which date four half-years' rent was due to C. B. Noroliffe in respect of the piece of land.

This was a summons in the action taken out by C. B. Noroliffe against E. Y. Western, the surviving executor, asking (1) that an account might be taken of the rent due to the applicant from the death of John Bowes to the 6th of April, 1887, when the tenancy expired, in respect of the 260 acres of land let to John Bowes. (2) That an account might be taken of the rents and profits received, or which, but for the neglect or default of the defendant, E. Y. Western, might have or ought to have been received by him or his agents in respect of the 260 acres of land since the 9th of October, 1885, the date of the death of John Bowes, to the 6th of April, 1887. (3) That the defendant, E. Y. Western, might be ordered to pay to the applicant the amount found due to him on the account first above mentioned out of the moneys with which the defendant was chargeable on the account secondly above mentioned, and to pay to the applicant his costs of the application.

Napier Higgins, Q.C., and *W. C. Druce*, for the summons.—The defendant does not object to have the question determined on summons, and it will be advantageous for all persons interested to have the question decided on the summons instead of incurring the expense of a fresh action by the applicant. The lessor has a clear right of action against an executor who has taken possession of premises demised to his testator for the rent of such premises provided it does not exceed the profit or yearly value of the premises.

They referred to *Hargreave's case*, 5 Rep. 31 b; *Rubery* v. *Stevens*, 4 B. & Ad. 241; *Buckley* v. *Pirk*, 1 Salk. 316; *Hornidge* v. *Wilson*, 11 Ad. & E. 645; Platt on Leases, vol. 2, pp. 368, 369.

Cozens-Hardy, Q.C., and *Deane*, for the defendant.—The landlord's remedy to obtain payment of arrears of rent is to prove for the amount in the administration of the estate of the deceased tenant whose estate is being administered; and an action against the executor for the amount of the rent is not in such a case the proper course to adopt. Such an action, if brought, will be restrained pending the administration. If the estate should prove insolvent, the rules in bankruptcy ought to apply: The Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 10.

Napier Higgins, Q.C., in reply.—Section 10 of the Judicature Act, 1875, has no application in this case: *Tadman* v. *D'Epinieul*, 30 W. R. 423, 20 Ch. D. 217.

NORTH, J. [after stating the facts set out above, proceeded].—At the end of the tenancy in April, 1887, four half-years' rent remained unpaid, one half-year practically being rent due in the lifetime of Mr. Bowes, the other three half-years being rent which had accrued after his death; and the question is what was the legal right of the lessor against Mr. Bowes, the lessee, and against his executor in respect of rent.

Now the right of the lessor, the claimant, as against the lessee is clear. He has a right to come in and prove for the whole of the rent; but on proving for the rent he is only entitled to receive in respect of it, if the estate is insolvent, as is possible in this case, the same dividend that other creditors would be entitled to receive in respect of their debts. What is his position as against the executor. If the latter is sued as executor and puts in a proper plea, he is only liable to the extent of the assets; but it is also open to the lessor to take proceedings against him as assign of the lease, and then the lessor is entitled to recover the rent from the executor as assign of the lease. But it would be hard upon the executor to be in possession of property for which he had to pay the full rent although the property itself was not worth as much as the rent. Therefore, the law is, as the cases cited and several others clearly establish, that if an executor is sued as assign of the lease for the rent accrued during the time in which he was in possession, he is entitled to set up by way of defence that he is only assign as executor, and that the profits or yearly value (I will consider the meaning of those words presently) of the property amount only to a sum less than the rent. Then he must pay into court the amount that he admits to be the value, and if his plea is proved, and that is the full value, he will be under no further liability in respect of the matter. I used the words "profits or yearly value." In some cases that have been referred to, the court has spoken of the liability of the executor in respect of profits; and it has been argued that profits mean merely what has actually been received *minus* the expenses, and therefore the profits cannot include anything which has not been received and which therefore cannot be profit. But in the cases in which the word "profits" was used the court generally assumed the profits to be more than the rent, in which case it did not matter whether they were called "profits" or anything else. In the few cases where the profits were referred to as being less than the rent, no suggestion was made that less than the full profits, whatever they were, had actually been received. I think that the word "profits" does not accurately describe that for which the executor as assign is liable. What he is liable for is to account for the actual value of the premises to him during the time in which the rent for which he is sought to be made liable has accrued or the time in which he has been in possession, independently of any question whether that value has actually been received by him or not. In the case of an executor who has proved the will it would be from the time of the testator's death.

In the form of plea as given in Woodfall's Landlord and Tenant, at p. 263, it is stated that an executor "sued as an assignee of the term, and who has not assigned over, may plead, except as to £ (being the full actual value of the demised premises during the period in respect of which the rent is claimed, and which should be paid into court, or the claim for it be otherwise answered), that the term did not vest in him by assignment otherwise than as executor or administrator, and that he has not at any time since the death of the lessee received or derived, nor could he during any part of that time receive or derive, any profit from the said demised premises, except sums amounting to the sum excepted, and that the said demised premises have not since the death of the lessee yielded any profit whatever, except to the amount excepted." Then the plea deals with the surplus with respect to which his liability depended upon whether he had assets or not. That is the form of plea given. In the case of *Hornidge* v. *Wilson*, Lord Denman says:—"With respect to the value, it is clear that an administrator who has fully administered and is chargeable with no default or *laches* may discharge himself from liabilities to a greater extent than the real value; but we think that the real value, as against one who takes to the premises and accepts rent for them after the death of his testate, must be taken to be that which the premises would have been worth but for his own act," that is to say, what he has received is not the test, but the real value of the premises. There an executor as assign was held liable for what might have been received if he had kept a covenant to repair, which he had not done and also for rent which a tenant was bound to pay, but had failed to pay through insolvency. Therefore, the

executor was held liable in respect of both these sums which he had not received, and as to one of which he could not actually have received through the insolvency of the tenant. That states the principle very clearly. But there is a later case of *Hopwood* v. *Whaley*, 6 C. B. 744, the facts of which come very near to the present. The marginal note is this: "Executor of lessee for years, is, in the absence of other assets, liable *de bonis propriis*, for the rent reserved to the extent to which he might by the exercise of reasonable diligence have derived profit from the premises." In that case the property was held for three years under a lease after the death of the testator, the rent payable to the lessor was £90 a year, and £270 was the amount of rent claimed. The executor himself was in actual occupation during one quarter, and his liability to pay one-fourth of the rent, or £22 10s. was clear. During the remaining two years and three-quarters the property was unlet, as the executor had tried to let it for a rent equivalent to the full rent payable, but had failed, and the property had remained unlet. The questions left to the jury are stated thus: "The learned judge was of opinion that as there was no plea of payment to cover the quarter during which the defendant occupied the premises the plaintiff must at all events have a verdict for that; and he left it to the jury to say, first, whether the defendant had in fact derived any profit or advantage from the premises, and if so to what amount; secondly," and this is the important point, "whether he might by the exercise of reasonable diligence have derived profit or advantage therefrom, and if so to what amount." The jury found that he had received the £22 10s., and also that although the property could not be let for £90 a year it might have been let for £60 a year; and the result was that the executor was held liable at the rate of £60 a year for the two years and three-quarters in which he had not himself occupied and for the full rent of the remaining quarter. After considering the form of plea, and commenting on the cases of *Hornidge* v. *Wilson* and *Rubery* v. *Stevens*, Coltman, J. says:—"The question then, in substance, is whether the defendant might have received profit and advantage from the premises to the amount of the rent due, or any part thereof." Maule, J., says:—"The cases on the subject of a lease devolving on an executor where the rent reserved exceeds the value of the premises are involved in some difficulty; I think, however, upon the authorities as well as on principle, that where the rent reserved exceeds the value of the premises, an executor in the character of an assignee, is liable to the extent of such value; and where the value exceeds the rent reserved, to the extent of such rent." These authorities clearly show that the executor in the present case is liable for the actual value of the premises during the time in which he held the premises as an assign, that is to say for a year and a half after the testator's death.

Then the question arises, How is the value to be valued at? It is clear from those authorities that the value is to be arrived at, first by considering what he has received, and then by considering what he might have received if reasonable diligence had been used. Therefore, those two items make up the total amount for the aggregate of which the executor is liable, provided that they do not together exceed the full amount of the rent.

In the present case the application is made in an informal way, which raises a difficulty I do not see how to get over, except by concession of the parties, although the respondent has not raised any technical objection to the form of the application. The application is by summons in the action to administer the estate of Mr. Bowes, and it asks, to put it shortly, that an account may be taken of what is due for rent since the death of Mr. Bowes to the expiration of the lease; that an account may be taken of the rent and profits received, or which, but for the wilful neglect or default of Mr. Western, might have been received in respect of the land during the same period; and then that Mr. Western may be ordered to pay the amount found due to the applicant on the account first mentioned out of the money with which he is chargeable on the account secondly mentioned, and to pay the costs of the application. As regards the estate of the testator, that form of claim is entirely misconceived. The right of the landlord against the testator's estate is merely to prove for the whole rent and be paid like any other creditor is paid. As against the executor he would have a right to bring his action, and to recover such an amount as was found to be due substantially upon the footing of such accounts as are asked by the summons. But that is not the measure o the liability of the testator's estate. As I understand the summons has been presented in this form upon the footing that the executor has been acting properly in the administration, and that whatever he is liable for the estate would be liable to recoup to him, and, therefore, the irregular step has been taken, with the consent of all parties, of making the claim directly against the estate instead of against the executor personally. But, as I pointed out, the measure of liability of the estate is the whole rent and nothing else; and, assuming that the executor pays the full amount that is asked for by the summons, he would not have a right to stand against the estate as creditor for that amount, because, even assuming that he was entitled to recover from the estate such a sum as he had actually received and accounted for to the estate, still he could not be entitled to receive from the estate what he has to pay by reason of his omission to recover what he might have done, because that is a loss that he would have to account for to the estate, and that the estate would not be answerable for. If, therefore, I were simply to direct the inquiry in the form asked by the summons, it would not give me any measure by which to ascertain the liability of the testator's estate. Then there is this difficulty. At the present time the only parties here are Mr. Norcliffe, the applicant, on the one hand, and the executor on the other as representing the estate, and no question between the estate and the executor can be decided where he is the only person representing his own interest, and also representing the estate, which really has an interest adverse to him. Therefore, upon this summons as it stands, I cannot give any relief; and as against the estate, but for what I am going to say, I should dismiss the summons without costs upon the ground that the application fails as regards the estate, but has been made in this form with the concurrence of the executor with a view to saving trouble and expense to all parties if it could be done. Strictly speaking, all that I can do is to dismiss the summons.

But I have pointed out what is, in my opinion, the liability of the parties. The liability of Mr. Western can, strictly, only be enforced by an action brought against him to recover the sums for which he is liable, and upon the present summons in the matter of the estate I cannot make any order against him. Unless he consents to an amendment of the summons it must be dismissed. But as the matter has been argued fully, and I have expressed my opinion, it is worth his while to consider whether it would not be better to amend the summons by adding, in addition to what is asked by it, an application that, in the alternative, if the court should be of opinion that the applicant is not entitled to any of the relief asked against the estate, then Mr. Western might be ordered personally to pay what should be ascertained to be due on taking the account. If that was done, and Mr. Western submitted, and it appeared on the face of the order that he submitted to be bound by the decision on the summons in the same way as if a writ against him had been filed, the parties would be in

the position of having got a judgment upon the point in question in the cheapest possible way, and, of course, it would be open to him, if he was not satisfied with the view I have taken, to appeal from it. If that course is assented to, I should give no costs, because Mr. Norcliffe would only have succeeded by arrangement between the parties that a claim that was not right in form might be put right so as to be made formal. It is for the parties therefore, to say, whether they will adopt the one course or the other. In the one case the summons will be dismissed without costs, in the other I should make a declaration to the effect that Mr. Western is liable in the way I have suggested, and direct an account of the rent due during the time that he has been in possession; and also, on the other hand, an account, in the form used in the direction to the jury in *Hopwood* v. *Whalley*, whether he had, in fact, derived any profit or advantage from the premises, and, if so, what amount; and, secondly, whether he might, by the exercise of reasonable diligence, have derived profit or advantage therefrom, and, if so, to what amount.

There are two points that were argued by Mr. Hardy about which I ought to say a word. The first was this. He says that no precedent can be found—and I am not aware of any myself—in which any such claim as this has been allowed in an administration suit. As the executor's liability is personal as assign, and not as executor, I should not expect to find any such claim made in an administration suit, because it is the subject of an action at law, and there are numerous actions reported in the books in which such a claim has been made personally. It is quite true, if he were sued and recovered against, he might have some claim against the testator's estate. As all parties interested in the estate are now represented by the same counsel, I cannot consider what the extent of the liability would be—whether the executor would be entitled to stand in the place of the lessor as creditor of the estate, or whether he would be entitled to have back out of the estate in full the amount that he has received and paid into the estate. It may well be that questions of this sort, which do not appear in the books, have arisen in administration suits; and the fact that no reported case is found bearing upon it in equity does not seem to me really important.

The second point was that the application was irregular. If it were regular it would be by writ. There is a suit to administer Mr. Bowes' estate. If a writ had been issued against the executor that action would have been stayed at once, because the creditor already has the benefit of the decree for creditors generally, and would not be allowed to prosecute that action, and Mr. Norcliffe ought not to be in a better position upon an irregular application than he would have been if the application had been in regular form. But that argument seems to me to be based upon a mistake. If this claim were against him as executor, I think the argument would have been right; but as it is made against him as assign it is against him *de bonis propriis*, and it is impossible to say that an action would be stayed against an executor merely because there is a suit to administer the estate of which he is executor when the ground of the action really is not his liability as executor, but his personal liability; suppose that, in this case, instead of the executor having become liable as assign, the testator had been liable for the rent, and Mr. Western had been surety for it. Of course, if he had been surety for the payment of the rent, no suit to administer Mr. Bowes' estate would have prevented an action being commenced and prosecuted to the end against the surety to recover the rent from him. Therefore, the executor being liable, not as such, but as assign *de bonis propriis*, it is impossible to say that an action against him in that character could be stayed merely because there was a suit to administer the estate of which he happened to be executor.

Solicitors, *Crossmans & Prichard*; *Western & Sons.*

Chan. Div. North, J. Oct. 25.

In re Jackson and Woodburn's Contract. (a.)

Vendor and purchaser—Summons—Determination of notice to rescind contract—Jurisdiction—Vendor and Purchaser Act, 1874 (37 & 38 *Vict.* c. 78), s. 9.

The court has jurisdiction, upon a summons under section 9 of the Vendor and Purchaser Act, 1874, *to determine the validity of a notice given by a vendor to rescind his contract to sell.*

Adjourned summons.

This was a summons under the Vendor and Purchaser Act, 1874.

On the 13th of October, 1886, an agreement was entered into between R. B. Jackson and Adam Woodburn, whereby the former agreed to sell to the latter certain real estate.

The contract contained the following conditions (*inter alia*):—No. 7.—"If the purchaser shall insist on any objection or requisition as to the title or abstract, or evidence of title, particulars, conditions, conveyance, surrender, or otherwise (not being a claim for compensation falling within the 10th of these conditions), which the vendor shall be unable, or on the ground that the expense would be unreasonably heavy, unwilling to remove or comply with, the vendor may, by notice in writing, to be given to the purchaser, or his solicitor, at any time, notwithstanding any negotiation or litigation in respect of such objection or requisition, or any attempt to remove or comply with the same, rescind the contract, unless, within fourteen days after the delivery of such notice, the purchaser shall, by notice in writing, withdraw such objection or requisition, and upon such rescission, the deposit shall be returned to the purchaser, but without any interest, cost of investigating the title, or other compensation or payment whatever."

No. 10.—"If any error or mistake shall appear to have been made in the description of the property, or the vendor's interest therein, the same shall not annul the sale, but, if the same shall be pointed out either by the vendor or purchaser prior to the time appointed for the completion of the purchase, compensation shall be allowed or given by the vendor or purchaser as the case may require."

There was also the following condition:—"The timber and coppice had been valued by Mr. George Barber, woodmonger, that on lot 1 at £180, that on lot 3 at £10, and that on lot 4 at £80, and that sum shall be paid by the purchaser of each lot in addition to his purchase-money."

The purchaser agreed to purchase lots 1, 3, and 4. He afterwards made a requisition that the vendor should allow compensation for a deficiency in the acreage of the property, and on the ground that the valuation of the timber was excessive.

The vendor refused to comply with this requisition and on the 29th of December, 1886, gave notice to rescind the contract. On the 10th of February, 1887 the purchaser took out this summons, asking for a declaration that the vendor was not entitled to rescind the contract; a declaration that the purchaser was entitled to compensation in respect of the deficiency in the quantity of the land comprised in the contract; a declaration that the purchaser was entitled to compensation in respect of the timber on the land being of less value than the sum mentioned in the contract.

The summons was adjourned into court.

Levett, for the purchaser.

T. L. Wilkinson, for the vendor.—I have to make

(a.) Reported by G. E. Jeffery, Esq., Barrister-at-Law.

preliminary objection to this summons. The court has no jurisdiction to decide this question on a summons under the Vendor and Purchaser Act. The question is one "affecting the existence of the contract," and is, therefore, within the exception in section 9.

Levett, for the purchaser.—It is too late to raise the objection after the vendor has filed affidavits in respect of the summons. The cases of *In re Yeilding and Westbrook*, 34 W. R. 397, 31 Ch. D. 344, and *In re Harrison and Thompson's Contract*, 34 W. R. 708, 32 Ch. D. 454, show the extent of the jurisdiction. The contract is still a subsisting contract, and the question is to what extent it exists. The contract cannot be put an end to until the vendor has returned the deposit.

North, J.—I do not think that the cases referred to have any bearing upon the present case; they do not relate to those words of section 9 of the Act which are now in question. In neither of those cases was any question raised as to the existence or validity of the contract. The point now raised is whether the question of the validity of the vendor's notice to rescind the contract is a question "affecting the existence or validity of the contract," and, therefore, excepted from the jurisdiction by summons given by section 9. The matter comes on for hearing in precisely the same way as it would if an action had been brought, and the court ought to dispose of it upon the summons if it can possibly do so. I think that, according to the true construction of section 9, the words of exception refer to the existence or validity of the contract in its inception, and do not preclude the court from deciding upon a summons the validity of a vendor's notice to rescind the contract. The question whether a power to rescind has been well exercised has often been decided by the court upon a summons under this section. *In re Dames and Wood*, 33 W. R. 685, 29 Ch. D. 626, is one of such cases. Therefore I overrule the preliminary objection. If the matter had been discussed before the chief clerk in chambers I should have thought that the objection to the jurisdiction had been taken too late. The matter, however, was not discussed at all in chambers, but the summons was adjourned at once into court. If I had allowed the objection I should have disallowed all the costs of the evidence on the summons.

The summons was then heard on the merits, and in the result North, J., held that the vendor was entitled to rescind the contract.

Solicitors for the purchaser, *Burton, Yeates, & Co.*, for *S. Hart Jackson*, Ulverston.

Solicitors for the vendor, *Indermaur & Brown*, for *H. J. A. Dickinson*, Broughton-in-Furness.

Chan. Div. North, J. } Oct. 25.

Best v. Applegate. (a.)

Practice—Mortgage—Foreclosure—Delivery of possession—R. S. C., 1883, ord. 18, r. 2; ord. 55, r. 5a (Dec., 1885).

In a foreclosure action commenced by originating summons, an order for foreclosure absolute may, as against the mortgagor in possession (he having been served and not appearing), include an order for delivery of possession, notwithstanding that such an order was not claimed by the summons.

Motion.

This action was commenced by originating summons on the 4th of December, 1886.

On the 13th of January, 1887, North, J., at chambers made an order that, in default of payment by the defendants to the plaintiff of the sum of £2,073 9s. and his taxed costs of the action (including any costs properly incurred by him as mortgagee), and any sum which the plaintiff might thereafter properly pay for ground-rents in respect of the mortgaged premises, on or before the 13th of July, 1887, the defendants should be foreclosed. And, the defendants consenting, a receiver was appointed to receive the rents and profits of the mortgaged premises.

The defendants made default, and, on the 4th of August, 1887, upon a motion by the plaintiff, North, J., made an order enlarging the time for redemption until the 2nd of September, 1887, and it was ordered that the receiver should pay the sum of £39 8s. 4d., which was in his hands, to the plaintiff on account of the £2,073 9s., and that on such payment the receiver should be discharged. And it was ordered that, in default of payment by the defendants, or some or one of them, to the plaintiff of the sum of £2,077 1s. 10d. on the 2nd of September, 1887, the defendants should be absolutely foreclosed. The sum of £2,077 1s. 10d. was made up of £2,034 0s. 8d. (the balance of the £2,073 9s. after deducting the £39 8s. 4d. received by the receiver), £29 17s. 2d. (the amount of the plaintiff's taxed costs), and £13 4s. which the plaintiff had paid for ground-rents since the date of the order of the 13th of January, 1887.

The defendants having made default, the plaintiff now moved that the order for foreclosure might be made absolute, and that the mortgagors might be ordered to deliver up possession of that portion of the mortgaged premises of which the mortgagors were in possession.

The defendants had been served, but they did not appear.

Jason Smith, for the plaintiff. [North, J., inquired whether the summons asked for an order for delivery of possession.]—I have not a copy of the summons. In *Salter* v. *Edgar*, W. N., 1886, p. 47, an order for delivery of possession was made although neither the writ or statement or claim asked for delivery of possession. A similar order was made in *Lacon* v. *Tyrrell*, W. N., 1887, p. 71, where the proceedings were commenced by originating summons and the summons did not ask for delivery of possession.

North, J.—I do not quite understand the cases referred to. I have some difficulty in seeing what jurisdiction there is to make an order for delivery of possession when the summons does not ask for it. But I will follow the cases cited if the registrar, on looking at the records in them, shall find that they are in point.

Solicitors, *Morten, Cutler, & Co.*; *R. H. Elton*.

[It was subsequently ascertained from the registrar that neither the writ in *Salter* v. *Edgar* nor the summons in *Lacon* v. *Tyrrell* asked for delivery of possession.]

Chan. Div. North, J. } Aug. 9.

Litchfield v. Jones. (a.)

Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4, sub-sections 3, 4—Solicitor—Town agent—Fiduciary capacity.

A solicitor who was the London agent of a country solicitor made default in payment of a sum ordered to be

(a.) Reported by G. E. Jeffery, Esq., Barrister-at-Law.

(a.) Reported by G. E. Jeffery, Esq., Barrister-at-Law.

paid by him in an action for an account by the country solicitor.

Held, that the defendant was liable to imprisonment under section 4, sub-section 3, of the Debtors Act, 1869, as a person acting in a fiduciary capacity, but not liable under section 4, sub-section 4, as a solicitor ordered to pay in his capacity of officer of the court.

Motion.

In 1882 an action was commenced by the executrix of a country solicitor against his town agent, Richard [illegible]ps, a solicitor, for an account of his agency.

On the 14th of July, 1887, an order was made that the defendant should pay into court within seven days, as directed in the schedule to the order, a sum of £3,022 13s. 1d., and should pay to the plaintiff the costs of the action subsequent to judgment.

This was a motion by the plaintiff to commit the defendant for default in disobeying the order to pay into court the sum of £3,022 13s. 1d.

Cookson, Q.C., and *Woodfall*, for the plaintiff.—As the defendant acted in a fiduciary capacity he comes within the exception contained in sub-section 3 of section 4 of the Debtors' Act, 1869, and is liable to imprisonment. He also comes within the exception contained in sub-section 4, because he was ordered to pay in his capacity of officer of the court.

T. L. Wilkinson, for the defendant.—The relationship of solicitor and client does not exist between a town agent and country solicitor: *Ward* v. *Eyre*, 28 W. R. 712, 15 Ch. D. 130. Nor can it be said that the agent was acting in a fiduciary capacity, his duties are similar to those of a banker who is a mere debtor. The distinction between fiduciary agents and other agents appears from the case of *Crowther* v. *Elgood*, 35 W. R. 369, 34 Ch. D. 691.

Cookson, Q.C., replied.

North, J.—In respect to the application to commit I am not disposed to accede to it for the reason that I do not see what good could be got by an order to commit. There is evidence that the defendant has no money, and the plaintiff is seeking to attach his property, and I do not see that he has anything more. I think there is jurisdiction to do more. I think the circumstances are such that the defendant does come within sub-section 3 of section 4 of the Debtors Act. In my opinion he is a person acting in a fiduciary capacity, and, in point of fact, I have in this case expressed that view when I ordered him to pay interest. Whether he comes under the 4th sub-section I feel a good deal more doubt, because he is not brought here in his capacity of a solicitor. It is quite true he would never have been selected to act as agent if he had not been a solicitor, but that seems to me to be a very different thing from his acting in the capacity of solicitor. If the Legislature had intended that the mere fact of his being a solicitor should be sufficient to expose him to the penalty of imprisonment it would have said so.

Solicitors, *G. H. Carthew*, for *William Turner*, Newcastle-under-Lyme; *R. B. Jones*.

Chan. Div.
Kekewich, J.

Jan. 2[illegible]

Verney v. Thomas. (a.)

Practice—Counter-claim—Defendants to counter-claim—Default of appearance—Ord. 32, r. 6—Ord. 27, r. 1

Several persons as plaintiffs brought an action against a defendant, T., to restrain him from infringing certain commonable rights over a piece of waste land. T. counter-claimed against the plaintiffs and seven other persons not originally parties to the action for an injunction to restrain them from erecting fences on part of the waste land. The seven persons so joined did not enter an appearance, and judgment against them on the counter-claim in default of appearance was moved for by the defendant in the action.

Held, that the cause of action against the seven persons was not severable within the meaning of ord. 27, r. 1, and came within ord. 32, r. 6, and that the case was not one in which immediate judgment would be granted against the defendants to the counter-claim who had not appeared.

Motion for judgment.

In this action the plaintiffs sought an injunction against the defendant Thomas restraining him from infringing the rights of common of the plaintiffs over a tract of waste land in the county of Anglesea. The defendant counter-claimed against the plaintiffs and seven other persons not previously parties to the action for an injunction restraining them from erecting or maintaining any fences or other enclosures on the piece of land in question.

The counter-claim was served on the seven persons in December, 1887. No appearance was entered within the eight days limited by R. S. C., ord. 21, r. 13, and an affidavit of service was filed under ord. 13, r. 2.

Judgment on the counter-claim in default of appearance was now moved for *ex parte* by the defendant in the action as against the seven persons made defendants to the counter-claim.

Costelloe, for the applicant.—The seven persons were added as defendants to the counter-claim under ord. 27, r. 12. They ought to have appeared within eight days, ord. 21, r. 13. As they have not appeared, an affidavit of service was filed under ord. 13, r. 2. The conditions for making ord. 13, r. 12, applicable have been duly complied with, and a default of pleading arose. The combined operation of ord. 19, r. 13, ord. 32, r. 6, and ord. 40, r. 1, give me the right to move for judgment: *Street* v. *Crump*, 32 W. R. 89, 25 Ch. D. [illegible]

Kekewich, J.—In this case the plaintiffs ask a declaration that they are entitled to certain rights of pasture as appurtenant to their lands, over a piece of waste land, and an injunction to assist the right. The defendant Thomas has delivered a counter-claim against the plaintiffs and certain other persons. The defendants have not appeared, and judgment in default is now asked for against these new defendants. It is objected in the office that the rules as to filing a defence in case of non-appearance do not apply to a counter-claim, but, reading ord. 21, r. 12, and ord. 27, r. 1, in the light of ord. 67, r. 4, a plaintiff by counter-claim against a defendant by counter-claim, in the position as a plaintiff in an original action, and if appearance is entered he can take the course of serving a notice of motion and proceed as against absent parties.

But then comes the question whether this is a case where judgment should be given against such defendants yet. The case falls within ord. 32, r. 6, which gives the judge a discretion as to granting a judgment

(a.) Reported by J. W. Greig, Esq., Barrister-at-[illegible]

The rule is as follows:—"Any party may at any stage of a cause or matter, where admissions of fact have been made either on the pleadings or otherwise, apply to the court or a judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court or a judge may, upon such application, make such order, or give such judgment, as the court or a judge may think just."

It is said the defendant has an independent right against these new parties, but, if so, it should not have been joined in this action. The policy of the Judicature Act of 1873 (section 24, sub-section 3) was to have all questions between the same parties settled, not to permit new claims to be dragged in as against other persons. If, on the other hand, this claim is connected with the original one, that is a reason for not granting the relief asked, as ord. 32, r. 6, and the latter part of ord. 27, r. 12, apply, and I think this motion ought to stand to the trial and the question raised in the counter-claim be decided then.

Solicitors, *Nisbet & Daw*, for *Turner & Allanson*, Carnarvon.

Chan. Div.
Kekewich, J. } Feb. 9, 10.

Davies v. Davies. (a.)

Settled Estates Act, 1877 (40 & 41 *Vict. c.* 18), *s.* 46—*Tenant for years—Liability for permissive waste—"Wear and tear and damage by tempest excepted."*

A tenant by the curtesy of a freehold tenement, granted, in exercise of the power contained in section 46 of the Settled Estates Act, 1877, *a lease of the premises for twenty-one years, and died soon afterwards. The lease contained a covenant by the lessee that he would "at all times during the term keep the premises in good and substantial repair, and the same in good and substantial repair deliver up to the lessor, at the expiration or sooner determination of the term, fair wear and tear and damage by tempest excepted."*

Held, in an action by the owner in fee of the premises to set aside the lease, that the lease was invalid as it was "not made without impeachment of waste," and therefore did not conform to the conditions of section 46 *of the Act.*

Yellowly *v.* Gower, 11 *Ex.* 274, 4 *W. R. Dig.* 194, *followed.*

Trial of action.

Mary Davies was seised in fee of the White Swan public-house, situate at Llanfrynach, in the county of Brecon. She died in 1851, whereupon her husband, Thomas Davies the elder, became tenant by the curtesy of the premises.

By an indenture dated the 28th of October, 1885, Thomas Davies the elder, in exercise of the power conferred upon him by the Settled Estates Act, 1877, demised to the defendant, William Davies, the White Swan for twenty-one years from the 27th of September, 1885, at the yearly rent of £34. The lease contained a covenant by the lessee that he would, "at all times during the said term, keep the said premises in good and substantial repair, and the same, in good and substantial repair, deliver up to the lessor at the expiration or sooner determination of the term, fair wear and tear and damage by tempest excepted."

The plaintiff, T. Davies the younger, the heir-at-law of Mary Davies, after the death of Thomas Davies, the elder, by this action claimed a declaration that the lease was not a valid exercise of the leasing power conferred by the Settled Estates Act, 1877, on the ground that the demise was not made without impeachment of waste, as the covenant to repair was subject to an exception of "fair wear and tear and damage by tempest."

Warmington, Q.C., and *Upjohn.*—The lease does not comply with section 46 of the Settled Estates Act, 1877. In *Yellowly* v. *Gower*, 11 Ex. 274, 4 W. R. Dig. 194, there was an implied exception from permissive waste by reason of the express covenant by the lessor to repair, and the lease was held bad. A tenant for years would be liable for damage by tempest if nothing were said about it in the lease. "If the house be discovered by tempest, the tenant must in convenient time repair": Co. Litt. 53a. The object of section 46 is to preserve the *corpus* of the estate for the reversioner. *Brown* v. *Trumper*, 26 Beav. 11, shows that a tenant is bound to give up the premises in as good a state of repair as when he took possession.

Barber, Q.C., and *Ingham.*—The section means the lessor is not to give the lessee a right of active waste. The fair meaning of this covenant is that the lessee is to keep the premises in substantial repair.

Warmington replied.

Kekewich, J., after dealing with other points in the case, proceeded:—T. Davies the elder, being tenant by the curtesy of a tenement, granted a lease under section 46 of the Settled Estates Act, 1877. According to that section, certain conditions have to be observed in such grants, including one that "such demise be not made without impeachment of waste." All the other conditions have been conformed to, and the question is, how far this one has been fulfilled. The meaning of the statute is not that the words, "with impeachment of waste," are to be inserted in the lease, but that in effect the lessee is not to be without impeachment of waste—in other words, that the lessee is not to be free from any obligation to which he would be subject if nothing were said about waste in the lease. This raises the question whether a lessee for years is subject to liability for permissive waste. The case of *Yellowly* v. *Gower*, seems to me to stifle any doubt on the point. In *Woodhouse and Walker*, 28 W. R. 765, 5 Q. B. D. 404, Lush, J., and Field, J., had the same idea, and Lush, J., went into the old law with reference to a tenant for life, but evidently thought a tenant for years was liable for permissive waste. I can have no doubt that both a tenant for years and a tenant for life are impeachable for permissive waste. What, then, is the effect of the present lease? The covenant as to repairs exempts the lessee from liability for "fair wear and tear and damage by tempest excepted." If those words were not there, the lessee would have been liable in those respects, and I therefore think the lease is not in conformity with the statute, and is bad, and must therefore be set aside.

Judgment for the plaintiff, with costs.

Solicitors, *Schultz & Son*, for *Gwillym & Charles James*, Merthyr Tydfil; *Vanderpump & Son*, for *W. P. Price*, Brecon.

(a.) Reported by J. W. Gauze, Esq., Barrister-at-Law.

Prob. Div. & Adm. Div. } Nov. 15.
Probate. }

In the Goods of Black. (*a.*)

Probate—Practice—Administration with will annexed—Grant to Administrator-General of British Guiana—Law of colony.

A testator domiciled in British Guiana, and having property there and in England, by his will appointed two executors.

By the law of British Guiana an executor of a will is allowed a period of six months which may be extended) from the death of his testator in which to deliberate whether he will act as executor or not; and during that period he may do certain acts and things necessary to protect the estate.

One executor was resident in England, the other in the colony, and the latter administered the estate on his own behalf and as attorney of the executor resident in England. Under the provisions of the law in force prior to the 1st of July, 1887, *he ultimately nominated the Administrator-General of the colony to act as executor on his behalf, but did not affect the rights of the other executor.*

The court, on application by motion, made a grant of letters of administration, with the will annexed, to the attorneys in this country of the Administrator-General, until such time as either he or the executor resident here should apply.

Motion for grant of letters of administration, with the will annexed, of the personal estate and effects in England of H. M. A. Black to Charles Champion and Charles Goble Champion, the attorneys duly appointed for this purpose of the Administrator-General of British Guiana.

The testator, H. M. A. Black, resided ordinarily at George Town, Demerara, in the colony of British Guiana, where his domicile was. He was lost at sea between Flushing and Queenboro in the month of September, 1886, having first made his will, bearing date April 6, 1886, by which he appointed as executors of his will and guardians of his children E. G. Barr, of England, and J. Moore, of British Guiana, and there was a clause substituting other executors in case these refused to act. Barr and Moore entered on their duties as executors.

By the law of British Guiana an executor of a will is allowed a period of six months from the death of his testator in which to deliberate whether he will act as executor or not, and during that period he may do certain acts and things necessary to protect the estate, and if necessary, at the expiration of that time, apply for a future period of deliberation, and at the end of that period or periods (called the "Period of Deliberation") he may elect to act in or renounce the trusts of the will.

But if an executor acts after that period he becomes officially the executor of the will, and prior to the 1st of July, 1887, he could only release himself from the executorship by nominating and substituting the Administrator-General of the colony to be executor in his place. This was done in this case by J. Moore on the eve of his leaving the colony in June, 1887, to reside permanently in England, and the Administrator-General is now administering the estate of the testator in the colony of British Guiana.

E. G. Barr for many years past permanently resided in England; he had not substituted the Administrator-General, and in consequence of a new law in force in the colony as from July 1, 1887, he could not now do so without leave of the courts.

By the law of the colony the Administrator-General of British Guiana is entitled to administer the whole estate, wheresoever situate, of any testator or intestate whose estate he may represent; and in the present case is the person entitled to apply for and take out letters of administration with the will annexed to the estate of the said H. M. A. Black, deceased, in England, for the purpose of realizing and administering such portion of the estate of the said testator as is situated there, or for any other purpose connected therewith.

The Administrator-General is further entitled, the moment any person is missing or absents himself from the colony without leaving an attorney or proper agent to represent the estate of such person and administer it. No person can claim administration of the estate in opposition to the Administrator-General after he has been legally substituted, and the Administrator-General has full power and authority by law, without the colony where it may be necessary to do so, to appoint an attorney or attorneys.

The statements of the law in the colony were deposed to by the Attorney-General of the colony, who happened to be in England, and he also deposed to the fact that the exemplification of the will, which was not in the form of an English probate, was a notarial copy of the will given out of the registrar's office according to the law and practice of the colony.

The testator, beyond his property in British Guiana, was also possessed of a large estate in England, and the object of the application was to administer the English estate.

Inderwick, Q.C. (*G. E. S. Fryer* with him), in support of the application.

Butt, J.—I do not see that any harm can be done by granting administration to the applicants, as attorneys for the use of the Administrator-General until he and Mr. Barr or either of them shall apply. As to sureties, I think the bond of the applicants, who are solicitors in London, will be sufficient.

Motion allowed.

Solicitors for the applicants, *Chapman & Sons.*

Prob. Div. & Adm. Div. } Nov. 8.
Probate. }

In the Goods of Wilde. (*a.*)

Probate—Practice—Administration de bonis non—*No residuary estate—Notice to residuary legatee by letter—Grant to specific legatee.*

Where, by the certificate of the chief clerk in an administration action, it appeared that there was no residuary estate, and several letters had been sent to the residuary legatee at his known residence in Canada asking him to renounce, the court granted administration de bonis non *to a specific legatee, without requiring further citation of the residuary legatee.*

Motion for a grant of administration *de bonis non* to Thomas Simkin Wilde, a specific legatee under the will of E. Wilde, without citation of the residuary legatee.

The testator died in February, 1879, leaving a will duly executed, in which, after giving certain specific legacies, he bequeathed the residue of his personal estate to his nephew Thomas Wilde. One executor renounced, the other, G. P. Pritchard, proved the will, and died

(*a.*) Reported by J. Gerard Laing, Esq., Barrister-at-Law.

(*a.*) Reported by J. Gerard Laing, Esq., Barrister-at-Law.

on the 5th of January, 1887, intestate, leaving a portion of the estate unadministered.

An action in the Chancery Division had been commenced to administer the estate of the testator. Several letters explaining the circumstances were sent to Thomas Wide, who was living at Moosinim, in the north-west territory of the Dominion of Canada, and the letters suggested that he should renounce, and contained a form for that purpose; but no answer had been received from him, although he was in correspondence with other members of the family.

The chief clerk had certified that the whole of the personal estate of the testator did not exceed £1,526, and that the debts and pecuniary legacies amounted to £2,005, so that there could be no residuary estate.

Searle, in support of the motion.

Hannen, P., granted the motion, subject to an affidavit verifying the chief clerk's certificate.

Solicitors, *Peacock & Goddard*, for *Cooper & Yates*, Rochdale.

Court of Appeal.

From Chan. Div. [and Chitty, J.] — Feb. 20, 21, 22; March 6.

Mutter *v.* Eastern and Midlands Railway Co. (*a*.)

Railway company—Debenture stock register—Shareholder's statutory right to inspect and take copies of register—Shareholder a "nominee" of a rival company—Companies Clauses Act, 1845 (8 *Vict. c.* 16), *s.* 45—*Companies Clauses Act*, 1863 (26 & 27 *Vict. c.* 118), *s.* 28.

The statutory right of a shareholder in a railway company to inspect the "Register of Mortgages" under section 45 of the Companies Clauses Act, 1845, *and to inspect the "Debenture Stockholders' Register" under section 28 of the Companies Clauses Act*, 1863, *includes a right to take copies of or extracts from such registers.*

Decision of Chitty, J., *affirmed.*

Motion.

The plaintiff was the registered holder of shares to the extent of £200 and of debenture stock to the extent of £500 in the defendant company, and by his writ in the action claimed an injunction to restrain the defendant company from preventing him having access at all reasonable times to the defendant company's register of mortgages and bonds, or their register of debenture stock, for the purpose of inspection and perusal, and from preventing him taking extracts from the said registers respectively of the names, addresses, and holdings of the persons and corporations entitled to such mortgages, bonds, and debenture stock respectively.

The plaintiff, after issuing the writ, moved for an interlocutory injunction in the above terms. It was agreed to treat the motion as the trial of the action.

The material facts, as they appeared from the evidence, were shortly these:—The shares which the plaintiff held in the defendant company had been transferred to the plaintiff for a nominal consideration by the chairman of the Great Eastern Railway Co.—a rival company; the debenture stock held by the plaintiff in the defendant company had been purchased by the plaintiff with money borrowed from the solicitor of the Great Eastern Railway Co.—who was, however, a personal friend of the plaintiff's, and the plaintiff had deposited other railway stock with the solicitor as security for the loan. The defendant company had, in fact, allowed the plaintiff to inspect the registers referred to, but had refused to allow him to take copies of, or make extracts from, the registers, and the real contest was as to whether the plaintiff had a right to do so. The question turned on the construction of section 45 of the Companies Clauses Act, 1845 (8 Vict. c. 16), and section 28 of the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118). Section 45 of the Act of 1845 provides that "a register of mortgages and bonds shall be kept by the company, and within fourteen days after the date of any such mortgage or bond an entry or memorial, specifying the number and date of such mortgage or bond, and the sums secured thereby, and the names of the parties thereto, with their proper additions, shall be made in such register; and such register may be perused at all reasonable times by any of the shareholders, or by any mortgagee or bond creditor of the company, or by any person interested in any such mortgage or bond, without fee or reward." Section 28 of the Act of 1863 provides that "the company shall cause entries of the debenture stock from time to time created to be made in a register to be kept for that purpose, wherein they shall enter the names and addresses of the several persons and corporations from time to time entitled to the debenture stock, with the respective amounts of the stock to which they are respectively entitled; and the register shall be accessible for inspection and perusal at all reasonable times to every mortgagee, bondholder, debenture stockholder, shareholder, and stockholder of the company, without the payment of any fee or charge."

Other sections of these Acts referred to as bearing on the question were section 10 of the Act of 1845, which directs that a "shareholders' address book," containing the names and addresses of every shareholder, be kept, and enacts that "every shareholder . . . may, at all convenient times, peruse such book *gratis*, and may require a copy thereof or of any part thereof," the company being authorized to charge sixpence for every 100 words copied; section 36 of the Act of 1845, which enables execution creditors of the company to issue execution against the shareholders to the extent of their shares in capital not paid up, and provides that, "for the purpose of ascertaining the names of the shareholders, and the amount of capital remaining to be paid upon their respective shares, it shall be lawful for any person entitled to such execution at all reasonable times to inspect the register of shareholders without fee"; section 119 of the Act of 1845 provides that a "book-keeper" should be appointed to enter the accounts of the company in "books to be provided for the purpose, and every such book-keeper shall permit any shareholder to inspect such books and to take copies or extracts therefrom at any reasonable time during the prescribed periods, and if no periods are prescribed, then during one fortnight before and one month after every ordinary meeting, and if he fail to permit any such shareholder to inspect such books or take copies or extracts therefrom . . . he shall forfeit to such shareholder for every such offence a sum not exceeding £5."

Romer, Q.C., and *W. Baker*, for the plaintiff.

R. S. Wright and *C. Haigh*, for the defendant company.

The arguments sufficiently appear from the judgment.

Chitty, J.—The first point taken by the defendant company is that the plaintiff is not a *bonâ fide* shareholder or debenture stockholder. But his name is registered as the holder of both the shares and the debenture stock, and *primâ facie* he is therefore entitled to sue. The result of the authorities is that the court

(a.) Reported by M. J. Blake and A. D. Maclaren, Esqs., Barristers-at-Law.

cannot deny the plaintiff the exercise of such rights as are conferred upon him as a shareholder by the Legislature. The personal merits of the plaintiff do not affect the question, and the court cannot go behind the register, which is final. The matter came before the courts in *Pender* v. *Lushington*, where the late Master of the Rolls decided that the register was the only evidence by which the rights of members to vote at a general meeting could be ascertained.

The strongest case in favour of the view taken by the defendant company that the plaintiff is not a *bonâ fide* holder is *Forrest* v. *The Manchester, Sheffield, and Lincolnshire Railway Co.* But there have been many other cases since then taking a different view, and notably *Bloxam* v. *The Metropolitan Railway Co.*, where it was held that the circumstances under which the plaintiff acquired his interest did not disentitle him from claiming relief.

No doubt the plaintiff here is acting in the interest of the Great Eastern Railway, but the state of the authorities do not justify me in going behind the register, and, accordingly, I must decline to accede to the argument, which is founded upon what has been termed the doctrine of "personal exception."

The second point taken by the defendants is one which depends upon the construction of the Companies Clauses Act. The plaintiff desires to inspect the register, and it is plain, under that Act, he has a right to inspect it and see every part of it. The object of the Act is that a shareholder should be able to ascertain the number of shares and the address of each shareholder and communicate with them. This is a use of the register which is frequently made by the directors themselves when they canvass the shareholders to support some particular matter at a general meeting. I think the shareholders are entitled to have the same convenience. Then the question arises whether the shareholders have not only a right to inspect, but also to take copies of, the register's contents. [His lordship then read sections 9, 10, and 45 of the Act, and continued:—] The Act contains no prohibition against a shareholder making notes of what he inspects. Why should it? It is plain, as Mr. Romer says, a shareholder might commit to memory as much as he could, and use the information he remembers, and I do not see why another shareholder with inferior powers of memory might not make a copy of the information he desires to use. I hold that it follows from his right to inspect that the plaintiff has a right to make copies, and is entitled to an injunction.

The defendant company appealed.

R. S. Wright and *C. Haigh*, for the appellant.—The plaintiff is a person employed by the Great Eastern Railway Co.—a rival company—to collect the names of memorialists to oppose a Bill in Parliament of the defendant company. The shares in the defendant company of which the plaintiff is the registered holder were not purchased by him, but were voluntarily transferred to him by the chairman of the Great Eastern Co.; the plaintiff is in reality the mere puppet of the Great Eastern Co., and this application is in reality made on their behalf, and on that ground the court ought not to grant this injunction: *Rogers* v. *Oxford and Wolverhampton Railway Co.*, 2 De G. & J. 662, 8 W. R. Ch. Dig. 68; *Forrest* v. *Manchester and Sheffield Railway Co.*, 9 W. R. 818, 4 De G. F. & J. 126; *Seaton* v. *Grant*, 15 W. R. 602, L. R. 2 Ch. 459; *Bloxam* v. *Metropolitan Railway Co.*, 16 W. R. 490, L. R. 3 Ch. 337; *Hattersley* v. *Earl Shelburne*, 10 W. R. 881. [Lindley, L.J.—Those cases were suits by one "suing on behalf of all others," but your case is not that.] The plaintiff is guilty of misrepresentation; he at first alleged he was a purchaser for value of the shares, but on cross-examination had to admit he was a mere voluntary donee. That is sufficient to disentitle him to the injunction sought. Again, on the construction of the Acts the plaintiff is not entitled to take copies of the register of mortgages or of the regi[illegible] of debenture stock; section 45 of the Act of 1845 [illegible] section 28 of the Act of 1863, which give the right [illegible] inspect, say nothing about taking copies, and wher[illegible] it was intended to give the right to take copies the [illegible] expressly gives it, as in section 10 of the Act of 1[illegible] relating to the "Shareholders' Address Book," [illegible] section 19 of the same Act, relating to the "A[illegible] Books." Even if there exists a right to take copi[illegible] in the discretion of the court to refuse to interfere [illegible] the application is not *bonâ fide*: *Reg.* v. *London* [illegible] *St. Katharine Docks Co.*, 23 W. R. 136. [Bowen, [illegible] —That was an application for a *mandamus*, and th[illegible] fore the matter was discretionary for some purposes.]

Romer, Q.C., and *W. Baker*, for the respondent[illegible] The object of the Acts in requiring these registers to [illegible] kept and in giving the right of inspection is to a[illegible] information to any stock or shareholder as to [illegible] names and addresses of the other stock and sh[illegible] holders, so as to enable him, if necessary, to comm[illegible] cate with them. This object necessarily implies [illegible] right of taking copies of the registers. If it did not [illegible] directors of a company could practically prevent a [illegible] holder canvassing other shareholders by refusin[illegible] allow him to take copies of their names [illegible] addresses, while the directors, having the reg[illegible] in their possession, could always canvass on [illegible] own behalf. The plaintiff, as a registered stockh[illegible] in the defendant company, has a statutory [illegible] to inspect these registers, and has by nece[illegible] implication a statutory right to take copies of them [illegible] course at his own expense. A right to inspect [illegible] always been held to imply a right to take copies: [illegible] v. *Pratt*, 30 W. R. 837; *Coleman* v. *West Hart[illegible] Railway Co.*, 5 L. T. N. S. 266. This is not an a[illegible] by the plaintiff suing on behalf of himself and all [illegible] shareholders, and the cases cited on behalf of the a[illegible] lant are therefore not applicable. The motive ind[illegible] the plaintiff to acquire the shares in the defendant c[illegible] pany cannot be gone into and cannot deprive him [illegible] statutory right: *Pender* v. *Lushington*, 6 Ch. D. 70, [illegible] W. R. Dig. 64.

R. S. Wright, in reply.—Debenture stockholders [illegible] no votes, and therefore it cannot be the object of [illegible] Acts to allow inspection and the taking of copies for [illegible] purpose of canvassing such stockholders. [Lin[illegible] L.J.—But the stockholders would have a *locus stan[illegible]* oppose a Bill in Parliament.] That *locus standi* is [illegible] given by the standing orders of Parliament made [illegible] after these Acts; the only object of allowing insp[illegible] is that a shareholder may see that not more th[illegible] proper amount of debenture stock remains outst[illegible] and that does not imply the right of taking co[illegible] Chitty's Practice (Archbold), vol. ii., part v., c. [illegible] Bacon's Abridgment, vol. iii., Title, Evidence (F.); [illegible] Grant on Corporations were also referred to.

Cur. adv. vult.

March 6.—The following judgment of the court w[illegible] delivered by

Lindley, L.J.—The plaintiff, who is a shareholde[illegible] and also a debenture stockholder, in the defenda[illegible] company, by this action claims the right, not only [illegible] inspect, but also to take copies, of the "Stockholde[illegible] Register," under section 28 of the Companies Clauses Ac[illegible] 1863. [The Lord Justice read the section, and con[illegible] tinued:—] The facts are simple. The plaintiff pre[illegible] sented himself at the office of the company in order t[illegible] inspect this register, which he was allowed to do, but h[illegible] was not allowed to take copies of, or make extract[illegible] therefrom. This action was then brought, and Chitty,

J., decided that the plaintiff was entitled to take copies. The defendant company have appealed, and two points have been raised on behalf of the appeal—first, that no right to take copies is given under that section; and, secondly, that even if the plaintiff had such a right, this is not a case in which the court would interfere on his behalf to enforce it. With regard to the second point, the argument is based on two grounds—first, that the plaintiff is merely a nominee in the interests of a rival company; and, secondly, that there has been such a want of candour in the affidavits made by the plaintiff as to disentitle him obtaining the interference of the court in his favour. That the plaintiff is merely a nominee has, in our opinion, been made out, but that fact in itself does not disable him from bringing this action, in which he does not assume to represent all other shareholders, but only to enforce his own statutory right as a registered shareholder. The cases cited, such as *Forrest* v. *Manchester and Sheffield Railway Co.*, do not touch this; they were cases, not merely of a nominee taking shares, but also assuming to represent all other shareholders. It has, no doubt, been also established that the plaintiff was, to say the least, guilty of a want of candour in his affidavits, but we do not consider he has been guilty of such misrepresentation or deceit as to disentitle him to relief if he is entitled.

Is the plaintiff entitled to what he seeks? The question thus raised is one of considerable importance to companies and shareholders generally, and we therefore considered it desirable to look into the authorities before giving our judgment. The result of my own researches is negative rather than positive. I have not been able to find a single case, either at law or in equity, in which the court has ever held that a person having a right to inspect a document has not also a right to take a copy of it, or so much of it as he requires for some legitimate purpose. The right to take a copy is treated as incidental to the right to inspect, and the common form of orders to inspect is to inspect and take copies. This seems to be the common form at law when a *mandamus* is granted and when an order is made on a motion in a pending action, and this is, and, so far as I have been able to discover, always has been, the common form of an order to inspect when made in Chancery. A great number of cases on this subject will be found collected in the well-known note to *Rex* v. *The Fraternity of Hostmen in Newcastle-on-Tyne*, 2 Str. 1,223, and in Chitty's Archbold, i., p. 511, 14th ed., and an examination of those and other authorities has led me to the conclusion that, speaking generally, a right to take copies is always treated as incidental to a right to inspect. I say speaking generally because I have found an instance of a special Act relating to a company in which a right to inspect has been granted, but a right to take copies has been expressly excluded. One of the Acts relating to the River Dee Improvement Commissioners contains such a clause. Again, there may be cases where the inspection of a document is all that can reasonably be exercised for any legitimate purpose; or a document which a man may have a right to inspect may be in such a dilapidated state as to render it impossible to take a copy of it without destroying or at least seriously injuring it. Again, a person may have a right to inspect the whole of a book or document in order to find out what part of it really concerns him, and his right to inspect may therefore extend to much more than he has a right to take a copy of. When the right to inspect and take a copy is expressly conferred by statute the limit of the right depends on the true construction of the statute. When the right to inspect and take a copy is not expressly conferred, the extent of such right depends on the interest which the applicant has in what he wants to copy and on what is reasonably necessary for the protection of such interest.

The common law right to inspect and take copies of public documents is limited by this principle, as is shown by the judgment in *Rex* v. *The Staffordshire Justices*, 6 Ad. & Ell. 84, see pp. 99—101; so is the common law right of the member of a corporation to inspect and take copies of the documents of the corporation: *Rex* v. *Merchant Taylors' Co.*, 2 B. & Ad. 115. Bearing in mind these principles, it is necessary to turn to the statute on which the plaintiff relies and to see what right it confers upon him. The section which gives him the right to inspect is silent on the subject of taking copies. There is, however, a section relating to another matter (Companies Clauses Act, 1845, s. 119) which expressly gives a right to take copies, as well as a right to inspect. But this section imposes a penalty, and as it was intended to impose a penalty, not only in the case of a refusal to allow inspection, but also in the case of a refusal to allow a copy to be taken, it was necessary to say so in express words and to mention both inspection and taking copies. The fact, therefore, that both are mentioned in this section, while inspection only is mentioned in section 28 of the Act of 1863, does not show that in framing this last section a right to take copies was intended to be excluded. Section 36 of the Act of 1845, which enables judgment creditors of the company to inspect the register of shareholders, would be practically useless if it were construed strictly and so as not to include a right to take copies. A judgment creditor of a company who cannot get paid by the company is entitled to sue all the shareholders in it whose shares are not paid up. For this purpose he must have their names and addresses, and it is idle to suppose that the right of inspection here given does not include a right to take a copy. Similar observations apply, though less forcibly, to section 45 of the Act of 1845, and section 28 of the Act of 1863. But it is obvious that a shareholder or debenture stockholder may desire to consult the whole of the debenture stockholders on some matter which concerns them all; and it is reasonable to suppose that the right to inspect the debenture stock register is conferred to enable him to do this, as well as for other purposes. Parliament having conferred the right to inspect, the court ought not so to construe the statute as to render the right conferred illusory; and if the court were to hold that in such a case as the present the right to inspect existed, but the right to take copies did not, the court would in effect be rendering the statute of no avail. Upon the ground, therefore, that in this case the right to take a copy cannot be denied without rendering the right to inspect practically useless, I am of opinion that the order appealed from was correct, and that this appeal must be dismissed, with costs.

Solicitors, *F. C. Mathews & Browne; Valentine.*

Bankruptcy. Dec. 16, 17, 20; Jan. 30.

Ex parte BROWN.

In re H. G. SMITH. (a.)

Practice—Judge's order by consent—Effect of failure to file—Money paid under garnishee order—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 27.

S. having given a consent to judgment being signed against him by C. & H., judgment was accordingly signed by them, but the consent was not filed as required by section 27 *of the Debtors Act,* 1869. *Y., who was a debtor of S., paid money to C. & H. under a garnishee order obtained under the judgment. S. subsequently became bankrupt, and his trustee in bankruptcy applied*

(a.) Reported by A. P. PERCIVAL KEEP, Esq., Barrister at-Law.

to the court for an order that C. & H. should pay to him the sum of money so received from Y.

Held, that the effect of non-compliance with the requirements of the section was that the money was paid by Y. to C. & H. to the use of the trustee, who was therefore entitled to recover it from them.

Appeal from the decision of Cave, J.

Cooper Willis, Q.C., and *Sidney Woolf*, for the appellant.

Winslow, Q.C., and *Yate Lee*, for the respondents.

The facts and arguments sufficiently appear from the judgment.

The following additional cases were cited:—*Orr* v. *Devigne*, 8 Ir. C. L. Rep. 100; *Gowan* v. *Wright*, 35 W. R. 297, 18 Q. B. D. 201; *Bryan* v. *Child*, 5 Ex. 368; *Bittleston* v. *Cooper*, 14 M. & W. 399; *Dimmack* v. *Bowley*, 2 C. B. N. S. 542, 6 W. R. C. L. Dig. 53; *Emmanuel* v. *Bridger*, 22 W. R. 404, L. R. 9 Q. B. 286.

Jan. 30.—The judgment of the court (Lord ESHER, M.R., BOWEN and FRY, L.JJ.) was read by

FRY, L.J.—The facts which give rise to this appeal are shortly as follows:—On the 17th of June, 1884, Clutton & Hussey issued a writ against the bankrupt Smith claiming the sum of £50,000. On the 18th of June Smith gave a consent to judgment being entered against him in the action, and on the 19th of June judgment was signed accordingly.

The consent to this judgment was not filed as required by the 27th section of the Debtors Act, 1869, of which more hereafter.

Young owed to Smith a sum of £700 for principal lent and £8 0s. 5d. for interest, and on the 5th of July, 1884, the plaintiffs, Clutton & Hussey, obtained a garnishee order *nisi* against Young. On the 6th of July the order was made absolute upon the terms that Young should pay £208 0s. 5d. to the plaintiffs on or before the 1st of August then next and the balance of the £700 by instalments; and on the 8th of July the £208 0s. 5d. was paid by Young to the plaintiffs.

On the 10th of July, 1884, the twenty-one days allowed for filing the consent order under the Debtors Act, 1869, expired.

On the 11th of July, 1884, a bankruptcy notice was served on Smith, and in September of the same year a petition was presented on which he was adjudged bankrupt, the act of bankruptcy being non-payment under the notice.

The trustee in bankruptcy now applies that Messrs. Clutton & Hussey may pay to him £208 0s. 5d.

It appears to us that the only claim which the trustee can have against the respondents Messrs. Clutton & Hussey is on the footing that the money so paid to them was money received by them to the use of the trustee.

Cave, J., refused the trustee's application on the ground that the object of the enactment in question was to prevent rivalry between a judgment creditor by consent and an ordinary judgment creditor, and was not to enable the trustee or a creditor or all the creditors to recover money from a creditor to whom it had actually been paid under a consent judgment. The opposite conclusion he held to be monstrous. In this view of the learned judge we are not able to concur. We feel as he did the inconvenience of the enactment, but we think that the course of decision and of enactment *in pari materia* prevents our giving effect at this time of day to the argument *ab inconvenienti*.

It is necessary briefly to refer to the course of legislation on this subject.

The first statute which must be referred to is the 3 Geo. 4, c. 39, which was passed, as its preamble shows, to remedy the injustice frequently done to creditors by secret warrants of attorney to confe[illegible] judgments for securing the payment of money. It re[illegible] quired all such warrants of attorney, or a copy of them to be filed within twenty-one days after execution; [illegible] in the event of a commission of bankruptcy after the twenty-one days against the defendant, it declared the warrant of attorney, and the judgment and execution thereon, to be fraudulent and void against the assignees in bankruptcy, unless within the twenty-one days after execution one or other of three things had been done—namely, the warrant had been filed, or judgment signed or execution issued. But the statute not only declared that the warrant of attorney and the judgment and execution thereon were fraudulent and void against the assignees, but enacted that such assignees should be entitled to recover back for the use of the creditors all the moneys levied or effects seized under and by virtue of the judgment and execution. So far the statute dealt only with warrants of attorney; but by section 3, after a recital that "the object of the previous provisions might be defeated by any person giving a cognovit *actionem* instead of a warrant of attorney to confess judgment," it provided for the filing of every cognovit *actionem* in any personal action, or a copy of it, "within twenty-one days after execution, otherwise such *cognovit actionem* and any judgment entered up thereon, and any execution taken out on such judgment should be deemed fraudulent and void against the assignees of the person giving such *cognovit actionem* under commission of bankrupt issued against him, after the expiration of the twenty-one days, in like manner as warrants of attorney and judgments and executions thereon are deemed and taken to be fraudulent and void by that Act."

As regards a *cognovit actionem*, the statute contains no express words giving the assignees a right to recover the moneys levied or effects seized, but the intention of the Legislature to place a *cognovit actionem* in the same position as a warrant of attorney is so clear as to make it probable that no distinction could be drawn with success between the two cases. In fact, the Legislature seems to treat the cause of action accruing to the assignee in bankruptcy as a result of the avoidance of the judgment obtained by consent. This statute contains, it will be observed, no limitation as to the time within which the bankruptcy may occur, or the action of the assignees be brought after the signing of the judgment or the levy of the execution, and the inconvenience which might arise from opening up old transactions under the Act soon attracted attention.

Thus, in *Wilson* v. *Whitaker*, 1826, M. & M., Abbot, C.J., pointed out the great inconveniences which might arise from avoiding an execution which had been perfected, and doubted whether the statute would extend to cases where there had been no act of bankruptcy at the time of giving the warrant of attorney.

Before this doubt was resolved another statute was passed bearing on the same subject—namely, the statute 1 & 2 Vict. c. 110, s. 60, which extended the provisions of the statute of George IV. to assignees in insolvency, and gave them by express language a right of action against persons who had received the moneys levied or effects seized where the warrant of attorney or *cognovit actionem* had not been duly filed. Under this statute the doubt which had been raised by Abbot, C.J., again arose, and this time it required decision. In the case of *Biffin* v. *Yorke*, 1843, 5 M. & Gr. 428, execution had been issued by the judgment creditor whose *cognovit* had not been duly filed, and the proceeds paid over to the judgment creditor before the insolvency. The court felt the inconveniences to which attention had been called, but held the language of the statute too clear and too general to enable them to put any limit of time upon it, and the assignee in insolvency recovered.

"It is said," observed Cresswell, J., "that it would

be a great hardship if a party could be called upon after several years to refund that which he has honestly recovered. He can, however, be only called upon to refund money which he has recovered under an execution which is pronounced by the Legislature to be fraudulent."

The next legislation which it is material to mention is contained in the Bankruptcy Act of 1849 (12 & 13 Vict. c. 106), ss. 135—7. The section with which we are concerned is the 137th. It is obvious that the earlier legislation, whilst dealing with warrants of attorney and *cognovits*, had not touched consents to judge's orders to sign judgment; and hence a door was opened which the Legislature thought it needful to close; and accordingly, by the 137th section of the statute in question, it was enacted that every judge's order made by consent given by a trader (who thereafter became bankrupt) in any personal action, and whereby the plaintiff should be authorized to sign judgment, or to issue execution should, or in certain cases a copy thereof should, be filed within twenty-one days after the making of such order, otherwise such judge's order, and any judgment signed or entered up thereon, and any execution issued on such judgment, should be null and void to all intents and purposes whatever. This clause gave no express right of action to the assignee in bankruptcy.

On this section, again, the same question arose as under the Insolvency Act in *Biffin* v. *Yorke*—namely, whether it could apply to money paid under an execution prior to the act of bankruptcy.

This was in the case of *Farrow* v. *Mayes*, 18 Q. B. 516 (1852), where the judge's order, not having been filed, as required by the Bankruptcy Act, 1849, judgment was signed and execution taken out, and a sum paid by the bankrupt's brother which must be held as a payment under the execution. The assignees under the bankruptcy sued for the recovery of this money, and it was held that they could recover it as money had and received to their use. Then the argument was pressed on the court that the statute was not intended to affect judgments which had been perfected by execution; but the argument was repelled by the judges, who said that the course of legislation made it clear that the enactment was intended to render void all such transactions, though executed before the date of the *fiat*, without notice of the act of bankruptcy.

Thus matters stood with regard to consents to judgment down to the year 1869, when the Legislature passed three statutes, which must be regarded as more or less parts of one scheme of legislation. The first in order of date was the Bankruptcy Act, 1869; the second the Debtors Act, 1869; and the third the Bankruptcy Repeal and Insolvency Court Act, 1869, which repealed, amongst other statutes, the Bankruptcy Act, 1849. The fifth section of the Debtors Act, 1869, deals with consents to judgments, and is the enactment on which the present inquiry turns. This section provides that, "when a judge's order, made by consent, is given by a defendant in a personal action whereby the plaintiff is authorized to sign judgment or to issue or to take out execution, then the order, or, in certain cases, a copy of the order, shall, together with certain other documents, be filed as mentioned within twenty-one days after the making of the order, otherwise the order, and any judgment signed or entered up thereon, and any execution issued or taken out on such judgment, shall be void."

The language avoiding the judgment if the consent has not been duly filed is the same as that of the Bankruptcy Act, 1849, and the clause is equally silent as to the time within which the judgment shall have been signed or execution levied. The case of *Biffin* v. *Yorke* and *Farrow* v. *Mayes* clearly apply to this new legislation as they did to the old. The Legislature shows no symptom of any desire to alter their effect, and in our opinion those cases were rightly decided, and we hold, therefore, that the existing legislation does apply, and gives the assignee in bankruptcy a right to recover as money had and received sums raised by execution out of the bankrupt's property.

But these considerations are not enough to solve the difficulties in the present case, because, as we have seen, the money sued for was not money raised by a levy of Smith's goods, but money of Young obtained under a garnishee order, a form of procedure as to which it is, to say the least, doubtful whether it can be accurately described as an execution.

The question is one of some difficulty. The statute, whilst avoiding the judgment, does not avoid any garnishee order obtained upon it, and on general principles and authority we hold it to be clear that in the absence of fraud a payment by a garnishee of the debt due from him to the defendant in the action is a good discharge to him, although the judgment on which the garnishee order was obtained be subsequently set aside (see *Westoby* v. *Day*, 1 W. R. 431, 2 E. & B. 605), and this conclusion is not, in our opinion, varied by the fact that the garnishee order gave Young a period within which to make the payment, and that he in fact made the payment before the last day of this period.

But what is the result if the judgment be set aside, and the garnishee order cannot? In our opinion the answer is as follows: When, on the 8th of July, Young paid the £208 0s. 5d. to Clutton & Hussey, he obtained a valid discharge of his debt *pro tanto;* he paid it to Clutton & Hussey, but to whose use? The judgment was subject to a double contingency, the consent order might still be registered within the twenty-one days, and, if so, the payment would be to the use of Clutton & Hussey, or the judgment might not be registered, but no bankruptcy might take place and no creditor seek to set aside the judgment, in that case again the payment would be to the use of Clutton & Hussey; or, again, the judgment might not be registered and a bankruptcy might occur; in that event the payment to Clutton & Hussey would be to the use of the trustee in bankruptcy. The payment by Young, and the discharge to him, cannot be affected by subsequent events, but the use to which the payment is made follows the validity or invalidity of the judgment, and is determined, therefore, by the contingencies which determine that question. As in the present case the consent was not registered within the twenty-one days, and bankruptcy has supervened, the judgment is void, and the payment made to Clutton & Hussey was made to the use of the trustee of Smith.

No question has been raised as to the competence of the Court of Bankruptcy to determine the issues raised; the proceedings must, therefore, we think, be taken to be valid, and the trustee is, in our opinion, entitled to recover from Clutton & Hussey the £208 0s. 5d.

Appeal allowed.

Solicitors for the appellant, *Munns & Longden.*

Solicitors for the respondents, *Law, Hussey, & Hulbert.*

From Q. B. Div. Feb. 29.

Bourne *v.* Netherseal Colliery Co. (*a.*)

Coal mines—Wages—Weight of mineral gotten—Deductions—Coal Mines Regulation Act, 1872 (35 & 36 *Vict. c.* 76), *ss.* 17, 18.

The owners of a coal mine agreed with the persons

(*a.*) Reported by A. P. Percival Keep, Esq., Barrister-at-Law.

employed in the mine that the mineral contracted to be gotten should be clean coal of a certain size, that coals sent from the stalls and headings should be paid for at a certain rate, and that no slack should be paid for, but all slack should be deducted. By section 17 *of the Coal Mines Regulation Act,* 1872, *where the amount of wages paid to miners depends on the amount of mineral gotten, the miners shall be paid according to the weight of mineral gotten, but the owner may agree with the miners to deduct in respect of stones or materials other than mineral contracted to be gotten.*

Held (*by* Lord Esher, M.R., *and* Lopes, L.J., Fry, L.J., *dissenting*), *that the agreement was within the Act, and that the agreement for deduction of slack, being unauthorized by the Act, was void; and that, therefore, the miners were entitled to be paid at the agreed rate for all coal sent up by them.*

Appeal from the decision of a Divisional Court (Stephen and Wills, JJ.) reported 35 W. R. 837, 19 Q. B. D. 357.

The action was brought in the county court to recover wages by men engaged in the defendants' colliery. The plaintiffs had signed a document in July, 1886, by which they agreed that the "mineral contracted to be gotten" referred to in the Coal Mines Regulation Act, 1872, should, in all cases, mean and include only such pieces of clean coal as could not fairly be passed through a rake the clear spaces between the prongs of which were two and a half inches wide, and that coals sent from the stalls and headings should be paid for at 1s. 6d. per ton, and heading slack 7d. per ton. It was further agreed that a premium of 2d. per ton on the coal would be paid to all those places whose boxes of coal did not contain an average of more than 112 lbs. of dust each per week, and that no slack whatever would be paid for except that sent out as heading slack, all other slack would be deducted from the different places in proportion to their loading.

By the Coal Mines Regulation Act, 1872, s. 17, "Where the amount of wages paid to any of the persons employed in a mine to which this Act applies depends on the amount of mineral gotten by them, such persons shall . . . be paid according to the weight of the mineral gotten by them, and such mineral shall be truly weighed accordingly. Provided always that nothing herein contained shall preclude the owner, agent, or manager of the mine from agreeing with the persons employed in such mine that deductions shall be made in respect of stones or materials other than mineral contracted to be gotten which shall be sent out of the mine with the mineral contracted to be gotten."

By section 18 "The persons who are employed in a mine to which this Act applies, and are paid according to the weight of the mineral gotten by them, may, at their own cost, station a person (in this Act referred to as a check-weigher) at the place appointed for the weighing of such mineral in order to take account of the weight thereof on behalf of the persons by whom he is so stationed. The check-weigher . . . shall have every facility afforded to him to take a correct account of the weighing for the persons by whom he is so stationed."

The method pursued at the defendants' colliery was as follows:—The coal was brought up the shaft in tubs, and was weighed at a weighing office three yards from the mouth of the shaft in the presence of a weigher employed by the defendants and a check-weigher appointed by the men. The tubs were then taken on trucks some little distance to an automatic machine known as a "Billy Fairplay," where the contents were sifted by being thrown on to a screen through which the slack passed and was automatically weighed.

It was admitted that it was impossible for the check-weigher at the mouth of the shaft also to supervise what took place at the "Billy Fairplay." The men were paid in accordance with the weight of coal raised, as ascertained at the mouth of the shaft, less the weight of the slack as ascertained by the "Billy Fairplay."

The action, which was a test action, was brought to recover the difference between this amount and that proportioned to the whole weight of coal raised.

The county court judge gave judgment for the defendants, but the Divisional Court reversed this decision on the ground that the deductions had been improperly ascertained.

The defendants appealed.

Rigby, Q.C., and *McClymont*, for the defendants.—The agreement was drawn up with the object of compelling the men to raise only large coal, and to leave the slack, which is valueless. Slack is not part of the mineral contracted to be gotten, and it may be deducted under section 17: *Hynd* v. *Spowart*, 22 Scottish Law Reporter, 702.

Alfred Young, for the plaintiffs.—Slack is coal, and as such, is part of the mineral contracted to be gotten, and cannot be deducted. The agreement is invalid.

Rigby, Q.C., replied.

Lord ESHER, M.R.—In this case it seems to me that the first thing to be done is to state my view of the construction of the contract, and then to see what effect the Act of Parliament has upon that contract. We must take into consideration the circumstances of fact and law existing when the contract was made. It was made after the Act of Parliament was passed, and it obviously referred in terms to the Act. It is a contract that the men should get all the coal in the seams, and not only coal of a certain size, and that they should be paid at the rate of 1s. 6d. per ton for the coal so got. Then it gives the premium of 2d. per ton to stimulate the men to make as little slack as possible. That is not, however, inconsistent with the agreement to pay 1s. 6d. a ton for "coals sent from the stalls and headings." Then it goes on that all slack, other than heading slack, shall be deducted. They treat it as a declaration. It is an endeavour to put upon the words of the statute a meaning which they will not bear. It is true that the men have agreed to this. But what is the object and meaning of the statute. It is, I think, intended to interfere with the freedom of contract, and it forbids the masters to bind the men to contracts contrary to the Act of Parliament. The Legislature intended to protect the colliers just as in the Merchant Shipping Act it intended to protect the sailors. But is a contract inconsistent with the Act of Parliament illegal? I think not. The Act will not let it be recognized as containing the sole contract, but it is valid so far as it does not conflict with the Act. If the wages of the men depend on the amount of coal gotten, then there can be no deductions from that amount, except such as are authorized by the Act, and if any other deductions are made by agreement that agreement is void. There is power to agree to certain deductions, and it is obvious that if it were not for that power no deductions whatever could be made. But they may agree to deduct "stones and materials other than mineral contracted to be gotten." It is clear that if coal is the mineral contracted to be gotten, there is no power to deduct slack, which is, after all, only coal broken small. The contract must, therefore, in my opinion, be carried out without the deduction, and the men are entitled to be paid the full price for the coal raised by them as ascertained at the weighing-office at the mouth of the shaft. As to the case of *Hynd* v. *Spowart*, it is not binding upon us, and with great deference to Lord McLaren, I cannot agree with that decision, and I decline, respectfully, to follow it.

It is unnecessary, I think, to determine the question of the correctness of the method of weighing, but I think that directly a case comes within the Act, and the owner claims to make deductions, it lies upon him to show that he has properly ascertained the weight so to be deducted, and that the weighing was such as to enable him fairly to claim such deductions. In my opinion the place of weighing fixed by him, and recognised by the men, was at the pit mouth, and, therefore, until that place was expressly altered, I do not think he had any right to weigh the coals elsewhere.

In my opinion judgment must go for the plaintiffs.

Fry, L.J.—I have the misfortune to differ from the view entertained by the Master of the Rolls and my brother Lopes, and I need hardly say that it is with great diffidence, therefore, that I express my opinion.

We are bound, I think, in looking at the statute to endeavour to see what were the evils at which it was aimed and what reforms it intended to introduce. Section 17 states a contingency and contains an enactment relating to that contingency. The contingency is this:—Where the amount of wages paid to miners depends upon the amount of mineral gotten by them; and the enactment is that in such a case the miners shall be paid according to the weight of the minerals gotten by them, which shall be truly weighed. The evils aimed at appear to me to be two; (1) the ascertainment of the amount might take place by measure, or in some way other than by weight; (2) the weighing might be unfair to the men, and the deductions might be excessive. Provision is, therefore, made by the Act both for checking the mode of weighing and also for limiting the deductions.

Now there were, at the time the Act was passed, several modes of payment in existence. The men might be paid according to time, according to the profits of the concern, according to the amount of coal sold, according to the amount of coal gotten, or according to the amount of a particular part or kind of coal gotten, which is, I think, the case here. The Act, in my opinion, has reference only to the case in which payment is according to the amount of mineral gotten. The Legislature were, I think, only minded to deal with that particular contingency. The Act does not avoid any particular contract, but it only says that in that particular case certain things shall happen.

Now, according to my construction of this contract, the mineral to be gotten was not coal generally but entire coal of a certain size, and it was agreed that the men should be paid, not for the whole amount of coal gotten, but for the amount of this coal which ultimately remained of this size. I think that the deduction was only used in order to ascertain this amount. Therefore I think that the contingency to which the Act refers has not arisen, and that this agreement is not within the Act. The Act is a penal one, and I think we should construe it strictly. Even although I am wrong in my view of the contract, I cannot see how the men insisted on receiving 1s. 6d. per ton for all coal gotten when they had agreed that this was to be the price for large coal only, and had agreed to receive nothing for slack.

Lopes, L.J.—I am of the same opinion in this case as the Master of the Rolls. It is, I think, almost impossible for miners to extract any mineral without also extracting other material at the same time. I think that section 17 was intended to interfere with the freedom of contract for the protection of persons working in mines. Directly wages are made to depend on the amount of mineral gotten the case falls within the Act. I think this agreement was made with reference to the Act, and that, inasmuch as it contains deductions unauthorized by the Act, it is void as to those deductions. Slack is neither stones nor material other than mineral contracted to be gotten. It is therefore unnecessary to decide whether the deductions were properly ascertained, since there was no power to make them at all.

I agree with the Master of the Rolls as to the case of *Hynd* v. *Spowart*, and I think this appeal must be dismissed.

Appeal dismissed.

Solicitors for the plaintiffs, *Field, Roscoe, & Co.*, for *Deane & Hands*, Loughborough.

Solicitors for the defendants, *Morten, Cutler, & Co.*, for *Challinor & Co.*, Leek.

From Q. B. Div. Feb. 9, 23.

Haslam Foundry and Engineering Co. *v.* Hall (*a.*)

Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 31—*Action for infringement of patent —Grant of certificate—Appeal—"Judgment or order" —Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 19.

In an action for infringement the defendant denied the validity of the patent, and delivered particulars of a number of objections thereto. He established one objection, but failed to establish the others. The judge gave judgment for the defendant, and, upon the application of the plaintiff, granted a certificate, that the validity of the patent came in question, under section 31 *of the Patents, &c., Act*, 1883.

Held, upon appeal by the defendant from the decision granting the certificate, that no appeal lay, as the decision was not a "judgment or order" within section 19 *of the Judicature Act*, 1873.

Action for the infringement of a patent. The defence was a denial of the validity of the patent, and particulars of a number of objections were delivered.

Upon the trial before Stephen, J., without a jury, one of the objections only was sustained, the defendants failing to establish any of the others. Judgment was accordingly entered for the defendants, and the judge, on the application of the plaintiffs, granted a certificate under section 31 of the Patents, Designs, and Trade-Marks Act, 1883, which provides that "in an action for infringement of a patent the court or a judge may certify that the validity of the patent came in question; and if the court or a judge so certifies, then in any subsequent action for infringement the plaintiff in that action, on obtaining a final order or judgment in his favour, shall have his full costs, charges, and expenses as between solicitor and client, unless the court or judge trying the action certifies that he ought not to have the same."

The defendants appealed from the decision as to the grant of the certificate.

Sir R. E. Webster, A.G., and *Aston, Q.C.* (*Carpmael* with them), for the plaintiffs, took the preliminary objection that the appeal did not lie.—By section 19 of the Judicature Act, 1873, the Court of Appeal has jurisdiction to hear and determine appeals from any "judgment or order" of the High Court of Justice. By section 100 "judgment" is to include decree, and "order" is to include rule. Ord. 58, r. 1, also speaks of appeals from any judgment or order. The grant of this certificate is not a judgment or order. The certificate imposes no burden upon the defendants, as it does not affect the costs in the present action: *Penn* v. *Bibby*, 15 W. R. 192, L. R. 3 Eq. 308. It has no effect in this action, but can only affect the costs in some future action. The plaintiffs may disclaim the one bad part of the patent, and the object of the certificate is to prevent the

(*a.*) Reported by W. F. Barry, Esq., Barrister-at-Law.

same issues being raised over again in a future action, except that pe eril of the party raising them.

Sir H. James, Q.C., and *Moulton, Q.C.* (*Bousfield* with them), for the defendants.—The grant of the certificate is a proceeding in the action. The certificate is part of the formal order. It is a judicial act of the judge in the action. It is, therefore, an "order." The Court of Appeal may, it is submitted, under section 31 of the Patents Act, 1883, grant the certificate, inasmuch as by ord. 58, r. 4, it has all the powers of the High Court; and it would be strange if the Court of Appeal could grant a certificate while at the same time it could not hear an appeal from the judge who granted it.

Cur. adv. vult.

Feb. 23.—Lord ESHER, M.R.—We must yield to the objection raised as to the jurisdiction of this court to entertain the appeal. In my opinion the words "judgment or order" do not include the grant of a certificate. To hold otherwise would have the effect of bringing within the purview of those words a great number of certificates of different kinds. Having come to this conclusion, I do not think that we ought to express any opinion as to the action of the learned judge in granting the certificate.

FRY, L.J.—Section 19 of the Judicature Act, 1873, gives the Court of Appeal "jurisdiction and power to hear and determine appeals from any judgment or order, save as hereinafter mentioned, of her Majesty's High Court of Justice." By the interpretation clause (section 100) "judgment" includes decree, and "order" includes rule. Therefore this court has jurisdiction to hear appeals from judgments, decrees, orders, and rules. At the date of the passing of the Judicature Act, 1873, a judge's certificate was a well-known method of expressing the action of the court. Judges granted certificates under the Patents Act, certificates for a special jury, certificates under 3 & 4 Vict. c. 24, s. 2, in respect of costs, where the plaintiff recovered less than 40s. in an action of trespass, and certificates that a summons at chambers was proper to be attended by counsel. There were these and many other kinds of certificates. It cannot be said, in my opinion, that they come within the words "judgment or order." If, therefore, the Legislature had intended to confer a right of appeal in this case it would have expressly given it. The Legislature is silent upon the point, and so no appeal lies.

LOPES, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiffs, *Wilson, Bristows, & Carpmael.*

Solicitors for the defendants, *J. H. & J. Y. Johnson.*

From Q. B. Div. June 14.

WIGHT v. SHAW.

Practice — Costs — Following the event — Claim and counter-claim—Ord. 65, r. 1.

The defendant admitted the plaintiff's claim for £78, and obtained a verdict for £17 on a counter-claim. The judge gave judgment for the plaintiff for his claim, with costs to the date of the counter-claim, and for the defendant for his counter-claim, with costs thereof and subsequently, including the costs of the trial.

Held, that, no "good cause" having been shown, the judge had not jurisdiction to prevent the costs from following the "event."

Appeal from Denman, J.

The plaintiff sued for £78 15s. for a quarter's rent of a furnished house. The defendant did not dispute the claim, but counter-claimed for £142 13s. 6d. damages in respect of the insanitary condition of the house, which was such that three inmates were attacked with diphtheria, and the defendant was consequently put to expense for medical attendance, and had to do repairs under order of the sanitary authority and leave the house and live elsewhere while the repairs were being done.

At the trial the jury found for the defendant on the counter-claim, with £17 16s. damages.

Denman, J., gave judgment for the plaintiff for £78 15s., with costs up to the date of the counter-claim, and for the defendant for £17 16s., with costs of the counter-claim and all subsequent costs, including those of the trial, on the High Court scale.

The plaintiff appealed against the judgment relating to costs.

W. Willis, Q.C., and *H. Tindal Atkinson*, for the plaintiff, referred to ord. 65, r. 1; *Jones* v. *Curling*, 28 W. R. 651, 13 Q. B. D. 262; *Mersey Steamship Co.* v. *Shuttleworth*, 32 W. R. 245, 11 Q. B. D. 531.

A. G. MaIntyre, for the defendant, cited *Baines* v. *Bromley*, 29 W. R. 706, 6 Q. B. D. 691.

Lord ESHER, M.R.—In this case the question arises whether the judge had any jurisdiction to make this order with regard to the costs. He could have no jurisdiction to interfere with the costs on the ground that the verdict was wrong. It was suggested in argument that the verdict was the result of a compromise, and unsatisfactory. For this purpose the verdict must be assumed to be right. It seems to me, therefore, that there was no good cause why the judge should order that the costs should not follow the event. It was argued that the order was inoperative, because the costs would go under it in the same way as they would have done if it had not been made. I do not think that that is so. I think it would prevent the master from taxing the costs in the way in which it has been laid down in *Baines* v. *Bromley*, that they ought to be taxed in such a case. Therefore, the order is not inoperative; and, as I have said, I think there was no jurisdiction to make it. For these reasons I think the appeal must be allowed.

LINDLEY, L.J.—I agree. If I could have seen any way in which the plaintiff could have got the balance of his claim without going to trial it is possible I might have taken a different view. I think the learned judge must somehow have proceeded on the supposition that the plaintiff could have got his £60 without going to trial.

LOPES, L.J.—It seems to me clear that the judge has, by his order, prevented the costs from following the event according to ord. 65, r. 1. The judge has no jurisdiction to do that except for good cause shown. The question, therefore, is whether there was any good cause here. It does not seem that there was. The result is that the appeal must be allowed.

Appeal allowed.

Solicitors, *Bolton, Robbins, Busk, & Co.*, for *G. Hicks; Freshfields & Williams.*

High Court of Justice.

Chan. Div. } Kay, J. } Feb. 9.

In re Brough.
Currey *v.* Brough. (*a.*)

Will—Bequest to one for life, with special power of appointment by will—Revocation of bequest by codicil—Effect on power.

A testator bequeathed a share of his residuary personal estate upon trust for his sister for life, and, after the decease of the survivor of herself and the tenants for life of the other shares of residue, upon trust for such of the children of two of his brothers as she should by will appoint, and, in default, upon trust for all such children living at the death of the survivor of the tenants for life, and the children of such of them as should be then dead. By a codicil the testator revoked all bequests whatsoever in favour of his sister.

Held, that the effect of the codicil was to revoke the power of appointment, and that the gift in default of appointment took effect.

Adjourned summons.

James Brough, by his will of the 22nd of November, 1876, gave and bequeathed all the residue of his personal estate to trustees upon trust, after payment thereout of debts and legacies, to invest the same and pay the annual produce thereof equally between his brothers Thomas and John and his sisters Harriet and Ann during their respective lives, and between the survivors of them during their respective lives, the last survivor to have the whole of such annual produce during his or her life, and after the decease of the survivor of his said brothers and sisters he directed that the said investments and the annual produce thereof should be held upon trust . . . (as to the original or accruing shares of his sister Harriet) upon trust for all or such one or more exclusively of the others or other of the children of his late brothers Arthur and William as his said sister Harriet should by will appoint, and in default of appointment upon trust for all such children or child as should be living at the death of the survivor of his said brothers and sisters and the children of such of them as should be then dead, such last-mentioned children to take equally between them the share to which their parent would have been entitled if living. And he will contained trusts in the same terms and in favour of the same persons with regard to the original or accruing shares of his brothers Thomas and John and his sister Ann. The testator made five codicils to his will, the last of which, dated the 15th of January, 1870, was as follows:—"I revoke all devises and bequests whatsoever contained in my will or codicils in favour of my sister, Harriet Brough." The prior codicils did not confer any benefits on Harriet Brough.

The testator died on the 14th of July, 1876. His sister Harriet survived him, and died on the 1st of January, 1886, having made a will which was assumed, for the purpose of this decision, to amount to an exercise of the power of appointment over one-fourth of the testator's residuary estate.

Both the brothers of the testator, Arthur and William, left children who were living at the death of John, the survivor of his brothers and sisters, which occurred in June, 1887.

This summons was taken out by the surviving trustee of the will to have it determined (*inter alia*) whether the fifth codicil operated as a revocation (1) of the special power of appointment given to Harriet Brough by the will, and (2) of the gifts in default of such appointment.

S. Dickinson, for the trustee.

Marten, Q.C., and *Wace*, for the persons entitled in default of appointment.

R. F. Norton, for the persons claiming under the will of Harriet Brough, contended that in spite of the codicil she retained the power of appointment, as the class to take was fixed by the testator, and not by her, as would be the case under a general power of appointment.

J. Simmonds and *Leverson*, for other parties.

Kay, J.—Under the will Harriet takes a life estate for her own benefit, and, besides that, this power of appointment amongst the children of Arthur and William. [His lordship read the power and the terms of the fifth codicil, and continued:—] There is no doubt that her life estate is revoked by the codicil. What becomes of the power of appointment? Is that a devise or bequest in favour of Harriet? Some people might think that the exercise of it was rather a burthen than a benefit, but the question is what the testator intended. Did he intend this to be in favour of Harriet? A person who gives to another the power of disposing of one-fourth of his residuary estate is, in my opinion, supposed to intend a favour to that person. The testator meant a favour by it. I do not doubt he considered it was a devise or bequest in her favour, and when he made a revocation, in the form I have read, I cannot doubt he meant to revoke the power of appointment, and that, as to this share, the gift in default of appointment must take effect.

Solicitors, *Ullithorne, Currey, & Villiers*, for *Barber, Currey, & Borough*, Derby; *Crowther, Anstie, & Vizard*

(*a.*) Reported by H. F. Ambrose, Esq., Barrister-at-Law.

Chan. Div. } Chitty, J. } Nov. 9.

In re Wenmoth's Estate.
Wenmoth *v.* Wenmoth. (*a.*)

Will—Construction—Gift of income—Period of distribution.

Although, as applied to a testamentary gift of corpus, it is an established rule of construction that, where there is a gift to children as a class made payable on attaining a given age or marriage, the class closes when the first child becomes entitled to a share, and after-born children are excluded, nevertheless such rule will not be applied by the court in the construction of the will to a testamentary gift of income.

This action was commenced by originating summons by the surviving trustee of the will of William Wenmoth, for the purpose of obtaining the decision of the court upon several questions. The principal point was whether the same rule of construction ought to be applied to a testamentary gift of income to children as a class as is applied to a testamentary gift of *corpus* to children as a class.

William Wenmoth, by his will, dated the 19th of April, 1870, after making certain pecuniary and specific bequests, gave to his trustees all his real and leasehold estate, and all the residue of his property, upon trust, out of the rents, interest, dividends, and annual proceeds thereof, to pay certain annuities to his daughter, Eliza McKever; and, subject thereto, the testator directed his trustees, during the life of the said Eliza

(*a.*) Reported by A. D. Maclaren, Esq., Barrister-at-Law.

McKever, to pay and apply the surplus of the said rents, dividends, interests, and annual proceeds, and, after her decease, the whole of such rents, dividends, and annual proceeds, unto and equally between his grandchildren (being the children of his son Joseph and his said daughter Eliza), on their respectively attaining the age of twenty-one years, during their respective lives, share and share alike. And the testator directed that from and after the decease of any of his grandchildren (save and except the last survivor of them) who should die leaving issue, his said trustees should pay and apply the share of such income and annual proceeds of such grandchild so dying unto and equally between his or her children (if any) who, being a son or sons, should attain the age of twenty-one years, or, being a daughter or daughters, should attain that age or marry; and, if there should be only one such child, then the whole to be paid to that one child; and, from and after the decease of the last survivor of his said grandchildren, upon trust to sell and convert into money, and to stand possessed of, the net proceeds arising from such sale and conversion (thereinafter referred to as his "trust fund"), upon trust to pay and divide the same unto and equally between such of his great-grandchildren as should be living at the decease of the survivor of the children of his said son Joseph and his said daughter Eliza McKever and should attain the age of twenty-one years, and, if more than one, as tenants in common; and the testator thereby declared that the share of any grandchild of his in the said rents, dividends, interest, and annual proceeds of his real and leasehold estate should be invested by his said trustees during the minority of any such grandchild, and should form part of his trust fund. By his will the testator also empowered his trustees to apply all or any part of the share of the yearly income, or of the share of the capital of the trust fund to which, under the dispositions thereinbefore contained, any minor should for the time being be entitled, or presumptively entitled, in or towards the maintenance and education, advancement, or preferment in the world or otherwise, for the benefit of such minor during his or her minority, or, at the option of his trustees, to pay the same to the guardian of such infant to be so applied, but for the application whereof by such guardian his trustees should not be liable.

The testator died on the 15th of February, 1871.

Eliza McKever was alive. She had two children, and both of them died under the age of twenty-one years and in the lifetime of the testator.

Joseph Wenmoth, the testator's son, had eleven children, viz.:—(1) Jane Eliza Wenmoth, born March 25, 1862, and now alive; (2) Alice Elizabeth Wenmoth, born January 15, 1864, and now alive; (3) William Joseph Wenmoth, born February 5, 1866, and now alive; (4) Henry Edwin Wenmoth, born September 22, 1867, and now alive; (5) Frederick Wenmoth, born April 25, 1869, and now alive; (6) George Wenmoth, born April 2, 1871, and now dead; (7) Joseph Wenmoth, born June 10, 1873, and now dead; (8) Thomas Francis Wenmoth, born October 29, 1878, and now alive; (9) Edith Wenmoth, born January 21, 1881, and now alive; (10) Joseph John Wenmoth, born April 3, 1883, and now dead; (11) Florence Mabel Wenmoth, born February 8, 1887, and now alive.

The questions asked by the summons were:—1. Whether the trusts of the testator's will for the benefit of his grandchildren (being such children as above mentioned) were confined to such grandchildren as were living at his death or extended (*a*) to grandchildren born after his death and before the eldest grandchild attained the age of twenty-one years, or (*b*) to all grandchildren whenever born. 2. Whether the grandchildren of the testator who for the time being had attained the age of twenty-one years were entitled to the whole of the net income of the testator's estate (subject to the defendant Eliza McKever's annuity) and, if not, to what part of such income they were entitled, and whether the plaintiff could apply any, and what, part of such income in or towards the maintenance, education, or otherwise for the benefit of such of the testator's grandchildren as for the time were under the age of twenty-one years. 3. Whether, and to what extent, the trusts of the said will for the benefit of the great grandchildren of the testator, (*a*) concerning the income of his residuary estate before the death of his last surviving grandchild, and (*b*) concerning the capital thereof after the death of such last surviving grandchild, were void for remoteness.

His lordship intimated during the argument that he would not give any judgment at present on the third question for decision on the summons.

Whitaker, for the plaintiff, stated the facts.

S. Stephens.—Such of the children of Joseph Wenmoth who were alive at the testator's death are alone entitled to the surplus income: *Elliott* v. *Elliott*, [illegible] Sim. 276; *In re Coppard's Estate, Howlett* v. *Hodson*, [illegible] W. R. 473, 35 Ch. D. 350.

Dunham.—The class should be extended so as to include the children of Joseph Wenmoth who attain twenty-one years and were born between the death of the testator and the time when Jane Eliza Wenmoth, the eldest of his children, attained the age of twenty-one years, which is the period of distribution, and any child who was born afterwards should be excluded: *Andrews* v. *Partington*, 3 B. C. C. 403; *Whitbread* v. *Lord St. John*, 10 Ves. 152; *Picken* v. *Matthews*, [illegible] Ch. D. 264, 27 W. R. Dig. 234; *In re Sayer's Trusts*, [illegible] L. R. 6 Eq. 319, 16 W. R. Ch. Dig. 154.

Jason Smith, for the children of Joseph Wenmoth who were born after Jane Eliza Wenmoth attained twenty-one years of age.—The rules which have been contended for only apply to gifts of *corpus*. The gift here is one of income, and such rules do not apply: *Mogg* v. *Mogg*, 1 Mer. 654; *Gillman* v. *Daunt*, [illegible] J. 48; *Emmet* v. *Emmet*, 28 W. R. 401, 13 Ch. D. [illegible]; *Pearks* v. *Moseley*, 29 W. R. 1, 5 App. Cas. 714.

Ashton Cross, for Mrs. McKever.

Chitty, J.—Where there is an immediate gift to children the meaning of the testator is free from doubt, and is that all the children in existence at his death shall take. The death of the testator is the period of distribution. There can also be no question at the present day, where the legacy is to a class of children living at the death of another person or attaining the age of twenty-one years, that each child who is alive at the death of the testator takes a vested interest, and that the class remains open to let in after-born children until the period of distribution and then closes. Those who were alive at the testator's death and those who were born before the eldest attains the age of twenty-one years are equally members of the class. All children born after that event are excluded. This much is clear and established by a series of decisions which it is too late now to call in question. The explanation of the rule consists in the fact that there are two inconsistent intentions, and both of which cannot be fulfilled. On the one hand there is the intention that all the children should take a legacy, and on the other hand the intention that payment of the legacies should be made to each at a certain time when all the children cannot be ascertained. The court has, therefore, held that the period of distribution is the period of ascertainment of the class. The rule has been called a rule of convenience, but as to this I would simply remark that it is a rule which is very convenient for the eldest children and very inconvenient for the younger ones.

Now that being the rule as regards the *corpus* of the fund, has the rule any application to the income thereof

As regards the income there is nothing, it seems to me, which requires the application of the rule. Where, as in the will now before me, the distribution is of income and not of corpus the difficulty does not arise. In the case of the distribution of *corpus* the trustees can never ascertain what is the aliquot share of a member of the class until the class is closed; but in the case of distribution of income the trustees can distribute periodically. There is no reason, therefore, why the rule should be applied to the case of income. [His lordship then read the will as above set out, and continued:—] Thus the persons to take take only on attaining the age of twenty-one years, and there is nothing in the maintenance clause showing that they are to take the income until they attain that age. I think that the general principles which I have already stated do not apply to this case. It was argued that the cases of *Elliot* v. *Elliot* and *In re Coppard* govern the decision in the present case. These cases are not in point, because there was in each a question as to the operation of the rule against perpetuities which would have upset each of the wills, and the decision in each of these cases saved the will. But the question of construction must be decided apart from any question as to remoteness. In *Pearks* v. *Moseley* the rule applicable to cases of remoteness is stated by Lord Selborne thus:—"You do not import the law of remoteness into the construction of the instrument by which you investigate the expressed intention of the testator. You take his words and endeavour to arrive at their meaning exactly in the same manner as if there had been no such law, and as if the whole intention expressed by the words could lawfully take effect. I do not mean that in dealing with words which are obscure and ambiguous, weight, even as a question of remoteness, may not sometimes be given to the consideration that it is better to effectuate than to destroy the intention, but I do say that, if the construction of the words is one about which a court would have no doubt, though there was no law of remoteness, that construction cannot be altered or averted to something different for the purpose of escaping from the consequences of that law."

In *Elliott* v. *Elliott* and *In re Coppard's Estate* neither judge refers to the rule against perpetuities, and if I thought those cases were in point I would have to consider them carefully. In the present case there is a gift of income to the grandchildren of the testator who shall be living at his death and to those who have been born since his death, including one who has been born since the eldest grandchild attained the age of twenty-one years. They are all members of the class, but contingently on the attainment by each of the age of twenty-one years. Such a gift is not avoided by the rule against perpetuities. From the power of maintenance [his lordship read from the commencement of the power to the word "minority"] it appears to me that the objects of that power are, amongst others, the grandchildren, and a grandchild born since the eldest of them attained twenty-one years is an object of the power.

It is not necessary to decide any ulterior questions, and the present declaration must be limited to existing circumstances. There will accordingly be a declaration that, as the true construction of the will and in the events which have happened, the income of the trust fund, subject to the annuity of Eliza McKever, is divisible into eighths, one of which is payable to each of the three eldest grandchildren (who have attained twenty-one years of age), and that the other five-eighths are to be applied to the objects of the power of maintenance, and subject thereto any surplus arising from the five-eighths is to be accumulated upon the trusts contained in the will. The rest of the summons to stand over, with liberty to apply.

Solicitors, *C. G. Hobbs; Wolferstan & Avery.*

Chan. Div. }
Chitty, J. } Nov. 2, 3.

Levy v. Abercorris Slate and Slab Co. (*a.*)

Debenture—Agreement to issue debentures—Bills of Sale Act (1878) *Amendment Act*, 1882, *s.* 17.

A "debenture" is a document which either creates or acknowledges a debt.

By a memorandum of agreement a company agreed to pay a person who had advanced money to the company the sum of £600, with interest, and charged certain hereditaments with the repayment of the £600 and interest, and further agreed with the lender that the company would, at any time during the continuance of the security, at the request of the lender, execute a legal mortgage, and, further, to issue debentures of the company to the extent of £600, secured over the capital, stock, goods, chattels, and effects of the company, including uncalled capital present and future.

Held, that the agreement was a debenture and within section 17 *of the Bills of Sale Act of* 1882.

Edmonds *v.* Blaina Furnaces Co., 35 *W. R.* 798, 36 *Ch. D.* 215, *followed.*

The question in this case was whether an agreement, so far as it related to the goods and chattels of a company ordered to be wound up compulsorily, was a debenture within the meaning of section 17 of the Bills of Sale Act of 1882, which is as follows:—"Nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital, stock or goods, chattels, and effects of such company."

The agreement was dated the 3rd of March, 1885, and was to secure the repayment of £600, with interest at £10 per cent. By the agreement the company agreed to repay the plaintiff in June, 1885, the £600, with interest, and charged all the hereditaments comprised in certain deeds specified in the schedule to the agreement (which deeds were deposited with the plaintiff), with the repayment of the £600 and interest, and to execute a legal mortgage when called on; and further agreed to give the plaintiff debentures of the company to the extent of £600, secured over all the capital, stock, goods, chattels, and effects, including uncalled capital, both present and future, of the company, and that the debentures should be payable on the 3rd of June, 1885, and should bear interest as from that date at £10 per cent.

In October, 1886, the plaintiff commenced this action to enforce the agreement, claiming a charge on the hereditaments comprised in the deeds specified in the schedule, and a charge on all the capital, stock, goods, and effects of the company, including uncalled capital.

Romer, Q.C., and *T. Ribton*, for the plaintiff, contended that the agreement was within the saving of section 17 of the Act of 1882, and cited *Ross* v. *Army and Navy Hotel Co.*, 35 W. R. 40, 34 Ch. D. 43, and *Edmonds* v. *Blaina Furnaces Co.*, 35 W. R. 798, 36 Ch. D. 215.

Sir Arthur Watson, Q.C., and *Byrne*, for the official liquidator.—The agreement to charge the capital and effects of the company should be in the form prescribed in the schedule to the Act of 1882, and should be registered. The word "debenture" is only applicable to documents in a prescribed form and issued in a series payable *pari passu*.

They cited *The Pharmaceutical Society* v. *The London and Provincial Supply Association*, 28 W. R. 957, 5 App. Cas. 857.

Romer replied.

(*a.*) Reported by V. de S. Fowke, Esq., Barrister-at-Law.

Chitty, J.—The plaintiff in this case sues the defendant company on an instrument set out in the statement of claim, and the company take a legal objection to the action and say that the document in question is void under the Bills of Sale Act (1878) Amendment Act, 1882, on two grounds, first, that it is one that requires registration, and it has not been registered, and, secondly, that it is not in the form prescribed by the schedule to the Act of 1882, and therefore void under section 9. In answer to these objections the plaintiff alleges that the instrument in question is, in effect, a debenture, and therefore within the exception of section 17. I need not read this section again, it was read in *Edmonds* v. *The Blaina Furnaces Co.*, and I have but little to add to the general considerations to be found in the judgment in that case as to the meaning of the term "debenture," and the interpretations to be placed upon the wording of that section. In my judgment in that case I mentioned one or two reasons as possibly governing the intention of the Legislature in the formation of section 17. After referring to the two great classes of existing companies—viz., those established by Act of Parliament, incorporating the Companies Clauses Act, 1845, and those incorporated under the Companies Act, 1862, which are bound by statutory provisions to keep a register of their debentures, I said in that case:—"The Legislature, finding these existing provisions for registration, may have considered that it was not necessary to require the registration under the Bills of Sale Act of the secured debentures of an incorporated company. The Legislature may have acted on this ground or may have taken the broader view that the secured debentures of incorporated companies were not within the mischief intended to be remedied by the Bills of Sale Acts." I would merely add that the argument to-day was mainly addressed to the form of the instrument before me and to the protections which the Legislature has thrown upon instruments of this kind in favour of the grantor, and which seem scarcely required in favour of a company. I am not able to state any other grounds on which the Legislature proceeded when this clause 17 was inserted. Now, looking at this section once more, I observe that it may be divided into four parts; it relates, first, to the thing called a "debenture"; secondly, the "debenture" must be "issued"; thirdly, it must be issued by a particular company—*i.e.*, a mortgage, loan, or other incorporated company; the term "loan" is a little awkward, and I do not know what is meant by a "loan company," but I pass it by, as also the term "mortgage company," which is also not quite clear, because I am satisfied that the words "or other incorporated company" are large enough, and must be construed as they stand, and are not to be cut down by the context; then the fourth part is that the debentures must be "secured upon the capital, stock or goods, chattels, and effects of such company." I am not prepared to say that a charge on the "capital stock" would not have been within the Bills of Sale Act. The material words here are "goods, chattels, and effects."

Now what is a debenture? I am unable to add anything to what I have already stated on this point in *Edmonds* v. *The Blaina Furnaces Co.* My attention has been called to an extract from Skeat's Etymological Dictionary and Blount's Law Dictionary, from which it appears that the word "debenture" is an old word, and is derived from the Latin *debentur*.

Bearing in mind the four divisions of section 17 as I have just given them, I must try and find out what the word "debenture" means. In the course of that argument I asked Sir Arthur Watson and Mr. Byrne to define a debenture, and they produced no satisfactory definition. I do not accept Sir Arthur Watson's attempted definition that a debenture must be one of a series of instruments, or must be an instrument issued *pari passu* with others. In my opinion a "debenture" means a document which either creates a debt or acknowledges a debt, and any document which fulfils neither of these conditions is not a "debenture." I cannot find any precise legal definition of the term, it is not either in law or commerce a strictly technical term, or what is called a term of art. It must be "issued," but "issued" is not a technical term, it is a mercantile term well understood, "issue" here means the delivery over by the company to the person who has the charge. As to what "company" means, I have already said it must be "an unincorporated company," and it must be secured on the "goods, chattels, and effects" of the company. Having thus gone through the section, once again I find I cannot add anything further on this point to what I have already stated in *Edmonds* v. *The Blaina Furnaces Co.*

I now proceed to look at the particular document before me, which I find contains an agreement to pay the £600 on a certain day, to charge certain hereditaments referred to in the schedule, and to execute a legal mortgage when called for, and then, further, according to the words of the statement of claim, which I am obliged to refer to instead of to the original document, because the defendant declined to allow the claim to be amended or to put in the original agreement, "to issue to the plaintiff debentures of the defendant company to the extent of £600, secured over all the capital, stock, goods, chattels, and effects, including uncalled capital, both present and future, of the defendant company, and that the debentures should be payable on the 3rd of January 1885, and should bear interest as from that date at the rate of £10 per cent. per annum." Now this document, it seems to me, is one which creates a debt, shows the extent of a debt, and acknowledges the debt. Apart from the Bills of Sale Act, 1882, this clause would in equity create an immediate charge in favour of the grantee, an agreement to give a charge is a charge in equity, and that is the meaning of Cotton, L.J., in *Ross* v. *The Army and Navy Hotel Co.* when he says:—"If the deed (that is the covering deed) had not been executed at all, there would have been in the debenture itself a contract to give such a security as was intended to be given by the deed." I have here a contract to give a charge which in equity is a charge; it is, therefore, a charge on the goods, chattels, and effects of the company; the goods, chattels, and effects form a security for this debt. Reasoning the case out in this way, the result is as plain as it can be on such a section as the one before me, which is by no means plain, that this document is a debenture, and that it is issued, and that it in fact complies with the four points I mentioned above.

I may add this, that if the debenture had actually been issued in compliance with the agreement, it is clear that section 17 would apply. I have here before me a document, not in form the same as a debenture in the commonly-accepted interpretation of that term, but its legal effect is the same, and it would be a strange interpretation to put upon this section to assume that it said that where the legal effect of two instruments was identical, yet because there was some slight difference in form the one should be good and the other void. It is true that the document before me is not called a debenture, but that is no sufficient reason why it should not if effect be one; I cannot read it as Sir Arthur Watson wanted me to read it, as a contract that it should not operate as a debenture; the parties had no such idea in this in their minds at the time, and I cannot impute such an intention to them. I think, therefore, that a mere agreement to issue what are called debentures is not sufficient to prevent the agreement itself from operating as a debenture within the protection of section 17. I cannot assent to Mr. Byrne's argument

that after the execution of this agreement it would have been competent for the company to issue further debentures to rank *pari passu* with this charge.

There is no ground here, on the facts as they appear by this statement of claim, for saying that this agreement is not within the protection of section 17. The result, therefore, is that the plaintiff is, in my opinion, entitled to the judgment he has asked for.

Solicitors, *Edward Lee; Carr & Son.*

Chan. Div. North, J. Jan. 16.

In re Kershaw.
Drake *v.* Kershaw. (*a.*)

Will—Bequest of leasehold house—Subsequent contract by testator to purchase leasehold reversion—Death of testator before completion of contract—Liability of legatee to pay purchase-money—Locke King's Act Amendment Act, 1877 (40 & 41 *Vict. c.* 34), *s.* 1.

Locke King's Act Amendment Act, 1877, *applies to leaseholds.*

A testator, by his will made in 1884, *bequeathed to his wife the leasehold house "in which I now reside." At the date of his will he was residing in a leasehold house.*

In 1887 *he entered into a contract with his lessor to purchase the ground lease, but died before completion of the purchase. His widow accepted the bequest.*

Held, that the testator's interest in the house passed to the wife subject to her liability to pay the purchase-money.

Originating summons.

This was a summons by the executors and trustees of the will and a codicil of J. H. Kershaw to obtain the opinion of the court on certain questions arising in the administration of his estate. The defendant was the widow of the testator, and she was also appointed executrix of the will.

The testator by his will, dated the 19th of November, 1884, gave to his wife "the leasehold house in which I now reside, provided she shall elect to accept the same, and declare such option to her co-executors within three months after my decease." At the date of the will the testator was residing in a house No. 14, Porchester-square, Paddington, which he held under a lease dated the 20th of April, 1870, for a term of seventeen years from the 25th of March, 1870.

On the 17th of April, 1885, he surrendered this lease to the lessor, and on the 18th of April, 1885, the lessor granted him a fresh lease of the house for a term of seventeen years from the 25th of March, 1885. On the [illegible] of February, 1887, the testator, through his solicitors, offered to purchase the head-lease under which the house held the house for the sum of £2,050. By a letter dated the 23rd of February the lessor accepted this offer, but no formal contract was entered into. On the [illegible] of March, 1887, the testator died. After his death the executors completed the purchase, paying the purchase-money out of the testator's estate.

The widow gave the executors notice that she accepted the bequest of the house.

The chief question raised on this summons was what interest passed to the widow under the bequest to her of the leasehold house in which the testator resided, and in particular whether she was entitled to the leasehold interest which belonged to the testator at the date of his will under the underlease without performing the contract subsequently entered into by him for the purchase of the reversionary leasehold interest, or whether she was entitled to have such contract carried out at the expense of the testator's estate for her benefit.

Phipson Beale, for the plaintiffs.—If your lordship holds that the testator's interest in the house passed to the widow she must pay the purchase-money: *Broadbent* v. *Groves*, 32 W. R. 223, 24 Ch. D. 94. Locke King's Act Amendment Act, 1877, applies.

Everitt, Q.C., and *Carson*, for the defendants.—The testator's interest in the house passed to the widow: *Saxton* v. *Saxton*, 28 W. R. 294, 13 Ch. D. 59. Locke King's Act Amendment Act, 1877, does not apply to leaseholds, and the testator's widow is not, therefore, liable to pay the purchase-money. In *Solomon* v. *Solomon*, 12 W. R. 540, it was expressly decided that the Act of 1854 did not apply to leaseholds. That case was followed by Hall, V.C., in *In re Wormsley's Estate*, 25 W. R. 141, 4 Ch. D. 665. The Act of 1877 no doubt contains the words "of whatever tenure" and "legatee." The former words were introduced for the purpose of including copyholds, while the word "legatee" only refers to a legatee of an estate *pur autre vie.*

Phipson Beale replied.

North, J.—The testator's interest in the leasehold house clearly passed to the widow. She must, however, pay the purchase-money. In my opinion, Locke King's Act Amendment Act, 1877, applies to leaseholds. The 1st part of section 1 of the original Act of 1854 (17 & 18 Vict. c. 113), contains the words "die seised of or entitled to any estate or interest in any land or other hereditaments," and Lord Romilly, in *Solomon* v. *Solomon*, considered that those words, if they stood alone, would include leaseholds. Those words, however, are followed by the words "the heir or devisee to whom such lands or hereditaments shall descend or be devised," and on that ground Lord Romilly decided that the Act was only addressed to lands passing to an heir or devisee, and not to lands passing to a legatee. There were many defects in that Act, and the second Act, of 1867 (30 & 31 Vict. c. 69), was passed. That Act was also defective, and the Act of 1877 was passed, and it might well be thought that if failure had attended the first two Acts it would also attend the third Act. But, at any rate, that Act does, in my opinion, include leaseholds. The words in section 1 are "of whatever tenure." It must have been intended that those words should include leaseholds, which were not included in the prior Acts, while freeholds and copyholds were. Then, again, the section contains the words "devisee, legatee, or heir." It seems to me that the presence of the word "legatee" in that section prevents any argument founded on the former Acts from applying in the present case. I think it would be too narrow a construction to hold that the word "legatee" only referred to a legatee of an estate *pur autre vie*, and not to a legatee of leaseholds. For these reasons, therefore, I hold that Mrs. Kershaw is not entitled to have the purchase-money of the house paid out of the testator's estate.

Solicitors, *Drake, Son, & Parton.*

Chan. Div. North, J. Oct. 28.

Allen *v.* Longstaffe. (*a.*)

Legacies charged on real estate—Insufficient security—Right of legatees to back rents of real estate.

A testator devised real estate to A., charged with the

(*a.*) Reported by G. E. Jeffery, Esq., Barrister-at-Law.

(*a.*) Reported by J. Trustram, Esq., Barrister-at-Law.

payment of a life annuity and of various legacies, to be paid, as to one moiety, at the expiration of six months after his decease, and, as to the other moiety, at the expiration of six months after the decease of the annuitant.

A. became bankrupt, and the trustee of his estate entered into possession of the land. Arrears of the annuity and parts of the legacies remained unpaid. The land was sold, and the proceeds were insufficient to satisfy the arrears of the annuity and legacies.

Held, upon motion by persons entitled to the arrears of the annuity and the legacies, that they were not entitled to have the back rents of the land applied in satisfaction of such arrears.

Motion.

By his will George Allen devised real estate to his nephew, George Allen, subject and charged as thereinafter mentioned, and the testator bequeathed to Elizabeth Allen, the widow of a deceased brother, an annuity of £60 for her life, to be charged upon his real estate devised to George Allen. The testator also bequeathed to his nephew, Charles Allen, a legacy of £1,000, and legacies of £500 each to his nephew, P. L. Allen, and his nieces, Elizabeth Squire, Caroline Allen, Eliza Allen, and Esther Allen, all such legacies to be charged upon his real estate devised to George Allen. And the testator directed that the legacies should be paid, as to one moiety, at the expiration of six months after his decease, and, as to the other moiety, at the expiration of six months after the decease of Elizabeth Allen.

The testator died in June, 1865.

In January, 1881, a resolution was passed by the creditors of George Allen, the nephew, who had filed a petition in bankruptcy, that his affairs should be liquidated by arrangement, and John Longstaffe was appointed trustee of his estate, and as such entered into receipt of the rents and profits of the real estate devised to him by the testator.

In 1882 Elizabeth Allen died. There was then due from the estate of George Allen more than seven year's arrears of her annuity and parts of the legacies bequeathed by the testator and charged upon the real estate.

In 1883 the action of *Allen* v. *Longstaffe* was commenced by the executors of Elizabeth Allen and some of the legatees to enforce the charge, and in 1886 another action of *Garfitt* v. *Allen* was brought by mortgagees of one of the legatees with the same object. These two actions were consolidated. The real estate was sold under an order of the court, and the proceeds, which were paid into court, were insufficient to satisfy what remained due in respect of the annuity and the legacies.

An order was made in chambers "that the rents and profits of the real estate of the said testator received by the defendant John Longstaffe from the 27th of January, 1881, the date of his appointment to be trustee of the estate of the defendant George Allen, a liquidating debtor, down to the date of the sale of such real estate, after payment of the interest on the prior incumbrances thereon, and subject to all proper allowances for repairs and outgoings, be applied rateably in discharge of the annuity and legacies given by the will of the said testator so far as they remain unsatisfied; and the costs of this application are to be costs in the action."

This was a motion to discharge the order.

Cozens-Hardy, Q.C., and *Eastwick*, for the motion.—The annuitant and legatees have no right to recover back rents against a devisee who has been in possession, just as a mortgagee who has not entered into possession has no right to recover back rents from a subsequent mortgagee who has been in possession: *Ex parte Wilson*, 2 V. & B. 252.

E. B. Cooper, contrd.—The position of beneficiari under a will differs from that of mortgagee, but s sembles that of legatee and residuary legatee. T testator intended the legatees to be paid in full befo the residuary devisee received his share of the estate.

They referred to *Birch* v. *Sherratt*, 16 W. R. 3 L. R. 2 Ch. 644; *Booth* v. *Coulton*, 18 W. R. 87 L. R. 5 Ch. 684.

North, J.—The annuitant and legatees are in t position of equitable mortgagees. They have a charg on real estate, but they have no legal estate. Th could not have taken possession of the land. Th have not taken steps to enforce their charge b obtaining the appointment of a receiver or otherwis and they are, I think, in the position of a mortgag who has not entered into possession. But a mortgag who has not entered into possession has no right to a account from a subsequent mortgagee who has been i possession. I think the order made in chambers i wrong, and must be discharged. The costs of this ap plication will be costs of the action.

Solicitors, *Saltwell & Tryon; Hatchett, Jons, & Co.*

Chan. Div.
Kekewich, J.

July 7, 8.

Birmingham and District Land Co. (Limited) v. London and North-Western Railway Co. (a.)

A land company had power, under several agreem with the leasing authority under an Estate Act, to e upon and build on part of the estate houses of a cert value, which were to be completed within a specif period. A railway company promoted, before the e piration of this period, a scheme for a railway pass through the lands in question, and the land comp obtained an indefinite extension of the time for com tion of the houses from the leasing authority. Sub quently the railway company obtained an Act authori their railway, and gave the usual notice to treat to land company, who, however, made no claim. Event the railway company entered into possession, dem that any interest in the land was vested in the l company.

In an action brought by the latter, claiming a de ation that the agreements were still subsisting, and compensation ought to be assessed and paid to the that footing,

Held, that the action would lie, and that the court jurisdiction to make a declaration in the terms asked, exact amount of compensation to be settled by an arbi trator under the Lands Clauses Act.

East and West India Docks Co. v. Gattke., 3 Mac G. 155, *and* London and Blackwall Railway Co. v. Cr 34 W. R. 201, 31 *Ch. D.* 354, *distinguished.*

Trial of action.

By a building agreement dated the 5th of Febru 1877, and made between M. P. W. Boulton, the lea authority under the Boulton Estate Act, 1874, of t one part, and the plaintiff company, of the other pa it was agreed that for a period of ten years from t 30th of November, 1875, the plaintiff company mig enter upon eight and a half acres of land—part of th estate—for the purpose of building houses of a certai value, paying rent in the meantime until leases wer granted. Power was reserved to the leasing authori to re-enter if the houses were not completed within th specified time.

By another agreement of the 5th of April, 187 expiring on the 30th of November, 1881, between th

(a.) Reported by J. W. Greig, Esq., Barrister-at-Law

same parties, the plaintiff company agreed to take three acres more of land and to build thirty-five houses thereon, to be completed within six years from the 30th of November, 1875.

Under an agreement dated the 27th of October, 1879, the value of the houses to be built on the land was reduced, and a number of them were built and leases granted to the plaintiff company.

In 1882 the defendant company promoted a railway scheme which would, if carried out, have rendered necessary the acquisition by them of the land comprised in the agreements. Under these circumstances the plaintiff company applied for, and obtained from M. P. W. Boulton, an indefinite extension of the time for the completion of the houses, and suspended the building operations.

On the 31st of July, 1883, the defendant company purchased the fee simple of part of the lands comprised in the agreements, and with notice of them. Notice to treat was given by the defendant company to the plaintiffs with respect to about one-third of the lands, but no claim was sent in by the latter.

On the 4th of January, 1886, the defendant company entered upon part of the lands comprised in the agreements, but no deposit was lodged, and they gave no bond, as required by the Lands Clauses Consolidation Act, 1845, and denied that the plaintiff company had any subsisting interest in the land.

This was an action by the plaintiff company claiming (1) a declaration that, as between the plaintiff and defendant companies, the building agreements were still subsisting, and that the price and compensation payable to them for the lands taken by the defendant company ought to be assessed on that footing; (2) an injunction restraining the defendant company from entering on the lands until they had complied with the provisions of the Lands Clauses Consolidation Act, 1845.

Romer, Q.C., Warmington, Q.C., and *Woodroffe*, for the plaintiffs.—The substantial issue is whether the plaintiff company have any interest in the land. After notice to treat the plaintiff company would not have been justified in continuing to build, as that would have cast additional expense on the purchasing company: Browne & Theobald's Law of Railways, p. 148; *In re Marylebone (Stingo-lane) Improvement Act*, 19 W. R. 1047, L. R. 12 Eq. 389; *Metropolitan Railway Co.* v. *Woodhouse*, 13 W. R. 516. Time was not of the essence of the contract as regards the building agreements, and, even if it were, had ceased to be so in consequence of the acquiescence of M. P. W. Boulton by accepting rent after the time fixed by the agreements: *Ex parte Newitt*, 29 W. R. 344, 16 Ch. D 522.

Ince, Q.C., and *O. L. Clare*, for the defendants.—In building agreements time is always of the essence of the contract. The jurisdiction of the court is ousted, and the question ought to be referred to arbitration under the Lands Clauses Consolidation Act, 1845: *East and West India Docks Co.* v. *Gattke*, 3 Mac. & G. 155, 173; *London and Blackwall Railway Co.* v. *Cross*, 4 W. R. 201, 31 Ch. D. 354, 373.

Kekewich, J.—The defendants, the London and North-Western Railway Co., have, under a special Act of 1883, compulsory powers of purchase over certain land in Birmingham, and under it they gave notice to treat to, amongst others, the plaintiffs, whom they conceived to be interested in the property. No claim was ever sent in by the plaintiffs. Eventually the company entered into possession, making no deposit, and giving no bond as required by the Lands Clauses Consolidation Act. This action was then brought, and the defendants contend that no compensation is due, on the ground that the plaintiffs have no interest in the land at all, and it is sought to exclude the jurisdiction of the court by suggesting that the question of any interest in the land is one that should go to arbitration under the Acts. Such a question is usually, no doubt, raised either under the Vendor and Purchaser Act, by payment into court and petition, or an action for specific performance after the purchase-money has been fixed by the arbitrator or a jury. But there can be no objection on principle or authority to the court deciding, as between a claiming landowner and the railway company, whether the former has or has not an interest. It would be sanctioning circuity of action and processes of delay if, now that the question is before me in an action, I were to say it must go to an arbitrator.

Two cases have been referred to as establishing the principle on which the jurisdiction of the court is said to be ousted: *The East and West India Docks* v. *Gattke*. That case was, however, one where a lessee applied, not to have his land bought and paid for; but for compensation under clause 68 of the Lands Clauses Act, on the ground that his lands were injuriously affected by the works of the dock company. The company tried to restrain a reference to an arbitrator, but the Chancery Division held a person might have his claim against a railway company adjudicated upon by the tribunal instituted by the Legislature, an arbitrator, or a jury. The same point arose in *The London and Blackwall Railway Co.* v. *Cross*.

But the case here is very different, for the company say there is nothing at all to determine. The action was commenced rightly, and there could be no excuse, except inadvertence, for the company entering without making the usual deposit or giving the usual bond. What is the claim? It is said that time is of the essence of the building agreements, and that they are now at an end by effluxion of time. Whether it was so or not is immaterial, since I am of opinion that Mr. Boulton virtually waived the completion of the buildings at the original date fixed, and allowed the matter to stand over until the railway scheme was more fully known. Mr. Boulton would, under the circumstances, have been precluded from re-entering under the clause to that effect, since the time for completion had not expired. It is impossible to say what interest the company has under the agreements, but it has some, and I see no difficulty in declaring that these agreements are subsisting down to the present time, for if a reasonable notice to complete were required so as to give a right of re-entry, I can see no indication of any having been given. The actual assessment of the interest will be for the proper tribunal. There will be judgment for the plaintiff, with costs.

Solicitors for the plaintiffs, *Robinson, Preston, & Stow*, for *Rowlands & Co.*, Birmingham.

Solicitor for the defendants, *C. H. Mason*.

Q. B. Div. (Hawkins and Charles, JJ.) Jan. 31.

Reg. v. Lee. (*a*.)

Bastardy — Affiliation order — Service of summons — Last place of abode—Bastardy Law Amendment Act, 1872 (35 & 36 *Vict. c.* 65), *s.* 4.

G. L. resided at Sunbury from September, 1886, *until the* 20*th of April*, 1887, *when he went to Southampton to "better himself." He returned to Sunbury for "his things" on the* 14*th of May, and on the* 19*th of May he sailed from Southampton to the West Indies. On the* 18*th of May a bastardy summons was left for him at the house where he had resided at Sunbury.*

(*a*.) Reported by Cecil Chapman, Esq., Barrister-at-Law.

Held, that this was a good service at "his last place of abode" within 35 & 36 Vict. c. 65, s. 4.

This was a motion to make absolute a rule *nisi* for a *certiorari* to bring up a bastardy order to be quashed on the ground that, owing to an insufficient service of the summons, the justices had no jurisdiction to make the order. From the month of January, 1885, to September, 1886, the appellant was a journeyman baker residing at Dorking in the same service with Kate Brett, the complainant, and in September, 1886, he obtained fresh employment at Sunbury, where he resided till the 20th of April, 1887. He then left Sunbury and went to Southampton "to better himself" and stayed there in lodgings till the 19th of May, when he shipped as baker on board a steamer for the West Indies. He had returned to Sunbury for "his things" on the 14th of May, and a bastardy summons at the suit of Kate Brett was left for him at his house in Sunbury on the 18th of May. The summons was heard on the 18th of June in his absence, and the justices made an order against him for 2s. 6d. a week as the putative father of the child.

Taylor, in support of the rule.—Sunbury had ceased to be the appellant's last place of abode when the summons was served there. He had gone to Southampton to get better employment and he had no intention of returning. In *Reg.* v. *Higham*, 5 W. R. 507, 26 L. J. M. C. 116, which is the case most against me, there was an *animus revertendi*. It is not sufficient to leave the summons at what apparently was the last place of abode, it must be actually so: *Reg.* v. *Evans*, 19 L. J. M. C. 151.

Mead, shewed cause.—Lee's residence at Southampton was a temporary one. He went there to better himself, but he does not say in his affidavit that he intended to settle there, and he left it as soon as he found a ship. His "things" were left at Sunbury, and he returned there on the 14th of May to fetch them, which shows that he treated that as his permanent residence. He knew that the proceedings were likely to be taken, for the child was born on the 8th of April and the mother had seen him about it. In *Reg.* v. *Higham* the facts are almost identical. The man there had reason to anticipate a summons and left his father's house to reside with a farmer in another part of the country without any intention of returning. The summons was left for him at his father's house, and it was held to be good service at his "last place of abode."

He cited also *Reg.* v. *Evans; Ex parte Davis*, 22 L. J. M. C. 143; *Reg.* v. *Brown*, 24 J. P. 740; *Reg.* v. *Damarell*, L. R. 3 Q. B. 50, 16 W. R. C. L. Dig. 14.

HAWKINS, J.—I am of opinion that the *certiorari* ought not to go and that the order ought not to be quashed. The application is made to set aside the order on the ground that there was no jurisdiction to make it, as the party upon whom it was made did not appear, and the order was made in his absence and he never received the summons. Section 4 of the Bastardy Law Amendment Act, says: "On the appearance of the person so summoned, or on proof that the summons was duly served on such person or left at his last place of abode six days at least before the petty sessions." When this matter came before the magistrates they were satisfied that the summons had been duly served at the last place of abode, and that George Lee was the father. This would not in itself be conclusive, and a party who feels himself aggrieved by an order is entitled to prove that in fact there was not jurisdiction. This is very clearly stated by Coleridge, J., in *Reg.* v. *Evans*, 19 L. J. M. C. at p. 155. We have therefore to decide whether the summons was left at the last place of abode. As Cockburn, C.J., says in *Reg.* v. *Damarell*: "Proof that the summons was left at the last place of abode is sufficient without more to give the justices jurisdiction." T authorities cited do not much assist us.

In *Evans' case* the order was quashed, for the su mons was not served at the lodgings where the defen ant last lived, and there was no difference in t character of residence between them and those which had occupied before. In *Reg.* v. *Davis* the *ratio decide* was that four days' residence at an inn before leav for America did not constitute a "place of" abode.

In *Reg.* v. *Damarell* a summons was served at a fa house where the defendant had been lodging for s years, and it was held good, although he had left days before for the purpose of going to America. v. *Higham* is a very strong authority in support of order. There the defendant had left his father's h and had obtained employment elsewhere, and had intention of returning. Now we come to this There is no doubt that the defendant had lived in S bury as assistant to Hopkins up till April 20, 1887, till then that was his last place of abode. Accordi the evidence of one witness he left "his things" th May 14. That is evidence to be considered that he not finally decided to leave these lodgings. He went to Southampton to better himself, not to himself there or to get permanent employment particular work or with any particular person. T certainly nothing to show that his staying there w like staying in an inn. I should have expected t say that he intended it to be his permanent abo he gives no suggestion that it was and no facts abo residence to point to such a conclusion. Looking the facts I can see nothing to satisfy me that the trates had not jurisdiction, and I come to the con that they had and that the service was duly made last place of abode. The rule must be discharge costs.

CHARLES, J.—I am of the same opinion. I think the authorities assist us much. The facts case must be looked at by themselves. The que a short one—namely, what is the proper inferen drawn as to the defendant's place of abode fr affidavits. He left Sunbury on April 20 and Southampton to better himself. He took lodging he does not say with whom, nor does anyone he was a lodger. He simply stayed there. Can then that Southampton was his last place of ab am by no means satisfied that we can. He w to cast about for employment, and had to liv where meanwhile. He did live at the place but he did not take his goods and chattels days before the summons was served. I think place of abode was Sunbury, and that his at Southampton was a transitory one for a spec pose, and not a "place of abode" at all.

Rule discharged.

Solicitor for the appellant, *G. W. Lay*, Brentw

Solicitor for the respondent, *W. J. Hodge*, Dor

Court of Appeal.

Chan. Div. March 3.

Hancock v. Hancock. (a.)

Married woman—Separate estate—Property acquired since the 1st of January, 1883—Effect of covenant in prior settlement to settle after-acquired property—Covenant by husband only—Married Women's Property Act, 1882, ss. 5, 19.

A marriage settlement made in 1870 contained a covenant by the husband alone for the settlement of any future-acquired property of the wife exceeding a specified amount (except jewellery and similar articles). After the commencement of the Married Women's Property Act, 1882, the wife became absolutely entitled, under a will made in 1883, to a share of the residuary estate, which exceeded the specified amount, without any limitation as to separate use.

Held, that the fact that the covenant was a covenant by the husband only did not prevent the settlement being a settlement within the meaning of section 19 of the Act, and that the effect of that section was to prevent the separate use given to the wife by the Act, excluding the operation of the settlement; and that, therefore, the wife's share was bound by the covenant to settle future-acquired property.

In re Queade's Trusts, 33 W. R. 816, not followed.

Decision of North, J. (ante, p. 166), affirmed.

Appeal from an order of North, J., on petition (*ante*, p. 166).

The facts sufficiently appear from the report of the case in the court below.

Mulligan, for the appellant petitioner.—The main question is whether there is here "any settlement, or agreement for a settlement," within the meaning of section 19 of the Married Women's Property Act, 1882. A covenant to settle after-acquired property contained in the settlement here was a covenant by the husband (in which the wife, or intended wife, did not join) to settle property coming to him in right of his wife. The property was made the lady's separate property by section 5 of the Act, and, therefore, did not go to the husband in her right, or at all, but remained her own; as she did not herself join in the covenant, it could not bind her property. It follows that there was, in fact, as regards that property, no "settlement or agreement for a settlement," and, therefore, section 19 does not apply. That a covenant by the husband alone does not bind the wife's after-acquired property is shown by *Armsden v. Smith*, 2 W. R. 435, 2 Dr. 298, and by *Jones v. Tredwell*, 29 W. R. 793, 18 Ch. D. 354. In *re Stonor's Trusts*, 32 W. R. 413, 24 Ch. D. 195, and *In re Whitaker, Christian v. Whitaker*, 35 W. R. 81, 34 Ch. D. 227, there was a covenant by the wife, and therefore the settlement was a settlement within section 19 of the Act, which distinguishes those cases from the present one. If my first contention is right, *In re Queade's Trusts*, 33 W. R. 816, is a clear decision in the petitioner's favour, being exactly on all fours with the present case, the lady's covenant having been there held void on the ground of her infancy, and the result, therefore, being the same as if she had not covenanted at all. In that case Chitty, J., pointed out some of the difficulties and absurdities that would arise from a literal construction of section 19.

E. R. Simpson, for the trustees, was not called upon.

Cotton, L.J.—This is an appeal from an order of North, J. (made on a petition by a married lady), deciding that the lady's share under the will of her mother is bound by the settlement made upon her marriage. The settlement contained a covenant—undoubtedly by the husband alone—to settle after-acquired property coming to the wife or to the husband in her right, and it is not disputed that whatever he takes by the marital right is bound by the covenant. The property is not, by the mother's will, given for her daughter's separate use, and it is therefore clear that, apart from the statute, the husband would take this fund by the marital right. Then comes the Married Women's Property Act, and gives it to the lady as her separate property. The contention of the petitioner's counsel is that she is not bound by her husband's covenant, and undoubtedly, if the property had been expressly left to her as her separate property by the will, that contention must have prevailed. Is property that is made separate property by the Act in the same position, or is it excluded by the operation of section 19? That brings us to the question, What is the true construction of that section? [His lordship read the section, and proceeded.] It is said that we must not consider the words "settlement or agreement for a settlement" in this section apply except to a settlement or agreement for a settlement by the wife, because of certain difficulties suggested by Chitty, J., in *In re Queade's Trusts* as likely to ensue from a literal construction of the words. But in my opinion we must give the Act its true construction in spite of the difficulties Chitty, J., seemed to apprehend would arise from doing so. In my opinion the true construction of the Act requires us to say that the effect of section 19 is to prevent section 5 interfering with the settlement, and to put the parties in the same position as if the Act had not been passed. In my opinion, if the difficulties which Chitty, J., felt were ever to arise and come before this court, we should not be justified, if the words of the Act were clear, in not giving them their true meaning, whatever might be the effect of such a construction, and it would be for the framers of the Act, if not satisfied with the result, to endeavour to induce the Legislature to remove the difficulties. This Act, which was passed with the intention of remedying some of the grievances of married women, has, undoubtedly, interfered greatly with their position, and if that has not been in every case to their advantage, they must take the good and the evil together. In my opinion, therefore, this application fails.

Lindley, L.J.—I am of the same opinion. Mr. Mulligan may be quite right in saying that there is no covenant here by the wife, but it does not follow that there is therefore no settlement within the meaning of section 19. That section says in plain terms that nothing in the Act is to affect what would have been the result of any settlement if the Act had not been passed. It is true that the section is badly framed, inasmuch as it says that nothing in the Act shall affect settlements, while the rest of the section itself does affect them. It is not now necessary to solve the puzzle suggested by Chitty, J., in *In re Queade's Trusts*. Possibly, if the difficulties he suggested ever really arise in a case coming before this court, the court may get out of them by holding that such a settlement is not a settlement within the meaning of section 19, or in some other way. In the present case I can see no sufficient reason for holding that this settlement was not a settlement, or agreement for a settlement, within that meaning.

Bowen, L.J.—I am of the same opinion. The language of the earlier part of section 19 clearly applies to this case, whatever difficulties may result from what follows. This application must be dismissed, with costs.

Solicitor, *William Horsley*.

(a.) Reported by R. H. Deane, Esq., Barrister-at-Law.

From Chan. Div. Feb. 29.

FANSHAWE v. LONDON AND PROVINCIAL DAIRY CO. (a.)

Practice—Mode of trial—Action to restrain nuisance—Application for trial with jury—Discretion of judge—R. S. C., 1883, *ord.* 36, *rr.* 6, 7 (a).

An action for an injunction to restrain a nuisance is not a cause or matter coming within ord. 36, *r.* 6, *so as to entitle as of right any party to the action to an order for trial with a jury.*

The Temple Bar, 34 *W. R.* 68, 11 *P. D.* 6, *followed.*

Decision of Kay, J., *affirmed.*

Appeal from Kay, J.

The action was for an injunction to restrain the defendants carrying on the business of dairymen in such a manner as—by noise in removing milk cans at night—to injure the plaintiffs in their enjoyment of houses occupied by them in the neighbourhood of the defendants' premises.

The defendants applied to Kay, J., the judge to whom the action had been assigned, for an order that the action should be tried with a jury. Kay, J., refused the application. The defendants appealed.

Ince, Q.C., and *J. H. Robertson*, for the appellants.—The question turns on the construction of R. S. C., ord. 36, rr. 2—7.* Under ord. 36, r. 6, the defendants are entitled to have this action tried with a jury unless sufficient reason to the contrary is shown (*In re Martin, Hunt* v. *Chambers*, 30 W. R. 527, 20 Ch. D. 365; *Clark* v. *Skipper*, 30 W. R. 465, 21 Ch. D. 134), but Kay, J., refused the defendants' application without any such reason to the contrary being shown. [COTTON, L.J., referred to *The Temple Bar*, 34 W. R. 68, 11 P. D. 6.] *The Temple Bar* was a special case dealing with a matter specially assigned to the Admiralty Division: *Fennessey* v. *Rabbits*, 56 L. T. N. S. 138, 35 W. R. Dig. 158. Ord. 36, r. 7 (a), is not applicable to this application, which comes under rule 6.

Marten, Q.C., and *Russell Roberts*, for the respondents, were not called on.

COTTON, L.J.—The first point raised is whether there is a right to require trial before a jury. That point has been decided by the Court of Appeal in *The Temple Bar*, which case has been commented on by Chitty, J., in *Coote* v. *Ingram*, 35 W. R. 390, 35 Ch. D. 117. In *Temple Bar* decided that a cause only comes within rule 6 of order 36 when it does not come within the class of cases determined by the previous group of rules in that order. That was an admiralty action, and this is an action to restrain a nuisance; neither come within the class of actions assigned to the Chancery Division, but, while the former could not have been dealt with by the Court of Chancery, the latter belongs to a class of actions which formerly could, and can now also, properly dealt with by the Chancery Courts. The question, therefore, arises, is this an action which comes under rule 6 or under rule 7 (a)? I think that the reasons given in the judgments in *The Temple Bar* show that this action comes under rule 7 (a). It was said that the discretion given to a judge under rule 7 to order a trial before a jury was exercisable only by the judge *ex mero motu*, but, in my opinion, an application for trial before a jury may be made under rule 7 (a) by any party also, and applications of this kind have even been made to us. Where a discretion is given to a judge by a rule it would be wrong to say the parties are not to be at liberty to apply to him to exercise his discretion.

This application must, therefore, be treated as having been made under rule 7 (a).

Mr. Ince said that the judge ought to have been satisfied that there were reasons against having the trial before a jury, and the case of *In re Martin, Hunt* v. *Chambers* was relied on as showing that, where no reason is given for having trial without a jury, the judge could not be said to have exercised his discretion at all. That case was decided on the Rules of 1875. No doubt the parallel rule in the Rules of 1875 to this rule in the Rules of 1883 is in the same terms, but then different antecedent matters were dealt with. It was an antecedent matter to that rule in the Rules of 1875 that any party had a right to have his case tried by a jury unless there was shown some reason to the contrary, and therefore the Court of Appeal, in the case referred to, held that Bacon, V.C., had not exercised his discretion; but now that antecedent matter is gone, parties have not now the general right of trial before a jury.

Rule 6 does not apply to this action, as I have already held, and rule 7 (a) is the rule that is applicable. Trial by jury in such an action as this is not being given as a right, it was for the party asking the judge to exercise his discretion and to give trial by jury to show reasons for that.

When a judge has exercised his discretion it would be wrong, except under very special circumstances, for the Court of Appeal to interfere. In the present case the learned judge has exercised his discretion, and, in my opinion, exercised it rightly.

LINDLEY, L.J.—I am of the same opinion, and adhere to the opinion I expressed in *The Temple Bar*. Rules 2—7 of this order form a group of rules, themselves containing new regulations as to the mode of trial, and we must not, therefore, go back to the old rules or we shall be misled.

Dealing with this set of rules as they now stand we find, first, that a party formerly entitled to trial by a jury is so entitled still; and, secondly, that a party formerly not entitled to trial by jury is not so entitled now. There were always, however, a class of cases where the parties might have got an order for trial by jury where without such an order, the trial would have been without a jury; and there were also cases where the court would order a trial without a jury where, without such an order, the trial would have been with a jury. Be

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

* Order 36, rule 3.—"Causes or matters assigned by the principal Act to the Chancery Division shall be tried by a judge without a jury unless the court or a judge shall otherwise order."

Rule 4.—"The court or a judge may, if it shall appear desirable, direct a trial without a jury of a question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which, previously to the passing of the principal Act, could, without any consent of parties, have been tried without a jury."

Rule 5.—"The court or a judge may direct the trial without a jury of any cause, matter, or issue requiring any prolonged investigation of documents or accounts or any scientific or local investigation which cannot, in their or his opinion, conveniently be made with a jury."

Rule 6.—"In any other cause or matter, upon the application, within ten days after notice of trial has been given, of any party thereto, for a trial with a jury of the cause or matter or any issue of fact, an order shall be made for a trial with a jury."

Rule 7 (a)—"In every cause or matter, unless under the provisions of rule 6 of this order, a trial with a jury is ordered . . . the mode of trial shall be by a judge without a jury, provided that in any such case the court or a judge may at any time order any cause, matter, or issue to be tried by a judge with a jury, or by a judge sitting with assessors, or by an official referee or special referee, with or without assessors."

even in these respects the law is not new, as rule 5 is really only a substitution for a rule that existed under the Common Law Procedure Act, and the old Court of Chancery had always the power to direct an issue to be tried by a jury. The only new effect of the Rules of 1883 is to shift the burthen of proof to the party who wishes to get a trial by jury. A discretion is given to the judge to make exceptional orders in exceptional cases. The present case is a nuisance case. It seems to me that in such class of cases the judge must be satisfied that it ought to be tried by a jury, and if not so satisfied it must be tried without a jury.

BOWEN, L.J.—I am of the same opinion. I think we are bound by *The Temple Bar*, and in saying that I do not at all intimate that I do not agree with that case. As to the exercise of discretion, it is no proof that a judge did not exercise his discretion because he merely dismisses an application without saying he does so in the exercise of his discretion. I think that in the present case the judge clearly exercised his discretion, and in fact so expressed himself, and on the facts of the case I do not myself see why it should not be more properly tried by a judge without a jury than before a jury.

Appeal dismissed.

Solicitors, *Frere & Co.; Kennedy, Hughes, & Kennedy.*

From Chan. Div. Dec. 21.

LYNCH *v.* MACDONALD. (*a.*)

Practice—Mode of trial—Action for redemption—Counter-claim for damages for fraud—Application for trial of action before jury—R. S. C., 1883, *ord.* 36, *r.* 6; *ord.* 19, *r.* 3; *ord.* 21, *r.* 15.

A plaintiff, in his statement of claim, claimed (1) *redemption of certain securities, consisting of shares;* (2) *damages for wrongful detention and conversion of the shares; and* (3) *a receiver. The defendant counter-claimed against the plaintiff for* (1) *an account of what was due to the defendant by the plaintiff;* (2) *damages for fraudulent misrepresentation, whereby the defendant was induced to credit the plaintiff with the proceeds of certain of the shares which had been sold.*

After the institution of the action the plaintiff, under an order of the Court of Appeal, paid into court a sum of money admittedly sufficient—apart from the question of fraud raised by the counter-claim—to satisfy what might be due by the plaintiff to the defendant. Before notice of trial had been given the plaintiff applied for an order for trial of the action with a jury.

Held, affirming North, J., *that ord.* 36, *r.* 6, *was not applicable, and therefore that the plaintiff was not entitled as of right to a trial with a jury.*

An application made on behalf of the plaintiff at the hearing of the appeal for an order that the counter-claim might be tried separately, was refused, on the ground that the plaintiff ought to have made an application for that purpose before reply, under ord. 21, *r.* 15, *or applied before trial to have the counter-claim disallowed under ord.* 19, *r.* 3.

Appeal from North, J., reported *ante*, p. 136.

The nature of the action and the counter-claim, so far as material, will be found stated in the report of the case in the court below.

The plaintiff made an application by way of motion before North, J., that the action might be tried by a judge with a jury.

North, J., refused the application.

The plaintiff appealed.

Cozens-Hardy, Q.C., and *Swinfen Eady*, for the appellant.—The appellant has a right to have the action tried by a jury, and the judge had no discretion to refuse it: ord. 36, r. 6. The action was, no doubt, originally in the nature of an action for redemption of certain shares. The defendant counter-claimed, alleging (*inter alia*) fraud and misrepresentation against the plaintiff. From what has taken place since the institution of the action, all that in substance now remains to be tried in the action and on the counter-claim is the question of fraud or no fraud, and that is an issue which the plaintiff has a right to have tried before a jury. A counter-claim, for many purposes, is a separate and independent action, and it is so here. The judge below thought himself bound by *Gardner* v. *Jay*, 33 W. R. 470, 29 Ch. D. 50, but that case is really in our favour. "Any other cause or matter" in rule 6 of order 36 means other than causes assigned to the Chancery Division which are dealt with in rule 3.

The Temple Bar, 34 W. R. 68, 11 P. D. 6, was also referred to.

Higgins, Q.C., and *R. M. Bray*, for the respondent, were not called on.

COTTON, L.J.—This is an appeal by the plaintiff from a refusal of North, J., of an application for trial of the action before a jury. If it were admitted that the refusal was a matter within the discretion of the judge, and that he had exercised his discretion, we should refuse to interfere. But it is said that the plaintiff has a right to trial before a jury under ord. 36, r. 6. That rule says: "In any other cause or matter, upon the application . . . of any party thereto for a trial with a jury of the cause or matter or any issue of fact, an order shall be made for a trial with a jury." The rule does not say that an issue of fact which, if it had been a separate cause, must have been tried before a jury, shall be so tried when not standing alone, but only that "in any other cause or matter"—excluding actions assigned to the Chancery Division—an order shall be made for trial with a jury. In my opinion it was quite wrong for the plaintiff here to apply to have the action tried with a jury. The counter-claim is not merely for damages, but extends to matters which are assigned to the Chancery Division, and therefore we cannot treat this counter-claim as an action not assigned to the Chancery Division. The plaintiff, if he had wished it, and had come in time, might, under ord. 21, r. 15, have got this counter-claim tried as a separate action and obtained an order for that purpose; but, in my opinion, we ought not now, on the ground of exercising our discretion, allow him to have it tried separately.

The appeal therefore fails.

FRY, L.J.—I am of the same opinion. Ord. 19, r. 3, gives the court power, on the application of the plaintiff before trial, to disallow a counter-claim if it cannot be conveniently disposed of in the pending action.

The plaintiff made no application under that rule, and this appeal must therefore be dismissed, with costs.

Solicitors for the plaintiff, *Saunders, Hawksford, Bennett, & Co.*

Solicitors for the defendant, *Watney, Tilleard, & Freeman.*

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

From Chan. Div. Jan. 19.

In re E. BULWER LYTTON'S WILL.
KNEBWORTH SETTLED ESTATES TRUSTS. (*a.*)

Settled land—Permanent improvements—Payment out of capital moneys—Approval of scheme—Expenditure in excess of original estimate—Settled Land Act, 1882, *s.* 26.

Where a scheme for the permanent improvement of a settled estate, by providing it with an additional water supply, and thus rendering it available as a building estate, had been submitted to the trustees and approved by them, and in carrying out the scheme it was found necessary to incur additional expense to that authorized by the scheme, the court, being satisfied that the additional expense was incurred for work which fell substantially within the scheme, made an order, under section 26 *of the Settled Land Act,* 1882, *directing the trustees to apply the capital moneys forming part of the settled property in payment of the additional expense.*

In re Hotchkin's Settled Estates, 35 *W. R.* 463, 35 *Ch. D.* 41, *distinguished.*

Decision of Stirling, J., *reversed.*

Appeal from a decision of Stirling, J.

This was an application by Lord Lytton, the tenant for life of the Knebworth Estates, to allow the payment out of capital moneys, forming part of the settled estates, of certain expenses in excess of the original estimate which had been incurred in carrying out a scheme, which had been sanctioned by the trustees, for permanently improving the estate by supplying it with an additional supply of water.

In 1885 a contract was entered into between Lord Lytton and Messrs. Spencer, Carter, & Co. for the provision of and distribution of an increased supply of water to a part of the property which had been laid out as a building estate, and also to the mansion-house, for the sum of £993 13s. A scheme was submitted to the trustees which referred to the contract, and was accompanied by a report of a surveyor who had been appointed by the Land Commissioners. In July, 1885, the trustees approved the scheme.

In carrying out the scheme it was found necessary to execute additional works at an expense considerably in excess of the amount named in the original contract. The cost of the additional works, which were certified to have been necessary, and properly executed, amounted to £850.

The question was whether the tenant for life was entitled to an order, under section 26 of the Settled Land Act, 1882, directing the trustees to apply the capital moneys, forming part of the settled property, in payment of the additional expense.

Stirling, J., on the authority of *In re Hotchkin's Settled Estates,* 35 W. R. 463, 35 Ch. D. 41, refused the application.

The tenant for life appealed.

On the appeal the claim in respect of two sums, amounting to £200, which had been expended by the tenant for life on the improvement of the mansion-house on his own authority, was abandoned.

Cozens-Hardy, Q.C., and *Lambert,* for the appellant.—The additional expenses were incurred for work which was necessary for the proper execution of the scheme which was approved by the trustees. *In re Hotchkin's Settled Estates,* upon which Stirling, J., based his refusal of our application, does not apply. In that case no scheme was submitted till after the improvements had been executed.

They referred to the Settled Land Act, 1882, ss. 21, 25, 26.

Spencer Butler, for the trustees.

HALSBURY, C.—In this case no doubt various difficulties might be suggested in the abstract as to the meaning of the word "scheme" as used in this section, and as to the limits within which the expenditure authorized is to be confined. A definition might be given to it which, if narrowly insisted on, would render the Act unworkable. At the same time, it may be that, where the trustees have approved of a scheme limiting the expenditure to a certain amount, the excess of expenditure may be so large, and constitute so wide a departure from the scheme as approved, as practically to amount to a substitution of a new scheme for that which was approved of by the trustees. It is, therefore, impossible to lay down any general rule on the subject. Each case must be governed by its own particular circumstances. Looking at the scheme submitted to the trustees, and of which substantially they signified approval, we find that it was a scheme for improving the value of the Knebworth Estate, part of which was intended for a building estate, by giving it a sufficient supply of water. The scheme submitted, provided for getting water from a well and storing that water in a tank from which, by force of gravitation, it might be distributed to portions of the estate. I cannot believe that the trustees, in giving the approval which they gave to the scheme, were misled as to the amount of expenditure that would be required and other additional expenses which were not contemplated by them or the tenant for life when the scheme was submitted to them. The substantial plan, however, for which it was intended to charge the capital moneys in the hands of the trustees was the execution of works in accordance with the scheme which was originally submitted, and, although further operations were not contemplated, still I am of opinion that, striking out from these additional expenses the claims which have been abandoned, the additional works fell substantially within the scheme, and that an order may be made.

COTTON, L.J.—I should add nothing if it were not a case of importance on the Act, and, in fact, this is a case on the point, for it is not at all similar to *In re Hotchkin's Settled Estates,* where the works were done without any scheme having been submitted either to the trustees or to the court.

The question we have to consider is whether the works which have been done, and in respect of which the additional expense not contemplated originally was incurred, were works which substantially fell within the scheme which was approved. It must be observed that the approval of the trustees was not conditional upon the works being completed for £993, and I am of opinion that the additional expense, after deducting some £200 in respect of items which have been abandoned, was incurred for works which were included in the proper execution of the scheme which was, in substance, approved by the trustees. The scheme, as stated by the Lord Chancellor, was for the purpose of obtaining a sufficient supply of water by deepening one of the wells on the estate and raising the water from it to a tower and distributing it over the estate. In carrying out that scheme it was found necessary, not only to sink the well lower than had been contemplated, but also to provide for storing the water by making underground headings, increase the size of the tanks and to do various other things which fell within the proper execution of the scheme which had been approved, but which had not been mentioned either in the scheme or specification. Take the case of the extra expenses incurred in sinking the well. If the trustees have approved of the particular work, and if that further sinking was necessary effectually to carry out that work, then I think that it was fully within the scheme and plan approved by the

(*a.*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

trustees. That being so, I think we may make the order for the reduced amount.

BOWEN, L.J.—I am of the same opinion. The inquiry which we have to entertain is this—What in fact is the scheme which was approved? Was the scheme which was laid before the trustees approved as a whole or in part only? That must require careful consideration in each case. It is obvious from the section that the proposals with reference to the expenditure to be incurred in the execution of the schemes form a substantial part of every scheme which is to be laid before the court or the trustees, and the approval to be given will be one which has some reference to such proposed expenditure without necessarily in substance requiring any limit as to expense. A scheme may be approved generally or subject to conditions as to expenditure. Probably if no limit was specified the trustees would be considered to impose, and a reasonable limit of expenditure in their opinion. But it may be that the scheme may be general without any condition. Was there any condition imposed in this case on the approval of the scheme, which, having regard to the end proposed, would exclude this proposed expenditure? I think the broader view of the Lord Chancellor and the Lord Justice is the better view, that the scheme approved was a general one for the supplying the estate with water, and that no condition was imposed, and that consequently the application of the tenant for life in its amended form may be acceded to. The appeal must be allowed.

Appeal allowed.

Solicitors, Lambert, Petch, & Shakespear; Walker & Williams.

From Q. B. Div. Feb. 15.

STEVENS *v.* BISHOP. (*a.*)

Income tax—Vicarial tithe rent-charge—Deduction of the cost of collection—Annual value—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35)—*Income Tax Act,* 1853 (16 & 17 *Vict. c.* 34).

A tithe-owner is entitled to deduct from the assessment to income tax in respect of a vicarial commutation tithe rent-charge, the amount which he is compelled to expend in addition in order to realize the tithe.

Decision of the Queen's Bench Division (35 *W. R.* 839, 19 *Q. B. D.* 442) *affirmed.*

Appeal from a divisional court (A. L. Smith and Williams, JJ.), reported 35 W. R. 839, 19 Q. B. D. 442.

The Rev. Dr. Stevens, Vicar of Portslade, Sussex, was assessed to the income tax for the year ending April 5, 1884, in respect of the vicarial commutation tithe rent-charge in the sum of £142 4s. 11d., which he admitted to be the amount receivable by him in respect of such tithe rent-charge. He claimed to deduct from this sum £[illegible], costs necessarily incurred by him in the collection of the tithe rent-charge.

It was admitted that he was compelled to expend this sum in order to realize the tithe.

The Divisional Court held that he was entitled to the deduction, and the Solicitor of Inland Revenue appealed.

Sir E. Clarke, S.G., and *A. V. Dicey* (*Sir R. E. Webster, A.G.,* with them), for the appellant.—The question is, under which rule of the Act of 1842 is the rent-charge to be assessed? It is not under rule 1 of schedule A., because it is incapable of occupation; nor under rule 2, because it is not a commutation of tithes arising from lands. Therefore it falls within section 10 of No. IV. of schedule A., and the person assessed is not entitled to any deduction except those expressly given by section 32 of the Act of 1853. The deductions given by that section evidently contemplate the gross return, and no other deductions can be made.

They cited *Coltness Iron Co.* v. *Black*, 29 W. R. 717, 6 App. Cas. 315.

F. M. White, Q.C., and *Tyrrell Paine,* for the respondent.—It would be a great hardship to say that a person must pay income tax on the whole amount which a person was entitled to receive, and not merely on that which he actually did receive. The assessment falls under rule 1 of schedule A. of the Act of 1842. The tithe rent-charge is to be taken as capable of occupation for the purpose of being rateable, and in order to fix the worth at which it could be let by the year the cost of necessary collection will be deducted.

A. V. Dicey replied.

Cur. adv. vult.

Feb. 15.—Lord ESHER, M.R.—In this case the clerical owner of a tithe commutation charge has been assessed to income tax, and a question arises as to the proper mode of assessment. What is the valuation on which income tax is to be levied, and can the person assessed deduct the expenses of collection? He is assessed under section 32 of the Act of 1853, which runs thus:—"In assessing and charging the duties under schedule A. of this Act in respect of lands, tenements, or hereditaments subject to any rent-charge under the Act for the commutation of tithes in England, or any other rent-charge in lieu of tithe, it shall be lawful for the commissioners, acting in the execution of this Act, if they shall think fit, on a due return of such rent-charge being made by the owner thereof in order to an assessment upon him, to charge and assess such owner in the assessment for the said parish with the duty under schedule A. of this Act in respect of such rent-charge." It is not contested that the return has been made, and that the commissioners have exercised whatever option is given them. He is therefore assessed with the duty granted by the Act. Section 5 gives the method in which such assessment is to be carried out: "The duties hereby granted shall be assessed, raised, levied, and collected under the regulations and provisions of the Act 5 & 6 Vict. c. 35." It is an enactment and declaration that the assessment under schedule A. of the later Act is to be made under 5 & 6 Vict. c. 35. The effect of that is to read into the Act of 1853 all the regulations and provisions of the earlier Act. They must therefore apply to this case, whether the words are exactly applicable or not, since it is expressly enacted that they shall apply. Any argument that they are inapplicable is, therefore, immaterial. We are driven, therefore, to see what was the mode of assessment prescribed by 5 & 6 Vict. c. 35. The method of assessment under that Act is contained in schedule A. It may be difficult to apply those provisions to such a case as this, but, as I said before, they must be applied.

In my opinion rule 1 of schedule A. is the rule applicable: "The annual value of lands, tenements, hereditaments, or heritages charged under schedule A. shall be understood to be the rent by the year at which the same are let at a rack rent, if the amount of such rent shall have been fixed by agreement commencing within the period of seven years preceding the 5th day of April next before the time of making the assessment; but, if the same are not so let at rack rent, then at the rack rent at which the same are worth to be let by the year, which rule shall be construed to extend to all lands, tenements, and hereditaments or heritages capable of actual occupation." It has been suggested that that rule cannot apply because this tithe rent-charge is incapable of actual occupation. To my mind

(a) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

there are two views to be taken of the rule. In the first place, it is by no means clear that the rule is exclusive. Matters incapable of actual occupation may very well be within the rule. But, in the second place, we must make the words apply, because we are forced by section 5 of the later Act to do so. This case cannot be brought within rule 2, because the descriptions there given will not admit it. It must, therefore, fall under rule 1.

I do not think that any of the other sections which were cited to us apply to the case of the assessment of a tithe rent-charge, or, if they do apply, they only direct the mode in which the assessment shall be carried out. Therefore, I think this tithe rent-charge had to be assessed under rule 1.

It follows, then, that the amount is to be the amount at which it would let at a rack rent. The cost of a merely optional collection could clearly not be deducted. Such a cost would not be taken into account in fixing the rack rent. But in this case we have it found that the amount could not be realized without this expenditure in the collection. In such circumstances there is no doubt that in fixing the rack rent the cost of collection would be taken into consideration and deducted. Therefore, I think that the cost of collection must be deducted from this assessment, and that this appeal must be dismissed.

The following judgment was read by

Fry, L.J.—I am of opinion that, under the statute of 1842, tithe rent-charge was not a hereditament charge under rule No. I. of schedule A. as a separate hereditament, but that it was assessed as part of the annual value of the lands, and was (under No. IV., rule 4) assessable either on the occupier of the land or on the person liable to pay the rent-charge—*i.e.*, to speak popularly, on either the farmer or the landlord—that it could not be assessed on the rector or vicar, and that it was assessed on the gross amount of the rent-charge.

This was altered by the statute of 1853 to this extent, that the commissioners were authorized to assess the rent-charge on the rector or vicar under schedule A., and by section 5 the earlier statute of 1842 was made applicable to the income tax under the later Act. For the first time, then, the rent-charge is treated as a separate and independent hereditament chargeable as such under schedule A. on the occupant or *quasi*-occupant of the hereditament—*i.e.*, on the rector or vicar—and if it is to be so chargeable it appears to me that the annual value can be ascertained only in the way pointed out by the general rule (No. I.)—*i.e.*, by treating the annual value as equal to the annual rent when the property was let at the rack rent, and, if not, then at the rack rent at which the same is worth to let by the year.

It tends to confirm this conclusion that the statute of 1853 itself appears to show an intention that the amount to be charged under the new method of assessment—*i.e.*, on the recipient of the rent-charge—should be different from that received under the older methods. I refer to the provision as to the deduction of the parochial rates and the special provisions as to deductions in Ireland.

I conclude, then, that on the method of assessment followed in the present case, seeing that the tithes were not let, we must find the rack rent at which they would let, and this clearly could not exceed their gross amount less the reasonable remuneration for collection. I hold, therefore, that the deduction was rightly claimed by Dr. Stevens, and that this appeal should be dismissed.

Lopes, L.J.—The combined effect of section 32 and schedule A. of the Act of 1853 is that this tithe rent-charge must be assessed on its annual value. How is that to be ascertained? We are sent by section 5 to the schedule A. of the Act of 1842, which by rule I gives us the method of arriving at the annual value of such hereditaments when not let at rack rent. I am of opinion that this tithe rent-charge would let for an amount which would be calculated on the basis that the necessary and proper cost of collection should be deducted. Therefore I agree with the Divisional Court that such cost should be deducted from the assessment, and I think the appeal must be dismissed.

Appeal dismissed.

Solicitor for the appellant, *Solicitor of Inland Revenue.*

Solicitors for the respondent, *White, Borrett, & Co.*

From Q. B. Div. [& Q. B. Div.] Nov. 22; Jan. 19, 21, Feb. 23.

Highworth and Swindon Union v. Westbury-on-Severn Union. (a.)

Poor law—Settlement—Emancipation—Acquisition of settlement after attaining the age of sixteen—Divided Parishes Act, 1876 (39 & 40 *Vict. c.* 61), *s.* 34.

By section 34 *of the Divided Parishes Act, where any person shall have resided for the space of three years in any parish in such manner and under such circumstances in each of such years as would make him irremoveable, he shall be deemed to be settled there.*

By section 35 *no person shall be deemed to have acquired a settlement from any other person, whether by marriage, estate, or otherwise, except in the case of a wife from her husband and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.*

The pauper, E. W., who had always been physically incapable of work, was the legitimate daughter of C. W. and M. W., and was born in the appellant union, in which her father was settled, on the 27*th of October,* 1861. 1862 *she and her parents went to reside in the N. Union, where her father, C. W., died in* 1868. *In* 1871 *her mother, M. W., married again. On the* 27*th of October* 1877, *the pauper attained the age of sixteen, and on the* 5*th of June,* 1880, *she began to receive relief from the N. Union. In November,* 1885, *the pauper, with her mother and stepfather, with whom she had always resided, moved into the respondent union, where on the* 21*st of September,* 1886, *she became chargeable.*

Held, by the Divisional Court (Stephen and Grantham JJ.), *on the authority of* R. *v.* Elvet, 7 *W. R.* 599; *E. & E.* 266, *that she had acquired a settlement in the N. Union.*

Held, by the Court of Appeal, *that she had not resided in the N. Union so as to acquire a settlement after she had attained the age of sixteen, and that she retained a settlement derived from her father, since her mother, on her second marriage, ceased to be a widowed mother, and that she was therefore settled in the appellant union.*

Every child, on attaining the age of sixteen, which such child continues a member of its father's family or not, and whether mentally or physically incapable or not, is, for the purposes of settlement, emancipated, and capable of acquiring a settlement for itself.

Special case.

This was an appeal by the guardians of the poor of the Highworth and Swindon Union against an order for the removal of a pauper named Eliza Wait from the Westbury-on-Severn Union, in the county of Gloucester.

(a.) Reported by Sir Sherston Baker and A. P. Perceval Keep, Esqs., Barristers-at-Law.

to the union of the appellants, on the ground that the pauper was legally settled in the parish of Rhydgwern, in the county of Glamorgan, in the Newport Union, by reason of a three years' residence there.

The following statement of facts is taken from the judgment of Lopes, L.J. :—

The order of removal was made on the 18th of March, 1887. The pauper Eliza Wait is the lawful daughter of Charles and Matilda Wait, and was born on the 27th of October, 1861, in the parish of Wanborough, in the appellant union. Charles Wait was born in the same parish.

In 1862 the father and mother, with the pauper, left Wanborough and went to reside in the parish of Rhydgwern, in the county of Glamorgan, in the Newport Union.

The father died at Rhydgwern about the 2nd of August, 1863.

The mother and the pauper continued to reside at Rhydgwern, and in 1871 the widow married George Gibbs, and they continued to reside with him until he died there in 1884.

The mother married her present husband, James Woodman, in November, 1885, and they, with the pauper, resided in Rhydgwern until the 9th of November, 1886, when they went to reside at Adsett, in the parish of Westbury-on-Severn, in the Westbury-on-Severn Union, in the county of Gloucester (the respondent union).

On the 1st of September, 1886, the pauper became chargeable to the respondent union, whereupon the said order of removal was made, whereby it was adjudged that the last legal settlement of Eliza Wait was in the parish of Wanborough, in the appellant union.

On the 27th of October, 1877, the pauper attained the age of sixteen. The pauper was in receipt of relief from the Newport Union from the 5th of June, 1880, up to the time of her going to Adsett on the 9th of November, 1886.

The pauper is now residing with, and always has lived with, her mother, and now is and always has been physically incapable of work.

It is to be assumed that the pauper, being physically incapacitated, would have been regarded as unemancipated under the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61). It is also a fact that she resided in Rhydgwern from 1862 to the 5th of June, 1880, without having received relief.

R. Cunningham Glen, for the appellant Union.—The question is whether the pauper has gained a settlement at Rhydgwern or not: *The Guardians of Keynsham* v. *The Guardians of Bedminster*, 26 W. R. 591, 3 Q. B. D. 79; *Reg.* v. *Elvet*, 7 W. R. 586, 2 Ell. & Ell. 266. The fact that in this case the pauper was residing with her mother did not prevent her from gaining an independent settlement.

He also cited *Guardians of Holborn* v. *Guardians of Chertsey*, 33 W. R. 344, 14 Q. B. D. 289, and on appeal 34 W. R. 498, 15 Q. B. D. 76; *R.* v. *Leeds Union*, 27 W. R. 708, 4 Q. B. D. 323; *Wolstanton and Burslem* v. *Northwich Union*, 46 L. T. N. S. 528; *R.* v. *Inhabitants of Cudham*, 7 W. R. 161, 28 L. J. M. C. 66.

Fraser McLeod, for the respondent union.—The pauper was unemancipated so long as she remained part of her mother's family, and was incapable of acquiring an independent *status* of irremoveability. The settlement of the pauper, therefore, will be her own last settlement, the parish of Wanborough.

He cited *R.* v. *St. Olave's*, 22 W. R. 75, L. R. 9 Q. B. 228; *Guardians of Salford* v. *Overseers of Manchester*, 27 W. R. 380, 10 Q. B. D. 172; *R.* v. *Inhabitants of Cowarne*, 2 B. & Ad. 861.

R. Cunningham Glen in reply.

Stephen, J.—In this case we must consider the position of the pauper at the time when she became chargeable, and whether at that time she had acquired any settlement of her own. Now, previously to the 5th of June, 1880, the pauper had resided in the parish of Rhydgwern for a number of years after her father's death, with her mother first, and then with her mother and stepfather.

Under these circumstances it seems to me that she became irremoveable and acquired a settlement in that parish. It is said that she did not reside so as to acquire a settlement, because the statute of 1876 does not apply to unemancipated children. But, in the first place, whether the pauper was unemancipated seems to be rather a matter of inference than of definite proof. I do not think that mere physical incapacity is necessarily proof that the pauper was unemancipated. Apart from that, however, I am of opinion that section 35 of 39 & 40 Vict. c. 61 very materially alters the state of the law with regard to these matters.

In the next place we have to consider the position of the girl at the time the order of removal was made, when her father's and mother's settlements were, so far as she was concerned, gone, the sole question being whether this girl had acquired any settlement of her own. There is certainly some difficulty in reconciling the statement of Hawkins, J., in the case of *The Guardians of Salford* v. *The Overseers of Manchester* with that he made in *The Guardians of Holborn* v. *The Guardians of Chertsey*. But it is not necessary to enter minutely into that, because in the case of *Reg.* v. *Elvet* all of the learned judges who decided the case speak of a girl as obtaining a *status* of irremoveability by residence with her father; and Erle, J., said, "when her father died the pauper had acquired an independent *status* of irremoveability, which she retained down to the time that the order of removal was made."

Now that case does not appear to me to be distinguishable in principle from the present case; and therefore, upon the same principle, it seems to me that this pauper did acquire a *status* of irremoveability in each year of her residence, although during such residence she lived with her mother and shared the house of her stepfather. I am therefore of opinion that the judgment here must be for the appellants, with costs.

Charles, J.—I am of the same opinion. She acquired irremoveability although she was unemancipated. This case is very similar to *Reg.* v. *Elvet*.

Judgment for the appellant union, with costs.

The respondent union appealed.

Jan. 19, 21, 23.—*Greene, Q.C.*, and *Fraser McLeod*, for the respondent union, the present appellants.

Lumley Smith, Q.C., and *R. Cunningham Glen*, for the appellant union, the present respondents.

The following additional cases were cited:—*R.* v. *St. Anne's, Blackfriars*, 1 W. R. 384, 22 L. J. M. C. 137; *R.* v. *Manchester*, 8 Q. B. D. 572 n.; *R.* v. *Glossop*, 12 Q. B. 117; *Easton* v. *St. Mary, Marlborough*, 15 W. R. 310, L. R. 2 Q. B. 129; *R.* v. *St. Giles-in-the-Fields*, 9 W. R. 52; *R.* v. *Leeds*, 27 W. R. 708, 4 Q. B. D. 323; *R.* v. *St. Leonard's, Shoreditch*, 14 W. R. 55, 6 B. & S. 784; *R.* v. *Ireland*, 16 W. R. 358, L. R. 3 Q. B. 130; *R.* v. *East Stonehouse*, 3 W. R. 375; *St. Pancras Union* v. *Norwich Union*, 35 W. R. 547, 18 Q. B. D. 521.

Cur. adv. vult.

Feb. 23.—The judgment of the Court (Lord Esher, M.R., Fry and Lopes, L.JJ.) was read by

Lopes, L.J.—This case raises important questions under the Divided Parishes Act, 1876. [His lordship then stated the facts as set out above, and continued:—] In our opinion the case is governed by sections 34 and

35. It will be necessary, therefore, carefully to consider these two sections. Section 35 abolishes all derivative settlements, except that which a wife may take from her husband and a child under sixteen may take from its father, if alive, or from his widow after his death, if she has acquired a settlement in her own right between the time of the death of the father and the child's attaining sixteen. Previously to the passing of this statute great expenses were often incurred by parishes in tracing remote derivative settlements and difficult steps in family pedigrees; and it was with a view to obviate this mischief that the 35th section was introduced into the Act, which at a stroke prohibits any question of a derivative settlement being entered upon beyond the two derivative settlements expressly mentioned: see *R.* v. *Guardians of the Poor of Bridgnorth*, 31 W. R. 938, 11 Q. B. D. 314. But the provision with regard to the child is most important. It is only while the child is under sixteen that it is to be capable of taking the derivative settlement of the father or widowed mother; any settlement acquired by the parents after the child attains sixteen is not to be communicated to the child, but the child is to retain the derivative settlement it had when it attained sixteen, until it acquires another. The language in the latter part of section 35 is clear and distinct. It declares that every child under the age of sixteen "shall take the settlement of its father and of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another." The Legislature hereby positively enacts what settlement a child shall take and hold up to sixteen and until it acquires another. The settlement of every child before sixteen and until it acquires another is definitely fixed and determined by the latter part of section 35. There is no qualification or limitation to the word "child," and we think that the doctrine of emancipation as it existed before 1876 can no longer prevail, and that every child on attaining the age of sixteen, whether such child continues a member of its father's family or not, and whether mentally or physically incapable or not, is for the purposes of settlement emancipated, and is rendered capable of acquiring a settlement for itself. Adopting this view of section 35, we have now to consider what the position of the pauper was on the 27th of October, 1877, when she attained sixteen. The father died in 1868. Up to that time she took his settlement, which was in Wanborough, in the appellant union, which settlement she would retain up to sixteen, unless her mother in the interval, whilst a widow, acquired a settlement in her own right, when she would take that settlement up to sixteen, and retain it until she acquired another. Her mother never acquired a settlement in her own right. Her mother has twice married, and would on each occasion take her husband's settlement. Under the law before the Divided Parishes Act, 1876, the mother's settlement so acquired would not have been communicated to the pauper, and under the 35th section of the statute the same result, in our opinion, follows, because on the second marriage of the pauper's mother she ceased to be a widowed mother, and consequently her settlement by such second marriage would not be communicated to her child. Therefore, under the provisions contained in section 35, the pauper would retain her father's settlement in Wanborough until she acquired another. Has she acquired another? It is said that she has acquired a settlement in Rhydgwern by three years' residence under section 34 of the Divided Parishes Act. To have acquired this settlement she must have resided in Rhydgwern for the term of three years in such a manner and under such circumstances in each of such years as would, in accordance with the several statutes in that behalf, render her irremoveable. But this must mean a residence after she attained sixteen, because up to that time she took her father's settlement and retained it until she acquired another. The pauper, in fact, has not resided in Rhydgwern so as to acquire a settlement there since she attained sixteen, because, attaining sixteen on the 27th of October, 1877, she was in receipt of relief on the 5th of June, 1880, and continued in receipt of relief up to the 9th of November, 1885, when she went to Adsett, where, on the 21st of September, 1886, she became chargeable.

We are of opinion, therefore, that the pauper has not acquired a settlement in Rhydgwern, but is settled in Wanborough, in the appellant union, the place of her father's last legal settlement.

The decision of the court below must be reversed, and this appeal must be allowed.

Appeal allowed.

Solicitors for the appellant union, *Few & Co.*

Solicitors for the respondent union, *Wilkins, Blyth & Co.*

High Court of Justice.

Chan. Div. Kay, J. — Feb. 11, 13.

In re Arnold.

Ravenscroft *v.* Workman. (a.)

Will — Construction — Charitable legacy — Residue — Mortmain — Direction to marshall assets — Real estate — Land in colony.

Testatrix gave all her real and personal estate to trustees upon trust to convert and pay debts and legacies; she gave several legacies, and directed that they should, in the first instance, be payable out of her real and leasehold estate. She then directed her trustees to divide the residue into three equal parts between three charities, and provided "that the foregoing charitable legacies shall be paid exclusively out of such part of my pure personal estate as is legally applicable for that purpose." The testatrix left pure and impure personalty; the only real or leasehold estate she possessed was at Cape Town, and not subject to the Mortmain Acts.

Held, that the provision for payment of the charitable legacies was equivalent to a direction that the residue should consist of pure personalty, and that that was a direction to marshal the assets in favour of the charities. The legacies must be paid out of the real estate at Cape Town, and the balance of the legacies and the debts and administration expenses must be paid out of the impure personalty, leaving the pure personalty for the charities.

Further consideration.

The question was whether, on the true construction of the will of Mrs. Arnold, her debts and legacies ought to be paid out of impure personalty, so as to leave her pure personalty to form part of the residue bequeathed to charities.

The testatrix gave to trustees all her real and personal estate upon trust for sale and conversion, and out of the moneys thus produced to pay debts, funeral and testamentary expenses, and legacies. She gave several pecuniary legacies, and directed that all the above legacies should be paid as soon as conveniently might be after her death, and should, in the first instance, be chargeable upon and payable out of the proceeds of sale of her real and leasehold estate (if any), and as to all the rest and residue of her estate not thereby already disposed of, she directed that her trustees should divide the

(a.) Reported by H. C. Roper, Esq., Barrister-at-Law.

sum into three equal parts, and should pay one such third part to the Bishop of Cape Town for certain charitable objects, and another to the Bishop of Lahore for similar purposes, and the other to the Society for the Propagation of the Gospel in Foreign Parts and the Additional Curates' Aid Society. And she directed "that the foregoing charitable legacies shall be paid exclusively out of such part of my pure personal estate as is legally applicable for that purpose."

By the chief clerk's certificate it appeared that the estate consisted of cash and other pure personalty, money invested on mortgage or otherwise connected with land, and freehold property at Cape Town, which, according to the law of Cape Colony, passed by the will, and could be given by will for charitable purposes.

The testatrix had no real estate in this country.

It was stated that the Cape Town property would not be more than enough to pay the legacies.

Horace Smith, Q.C., and *Fellows*, for the trustees of the will.

Martin, Q.C., and *C. Williams*, for the next of kin and heir-at-law.—The debts and administration expenses ought to be paid rateably out of the real estate (after paying the legacies), the impure personalty, and the pure personalty, and then the residue of the pure personalty will go to the charities. It is only a gift of the residue, and there is no direction to marshall the assets in favour of the charities: *Beaumont* v. *Oliveira*, 17 W. R. 41, 269, L. R. 4 Ch. 309.

Stock, for the Society for the Propagation of the Gospel and the Additional Curates' Aid Society.—The testatrix directs that the residue is to consist entirely of pure personalty; that is equivalent to a direction to marshall: *Wills* v. *Bourne*, L. R. 16 Eq. 487.

Dacinous Sturges, for the Bishop of Cape Town.—The word "exclusively" shows that the testatrix meant the whole of the pure personalty to be reserved for the charities: Jarman on Wills, 4th ed., p. 236; *Miles* v. *Harrison*, 22 W. R. 441, L. R. 9 Ch. 316. The land at Cape Town is not affected by the Mortmain Acts, and the surplus of it, after paying legacies, should be given to the charities also.

Martin, Q.C., in reply.—The land at Cape Town was the only real estate she had, and it is not pure personalty. There is nothing in the will to take it out of the general rule: *Llewellyn* v. *Rose*, 17 W. R. 984, W. N. 1869, p. 178; *Lewis* v. *Boetefeur*, 38 L. T. N. S. 93, 26 W. R. Dig. 4, W. N., 1879, p. 11.

Kay, J.—The question I have to decide is the question of the construction of this will. No doubt there is a rule of law that, although the courts of equity favour charities, as it is said, yet they will not marshall the assets so as to make a charitable bequest payable out of pure personalty unless there is a direction in the will that it should be done. Of course the testator may direct what he pleases in his will, and the proper way to deal with the will upon which a question of this kind arises is first of all to construe the will, without referring to rule of law, and see what it means, and then apply to it the rule of law. Now in this case I have the case of a testatrix who died having three kinds of property. One was what we should call real estate, that is, land situate in Cape Town; she had no freehold or leasehold property situate in England. Another species of her property was personalty in England, which was not of real estate, and therefore could not be validly given for charitable purposes in England; and the third description of her property was pure personal estate, which could be given for charitable purposes in England. Having these three kinds of property at her death, and intended at the date of her will, she makes her will in this form, reading it shortly:—[His lordship referred to the will, and continued:—] Now there were no charitable legacies properly so called; the only thing given to charity was the residue. Therefore these last words really come to this:—"I direct that the residue which I have given to charities shall be paid exclusively out of my pure personal estate." Now what is the difference between those words and if she had said, "I direct that the residue which I have given to charities shall consist exclusively of pure personal estate." I see no difference at all. How can you give any meaning whatever to these words, that the charitable legacies shall be paid exclusively out of the pure personal estate, without attributing to them this meaning—that the residue which I have given in charity shall consist exclusively of pure personal estate? The words seem to me to have that meaning, and only that meaning, and it is quite impossible to my mind to give them any other meaning. But then if the testatrix had said: "I give my residue to charity, and I direct that the residue shall consist exclusively of pure personal estate," that means, "You shall discharge all other liabilities out of my estate which is not pure personalty as far as that will go in the first instance, and shall reserve my pure personal estate as far as you can to pay it to these charities"; and that seems to be, on the face of the will, without regarding any authority in the matter, as plain a direction to marshall to that extent and in that sense as could be given. I read the will as meaning this: "I give all my real and personal estate in a mixed fund to my executors to convert; I direct that certain legacies shall be paid out of it; and then I direct that, after all the previous purposes of my will have been satisfied, the pure personalty shall be reserved, so far as it can be, and be given as residue to the charities."

There is another point in the will, which is this. As I have said, after giving legacies which are not legacies to charities, she directs expressly that those legacies shall, in the first instance, "be chargeable upon and payable out of the proceeds of the sale of my real and leasehold estate (if any)." The only real and leasehold estate she had at the date of her will or at her death was certain property in Cape Town, and again, without regarding any rule of law, I must first of all construe the will. Is that, or is it not, a direction that these legacies shall be payable first of all out of the proceeds of the Cape Town property? It seems to me as a matter of construction that it is impossible to read it in any other way. It is said, "Oh, but she might have had real estate in England at her death, and it only applies to real estate in England." How can I arrive at that conclusion? She had not at the date of her will any real estate at all except this real estate in Cape Town. An English testatrix would look upon it as real estate undoubtedly, and, therefore, as a matter of construction I can only arrive at the conclusion that this direction must be obeyed by applying, first of all, what real estate, as we should call it, or leasehold estate (because the direction applies to both) she had in Cape Town in payment of the particular legacies which are, according to this will, to be paid in the first instance out of her real and leasehold estate. That is an imperative direction, but what the consequences may be is a matter with which I have nothing to do.

Now I am to apply to this the rule of law. In the first place I am told there is no law in Cape Town which would prevent the real estate there being applied to charity, but that does not in the least degree interfere with the construction of the will; and this will, as I said, according to its true construction, seems to me to devote the real and leasehold estate in Cape Town to the payment of certain legacies other than charitable legacies, and I gathered that it would not be more than enough to pay those legacies. Therefore it would be exhausted. Then I must deal with the rest of the will. As I have said, I can give no meaning whatever to these last words

except this meaning, that the assets are to be marshalled as far as possible so as to leave the pure personalty to be the "residue" of the estate. What does "residue" mean. "Residue" means what is left after payment of all debts, funeral, testamentary expenses, and legacies. That is the residue. And when she had directed that her residue should consist of pure personalty it involved of necessity a direction that the debts, funeral, testamentary expenses, and other legacies, so far as the Cape Town property should not be sufficient to satisfy them, must be paid in the first instance out of the impure personalty so as to leave the pure personalty free for charities.

Now I am referred to various authorities. They do not exactly, of course, touch the will, but they come so near to it I think as entirely to confirm the mode in which it seems to me to be right to construe this will.

The first case which was cited was the case of *Beaumont* v. *Oliveira*. [His lordship read the headnote to that case, and proceeded :—] There it was held that there was no direction to marshall in favour of the charitable legatees. There was not there a gift of the residue, but the decision was that between the charitable legatees on the one hand, and the funeral and testamentary expenses and debts and the other legacies on the other hand, there was no direction to marshall. That really does not touch the question I have to decide at all, because here I am to give a meaning to these words "that the residue is to consist of pure personalty," which I take to be a short mode of expressing what the testatrix has expressed in this will.

But there are two other cases which touch it very much more nearly. One is the case of *Wills* v. *Bourne*, which came before the Lord Chancellor, Lord Selborne, when he was sitting for the Master of the Rolls. That was a case of an annuity and certain pecuniary legacies, and the testator devised his real estate to trustees to sell, and out of the proceeds of sale to pay all the costs and expenses attending the sale. Then to pay all his debts, funeral and testamentary expenses, and the annuity and legacies so given, and then all the personal estate was given to the said trustees to convert into money, and to pay such debts as the proceeds of sale of his real estate would not extend to pay, and should stand possessed of all residue of the personal estate for charitable purposes. Then there came this direction. That "only such part or parts" of the testator's estate and premises should "be comprised in the residue" thereof and be so divided as might "by law be given for charitable purposes." There you have the very words which seem to me to be involved in the expression here; only such part as was pure personalty should be comprised in the residue, that is, the residue should consist only of such part as was pure personalty, and the Lord Chancellor held that that amounted to a direction to marshall. It is quite true that the words there were more explicit than the words I have got in this case.

There is another case, of *Miles* v. *Harrison*, which follows that in the Court of Appeal, and there the words were different. After giving some small pecuniary and specific legacies, the leasehold estate and the residue of the personal estate was given to trustees in trust to convert into money and to pay the income to his wife so long as she would remain his widow. Then to raise various sums for the purchase of Government annuities, and then other legacies, and then the residue was given thus, "As to all residue and remainder of my personal estate" to charities, "And my will is, and I expressly direct, that the three last-mentioned legacies or bequests" (which were to charities) "shall respectively be paid and satisfied out of such part of my personal estate as can lawfully be applied to the payment thereof, and which shall be reserved by my trustees or trustee for the time being for that purpose." There, again, it was as clear a direction to make the residue consist of pure personalty and to reserve the pure personalty in order to deal with it as residue as could be given, and Lord Cairns accordingly decided that that amounted to a direction to marshall, and James, L.J., the same, and Mellish, L.J., the same, but Mellish, L.J., said this :—"I think the case is really governed by the judgment of Lord Selborne in the case of *Wills* v. *Bourne*, for the will in that case was substantially the same as this will would have been if there had been no direction to reserve. If the direction of the trustees had stopped at the words, 'and I will is, and I expressly direct, that the three last mentioned legacies or bequests shall respectively be paid and satisfied out of such part of my personal estate as can be lawfully applied to the payment thereof,' then that case would have been directly point, and the words which follow seem to me only make the matter still stronger and clearer than it otherwise would have been." It is not necessary to say whether one quite agrees with that or not; it is certainly an expression of opinion on the part of a very great judge that words such as we have in this would be quite sufficient of themselves to amount to a direction to marshall.

Now I have heard nothing at all cited which is in conflict with these cases except a case before Kay, V.C., which was before these last two cases, and according to the reports, this case was not referred to either of the cases before the Lord Chancellor or the Lords Justices. It is the case of *Llewellyn* v. *Jones*, and the only reference I have to it is in the *Weekly Notes* of 1869, page 178. There the bequest was pecuniary legacies to individuals and one charitable legacy, and then all the residue of the estate to charities, and a direction that "the several charitable bequests given by her will should be paid out of such part of her personal estate only by law applicable to bequests of that nature," and there the Vice-Chancellor held that the circumstance of the bequests to the charities being residuary only rendered the direction contained in the will as to the mode of payment nugatory." That is not quite accurate according to the report, because there was one bequest which was not residuary, to the Liverpool Infirmary. But I have only a very short note of it in the *Weekly Notes*, and I certainly cannot think that as an authority which in the least degree impairs the authority of the two cases which I have referred to before Lord Selborne and the Court of Appeal.

Another case was cited, of *Lewis* v. *Bodefear*, which did not follow those two cases, and in which those two cases were cited. That was a case which depended on the construction of the whole will, and all I can say is that was a very different will indeed to that which I have to construe.

Now there can be no sensible meaning given to those words which direct that the residue shall be paid out of the pure personal estate except that the pure personal estate shall be reserved as residue, and, at all events, as a matter of construction, I come to the conclusion that this does amount to a direction to marshall for the benefit of the charitable institutions to which the residue is given; and accordingly the debts, funeral and testamentary expenses, and the costs of the action, and what remains of the pecuniary legacies must be paid out of the impure personalty so far as it will go—as to the legacies, first of all out of the Cape Town property, and the balance out of the impure personalty—leaving, as far as possible, the pure personal estate to constitute the ultimate residue given to charity.

Solicitors, *Ravenscroft, Hills, & Woodward; Lawrance, Baker, & Waldron; Sandilands, Humphreys, Arnold, & Jones; Nicholl, Manisty, & Co.*

Ch. Div.
Kay, J.

Dec. 7, 14.

In re Moore.

Trafford *v.* Maconochie. (*a*.)

Will—Construction—Illegal condition—Limitation—Public policy—Personalty—Annuity "during such time as she may live apart from her husband."

A testator gave all his property to a trustee upon trust, after payment of debts, &c., to pay to M. M., "during such time as she may live apart from her husband, before my son attains the age of twenty-one years, the sum of £2 10s. per week for her maintenance whilst so living apart from her husband," and the will contained a gift of residue. M. M. and her husband were living together, and the property consisted of personalty.

Held, that the provision as to living apart was void, as contra bonos mores; that it was a limitation, and not a condition; and that, therefore, the annuity was void also.

Adjourned summons.

The summons was taken out to decide the question whether a legacy to Mrs. Maconochie of £2 10s. per week during such time only as she might live apart from her husband during the infancy of J. W. Moore was valid or not.

John Moore, by his will of the 2nd of April, 1885, gave all his property to a trustee upon trust after payment of debts, &c., "to pay to my sister, Mary Maconochie, during such time as she may live apart from her husband before my son attains the age of twenty-one years, the sum of £2 10s. per week for her maintenance whilst so living apart from her husband," and the will contained a gift of residue. At the date of the will and down to the testator's death on the 17th of April, 1885, Mr. and Mrs. Maconochie were living together as man and wife, and had always done so since their marriage.

The testator's property consisted entirely of personal estate.

Williamson, for the trustee.

Marten, Q.C., and *Whitehouse*, for Mrs. Maconochie.—The annuity is given on condition that the annuitant should live apart from her husband, and in order to induce her to do so; such a condition is *contra bonos mores*, and is void, but it is a condition precedent, not a limitation, and the gift remains good freed from the condition. The words "apart from her husband" should be struck out: *Brown* v. *Peck*, 1 Eden. 140; *Wren* v. *Bradley*, 2 De G. & Sm. 49; *Egerton* v. *Earl Brownlow*, 4 H. L. Cas. 1; *Bean* v. *Griffiths*, 1 Jur. N. S. 1045, 4 W. R. Dig. 113; *Cartwright* v. *Cartwright*, 3 De G. M. & G. 982; *H.* v. *W.*, 3 K. & J. 382, 6 W. R. Dig. 29; *Hindell* v. *Dwarris*, John. 172, 7 W. R. Dig. 107. Kay, J., referred to *Webb* v. *Grace*, 2 Ph. 701].

Mitchold, for the residuary legatee.—This is a limitation, not a condition, and the whole gift is void: *Nicol* v. *Nicol*, 34 W. R. 283, 31 Ch. D. 524; *Heath* v. *Lewis*, 1 H. L. 314, 3 De G. M. & G. 954; *Cocksedge* v. *Cocksedge*, 14 Sim. 244; on appeal, 5 Hare, 397.

Marten, Q.C., replied.

Cur. adv. vult.

Dec. 14.—Kay, J., referred to the will and continued: Before applying rules of law to a provision of this kind, it is proper to determine, independently of any such rule, what is the construction of this bequest. At the date of it Mary Maconochie had been married for many years, and had never lived apart from her husband, and they have been living together up to the present time. The testator's son is still under the age of twenty-one years. Independently of any rule of law or decided case, the construction of the words which I have read is indisputable. It is a gift of a fixed sum every week during a certain period. To that period there are two limits. It is not to extend, in any case, beyond the joint lives of the husband and wife and the time when the testator's son attains twenty-one, but the payments are only to be made during such part of that period as Mary Maconochie may be living apart from her husband, and for her maintenance whilst so living apart. As matter of construction, it is impossible to hold that any of these payments are given to her while living with her husband. The living apart from the husband is of the essence of the gift in this sense—that it is the measure of the duration of these payments.

It has been argued that it must be treated as a legacy given upon a condition precedent, which, being against the policy of the law, must be rejected, leaving the legacy free from conditions. If it be treated as a gift of an indefinite number of weekly payments of £2 10s., there being a condition attached to each that in the week for which it is payable the legatee should be living apart from her husband, if the condition be rejected it must fail, because the number of payments is undefined. In other words, if it be a gift of so many sums of £2 10s. as there should be weeks in which the legatee was living apart from her husband, then, if you strike out the words, "living apart," &c., there are no means of computing how many such payments should be made.

The duration of these payments is a limitation, not a condition, and to give them any longer or other duration than that prescribed by the will cannot be done by treating them like a legacy of a sum of money given subject to a condition which may be discharged. To treat this gift in that manner would be making an entirely new and essentially different bequest.

It may be said, you do, in effect, make a different bequest when you reject a precedent condition and establish the legacy discharged from it. That is so. It is doing great violence to the will. In cases of real estate the common law of England will not permit such a construction. But this rule adopted from the civil law ought not to be extended. By rejecting a precedent condition upon which a simple legacy of a sum of money is bequeathed, the amount of the legacy is not altered. But in this case the argument requires that an annuity given during one period should be altered into an annuity for another and wholly different period. This is, for the present purpose, the essential difference between a condition and a limitation.

If the gift were during the joint lives of the husband and wife, until the son attained twenty-one, with a condition defeating it if the husband and wife lived together, it might be necessary to reject the condition and maintain the gift, but I think it impossible to construe the will in that way. Suppose it were a legacy of a sum computed by the number of illegal acts committed by the legatee at £2 10s. for each; obviously such a legacy must fail if you reject the mode of computing it.

Then suppose it to be £2 10s. for every week in which the legatee should commit an illegal act; if the limitation be rejected, the computation would be equally impossible; and I am not aware of any rule of construction or rule of law which would justify the court in treating such a gift as a life annuity.

The argument in its most plausible form, is that from the nature of the gift, there are two limits contemplated, and if you take one away the other only is left, and, therefore, in this case the gift should be read as though it were £2 10s. a week during the joint lives of husband and wife until the son attains twenty-one. But what authority is there for thus removing an essential limit.

(a.) Reported by H. C. Roper, Esq., Barrister-at-Law.

There is none, unless it can come under the law as to conditions, or, what is in some cases equivalent, conditional limitations defeating an interest previously given. But before this law can be applied it must be determined as matter of construction whether the gift is of that nature. In my opinion the true construction of this bequest is that it is a limitation of weekly payments during a specified time, and that it is not a legacy subject to a condition either precedent or subsequent. The object of the limitation being obviously to induce the person in whose favour it is made to live apart from her husband, the whole limitation may possibly be void, but, the event not having happened, the trust has not arisen at all.

For this construction it seems to me that there is clear and distinct authority. In *Webb* v. *Grace*, a covenant to pay to a single woman during her life, subject to the proviso after contained, an annuity of £40, provided that if she married the annuity should be reduced to £20, was held to be valid because it was in effect an agreement to pay £40 a year to her during so much of her life as she should remain unmarried, and £20 a year afterwards, and that this was a limitation, not a condition.

In *Heath* v. *Lewis* a gift by will to a woman who had never been married, if she should be unmarried at the death of M., of £2 10s. a month during her life if she should so long remain unmarried, was read "as a limitation as distinguished from a condition," and therefore the payments ceased on her marriage. This gift might have been construed to be a defeasible life annuity more easily than the provision in the will now before me, and, of course, the defeasance would have been void.

In *Evans* v. *Rosser*, 12 W. R. 570, 2 H. & M. 190, the testator gave real and personal estate to his son-in-law during the term of his life or till marriage again, and, after his death or marriage, over. And it was held that this was a limitation till marriage, and not a gift of a life estate defeasible on marriage.

The same construction was applied in the well-known case of *Rochford* v. *Hackman*, 9 Hare, 475, where a limitation in form determining a life estate upon alienation was held to amount to a limitation until alienation and then over—a construction which has been followed in a multitude of cases since that decision.

But it is said that the court is bound by authority to hold that the legatee in this case is entitled to £2 10s. a week whether she lives apart from her husband or not. The authorities cited demand a careful consideration.

Undoubtedly our law in dealing with bequests of personal property has adopted some doctrines of the civil law which seem to me much less satisfactory than the rules of the common law which we apply in the case of devises of real estate. Swinburne, part 4, s. 5, 7th ed., p. 384, states four sorts of impossible conditions, of which the second are "those which be contrary to law or good manners," instancing a gift of £100 to A. B. f he murder such a man or deflower such a woman. In ipart 4, s. 6, he says that where a condition is impossible such condition hindereth not the legatary, but that he may recover the legacy as if such had not been at all expressed. In part 4, s. 6, p. 407, it is stated that when the condition is both impossible and unhonest the disposition is void in disfavour of the testator who added such a condition, whereas, if the condition had been only impossible or unlawful, the disposition had been good, and that in favour of the testament.

Jarman, at p. 12 of vol. 2, 4th ed., states the law adopted from the civil law to be that, where a condition precedent is originally impossible, or is made so by the Act or default of the testator, or is illegal as involving *malum prohibitum*, the bequest is absolute, just as if the condition had been subsequent. But that, where it is illegal as involving *malum in se*, the civil agrees with the common law in holding both gift and condit void.

This law is recognized in Williams on Executors, ed., p. 1174.

In Tothill, p. 141, is a short note of a case *Te* v. *Brale*, November 8, 6 Jac., a devise made to daughter to pay her a sum of money if she w divorced from her husband. The gift made though the condition void.

The doctrine that conditions precedent as w conditions subsequent which are against the po the law are treated as void in cases of legacies of sonal estate, and that the legacy "stands pure simple," is distinctly recognized by Lord Hardwic *Reynish* v. *Martin*, 3 Atk. p. 332. And the borrowed from the civil law were held by the Master of the Rolls to apply to a mixed fund o proceeds of real and personal estate: *Bellairs* v. *Be* 22 W. R. 942, L. R. 18 Eq. 510.

I assume, therefore, that if this is to be treated legacy given upon a precedent condition or defe by a subsequent condition which is bad as ins that which is *malum prohibitum*, the legacy must effect discharged of the condition.

In *Brown* v. *Peck* the testator, noticing in hi that his niece Rebecca had married without the c of her mother, directed that, if she lived with her band, his executors should pay her £2 a month more; but, if she lived from him and with her then they should allow her £5 a month. Lord K Henley held that she was entitled to the monthly ment of £5, "and that the condition annexed, b both impossible at the time of imposing it and *bonos mores*, the legacy was simple and pure." I referred to the registrar's book, and it seems clear the condition was only impossible in the sense everything which is prohibited by law is so in the templation of law. The husband, wife, and seem to have been all three living. It is evid the will was read as a gift of £5 a month to for life upon condition that she did not live w husband, or £5 a month for life cut down to £2 should live with him. Such a condition was agai policy of the law, and was therefore treated as a It appears from the registrar's book that the point not argued, the other parties desiring that the should have the £5 a month.

In *Wren* v. *Bradley* one bequest was to pay to testator's daughter in case she should be living from her husband, A., and should continue so during the lifetime of the testator's wife, an £30; but if she should cohabit with him it should cease during such cohabitation. The husband and wife were living apart at the date of the will, but were living together at the death of the testator, and the Vice-Chancellor, evidently with considerable hesitation held that she was entitled to the gift discharged of the condition. He came to the same conclusion with respect to a direction to pay the interest of one-third of the residue to his said daughter "during such time as she shall continue to live apart from her said husband," but if she cohabited with him the income was to be paid to other persons, and after her death the capital to given over. This latter gift is in the form of a limitation rather than a condition. I must follow the decisions in any case governed by them. But the construction of one set of words is not binding where we are construing a different provision. Because the c in those cases held the words were conditional it does follow that other words are to be so construed. decisions are only binding when the bequest is ne tained to be conditional by independent construct They do not lay down any rule as to what bequests to be so considered. No canon of construction established by either of the cases for this purpose.

I confess that I find it difficult to understand these two decisions. As to *Brown* v. *Peck* the legatee must have been entitled to the gift of £2 a month. That was not affected by any illegality. If the reason given in the short report be good, she should have had the £5 a month as well as the £2. The only mode of preventing this was by treating it as an annuity of £5 a month during the joint lives of the husband and wife cut down to £2 a month if they lived together. I should have had great difficulty in so construing it.

But such a bequest is altogether different from a gift of a weekly payment during a period only defined by the lives living apart from her husband. In that respect the wording of the bequest in this case differs materially from that in *Brown* v. *Peck*.

Here the payments can be made "during such time as she may live apart from her husband," and there is no alternative life annuity or gift for any longer period. In *Brown* v. *Peck* it was, if she lived with her husband, £2 a month, but if she lived from him £5 a month, one either of those payments being intended to last during the joint lives.

In *Wren* v. *Bradley*, however, the gifts more nearly resembled the bequest in the present case, especially the gift of interest of one-third of the residue, which was to be paid "during such time as she should continue to live apart."

The gift of residue was obviously construed as a life interest with a conditional limitation divesting it which should be rejected. With all respect I think this construction doubtful. But, again, the words differ from those in the present case. It was more possible to construe the gift as a defeasible life interest than it would be to put that construction upon the words I have to consider.

In one sense the rule rejecting certain conditions, which is borrowed from the civil law, is a rule of construction. That is, when you find a legacy coupled with a bad condition, the will is to be construed as if the condition was not there. But obviously it must first be ascertained whether there is a conditional legacy, and the construction for this purpose is independent of and must precede the application of the rule.

I hold that the legatee in this case is not entitled to the payment of £2 10s., because those payments are legacies given upon a condition, but are to be made only within certain limits which the court has no power to alter.

Solicitors, *Brownlow & Howe*, for *T. M. J. & A. Hillhouse*, Wolverhampton; *Williamson, Hill, & Co.*, for *Trafford & Cook*, Northwich; *Emmett, Son, & Noble*, for *A. W. Barradale*, Dudley.

Chan. Div. Smith, J. } Dec. 8.

In re Gibbes' Settlement. White *v.* Randolph. (*a*).

Will—Power of appointment—Appointment by testamentary instrument—Subsequent appointment by will—Revocation—Wills Act (7 *Will.* 4 & 1 *Vict. c.* 26), *s.* 27.

Under a marriage settlement £1,000 was settled upon trust for such persons as G. should by will or codicil, or any writing in the nature thereof, appoint. G. executed a document which he called a testamentary appointment, and thereby, in pursuance of his power of appointment under the settlement, he appointed the £1,000, subject to the payment of his debts, funeral and testamentary expenses, whether of his testamentary appointment or of any will or codicil affecting his general property, unto his four sons. G. afterwards by will, after making various specific bequests to his four sons and three daughters, gave, devised, and bequeathed all the rest, residue, and remainder of his estate and effects whatsoever and wheresoever unto all his children equally. Probate was granted of the will, but not of the testamentary appointment.

Held, that, by virtue of the 27th section of the Wills Act, the gift in the will operated as a revocation of the prior testamentary appointment, and as an execution of the power of appointment given by the marriage settlement.

Adjourned summons.

By a settlement dated the 27th of October, 1834, and made on the marriage of the Rev. Heneage Gibbes and Margaretta Gibbes his wife, the sum of £1,000 was settled upon trust, after the death of the husband and wife, for such person or persons and in such shares, manner, and form "as the said Heneage Gibbes at any time of times hereafter by his last will and testament in writing, or any codicil thereto, or any writing in the nature thereof respectively to be signed and published by him in the presence of one or more credible witness or witnesses shall direct or appoint, give or bequeath, the same."

On the 20th of June, 1883, Heneage Gibbes executed a testamentary appointment, and thereby, in pursuance of the power given him by the settlement, appointed, "the sum of £1,000 over which I have a power of appointment by the said settlement, after payment of all my just debts, funeral and testamentary expenses, whether of this testamentary appointment or of any will or codicil affecting my general property, unto my four sons in equal shares and proportions as tenants in common, and not as joint tenants. And I appoint George Graham White, of Launceston, in the county of Cornwall, gentleman, executor of this testamentary appointment."

On the 20th of July, 1883, Heneage Gibbes made a will, and thereby, after making various specific gifts of plate and furniture to his four sons and three daughters, proceeded, "all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, I give, devise, and bequeath unto all my children equally as tenants in common. I appoint George Graham White, of Launceston, in the county of Cornwall, gentleman, executor of this my will."

On the same day he also made a codicil to his will, and thereby provided, "In case any creditor or assignee of my son Heneage Gibbes, or any person claiming or being entitled to claim any property or effects given by my said will to my son Heneage over and above the sum of £300 referred to in the testamentary appointment of my late wife in favour of my said sons, such property or effects I give unto my son George Edward absolutely."

The testator died in 1887, his wife having predeceased him, and his will and codicil were proved by George Graham White, but probate of the testamentary appointment of the 20th of June, 1883, was refused.

This was a summons by George Graham White, as plaintiff, against the surviving trustee of the marriage settlement and two of the testator's sons, as defendants, asking for a declaration that the plaintiff, as executor of the will, was entitled to the sum of £1,000 comprised in the marriage settlement, over which the testator has a general power of appointment given by the settlement.

The question to be decided was whether the testamentary appointment of the 20th of June, 1883, had been revoked by the will of the 20th of July, 1883, by virtue of the Wills Act, s. 27.

Section 27 of the Wills Act enacts that "a bequest of the personal estate of the testator, or any bequest of

(*a*) Reported by J. Trustram, Esq., Barrister-at-Law.

personal property described in a general manner, shall be construed to include any personal estate or any personal estate to which such description shall extend (as the case may be), which he shall have power to appoint in any manner he may think propor, and shall operate as an execution of such power, unless a contrary intention shall appear by the will."

Cookson, Q.C., and *Vernon Smith*, for the summons.—The plaintiff is entitled to the £1,000 comprised in the settlement, because the testamentary appointment of the 20th of June, 1883, is, by virtue of the 27th section of the Wills Act, revoked by the will of the 20th of July, as no contrary intention appears by the will.

They referred to the Wills Act, s. 27.

J. Henderson, for the defendants.—The testamentary appointment is not revoked by the will, which does not expressly revoke it: *Pomfret* v. *Perring*, 3 W. R. 81, 5 De G. M. & G. 775; *Palmer* v. *Newell*, 3 W. R 333, 20 Beav. 32. They were intended to operate together; and the executors might have applied to the Probate Division to allow proof of both.

They referred to *In the Goods of Fenwick*, L. R. 1 P. & D. 319, 15 W. R. Prob. Dig. 16; *Inglefield* v. *Coghlan*, 2 Coll. 247.

Cookson, Q.C., replied.

NORTH, J.—I think that the testamentary appointment of the 20th of June, 1883, and the will of the 20th of July, 1883, were meant to operate together. I think that what the testator intended was that by the former he should exercise his power of appointment, and that by the latter he should dispose of his property not included in the appointment. The provisions of the codicil confirm this view. I do not believe the codicil was intended to apply only to the instrument of the 20th of July. In the case, however, of *In re Jones, Greene* v. *Gordon*, 35 W. R. 74, 34 Ch. D. 65, Kay, J., says:—"I think that this case is covered by the Act. As I read the statute it is useless to speculate about the intention of the testatrix. The court may have a strong suspicion that the testatrix did not intend to exercise what is called a general power of appointment, and that if she had been told that she had done so she would have been very much surprised to hear it. But the statute renders any such speculation fruitless." The question is really as to the second instrument as it stands.

It is a pity that the application to allow proof of both instruments was not made to the Probate Division, as this would have removed all question as against the trustee of the settlement. But for some reason or other the parties have not taken that course. The question is as to the strict legal rights under the will. [His lordship read the will as set out above, and continued:—] I should have thought that in itself was sufficient to show the testator's meaning, without any other instrument, and meant, "I give, devise, and bequeath everything I have not hereinbefore disposed of," and that would be sufficient to operate as an execution of the general power of appointment if the testamentary appointment had never existed. Does the testamentary appointment, not referred to in the will, alter the matter? In my opinion it does not, because the Wills Act itself shows what a contrary intention is, and the mode in which it is to be shown. Section 27 says a general bequest is to operate as an execution of a general power over personal estate, "unless a contrary intention shall appear by the will." Now I think that the will referred to there is the instrument in which the general bequest is contained, and therefore I cannot look beyond that document to find a contrary intention. The contrary intention must be found within the four corners of the will itself—or, of course, I might look at the subsequent codicil. I do not find it there.

Under these circumstances I come to the conclusion that the will operated as an execution of the power of appointment, and a revocation of the previous appointment, and that probate of the testamentary appointment need not be taken out.

Solicitors, *G. H. Carthew; Dawes & Sons.*

Chan. Div. North, J. — Dec. 3

KINGDON v. KIRK. (a.)

Specific performance—Non-appearance of defendant—Default in completion—Declaration that vendor entitled to forfeit deposit—Costs.

In a vendor's action to enforce a contract to purchase real estate, the plaintiff, by his statement of claim claimed specific performance, or, in the alternative, a declaration that the plaintiff was entitled to forfeit the deposit and resell the property.

The purchaser had accepted the title, but had failed to complete on the day fixed for completion. There was a condition empowering the vendor to forfeit the deposit and resell the property in case the purchaser failed to comply with any of the conditions of sale. The defendant had not appeared to the writ.

Held, that, if, in such a case, the writ had claimed such an alternative declaration as was asked by the statement of claim, the declaration might be made.

But held, that the order should direct the plaintiff to pay the costs of the action.

Motion for judgment.

This was an action by a vendor for the specific performance of an agreement to purchase real estate. The purchaser had paid a deposit. By one of the conditions of sale the vendor was empowered, in case the purchaser should fail to comply with any of the conditions, to forfeit the deposit, and to resell the property. The purchaser accepted the title, but failed to complete at the time fixed by the agreement. By his statement of claim the plaintiff claimed specific performance of the agreement, or, in the alternative, a declaration that the plaintiff was entitled to forfeit the deposit and to resell the property in accordance with the conditions. The defendant had not appeared to the writ, and the statement of claim had been delivered by filing it.

The action now came on on motion for judgment.

Levett, for the plaintiff.—I ask for a declaration according to the second alternative of the statement of claim. No doubt in *Stone* v. *Smith*, 35 W. R. 545, 34 Ch. D. 188, Kekewich, J., refused to give similar relief, but in that case the statement of claim had only asked for specific performance.

The defendant did not appear.

NORTH, J.—I will make the declaration asked for. The declaration is, however, in the nature of a luxury for which the plaintiff ought to pay, and the plaintiff must, therefore, pay the costs of the action, and it should appear on the face of the order that it is made on the terms of his doing so.

On its being subsequently discovered that the writ had only claimed specific performance, NORTH, J., following *Gee* v. *Bell*, 35 W. R. 805, 35 Ch. D. 160, said that as the defendant had not appeared, the plaintiff could only have judgment for specific performance.

Solicitors, *Warren, Gardner, & Murton.*

(a.) Reported by G. E. JEFFERY, Esq., Barrister-at-Law.

Chan. Div.
Kekewich, J.

Jan. 16, 17.

KERFORD v. SEACOMBE, HOYLAKE, &c., RAILWAY CO. (a.)

Railway company—Notice to treat—Part of a house—Lands Clauses Consolidation Act, 1845, s. 92.

The plaintiff was the owner of a piece of land, fronting a private road, whereon he had built for himself a dwelling-house. He afterwards bought some land fronting the same road on the other side, immediately opposite his dwelling-house, and built stables, coachhouse, and greenhouses as part thereof, and laid out the rest as a garden, all of which he used together with and as part of his residence. A railway company gave notice to treat for the piece of land whereon the stables, &c., were situate.

Held, that they could not be compelled under section 92 of the Lands Clauses Act, 1845, to take the dwelling-house also.

Trial of action.

This was the hearing of an action brought by a landowner against a railway company who had given notice to treat for a part of some land belonging to the plaintiff, to compel the company to take the whole of such land, and the question was as to the construction to be put upon the words "part of any house" in section 92 of the Lands Clauses Consolidation Act, 1845. In 1853 the plaintiff bought a piece of land at New Brighton, in the county of Chester, adjacent to the north side of a private road known as Alexandra-road, and built thereon a dwelling-house called Buena Vista. In 1864 he bought a piece of land on the south side of the said road, immediately opposite his dwelling-house, and erected thereon stables, coachhouse, coachman's and gardener's cottages, and greenhouses, which he used together with his dwelling-house. On the 25th of January, 1887, the defendant company, under their statutory powers, served on the plaintiff the usual notice to treat for the purchase of the land lying on the south side of the road. On the 17th of February, 1887, the plaintiff served on the defendant company a counter-notice stating that he would not sell the land lying on the south side of the road unless the company would also take the whole of the land occupied by the plaintiff, including the said dwelling-house. This the company declined to do, and began to take steps to obtain possession of the land comprised in the notice to treat only. The plaintiff thereupon commenced this action, claiming (1) a declaration that the defendants are not entitled to take the property included in their notice to treat without taking the remaining part of the property called Buena Vista; (2) an injunction to restrain the defendants from taking any proceedings to assess the compensation payable to the plaintiff in respect of the land comprised in their notice to treat only, and from entering upon or taking any other proceeding to obtain possession of the said land. The statement of claim alleged that the buildings on the land comprised in the notice to treat were appurtenant to the dwelling-house and essential to the occupation and enjoyment thereof. This allegation was denied by the defendants. It appeared from the evidence that the plaintiff was liable under a covenant for the repair of half of the private road.

Warmington, Q.C., and *Chadwyck Healey*, for the plaintiff.—The stables, coachhouse, cottages, and greenhouse are part of the curtilage of, and appendant to, the dwelling-house, and so form part thereof within the meaning of section 92 of the Lands Clauses Act: *Sparrow* v. *Oxford, &c., Railway Co.*, 2 De G. M. & G. 94. *Spackman* v. *Great Western Railway Co.*, 1 Jur. N. S. 790, 4 W. R. Dig. 83, shows that the intervention of the road makes no difference.

They also referred to *Grosvenor* v. *Hampstead Junction Railway Co.*, 5 W. R. 812, 1 De G. & J. 446; *Cole* v. *West End of London Railway Co.*, 28 L. J. Ch. 767, 8 W. R. Dig. 66; *King* v. *Wycombe Railway Co.*, 29 L. J. Ch. 462, 8 W. R. Dig. 66; *Hewson* v. *London, and South-Western Railway Co.*, 8 W. R. 467; *Salter* v. *Metropolitan District Railway Co.*, L. R. 9 Eq. 432, 18 W. R. Ch. Dig. 117; *Richards* v. *Swansea, &c., Co.*, 26 W. R. 764, 9 Ch. D. 425; *Barnes* v. *Southsea Railway Co.*, 32 W. R. 976, 27 Ch. D. 536. [KEKEWICH, J., referred to *Marson* v. *London, Chatham, and Dover Railway Co.*, L. R. 6 Eq. 101, 16 W. R. Dig. 80; *Pulling* v. *London, Chatham, and Dover Railway Co.*, 12 W. R. 770, 969.]

Barber, Q.C., and *R. Neville*, for the defendants.—This case is governed by *Steele* v. *Midland Railway Co.*, 14 W. R. 367, L. R. 1 Ch. 275, and *Fergusson* v. *London, Brighton, and South Coast Railway Co.*, 11 W. R. 1088, 3 De G. J. & S. 653. The ground comprised in the notice to treat is not a curtilage, and would not pass by a devise of the dwelling-house.

They also referred to *Smith* v. *Martin*, 2 Wms. Saund. 401a; *Hearn* v. *Allen*, Cro. Car. 57; *Treadwell* v. *London and South-Western Railway Co.*, W. N., 1884, p. 233; Sheppard's Touchstone, p. 94 (ed. 1820).

Warmington, in reply.—It is not necessary that the part taken should be actually continuous with the rest or acquired at the same time: *Governors of the Hospital of St. Thomas* v. *Charing Cross Railway Co.*, 9 W. R. 411, 1 J. & H. 400.

KEKEWICH, J.—It is to my mind somewhat strange that in the year 1888 I should not only be called upon to decide a question of difficulty on the application of the 92nd section of the Lands Clauses Consolidation Act, but that I should be told, and told with truth, that it is a novel question. For I long period of my professional life I was familiar with the many cases, some reported and some not reported, some fought and some not fought, which arose on the 92nd section, and I well remember how we rested our case in *Pulling* v. *London Chatham, and Dover Railway* on the decision of the Court of Appeal in *Fergusson's case*, and ultimately succeeded. But so it is, that for some reason or other, because, perhaps, for the reason suggested in argument, there has been a cessation of hostilities or a comparative cessation of hostilities on the construction of this section, either the profession has been satisfied with the conclusions or for some other reason; but there have not been cases of recent years, with very few exceptions.

Now it would be equally useless and impertinent for me to say, or even to consider, what my judgment would be if this question were *res integra*. It is not. I am bound, of course, by the authorities which have, so far as they have decided the question, settled the law, but I may venture to say this, that if I were entirely at liberty to follow the bent of my own opinion, I should be disposed to follow the more liberal construction indicated by Knight-Bruce, L.J., a construction which is expressed, I observe, by Wood, V.C., in giving judgment in the case of *Steele* v. *Midland Railway Co.* I am not sure that what he there says about Knight-Bruce, L.J.'s view is to be found in any report of any case—at any rate, I am not aware of any at the present moment. But on p. 279, L. R. 1 Ch. App., Wood, V.C., there referring to the view taken by Knight-Bruce, L.J., says:—"Everything which is necessary for the convenience and comfortable occupation of a house is to be included by a liberal construction of the Act as part of that which is protected by the 92nd section." But there has not been adopted so liberal a construction, and I must, as far as I can, ascertain what is the proper construction of the section.

(a.) Reported by P. F. WHEELER, Esq., Barrister-at-Law.

Now the section is the 92nd section, which must be read, I think, in order to ascertain its meaning—that is to say, in order to ascertain the policy of the Legislature in connection with the 23rd section, which has itself led to some little litigation. The Legislature is dealing, in the 92nd section, with land that is built upon, and it divides land that is built upon into three parts. It is land consisting of a house, or land consisting of other buildings, not being houses, whatever houses may mean, or, thirdly, they may be manufactories; and in the 93rd section the Legislature deals with land which is not situate in a town or built upon (it seems to assume that land in a town will be built upon)—that is to say, land in the country, rural land; and it provides that, when land of that character is intersected so as to leave only less than half an acre on either side of the railway, then the landowner shall not be obliged to remain the owner of so small a part, but the company shall be bound to take the whole. That was a provision for the benefit of the landowner, and in the 92nd section there is another provision for the benefit of landowners applied to those other classes of properties. That it was intended for the benefit of landowners is evident on the face of the Act of Parliament, and was expressed by Knight-Bruce, L.J., in what I think may be called the leading case as regards the word "house"—namely, the case of *Grosvenor* v. *The Hampstead Junction Railway Co.* On page 452 he says: "I thought that all such questions"—that was, whether "house" was to have a limited meaning—"had been set at rest, and, for the sake of general convenience and for the sake of ordinary justice to private proprietors, it had been considered right to read the word 'house' different from the ordinary legal sense and different from that which is contained in a conveyance, and as against the railway company." There it was held that the word "house" was to be construed in its ordinary legal sense, or, as Turner, L.J., put it—and it is important to observe his words—"I take, therefore, the question to be, What would pass under a conveyance of the house?" There the judges decided against the railway company that that was the proper construction. It is now urged from a different point of view.

It was urged in three other cases, to which I will call attention, that restricting the meaning of the word "house" to what it would mean in a conveyance is in favour of the railway company and not against it. Now I am asked, or I am invited rather, to hold that this piece of land (it is quite unnecessary for me to refer to the plan for a description of it) on the south side of the road—public or private is immaterial for this purpose—is not part of the house, because it is detached from the house, and it is said that a piece of land detached from a house will not pass as part of the house, whether it be garden or stables, or, as Mr. Warmington suggested in reply, a coal-shed or anything of that kind. I am not prepared to express any opinion on that point. I do not think it is necessary to the case, and I think that that is a question which may well be properly left open for consideration until it is necessary to decide it. In saying that I embrace both the cases where there is physical connection by means of a bridge, a tunnel, or level crossing, or where the physical connection is wanting, I can well conceive cases where detached property might pass as part of the house on the strictest interpretation of a conveyance, but I do not intend to decide that in this case.

Now I turn to the three decisions of *Fergusson* v. *The Brighton Railway Co.*, in 1863, *Pulling* v. *The London, Chatham, and Dover Railway Co.*, in 1864, and *Steele* v. *The Midland Railway Co.*, in 1867, all decisions of the Court of Appeal and all decisions in which Knight-Bruce, L.J., at any rate did not concur with his colleague, Turner, L.J., but where, nevertheless, the decisions of the Court of Appeal were consistently in one direction, and must be taken to be expressed in [illegible] judgment of Turner, L.J. In the course of those [illegible] I observe that Turner, L.J., distinctly states that Kn[illegible] Bruce, L.J., did not agree with him. He says, in [illegible] judgment, "Unfortunately I and my learned br[illegible] differ in our judgment upon the point." Knight-Br[illegible] L.J., according to his habit, which many of m[illegible] familiar with, did not say he differed, but [illegible] intimated a doubt. He followed the same course in [illegible] other two cases, but, as regards them, I do not find [illegible] definite intimation by Turner, L.J., that Knight-Br[illegible] L.J., differed from him. But whatever Knight-Br[illegible] L.J.'s opinion was, whether it was a distinct differ[illegible] only not expressed because he deferred to his colle[illegible] or knowing that, whatever his opinion was, he coul[illegible] alter the decision, there being then only two jud[illegible] the Court of Appeal and Turner, L.J., being for [illegible] ing the decision of the court below—whatever may [illegible] been his real opinion, the decision is the decision of [illegible] Court of Appeal, and is the decision of Turner, [illegible] and what it comes to is this—it expressed, [illegible] different language, over and over again what he [illegible] said in the case of *Grosvenor* v. *The Hampstead Ju[illegible] Railway Co.*, upon which I have already said a [illegible] words. He holds that the question under the [illegible] Clauses Act is that, when you come to consider [illegible] a particular building is a part of a house so th[illegible] railway company can be prevented, under the [illegible] Clauses Act, from taking the piece of land [illegible] taking the whole house, whatever is properly de[illegible] by that, you must ask yourself what would pass by [illegible] word "house."

Now in some of the cases the question is, [illegible] would pass by a devise or conveyance? and [illegible] has been taken in the argument to that alternative [illegible] of stating the proposition. I think the exceptions [illegible] have been omitted, and for this reason. The que[illegible] not what would pass by a house in a devise [illegible] regard to the rest of the will, but what would pa[illegible] house either by a devise or conveyance of the house [illegible] that is to say, construing that part of the will by [illegible] because one never does construe one part of a w[illegible] itself independently of the other. But that is [illegible] meaning of the proposition in that way—devise or [illegible] veyance. You must not have appurtenances. You [illegible] not have any such words as "in my occupation," or [illegible] such words as a reference to a conveyance—"con[illegible] by such and such a deed," or any such words as "k[illegible] or called by" or anything of that kind. The qu[illegible] must be, What would pass by a conveyance of, as [illegible] case, "my house" or "the house, Buena Vista"? [illegible] this land here would pass by such a description, [illegible] in a devise standing alone or by a conveyance, then [illegible] garden would pass—this garden, stables, and so on; [illegible] if that would not pass then the company are not co[illegible] pellable to take the residue, when they take the g[illegible] and stables, as part of the garden and stables. Now [illegible] my mind, looking at it from a conveyancer's poi[illegible] view, and that is the point of view to regard it fro[illegible] think this garden and other property would not pa[illegible] part of the house. Putting myself in the position [illegible] conveyancer advising on the title, I should say I h[illegible] a conveyance of the house some time after 1864, w[illegible] the larger part of the property was conveyed to [illegible] Kerford, and if I find a conveyance of the house, or [illegible] house, "Buena Vista," I should say that passes the [illegible] dence, and does not pass the garden and stables on [illegible] other side of the road. It is not necessary to refe[illegible] any length to the deeds that were put in, and not s[illegible] to the mortgage, which was a mere contract between [illegible] Kerford and some person who was willing to lend [illegible] money, to show what property should be included in [illegible] mortgage. It includes these properties and some o[illegible] properties. It is not necessary to look to see how [illegible] property is referred to; there is nothing there to [illegible]

...ion. The northern part of the property is where the ...idence is built, and where another residence is also ...t, and that was purchased in the year 1853 by Mr. ...rd. There was no house then built, and I see ...ing really in the conveyance at all to help one. It ...ld be quite immaterial whether he contemplated ...asing the other property if he could get it, but ...e is no reference to it at all, and, in fact, I ...er from the conveyance that the southern prop... belonged to other persons, and therefore, one ...ld not expect any reference the one to the other.

The only thing which I will mention is this reference ... a private road. To my mind it is not necessary to ...ate that at any length, but I stopped Mr. Neville on ...t part of the case because that is confessedly not a ...ivate road in the sense of a road belonging to the ...operty on the northern side of it only, so that it is pri... in the sense of really being in the same ownership. ...can only be a private road in the sense of not being ...dicated to the public, but being open to the use and ...joyment of those persons whose houses front on it. I ...not see really, regarding it as a private road, how it ...be of any use to one side or the other. The con...ance in 1864 of the southern part obviously con...plates the erection on the southern property of the ...dge, cottage, stables, coachhouse, and other offices ...r buildings to be used or occupied with the present ...elling-house of him, the said Geo. Briscoe Kerford." ...That is what he intends, and the conveyance provided ...that and that only shall be erected on the piece of land ...he bought. Now from that time forward I have no ...doubt that it has been so occupied with stables, garden, ...and so on, which are a very convenient adjunct to his ...house. I do not consider it to be any advantage, from ...my point of view, to investigate narrowly whether any ...one in the neighbourhood has stables or gardens or ...ild houses and so forth. I have no doubt that these ...convenient adjuncts to the house, and if it were a ...question of comfortable enjoyment I have no ...that that the property has been held comfortably and ...veniently with the house; that it has been intended ...be so used ever since 1864, and, there being nothing ...show the contrary, that it is intended to be used now ...in the future. But to my mind that does not con...ate the case. According to the authorities the ques...n is whether the garden and so forth would pass by a ...nveyance of the house. On that ground, and on that ...ound only, and considering myself bound by the ...ecisions of the Court of Appeal, I hold that the plain...f has no right to call upon the defendants to purchase ...residence because they have taken the whole or some ...—I understand they have really taken the whole—...the property on the south side of the road which has ...been used as stables, garden, and coachhouse. My ...gment would be the same whether they had taken ...whole or any part. The case has been argued on ...footing, and, treating it in the way which I have ...med, I must give judgment for the defendants, ...of course, they will have the costs of the action.

...licitors for the plaintiff, *Wynne, Holme, & Wynne*, ...*Simpson & North*, Liverpool.

...licitors for the defendants, *Gill, Archer, & Maple*, ...Liverpool.

Court of Appeal.

From Chan. Div. March 21.

Licensed Victuallers' Newspaper Co. v. Bingham. (a.)

Copyright—Trade name—Title of newspaper—Exclusive right acquired by reputation and acceptance—Question of fact—Copyright Acts (6 & 7 *Will.* 4, *c.* 76; 5 & 6 *Vict. c.* 45).

No copyright in the title of a newspaper is acquired by registration of the paper under the Copyright Acts.

An exclusive right to the use of the title of a paper may, however, be acquired at common law by reputation and acceptance, and the existence or non-existence of such reputation and acceptance is a matter of fact to be decided on the evidence.

Appeal from North, J.

The action was for an injunction to restrain the publication by the defendant of a newspaper dealing with racing and matters connected with the licensing trade under the title *Licensed Victuallers' Mirror*, on the ground that the plaintiffs had previously published a newspaper dealing with similar subjects under that title.

The facts, as they appeared from the evidence, were as follows:—

The plaintiffs' paper was first published on Friday, February 3, 1888, and on February 4 it was registered at Stationers' Hall under the Copyright Acts, on which day an advertisement, containing an announcement of the publication and the name of the paper, was sent to another paper called the *Sporting Life*; this advertisement appeared in the *Sporting Life* of Monday, February 6. The plaintiffs had previously advertised the fact that they intended to bring out a new sporting paper, but they did not advertise the title they intended to give it until the date mentioned. The plaintiffs had found some difficulty in getting a new title, as the defendant had previously published no less than twenty-five papers, each of which was an exact copy of the other, except that each had for its title a different word in connection with the words "Licensed Victuallers"—*e.g.*, *Licensed Victuallers' Chronicle*, *Licensed Victuallers' Herald*, &c., &c. The defendant, however, had not previously hit upon the title *Licensed Victuallers' Mirror*. On February 6, however, the same day on which the plaintiffs' advertisement appeared in the *Sporting Life*, the defendant published a paper also called the *Licensed Victuallers' Mirror*. It appeared that there had been only five copies of the plaintiffs' paper sold on February 3, the day of its first publication, and ten copies on February 4, but that on February 17 as many as 1,900 copies were sold. The plaintiffs, after issuing the writ in the action, applied for an interlocutory injunction. North, J., refused the application, on the ground that there was no sufficient evidence to show that the plaintiffs had established a reputation in the market entitling them to such an injunction.

The plaintiffs appealed.

Everitt, Q.C., and *St. John Clerke*, for the appellants.—The case of a newspaper published with a particular title is peculiar. The right we claim is not that of a trade-mark; nor is it copyright in the strict sense. But in a newspaper, from the subject-matter of the case, the right is one necessarily identified with the title under which the paper is published. The proprietor of a newspaper has a right to prevent any other person adopting the same name for any other similar publication and this right is a chattel interest: *Kelly* v. *Hutton*, 16 W. R. 1182, L. R. 3 Ch. App. 703; *Maxwell* v. *Hogg*, 15 W. R.

(a.) Reported by M. J. Blake, Esq., Barrister-at-Law.

467, L. R. 2 Ch. App. 307; *Weldon* v. *Dicks*, 27 W. R. 639, 10 Ch. D. 247. [LINDLEY, L.J.—Was not *Weldon* v. *Dicks* disapproved of in *Dicks* v. *Yates*, 18 Ch. D. 76, 29 W. R. Dig. 57? The Lord Justice also referred to *Lawson* v. *The Bank of London*, 4 W. R. 481, 18 C. B. 84].

Cozens-Hardy, Q.C., and *Edward Martin*, the for respondent, were not called upon.

COTTON, L.J.—This is an appeal from an order of North, J., refusing an injunction to restrain the defendant publishing a newspaper called the *Licensed Victuallers' Mirror* at the suit of the plaintiff company, who are the publishers of a paper with the same title. Now the principle on which an injunction is granted in such cases is that, by reputation or otherwise, the plaintiff has acquired an exclusive right to use the name in question, not merely that he has the right to use it. Have the present plaintiffs established any such exclusive right? The plaintiffs say that they registered their paper under the Copyright Acts on Saturday, February 4, but they admit that the registration under the Copyright Acts does not give them the right to the use of this name. They say, however, that they sold five copies of their paper on Friday, February 3, the day of the first publication, and ten copies on Saturday, February 4; but in my opinion such small sale of their paper before the 6th of February, when the defendant commenced selling his paper, cannot be sufficient to get the plaintiffs by reputation the exclusive right to the use of the name. The larger sale of the plaintiffs' paper subsequently is immaterial; the question is whether, when the defendant first began to use the name on the 6th of February, the plaintiffs had got the exclusive right to it. If the plaintiffs had not then got the exclusive right to use that name, the defendant has an equal right to use it. In my opinion the decision of North, J., is right, and is based on the right grounds.

LINDLEY, L.J.—I am of the same opinion. The plaintiffs must make out that they have either an exclusive right to the use of the name in question in connection with their paper or have copyright in the name. As to copyright, I am of opinion the Copyright Acts will not help them in any way. The case of *Weldon* v. *Dicks*, before Malins, V.C., cannot, I think, be now considered to be correct law, as the registration of the title of a book does not give any exclusive right to the use of the title. If the Copyright Acts fail the plaintiffs, they must fall back on common law principles—that is, they must establish such reputation as the court can recognize as a fact. Have the plaintiffs got such reputation? That is a matter of fact to be decided on the evidence, and in my opinion the plaintiffs, who first published their paper on February 3, had not by February 6 acquired such a reputation in the title as to give them at common law an exclusive right to the use of it.

This matter is one of very great importance, for it seems to me there is a flaw in this respect in the Copyright Acts. In a newspaper the name is all important commercially—the goodwill of the name is all important. The value of the *Times*, for instance, depends on its name; the copyright is of no value. The *Times*, of course, is safe enough. But, as the law stands at present, I am sorry to say, if anyone starts a newspaper under a new name, any other person can adopt the same name the next day. That is the law.

BOWEN, L.J.—I am of the same opinion. I also think that there is no copyright in the name of a newspaper, even if registered under the Copyright Acts. The only question that remains for consideration, therefore, is whether an exclusive right to the title had been acquired by the plaintiffs at the time when the defendant published his paper. This exclusive r must be acquired by reputation, and in the case newspaper by sale. The true principle is laid dow Lord Westbury in the well-known "Anatolia" liqu case, *McAndrew* v. *Bassett*, 12 W. R. 777, 4 De G. 380, and is cited by Cairns, L.J., in *Maxwell* v. " "Property in the word for all purposes cannot exist; property in that word, as applied by way of s upon a particular vendible article, as a stick of liqu does exist the moment the article goes into the m so stamped and there obtains acceptance and reputa whereby the stamp gets currency as an indicati superior quality or of some other circumstance w render the articles so stamped acceptable to the publ *Mutatis mutandis* that *dictum* applies to the case newspaper acquiring a reputation in the market. proprietor of a newspaper does not acquire an exc right to the use of its name until he has enjoyed use of it by sale to such an extent that the name notes something to intending purchasers. The qu in each case is whether the defendant's conduct c shown to be reasonably calculated to deceive persons might be reasonably expected to buy the pl article into the belief that the defendant's artic the plaintiffs'. To do that it must be shown th has been such a sale of the article by the pl under the name in question as to establish in the of persons who were likely to buy it a connecti tween the name and the plaintiffs' article. That only be established by a sale for such a reasonable as would build up the reputation of the plaintiffs. not always easy to define the exact moment at the reputation is acquired, but unless it had be quired it cannot be said that any exclusive right use of the name has been acquired. In my o the judgment of the learned judge in the court was most exact, and put the law as well as possibly be put.

Appeal dismissed.

Solicitor for the plaintiffs, *Lambert.*

Solicitors for the defendant, *J. C. Rutter & Son.*

From Chan. Div. Jan. 18, 21,

BORTHWICK *v.* THE "EVENING POST." (a)

Trade name—Infringement—Name of newspaper—I junction.

The plaintiff was the proprietor of the Morning P *The defendants had recently commenced publishi evening newspaper under the name of the* "Evening P *with which is incorporated the* Daily Recorder." *printing of the name and the general typography of paper resembled that of the* Morning Post, *and the* *was the same, but the size and number of column letterpress were different. The plaintiff did not pu an evening edition of his paper, nor was it alleged he intended to do so. It was proved that twenty pe had applied at the office of the* Morning Post *for c of the* Evening Post, *under the impression that there some connection between the two papers. On a motion the plaintiff for an injunction to restrain the defend from publishing any newspaper by the name of* Evening Post,

Held, that no injunction could be granted, inasm as no damage to the plaintiff had been proved.

Decision of Kay, J., *reversed.*

Appeal from a decision of Kay, J.

(a.) Reported by W IVIMEY COOK, Esq., Barrister-at-Law.

In this case Kay, J., on the application of the plaintiff, who was the proprietor of the *Morning Post*, granted an injunction restraining the defendants, who were a limited company, from publishing, selling, or advertising for sale any newspaper by the name of the *Evening Post*, or by any other name calculated to induce the public to believe that such newspaper was an edition of the *Morning Post*.

The defendants appealed.

The facts are stated in the judgment of Lord Coleridge, C.J.

Renshaw, Q.C., *Levett*, and *Bryan Farrer*, for the appellants, referred to *Walter* v. *Emmott*, 54 L. J. N. S. Ch. 1059, 34 W. R. Dig. 88; *Cowen* v. *Hulton*, 46 L. T. N. S. 897, 30 W. R. Dig. 101.

Marten, Q.C., and *Begg*, for the respondent, referred to *Burgess* v. *Burgess*, 3 De G. M. & G. 896; *Prowett* v. *Mortimer*, 4 W. R. 519; *Ingram* v. *Stiff*, 5 Jur. N. S. 947, 7 W. R. Ch. Dig. 28; *Clement* v. *Maddick*, 1 Giff. 98, 7 W. R. Ch. Dig. 28; *Chance* v. *Sheppard*, Seb. Dig. 189; *Millington* v. *Fox*, 3 My. & Cr. 338; *Singer Manufacturing Co.* v. *Loog*, 31 W. R. 325, 8 App. Cas. 15, 33.

Renshaw replied.

LORD COLERIDGE, C.J.—In this case we have been asked to reverse a judgment of Kay, J., by which he issued an injunction to restrain the defendants from publishing a paper under the name of the *Evening Post*, with which is incorporated the *Daily Recorder*. Now the facts of the case are simple to a degree. Everybody is aware of the existence of the *Morning Post*, an old-established paper of high character, which has existed for a great many years. It seems that some years ago the plaintiff was in the habit of publishing, later in the day, sometimes as late as three in the afternoon, a second or third edition of the *Morning Post*, but still always under the name of the *Morning Post*. It is not suggested that the plaintiff ever did intend, or does intend, to publish a paper called the *Evening Post* in connection with the *Morning Post*, of the same nature and under the same authority as the *Morning Post*. Under these circumstances an application was made to Kay, J., to issue this injunction, and he issued it. It was not suggested that it came exactly within the authority of any case in which the very name, or a colourable imitation of the name, had been taken by the person against whom the application was made. Under such circumstances there is plenty of authority, authority founded on the soundest sense, to show that the court would interfere as to a matter of property. There may be property in a name as well as property in anything else, and anything like an interference with property in a name would be immediately restrained by the court. It is to be observed that in the advertisement of the *Evening Post* the office was stated in large type, and that the office was said to be 168, Fleet-street, whereas most persons who have lived in London for some time are aware that the *Morning Post* is published at a large house in Wellington-street, on the front of which house appears the name *Morning Post* in large letters.

Now the defendant company, towards the end of the month of December, advertised that they were about to publish a paper under the name of the *Evening Post*, and that they had incorporated with it the *Daily Recorder*, which is an old paper, and had apparently a large circulation. These are all the facts except this, that as many as twenty applications have been made to the office of the *Morning Post* for copies of the *Evening Post*, showing that the applicants were under the impression that there was some connection between the *Evening Post* and the *Morning Post*, and that one could be bought at the office of the other. But the plaintiffs' case is not put mainly upon that. It is put somewhat in this way. It is said that the *Evening Post* is the natural name for the *Morning Post*, if it issued an evening edition, to assume; that anybody who saw the *Evening Post* advertised, if he looked at it carelessly and did not observe where it was published, might not unnaturally come to the conclusion that it was an evening edition of the *Morning Post*, and that, being an evening edition of the *Morning Post*, it was issued under the authority of the *Morning Post*, and would be conducted by the same persons as the *Morning Post*, and would represent the general opinion of the *Morning Post*; and that persons who took the evening paper under the impression that they were taking something issued by the writers or editors or staff of the *Morning Post* might be so annoyed and displeased with what they saw in the former paper that they would discontinue their support of the latter paper, the *Morning Post*, and that, therefore, the proprietor of the *Morning Post* would be injured. All that, no doubt, is conceivable, but it seems to me that it is only conceivable—that the damage suggested is not a damage that, as far as I am aware, has ever yet been made the ground for interference on the part of this court; and if the matter stood there, there is good reason for saying that what is suggested is not sufficient to justify the interference of the court. But it is put, and can only be put, as I think, upon another ground, and that ground is this, that the assumption of the name of the *Evening Post* was intended by the takers of it, and might by reasonable people be supposed to indicate a connection between the two papers, and that therefore there was an attempt upon the part of the assumers of the title of the *Evening Post* to trade under the colour of the *Morning Post*, and to take advantage of the benefits which the connection might be supposed to give to the new paper; and that as there is no such connection, and as the benefit suggested to be gained would be gained under a mistake and misapprehension induced by the defendants, that would be a ground for the interference of this court. I am not at all prepared to say that if it were clearly made out, not only that such a thing might happen, but that there was any ground for supposing that it had happened, this court would not interfere and would not confirm this judgment; but what strikes me in the matter is that there is no evidence that the *Morning Post* has suffered any damage. There have been twenty applications, and twenty only, made to the *Morning Post* for copies of the *Evening Post*, and from that the court is asked to draw the inference which I have already indicated. But there is no evidence that a single copy less of the *Morning Post* has been sold than would have been if the defendants had not taken the action they have. Under those circumstances it seems to me that there is not enough in this case to warrant the interference of the court by injunction, and that the judgment of Kay, J., must be reversed. But I could not for my own part clear my mind of a lurking suspicion that the name the *Evening Post* was taken because there was a *Morning Post*, and that, although the *Morning Post* has not been hurt, and perhaps the *Morning Post* never will be hurt to the extent of one penny, yet the public and the persons who buy the *Evening Post* may possibly think there is some connection with this old-established paper; and at all events I cannot quite feel certain that the assumer of the title did not wish that the public should so think. And under those circumstances, although we reverse the judgment, I think there must be no costs in the case, and that the company must pay their own costs at all events in respect of the experiment they have made both here and in the court below.

GORELL, L.J.—I agree in that conclusion, and as we

differ from Kay, J., I must state my reasons for differing from him. In his judgment and in argument a good many authorities were referred to. In my opinion, in cases like this, and especially cases arising under the circumstances before us, authorities are of no use when once we have got the true principle on which the court ought to act. That very clearly appears from a case which was referred to by Mr. Marten, of *Hogg* v. *Kirby*, 8 Ves. 225, where the publication of a work put forward by the defendant was stopped at the instance of the plaintiff, the publisher of another work. There Lord Eldon says the question is this:—Whether there is a representation that the work of the defendant is the same as the work of the plaintiff? His words are:—"I shall take the question here to be not whether the work is the same, but whether the defendant has not represented it to be the same." Now I will state the case here a little more favourably for the plaintiff, because it is not only whether the defendants have represented their paper to be the same as the plaintiff's, but whether the public would not understand that the defendants' paper was issued from the office of the *Morning Post*, and connected with the *Morning Post* in such a way as to damage or prejudice the plaintiff. That I think is the question we have to consider; and there is this fact in this particular case which distinguishes it from most of the cases which have come before the court, that these two publications cannot be called competing publications; the one is a morning paper, the other is an evening paper; and although at one time the proprietor of the *Morning Post* did publish later editions, he did not publish an evening paper, but only published from time to time late editions of the paper entitled the *Morning Post* at a time of day when the evening papers begin to be issued. But I think it could not be suggested that anyone would, in consequence of the representation contained in the title *Evening Post*, understand that to be in competition with, or that it would interfere with the sale of, the *Morning Post*. That could hardly be contended. Of course, if that had been the case, it would have been much easier to make out that that was the object intended by the defendants, and that there would be damage resulting from such a representation, whether intended or not intended; because if one paper is bought for the other, there must at all events be the loss of the sale which would otherwise take place of the work of the plaintiff. Therefore there is this circumstance to be taken into consideration, that these are not competing papers, so that the title would be understood to be a representation, even if it were not so intended, either that this was an evening edition of the *Morning Post*, an *Evening Post* issued from the offices of the *Morning Post*, or that it was an evening paper connected with the publication of the *Morning Post*.

There is this also to be observed. This is not like the sale of tea or soap or anything else bought by the public where the article is done up in packets and the purchaser fixes upon some one distinctive feature which easily catches the eye, such as a particular word in large type, and is misled by the imitation of the word in large type, because the representation must be assumed to be made only to those who are going to buy, who will be the reading public, and they will not be people who will only take, so to speak, one catch look at the paper. They will read it, and they would also be people who would be in a position to form an opinion upon the politics contained in the *Evening Post*. Therefore they are persons of rather more intelligence than the class of purchasers I have already referred to. I think that the *Evening Post* would be the natural name for the *Morning Post* to assume if it were published as an evening paper, but then there is no suggestion that the plaintiff has really intended to publish an evening paper, and one comes to the question, assuming that this paper or the name could be understood by some persons to be connected in some way with the *Morning Post*, can it be said that there is any reasonable prospect of damage or injury to the *Morning Post*? It is only the name. The papers are not alike; the get up is different, and there is nothing, in my opinion, except the name of the *Evening Post*, which can be considered as a suggestion that it was connected with the *Morning Post*. In my opinion in order to justify us in granting an injunction, we ought to be satisfied that there probably will be injury to the pocket of the plaintiff. Therefore, really this is only a common law action for representing that the work of the defendant was the work of the plaintiff, or was so connected with the work of the plaintiff as to do the plaintiff some damage by injuring the selling of his work. It is true we are dealing with it on equitable principles in this way: We are granting an injunction, and, although courts of common law now have the power of granting injunctions, still it is an equitable remedy, and it ought not to be granted unless the court is satisfied that there is damage to the plaintiff, or probable damage, not damage already incurred, as the result of the defendants' action. There must be some evidence that the defendants' work will cause injury to the plaintiff, and will prevent the plaintiff from selling some copies of his work. But here the only suggestion which is put forward is this—subject to one which I will mention presently—that people will be so disgusted at seeing the way in which the editor of the *Morning Post* is supposed to be issuing the evening edition of the paper that they may say, "We must get rid of the *Morning Post* when the proprietor issues anything like *The Evening Post*." But I do not think anybody who has read the paper would think that this was issued by some person who prepared and issued the *Morning Post*. But then it was suggested that anyone who had heard called out at a railway station, "Terrible Accident," or "Frightful foreign news," or anything of that sort, and saw an evening placard, would buy the paper and would then say "I relied upon the *Morning Post*, being sure that the *Morning Post* would contain correct intelligence," and finding that the news could not be depended upon, would then give up his *Morning Post*. But that is not a reasonable conclusion. Anyone who reads the paper would at once see that it was not from the same hand. If it differed in politics they would at once see the difference. They would not imagine that the *Morning Post* advocated one kind of politics in the morning and another kind in the evening. As regards the news, they would see when they read the paper that it did not come from the same hand, and therefore there is no probability of damage or injury to the proprietor of the *Morning Post* by the mistakes or failures of *The Evening Post* to act as well as the *Morning Post* does for the benefit of the public. There is only a suggestion of possible injury, and I think we ought not to act on that. In order to justify us in granting an injunction we must have evidence to satisfy us that there is reasonable probability that, in fact, there will be injury to the party complaining. In my opinion the action ought to be dismissed, and I agree with the Lord Chief Justice, that it should be dismissed without costs.

BOWEN, L.J.—This seems to me to be a very difficult case, and one very much upon the line, and I am not at all surprised that the proprietor of the *Morning Post* has brought this action, or that the learned judge in the court below came to a different conclusion from that to which we arrive. Now what is the question we have to ask ourselves—the test of the law which we have to apply? This is an action the gist of which is that in embodying at the head of the paper the title *Evening Post*, the defendants, it is said, have put forward an untruthful representation which is calculated to injure the property of the *Morning Post*—the untruthful representation being an implied repre-

sentation that there was a proprietary connection between the new paper and the old paper. That is the gist of the action. In order to see if it can be supported we must ask ourselves the question, is the title *The Evening Post* calculated to deceive persons into the belief that the paper was published by the proprietor of the *Morning Post* in a way calculated to injure the business of the *Morning Post*? Unless this complex and double proposition can be answered in the affirmative, the application for an injunction must fail. In order to succeed the *Morning Post* must make out that the title *Evening Post* is calculated to deceive people into the belief that the paper is published by the *Morning Post*, and in a way which is likely to injure the *Morning Post*. Now, first of all as to the deception. Is it calculated to deceive? Twenty persons have been deceived. I do not lay, I hope, undue stress upon that. Secondly, why has the title *Evening Post* been deliberately adopted by that paper? The world is wide, and there are many names. Why was there a persistent resolve to take the title *Evening Post* when the *Evening Courier*, or *Evening Gazette*, or some other name might have been taken? The proprietor of the *Morning Post* apparently is not about to publish an evening paper; but suppose it was his intention to publish an evening edition, and that intention was carried out, what name would it be more natural for him to choose than the *Evening Post*? The *Daily News*, if it published an evening edition, would in all probability call it the *Evening Daily News*; but you cannot suppose a paper which is called the *Morning Post* if it published an evening edition would call itself the *Evening Morning Post*. That would be too absurd. The natural title which the *Morning Post* would take would be the *Evening Post*. Now why has that title been taken? One ought not to hesitate when one is judging facts as well as law to draw a sharp line, and I do not hesitate to draw the inference that the title was taken to deceive somebody. But that is not enough. Is it calculated to deceive the public in a way which would injure the *Morning Post*? It may be that it is taken to deceive the public without injuring the *Morning Post*. In my opinion that is exactly what has happened in this case; it has been an attempt to deceive the public, but there has not been shown any probability of injuring the *Morning Post*. The *Morning Post* is an old-established paper—everybody knows it, its character and politics, and literary position. I am of opinion that this attempt is one which never could touch that. In the first place, it is not a competing paper, and there arises a broad distinction between this case and almost all the others which have been cited to us. It is not entering into competition. A person does not buy the *Morning Post* the less because he buys the *Evening Post*. When, if at all, is it to be suggested that the injury will be done to the *Morning Post*? When the public buy it? We then asked the learned counsel who argued the case for the *Morning Post* how he suggested that a person who bought the *Evening Post* in the evening would be less likely to buy the *Morning Post* in the morning, and, as the Lord Chief Justice suggested, would the *Morning Post* take one penny the less? The counsel was then driven to this ingenious suggestion, that a person going by railway might buy his *Morning Post* overnight. Fancy the portrait of a gentleman buying the *Morning Post* overnight. It is a suggestion which seems to me most remote and imaginary. It is as unlikely as if you were to have your breakfast overnight. The only case in which I can conceive a person having breakfast overnight is when he is not likely to have it next morning; and, therefore, if a person is not likely to be able to purchase a *Morning Post* overnight, it is just as likely he might then purchase the *Evening Post*. But the hypothesis is that in such a case he cannot buy the *Morning Post* next morning, and, if so, where is the injury? It is too remote and fanciful to suppose that anything of that sort will happen. In the next place, is a person who reads the paper likely to be deceived? He must be an extremely unintelligent person if he thinks that the *Evening Post*, which disclaims all connection with the *Morning Post*, and writes upon different topics and in a different style, is connected with the *Morning Post*. The suggestion would explode itself before he got half way through the first page. I think the *Morning Post* is not likely to be hurt. Still, I think a trick has been attempted to be played, and for that reason I think the justice of the case is sufficiently met by dismissing the action, without costs.

Appeal allowed.

Solicitors, *J. Anderson Rose; Lewis & Lewis.*

From Chan. Div. Dec. 21.

DOWNING *v.* FALMOUTH UNITED SEWERAGE BOARD. (*a.*)

Practice—Discovery of documents—Discretion of judge—Use of affidavits on application for discovery—R. S. C., 1883, *ord.* 31, *r.* 12.

On an application for discovery of documents under ord. 31, *r.* 12, *the court has discretion to refuse discovery which it considers cannot be reasonably expected to be of any use to the applicant. On such an application it is not the practice of the court to require or allow affidavits to be made in order to enable the court to decide whether there ought to be discovery; but the court, in order to come to a conclusion, must look at the pleadings, and may also look at any affidavits for some other purpose already made in the action. The party intending to use such affidavits must give notice of his intention to the other side and specify the particular affidavits or particular passages in affidavits that he relies on. A general notice to read all such affidavits ought not to be given, and will render the party giving such general notice to read liable to pay the costs occasioned thereby.*

Appeal from Chitty, J.

The action was for an injunction to restrain the defendants using a sewer tank in such a way as to cause a nuisance.

The plaintiffs were several persons who occupied shops and houses near the tank. The defendants were the local sewerage authority at Falmouth. The defendants, in their defence, after denying the existence of any nuisance, alleged that the tank was constructed by a competent engineer and approved of by the Local Government Board; they further alleged that before the action was instituted, on hearing the complaints made by the plaintiffs, they employed an engineer to inspect and report on the working of the tank, that they submitted that report to the plaintiffs and offered to carry out the suggested recommendations, but that the plaintiffs refused such offer; that after such refusal the defendants, on July 19, 1887, passed a resolution consenting to the nomination of an engineer to be approved of by the plaintiffs, and offered to carry out such recommendations as he should make as to abating any existing nuisance (except the removal of the tank) with the consent of the Local Government Board, and that such resolution was communicated to the plaintiffs, who would not accept the offer therein contained.

The plaintiffs shortly afterwards—viz., in August, 1886—instituted this action. On November 25, 1887, the plaintiffs applied under ord. 31, r. 12, for an order for discovery by the defendants of documents in their possession relating to the matters in question. The plaintiffs proposed to read in support of their application certain affidavits which had been filed upon a

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

motion for an *interim* injunction before the vacation judge. This was objected to by the defendants, on the ground that proper notice had not been given, and the objection was allowed.

Chitty, J., refused the plaintiffs' application.

The plaintiffs appealed, and gave notice to read (if necessary), on the hearing of the appeal motion, the evidence filed on the motion before the vacation judge. The defendants gave notice that they would object thereto, this evidence having been disallowed in the court below.

The evidence in question consisted of about thirty affidavits, the great part of which related exclusively to the fact of nuisance, and had no reference to documents. One of the affidavits, however, related to the resolution of July 19, 1887, and two other affidavits related to correspondence between the defendants and the Local Government Board in the years 1885-6-7, showing that the latter had refused to sanction a loan for further works which would bring more sewage into the tank.

Sir A. Watson, Q.C., and *S. J. Fraser Macleod*, for the appellants.—On an application for discovery under ord. 31, r. 12, the judge has to exercise a discretion in refusing or allowing discovery. The judge, therefore, can and ought now to receive evidence on the points with respect to which discovery is sought: *Martin* v. *Spicer*, 34 W. R. 589, 32 Ch. D. 592.

Romer, Q.C., and *Bramwell Davis*, for the defendants.—[Cotton, L.J.—Do you object to make an affidavit specifying what entries the books in your possession contain as to any resolution of the board admitting that the sewage works caused a nuisance, and in particular as to the resolution of July 19, 1887; and also specifying any correspondence between the defendants and the Local Government Board containing any such admission?] We are willing to make such an affidavit, reserving, of course, our right to claim priviiege. [They were stopped.]

Sir A. Watson, Q.C., replied on the question of costs.

Cotton, L.J.—This is an appeal by the plaintiffs from an order of Chitty, J., refusing to make the ordinary order for discovery of documents, and also declining to make any limited order. The application was made under ord. 31, r. 12, and with reference to that, the plaintiffs have given notice to read on this appeal a mass of affidavits filed on a previous interlocutory application. Now the court ought not to be required to consider a mass of affidavits on the question whether the defendant is likely to have in his possession documents to the production of which the plaintiff is entitled. The rule in question never intended to do away with the principles with regard to discovery, but only intended to give the court a discretion, to be exercised reasonably; and if the court is satisfied that no result could be obtained by the production of documents, or no good could be reasonably expected to result, the court may refuse to make any order. How is that to be ascertained? By looking at the pleadings. The pleadings show what questions have to be tried, and the nature of these questions will show whether there is good reason for coming to the conclusion that the production of documents cannot be expected to be of any use. But the court ought not to require affidavits to be made for that purpose. Where there has already been something mentioned outside the pleadings in affidavits previously made by both parties, the court may look at it to inform its mind in deciding whether it would be material for the purposes of discovery.

I think that Chitty, J., was right in considering that as the question in the action was nuisance or no nuisance, it was not probable that the plaintiffs would be assisted by any general order for production, and therefore, that he was right in refusing to make the order asked for, which would only result in scheduling a mass of documents that could not be of any use to the plaintiffs. I think the court should see what the real test between the parties really is, and, therefore, should look, not only at the pleadings, but at the whole proceedings as expanded beyond the pleadings by the affidavits, in order to see whether they suggest the existence of documents the production of which would be serviceable. But that ought not to be done without the attention of the other side being called to the affidavits relied on, and a general notice to read a mass of affidavits ought not to have been given. The plaintiff's case is that this is in fact a nuisance, and attention has been called to resolutions of the board and to correspondence with the Local Government Board which possibly may furnish evidence sufficient to establish the fact of the existence of an actionable nuisance, and may save the plaintiffs the expense of going into evidence about it. In my opinion, therefore, we should to require the defendants to make an affidavit as to documents in their possession containing any admission as to a nuisance, also as to the correspondence between the defendants and the Local Government Board in the years 1885, 1886, 1887 relating to the defendants' system of sewage; the defendants to be at liberty to raise any question of privilege as to any of the documents. As regards costs, the plaintiffs were wrong in proceeding on the idea that affidavits are to be filed on these occasions, and altogether wrong in giving a general notice to read this mass of affidavits instead of calling the attention of the defendants to the fact that the existence of documents material to the plaintiffs' case was suggested by three of the affidavits; the plaintiffs must, therefore, pay the costs occasioned by their general notice. The other costs here to be costs in the action, and we do not interfere with the order below as to costs.

Fry, L.J.—I am of the same opinion. It is said that under the new practice the court ought to allow parties to file evidence in order to enable the court to decide whether there ought to be discovery. That view, in my opinion, is erroneous.

Solicitors for the plaintiffs, *Downing, Holman, & Fox*, for *Downing & Handcock*, Cardiff.

Solicitors for the defendants, *Rowcliffes, Rawle, & Co.*, for *Jenkins*, Falmouth.

From Chan. Div. Aug. 3, 5, 6, 7, 8, 1887.

Kurtz v. Spence. (a.)

Patent—Action to restrain threats by patentee—Right to raise issue of validity of patent—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 32—*Amendment of pleadings—R. S. C.*, 1883, *ord.* 28, *r.* 1.

In an action brought under section 32 *of the Patents, Designs, and Trade-Marks Act*, 1883, *to restrain threats, the plaintiffs, by their statement of claim, alleged that the defendants' patent was invalid.* Chitty, J., on the *application of the defendants, ordered the allegation to be struck out. A subsequent application made to* Kekewich, J., *to whom the action had been transferred for trial, for leave to amend the statement of claim by restoring the allegation of the invalidity of the patent was refused.*

(a.) Reported by W. Ivimey Cook, Esq., Barrister-at-Law.

Held (Fry, L.J., *dissenting*), *that the leave to amend ought to be given on certain terms which would prevent the defendants suffering any loss.*

Decision of Kekewich, J., *reversed.*

Appeal from a decision of Kekewich, J.

The action was brought by the plaintiffs under section 32 of the Patents, Designs, and Trade-Marks Act, 1883.

The plaintiffs were the owners of a patent for an invention of "improvements in the manufacture of certain chemicals and in their purification from iron," referred to in the pleadings as "Kynaston's Invention."

The defendants were the owners of a patent known as Spence's Patent, for an invention of "improvements in the manufacture of alum and other salts of alumina."

The defendants alleged that the plaintiffs' use of the Kynaston Invention was an infringement of the defendants' patent, and threatened the plaintiffs with legal proceedings and liability in respect of such use.

The plaintiffs then commenced this action, and in the statement of claim it was stated that the Kynaston Invention was not an infringement of the defendants' patent; that the plaintiffs had never used the defendants' patent; that the defendants' patent was invalid; and that the defendants had not commenced, and refused to commence, either against the plaintiffs or any other person, any action for the infringement of the defendants' patent.

Thereupon the defendants took out a summons to strike out the statement by the plaintiffs in the statement of claim that the defendants' patent was invalid.

Chitty, J., on the 12th of August, 1886, ordered the statement to be struck out (35 W. R. 26, 33 Ch. D. 579).

In the recent case of *Challender* v. *Royle*, *ante*, p. 157, 36 Ch. D. 425, the court expressed an opinion that in such an action the validity of the defendants' patent could be put in issue. In consequence of this opinion the plaintiffs in the present action applied to Kekewich, J., to whom the action had meanwhile been transferred for trial, for leave to amend the statement of claim by restoring the allegation of invalidity of the patent.

Kekewich, J., thought that he was bound by the decision of his predecessor, which had not been appealed against, and refused the application.

The plaintiffs appealed from this refusal, and also applied to the court by original motion for leave to appeal from the order of Chitty, J., notwithstanding the expiration of the time limited for so doing.

Moulton, Q.C., and *Lawson*, for the application for leave to appeal from the order of Chitty, J.

Aston, Q.C., and *Chadwyck Healey*, for the defendants.

The COURT (COTTON and FRY, L.JJ.) refused the application.

The appeal from Kekewich, J., was then heard.

Moulton, Q.C., and *Lawson*, for the appellants.—The court has jurisdiction under rule 1 of order 28 to allow the amendment of the pleadings if they do not raise the true issue between the parties, and such an amendment has been allowed, even at the trial: *Tildesley* v. *Harper*, 27 W. R. 249, 10 Ch. D. 393. Here the question between the parties is as to the validity of the defendants' patent, and that is a question which it has recently been held may be raised: *Challender* v. *Royle*. The amendment ought, therefore, to be allowed.

Aston, Q.C., and *Chadwyck Healey*, for the defendants.—The effect of allowing this amendment would practically be to reverse the order of Chitty, J., which has not been appealed against, and which is not appealable by reason of the time limited for appealing having expired. The amendment ought not, therefore, to be allowed.

Moulton, Q.C., replied.

Cur. adv. vult.

Aug. 5, 1887.—COTTON, L.J.—This is an appeal from a refusal of Kekewich, J., to give the plaintiffs liberty to introduce by amendment into their statement of claim words which would enable them to contest the validity of the patent claimed by the defendants. The action is brought under the 32nd section of the Patents, Designs, and Trade-Marks Act, 1883, which enables anyone who is threatened with proceedings if he uses a certain invention to proceed by action to restrain the issue of such threats. In order to establish his claim he must show that what he is doing is not an infringement of any legal right of the defendant. Chitty, J., on the 12th of August last year, struck out from the statement of claim seven words which had been introduced by the pleader questioning the validity of the defendants' patent, and in consequence of the opinion lately expressed by this court in *Challender* v. *Royle*, the plaintiffs moved, before Kekewich, J., for liberty to amend their statement of claim by introducing an allegation that the defendants' patent is invalid. They did so, under ord. 28, r. 1, which says that "the court or a judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties." Now I do not in any way vary or depart from the opinion I have previously expressed. The point did not come before us in such a form that we could finally decide it, but after that expression of opinion by the Court of Appeal it is certainly a real question between the plaintiffs and the defendants here to be tried in the action whether the plaintiffs can successfully impeach the patent on which the defendants are relying, and which they say the plaintiffs are infringing. I do not go at all into any of the questions introduced by Mr. Aston as to whether the threats were such threats as would come within the section, and various other matters, but I will only deal with the question whether this is one of the questions to be decided between the parties. If I thought that that point could not be raised in this action I should say that was a ground for not allowing the amendment, but assuming that it can be raised in such an action as this, what, then, is to be done? If it had not been that a year ago Chitty, J., made an order preventing the plaintiffs from raising this question, and the plaintiffs acquiesced in that order for nearly a year, I think the court, taking the view which Bowen, L.J., and I expressed, though we had not to decide it, would say that it is right, having regard to the terms of this rule, that the matter should be introduced so as to allow the question to be decided between the parties. There was an original motion before us on Wednesday for leave to appeal notwithstanding the time which had elapsed since Chitty, J.'s order of the 12th of August, 1886.

We refused that application, and I have no doubt that we were right. No reason was shown for the delay in appealing, except that the parties did not then sufficiently consider what the law was, or were afraid to try the appeal, which, of course, is not a good reason.

The case now before us is different. When by an amendment the real substantial question can be raised between the parties, ought we to refuse to allow the amendment, having regard to the rule and to the direction in the Judicature Act that, as far as possible, in any proceeding all questions between the parties shall be decided, so as to prevent multiplicity of actions. I have come to the conclusion, and Bowen, L.J., agrees with me, that it would be better (if we can do it without injustice to the defendants) to allow that amendment to be introduced rather than to leave the plaintiffs to the

liberty which we gave them, on the application for leave to appeal, of having the action dismissed without prejudice to their right to bring another action. But we ought to see that the defendants do not suffer any loss or expense, and we ought also to see that they are not prejudiced in the way of trying the question of the validity of the patent. They ought, therefore, to have the same notice of the objections to be taken, and the same right of beginning and replying as they would have had if they had brought an action against the plaintiffs to restrain the violation of their patent. I do not see that the defendants can be prejudiced by our allowing this amendment if we give them the costs which have been incurred and wasted, and also give them such rights of knowing what the objections are, and of beginning and replying, as they would have if an action had been brought by them for violation of their patent. Therefore we think it the right course to give the plaintiffs liberty, on or before Tuesday next, to introduce, by way of amendment, in their statement of claim an allegation that Spence's patent is invalid, on the grounds to be mentioned in our order, the plaintiffs undertaking to allow the defendants, on the question of validity of the patent, to begin and have a reply. Then, which I think is the only way of saving the defendants from any expenses which they ought not to bear, we add this: "And order the plaintiffs, if they so amend, to pay to the defendants their costs as between solicitor and client of this application and all costs incurred by the defendants and thrown away in consequence of the amendment hereby authorized not having been made on the day after Chitty, J.'s order of the 12th of August, 1886, including the costs (if any) caused by any adjournment of the action rendered necessary by reason of the amendment being made or authorized." We do not make the order for payment of the costs as between solicitor and client as an adverse order between litigants, but we impose such payment as a term on which we give the plaintiffs the liberty to amend, so as to show that we very much discourage a party's waiting, as these plaintiffs have done, for such a length of time, before bringing to the Court of Appeal the question whether they are at liberty to introduce such an amendment. If the plaintiffs do not avail themselves of this liberty to amend, the only order will be that the appeal motion will be refused, with costs, those costs being costs to be taxed as between party and party in the ordinary way.

BOWEN, L.J.—I am of the same opinion.

FRY, L.J.—I think that my learned brethren are too indulgent to the applicants. I do not for a moment doubt, after their previous expression of opinion, that the question which is to be raised by this amendment is one which would have been proper to have been decided in the action if it had been properly raised; but it is to be borne in mind that in this case there is a subsisting order dealing with this particular point of pleading. That order was made more than a twelvemonth ago, and we have held that order not to be the subject of appeal, for, although a new view of the law may have been expressed, no new matter has arisen. Under these circumstances I do not think it competent to the court to make an amendment inconsistent with and reversing that order. I further think that it is in the interests of litigants that there should be some finality in orders of this description; and where an order has been made, and is no longer subject to appeal, dealing with the mode of conducting the case, I think that it is right that that decision should be final as between the litigants in that action, and that, therefore, we have done the utmost to which the applicants are entitled, in giving them leave to bring another action free from any prejudicial effect of their not having raised the point in this action. The fact that in this very case, we had before us in the paper two days ago two applications in the same action about the same amendment of pleadings, is an illustration of the multiplicity of applications to which this, as I think, laxity of practice is likely to lead. I think, further, although the whole policy of the Judicature Act and of the rules require the court to allow all proper amendments to be made to raise the real question between the parties, yet that it is possible for the plaintiff, by his want of care, by his delay, and by his negligence, to deprive himself of the right of further harassing the defendant by new amendments. I have one or two objection to the order, which is this. I think it is not suitable than the nature of things allows usefully to be made; and I am apprehensive that orders of such extreme complexity will only lead to further difficulties in litigation. For these reasons, I need not say so willingly, I differ from the conclusion of my learned brethren.

Solicitors for the appellants, *C. P. Pritchard & Marshall*, for *G. R. Rogerson & Co.*, Liverpool.

Solicitors for the respondents, *Jaques & Co.*

From Q. B. Div. Oct. 27; Nov. 2; Dec. 14.

THOMAS v. OWEN. (a.)

Easement — Right of way—Implied grant—General words—"Appurtenances."

In the case of a formed road made over an old servient tenement to and for the apparent use of a dominant tenement, there is an implied reservation of the right of way on a demise of the soil of the servient, although the easement be neither continuous nor of necessity.

In such a case a subsequent demise of the dominant tenement, "together with the appurtenances belonging thereto," will pass the right of way.

Appeal from a divisional court (Mathew and Grantham JJ.), refusing a new trial of the action.

Clement Higgins, Q.C., and *J. E. Vincent*, for the appellant.

F. Marshall, for the respondent.

The facts and arguments sufficiently appear from the judgment.

Cur. adv. vult.

Dec. 14.—The judgment of the COURT (Lord Esher, M.R., BOWEN and FRY, L.JJ.), was read by

FRY, L.J.—This is an action brought for interference with a right of way; and the question is whether the plaintiff has the right of way which he claims.

The plaintiff and defendant are tenants of adjoining farms in the Island of Anglesea, under Sir Richard Bulkley, the plaintiff's farm being known as Tywian and the defendant's farm as Caeran.

A parish road, leading from Llanrhyddlad to a place on the coast known as Cemlyn Bay, passes through Caeran, the defendant's farm; the plaintiff's farm communicates with this highway by a road which, from the plans and other evidence before us, we hold to be a private road. This private road joins the parish road at a place called the Old Bar. From a point on the plaintiff's farm and on this private road about half-way between the homestead of Tywian and the Old Bar,

(a.) Reported by A. P. PERCIVAL KEEP, Esq., Barrister-at-Law.

lane, known as Lon Car Glas, runs westward, and leads from the plaintiff's farm and the private road to a spot on the parish road nearer to Cemlyn Bay than the Old Bar.

It is therefore the nearest way from Tywian to Cemlyn Bay and the parts thereabouts, and besides being nearer than the private road it is level, whilst the private road is steep and hilly. The right of way claimed by the plaintiff is along this Lon Car Glas.

This lane is, we conclude from the evidence before us, an ancient lane; it is 418 yards in length, 22 yards wide; for a short distance on one side near its eastern end the lane is bounded by the plaintiff's land, but with this slight exception it has the defendant's land on both sides; it is bounded by turf banks with hedges on the top for its whole length; it has no communication on either side with the defendant's land. The roadway is made with cobble stones, and is partly grown over with grass. The lane is a made road perfectly visible; it is a long strip between two roads intersecting the defendant's farm, separated from that farm on both sides, and only open to the defendant's access at its western end where it joins the parish road; it subserves no use for the defendant's farm, except so far as it may be grazed by his cattle, but it leads from the high road to the plaintiff's land and towards the plaintiff's farmhouse, and that is its only visible purpose and reason for existence.

Such is the present condition of the road, and such we conclude, from the evidence, has been its condition for thirty or forty years before the action was brought.

It has for many years past been used by the plaintiff as occasion required, both for himself and his family, in going to chapel and elsewhere, and by his carts in bringing coal, gravel, seaweed, and guano from Cemlyn Bay; and it has from time to time been repaired by him. These acts have been done by the plaintiff without asking or receiving permission from the defendant, and, until immediately before action, without interference on his part.

We conclude from the evidence that the user for thirty or forty years past has been in accordance with the modern user by the plaintiff as we have stated it.

The defendant had occupied his farm prior to 1873 as tenant from year to year. But in that year he accepted a lease from Sir Richard Bulkley under which he now holds. By that lease the landlord demised to the defendant, amongst other things, all those tenements usually known by the name of Caeran, containing by admeasurement 305a. 1r. 24p., described as then in the tenure or occupation of the defendant. This description was followed by general words and by reservations of timber, mines, and game. The lease is silent as to the lane in question and any user thereof, but it is admitted by the plaintiff that the lane is comprised in the 305a. 1r. 24p. of Caeran.

The plaintiff had occupied his farm as tenant from year to year to Sir Richard Bulkley down to the year 1878, when he accepted a lease from his landlord under which he now holds. By this instrument the lessor demised to the plaintiff the messuage known as Tywian, together with all the land and all houses, buildings, and appurtenances thereto belonging, subject to reservations of timber, mines, and game. This lease contains no other general words than the word appurtenances.

We think it a just inference or conclusion from the evidence before us that both in 1873 and 1878 the use of the lane in question was visibly necessary to the comfortable enjoyment of the plaintiff's farm in the manner in which it was enjoyed and had been enjoyed at and before those dates respectively.

We think further that in construing the leases of 1873 and 1878 we are bound to attend to the previous user of the plaintiff's and defendant's farms respectively: *Hall* v. *Lund*, 11 W. R. 271, 1 H. & C. 676.

The defendant interfered with the plaintiff's user of the lane, and therefore this action was brought.

It was tried before Mr. Commissioner McIntyre and a jury, who found that the plaintiff was entitled to a right of way along the lane by reason of user. Judgment was entered for the plaintiff accordingly, and from that judgment this appeal is brought.

The main contention of the appellant has been that, even assuming the user as found by the jury and as we have stated it, the plaintiff cannot recover. The defendant has, in addition, raised certain contentions as to the facts, in respect of which we have already stated our conclusions. The evidence, in our opinion, amply justifies the verdict and judgment, in point of fact, if they can be justified in point of law.

The defendant has contended before us that, according to the true construction of the lease of 1873, Sir Richard Bulkley thereby purported to demise to him Lon Car Glas free from all rights of way in the plaintiff; that the lessor was estopped by this lease, and that the plaintiff, having taken a subsequent lease from Sir Richard Bulkley, is, like his lessor, estopped from denying the defendant's title to the lane free from any right of way.

The defendant further contends that, even if Sir Richard Bulkley was able to grant a right of way to the plaintiff over Lon Car Glas, he did not in fact grant it by the lease of 1878, under which the plaintiff claims, and, consequently, that the plaintiff has no title to the way claimed.

With regard to the lease of 1873, it is not necessary to consider how the matter would have stood if the lessor had himself been in possession of the plaintiff's farm at the date of this lease to the defendant, for this was not the case. On the contrary, at the date in question the material facts stood thus; the farm, now the plaintiff's, was then in his occupation as tenant from year to year under Sir Richard Bulkley; the lane in question was a made and fenced road, subsisting visibly for the convenience of the plaintiff's farm and of no use as a road to the defendant, it was, and had been, openly used by the plaintiff and his predecessors in title for many years, and had been repaired by them; the right of using this road constituted an easement of the farm occupied by the plaintiff, and no demise could be made of the soil of the lane free from that right without derogating from the grant to the plaintiff under which his then subsisting tenancy was constituted. In this state of circumstances the presumption that the demise in question of Lon Car Glas was free from any right of way is, in our opinion, rebutted by a consideration of these circumstances, just as in *Doe d. Freeland* v. *Burt*, 1 T. R. 701, the presumption that the demise of a house extended to the centre of the earth was rebutted by the existence at the time of the demise of the house of an earlier demise of a cellar by the same lessor, and the occupation of that cellar by a person claiming under that demise.

But then it is urged that, alike in implied reservations and in implied grants, a rule exists to this effect, that, whilst such an implication may arise in the case of easements of necessity and continuous easements, it cannot arise in the case of easements which are neither of necessity nor continuous, and for this proposition *Polden* v. *Bastard*, 14 W. R. 198, L. R. 1 Q. B. 156, is cited, and many other authorities might have been invoked. But on this principle, as established by such decisions, there has been engrafted by other decisions an exception in the case of a formed road made over an alleged servient tenement to, and for the apparent use of, the dominant tenement (*per* Bramwell, B., in *Langley* v. *Hammond*, 16 W. R. 937, L. R. 3 Ex. 161, *Watts* v. *Kelson*, 19 W. R. 338, L. R. 6 Ch. App. 166); and if the exception arises in the case of a grant, we think it ought to arise in the case of a reservation

made to support an earlier grant, as in the present case.

For these reasons we are of opinion that the lease of 1873 was, according to its true construction, subject to the right of way over Lon Car Glas then existing in the plaintiff, and that consequently no question of estoppel can arise.

Then arises the question whether the lease of 1878 from Sir Richard Bulkley to the plaintiff conveyed to him the right of way in question. Under the circumstances of this case as we have found them, it appears to us to follow from the cases of *Watts* v. *Kelson* and *Kay* v. *Oxley*, L. R. 10 Q. B. 60, 23 W. R. Dig. 251, that the right of way in question would pass if the lease had contained general words descriptive of easements and rights usually enjoyed with the demised hereditaments.

But it was contended before us that the absence in the lease of 1878 of any other general words than the word appurtenances made an important difference, and distinguished this case from the earlier authorities to which we have referred.

No doubt the word appurtenances is not apt for the creation of a new right, and the word appurtenant is not apt to describe a right which had never previously existed, and therefore the mere grant of all appurtenances or of all ways appurtenant to the principal subject of the grant has been held in many cases not to create a new right of way where the right was not pre-existing at the date of the grant. But from as long ago as the 1st of Philip and Mary (*Hill* v. *Grange*, Plow. 170) the word appurtenances has easily admitted of a secondary meaning and as equivalent in that case to usually occupied.

Here at the date of the lease of 1878 Lon Car Glas was not in the occupation of the lessor, but in that of the defendant, and the defendant had, as we have held, acquired an estate in it as against which the right of way was reserved, and reserved for the benefit of the land and house of the plaintiff; and under these circumstances we think that the right of way did pass under the word appurtenances.

This conclusion is, we think, aided by sufficient authority, for which purpose it will suffice to refer to the cases of *Nicholas* v. *Chamberlain*, Cro. Jac. 121; *Hall* v. *Lund*; and *Ewart* v. *Cochrane*, 10 W. R. 3, 4 Macq. 117.

For these reasons we hold the judgment appealed from to be right, and dismiss this appeal with costs.

Appeal dismissed.

Solicitors for the appellant, *Ullithorne, Currey, & Villiers*, for *J. K. Roberts & Laurie*, Llangefni.

Solicitors for the respondent, *Winter & Co.*, for *David Owen*, Bangor.

From Q. B. Div. Aug. 1.

Ex parte PARTRIDGE. (*a*.)

Dentist—Dentists' register—Qualification—Erasure of name on loss of qualification—Dentists Act, 1878 (41 & 42 *Vict.* c. 32).

Where a person has been placed upon the dentists' register kept under the provisions of the Dentists Act, 1878, *in respect of a qualification which has since been taken away, his name cannot be erased from the register simply upon proof of the loss of such qualification.*

Hence, where a person had obtained a licence from a medical authority, and his name was placed upon the dentists' register in respect of such qualification, his name is not liable to be erased from the register simply upon proof that his licence has been cancelled by the medical authority.

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Appeal from a judgment of the Queen's Bench Division making absolute a rule for a *mandamus* directing the General Council of Medical Education and Registration to restore the applicant's name to the register of dentists kept under the Dentists Act, 1878.

The applicant in 1878 obtained from the Royal College of Surgeons in Ireland a diploma in dentistry, and as a licentiate of that body his name was, under sec. 6 of the Dentists Act, 1878, entered in the dentists' register kept under the provisions of that Act. The Royal College of Surgeons in Ireland granted the diploma on the conditions that the holder would not seek to attract business by advertising or by any practise considered by the college to be unbecoming, and that the diploma would be cancelled on its being proved to the satisfaction of president and council that he had done so.

In 1885 the Royal College of Surgeons in Ireland cancelled the diploma on the ground that the applicant had advertised for business, and, upon receiving notice of the fact that the diploma had been cancelled, the General Council of Medical Education and Registration erased his name from the dentists' register.

The Divisional Court (Mathew and A. L. Smith, JJ.) having made the rule for a *mandamus* as stated above, the general council appealed.

The Dentists Act, 1878, s. 2, provides that "medical authorities" mean the bodies and universities who choose members of the general council.

Section 3.—A person shall not be entitled to take or use the name or title of "dentist," . . . or "dental practitioner," or any name, title, addition or description implying that he is registered under this Act, or that he is a person specially qualified to practise dentistry, unless he is registered under this Act.

Section 6.—Any person who (*a*) is a licentiate in dental surgery or dentistry of any of the medical authorities, or (*b*) is entitled, as hereinafter mentioned, to be registered as a foreign or colonial dentist, or at the passing of this Act *bonâ fide* engaged in the practise of dentistry or dental surgery, either separately or in conjunction with the practise of medicine, surgery or pharmacy, shall be entitled to be registered under this Act.

Section 7.—Where a person entitled to be registered under this Act produces or sends to the general registrar the document conferring or evidencing his licence or qualification, with a statement of his name, address, and the other particulars, if any, required for registration, and pays the registration fee, he shall be registered in the dentists' register.

Section 11.—(1) A register shall be kept by the general registrar to be styled the dentists' register; that register shall (*a*) contain in one alphabetical list United Kingdom dentists—that is to say, &c.; and (*b*) contain in a separate alphabetical list all such colonial dentists as are registered in pursuance of this Act; and (*c*) contain in a separate alphabetical list all such foreign dentists as are registered in pursuance of this Act. (2) The dentists' register shall . . . state the description and date of the qualification in respect of which the persons are registered, &c. (3) The general council shall cause a correct copy of the dentists' register to be from time to time and at least once a year printed under their direction. . . .

Section 12.—(1) The general registrar shall from time to time insert in the dentists' register any alteration which may come to his knowledge in the name or address of any person registered. (2) The general registrar shall erase from the dentists' register the name of every deceased person. (3) The general registrar may erase from the dentists' register the name of any person who has ceased to practise, but not (except as hereinafter provided) without the consent of that person. . . .

Section 13.—The general council shall cause to be [illegible] from the dentists' register any entry which [illegible] been incorrectly or fraudulently made. Where [illegible] registered in the dentists' register has, [illegible] before or after the passing of this Act, or [illegible] before or after he is so registered, been convicted [illegible] in her Majesty's dominions or elsewhere of an [illegible] which, if committed in England, would be a [illegible] or misdemeanour, or been guilty of any infamous [illegible] disgraceful conduct in a professional respect, that [illegible] shall be liable to have his name erased from the [illegible]. The general council may . . . cause in[illegible] to be made into the case of a person alleged to be [illegible] to have his name erased under this section. . . . [illegible] name erased from the register in pursuance of this [illegible] shall also be erased from the list of licentiates [illegible] dental surgery or dentistry of the medical authority [illegible] which such person is a licentiate.

Section 15.—The general council shall, for the pur[illegible] of exercising in any case the powers of erasing [illegible], and of restoring to, the dentists' register the [illegible] of a person or an entry, ascertain the facts of such [illegible] by a committee of their own body, not exceeding [illegible] in number, of whom the quorum shall be not less [illegible] three, and a report of the committee shall be con[illegible] as to the facts for the purpose of the exercise of [illegible] said power by the general council.

Kennedy, Q.C., and *Muir Mackenzie*, for the appellants.—Keeping a register under section 11 means keeping a correct register. There are certain cases specified in sections 12 and 13 in which the name can be erased from the register. But the council must have [illegible] power to erase the name of a person who has [illegible] qualification, the power being implied from the [illegible] to keep a correct register. The applicant, if [illegible] *mandamus* goes, may practise in Dublin, though [illegible] has been taken away.

[illegible], Q.C., and *Lyon*, for the applicant, were not [illegible] upon.

[illegible] Bowen, M.R.—In this case the applicant was, in [illegible] a licentiate of the Royal College of Surgeons in [illegible], and in respect of that qualification applied to [illegible] upon the register kept under the Dentists [illegible] 1878. Since that time, in consequence of a breach [illegible] undertaking entered into by him with the Royal [illegible] of Surgeons in Ireland, that body cancelled his [illegible], and upon that being brought to the notice [illegible] general council they, for that reason alone, [illegible] his name from the dentists' register without [illegible] under the provisions of sections 13 and 15 of the [illegible] Act, 1878. The question before us is whether [illegible] were justified in so doing, and that question [illegible] upon the provisions of the Dentists Act, 1878. [illegible] 6 deals with the case of a person who is to be [illegible] on the register. "To be registered" means to be [illegible] upon the register. That seems to me to be the [illegible] meaning of that section. The provisions of [illegible] 7 seem to me to show that that is so. It [illegible] the qualified person who "pays the registra[illegible]" being entitled to be registered. That means [illegible] of one fee on registration, not payment of an [illegible], and seems to me to show that section 6 [illegible] the time of putting the name on the register. [illegible] is the true construction of the section, it gets [illegible] the meaning sought to be placed on section [illegible] The 1st sub-section of section 11 must refer to the [illegible] when the person is placed upon the register. The [illegible] sub-section refers to the description and date of the [illegible]ations of the registered persons in respect of [illegible] they are registered. The 3rd sub-section is clearly [illegible] in any view of the case, because names may be [illegible] from the register under the provisions of sections [illegible] 15, and other names may be added to it. Up to [illegible] there is no provision for dealing with the register except with regard to the original entry of names in it. Section 12, however, deals with the power of erasing from the register the names of deceased persons and persons who have ceased to practise. Section 13 deals also with erasures from the register, giving the general council power of erasing the names of registered persons in certain specified instances. The general council are to "cause inquiry to be made into the case of a person alleged to be liable to have his name erased under this section." They are to exercise that power of erasure under the provisions of section 15. The provisions of those two sections seem to me conclusive to show that the power of erasure conferred upon the general council is a judicial power, and is confined to those matters into which the council can make inquiry—namely, where the case comes within section 13. The power of erasure conferred by section 13 is different from the power conferred by section 12, which is in the nature of a ministerial power. I do not mean in any way to say that the local medical authority may not, by reason of the breach of the condition upon which they granted the licence, strike the name off their register; but I do say that the mere fact that the applicant's name has been struck off the local register by reason of such a breach does not of itself entitle the general council to strike his name off their register without due inquiry under sections 13 and 15. The Dentists Act, 1878, instituted the dentists' register, and accordingly the well-known principle of law is applicable—that when a statute institutes a new state of things, the powers of dealing with that state of things must be looked for solely within the four corners of the statute. Therefore, everything with respect to this new register must be found in the statute itself. Though I have arrived at this conclusion, I must add that if the general council think that the breach of the condition under which the licence in Ireland was obtained is disgraceful conduct in a professional respect within the meaning of section 13, and I am myself inclined to think that such may, under certain circumstances, be the case, then I think that they would have the power, after due inquiry, of erasing the name from the register. This *mandamus* must go, but the fact of its going does not take away from the general council their power to exercise jurisdiction under sections 13 and 15 of the Dentists Act, 1878.

Lindley, L.J.—This case is one of great importance because we have come to the conclusion that the general council have no power to remove a name from their register simply on the ground that the name has been removed from the register of the local medical authority, without exercising the powers conferred upon them by sections 13 and 15, the registered person's qualification, in respect of which he was placed upon the dentists' register, having been derived from the fact of his being on the local register. Whether it is accidental or not, this Act of 1878 differs from the Medical Act, 1858, the power of erasure being more limited in the Act of 1878, and the consequence is that the local bodies have less control over dentists than over medical men. This question turns upon the Act itself. Section 6 seems to me to refer to the original entry of the name in the register, and this view is borne out by section 7. There are certain provisions which relate to the putting of names on the register, and there are certain provisions contained in sections 12, 13, and 15 which relate to the removal of names from the register. There is no provision which enables the general council to remove a name from the register simply because the name has been removed from the local register. This applicant is entitled to have his name restored to the dentists' register without prejudice to an inquiry by the general council, if they think fit, as to whether his case comes within section 13.

Lopes, L.J.—In my opinion it is not sufficient to en-

title the general council to erase the applicant's name from the dentists' register that he has lost the qualification by means of which he was placed upon the register. I am, however, clearly of opinion that it is now open to the general council to take proceedings under sections 13 and 15, and if the case is made out against the applicant under section 13 to erase his name. I will only add that, if upon due inquiry they come to the conclusion that he has wilfully and deliberately acted contrary to the condition imposed upon him when he obtained his diploma, his conduct would come within the words "disgraceful conduct in a professional respect."

Appeal dismissed.

Solicitors for the appellants, *Warren, Gardner, & Murton.*

Solicitor for the respondent, *R. Calkin Lewis.*

High Court of Justice.

Chan. Div. Kay, J. — March 2.

In re Exchange Drapery Co. (Limited). (*a.*)

Company—Winding up—Distribution of surplus assets—Shares fully and partly paid up—Proviso in articles for interest on balance.

Certain shares in a company were allotted as fully paid up, and the articles of association provided that the holders of these shares should be entitled to interest upon such amount of the nominal value of these shares as should be equal to the amount for the time being not called up on the ordinary shares. The amount due on the latter shares was not called up in full. The company went into liquidation, and, after paying its debts and liabilities and repaying to the above shareholders the excess in value of their shares over the ordinary shares, there remained a surplus distributable among the shareholders.

Held, that, under the above proviso, the holders of the fully paid-up shares were entitled to interest on the amount repaid to them, to be calculated from the date of the commencement of the winding up to the date of the repayment.

Motion.

The company was incorporated in 1872 for the purpose of taking over and working a drapery establishment in Sheffield, the nominal capital being £45,000 in 4,500 shares of £10 each. The articles of association set out an agreement, made on the 1st of August, 1871, between the vendors and the promoters of the company, by which, after provisions that the promoters should form a company under the above name for purchasing the vendors' business, and that the vendors should sell to the company their business premises and goodwill, it was agreed (clause 8) that the total price to be paid by the company to the vendors should be £20,500, payable (clause 10) as to £15,000 by the issue of 1,500 fully paid-up shares, and as to the residue by a first instalment of £5,000 in cash, and the remainder by three equal instalments to be respectively secured by bills drawn by the vendors upon, and accepted by, the company, the whole of the unpaid purchase-money to carry interest at five per cent. per annum.

Clause 11 provided that the 1,500 shares to be allotted to the vendors should be called and marked as "vendors' shares," and that "the vendors or other the holders of these shares shall be entitled to dividends upon so much thereof as shall be equal to the amount which for the time being shall be paid up upon the ordinary shares of the company, and shall be entitled also to interest at the rate of five per cent. per annum upon such amount of the nominal value of the said shares called 'vendors' shares' as shall be equal to the amount for the time being not called up upon the said ordinary shares."

Clause 12 provided that the 1,500 shares should be divided between the vendors individually as they should direct, and that the "dividends" on such shares and the "interest" for the time being payable in respect thereof under clause 11 should not be payable for the first five years, "unless and until the holders of the other or ordinary shares in the company shall have received a dividend equal to £10 per cent. in each year of the said term of five years on their paid-up capital for the time being."

Article 4 of the articles of association ratified the agreement, and article 20 empowered the directors to receive from any member all or any part of the sums unpaid upon any share or shares held by him beyond the sums actually called for, and upon the money so received in advance to allow interest at such rate and times as they and the member paying in advance should agree upon.

Of the 4,500 £10 shares constituting the capital of the company, the 1,500 vendors' shares were duly allotted fully paid up pursuant to the agreement, and the remaining 3,000 shares were issued to the public, but only £7 per share was called up thereon.

In 1887 resolutions were passed for the voluntary winding up of the company, and a liquidator was appointed. The liquidator realized all the assets of the company, and, after making due provision for the debts and liabilities and the expenses of the winding up, there remained a considerable surplus for distribution among the shareholders. Out of this surplus the liquidators returned to the holders of vendors' shares the sum of £3 per share, thus reducing the amount paid upon those shares to £7 per share, the amount paid upon the ordinary shares.

Under the provisions of clause 11 of the agreement interest at five per cent. per annum up to the 13th of April, 1887, the date of the commencement of winding up, had been paid to the holders of vendors' shares in respect of the £3 paid up upon their shares beyond the amount called up upon the ordinary shares. The question then arose as to whether the owners of vendors' shares were entitled to a further payment of such interest from the commencement of the winding up to the date of the refunding to them of the £3 per share. The question was raised upon a motion by the liquidator asking "that it might be determined whether, in the distribution of the surplus assets of the company, the holders of the 1,500 vendors' shares, upon which the full sum of £10 was credited as paid, were entitled (after receiving £3 per share upon each of their shares with interest thereon to the 13th of April, 1887), before any repayment was made in respect of the other shares of the company, upon which £7 only was credited as paid, to be paid interest on the said sum of £3 at five per cent. per annum from the 13th of April, 1887, to the payment of the said sum of £3 per share, or during what and what period."

Theobald, in support of the claim, referred to *Dale v. Martin*, 11 L. R. Ir. 371, 32 W. R. Dig. 36, where it was held that, under a clause in the articles of a company providing that sums paid on shares in advance of calls were to carry interest, such interest was recoverable as a debt against the assets of the company.

Vernon R. Smith, for the holders of ordinary shares

(*a.*) Reported by H. F. Ameedee, Esq., Barrister-at-Law

contended that the claim involved the preference of one set of shareholders over the others.

Kay, J.—For the purpose of the present application I must treat the 11th clause of the agreement as being a binding clause, and the question is, what is the meaning of it? It is a provision that certain persons who have paid up the full £10 a share, the ordinary shares not having been paid up in full, shall receive, in respect of the amount which they have paid beyond the ordinary shareholders, interest, the interest being given in these terms—[His lordship read the 11th clause and proceeded:—] *Primâ facie* that means that the amount paid up on the vendors' shares beyond the amount paid on the ordinary shares shall be treated as an advance to the company, carrying interest at five per cent. What has happened is that the company has been wound up, and all the ordinary creditors have been paid. I quite agree that no shareholder could come and say "I will prove for interest in competition with and as against ordinary outside creditors." The law of partnership, which has been adopted in the winding up of companies, is against that; but then, the creditors having been paid, the duty of the court is to adjust the rights of the various contributories among themselves. Now it appears that the creditors have been paid, and that there is a surplus of assets, which surplus it is proposed to apply, first, in paying back to the advanced shareholders, as I will call them, the amount advanced beyond the sum paid on the ordinary shares. The question is whether the payment back of the £3 per share will put the advanced shareholders on an equality with the ordinary shareholders. Having regard to the contract, if the advanced shareholders receive back nothing but their capital, that will by no means put them on an equality with the ordinary shareholders. If the meaning of the agreement was to put all the shareholders on an equality, it is the duty of the court, in dealing with the surplus assets, to carry out that agreement, and as far as possible to preserve and effectuate that equality. I do not see how that can be done except by paying back to the advanced shareholders the £3 capital, and then allowing the shareholders, out of any money that remains, interest at five per cent. on the capital so paid back, from the date of the commencement of the winding up up to the date of the payment back. When that has been done all the shareholders will be on exactly the same basis. Whatever assets remain will then be distributed *pari passu* among all the shareholders.

Order accordingly.

Solicitors, *Pattison, Wigg, & Co.*, for *Broomhead, Wightman, & Moore*, Sheffield; *Pritchard & Sons*, for *Webster & Styring*, Sheffield.

Chan. Div. } North, J. } July 9, 11.

In re Hobbs.

Hobbs *v.* Wade. (*a.*)

Statute of Limitations—Receipt of rents by father as bailiff for infant son—3 & 4 Will. 4, c. 27, s. 12.

A father and his wife were entitled as tenants in common in fee to gavelkind land. The wife died in May, 1870, leaving two sons, Samuel and John. At the time of his mother's death John was an infant. He attained twenty-one in 1877, and died in May, 1884. On the mother's death her moiety descended to her two sons as her co-heirs, according to the custom of gavelkind, subject to the right of the father to a moiety of the rents so long as he remained a widower. On the death of the mother the father entered into receipt of the whole of the rents of her moiety without accounting to his sons or making any acknowledgment in writing of their title for more than twelve years. In February, 1884, the father married again. He died in November, 1884.

Held, that, as to the one-eighth of the property to which John became entitled in possession on the death of his mother, the father must be presumed to have entered into receipt of the rents as bailiff for his infant son, and that, consequently, the title of John was not barred by section 12 of the Act 3 & 4 Will. 4, c. 27.

But held, that, as to Samuel's own one-eighth, the same presumption did not arise, and that, as there was no evidence that the father had received the rents as agent for Samuel, or had, before the expiration of twelve years, acknowledged his title in writing or accounted to him for the rents, Samuel's title to that one-eighth was barred by the statute.

Adjourned summons.

This was an action for the administration of the estate and the execution of the trusts of the will of Samuel Hobbs, who died on the 19th of November, 1884. In answer to the inquiries directed by the judgment at the trial of the action the chief clerk found that the testator's real estate at the time of his death consisted of (*inter alia*) (1) an undivided moiety of about twenty-eight acres of freehold land of gavelkind tenure, called The Salts situate, at Whitstable, in Kent; (5) one-fourth part of the land comprised in item (1), which is claimed by his son, Samuel Hobbs, the younger.

The testator and his wife, Sarah Hobbs, were entitled to the land called The Salts in equal undivided moieties, as tenants in common in fee.

Sarah Hobbs died intestate on the 9th of May, 1870, leaving two sons surviving her—viz., Samuel Hobbs, the younger, and John Hobbs. At the time of her death Samuel was more than twenty-one years of age, but John was an infant. By the custom of gavelkind the moiety to which the mother was entitled descended to her two sons as tenants in common in fee, in equal undivided moieties, subject to the right of her husband to receive a moiety of the rents of her moiety so long as he should remain a widower.

On the death of his wife the testator entered into the receipt of the whole of the rents of her moiety, and remained in possession until the 24th of June, 1884, without accounting to either of his two sons.

On the 29th of February, 1884, the testator married again, whereupon his right to receive a moiety of the rents of his first wife's moiety ceased.

In 1877 the son John attained twenty-one, and in May, 1884, he died intestate, and his interest in the property descended to his brother Samuel, as the heir, according to the custom of gavelkind, of the mother.

The question (which was raised by a summons to vary the chief clerk's certificate with regard to item 5) was whether the title of Samuel, the son, to the moiety of his mother's moiety, the rents of which the testator was not entitled to receive until his second marriage, or any part thereof, was barred by the Statute of Limitations, by reason of his father's receipt of the rents for more than twelve years after the death of the mother. The testator had never during that period given any acknowledgment in writing of the title of either of his sons, or accounted to either of them for his share of the rents. There was evidence that in 1879 the testator had made, to a solicitor who had been instructed by the son John to claim from his father the share of the rents to which John was entitled since the death of his mother, verbal admissions of the right of the two sons respectively to one-half of their mother's moiety of the land. There was also evidence that in 1884, before his father's death, Samuel, the son, had given notice to the tenant of the property not to pay the rent to anyone but himself, and that, in

(a.) Reported by G. E. Jeffery, Esq., Barrister-at-Law.

consequence of this claim, the testator's solicitor, by his directions, had accounted to his son Samuel for the rent due in June, 1884, and had paid him a sum of £1 3s. 9d. as being his one-fourth of the residue of the rent after payment of the interest on a mortgage affecting the whole property. The solicitor at the same time retained a similar sum of £1 3s. 9d., as representing the one-fourth of the rent belonging to John, in part satisfaction of a charge which he had created in favour of the solicitor.

Mulligan, for the summons.—With regard to the one-eighth to which John became entitled in possession on the death of his mother, the father must be taken to have entered into the receipt of the rents as his son's bailiff, and his character of bailiff did not cease when the son attained twenty-one: *Thomas* v. *Thomas*, 4 W. R. 135, 2 K. & J. 79, 83; *Wall* v. *Stanwick*, 35 W. R. 701, 34 Ch. D. 763. The statute did not, therefore, as regards John's one-eighth, commence to run until he attained twenty-one in 1877.

As to Samuel's own one-eighth the evidence shows that the testator was really in receipt of rents as his agent. The *onus* is on the other side to show that Samuel made a gift of his share of the rents to his father: *Hoghton* v. *Hoghton*, 15 Beav. 278.

C. T. Mitchell, for the defendants.—Both in *Thomas* v. *Thomas* and *Wall* v. *Stanwick* the father, who had entered into possession, could not have taken possession in any other character than that of bailiff to the infant. He had no right of his own. These cases are, therefore, distinguishable from the present. At any rate, they do not apply to Samuel's one-eighth, and there is nothing to shew that the testator received Samuel's share of the rents as his bailiff or agent. An acknowledgment by an agent is not enough: *Ley* v *Peter*, 6 W. R. 437, 3 H. & N. 101. Payment of rent after the statutory period has expired does not prevent the statute applying: *Saunders* v. *Saunders*, 29 W. R. 413, 30 *Ibid.* Dig. 117, 19 Ch. D. 373.

Mulligan replied.

North, J. (after stating the facts), continued.—There is no question as to the testator's own moiety of the property. The other moiety, which belonged to his wife, descended, on her death in May, 1870, to her two sons, Samuel and John, in equal shares, subject to their father's tenancy by the curtesy of one-half of the moiety (*i.e.*, one-fourth of the whole) so long as he should remain a widower. On his marriage again, in February, 1884, his interest by the curtesy came to an end, and that one-fourth of the property vested in possession in the two sons, and on the death of John intestate his moiety of that one-fourth descended to his brother Samuel. As to that one-fourth the title of Samuel is clear. The question which now arises is as to the other one-fourth, which descended to the two sons immediately on the death of their mother. As regards the one-eighth, which then descended to John, he was an infant at the time, and his father, having on the death of his wife entered into the receipt of the rents of the whole of the moiety, must be taken to have entered into the receipt of the one-eighth to which John was immediately entitled as bailiff for his infant son. The father continued in receipt of the rents after John had attained twenty-one, and the cases which have been cited show that, as he was in possession as John's bailiff at the time when John attained twenty-one, he must be taken to have continued in possession in the same character, unless something was done to change the character of his possession, and no such change has been proved. The brother Samuel is therefore now entitled to that one-eighth and his title to three-eighths of the whole property is clear. The only question is as to the remaining one-eighth. To that one-eighth Samuel became entitled in possession on the death of his mother, and he was the age. When his father began to receive the rents one-eighth, there was nothing in the relation of t ties to show the existence of any agency or tru or that the father was receiving the rents as th of his son. The father remained in possession t 1884, and at that time some claim was set Samuel. But it is clear that no acknowledg writing of Samuel's title had been made by the and, therefore, the father had already acquired title against Samuel by the statute, so far as a ledgment was concerned. Then it appears that ment in respect of the rent due in June, 1 made by the father to Samuel. But at that statutory period of twelve years had run, and ment of rent to Samuel could defeat the title w father had already acquired under the statute. v. *Saunders* is a clear authority for that. T ment of rent, therefore, cannot support the claim. It has been argued that there is evidence shows that the father was in receipt of the agent or trustee for his son Samuel, and that t vents the statute being set up a defence to his c cannot find evidence of anything of that kind du time in which the statute was running. There payment of rent to Samuel during that period said that some admissions were made by the his son's title, but there was no acknowledg writing. The result is that, as regards this one of the property, the father, having entered in re the rents in 1870, acquired a good title to it at of the statutory period of twelve years. The must be varied as to the item (5) by substitut eighth part (for one-fourth part) of the lands in item (1).

Solicitors, *Saw & Son*; *Bolton & Mote*.

Chan. Div. North, J. June 30;

Ashworth v. Lord. (a.)

Mortgage—Redemption—Mortgagee in possession payment—Account with annual rests—Costs.

In an action by persons claiming to repre original mortgagor for redemption of the mor property (the mortgagees having been in possess many years), the judgment at the trial directed the of the ordinary accounts in a redemption action mortgagees in possession, including an account of was due to the defendants for principal and inter their taxed costs of the action; and that, on pay the plaintiffs within six months after the certi the balance (if any) which should be found due defendants, the defendants should reconvey the m property to the plaintiffs, and that, in default of ment, the action should be dismissed, with costs.

But, in case it should appear, on taking the acc that the defendants had been overpaid, the further sideration of the action was to be adjourned. The clerk found by his certificate that the mortgage debt been paid off in 1866 by means of rents which the fendants had received, and that there was a sum of due from them in respect of rents which they had received.

The defendants had, by their statement of defence denied the title of the plaintiffs to redeem, and pleaded the Statute of Limitations. They had insisted that a large balance was due to them.

At the trial of the action the plaintiffs' title to red

(a.) Reported by G. E. Jeffery, Esq., Barrister-at-La

was not disputed, and the defence of the statute was overruled.

Held, that the account must be taken against the defendants with annual rests from the date at which the mortgage debt was fully paid.

Held, also, that the defendants must pay the costs of the action.

Further consideration.

By an indenture of mortgage, dated the 29th of June, 1819, John Ashworth surrendered to John Holt certain copyhold premises by way of mortgage to secure the payment of £600 and interest, and on the 18th of April, 1820, John Holt was admitted pursuant to the surrender. On the 1st of January, 1823, John Ashworth charged the property with the payment to John Holt of the further sum of £200. John Ashworth died in November, 1825. In 1827 John Holt died intestate, and on the 10th of March, 1827, administration to his estate was granted to his son, Richard Holt, who was his heir-at-law, and his heir according to the custom of the manor of which the mortgaged premises were held, and also his sole next of kin. Richard Holt died in 1840, having devised his trust and mortgage estates to trustees, whom he also appointed his executors, and to whom letters of administration *de bonis non* of John Holt were afterwards granted.

On the 27th of July, 1841, the trustees and executors of Richard Holt transferred the mortgage to James Pickup. In the year 1850 portions of the mortgaged property were sold, and the proceeds of sale were applied in redemption of the mortgage debts. On the 10th of April, 1856, Pickup died, having by his will appointed J. P. Lord, R. B. Dodgson, and Thos. Hart trustees and executors thereof, to whom he also devised all estates vested in him as trustee or mortgagee.

In May, 1857, the trustees of Pickup's will entered into the receipt of the rents and profits of the mortgaged property. Thomas Hart died in August, 1861, and Lord and Dodgson remained in receipt of the rents until the writ in this action was issued on the 23rd of December, 1876. By their statement of claim, delivered on the 16th of March, 1877, the plaintiffs alleged that the title of the mortgagor had been acknowledged in writing by the trustees of the will of Pickup in December, 1857, and that the defendants had received from the rents of the property more than was due to them under their mortgage. The plaintiffs claimed an account of what was due to the defendants upon the mortgage; an account of the rents and profits received by the defendants as mortgagees in possession, and that the plaintiffs might redeem the property on payment of what might appear to be due to the defendants; that, in case the annual rents received by the defendants should have exceeded the interest due upon the mortgages, annual rests might be made, and that what should be owing on account of rents and profits might be applied, first, in payment of the interest of the mortgage securities, and then in sinking the principal; and that, in case it should appear that the defendants had been overpaid their principal, interest, and costs, the defendants might be ordered to pay the balance to the plaintiffs with interest.

On the 6th of June (Lord having in the meanwhile died) Dodgson delivered a defence, by which (*inter alia*) he relied on the Statute of Limitations (3 & 4 Will. 4, c. 27). He alleged that Pickup was entitled to a lien or charge on the mortgaged premises in respect of two bond debts of £100 and £200, and he denied that any balance was due to the plaintiffs, and claimed that a large balance was due to himself. At the trial, on the 5th of July, 1878, the plaintiffs' title to redeem was not disputed, and the court overruled the defence of the statute. By the judgment it was ordered that the ordinary accounts in a redemption action against mortgagees in possession should be taken, including an account of what was due to the defendant for principal and interest in respect of his mortgage securities, and for his costs of the action, to be taxed in case the parties should differ. An inquiry was also directed whether anything, and what, was due to the defendant Dodgson, and from whom, in respect of the two bond debts. And it was ordered that, on the plaintiffs paying to the defendant Dodgson the balance (if any) found due to him, within six months after the date of the certificate, the defendant should resurrender the mortgaged premises to the plaintiffs, and that in default of payment the action should be dismissed, with costs. But in case it should appear, on taking the accounts, that the defendant had been overpaid, the further consideration of the action was to be adjourned. On the 13th of June, 1882, the defendant Dodgson died, and on the 11th of November, 1882, an order of revivor was made against Jane Dodgson, his widow and sole executrix. She died on the 20th of January, 1884, and on the 19th of December, 1884, an order of revivor was made against her executors, Ainsworth and Whalley. The chief clerk made his certificate on the 28th of February, 1887, by which he found that there was not any sum due for principal and interest to the late defendant Dodgson, or to the defendants, Ainsworth and Whalley, as the legal personal representatives of the late defendant Jane Dodgson, in respect of the mortgage securities. The chief clerk also certified that all sums secured by the mortgages were repaid to Dodgson and Lord in November, 1866, and that on the 30th of November, 1866, there was a balance of £11 12s. 7d. due from them; that at the date of the issue of the writ there was due from them the sum of £325 8s. 3d., and that at the date of the certificate there was due from the defendants, Ainsworth and Whalley, the sum of £618 2s. 8d.; that Dodgson, Hart, and Lord entered into receipt of the rents and profits of the mortgaged premises in the month of May, 1857, and that of the sum of £618 2s. 8d. £462 8s. 2d. was due from the defendants, Ainsworth and Whalley, as the representatives of the late defendant, R. B. Dodgson, £44 9s. 4d. as the representatives of the late defendant, Jane Dodgson, and the residue, £111 5s. 2d., from themselves.

The action now came on for further consideration.

Cozens-Hardy, Q.C., and *E. S. Ford*, for the plaintiffs.—The plaintiffs are entitled to repayment of all over-payments, with interest calculated with annual rests from the date on which the mortgage debt was paid off: *Wilson* v. *Metcalfe*, 1 Russ. 530. We only ask for interest at the rate of £4 per cent. Inasmuch as the defendants have raised a hostile defence, they ought to pay the costs of the action: *Barlow* v. *Gains*, 23 Beav. 244; *National Bank of Australasia* v. *United Hand in Hand and Band of Hope Co.*, 27 W. R. 889, 4 App. Cas. 391.

Everitt, Q.C., and *Ingle Joyce*, for the defendants.—There was a *bonâ fide* question raised, and the defendants ought not to be visited with costs. In any case they ought not to be made personally liable: *Boynton* v. *Boynton*, 27 W. R. 825, 4 App. Cas. 733; Williams on Executors, 6th ed., vol. 2, p. 1828. The court is precluded by the form of the judgment—directing an account of what was due to the defendant Dodgson for his taxed costs of the action—from ordering the present defendants to pay the costs of the action: *Wilson* v *Metcalfe*. As to the claim for annual rests the plaintiffs are bound by the form of the certificate, which finds that a specified balance was due on a certain day, and the court will not go behind that finding.

Cozens-Hardy replied.

North, J. (after stating the facts, continued).—The

first question that arises is as to annual rests. The plaintiffs ask for annual rests on the balances found due from the times at which those balances respectively became due. The form of the judgment shows that interest was in arrear at the time when the mortgagees (the predecessors of the present defendants) entered into possession. Therefore, annual rests have not been made in the accounts directed by the judgment. But, in my opinion, that has no bearing on the question whether annual rests ought to be made against the defendants from the subsequent date at which it has been shown that the mortgage debt was fully paid. The principle on which annual rests are not ordered as against mortgagees in possession, whose interest was in arrear at the time when they entered into possession, is that it cannot be considered that, in so doing, they elected to receive their capital by driblets. They are entitled, in the absence of any bargain to the contrary, to have their whole capital paid off at once, and the taking of possession is not evidence of such a bargain. But, after they have been paid in full, they are, as was pointed out by the Master of the Rolls in *Wilson* v. *Metcalfe*, persons who are, in receiving the rents after their debt has been fully paid, availing themselves of another man's money for their own use and benefit, and they ought to be charged with interest. In that case annual rests were directed to be made from the time at which the mortgage debt was fully paid, and that is what I have always understood to be the practice in the few cases in which the point has arisen. It seems to me that annual rests are in the present case a matter of course.

It is suggested that they ought not to be allowed since the date of judgment. I cannot see any reason for that distinction. The same state of things continued, and the same principle applies. The mortgagees remained in possession of another man's property, claiming either that it was their own or that they were retaining it in respect of their debt. That claim has failed, and I can draw no line in respect of annual rests at the date of the judgment.

With regard to the costs of the action, it was suggested that I cannot now order the mortgagees to pay costs by reason of the decision in *Wilson* v. *Metcalfe*, which is said to have been followed in numerous cases. The present case does not appear to me to correspond with that. The point whether the costs should be paid by the mortgagee seems to me to have been reserved by the judgment to be dealt with after it should have been ascertained whether his claim was well founded or not. It has turned out to be an unfounded claim, and it seems to me that, under such circumstances, the usual and proper order is, that a mortgagee who has remained in possession, claiming the mortgaged property as his own after he has been fully paid, must pay the costs of a redemption action.

The defendants' counsel endeavoured to draw a distinction between the costs before and the costs after the judgment, and at first I thought there was something in that distinction, because the costs before the judgment were incurred at the time when there was a hostile claim by the defendants setting up the Statute of Limitations. Since the judgment the Statute of Limitations has been out of the case, but the defendants have still insisted before the chief clerk that a large amount was due to them. That amount was disallowed; and again, after their accounts had been taken, a surcharge was carried in against them which has to some extent succeeded.

Under these circumstances it seems to me that no ground has been shown for relieving the defendants from the payment of any part of the costs of the action. I was disposed at one time to think that, as so long a period as ten years had been allowed to elapse between the date of the judgment and the completion of the accounts, and during that interval several changes of interest had taken place, this might have affected the co[illegible] some extent in favour of the defendants. But on lo[illegible] at the dates I find that there has been considerable [illegible] which is not chiefly, if at all, attributable to the [illegible]tiffs, and I cannot, on this ground, relieve the d[illegible]ants from any part of the costs. The order for pa[illegible] of costs by the defendants will not prejudice any [illegible] which they may have in the administration of the e[illegible] of their own testator and testatrix to have those [illegible] allowed to them, but, as between the plaintiffs a[illegible] defendants, the order must be for payment of th[illegible] by the defendants.

Minute of order.—Order that annual rests be [illegible] in the accounts of the rents and profits of the [illegible]gaged property certified to have been received [illegible] late defendants Dodgson and Lord, and the late d[illegible]ant Jane Dodgson, and the defendants Ainsw[illegible] Whalley, from the 30th of November, 1866, to th[illegible] when from the certificate it appears that Dodgson [illegible] and Pickup were overpaid their principal, inter[illegible] costs, up to the date of payment, and that [illegible] be computed on the respective balances in each [illegible] the rate of £4 per cent. per annum, and in tak[illegible] annual rests (except the first) the interest of [illegible]ceding balance is to be included in such bala[illegible] to charge the defendants with compound [illegible] thereon. And it appearing (from an affidav[illegible] the 29th of July, 1887) that the total amount d[illegible] account, when such annual rests have been ma[illegible] in, amounts to £964 7s. 4d., and that the [illegible] thereof to be paid by the defendants Ainsw[illegible] Whalley, as executors of Dodgson, for the pe[illegible] the 30th of November, 1868, to the 13th of Ju[illegible] amounts to £777 17s. 1d.; that the portion to [illegible] by those defendants, as executors of Jane Do[illegible] the period from the 13th of June, 1882, to th[illegible] January, 1884, amounts to £51 8s. 1d., and th[illegible]tion to be paid by those defendants personal[illegible] period from the 20th of January, 1884, up to [illegible] of payment amounts to £135 2s. 2d. Order [illegible] defendants, as executors of Dodgson (they ad[illegible] assets), to pay the £777 17s. 1d. to the plaintiff[illegible] as executors of Jane Dodgson (they admitting a[illegible] pay the £51 8s. 1d. to the plaintiffs; and to pa[illegible] plaintiffs the £135 2s. 2d. due from the defenda[illegible]sonally, the several payments to be made on or [illegible] the 1st of August, 1887, or subsequently with[illegible] days after service of the order on the defendants.

Solicitors for the plaintiffs, *Bolton, Robbins, B[illegible] Co.*, for *Knowles & Thompson*, Newchurch.

Solicitors for the defendants, *Gregory, Rowcli[illegible] Co.*, for *L. & W. Wilkinson*, Blackburn.

House of Lords.

From C. A. (England). April 28, 29; Aug. 9.

Blackburn, Low, & Co. v. Vigors. (a.)

Marine insurance—Principal and agent—Concealment of material facts by agent through whom policy not effected.

Underwriters instructed their agents to re-insure an overdue ship. During negotiations the agents received material information, which they did not make known to the underwriters, who re-insured the ship through these agents for £800. The underwriters afterwards re-insured the ship further for £700 through different agents. Neither the underwriters nor the last-named agents had the information which the first-named agents had. The ship was lost.

Held, that the knowledge of the first-named agents was not the knowledge of the underwriters so as to affect the second re-insurance, and that the underwriters were entitled to recover upon it.

Decision of the Court of Appeal (*reported* 17 *Q. B. D.* 553, 34 *W. R. Dig.* 116) *reversed.*

This was an appeal from a decision of the Court of Appeal (Lindley and Lopes, L.JJ., Lord Esher, M.R., dissenting) reversing a decision of Day, J., who tried the case without a jury.

The following statement of the facts will be found sufficient for the purpose of this report.

The plaintiffs were underwriters and insurance brokers at Glasgow, and were underwriters of a policy on the steamship *Florida*. The policy had been effected by the owners of the ship through Rose, Murison, & Thompson, of Glasgow, who were the brokers for effecting insurances upon her. The ship left New York on the 11th of April, 1884, and was due at Glasgow on or about the 25th. The ship not having arrived, the plaintiffs, desiring to protect themselves from loss, endeavoured on the 30th of April to effect a re-insurance. They first attempted to do this through Roxburgh, Currie, & Co., but, the terms being too high, no insurance through them was then effected. The next day Mr. Low, one of the plaintiffs, saw Mr. Thompson, a member of the firm of Rose, Murison, & Thompson, and asked him about the ship, and requested him to telegraph to the London agents of his firm—viz., to Rose, Thompson, Young, & Co.—to effect an insurance for £1,500 at fifteen guineas; and a telegram to this effect was accordingly sent between 11 and 12 o'clock. At 12.30 on the same day a Mr. Murray gave Murison important information brought to Glasgow by another ship, calculated to excite suspicion of the loss of *The Florida* some days previously. *The Florida* had, in fact, been lost some ten days previously. The information thus obtained by Murison was never disclosed by him to the plaintiffs, and the plaintiffs knew nothing about the matter and concealed nothing themselves. Shortly after the above interview Rose, Thompson, Young, & Co., of London, telegraphed to Rose, Murison, & Thompson, of Glasgow: "Twenty guineas paying freely and market very stiff—likely to advance before day is out." This telegram was shown to the plaintiffs, who ultimately effected an insurance through Rose, Thompson, Young, & Co. for £800 at twenty-five guineas. This, however, is not the policy in question in this action. But on the next day, the 2nd of May, the plaintiffs, through Roxburgh, Currie, & Co., effected a further re-insurance with the defendant for £700 at thirty guineas, and this is the policy on which this action is brought.

At the trial of the action the substantial defence set up was, that the defendant was induced to subscribe the policy by the wrongful concealment by the plaintiffs and their agents of material facts known to the plaintiffs or their agents and unknown to the defendant.

Day, J., gave judgment for the plaintiffs, and the Court of Appeal reversed this decision and gave judgment for the defendant.

The appellants appealed to the House of Lords.

April 28, 29.—*Sir C. Russell, Q.C.*, and *Hollams*, for the appellants.—The material information did not come to the ears of the plaintiffs, or of any agent of theirs employed either in connection with this contract or in such a way as to impose a duty to transmit such information to his principals. No authority goes to the length necessary to support the judgment of the Court of Appeal in this case.

They cited *Fitzherbert* v. *Mather*, 1 T. R. 12; *Gladstone* v. *King*, 1 M. & S. 35; *Proudfoot* v. *Montefiore*, 15 W. R. 920, L. R. 2 Q. B. 511; *Stribley* v. *Imperial Marine Insurance Co.*, 24 W. R. 701, 1 Q. B. D. 507; *Ruggles* v. *General Interest Insurance Co.*, Amer. Rep. 4 Mason 74, 12 Wheaton, 408; 1 Phillips on Insurance, ss. 531, 543.

Sir R. E. Webster, A.G., and *J. G. Barnes*, for the respondent.—The agent had the information when the relationship of principal and agent still existed between himself and the appellants. The two policies effected, the first of which is clearly void, are on the same footing. The broker was authorized to effect insurance on the whole amount; until this was done he was bound to tell his principal all he knew, and the principal is in law presumed to have that knowledge.

They cited 2 Duer on Marine Insurance, s. 13, part 1, pp. 381, 415; 1 Phillips on Insurance, ss. 543, 549, 562, 564; 1 Arnould, 4th ed., pp. 481, 490. *Wyllie* v. *Pollen*, 11 W. R. 1081, was referred to.

Hollams replied.

Aug. 9.—Lord Halsbury, C.—In this case the plaintiffs sue upon a policy of marine insurance, and the only question arises upon the statement of defence that the defendant was induced to enter into the contract by concealment of material facts by the plaintiffs and their agents.

The facts are not in dispute. Neither the plaintiffs nor the agent through whom the policy was effected had any knowledge of the material fact, the concealment or non-disclosure of which is relied on as vitiating the policy, but an agent who did not effect the policy at an earlier period received information admitted to be material while he was acting as agent to effect an insurance for the plaintiffs which he did not communicate.

Day, J., before whom the case was decided without a jury, held that this did not affect the validity of the policy. A majority of the Court of Appeal reversed Day, J.'s judgment, and held that the non-disclosure was fatal to the plaintiffs' claim.

So far as I can understand the judgment of the Court of Appeal, it is intended to lay down a principle that would not, I think, be contested; but it applies that principle to a state of facts to which I think it is inapplicable. Lindley, L.J., says (I think correctly): "It is a condition of the contract that there is no misrepresentation or concealment either by the assured or by anyone who ought, as a matter of business and fair dealing, to have stated or disclosed the facts to him or to the underwriter for him." And Lopes, L.J., after stating the principle upon which the knowledge of the agent is the knowledge of the principal, explains it to mean that the principal is to be as responsible for any knowledge of a material fact acquired by his agent

(a.) Reported by C. G. Napier Trollope, Esq., Barrister-at-Law.

employed to obtain the insurance as if he had acquired it himself. To the propositions thus stated I think no objection could be made, but it is obvious that the words in the one judgment, "agent employed to obtain the insurance," or in the other judgment the words, "the underwriter," import that the particular contract obtained was, in the language of the statement of defence, a policy which the defendant was induced to subscribe by the wrongful concealment by the plaintiffs and their agents of certain facts then known to the plaintiffs or their agents, and unknown to the defendant, which were material to the risk.

I doubt very much whether the solution of the controversy as to what is the true principle upon which the contract of insurance is avoided by concealment or misrepresentation, whether by considering it fraudulent or as an implied term of the contract, helps one very much in deciding the present case. If one were to adopt in terms the language of Lord Ellenborough, C.J., in *Gladstone* v. *King*, I do not think it could justify the judgment of the majority of the Court of Appeal. In that case a policy lost or not lost was effected on the 25th of October. On the previous 25th of July the ship had run upon a rock. On the 5th of August the captain wrote to his owners, the plaintiffs; they received his letter on the 25th of October. Whatever may be said of the logic of that case, which acquitted the captain of all ill intention, but decided upon the ground that otherwise owners might direct their captains to remain silent, and which, upon a policy lost or not lost, assumes any antecedent damage to have been an implied exception out of the policy, it does not proceed upon any such ground as the Court of Appeal appear to rely on here. Lord Ellenborough says:—"No mischief will ensue" (a somewhat strange mode of enunciating a proposition of law) "from holding in this case that the antecedent damage was an implied exception out of the policy. If the principle be new, it is consistent with justice and convenience." Unfortunately, his lordship does not state what is the principle which he apparently admits to be new. I can quite understand that, when a man comes for an insurance upon his ship, he may be expected to know both the then condition and the history of the ship he seeks to insure. If he takes means not to know, so as to be able to make contracts of insurance without the responsibility of knowledge, this is fraud. But even without fraud, such as I think this would be, the owner of the ship cannot escape the necessity of being acquainted with his ship and its history because he has committed to others—his captain, or his general agent for the management of his shipping business—the knowledge which the underwriter has a right to assume the owner possesses when he comes to insure his ship.

With respect to agency so limited, I am not disposed to differ with the proposition laid down by Cockburn, C.J., in *Proudfoot* v. *Montefiore*. A part of the proposition is "that the insurer is entitled to assume as the basis of the contract between him and the assured that the latter will communicate to him every material fact of which the assured has, or in the ordinary course of business ought to have, knowledge." I think these last are the cardinal words, and contemplate such an agency as I have described above. I am unable, however, to see that the present case is governed by any such principle.

A broker is employed to effect a particular insurance—while so employed he receives material information—he does not effect the insurance and he does not communicate the information. How is it possible to suggest that the insurer could rely upon the communication to the principal of every piece of information acquired by any agent through whom the assured has unsuccessfully endeavoured to procure an assurance? I am unable to accept the criticism by the Master of the Rolls upon the proposition that the knowledge of the agent is the knowledge of the principal. When a person is the agent to know, his knowledge does bind the principal. But in this case I think the agency of the broker had ceased before the policy sued upon was effected. The principal himself and the broker through whom the policy sued on was effected were both admitted to be unacquainted with any material fact which was not disclosed. I cannot but think that the somewhat vague use of the word "agent" leads to confusion. Some agents so far represent the principal that in all respects their acts and intentions and their knowledge may truly be said to be the acts, intentions, and knowledge of the principal. Other agents may have so limited and narrow an authority, both in fact and in the common understanding of their form of employment, that it would be quite inaccurate to say that such an agent's knowledge or intentions are the knowledge or intentions of his principal; and whether his acts are the acts of his principal depends upon the specific authority he has received.

In *Fitzherbert* v. *Mather* the consignor and shipper of the goods insured was the agent whose knowledge was in question. In *Gladstone* v. *King* the master of the ship was the agent; and in *Proudfoot* v. *Montefiore* the agent was the accepted representative of the principal, in effect trading and acting for him, in Smyrna, the owner himself carrying on business in Manchester. And though the decision in *Ruggles* v. *The General Insurance Co.*, before the Supreme Court of the United States, may not be very satisfactory in what they held under the circumstances of that case to be the relation between the captain of the ship and his owners, the principle upon which that case was decided was the supposed termination of the agency between them.

Where the employment of the agent is such that in respect of the particular matter in question he really does represent the principal, the formula that the knowledge of the agent is his knowledge is I think correct, but it is obvious that that formula can only be applied when the words "agent" and "principal" are limited in their application.

To lay down as an abstract proposition of law that every agent, no matter how limited the scope of his agency, would bind every principal even by his acts, is obviously and upon the face of it absurd; and yet it is by the fallacious use of the word "agent" that plausibility is given to reasoning which requires the assumption of some such proposition.

What, then, is the position of the broker in this case whose knowledge, though not communicated, is held to be that of the principal?

He certainly is not employed to acquire such knowledge, nor can any insurer suppose that he has knowledge in the ordinary course of employment like the captain of a ship, or the owner himself, as to the condition or history of the ship.

In this particular case the knowledge was acquired, not because he was the agent of the assured, but from the accident that he was general agent for another person. The reason why, if he had effected the insurance, his knowledge, unless he communicated it, would have been fatal to the policy, is because his agency was to effect an insurance, and the authority to make the contract drew with it all the necessary powers and responsibilities which are involved in such an employment; but he had no general agency—he had no other authority than the authority to make the particular contract, and his authority ended before the contract sued on was made. When it was made no relation between him and the shipowner existed which made or continued him an agent for whose knowledge his former principal was responsible. There was no material fact known to any agent which was not disclosed at the point of time at which the contract was made; there was no one

possessed of knowledge whose duty it was to communicate such knowledge.

For these reasons I am of opinion that the judgment of the Court of Appeal should be reversed, and the judgment of Day, J., restored, and I move your lordships accordingly.

Lord Watson.—This is a case of considerable nicety; but I have ultimately come to the conclusion, for the reasons already stated by the Lord Chancellor, that the appeal ought to be allowed.

It is, in my opinion, a condition precedent of every contract of marine insurance, that the insured shall make a full disclosure of all facts materially affecting the risk which are within his personal knowledge at the time when the contract is made. Where an insurance is effected through the medium of an agent, the ordinary rule of law applies, and non-disclosure of material facts, known to the agent only, will affect his principal, and give the insurer good ground for avoiding the contract.

In the case of insurance by a shipowner, it has been decided that he is affected by the knowledge of a class of agents other than those whom he employs to insure. In the ordinary course of business, the owner of a trading vessel employs a master and ship agents, whose special function it is to keep their employer duly informed of all casualties encountered by his ship, which would materially influence the judgment of an insurer. On that ground it has been ruled that the insurer must be held to have transacted the insurance in reliance upon the well-known usage of the shipping trade, and that he is, consequently, entitled to assume that every circumstance material to the risk insured has been communicated to him, which ought, in due course, to have been made known to the shipowner before the insurance was effected. Accordingly, if a master or ship agent, whether wilfully or unintentionally, fail in their duty to their employer, their suppression of a material fact will, notwithstanding his ignorance of the fact, vitiate his contract.

I do not think it necessary to notice in detail the authorities which bear upon this point. I desire to say, however, that I have difficulty in comprehending the principle upon which the court in *Gladstone* v. *King* and *Bribley* v. *The Imperial Marine Insurance Co.* held that the innocent non-communication of a material fact, by an agent who was the *alter ego* of the shipowner, merely created an exception from the policy. In both these cases the court appears to me to have undertaken the somewhat perilous task of settling the terms of the contract which the insurer would have made for himself if the fact had been communicated to him.

In the present case it is sought to extend the imputed knowledge of the insured to all facts which, during the period of his employment, became known to any agent, other than the agent effecting the policy in question, who was employed at any time, successfully or unsuccessfully, to insure the whole or part of the same risk with that covered by the policy. This is a case of re-insurance; but it is obvious that the principle, if admitted, would be equally applicable to the original contract.

I am of opinion that the responsibility of an innocent insured for the non-communication of facts which happen to be within the private knowledge of persons whom he merely employs to obtain an insurance upon a particular risk, ought not to be carried beyond the person who actually makes the contract on his behalf. There is no authority whatever for enlarging his responsibility beyond that limit, unless it is to be found in the decisions which relate to captains and ship agents; and these do not appear to me to have any analogy to the case of agents employed to effect a policy. There is a material difference in the relations of these two classes of agents to their employer. The one class is specially employed for the purpose of communicating to him the very facts which the law requires him to divulge to his insurer; the other is employed, not to procure or give information concerning the ship, but to effect an insurance. There is also, as the Master of the Rolls pointed out, an important difference in the positions of those two classes with respect to the insurer. He is entitled to contract, and does contract, on the basis that all material facts connected with the vessel insured known to the agent employed for that purpose have been by him communicated in due course to his principal. So, also, when an agent to insure is brought into contact with an insurer, the latter transacts on the footing that the agent has disclosed every material circumstance within his personal knowledge; but it cannot be reasonably suggested that the insurer relies, to any extent, upon the private information possessed by persons of whose existence he presumably knows nothing.

In the circumstances of this case I have come to the conclusion that, whilst it might be the moral duty of Mr. Murison to communicate to the appellants the information which he received on the forenoon of the 1st of May, 1884, he was under no legal obligation to do so. There may be circumstances which impose upon agents in the position of Mr. Murison an express or implied duty to communicate their own information to their principal, but nothing of that sort occurs here. I must, in fairness to Mr. Murison, say that I can find no warrant for the inference of fact drawn by Lindley, L.J., that he purposely omitted to impart his knowledge to the appellants in order that they might re-insure on more favourable terms. No such imputation was made at the trial, and, if it had been made, it ought to have been submitted to the jury, and their verdict taken upon it.

I concur, therefore, in the judgment which has been moved.

Lord Fitzgerald.—In this very interesting case I concur in the order which will presently be proposed by the Lord Chancellor. I adopt entirely the reasons which have been given by the Lord Chancellor and by Lord Watson. The judgment delivered by Lord Esher, M.R., was one of more than usual ability—it was a considered judgment, prepared with care and upon a critical examination of the authorities; and I am prepared to adopt that judgment and substantially the reasons given by the noble and learned lord for the conclusion at which he arrived, though not every portion of those reasons.

Lord Macnaghten.—I agree.

It has frequently been said by great judges that the doctrine of constructive notice ought not to be extended. It seems to me that the decision under appeal involves a great and a dangerous extension of that doctrine.

There is nothing unreasonable in imputing to a shipowner who effects an insurance on his vessel all the information with regard to his own property which the agent to whom the management of that property is committed possessed at the time, and might in the ordinary course of things have communicated to his employer. In such a case it may be said without impropriety that the knowledge of the agent is the knowledge of the principal. But the case is different when the agent whose knowledge it is sought to impute to the principal is not the agent to whom the principal looks for information, but an agent employed for the special purpose of effecting the insurance. It is quite true that the insurance would be vitiated by concealment on the part of such an agent just as it would be by concealment on the part of the principal. But that is not because the knowledge of the agent is to be imputed to the principal, but because the agent of the assured is bound as

the principal is bound to communicate to the underwriters all material facts within his knowledge. Concealment of those facts is a breach of duty on his part to those with whom his principal has placed him in communication: *Lynch* v. *Dunsford*, 14 East. 494.

It was said that in the present case Murison was under a legal obligation to communicate to the appellants the knowledge which he acquired while employed as their agent. But the learned counsel for the respondent produced no authority for that proposition, nor did they, I think, satisfy your lordships that such a legal obligation flowed from Murison's employment. The majority of the Court of Appeal say that, whether there was a legal obligation on the part of Murison or not, there was a moral obligation on his part to communicate this information to his employers. But I apprehend that it is not the function of a court of justice to enforce or give effect to moral obligations which do not carry with them legal or equitable rights. Whatever may be thought of Murison's conduct from a moral point of view, it would, in my opinion, be a dangerous extension of the doctrine of constructive notice to hold that persons who are themselves absolutely innocent of any concealment or misrepresentation, and who have not wilfully shut their eyes or closed their ears to any means of information, are to be affected with the knowledge of matters which other persons may be morally, though not legally, bound to communicate to them.

Order appealed from reversed; judgment of Day, J., restored; respondent to pay to the appellants the costs both here and below. Case remitted to the Queen's Bench Division.

Solicitors for the appellants, *Hollams, Son, & Coward.*

Solicitors for the respondent, *Waltons, Bubb, & Johnson.*

Court of Appeal.

From Chan. Div. March 21.

BARTON v. LONDON AND NORTH-WESTERN RAILWAY CO. (*a*.)

Practice—Third party procedure—Third party notice—Appearance of third party to notice—Nature of relief claimed by action—Circumstances under which third party not entitled to be added as defendant.

In an action against a railway company, the relief claimed by the plaintiffs was that sums of stock of a specified amount might be transferred into the names of the plaintiffs in the company's register, the plaintiffs alleging that stock to that amount had been improperly transferred out of their names by the defendant company in consequence of a forged authority to transfer. The railway company were alone made defendants.

The defendant company obtained leave to issue a third party notice claiming indemnity against persons who were transferees of part of the stock, and that order was not appealed from. On a summons for directions by the defendant company—the third parties refusing to admit any liability to contribution or indemnity—Kay, J., *made an order that the third parties should be at liberty to attend at the trial of the action and take such part therein as the judge might direct, and that they should be bound by the trial, but refused to allow them to deliver a defence.*

(*a*.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

Held, on appeal by the third parties, that the order was right, on the grounds (1) *that, though the defendant company were willing to have the third parties added as defendants, yet, having regard to the nature of the relief claimed by the action, the plaintiffs were entitled to object to the third parties being added as defendants; and* (2) *that, having regard to the fact that the defendant company had, by their defence, raised every point that could be suggested by the third parties, no injustice had been done to the third parties by the refusal to allow them to deliver a defence.*

Eden v. Weardale Iron and Coal Co., 35 *W. R.* 507, 35 *Ch. D.* 287, *explained.*

Coles v. Civil Service Supply Association, 32 *W. R.* 407, 26 *Ch. D.* 529, *followed.*

Appeal from Kay, J.

The action was brought in December, 1886, by Ann Barton and Elizabeth Ashe, the present trustees of the will of Samuel Barton, who died in 1870, the plaintiff Ann Barton being also an executrix. The railway company was the sole defendant to the action.

The plaintiffs claimed that the defendant company might be ordered "to appropriate or purchase and to transfer to and register in the names of" the plaintiffs "a sum of £11,641 consolidated stock, and a sum of £1,250 4 per cent. stock."

The plaintiffs alleged that sums of stock to that amount belonging to the estate of the testator stood in the books of the defendant company in the names of Ann Barton, the plaintiff, and Thomas Barton, the other executor and trustee under the will of the testator, and that between the years 1874 and 1885 the same was wrongfully transferred by the defendant company out of the joint names of Ann Barton and Thomas Barton by reason of the defendant company having acted on a deed or deeds authorizing the transfers, and purporting to have been executed by both Ann Barton and Thomas Barton, though, in fact, it was alleged that the signature of the plaintiff Ann Barton to the said deeds were forgeries and that the plaintiff Ann Barton had never authorized or assented to the said transfers.

In 1886, after the transfers referred to, Thomas Barton became insolvent and retired from the trusts of the will, and the plaintiff Elizabeth Ashe was, under the powers in that behalf contained in the will, appointed a trustee of the will in the place of Thomas Barton.

The defendant company, by their defence, denied the allegation that the said deeds were not assented to and not executed by the plaintiff Ann Barton, and that any signature thereto was forged, and they also, in their defence, raised the point that an authority to transfer given by one of two executors was sufficient.

On the 29th of July, 1887, the defendant company applied for and obtained leave, under ord. 16, r. 48, to issue a third party notice on D. Leahy Arthur and Sir J. Percival Radcliffe, the present holders and transferees of part of the stock referred to, and this notice was served on these transferees on the 18th of August, 1887. The transferees did not move to have this order discharged or varied.

The defendant company subsequently took out, under ord. 16, r. 52, a summons for directions, and at the hearing of this summons the third parties applied to be made defendants in the action, but, in reply to a question of Kay, J., refused to admit any liability to indemnify the defendant company. Kay, J., on the 10th of February, 1888, made an order on the summons for directions that the third parties should be at liberty to attend at the trial of the action and take such part in the proceedings as the judge should direct, and that they should be bound by the result of the trial of the action, with liberty to any party to the action to apply; but refused leave to the third parties to deliver a defence in the action.

From this order the transferees, the third parties, appealed.

Vaughan Hawkins, for the appellants.—The appellants ask to be made defendants in the action, and to be at liberty to deliver a defence, and as the question whether the transfers were forgeries or not is one in which all parties are interested, the plaintiffs cannot be embarrassed or prejudiced thereby: *Carshore* v. *North-Eastern Railway Co.*, 33 W. R. 420, 29 Ch. D. 344. Kay, J., in making this order followed the form of order which he himself introduced in *Coles* v. *Civil Service Supply Association*, 32 W. R. 407, 26 Ch. D. 529; but it has been subsequently held by the Court of Appeal in *Eden* v. *Weardale Iron and Coal Co.*, 35 W. R. 507, 35 Ch. D. 287, that persons brought in as third parties are in the position of defendants, and may administer interrogatories. Section 24, sub-section (3), of the Judicature Act, 1873, shows what are the liabilities and rights of a person brought in under the third-party rule, and see the Annual Practice, 1887-8, p. 11. [COTTON, L.J.—You did not move to discharge or vary the order making you a third party.] The court has power to add the third parties as defendants without any application: ord. 16, r. 11. *Cottam* v. *Eastern Counties Railway Co.*, 9 W. R. 94, 1 J. & H. 243, shows that in an action of this kind the transferees of the stock ought to be made defendants.

Taylor v. *Midland Railway Co.*, 8 W. R. 401, 10 W. R. 382, 28 Beav. 287, 8 H. L. Cas. 751, was also referred to.

O. L. Clare, for the defendant company, did not object to the appellants being made defendants in the action, nor to any particular form of order being made, so long as the appellants were kept in the action so as to be bound by the result of the trial.

Alfred Whitaker (*Renshaw, Q.C.*, with him), for the plaintiffs.—The plaintiffs by their action do not claim the specific stock now standing in the names of the appellants, the transferees, nor do they claim any specific stock. The plaintiffs have claimed nothing as against the transferees, and there is no privity between them and the plaintiffs. The plaintiffs' claim is against the railway company alone as custodians of the register, for not keeping an accurate register. *Taylor* v. *Midland Railway Co.* is a case of an exactly similar claim. [LINDLEY, L.J., referred to *Sloman* v. *Bank of England*, 14 Sim. 475.] Any application made now to have the transferees added as defendants comes too late. The order made by Kay, J., follows *Coles* v. *Civil Service Supply Association*.

Vaughan Hawkins, in reply.—The appellants have been brought in as third parties, and the order now appealed from binds them generally by the result of the trial and not merely for contribution or indemnity. [COTTON, L.J.—Is there any case in which an order has been made giving a third party the right and liberty you now claim?] *Benecke* v. *Frost*, 24 W. R. 669, 1 Q. B. D. 419, is such a case. [COTTON, L.J.—That was a case, not under the present rules, but under the rules of 1875.] [LINDLEY, L.J.—The only case I can find where an order of this kind was made is the case of *Eden* v. *Weardale Iron and Coal Co.*, where an anomalous order of this kind had been made and was not appealed.] In substance the relief claimed in this action is a re-transfer of this stock. [COTTON, L.J.—What defence do you suggest has not been raised by the defendant company?] I should like to set up a claim on contract by way of defence, and that the transfer by one executor was sufficient to give me a good title. [COTTON, L.J.—Any claim on contract you have, notwithstanding; and the other matter has been raised by the defence of the company. The order of Kay, J., also gives liberty to any parties to the action to apply in chambers as they may be advised.] I doubt whether that applies to my clients.

COTTON, L.J.—This is an appeal from Kay, J., by persons made parties to the action under what is known as the third party rule; the order giving the defendant company liberty to serve these persons has not been appealed from, and we have not now to deal with that order. The only question we have now to consider is whether any injustice has been done to the third parties by the order made upon the application for directions—whether that order for the trial of the matter in issue in their presence did not give them all that they were entitled to. To decide that we must look at the nature of the action. The plaintiffs brought their action against the railway company alone to compel the company to replace certain stock which the plaintiffs said ought to be standing in their names in the company's books. In my opinion, whatever may be the consequence as between the company and other persons, the plaintiffs are entitled to proceed against the company alone, on the ground that it is their duty to keep their books properly—not to take the stock which was registered in the plaintiffs' names out of their names without a proper authority from them to do so, and that the company are liable to replace the stock which they have without that proper authority taken out of the plaintiffs' names. It has been often held in cases against the Bank of England that if the plaintiff sought to have the identical stock which had been wrongfully transferred replaced in his name, he might have done so, but in that case he must have sued the transferees, making the company co-defendants, as being the custodians of the register. But in this case the plaintiffs did not take that course. The company did not at first suggest that the third parties ought to be made defendants, but got a third party order against these persons in order that they might be bound by the decision in this action of the question whether these transfers were forged or not. By the order now appealed from, Kay, J., gave no liberty to the present appellants to put in a defence or to intervene as parties in the action, but ordered that they should be at liberty to attend at the trial and take such part in the proceedings as the judge might direct, and should be bound by the result of the trial. Of course, the present appellants, having that liberty, might make an application to raise any defence not raised by the railway company. But it seems to me that every point which could be raised by the third parties is raised in the defence of the company. If the third parties wish to administer interrogatories, they can inform the defendant company what it is they wish to be elicited from the plaintiffs by interrogatories, and if the defendant company refuse to put the interrogatories, the third parties might apply to the judge in chambers for an order for that purpose; but when, as here, all points are fairly raised by the defence, and intended to be fought out by the defendant company, the plaintiffs ought not to be embarrassed by the third parties coming in to defend the action and interrogate as if they were defendants. Having regard to the nature of the relief which the plaintiffs seek, it is quite right that the railway company only should be made defendants, and I am unable to see that the order does not give the appellants everything which they ought to have. The court must endeavour to do justice to third parties, but at the same time it must take care not to do injustice to the plaintiffs. If there were any witnesses which the appellants may think ought to be called at the trial, they can communicate with the company's advisers, and, if they refuse to call those witnesses, the appellants can make an application to the judge, and he would no doubt allow the third parties to call those witnesses themselves.

LINDLEY, L.J.—I am of the same opinion. At first it

seemed to me that the plaintiffs could not prosecute their action without these third parties being brought in as defendants, but the cases of *Sloman* v. *Bank of England* and *Taylor* v. *Midland Railway Co.* show that the plaintiffs need sue no one but the railway company. The issues to be decided in the action are, first, whether the transfers are forgeries or not; and, secondly, whether the signature of one of the registered joint holders is sufficient. The judge below gave the present appellants liberty to appear at the trial of the action and to take such steps in the proceedings as the judge might direct. It must be remembered that the railway company are *bonâ fide* defendants, and mean to raise and contest the points raised by the pleadings. In my opinion no injustice is done, or likely to be done, by this order, under the circumstances, to the present appellants.

BOWEN, L.J.—I am of the same opinion. The plaintiffs are seeking to impeach certain transfers of stock which they allege are forged transfers. But the action is brought against the railway company alone, and at first, after hearing the argument of Mr. Vaughan Hawkins, it seemed to me that the company ought not to have been the sole defendants. But Mr. Whitaker, by his able argument, rolled back the tide of war which had risen against him, and changed the view I had first taken.

The relief sought by the action is relief sought, not as against the third parties, but as against the railway company alone. Mr. Vaughan Hawkins was compelled to admit that, as the action was at first launched, the transferees were not necessary parties; but he urged that they had been made parties to the action by an order, under the third party rule, which bound them by the result of the action, and yet did not give them adequate protection under that rule.

The case of *Cottam* v. *Eastern Counties Railway Co.* was relied on as showing that the transferees ought to have been made defendants, but that case is not in point, as there relief was sought directly affecting the transferees. Whether in the present case these transferees were rightly or wrongly brought in as third parties I say not. They have submitted to that by not moving to discharge the third party order. A summons for directions was then taken out, as it had to be, under ord. 16, r. 52, to protect both the plaintiffs and the third parties. Now what is the way in which a third party, when brought in, is protected without embarrassing the plaintiff? The next rule, rule 53, deals with that. In the first place, the judge *may* permit the third party to defend the action, but not so as to embarrass the plaintiff, and the third party has no right to superadd himself as a defendant except on terms such as admitting a liability to give indemnity, &c., and Mr. Vaughan Hawkins' clients refused to admit such liability to give indemnity; but the rule goes further, and provides, secondly, that a third party may appear at the trial and take such part in the proceedings at the trial as the judge may think fit; thirdly, the judge may give such directions as he thinks fit for the purpose of having the question conveniently tried, and as to the mode and extent in or to which the third party shall be bound by the judgment in the action. The railway company here are not sham defendants, or defendants who have no interest in opposing the plaintiff's claim, as in some of the cases, of which *Witham* v. *Vane*, 28 W. R. 276, 49 L. J. Ch. 242, may be cited as an example, but they are effectively defending the action, and it seems to me, therefore, that Mr. Vaughan Hawkins' clients have no right to be made defendants because they wish to dress the defence in a particular fashion, if their interests are substantially defended by the railway company. They can make an application to prevent any miscarriage of justice if, by reason of anything happening subsequently to the order, their interests would not be substantially defended. No such necessity has yet arisen.

Appeal dismissed.

Solicitors for the appellants, *Palmer, Elaud, Nettleship.*

Solicitor for the defendant railway company, *C. Mason.*

Solicitors for the plaintiffs, *Stephens & Stephens.*

From Chan. Div. March 7.

MILLER v. HARPER. (a.)

Practice — Summons for particulars — Discovery — R. S. C., 1883, ord. 19, r. 17.

In an action by the executors of a deceased married woman against her husband claiming the delivery up of certain furniture in the defendant's possession which was alleged to form part of the separate property of the deceased, the defendant took out a summons for particulars of the claim.

Held, affirming North, J., *that no order ought to be made upon the summons until the defendant had given discovery as to the furniture in his possession, specifying what he claimed as his.*

Appeal from North, J.

The action was brought by the executors of a deceased married woman against her husband, and the plaintiffs claimed certain furniture, then in the house of the defendant, as the separate estate of the testatrix.

The furniture in question was in part alleged to have been settled to the separate use of the testatrix by a marriage settlement, and in part to have been purchased by her during coverture out of her separate income.

After the delivery of the statement of claim, the defendant took out a summons for delivery of particulars by the plaintiffs of the nature and description of the several articles of furniture alleged to have belonged to the testatrix for her separate use, together with dates showing when and of whom the alleged purchases were made, and what articles were purchased and what price paid therefor, and for a stay of all further proceedings unless such particulars were given within seven days.

North, J., refused to make any order on this summons and ordered it to stand over until the defendant should have made an affidavit stating what articles of furniture and effects in the house the defendant claimed.

The defendant appealed.

J. G. Wood, for the appellant.—The defendant is not bound to give discovery until he has obtained the particulars from the plaintiffs; there should first be some issue knit between the parties. The plaintiffs had made no application for discovery, and, therefore, the order was wrong in form in requiring the defendant to make discovery. The plaintiffs have no doubt since applied for discovery, but had not done so when the defendant's summons was dealt with.

Swinfen Eady, for the respondent, was not called on.

COTTON, L.J.—I think the order that was made was right in substance, if not in form. The action is brought by the executors of a deceased lady. The lady herself would, of course, have known what furniture was hers and what belonged to the trustees of her settlement, but the executors cannot know that. In my opinion the learned judge was substantially right in refusing to make any order for particulars on the application of the

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

defendant until the defendant gave discovery by making an affidavit stating what the articles of furniture in the house were that he claimed. It would not be right to require the plaintiffs, who are executors, to give particulars until the defendant had done that.

LINDLEY, L.J.—I also think the order was right; if the contention put forward on behalf of the defendant were adopted, I do not see how the plaintiffs would be able to carry on the action at all.

BOWEN, L.J.—I am of the same opinion. In such cases it is a good practice, and one in conformity with the rules of procedure, to adjourn a summons for particulars till such discovery be given.

Appeal dismissed.

Solicitors, *Peacock & Goddard; S. F. Miller & Son.*

From Chan. Div. Feb. 14, 16, 23.

GAS LIGHT AND COKE CO. v. SOUTH METROPOLITAN GAS CO. (a.)

Metropolitan Gas Act, 1860 (23 & 24 *Vict. c.* 125), *s.* 6 —*District—Supply of gas for sale—Supply for consumption beyond district—Point of supply.*

The Nine Elms Station of the London and South-Western Railway Co. lies partly in the district of the plaintiff company and partly in that of the defendant company. The defendant company placed meters within their own district, from which gas was passed through pipes to that portion of the Nine Elms Station lying within the plaintiff company's district. Section 6 of the Metropolitan Gas Act, 1860 (*which applied to both companies*), *after defining the limits of each company's district, enacted that "No other company or person than the company to whom such limits are for the time being assigned . . . shall supply gas for sale within the said limits, unless authorized by Parliament so to do."*

Held, that the decision in the case of Imperial Gas Light and Coke Co. *v.* West London Junction Gas Co. (*Journal of Gas Lighting, Jan.* 7, 1868, *p.* 14, 56 *L. J. N. S. Ch.* 862 *note*) *governed the present case, and therefore that the point of supply within the meaning of the section is the meter through which the gas passes into the pipes for consumption by the customer, and that it is not a transgression of the statutory provision to supply gas for sale at a meter within the district of the supplying company, although it is intended for consumption and is in fact consumed within the district of another company.*

Per Lindley *and* Bowen, L.JJ., *that if not bound by the decision referred to they should have held that "supply" of gas was a process continuing from the place where the gas is made to where it is burnt.*

Decision of Kekewich, J. (ante, *p.* 119), *affirmed.*

This was an appeal from a decision of Kekewich, J., reported *ante*, p. 119, where the facts of the case and the arguments are fully stated.

The facts were shortly as follows:—

The plaintiff company was formed by the amalgamation of several gas companies, and had an exclusive right of supplying gas over the district formerly supplied by its constituent companies, such supply being governed by the provisions of the Metropolitan Gas Act, 1860. The defendant company in like manner was formed by the amalgamation of several gas companies, and had an exclusive right of supplying gas over a district adjoining the district of the plaintiff company, such supply being also governed by the provisions of the Metropolitan Gas Act, 1860.

By that Act (section 6) the limits of the companies are defined, and it is enacted that "no other company or person than the company to whom such limits are for the time being assigned or shall hereafter be assigned, shall supply gas for sale within the said limits unless authorized by Parliament so to do."

The premises of the London and South-Western Railway Co. at Nine Elms, consisting of extensive locomotive and other works, are situated partly within the plaintiff company's district and partly within the defendant company's district. By an agreement with the London and South-Western Railway Co. the gas for the supply of the whole of the railway company's premises at Nine Elms was furnished by the defendant company through three meters within the defendant company's district, but the gas was admittedly used outside the defendant company's district.

The plaintiff company, by their action, to which the railway company were not parties, claimed an injunction and damages against the defendant company.

Kekewich, J., dismissed the action, with costs.

The plaintiff company appealed.

Sir Henry James, Q.C., Sir Charles Russell, Q.C., Sir Horace Davey, Q.C., R. S. Wright, Danckwertz, and *Haldane*, for the appellants.

Sir R. E. Webster, A.G., Michael, Q.C., and *Prior*, for the respondents.

Sir Henry James, Q.C., replied.

Cur. adv. vult.

COTTON, L.J.—This is an appeal from a decision of Kekewich, J., dismissing the plaintiffs' action. If the objection had been seriously pressed that the railway company ought to be parties, I am of opinion that that objection ought to prevail; but under the circumstances it is our duty to decide the question before us on its merits, and notwithstanding the absence of the railway company. [After stating the facts, his lordship proceeded:—] The question which we have to consider is, What is the true interpretation of the words "supply gas for sale within the said limits" in section 6 of the Metropolitan Gas Act, 1860? Now, whatever view we might have taken of those words if the matter had come before us unhampered by authority, we cannot, in my opinion, decide in favour of the plaintiffs, having regard to the case which has been cited to us of *The Imperial Gas Light and Coke Co.* v. *West London Junction Gas Co.*, reported in Journal of Gas Lighting, 7th January, 1868, p. 14; 56 L. J. N. S. Ch. 862, note. That case is not reported in the authorized reports, but its substantial accuracy has not been disputed on either side; and we must assume it to be correct. It is true that the circumstances of that case were widely different from the present; but the principles there laid down by Cairns, L.J., and Rolt, L.J., exactly apply to the case before us.

Lord Cairns said: "There is no controversy that the two meters—both the meter of the Wormwood Scrubs Co., by which they check the delivery of their gas, and the meter of the Great Western Railway Co., by which, for their own satisfaction, they check the receipt of the gas—are both out of the district of the Imperial Gas Co., and close to the Wormwood Scrubs Works. In my opinion, therefore, this is a question which does not admit of any serious doubt, because, although gas is a very intangible article to our apprehension, still gas is a manufactured article, which is sold and delivered like any other manufactured article, and the question is to determine when and at what part this manufactured article is sold and delivered. Certainly, as I understand it, with regard to gas, wherever the point is that the meter of the company is fixed, and the gas leaves the

(a.) Reported by C. HERBERT BROWN, Esq., Barrister-at-Law

meter and is delivered to the consumer, that is, the point where the risk of the company ends and the risk of the consumer begins. In a dwelling-house the pipe on both sides of the meter may or may not belong to the company, but where the meter which tells what gas has passed through and been delivered on the premises is, that is the place where the risk of the company ends and the risk of the consumer begins; and so I say, in my opinion, the gas company in this case delivering gas through these two meters, which are altogether out of the district of the Imperial Co., the gas is there sold and delivered to the Great Western Railway Co., and if there be a supply for sale within the meaning of the Act of Parliament, that supply for sale is not, in my opinion, within the limits of the Imperial Co. but in a wholly different district." And Rolt, L.J., expresses himself to the same effect.

That is a clear decision as to the proper construction of the Act, and it is a decision, acted on for many years, which this court is, I think, bound to follow. The decision of Kekewich, J., must be affirmed, and this appeal dismissed, with costs.

LINDLEY, L.J.—The question in this action is as to the meaning of the words "supply gas for sale." My own opinion is that the process of supply is continued from where the gas leaves the gasometer to where it is burnt. I cannot, however, in this case put upon the words the construction which I think right, having regard to the construction placed upon it by Lord Cairns and Rolt, L J., in the case to which the Lord Justice has referred.

BOWEN, L.J.—My own impression has been that this is a case in which one ought to have the courage of one's opinions, and in which, holding the view which we do hold as to the construction of the word "supply," we ought to decide accordingly. For my part, I cannot agree with the construction laid down by Lord Cairns and Rolt, L.J. In my opinion to supply does not mean to sell and deliver; a meter is not a reservoir, or the point at which the supply is made; but the operation of supply continues till the gas reaches the burner. However, I concur with my learned brothers in yielding to the expressed opinion of the court in the case to which reference has been made and which has been acted upon by this court for many years. The appeal will accordingly be dismissed.

Solicitors, *Bedford, Monier-Williams, & Robinson; Johnson, Budd, & Johnson.*

From Chan. Div. July 8, 9, 11, 12, 14, 15; Aug. 4.

PROCTOR v. BENNIS. (a.)

Patent—Specification—Description—Combination producing new result — Infringement by mechanical equivalents.

Where a patent has been obtained for an invention consisting of a combination of mechanical appliances, where the invention is new it is not necessary—on the question of validity of the patent—that the particular portions of the combination should or should not have been claimed as novel in the specification; but, on the question of infringement, where the infringement alleged is not the taking of the combination, but the taking of a subsidiary portion of the combination, then it is necessary that the novelty of such portion should have been claimed.

Foxwell v. Bostock, 12 *W. R.* 723, 4 *De G. J. & S.* 298, *explained.*

Harrison v. Anderston Foundry Co., 1 *App. Cas.* 574, 25 *W. R. H. L. Dig.* 174, *followed.*

Where the invention claimed by a patentee is one merely for improvements in a combination of the mechanical means already used in old machines, producing a result already well known, there the patentee will be held strictly to the description given in his specification of the particular means by which his invention is carried into effect, and the doctrine that mere mechanical equivalents constitute an infringement does not apply. But where the invention claimed is one not merely for improvements in the combination of mechanical means employed, but also in the application of those means to produce a result that is novel, then the user by another person of mere mechanical equivalents for the purpose of producing the same result constitutes an infringement of the patent.

Curtis v. Platt, 3 *Ch. D.* 135n, 13 *W. R. Ch. Dig.* 59, *distinguished.*

Clark v. Adie, 26 *W. R.* 45, 2 *App. Cas.* 315, *explained.*

The defendant in an action for infringement of a patent, in order to successfully plead—at the hearing of the action as distinguished from an interlocutory application—"acquiescence" as a bar to the plaintiff's rights, must prove (1) *that the defendant was ignorant of the plaintiff's rights; and* (2) *that the plaintiff knew that the defendant was ignorant of the plaintiff's rights, and stood by and allowed the defendant to expend money in ignorance of the plaintiff's rights.*

Appeal from Bristowe, Vice-Chancellor of the Palatine Court of Lancaster.

The action was to restrain the infringement of a patent obtained by the plaintiff in June, 1875. The defendant Bennis was the maker of machines alleged to be infringements, and the other defendants, Crosses & Winkworth and Greenhalgh & Shaw, were persons who were using the machines made by Bennis.

The plaintiff's patent was for an invention having for its object improved and self-acting mechanism for the supply and distribution of fuel at intervals over the surface of fire in furnaces.

The plaintiff, in his specification, described the construction and action of his apparatus as follows:—"I employ an ordinary feed-hopper applied to the front of the boiler, which, by means of spiked rollers, will give a supply of fuel: the fuel is received upon an inclined door or flap . . . . the door or flap is secured to cross-shafts, to which, by means of levers or tappets, a partial turn or rotary motion is given, drawing back the door or flap until the tappet shall have passed its throw, whereon the partial rotation of the shaft is suddenly reversed by means of a coiled spring or weight applied thereto. By such reversing action the door or flap attached to the shaft receives a rapid forward movement in the direction of the furnace bars, throwing and distributing the fuel over a portion of the fire. The tappet is provided with two or more varying throws, so that the spring will be coiled more or less as the fuel is to be alternately thrown on to the surface fire at the front, midway, or back of the fire surface. The tappet shaft receives motion from a worm and worm-wheel."

The plaintiff, in his specification, then went on to describe the same in detail and with reference to various figures thereunto annexed, and continued as follows:—"I would have it to be understood that I lay no claim to the hopper, nor to the spiked rollers, nor to the shafts and worms for operating the same; but what I do claim is the employment of the tappets and shafts and springs when applied to and in connection with the doors as and for the purpose herein fully described and illustrated."

The defendant Bennis had, in April, 1875—prior to the date of the plaintiff's patent—taken out a patent

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

for improvements in the mechanism of furnace-feeding machines, but in that patent of Bennis' the coal was thrown upon the fire by a longitudinal thrust, the pusher being worked by an arm. It appeared that Bennis, before taking out this patent, had tried radial action, but abandoned it, and adopted the longitudinal action in his patent. Bennis' patent, however, was not a success, and never came into practical use.

Some years subsequent to the date of the plaintiff's patent Bennis began to manufacture the machines which the plaintiff alleged constituted infringements of the plaintiff's patent. These machines of Bennis', though different in general appearance to those of the plaintiff, worked like the machines of the plaintiff, with an intermittent radial motion, and the radius was moved in one direction by tappets, and in the opposite direction by a spring, as in the plaintiff's machine. In Bennis' machine, however, the radius was not attached to a shaft, but worked on a pin, and was itself impelled by the tappets and the spring, whereas in the plaintiff's machine the radius was attached to a shaft, and the shaft was impelled by the tappets and the spring.

Bennis exhibited these machines of his at Manchester in 1882, and at Oldham in 1883, and the other defendants bought and used them. The plaintiff saw Bennis' machines at both exhibitions, but did not then complain of them as infringements. It appeared from the evidence that the plaintiff, in 1882, knew that the other defendants had purchased some of Bennis' machines, and that the plaintiff had on several occasions asked the other defendants to try the plaintiff's machine instead of Bennis', as it was better than that of Bennis, but had never intimated to those defendants that Bennis' machine was an infringement of the plaintiff's patent.

In 1887 the action was tried before the Vice-Chancellor of the County Palatine of Lancaster, who held that the machine made by Bennis was an infringement of the plaintiff's patent, and gave judgment accordingly against Bennis, but dismissed the action as against the other defendants on the ground that the plaintiff had lost his right of action against them by acquiescence.

The plaintiff appealed from so much of the judgment as dismissed the action against the defendants other than Bennis; and the defendant Bennis appealed from the judgment against him. The appeals came on for hearing together.

The nature of the arguments sufficiently appears from the judgments.

Sir R. E. Webster, A.G., Moulton, Q.C., and *S. Hall*, for the plaintiff's appeal.

Aston, Q.C., and *Bousfield*, for the defendant Bennis' appeal.

Rigby, Q.C., and *Bather*, for the respondents Crosses & Winkworth.

O. L. Clare, for the respondents Greenhalgh & Shaw.

Aug. 4.—COTTON, L.J. [after stating the nature of the appeal, continued:—] The first question we have to consider is, what is it the plaintiff claims by his specification? For the present it is sufficient to state that his claim is for a combination forming a machine to distribute coal on fires or furnaces, and it is a combination and nothing else that he claims. It was not contested that it was useful, and it was not seriously contended that it had been anticipated, but it was contended before us that the plaintiff's specification was not good, because it did not point out what he admitted to be old and what he considered to be new. It was argued that the infringement complained of was an infringement, not of the combination, but of some subsidiary combination or some particular portion in the plaintiff's machine. That argument is erroneous, because the case made by the plaintiff is that the defendants have infringed the combination which was patented, but it is desirable to deal with the objection to the specification.

Counsel for Bennis relied on the opinion expressed by Lord Westbury in *Foxwell* v. *Bostock*, 12 W. R. 753, 4 De G. J. & S. 298, but that must be read with the light thrown upon it by Lord Cairns in *Harrison* v. *Anderston Foundry Co.*, 1 App. Cas. 574, 25 W. R. H. L. Dig. 174. [The Lord Justice here read the passage in the judgment of Lord Cairns referring to *Foxwell* v. *Bostock*, and continued:—] In my opinion, it is of necessity, apart from this expression of Lord Cairns, that where a combination is claimed to be an invention, then, if that invention be new, it is immaterial, on the question of validity of the specification and the goodness of the patent, whether the patentee has pointed out how far he does or does not claim particular portions.

Of course, if the alleged infringement had been the taking a subsidiary portion of this combination—particular parts of the machinery which formed the combination—it would have been material; but here the plaintiff in his claim cuts himself down entirely to the combination, pointing out that he simply claims the combination of four parts—the combination of the tappets, shafts, and springs with his flaps or doors.

It was further contended by Mr. Aston that all the differences between the machine which Bennis is making and selling and the machine specified in Bennis' patent of April, 1875—which was prior to that of the plaintiff—were mere alterations which any workman could introduce as a variation of that machine without any invention whatever, and that as Bennis had got a patent which should cover all such additions or variations as could be made by an ordinary workman without invention from his specification, it was impossible that the later grant to the plaintiff should prevent Bennis from using that which was really described in his own patent. In my opinion, looking at the machinery, one would come to the conclusion that the difference between Bennis' machine as described in his specification and the machines which he is now making is not of the character so urged. It is remarkable that the only witness supporting that contention of Bennis is his principal scientific witness—of the very highest attainments as a scientific witness—but not a practical man employed in making these machines. No workman was called to say that these variations would have occurred to him, or were such as he would have introduced without any invention. [The Lord Justice here mentioned a particular variation with respect to the action of the door or flap, and continued:—] It would be singular that this variation, which has made a machine effectual, while the patented machine of Bennis' seems never to have come into practical use, should be considered a mere obvious variation not requiring any invention.

We then come to this point—is there an infringement? The contention of the plaintiff is, not that parts of his machinery have been taken, for which he has a right to protection, but that his combination has been taken. It is obvious that Bennis has not taken absolutely and exactly the combination which the plaintiff has patented; but the question is, Has the combination in substance been taken? Has Bennis, though not exactly taking the whole combination which has been patented, taken, by slight variations or by mechanical equivalents, the substance of it, so as to produce the same result by practically the same means? [The Lord Justice here referred in detail to the specification of the plaintiff, and said:—] Now the ingenuity of counsel produced the argument that this does not claim a combination. I agree that it does not contain the word "combination," but what is here claimed is, to my mind, essentially a combination, and nothing else. A combination is the use of certain things in connection with others to produce a machine, and that

is what is here claimed. [The Lord Justice then entered into an examination of the machine made and sold by Bennis with reference to the differences between it and the plaintiff's machines, and continued :—] In my opinion, although Bennis has not got the exact combination of the plaintiff, yet he has got it in substance and result by putting mere mechanical equivalents for elements of the plaintiff's combination, which is protected by his patent.

Then it is said, on behalf of Bennis, that there are certain omissions in the machine which he is making and selling of parts which there are in the plaintiff's combination; that there are certain things in Bennis' machine not found in the plaintiff's, and producing a result which is not obtained in the plaintiff's machine; and that that would prevent what has been done by Bennis being considered as an infringement of the plaintiff's machine. But if Bennis has, by any additions, made an improvement which would be a subject for letters patent, that will not enable him to take the plaintiff's combination and apply his improvements to it. Omissions or additions may be very material in considering whether, in fact, the machine of Bennis is an infringement of the combination which the plaintiff claims; but, if Bennis really has taken the substance and essence of the plaintiff's combination, the mere fact that certain parts are omitted or certain parts are added cannot prevent his machine from being an infringement of the plaintiff's combination.

Then it was said we are bound by what was laid down by the judges in *Curtis* v. *Platt*, 3 Ch. D. 135n, 3 W. R. Ch. Dig. 59. The principle alleged to have been laid down there was that where an invention is claimed for improvements in machinery consisting only in a combination, there the patentee must be held to the description which he gives of the particular means by which his invention is to be carried into effect, and that the doctrine of mechanical equivalents cannot apply. In my opinion that case does not apply to the present, because the observations there made were applied to a case where the patent was for an improvement in a machine which had been long in use for producing a certain result. There was no novelty in the results to be produced, and the only novelty which could be claimed was the application and use of certain mechanical means in order to produce in a known machine the same result which in that known machine had been produced by other mechanical means. That, to my mind, distinguishes that case from the present. [The Lord Justice then referred in detail to the nature of the invention claimed by the patentee in *Curtis* v. *Platt*, and continued :—] In applying the words used by the judges in that case, we must consider the nature of the case before them, and I come to the conclusion that what they meant was—that where there is no novelty in the result, and where the machine is not a new one, but the claim is only for improvements in a known machine for producing a known result, the patentee must be tied down strictly to the invention which he claims, and the mode which he points out of effecting the improvement. But here, although there had previously been imperfect machines for feeding furnaces automatically, yet there had not, previously to this machine, been any machine by which that had been done by any intermittent radial action of a flap or door, as is done here by the plaintiff. In my judgment, therefore, we must come to the conclusion that the defendant Bennis, and also the other defendants, have infringed the plaintiff's patent, and that, so far as this goes, the appeal of Bennis must be dismissed.

Then we come to the question whether anything has been done by the plaintiff which will bar his right of relief as against the defendants? Now we must bear in mind that this is not a question as to an interlocutory injunction. If the plaintiff, after what had taken place, had come here for an interlocutory injunction, it would have been difficult for him to answer some of the arguments which on this part of the case were urged against him, because the court does not interfere on interlocutory injunction unless the plaintiff has been prompt in making his claim. But here we are at the hearing, and what we have to consider is, has the right of the plaintiff been barred by what has been done by the plaintiff? [The Lord Justice, after here referring to the evidence on this point, came to the conclusion that the proper construction of the evidence was, not that the plaintiff gave permission to the defendants other than Bennis to use the machines made by Bennis, if on a trial those machines were found to be better than the machines of the plaintiff, but that the plaintiff merely requested those defendants to try the plaintiff's machine, and if they did, that they would find it a better machine than that of Bennis'; and continued :—] Then it is said that, independently of that, there had been a lying by on the part of the plaintiff which would in a court of equity prevent him from obtaining relief. In my opinion there has not. The right of the patentee does not depend on the defendant having notice that what he is doing is an infringement. If what the defendant is doing is, in fact, an infringement, his having acted *bonâ fide* and honestly will not protect him from an injunction. It does not depend on notice. The right of monopoly has been granted to the patentee, and what it is necessary for the defendant to show in order to raise an equity against the plaintiff, is expressed by Lord Cranworth in *Ramsden* v. *Dyson*, 14 W. R. 926, L. R. 1 H. L. 129, as follows: "If a stranger begins to build on my land, supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that when I saw the mistake into which he had fallen, it was my duty to be active to state my adverse title, and that it would be dishonest in me to remain wilfully passive on such an occasion in order afterwards to profit by the mistake which I might have prevented." That lays down the principle that it is necessary that the person who alleges this lying by should have been acting in ignorance of the title of the other man, and that the other man should have known that ignorance, and not mentioned his own title. Here none of the defendants state that they never knew anything about the plaintiff's patent. In my opinion it must be taken that they did know it, but, if they did not, I cannot find anything from which we ought to draw the conclusion that the plaintiff had reason to suppose that they did not; why should he not suppose that they were acting on the view for which they are now contending, that what they were doing was no infringement?

In my opinion the facts of this case do not require or enable us to hold that the plaintiff lay by, so as by his silence, with knowledge that the defendants were acting in ignorance of his title, to deprive himself of any title to relief which he otherwise would have had.

Then, is there anything like a representation that the machines of Bennis were no infringement? It is true that the plaintiff never said they were, although he knew it. But, in my opinion, mere silence, merely not giving notice to the defendants that what they were doing was an infringement, cannot reasonably be taken as any representation that what they were doing was not an infringement. It would be going much too far to hold that the omission of the patentee to say, "You are infringing my patent," amounted to a representation by him that what the parties were doing was not an infringement. There is no evidence to lead us to the conclusion that there was any estoppel against the plaintiff by a representation made by him to the effect relied on

by the defendants. In my opinion, therefore, the appeal of the plaintiff succeeds and the appeal of Bennis fails.

BOWEN, L.J.—I am of the same opinion. With regard to the defendants other than Bennis, the Vice-Chancellor decided that the plaintiff had lost against them whatever rights he originally possessed owing to conduct or inaction on his part which amounted either to estoppel or to acquiescence within the meaning attached to that word by the well-known practice and principles of the courts of equity. As to estoppel, it seems to me that there is a very short, and I think conclusive, answer to the respondent's argument. There certainly was no representation made by the plaintiff to the effect that he would not enforce his rights or that he had got no rights as against these defendants, nor was there, in my opinion, any conduct which amounted to such a representation. I think the only plausible ground which Mr. Rigby could take was that there had been acquiescence. But in order to make out acquiescence it is necessary for them to establish that the plaintiff stood by and knowingly allowed the defendants to proceed and to expend money in ignorance of the fact that the plaintiff had rights and meant to assert such rights. If they made out that case, then a court of equity would not afterwards allow the plaintiff to interfere with them except upon the terms of placing them in the same position and compensating them for the loss which they had sustained owing to a mistake which he favoured. It seems to me impossible to apply this doctrine to the facts before us. It seems to me that the true inference of fact to be drawn here is that these defendants, other than Bennis, were acting at their own peril throughout, and knew throughout that they were so acting. Although they reckoned on security, and although for a long time the plaintiff did not interfere, there was nothing on the part of the plaintiff to lull them into security.

I will now state the conclusion at which I have arrived on the question of Bennis' patent. Mr. Aston said, first, that there was no infringement, and then, that, if there were any, it was only in respect of the radial action of the door, and that this radial action was not put forward in the plaintiff's patent as a substantial element of claim, and that if it had been so put forward it would not have been a good subject-matter for a patent. The answer is this, that the plaintiff's claim is for a combination and nothing more, and that when a combination and nothing more is claimed, the combination being a novelty, it is immaterial that the patentee should point out how far he claims novelty for particular portions which go to make up the combination. Those portions are not his claim, but it is putting them together and combining them that constitutes his claim. That seems to me to be the true law as laid down in *Harrison* v. *Anderston Foundry Co.*, without a reference to which case *Foxwell* v. *Bostock* is liable to be misunderstood. Then, again, it was said that there was no difference between the plaintiff's patent and the prior patent of Bennis except variations which a mechanic of ordinary competency could easily achieve, and that Bennis was entitled to stand on his prior grant. To my mind the answer to that is, that there is no evidence upon which I could rely to support that view, and that Bennis for five years did not make those variations.

I pass now to the question whether there has been any infringement. Has the combination been taken, or a substantial part of it? All has not been taken. Has Bennis, then, taken so much as to produce the same result by the same means or by mere mechanical equivalents for the same means? [The Lord Justice here entered into an examination of the nature of the plaintiff's invention, and continued:—] Now I think it goes to the root of this case to remember that this is, as was described by one of the counsel, a pioneer invention, and it is by the light of that, as it seems to me, that we ought to consider the question whether there have been variations or omissions and additions which prevent the machine which is complained of from being an infringement of the plaintiff's. With regard to the variations, I take precisely the same view that Cotton, L.J., has taken. With regard to the additions and omissions, it is obvious that additions may be an improvement, and that omissions may be an improvement, but the mere fact that there is either an addition or an omission does not enable the defendant to take the substance of the plaintiff's patent. The question is, not whether the addition or omission is material, but whether what has been taken is the substance and essence of the invention. That seems to me to be the true test as propounded by the House of Lords in *Clark* v. *Adie*, 26 W. R. 45, 2 App. Cas. 315. Now in *Curtis* v. *Platt* it has been said that, where the patentee has claimed a particular mechanical device for effecting the object in view, he must be held strictly to that device. But when you are considering an absolutely new invention with a novel result, you cannot apply that rule without recollecting that the result effected is new as well as the combination, and that when there is really an ingenious novelty in the idea that the combination will produce a new result, that novelty in the idea is part of the merit of the very combination. I do not feel, after the reflection we have given the case, much doubt that there has been an infringement, and I think that the appeal of Bennis ought to fail.

FRY, L.J.—I have arrived at the same conclusion. I will first consider the point which has been raised by the appeal of those defendants against whom an injunction was sought on the ground of their user of the machine. Their case, which was successful before the Vice-Chancellor, may be stated in one or other of two ways. It may be placed on the equitable doctrine of acquiescence, or it may be placed on the legal doctrine of estoppel by conduct. In the present case there is no evidence of the knowledge on the plaintiff's part of any mistake by the defendants of their legal rights; and, further, I think that there is no evidence of any representation, made either by conduct or by words to the defendants by the plaintiff, of the character which was relied upon, and which would be necessary to support either the legal or the equitable defence. I think, therefore, that the defence of those defendants who used the machine, whether it be treated as a legal defence of estoppel or as an equitable defence of acquiescence, entirely fails. The ingredients necessary to each of these defences are wanting. Now with regard to the question of the patent and the infringement of it. The pith and substance of the plaintiff's invention is, in my judgment, putting coals upon a fire by an intermittent radial action. Was there any prior publication of an invention which was substantially the same as the plaintiff's? [The Lord Justice here considered the patents of Stanley and Church, and came to the conclusion that their machines were different in their action from the plaintiff's, and continued:—] Then, as to Bennis' invention and patent, it appears to me also to be plain that a longitudinal thrust was the essence of that invention and patent, and I have come to the conclusion that it is not a mere matter of ordinary practice which any ordinary workman could have given effect to, to pass from the longitudinal thrust of Bennis' machine to the radial action of the plaintiff's machine.

Then as to the question of infringement. [The Lord Justice then described the nature of the invention claimed by the plaintiff, and continued:—] The main inquiry we have to answer before determining the true construction of that claim is, Was this combination for an old object, or was it a combination for a new object?

It appears to me that the cases and the reason of the case draw a broad distinction between combinations which are old as regards their elements and old as regards the object to be attained, and combinations which, though old as regards the elements, are new as regards the mode of putting them together, and new as regards the object to be attained.

I think that a comparison of what was said in *Curtis* v. *Platt*, where a broad distinction was drawn by Lord Hatherley between old and new objects, with what was said by Lord Cairns in *Clark* v. *Adie* in indicating the second mode in which the combination might be infringed in that case, and with what was said by the present Master of the Rolls in *Nordenfelt* v. *Gardner*, 1 Rep. Pat. Cas. 65, goes to show that there is a broad line of distinction to be drawn between the cases of combination for an old object and cases of combination for a new object, and, as I have already said, reason goes along with those authorities. Was, then, the object in the present case an old one, or was it a new one? Putting fuel on a fire is, of course, an act as old as can be. But is that the real object of the patent? I think the real object of the patent is this, the automatic placing of coal on a fire by intermittent radial action. That object is new. I think, therefore, we are bound to construe this combination as a combination to effect a new and useful object. That being so, what was stated by Lord Cairns in *Clark* v. *Adie* distinctly applies. He said:—"The second mode"—that is, second mode in which a combination might be infringed—"would be one which might occasion more difficulty. The infringer might not take the whole of the instrument described, but he might take a certain number of parts of it; he might make an instrument which, in many respects, would resemble the patented instrument, but would not resemble it in all its parts. Then the question would be, either for a jury or for any tribunal which was judging of the facts of the case, whether that which was done by the alleged infringer amounted to a colourable departure from the instrument patented, and whether in what he had done he had not really taken and adopted the substance of the instrument patented." That appears to me to be the inquiry here. In the present case we have these broad features of likeness, that in both machines the motion is a radial motion, in both machines it is an intermittent action, in both machines it is, of course, produced by means of a radius, in both machines that radius is moved in one direction by tappets, and the same radius is moved in the opposite direction by a spring. All those broad features of the machines are common, but there is this difference, that in the plaintiff's machine a shaft is impelled by the tappets and by the spring, whereas in Bennis' machine the radius itself is impelled by the tappets and the spring. It follows that the radius in the plaintiff's machine is attached to the shaft, whereas the radius in Bennis' works on a pin. That is the broad distinction between them. The result, however, seems to me to be substantially the same—by substituting the pin for the shaft as the centre on which the radius acts, and by impelling the radius itself instead of impelling the shaft fixed to the radius, you have produced, in substance, precisely the same radial action by the same means. I think, therefore, that we have here, in the plaintiff's machine, a new combination for a new object, and that the gist of that combination has been taken by Bennis, and that consequently there is an infringement.

For these reasons I agree with the conclusion arrived at by my learned brethren.

Appeal of the plaintiff allowed; appeal of the defendant Bennis dismissed.

Solicitors for the plaintiff, *Shaw & Tremellen*, for *A. Macdonald Blair*, Manchester.

Solicitor for Bennis, *Stringer*, Manchester.

Solicitors for the defendants Crosses & Winkworth, *Johnston, Harrison, & Powell*, for *T. H. Winder*, Bolton.

Solicitors for the defendants Greenhalgh & Shaw, *Chester & Co.*, for *A. W. Reed*, Manchester.

From Chan. Div. July 13.

PALMER v. MALLET. (a.)

Agreement — Construction—Joint and several—Agreement in restraint of trade entered into with partners —Dissolution of partnership—Subsequent breach as to one partner.

A. was engaged as assistant to B. & C., who carried on the business or profession of surgeons in partnership at N. Upon entering such service, A. gave to B. & C. a bond, which contained the recital of an agreement that A. would not at any time thereafter "set up or carry on the business or profession of a surgeon." The partnership between A. and B. was subsequently dissolved, and A. was engaged by B. as his assistant. Upon an application by C. to restrain A. from so acting,

Held, that the agreement entered into by A. with B. & C. was both joint and several, and that C. was therefore entitled to sue alone for a breach of it.

Held, also, that A. had committed a breach of it by acting as assistant to B., and that an injunction ought, therefore, to be granted.

Allen v. Taylor, 19 *W. R.* 556, *distinguished.*

Decision of Chitty, *J.*, *affirmed.*

Appeal from a decision of Chitty, J.

In October, 1885, the defendant Mallet entered into the employment of Hall & Palmer, who were then carrying on in partnership at Newtown, in Montgomeryshire, the business of general medical practitioners, as their salaried assistant.

On the 4th of December, 1885, the defendant gave Hall & Palmer a bond, by which he became bound to pay them, their executors, administrators, or assigns, the sum of £1,000. The bond contained the following recitals:—"Whereas the said T. C. Mallet has lately been taken into the employment of the said E. Hall and H. L. Palmer as an assistant in their said business of practice of surgeons, accoucheurs, and apothecaries, carried on by them in Newtown aforesaid, and its surroundings: And whereas one of the terms upon which the said T. C. Mallet was taken into the employment of the said E. Hall and H. L. Palmer, as aforesaid, was that he should not at any time set up or carry on the business or profession of a surgeon, accoucheur, apothecary, or physician in the said town of Newtown or within ten miles thereof, and that he should enter into and execute these presents." The condition of the bond was, "That, if the said T. C. Mallet shall not at any time hereafter, directly or indirectly, and either alone or in partnership with or as assistant of any other person or persons, or otherwise howsoever, set up or carry on the profession or business of a surgeon, accoucheur, apothecary, or physician, or any branch thereof, or any professional business connected therewith within the said town of Newtown, or within ten miles thereof, without the consent in writing of the said E. Hall and H. L. Palmer, their executors, administrators, or assigns being first obtained for that purpose: And if the said T. C. Mallet shall not, either by himself or by any other person or persons, either on behalf of himself or any other person or persons,

(a.) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

any time hereafter solicit the custom or support of the persons who are now, or may hereafter from time to time be, the customers or patients of the said E. Hall and H. L. Palmer, their executors, administrators, or assigns, or either of them, in or in connection with such profession or business as aforesaid, or solicit any of such persons to discontinue his or her employing the said E. Hall and H. L. Palmer, their executors, administrators, or assigns, or either of them: But so that nothing herein contained shall prejudice or affect the right of the said E. Hall and H. L. Palmer, their executors, administrators, or assigns, to restrain by injunction any breach on the part of the said T. C. Mallet of the agreement hereinbefore recited, and to recover damages against him, his executors or administrators, for any antecedent breach thereof in lieu of taking proceedings against him or them under the above-written bond, then the above-written bond or obligation shall be void."

On the 2nd of May, 1887, the partnership was dissolved by the judgment of the court in an action for dissolution, and thenceforth Hall and Palmer each carried on business separately in Newtown, and the defendant entered into the employment of Hall as a salaried assistant.

On the 6th of May, Palmer brought this action to restrain the defendant from so acting, on the ground that he was thereby committing a breach of the above agreement.

The only evidence of the agreement was the recital of it contained in the bond.

On the 24th of June, Chitty, J., granted an injunction.

The defendant appealed.

Aston, Q.C., and *Yate Lee*, for the appellant.—The agreement recited in the bond is only a joint one—not joint and several—and was intended for the protection of the joint business only, and that business now being at an end the plaintiff alone cannot sue upon it. Assuming, however, that the plaintiff alone can sue, we contend that acting as an assistant to another person was not a breach of an agreement not to "set up or carry on the business or profession of a surgeon," &c. The words "assistant of any other person or persons" in the condition of the bond mean any person or persons other than the parties to the agreement, and do not apply to the acting as an assistant to one of those persons.

They referred to *Allen* v. *Taylor*, 19 W. R. 35; *Lake* v. *South Kensington Hotel Co.*, 27 W. R. 514, 11 Ch. D. 121; *Corporation of Bristol* v. *Westcott*, 27 W. R. 841, 12 Ch. D. 461.

Romer, Q.C., and *Alan Stewart*, for the respondent, were not called upon.

Cotton, L.J.—I cannot say that we have not had some difficulty in dealing with this case. We are asked to give effect to and enforce a contract when nothing is known of its terms but from a recital in a bond. The action is not on the bond, but one of the two partners in whose favour that bond was executed relies on an agreement recited in it, and asks the court to grant an injunction to restrain Mr. Mallet from breaking the alleged agreement. We cannot now finally decide the question between the parties, but, unless there is some further evidence as to the terms of the agreement beyond the recital in the bond, I do not see how the parties can usefully go on with this litigation.

Now was Chitty, J., right? I think he was. He granted an injunction, in the terms of the agreement recited, to restrain the defendant, Mr. Mallet, from carrying on the business or profession of a surgeon in Newtown or within ten miles thereof. At the time when this bond was entered into Mr. Palmer and Mr. Hall, as appears in the bond, were carrying on business in partnership together at Newtown as surgeons, accoucheurs, and apothecaries. The bond recites—[his lordship read the recital as above set forth, and continued:—] Now that recital deals with two things—the execution of the bond and the contract on which Chitty, J., has relied.

I do not refer to the terms of the condition of the bond, because what we have to deal with is the agreement appearing on that recital. We must look at the position of the parties with whom that agreement was entered into. They were carrying on business as partners. Although they were partners for life that partnership might be put an end to, and in fact it has been put an end to, so that they had a joint interest as partners in the business which they carried on as surgeons, accoucheurs, and apothecaries, and they had several interests in it in the event of a dissolution. That being so, the proper construction of this imperfectly-recited agreement is that it is an agreement entered into by the appellant with the partners jointly and severally. I think that in this I am only following the rule laid down by Parke, B., in *Sorsbie* v. *Park*, 12 M. & W. 146, 158: "The rule is, that a covenant will be construed to be joint or several according to the interest of the parties appearing upon the face of the deed, if the words are capable of that construction; not that it will be construed to be several by reason of several interests if it be expressly joint. Suppose there were a covenant with A. and B. jointly that a certain thing should be done by the covenantor; both of those persons must sue. But where it appears upon the face of the deed that A. and B. have several interests, they must sue separately." Then in Sheppard's Touchstone (at p. 166) it is said: "But the implication or construction of law, when the words are ambiguous, or are left to the interpretation of law, will be that the words have an import corresponding to the interest, so as to be joint when the interest is joint, and several when the interest is several; notwithstanding language which, under different circumstances, would give to the covenant a different effect." Now when all we have is this recital, which both parties agree we must treat as the only evidence of a contract, I think, having regard to what I mentioned as being the position of these gentlemen, Hall and Parker, as regards, not the partnership business, but as regards the business which was being carried on by them as partners, we ought to consider this an agreement both joint and several. That gets rid of one, and, to my mind, the principal, difficulty in the plaintiff's case.

Then there is another question. It is said that, assuming Mr. Palmer to be entitled to sue, yet the defendant has not committed any breach of his contract that he should not at any time set up or carry on the business or profession of a surgeon, and it is said that the defendant is not doing so where he is simply acting as assistant at a salary for another man who is carrying on the business for his own benefit. I do not think that the question whether the appellant is carrying on the business or profession can depend on whether he is paid by salary or by a certain share of the profits. It is true that in *Allen* v. *Taylor*, where there was a contract not to carry on the trade of a rag dealer, it was held that merely acting as clerk or assistant to a person carrying on that trade was not a breach of the covenant. But an agreement not to carry on a trade is a very different thing from an agreement not to carry on a business or profession. "Carrying on a trade" implies, to my mind, that the person engaged in it is engaged in it *quâ* trade—that is to say, as a trade producing profit or loss which is to be shared by him, and that is not the case if he is merely a salaried assistant. I cannot come to the conclusion that a man is less carrying on the profession of a surgeon because he is doing so as assistant to someone else. "Profession" is different from trade, and it is much more emphatic, to my mind, than if "business"

alone were here. When, as here, the words "carry on the business or profession of a surgeon" are merely used to denote what is done by a man acting as a surgeon, a man, in my opinion, acts as surgeon and carries on the business of a surgeon none the less because he is not the principal, or engaged in the business as a partner, but is merely carrying it on as assistant to somebody else. In my opinion, therefore, on both points the appeal fails.

BOWEN, L.J.—I am of the same opinion. The first question is how to construe this argument, or rather, perhaps, how to treat the short recital of it contained in the bond, and to see whether we are to draw the inference from that recital that the contract between Hall and Palmer on the one side, and Mallet on the other, was a joint contract or a joint and several contract. The rule has been expressed by Cotton, L.J., that, where the words are capable of either construction, you must look at the general tenour and context to see whether the contract was joint or joint and several. The whole of the cases connected with that point will be found, I think, collected in Wms. Saunders (vol. 1, p. 162), in the recent edition, and *Sorsbie* v. *Park* and *Bradburne* v. *Botfield*, 14 M. & W. 559, are leading authorities upon it. That being so, we must look at this bond as a business document, and see if we can extract from it anything that throws light on the terms upon which Mallet was taken into the employment of the firm. It seems to me, when you look at the whole of it, you see that Hall and Palmer were carrying on business in partnership. Nothing is said, it is true, about the way in which the partnership was to come to an end, nor was it necessary to do so. It is obvious that a partnership cannot last for ever. There is no certainty that it will not be determined, either on notice or otherwise, even during the lifetime of both partners. Now unless, after such determination, each partner was to have a several interest in the performance of this contract by Mallet, he would be at liberty to set up practice at Newtown, with the experience gained in their service, and to the injury either of Mr. Hall or Mr. Palmer, or both, according as either or both remained in Newtown. That shows, in fact, that there must have been separate interests, as well as a joint interest, in these two persons; and, though the interest in the bond would be joint so long as they continued in partnership, nevertheless, there was the possibility that it might be severed, and we should expect to find the protection to be commensurate with the interests which were reasonably to be inferred from the description of their business. Therefore, I think the true construction of this agreement is that either Mr. Palmer or Mr. Hall might enforce it for his own benefit during his lifetime, in the event of the partnership having come to an end.

The next question is, Has there been a breach? That seems also a rather difficult question. To answer it we must inquire what is the meaning of "set up or carry on the business or profession of a surgeon." We have in the bond a clause which throws a great deal of light on it. I do not say that it is an interpretation clause, because I do not think that the language of the original agreement is strictly to be construed by what you find in the condition; but if the condition shows that the persons who drew the bond included in their own minds under the words "setting up and carrying on the business or profession of a surgeon," the setting up in business as the assistant of somebody, that, I think, is an indication that in the original agreement carrying on the business or profession of a surgeon was intended to include acting as an assistant to a surgeon. That, I think, is the answer to Mr. Yate-Lee's argument founded on the word "other." It does not follow that because the words "assistant to any other person or persons or otherwise howsoever" in the condition would not cover any particular case, therefore that case would not fall within the original agreement. I think that, according to the true construction of the earlier clause, a person is not the less carrying on a profession because he acts as an assistant of someone carrying it on. For these reasons I agree with what Cotton, L.J., has said, and, although I express my own opinion, I do not in any way dissent from anything he has said.

FRY, L.J.—I have arrived at the same conclusion as my learned brethren, and I will add very little. The grounds of my conclusion are the same as theirs, with possibly a slight exception. I am rather more inclined to think that there is only one agreement to be found in the whole of this document—that is to say, I incline to think that the agreement which is implied in the condition is the same as that which is referred to in the recital, and that, therefore, the recited agreement is to be treated as that which is written out more fully in the condition. This difference of opinion is immaterial, and probably the view taken by the Lords Justices is the more accurate one.

Solicitors for the appellant, *Bolton, Robbins, Bailey & Co.*, for *E. Powell*, Newtown.

Solicitors for the respondent, *Talbot & Quayle*, for *Talbot & Woosnam*, Newtown.

High Court of Justice.

Chan. Div. Kay, J. } March 14, 22.

In re DUGDALE.
DUGDALE *v.* DUGDALE. (*a.*)

Will — Construction — Absolute interest — Restricting devise—Repugnant condition—Gift over on bankruptcy.

Testatrix devised and appointed real and personal estate upon trust for J. B., his heirs and assigns, and directed that, in the event of his doing or suffering any thing whereby he should be deprived of the beneficial enjoyment thereof, then the trust for his benefit should determine, and the property should go and be held in trust for his wife.

Held, that the events upon which the executory devise was to take effect were (1) *alienation,* (2) *bankruptcy, judgment and execution; that the first was void, and therefore void; that the second was an attempt to avoid the operation of the bankruptcy laws, and was void; and that J. B. was absolutely entitled.*

Adjourned summons.

By the will of Elizabeth Dugdale, dated in 1868, she disposed of certain real and personal property by devising and appointing it "upon trust for my son, James Boardman, his heirs and assigns, but if the said son, James Boardman, should do, execute, commit or suffer any act, deed, or thing whatsoever, whereby or by reason, or in consequence whereof, or in the operation of law he would be deprived of the personal beneficial enjoyment of the said premises in his lifetime, then and in such case the trust herein contained for the benefit of my said son, James Boardman, shall absolutely cease and determine, and the estates, hereditaments, money, and premises hereby before limited in trust for him, and also any and every other share of property, real and personal, which may survive or accrue to him under the trusts of this will

(*a.*) Reported by H. C. ROPER, Esq., Barrister-at-Law.

will, and whereof by reason or in consequence of any act, deed, or thing as aforesaid, or by operation of law, he would be deprived in his lifetime of the personal beneficial enjoyment shall go and be held in trust for" his wife, or, if no wife then living, for his children equally, their heirs, executors, administrators, and assigns, and if there should not be any wife or child living, then during so much of his life as there should be a want of any such wife or child, the rents and income should be accumulated for the benefit of any future wife or children, and so much as could not legally be accumulated should be paid to the persons who under the trust thereinafter declared would be entitled thereto if James Boardman was not living, "And if he shall die without leaving any issue of his body him surviving, the estates . . . shall go and be held in trust for" such of the testatrix's other issue as he should by deed or will appoint, and in default in trust for her other children equally, their respective heirs, executors, administrators, and assigns; and she declared that each of her sons should, during the continuance of the trust thereinbefore contained, for his benefit respectively, have the letting and full management of the hereditaments limited in trust for him without the intervention of the trustees.

The will had previously contained similar provisions for two other sons, Thomas and Adam.

James Boardman Dugdale was unmarried, and he claimed this property absolutely upon the ground that the executory devise was repugnant and void.

Farwell, for the summons.—The restraint on alienation is void, and the gift over, with all the subsequent limitations, fails. It is impossible to sever the different portions of the clause, and together they cover every form of alienation: *Bradley* v. *Peixoto*, 3 Ves. 324, Tud. L. C. Conv., 3rd ed., p. 972; *In re Machu*, 30 W. R. 887, 21 Ch. D. 838; *In re Ross, Hicks* v. *Ross*, 32 Solicitors' Journal, 289; *Holmes* v. *Godson*, 4 W. R. 415, 8 De G. M. & G. 152; *Rochford* v. *Hackman*, 9 Hare, 475; *Churchill* v. *Marks*, 1 Coll. 441.

A. J. Chitty, for the respondents.—The restraint on alienation is only partial—during his lifetime—and it is not void: *In re Macleay*, 23 W. R. 718, L. R. 20 Eq. 186; *In re Rosher*, 32 W. R. 821, 26 Ch. D. 801.

Farwell, in reply, referred to *Brandon* v. *Robinson*, 18 Ves. 429. [Kay, J., referred to *Joel* v. *Mills*, 3 K. & J. 458, 6 W. R. Ch. Dig. 114.]

Cur. adv. vult.

March 22.—Kay, J., stated the facts as above, and continued:—There is no doubt that a condition against alienation is void: Co. Litt. 223*a*.

The difference between a condition properly so called and a conditional limitation or an executory devise is, that in the case of a condition the estate is to revert to the grantor or his heirs; in the other cases it is limited over to other persons. But even in the case of a condition the power of alienation may be restricted, though it cannot be entirely taken away. For example, a condition not to alien "to such a one, naming his name, or to any of his heirs, or of the issues of such a one, &c., or the like, which conditions do not take away all power of alienation from the feoffee, &c., then such condition is void": Litt. s. 361.

It has been said that a total restriction of alienation for a limited time may be good. During the argument in *Churchill* v. *Marks* an eminent conveyancer, in answer to a question put to him by the court, stated his opinion to be that a gift to A. in fee, with a proviso that if A. aliens in B.'s lifetime the estate shall shift to B., is valid.

Such a limitation might not deprive A. altogether of the power of alienation, because he might outlive B., and after B.'s death his power of alienation would not be interfered with. But it is to be observed that there is no decision to this effect, and the late Mr. Waley, in a note, p. 111 of the 3rd volume of Davidson's Conveyancing, 3rd ed., to which my attention has been called, states his opinion that this doctrine is doubtful.

In *In re Macleay* there was a devise of real estate to one in fee, "on the condition that he never sells it out of the family." This was held to be a good condition by Jessel, M.R., it being a limited restriction on alienation.

The decision was dissented from by the late Mr. Justice Pearson in *Rosher* v. *Rosher*, where the devise was to the testator's son in fee, with a proviso that if the son, his heirs or devisees, should desire to sell the same or any part thereof in the lifetime of the testator's wife, she should have the option to purchase at £3,000 for the whole and a proportionate price for any part. £3,000 was much less than the value of the estate, and this, although restricted to the life of the testator's widow, was held to be void.

It is clearly settled that a gift over upon an attempt to alien an absolute interest previously given is as void as a condition. This is shown by the cases of *Bradley* v. *Peixoto*; *Ross* v. *Ross*, 1 Jac. & W. 154; *Holmes* v. *Godson*, in which Turner, L.J., stated that the law is the same both as to gifts of real and personal estate; and *Shaw* v. *Ford*, 26 W. R. 235, 7 Ch. D. 669.

In Fearne's Contingent Remainders, 10th ed., pp. 12, 15, the difference between a conditional limitation or executory devise and a contingent remainder is discussed, the illustrations given being that a limitation to the use of A. and his heirs till C. returns from Rome, and after the return of C. to the use of B. in fee, is in a deed a conditional limitation, in a will an executory devise. But a limitation to the use of A. until C. returns from Rome, and after the return of C. to the use of B. in fee, is a contingent remainder to B., the whole fee not being limited to the use of A., as in the former case, but only a particular estate to endure till the return of C., which, being an uncertain period, such particular estate is a freehold, and consequently the limitation to B. and his heirs is a contingent remainder.

At p. 15 of Fearne's Contingent Remainders it is said that limitations defeating a portion of an estate previously given "are properly termed conditional limitations to distinguish them, on the one hand, from conditions of which only the grantor or his heirs can take advantage, and, on the other, from remainders in the strict and proper sense of the word as above defined, and though these conditional limitations are not valid in conveyances and common law, yet within certain limits they are good in wills and conveyances to uses."

In accordance with the doctrine as thus stated by Fearne, there are a series of decisions, of which *Brandon* v. *Robinson*; *Webb* v. *Grace*, 2 Ph. 701; *Rochford* v. *Hackman*; and *Joel* v. *Mills* are examples, which decide that, if real or personal estate be given to A. for life with remainder to B. absolutely, with a proviso that if A. should attempt to assign his life estate should cease, such a proviso is read as a limitation to A. during his life, or until he should attempt to assign, and upon that event, or after his death, over, and such a limitation is held to be valid.

The result is that a limitation by way of use or in a will to A. until he attempt to alien, and on that event to B. and his heirs, is valid, A. taking an estate of freehold which only endures by the terms of the limitation until the attempted alienation, and B. taking a contingent remainder. But a limitation to A. "and his heirs," but if he attempt to alien to B. in fee, is an invalid gift over; so also where the limitation is to A. "and his heirs" until he attempts to alien, and thereupon to B. and his heirs. This is as clearly a conditional limitation as the other, because a fee simple

endures for ever, and any attempt to cut it down must be a defeasance.

The general law is, that a defeasance either by condition or by conditional limitation or executory devise cannot be well limited to take effect in derogation, not merely of the right of alienation, but of any of the natural incidents of the estate which it is intended to divest. Instances of this are given in *Sir Anthony Mildmay's case*, 6 Co. Rep. 40a, where the law is stated thus: "If a man makes gift in tail on conditions that the donee shall not commit waste, or that his wife shall not be endowed, or that the husband of a woman tenant in tail after issue shall not be tenant by the curtesy, or that tenant in tail shall not suffer a common recovery—these conditions are repugnant and against law, because by the gift in tail he tacitly enables him to commit waste, that his wife shall be endowed, and to suffer a common recovery, and therefore it is repugnant to restrain him by condition, for that would be to give a power and to restrain the same power in one and the same deed." As I have shown, a conditional limitation or executory devise is subject to the same rule.

The events upon which the executory devise in this case is to take effect seem to be—(1) alienation; (2) bankruptcy or judgment and execution. The alienation contemplated is any alienation whatever by the devisee not limited in any way. This is clearly invalid. With respect to the other event, bankruptcy or judgment and execution effect an involuntary alienation. Can a fee simple estate be divested by an executory devise on that event? The liability of the estate to be attached by creditors on a bankruptcy or judgment is an incident of the estate, and no attempt to deprive it of that incident by direct prohibition would be valid. If a testator, after giving an estate in fee simple to A., were to declare that such estate should not be subject to the bankruptcy laws, that would clearly be inoperative. I apprehend that this is the test. An incident of the estate given which cannot be directly taken away or prevented by the donor cannot be taken away indirectly by a condition which would cause the estate to revert to the donor or by a conditional limitation or executory devise which would cause it to shift to another person. This agrees with the decision of Chitty, J., in *In re Machu*. The words "conditional limitation" seemed to be used in that case, not in the sense in which Fearne and Butler employ them, but rather to describe an estate upon which a contingent remainder might be limited. According to the illustration which I have given from the definition by Fearne, the limitation in *In re Machu* would be in a deed a conditional limitation defeating a fee simple and in a will an executory devise.

I am of opinion, for the foregoing reasons, that the executory devise in this case is invalid as repugnant.

It was attempted to distinguish one portion of it—namely, that which begins with the words, "and if he shall die without leaving issue of his body him surviving," and it was argued that this gift over must be valid. But I am of opinion that this is only a portion of the limitations which are intended to take effect upon the forfeiture by alienation or bankruptcy, &c., and not otherwise.

The original devise is in trust for the plaintiff, his heirs and assigns. The intention to defeat this must be as clearly expressed as the gift, and if the last point were more doubtful than I think it, the plaintiff ought to have the benefit of the doubt.

It is consistent with the practice of the court as recognized in *Lady Langdale* v. *Briggs*, 4 W. R. 144, 703, 8 De G. M. & G. 391, that the plaintiff should have a declaration as to the nature of his interest and the validity of the gift over.

I must declare that he is entitled to an equitable estate in fee simple in the real property, and an absolute interest in the personalty given to him, and that the attempted executory gift over is void.

Summons allowed.

Solicitors, *F. J. Thairlwall* for *Ainsworth, Sanderson, & Howson*, Blackburn.

Chan. Div. North, J. } Dec. 6, 12.

Topham v. Greenside Glazed Fire Brick Co. (a.)

Bill of sale—Registration—Fixtures—Trade machinery—Personal chattels—Debenture—Bills of Sale Act, 1878, *ss.* 4, 5, 8—*Bills of Sale Act*, 1882, *s.* 17.

The effect of section 5 *of the Bills of Sale Act*, 1878, *is to prevent the articles which by it are excluded from the definition of "trade machinery" from being "personal chattels" for any of the purposes of the Act. Consequently a mortgage of them does not require registration.*

A coal and brickmaking company deposited their title deeds to certain beds of coal and fireclay with their bankers, together with a memorandum, which stated that the deposit was made to secure to the bankers "payment of all sums of money which we are now, or at any time hereafter may be, indebted to you, whether on current account for principal, interest, commission, and charges, or on any other account whatsoever." The memorandum contained an agreement to execute a legal mortgage of the property when required, but it did not contain any acknowledgment of a debt, or any covenant or agreement by the company for payment.

Semble, *that the memorandum was not a "debenture" within the meaning of section* 17 *of the Bills of Sale Act*, 1882.

Interpleader summons.

This was an interpleader summons by the sheriff of Yorkshire to determine whether the plaintiffs, who were judgment creditors of the defendant company, were entitled to some trade machinery of the defendants which the sheriff had seized under a *fi. fa.* issued by the plaintiffs upon their judgment. The machinery was claimed by the Yorkshire Banking Co. by virtue of an equitable mortgage by deposit of title deeds from the defendant company.

By an agreement dated the 30th of June, 1882, Joseph Illingworth, the then lord of the manor of Pudsey, in the county of York, agreed to sell to W. R. Tattersall all the coal and fireclay in the manor belonging to him, with the right to work the same, and it was provided that Tattersall should and would in the working and getting of the coal and fireclay observe and perform all and every the provisions contained in the Pudsey Inclosure Act (51 Geo. 3, c. 128), and which on the part of the lord of the manor were to be observed and performed and keep Illingworth indemnified therefrom. By an agreement dated the 1st of August, 1883, Tattersall agreed to sell his interest in the coal and fireclay to James Gray and Henry Horne. By an agreement dated the 15th of October, 1884, Gray and Horne agreed to sell their interest in the coal and fireclay to the defendant company.

The defendant company was incorporated in November, 1884, one of its objects set forth in the memorandum of association being "to acquire and continue the business of brick-makers, colliery proprietors, and dealers in coal, ironstone, clay, and other minerals carried on by Gray and Horne." The surface of the land under which the coal and fireclay lay belonged to one

(a.) Reported by G. E. Jeffery, Esq., Barrister-at-Law.

Thornton, the company having the right to use it for the purpose of working the coal and fireclay. The coal and fireclay were situate at some depth below the surface, so that between them and the surface there was interposed a *stratum* of earth which did not belong to the company. Shortly after its incorporation the company took possession of portions of the surface, and erected thereon for the purposes of their business a fixed steam-engine, with main shafting and gearing, a fixed boiler with mountings, a fixed donkey-engine, with fixed pump and well cover, a fixed weighing-machine, and certain steam piping with the fittings thereof in the drying shed. All these articles were fixed to the surface of the land. After these articles had been erected the defendant company deposited their title deeds to the coal and fireclay—viz., a copy of the Pudsey Inclosure Act, and copies of the agreements of June and August, 1883, and October, 1884, with their bankers, the Yorkshire Banking Co. The deposit was accompanied by a memorandum addressed to the banking company, dated the 3rd of December, 1885, whereby it was stated that the deeds were deposited "for the purpose of securing to you payment of all sums of money in which we are now, or at any time hereafter may be, indebted to you, whether on current account for principal, interest, and commission, and charges, or on any other account whatsoever. And in consideration of the advances now made to us, and of our account being continued, we hereby undertake to execute, when thereunto requested, a proper mortgage, with immediate power of sale, or such further security as may be necessary for the purpose of effectually transferring to any person or persons whom you may designate for that purpose the legal estate in the property to which this security relates." This memorandum did not contain any acknowledgment of a debt, or any covenant or agreement by the company to pay, except so far as the agreement to give a legal mortgage implied such a covenant. It was not registered under the Bills of Sale Acts.

On the 16th of August, 1887, the plaintiffs obtained judgment against the defendant company for £329 3s. 4d. and costs, and they issued execution thereon. Under this execution the sheriff seized the above-mentioned machinery.

The banking company claimed the machinery under their equitable mortgage, there being a considerable sum due to them under it.

Geo. Henderson, for the sheriff.

Ashton Cross, for the bank.—By virtue of their equitable mortgage, the bank are entitled to the machinery: *Meux* v. *Jacobs*, 23 W. R. 526, L. R. 7 H. L. 481. The question is whether there is anything in the Bills of Sale Acts to interfere with their rights. The articles in question are clearly within that class of machinery which by section 5 of the Act of 1878 is excluded from the definition of "trade machinery" in that section; they are not, therefore, "personal chattels" within the meaning of the Act, and, consequently, a mortgage of them does not require registration. Another question that arises is whether the equitable mortgage is not really "a debenture" within the meaning of section 17 of the Act of 1882, and, therefore, excepted from the Act of 1878. I submit that it is. It contains an admission of indebtedness by the company to the bank, and gives the bank a charge on the company's property: *Edmonds* v. *Blaina Furnaces Co.*, 35 W. R. 798, 36 Ch. D. 215; *Levy* v. *Walker*, *Morris Slate and Slab Co.*, *ante*, p. 411, 37 Ch. D. 26.

Tindal Atkinson, for the execution creditors.—The machinery in question is within the definition of "personal chattels" contained in section 4 of the Act of 1878; and a mortgage of it, therefore, requires registration. A "fixture" is something affixed to the soil, and which passes with the freehold. These articles are mere "personal chattels" like loose tools, and the owner of land would be entitled to have them removed if the company were to cease working the clay: *Wake* v. *Hall*, 31 W. R. 585, 8 App. Cas. 195. The memorandum of deposit was not intended to be a "debenture." It contained no agreement or undertaking to pay any money. In *Edmonds* v. *Blaina Furnaces Co.* there was a covenant to pay on a day certain, and also a charge on the property.

Ashton Cross replied.

Dec. 12.—North, J.—In this case the real questions to be decided turn upon the construction of some of the sections of the Bills of Sale Acts of 1878 and 1882. [His lordship then stated the facts, and continued:—] The machinery in question was erected by the company on the surface of the land, and it is admitted that the coal and fireclay, which was sold to the company, lie at some distance below the surface, and therefore they are separated, by other minerals belonging either to the lord or to someone else, from the surface, which belongs to Thornton. As I read section 35 of the Inclosure Act, the right to use the surface and the right to raise the minerals are totally different things, and there is nothing in the Act which limits the lord's power of using the surface lying immediately over the mines and minerals which are being worked. If fireclay or coal cropped up on the side of a hill it might be more convenient for the purpose of working it to make a shaft or level horizontally or to sink it at an angle perpendicularly. Section 35 would, I think, enable the lord to use the surface even though it did not lie immediately over the mine and minerals which were being got. But in the present case the part of the surface which is used is that of land belonging to Thornton, lying at some distance above, but immediately above, the coal or fireclay which is being got.

The bank claim the machinery in question as having been put up on their land, and their claim is rested upon the case of *Meux* v. *Jacobs*. I should have thought that it was deserving of fuller argument whether and how far the case applies to fixtures which are not annexed to the land worked, but are upon another tenement not belonging to the same owner, and not even abutting on the mortgaged land. But Mr. Atkinson directed his argument to the point that the security of the bank is void by reason of the Bills of Sale Acts. Paragraph 4 of the admissions agreed upon by the parties, after referring to the memorandum of deposit, states that, "The bank claims that by virtue of the deposit of the documents mentioned in the schedule thereto, it was thenceforward entitled in equity to all the property of the company, including the fixtures hereinbefore mentioned, and could demand a legal assurance thereof at any time, but the execution creditors contend that the memorandum, even if binding on the company, which is not admitted, confers no title on the bank as against the execution creditors, and, further, that such fixtures and machinery are removable and liable to execution as chattels." It is admitted that the equitable security of the bank has not been registered under the Bills of Sale Acts. But the bank say that registration of their security is not necessary, and the argument was put on two different grounds. I will deal first with the contention that this memorandum is a debenture, and is, therefore, excepted from the operation of the Bills of Sale Act. That depends upon section 17 of the Act of 1882.

And the question arises, what is a debenture? It was held by Chitty, J., in *Edmonds* v. *Blaina Furnaces Co.* that a memorandum of agreement which contained a covenant by a company to pay to each of nine persons who were mentioned in the agreement as lenders the

sum of money set opposite his name, and to pay them *pari passu*, and which charged all the property of the company as security for the payment thereof, was a debenture. I feel some little difficulty in following that decision entirely for this reason, it has been held by Field, J., in chambers in *Brocklehurst* v. *Railway Printing and Publishing Co.*, W. N. (1884), p. 70, and by the Court of Appeal in *Ross* v. *Army and Navy Hotel Co.*, 35 W. R. 40, 34 Ch. D. 43, that the covering deed which usually accompanies the giving of debentures when due is not a "debenture" within section 17, and requires registration under the Bills of Sale Acts if it deals with personal chattels, and is void if not registered. I feel a difficulty in seeing how, if a covering deed is not a debenture, an agreement which contains substantially the material parts of a covering deed—viz., the agreement to pay the several persons named *pari passu*—and the charging of the debts upon the property of the company, can be a debenture. Another difficulty arises in this way. In *Ross* v. *Army and Navy Hotel Co.* it was treated by the Court of Appeal as at least an open question whether an instrument which charged specific property of the company as distinguished from a general charge on all its property could be a debenture. In the present case, the property charged is very specific; it consists of the company's interests in certain lands, and the agreement does not charge any chattels at all, except so far as the mortgage of the lands affects the chattels which are affixed to it. I feel this further difficulty as regards section 17. That section says that "nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company." Why are "mortgage" and "loan" companies mentioned. It is difficult to see why these companies should be mentioned specifically if the words "other incorporated companies" are meant to include every company whatsoever and if the debentures of every company were to be free from the restrictions of the Act. It was thrown out by Grove, J., in *Jenkinson* v. *Brandley Mining Co.*, 35 W. R. 834, 19 Q. B. D. 568, that the words "other incorporated company" would mean any incorporated company *ejusdem generis* with mortgage and loan companies. I have great difficulty in conceiving of a company *ejusdem generis* with mortgage and loan companies. By a loan company I understand a company whose personal business, or one of whose chief businesses, is to lend money on loan, and I suppose a mortgage company is a company whose business is to lend money on mortgage, but what other companies are companies *ejusdem generis* with companies which lend money on mortgage or otherwise I do not know, nor can I see upon what ground a company which lends money should have a greater immunity as regards its powers of borrowing money and giving security for the money borrowed than any other incorporated company. Moreover, according to the views expressed by Chitty, J., in *Edmonds* v. *Blaina Furnaces Co.*, the word "debenture" has no precise legal definition, but it always imports an acknowledgment of a debt, and generally, if not always, a covenant or an agreement to pay.

In the present case I do not find that the memorandum contains any acknowledgment of a debt. It is quite true that the memorandum was given for the purpose of securing the then present advance of the bank to the company and any other sums which might become due from the company to the bank, but there is no reference to any specific sum. One does not know what was the exact amount due to the bank at the moment at which the document was executed, and from that time forward the sum secured would no doubt vary from day to day, for it is a security for the balance of the current account to a limited amount, having regard to the stamp placed upon the document. Nor do I find in the document any agreement by the company to pay. It is quite true that there is an agreement to give a legal mortgage when requested, and a legal mortgage would no doubt contain a covenant by the company to pay the debt, but that is very indirect, and I do not find that the document itself contains any other agreement whatever to pay the debt. Its object was not to give a security by way of any agreement or covenant to pay, but to give a charge upon certain property of the company.

Having regard to all these considerations, I feel it impossible at present to hold that a mere memorandum in writing by a coal and fireclay and brick-making company of a deposit with their bankers of all the documents of title relating to certain beds of coal and fireclay as a security for the balance which they might then or thereafter owe to their bankers on their current account, but which does not admit any specific debt or contain any agreement to pay otherwise than by an agreement to execute a legal mortgage, comes within the exception contained in section 17 of the Act.

The next question is whether this memorandum required registration under the Bills of Sale Acts, and that depends upon whether it is a bill of sale of "personal chattels" within the meaning of section 4 of the Act of 1878. Looking at the definition contained in that section, this memorandum is, beyond all question, a bill of sale if it relates to personal chattels as defined by the section. The definition may be said to divide fixtures roughly into fixtures separately assigned (and what a "separate assignment" means is shown by section 7 of the Act), and fixtures which are not separately assigned. That is not a complete division, because, curiously enough, "fixtures" are only excepted from the expression "personal chattels" when assigned together with a freehold or leasehold interest in any land or building to which they are affixed, and there might be fixtures assigned together with an interest in a copyhold land. But, leaving that out of consideration, I think one may treat the definition as roughly dividing fixtures into two classes—those separately assigned and those assigned together with the land or building to which they are affixed. In the former case they are "personal chattels," in the latter they are not. But then there is a further exception, because the proviso is that personal chattels shall not include fixtures when assigned together with a freehold or leasehold interest in land except trade machinery as hereinafter defined.

Then we must turn to section 5 to see what is meant by trade machinery. That section begins by saying "trade machinery shall, for the purposes of this Act, be deemed to be personal chattels." Therefore, looking at those words alone, all trade machinery is mentioned in the expression "personal chattels." Then section 5 goes on: "For the purposes of the Act trade machinery means the machinery used in or attached to any factory or workshop"; and it is clear, from the subsequent definition of the words "factory and workshop," that the machinery which the sheriff has seized is machinery of that kind. It is used in a place where bricks are made and incidentally to the making of bricks and adapted to the clay for sale. But then follows this exception—"exclusive of"—to put it shortly—"fixed motive powers," "fixed power machinery," and "steam, gas and water pipes." It is admitted that all the articles about which the present question arises come within the description of trade machinery which is excluded from the operation of the section which makes all "trade machinery" "personal chattels." But it is agreed that the "trade machinery" thus excluded is merely "trade machinery" as, but for the exclusion, would come within the description contained in section 4 of "fixtures not separately assigned," and, therefore, it has no application to a case where, as here, the machinery is not affixed to the freehold interest, and does not come within the description of fixtures assigned together with a freehold interest in land to which they are

mind. There are, however, some other words in section 5, which I have not yet read, which seem to me conclusive upon the point. I mean these words: "The machinery or effects excluded by this section from the definition of trade machinery shall not be deemed to be personal chattels within the meaning of this Act." Those words seem to me to be clear and definite, and I must hold that the articles in question, being all machinery or effects excluded by the section from the definition of "trade machinery," are not "personal chattels" within the meaning of the Act for any purpose whatever, and, therefore, any document, whatever it may be, which assigns them is not an assurance of "personal chattels" within the meaning of the Act. I hold, therefore, that this memorandum of deposit, not being an assurance of "personal chattels" within the meaning of the Act, did not require registration.

The result is that the claim of the bank succeeds, and the execution creditors cannot have these articles.

Solicitors for the sheriff, *Bell, Brodrick, & Gray.*

Solicitors for the bank, *Speechly, Mumford, & Landon*, for *Mumford & Johnson*, Bradford.

Solicitors for the execution creditors, *Yewall & Son*, London and Bradford.

Q. B. Div. (Mathew and A. L. Smith, JJ.) Feb. 11.

Firth v. North-Eastern Railway Co. (a.)

Railway company — Carrier — Passengers' luggage— Delivery to passenger—Termination of company's risk —Loss of luggage—Measure of a "reasonable time."

It is the duty of a railway company, with regard to the luggage of a passenger which travels by the same train with him, but not under his control, when it has reached its destination, to have it ready for delivery upon the platform at the usual place of delivery until the owner, in the exercise of due diligence, can receive it; but the liability of the company as carriers will cease after a reasonable time has been allowed to the owner to do so.

Appeal, by motion, that the judgment of the county court judge of Yorkshire, delivered at a court holden at Leeds, be reversed, and judgment entered for the defendants under the following circumstances.

The plaintiff was travelling by the North-Eastern Railway from Hull to Leeds, and saw his portmanteau placed in the van of the train at the former station. On arrival at Leeds he could not get a railway porter. He saw a portmanteau on the platform which he thought was his own. He placed it in a carriage, and drove with it about a mile to his house. On arrival he found that it was not his portmanteau. He immediately drove back to the station. The portmanteau was not there, and has not since been found. A label was tied to its handle, but there were a number of foreign labels on its sides. The portmanteau which the plaintiff took away in mistake for his own also had a label tied to the handle, with the name of a Mr. Marsland on it.

This gentleman alighted at Leeds also. He missed his own portmanteau, but saw another of similar size to it and very like it. He saw this portmanteau about four or five minutes after the arrival of the train, and after the vans had been cleared, it was then close to the cloak luggage office. The train had stopped four times between Hull and Leeds, but it would not have been possible to get luggage out of the van before reaching Leeds.

The county court judge found a verdict for plaintiff for £12, and gave leave to the defendants to appeal. The plaintiff then offered to give up the verdict and costs rather than contest an appeal.

The defendants appealed.

Mesey-Thompson, for the defendants, cited *Patscheider* v. *Great Western Railway*, 26 W. R. 268, 3 Ex. D. 153, and *Bunch* v. *Great Western Railway*, 34 W. R. 574, 17 Q. B. D. 215.

Morten, for the plaintiff.—The county court judge was of opinion that the portmanteau of the plaintiff was stolen before the expiration of a reasonable time for the plaintiff to claim his property. The ticket of the plaintiff was issued under the conditions contained in the time tables of the defendants, that unclaimed luggage would be deposited in the lost luggage office until claimed [A. L. Smith, J.—What if a wrong person claim it?] The portmanteau of the plaintiff was probably stolen before he took away the wrong one. There is no evidence that the unclaimed portmanteau seen by Mr. Marsland was the portmanteau of the plaintiff. We must consider what is "reasonable time" within which a passenger should claim his luggage.

He cited *Chapman* v. *London and North-Western Railway*, 28 W. R. 566, 5 Q. B. D. 278.

Mesey-Thompson, in reply.

Mathew, J.—This appeal must be allowed, on the ground that there was no evidence upon which the learned county court judge could have held that the portmanteau was stolen before the expiration of a reasonable time within which the plaintiff should have applied for its delivery.

The question here is whether the common law liability of the defendants was still in existence at the time when this portmanteau was stolen. That obligation is to deliver the property to the real owner, within a reasonable time after the arrival of the property at its destination. When that reasonable time has expired they may, if the property be still in their possession, be liable as warehousemen, but they are no longer liable as common carriers. What is the measure of "a reasonable time"? If we measure a reasonable time here, with reference to the conduct of the plaintiff himself, that time has expired, because he had gone away and had come back again and claimed what he thought was his portmanteau. If we measure the time by the time which Mr. Marsland took to take delivery, the reasonable time had expired, because when Mr. Marsland had gone I do not see what evidence there is to show that Mr. Firth's portmanteau was not lying there ready to be delivered to him. Mr. Marsland puts the time at three or four minutes afterwards when he saw the portmanteau ready, lying there to be delivered to Mr. Firth.

What is the strong presumption under these circumstances? Why, that probably somebody who saw Mr. Marsland come forward and disclaim this portmanteau as not being his, came forward, claimed it, and made off with it. It would be most unreasonable, under those circumstances, to put the loss on the company. It was the fault of the owner himself in leaving his property as he did, and exposing it to the very risk which happened to it.

I think, therefore, that the judgment of the learned county court judge was wrong, and that judgment must be entered for the company.

A. L. Smith, J.—I think so too. Mr. Firth sues the company under their common law obligation as common carriers. He does not sue them as warehousemen, and for a very good reason—viz., there is no evidence of omission by them to do that which was reasonable in that capacity. He sues, therefore, upon the common carriers' liability—that is, to safely carry, convey, and deliver to the true owner within a reasonable time.

(a.) Reported by Sir Sherston Baker, Barrister-at-Law.

I cannot do better, upon this part of the case, than read, as Cleasby, B., did in the case of *Patscheider* v. *Great Western Railway Co.*, the extract from the American work, Redfield on Carriers:—"It is the duty of a railway company, in regard to the baggage of a passenger which has reached its destination, to have the baggage ready for delivery upon the platform at the usual place of delivery until the owner, in the exercise of due diligence, can call and receive it, and it is the owner's duty to call for and remove it within a reasonable time." Cleasby, B., reads that passage with approval; I do the same. It is entirely consonant with what I think to be the law, and I apply that as the law here. The learned county court judge has found for Mr. Firth, because he came to the conclusion, upon the evidence, that the portmanteau was stolen before a reasonable time had elapsed; that, in other words, to put it in the terms of his own judgment, the portmanteau of Mr. Firth was stolen before he took away the wrong one. Now, if there had been any evidence of that, we could not have held that we ought to set aside the judgment of the learned judge, for this reason, that he would have held, and properly have held, that before the transit had come to an end—not only with regard to the carrying, but as regards the delivery, during which period the company were undoubtedly common carriers—the portmanteau was missing for some reason or other, and therefore they had not fulfilled their obligation as common carriers to deliver. But how is that? How does the evidence stand upon the question of the owner coming with due diligence to call for his property within a reasonable time? First of all, Mr. Firth, after first going away, returns and removes his own portmanteau and another which he thinks to be his. That would be, *per se*, some evidence of what Mr. Firth himself must consider to have been a reasonable time to get his portmanteau. But, assuming that he had as long a time as Mr. Marsland took, who was apparently not such an expeditious passenger, and that he had come for it five minutes afterwards. What then? The sole evidence which is given in this case is that Mr. Firth's portmanteau was there when Mr. Marsland came and was looking for his, which had been taken away. The evidence is all one way upon this, being that when Mr. Marsland was looking for his portmanteau and could not find it (for the best of all reasons, because Mr. Firth had taken it away and was in the cab with it), he sees Mr. Firth's portmanteau upon the platform; and that is five minutes after the first delivery.

The evidence is that Mr. Firth's portmanteau was then upon the platform ready for delivery.

Under those circumstances, that being the evidence, how can it be said that the duty of the railway company as common carriers extended at any rate longer than when Mr. Marsland could have got the luggage, if that had been what he wanted? It seems to me it did not. And the learned county court judge himself finds really that Mr. Firth did not apply for his own portmanteau within a reasonable time. It seems to me there is no evidence at all that that portmanteau was stolen or removed from the platform by anybody within the reasonable time which Mr. Firth had to take delivery of it; I think, therefore, that the judgment which is founded upon that presumption is wrong, and that the judgment ought to be entered for the defendants.

MATHEW, J.—As the plaintiff offered to yield to the defendants the verdict and costs which he had gained in the county court rather than contest this appeal, we think that there ought to be no costs against him now.

Judgment for the defendants, without costs.

Solicitor for the plaintiff, *Wm. Tanner.*

Solicitors for the defendants, *Williamson, Hill, & Co.*, for *Gibb*, York.

Q. B. Div. (A. L. Smith and Charles, JJ.) Jan. 26.

ARBITRATION BETWEEN GIFFORD AND THE BURY TOWN COUNCIL. (*a.*)

Arbitration—Public Health Act, 1875 (38 & 39 Vict. c. 55), *s.* 180—*Invalid appointment of arbitrator—Award—Rules of the Supreme Court, ord.* 62, *r.* 15.

The Public Health Act, 1875, *s.* 180, *requires that arbitrator appointed by the local authority to be under their common seal and the arbitrator appointed by the other party to be under his hand. The latter party to an arbitration under this statute having appointed his arbitrator, but not under his hand,*

Held, that the appointment of the arbitrators, and the appointment of an umpire made by them, and the award of the umpire, were invalid, and neither the submission nor the award could be made a rule of court.

This was a motion to make a submission to arbitration, under the Public Health Act, 1875 (38 & 39 Vict. c. 55), *s.* 180, a rule of court, and also to make an award resulting from the arbitration a rule of court.

Horace Browne, for the applicant, cited *Re Ralph*, 26 SOLICITORS' JOURNAL, 165; *In re Dawdy*, 15 Q. B. D. 426, 34 W. R. Dig. 8; and Russell on Arbitration, 6th ed., p. 563.

Poyser, for the corporation.

The arguments of counsel and the facts of the case sufficiently appear from the judgment.

A. L. SMITH, J.—It appears that the corporation entered and laid drain pipes in the land of the applicant, who, being injuriously affected thereby, submitted his claims against the corporation to arbitration, under the Public Health Act, 1875 (38 & 39 Vict. c. 55). The statute enacts (section 180): "With respect to arbitrations under this Act, the following regulations shall be observed—that is to say, (1) Every appointment of an arbitrator under this Act, when made on behalf of the local authority, shall be under their common seal, and on behalf of any other party, under his hand." This means that, when a corporation appoints an arbitrator, they shall appoint by seal, and not otherwise; and that when the opposite party appoints an arbitrator, such party shall appoint under his hand, and not otherwise. I think that this provision is mandatory. Then it proceeds:—"(2) Every such appointment shall be delivered to the arbitrators, and shall be deemed a submission to arbitration by the parties making the same." Therefore, every appointment by a corporation is to be under seal, and every appointment by the other party is to be under his hand. In this case the corporation duly appointed their arbitrator, but the applicant, although he appointed an arbitrator also, did not do so under his hand. The arbitrators appointed an umpire, and, on failing to agree in the arbitration, referred the matter to him. He has awarded in favour of the applicant, who now asks that make the award a rule of court. But have the requirements of the above statute been complied with, and, in their absence, can a submission be made under the statute? I think not.

Again, by sub-section 7 of this section, "Where there is more than one arbitrator, the arbitrators shall, before they enter on the reference, appoint by writing under their hands an umpire." This cannot mean other than that where there is more than one arbitrator, the arbitrators—those appointed under the above sub-sections, under seal and under hand—shall, before they enter on the reference, appoint by writing under their hands an umpire.

In this case it is evident that there never was an

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

appointment of two arbitrators pursuant to the statute; and if the two arbitrators are not appointed, how can they appoint an umpire in their turn under the statute? This is not an arbitration by consent, but one pursuant to the statute. One arbitrator has been lawfully appointed, and the other arbitrator has been unlawfully appointed, and they cannot appoint an umpire. The appointment of the umpire by them was not legal, because the provisions of the statute must be complied with as the basis of the appointment. Neither the original submission, nor the appointment of the umpire, which has been relied on as being a submission, can be made a rule of court. I should further point out that before the arbitrator enters on his duties he should make a statutory declaration, and the arbitrator appointed by the claimant did not do so. Again, sub-section 2 of this section shows what the submission is to be, and by sub-section 14 any submission "under the provisions of this Act" may be made a rule of court—that is, a joint appointment in full pursuance of this Act shall be made a rule of court. The application must be refused.

One word as to the award. It has been argued on behalf of the applicant that under ord. 61, r. 15, an award should be made a rule of court.

It is certainly possible within the wording of that order to make an award a rule of court, but in my experience I have never known an award made a rule of court, but only a submission. I find however that it was the old practice in Chancery to make an award a rule of court. In *Jones* v. *Jones*, 29 W. R. 65, 14 Ch. D. 593, at pp. 594-5, Jessel, M.R., said: "In cases of submission to arbitration it was very usual in the Court of Chancery to make the award an order of court. Seton on Decrees, 4th ed., p. 403, Consol. Ord. 23, r. 23. But as it is important that under the Judicature Acts the practice of all the courts should be as far as possible uniform, I have ruled in my court that the proper course is to make the submission a rule of court, according to the practice of the common law divisions." This course has always been adopted from that time, and if I am right in my opinion that the statute is binding on the arbitrators the award cannot be enforced, and it would be of no use to make it a rule of court in the present case.

Charles, J., concurred.

Motion refused.

Solicitors for the claimant, *Paterson, Snow, Bloxam, & Linder.*

Solicitor for the corporation, *Gilbert Robins.*

Q.B. Div. (Huddleston, B., and Manisty, J.) Jan. 24.

Tagart & Co. *v.* Marcus & Co. (*a.*)

Set-off—Action by agents—Counter-claim against principals—Set-off—Judicature Act, 1873, *s.* 24, *sub-section* 3—*Ord.* 19, *r.* 3.

In an action of trover and for goods sold and delivered defendant cannot set off a claim for unliquidated damages which he has against a third party on another transaction, although the third party happens to be the plaintiff's principal.

This was an action brought to recover £821 0*s.* 5*d.*, the value of a cargo of timber.

The defendants, having received the bill of lading, promised to accept a bill for the price. Instead of accepting to the full amount they claimed to deduct a sum of £91 for damages due to them from one Jacobson, the plaintiffs' principal, on account of delay in the delivery of another cargo, and they offered the plaintiffs the sum of £729, which was refused, as the plaintiffs did not consider themselves entitled to bind their principal by a consent to the deduction upon a previous transaction. The plaintiffs then sued for the full amount, and the defendants counter-claimed for £91. Upon a summons before Pollock, B., at chambers, an order was made affirming the decision of the master to strike out the counter-claim.

The defendants appealed.

Lawson Walton, for the defendants.—The defendants are entitled to set off their claim for £91, although it is in the nature of a counter-claim. In *Gathercole* v. *Smith*, 29 W. R. 577, Bramwell, L.J., says:—"Looking at the language of section 24, sub-section 7, of the Judicature Act, 1873, the Legislature has made no distinction between a counter-claim and set-off. In ord. 19, r. 3, it is said that a defendant may 'set off' or 'set up' any right or claim; the words 'set up' and 'set off' are equivalent expressions." If the plaintiff were the trustee of a third person we could counter-claim against his *cestui que trust*, and the position here is the same. The counter-claim need not be in regard to the same transaction: *Winterfield* v. *Bradnum*, 26 W. R. 472. Brett, L.J., says:—"It seems to me that the counter-claim, as it at present exists, is of three kinds. Very often it is a set-off merely. Sometimes it is not, but it is a claim of some sort arising out of the same transaction. But there may now be a counter-claim in respect of a wholly different transaction." The only authority for the right to counter-claim against a *cestui que trust* when sued by a trustee is to be found in *Macdonald* v. *Bode*, W. N., 1876, p. 23. Lindley, L.J., there says: "Section 24, sub-section 3, of the Act of 1873 gives a wider power than that under ord. 16, rr. 17, 18," and so he gave the defendant leave to set up a counter-claim against the *cestui que trust*, who was alleged to be the real plaintiff. In *Young* v. *Kitchin*, 26 W. R. 403, 3 Ex. D. 12, it was held that the defendant, who was sued by the assignee of a debt, was entitled, by way of set-off or deduction from the plaintiff's claim, to the damages sustained by non-performance of contract by the plaintiffs' assignor. In *Peat* v. *Jones & Co.*, 30 W. R. 433, 8 Q. B. D. 147, the defendants were allowed to set-off a claim for unliquidated damages against a trustee in bankruptcy. The defendant may not be entitled to judgment upon his counter-claim, but he is entitled to set it up as an answer to the action and to prevent the plaintiffs getting judgment. It is a matter to be considered in reference to the plaintiffs' claim, and the defendant need not have judgment at all, the decision of the master, therefore, was wrong.

Vaughan Williams, for the plaintiffs.—The authorities cited do not assist the defendant. They do not show that in an action of trover a counter-claim for damages could be allowed against a third person. All the cases cited lend themselves to a set-off. There is no ground for saying that in equity a counter-claim would be allowed under the circumstances. The debt, which but for the intervention of a trustee could be claimed by the defendant as a legal debt, is allowed to be pleaded as an equitable set-off: *Cochrane* v. *Green*, 9 W. R. 124, 9 C. B. N. S. 448.

Walton, in reply.—This is not really a case of trover, and there is nothing to take this out of the general rule. The substantial question is what judgment should be pronounced in the action? A set-off need not arise out of the same matter, for it is allowed in a case of specific performance.

Huddleston, B.—This is an appeal from a master in

(a.) Reported by Cecil Chapman, Esq., Barrister-at-Law.

chambers, and has been referred by Pollock, B., to the court. The circumstances are these. The plaintiffs, who are timber merchants, send shipping documents to the defendants, and require payment for the goods. The defendants retain the documents, and counter-claim for £91 5s. damages in respect of a contract made in May with Jacobson, the plaintiffs' principal, which was admittedly another transaction. They deny the conditions on which they are alleged to have received the documents, and rely upon the previous transaction by way of defence. Such a defence is a novelty of a startling character. All the cases referred to are cases between the same parties on the same transactions. The case of *Macdonald* v. *Bode*, reported in the *Weekly Notes*, I cannot accept as an authority; but I am quite satisfied that in that case the counter-claim was on the same matter, and that Macdonald was a mere naked trustee—that is, a mere nominee; therefore, it is said the defendant ought to be allowed to have his set-off against the real plaintiff. To hold the contrary leads to absurdity. Suppose an action for specific performance against a sub-tenant, and the sub-tenant sets up a claim against the superior landlord for fraud. In this case judgment might be a return of the documents or 1s. damages, and then what could be the judgment on counter-claim? The counter-claim cannot be allowed. There is no authority for such a course.

MANISTY, J.—This is another attempt to mix up set-off and counter-claim. They are essentially distinct. This has been clearly shown in the case of *Stooke* v. *Taylor*, 29 W. R. 49, 5 Q. B. D. 569. Cockburn, C.J., says, on page 575: "Set-off and counter-claim may be, and commonly are, essentially different." Counter-claim is a counter-action, and is not a set-off at all. We are asked in this case to say that the defendants are to try an action against the principals of the plaintiffs upon a separate transaction in the absence of Jacobson & Co., the principals in question. Could anything be more unjust than that such should be done? The plaintiffs have nothing at all to do with it. It is perfectly clear that the plaintiffs are not suing as trustees for Jacobson. They are recovering what they have paid or covenanted to pay to their principals. Apart from that, this is the first attempt in an action of trover to treat a counter-claim against third parties as a set-off, and it cannot succeed. The appeal must be dismissed, with costs.

Solicitors for the plaintiffs, *Druces, Jackson, & Attlee.*

Solicitors for the defendants, *Ingledew & Ince.*

Q. B. Div. (Stephen and A. L. Smith, JJ.) } Nov. 15; Jan. 24.

McGREGOR *v.* McGREGOR. (*a.*)

Husband and wife—Agreement for separation—Action for arrears of maintenance by wife—Jurisdiction of county court—Parol agreement—Statute of Frauds, s. 4.

An action for arrears of maintenance payable under a parol agreement for separation made between husband and wife, in compromise of cross-summonses for assault, was brought by the wife in a county court. The county court judge gave judgment in favour of the claim.

Held, that the agreement had been made for good consideration; that, the consideration being executed, the Statute of Frauds did not apply; and that the county court judge had jurisdiction.

Knowlman *v.* Bluatt, 22 *W. R.* 77, *L. R.* 9 *Ex.* 307, *followed.*

(*a*). Reported by A. H. TODD, Esq., Barrister-at-Law.

This was an appeal from Judge Holt, county court judge of Northumberland.

The action was brought by a wife against her husband to recover £6, being arrears of maintenance payable by the husband under a parol agreement for a separation.

The county court judge held the agreement to be valid and gave judgment for the wife.

The husband appealed.

Walton, for the appellant.—A wife cannot enter into such a contract with her husband, certainly not apart from the Married Woman's Property Act, 1882 (45 & 46 Vict. c. 75). There is no consideration in the promise to live apart for the husband's promise to maintain. Thus a separation deed without trustees is void: Story's Equity, p. 1428; *In re Shakespear, Deakin* v. *Lee*, 33 W. R. 744, 30 Ch. D. 169; *Palliser* v. *Gurney*, 35 W. R. 760, 19 Q. B. D. 519. Again, the agreement is merely parol. The county court judge held that it was not within the Statute of Frauds, because it might have been performed within the year. But it is submitted that this agreement contemplates a continuance during life, and that brings it within the Statute of Frauds: *Eley* v. *Positive Government Life Assurance Co.*, 25 W. R. 338, 1 Ex. D. 88; *Davey* v. *Shannon*, 17 W. R. 599, 4 Ex. D. 81. [STEPHEN, J.—Would this agreement be an answer to an action for the restitution of conjugal rights? *McClymont, amicus curiæ*, referred to *Besant* v. *Wood*, 12 Ch. D. 605, 27 W. R. Dig. 91.] This was not an action for specific performance, but a proceeding on the common law side of the county court.

He also referred to *Baker* v. *Baker*, 11 W. R. 893; *Butler* v. *Butler*, 34 W. R. 132.

Sim, for the respondent.—In *Palliser* v. *Gurney* the action was against a married woman, and it was necessary to prove separate estate. In this case there was some evidence of the existence of separate estate. The wife had supported herself and children. The court in *Besant* v. *Wood* shows that a contract to live separately is good, and that trustees are not necessary. *Manby* v. *Harris*, 32 W. R. 941, 27 Ch. D. 166, shows that husband and wife are separate persons. As to the Statute of Frauds, *Souch* v. *Strawbridge*, 2 C. B. 815, is in his favour.

Walton, in reply.

Cur. adv. vult.

A. L. SMITH, J., on January 24, read the following judgment of the court:—

This is an action brought in the county court of Newcastle-upon-Tyne to recover £6, being arrears of maintenance contracted to be paid by a husband to his wife under the following circumstances:—The plaintiff and the defendant, before and at the time of the contract hereafter referred to, were and still are husband and wife. On several occasions prior to the month of June, 1886, the defendant's ill usage had compelled the plaintiff to apply to the police for protection against the defendant, her husband, and in the month of June, 1886, she was counselled to take out a summons against him for assault. The defendant, thereupon, took out a cross summons against the plaintiff on the 1st of July, 1886. When the summonses were about to come on for hearing at the police court, negotiations took place between the respective solicitors, and it was eventually agreed between the plaintiff and the defendant "that they should live separate and apart, that the defendant should pay the plaintiff £1 per week, and that she should therewith maintain herself and three children, that she should indemnify the husband against all debts contracted by her, and, further, that the summonses should be withdrawn." The above are the findings of the county court judge. He also found that nothing had occurred to rescind or affect the agreement, and, as we understand, that the plaintiff had done all things

her part to entitle her to have it carried out and performed by the defendant. So matters stood when the present action was brought. The county court judge gave judgment for the plaintiff, and the defendant appealed. It was contended by Mr. Walton on his behalf that, notwithstanding the contract existing, as found by the judge, no action was maintainable by the wife against the husband thereupon, and, at any rate, in an ordinary action in the county court upon the agreement no relief could be given to the wife. It was argued as follows: It was said that, the husband and wife being one, no contract could be entered into between them, and consequently that the one could not sue the other upon an alleged breach of what could not exist. That it was impossible for parties, standing in the relation of husband and wife, to contract without the intervention of a trustee; that even if he was wrong in the above, the Statute of Frauds was an answer to the case, the contract being one not to be performed within the space of one year from the making thereof. The county court judge came to the conclusion that, by reason of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), the plaintiff was entitled to contract as she did with the defendant. It should be pointed out that he came to this conclusion before the case of *Palliser* v. *Gurney* was reported. We are unable to agree with the county court judge in holding that the Married Women's Property Act gave power to the wife to contract with her husband as she did in this case. It seems to us to be now too late to argue as it was argued before us—that a husband and wife, in consideration of not taking proceedings the one against the other for matrimonial offences, cannot contract to live separate or apart, and that the courts will not grant relief when such a contract is in fact made. In our judgment the law is that, when circumstances exist between husband and wife which would or which might give rise to proceedings by way of suit for matrimonial offences, it is competent, in consideration of the one not taking such proceedings against the other, for the two to agree to live separate and apart, and that the courts will enforce such a stipulation when made. In the case of *Wilson* v. *Wilson*, 1 H. L. Cas. 538, the House of Lords decided that a deed of separation between husband and wife was not against public policy, whatever might have been argued upon this point prior to that decision.

In *Hunt* v. *Hunt*, 10 W. R. 215, 4 De G. F. & J. 233, Lord Westbury, it would seem, thought that a husband and wife under the circumstances above mentioned could contract, and that such contract ought to be enforced. The President of the Probate Division (Sir J. Hannen) in *Marshall* v. *Marshall*, 27 W. R. 399, so held, and so also the late Sir G. Jessel, M.R., in *Besant* v. *Wood*. It seems to us that the power of the husband and the wife to contract under the circumstances existing in the present case is settled by judicial authority, and the reasons for so holding are so cogently pointed out by Sir G. Jessel, in *Besant* v. *Wood*, 12 Ch. D., pp. 621, 622, that we do not extract or recapitulate them, but adopt hem in this judgment. It follows from the above that the point taken, that there is no trustee with whom the husband and wife may respectively contract, will not avail the defendant, and that the passage from Story's Equity Jurisprudence, p. 1428, and the decision of Lord Eldon in *Legard* v. *Johnson*, 3 Ves. 352, are not applicable to cases like the present. We wish also to point out that in *Rowley* v. *Rowley*, 35 L. J. P. & M. 110, 15 W. R. H. L. Dig. 6, there was merely, as it appears, an agreement between husband and wife, who were then parties to divorce proceedings, to compromise the suit upon terms. The House of Lords held that this was a valid, binding agreement between the parties, and gave effect to its provisions. There was no trustee or anything of the sort in the case. If, then, an agreement between husband and wife to compromise a suit is valid and binding, why, we would ask, is not an agreement to live separate and apart, without bringing the suit, to be valid and binding, the consideration being the existence of facts which would give jurisdiction to the court? In our judgment it is. Such consideration existed in the present case—viz., a claim of cruelty against the husband.

As to the point taken, that this was an ordinary county court action and not a proceeding upon the equity side of the court, it should be noticed that the effect of sections 24 and 25 of the Judicature Act, 1873, and sections 89, 90, and 91 of the same Act are such as to give power to the county court to grant relief, even though the action in force is a common law action for debt, in as ample a manner as if it were an action in the superior court. Now as to the Statute of Frauds, various cases were cited in argument upon the one side and the other as to whether this agreement was or was not within the statute as being an agreement "which is not to be performed within one year from the making thereof," the county court judge held it to be not within the statute. But be this as it may, it seems to us that inasmuch as this is an action to recover six weeks' arrears of maintenance, the plaintiff is entitled to recover as money paid at defendant's request, the consideration being executed, and that this point was expressly decided in the plaintiff's favour in the case of *Knowlman* v. *Bluett*, 22 W. R. 77, 758, L. R. 9 Ex. 307, in the Exchequer Chamber, and is really indistinguishable from the present case.

For these reasons we give judgment for the respondent, with costs.

Solicitors for the appellant, *Walton, Williamson, & Hill*, for *A. Whitehorn*, North Shields.

Solicitors for the respondent, *Pyke, Parrott, & Co.*, for *Joel & Parsons*, Newcastle.

Q. B. Div. (Mathew and A. L. Smith, JJ.) Jan. 17.

Halgate v. Brett. (a.)

Poor law—Audit of accounts—Neglect to attend—Liability for disobedience—4 & 5 Will. 4, c. 76, s. 96; 7 & 8 Vict. c. 101, s. 33.

Mere neglect by overseers to attend an audit of parish accounts which has been duly notified by the auditor does not of itself constitute the offence of wilful disobedience under 4 & 5 Will. 4, c. 76, s. 96.

This was a case stated under 20 & 21 Vict. c. 43, on the application of the appellants.

At a court of summary jurisdiction held at Chelmsford on the 5th day of August, 1887, the appellants were charged by the respondent with "unlawfully and wilfully disobeying a certain order of the Local Government Board, dated the 14th of January, 1887, by not attending at the time and place appointed by the respondent, the auditor, for the audit of their accounts and the submission to such auditor of their books, vouchers, and other papers necessary for the passing of the accounts.

The appellants were churchwardens of the parish of Springfield and overseers of the poor. It was proved that notice of the audit was sent by post to the assistant overseer, who was also a defendant in the case, and that he received it. Public notice had also been given in the *Essex Weekly News*, the county paper circulating in the district. The appellants (the churchwardens) did not

(a.) Reported by Cecil Chapman, Esq., Barrister-at-Law.

receive any notice, and were not aware of the intended audit.

It was contended before the magistrates that, a paid assistant overseer having been appointed to do the duties, the appellants were not overseers within the meaning of the poor law statutes, and that, not having actually received notice, they were not liable to conviction.

The magistrates held that the auditor had done all that was necessary on his part; that the overseers had not relieved themselves of responsibility by appointing a paid assistant, and were as strictly overseers of the poor as any others in the position; and that notice to their assistant was notice to them.

They therefore convicted the appellants and fined them 1s. each, and fined the assistant overseer, who did not appear, £2 and costs.

If the magistrates were right, the conviction was to stand; if they were wrong, the conviction was to be quashed.

Channell, Q.C. (*Wightman Wood* with him), for the appellants.—It is necessary to prove wilful disobedience to maintain this conviction. Without notice brought home to the defendants, no wilful disobedience can be proved. In a criminal case notice to one person cannot be made notice to another.

Alexander Glen, for the respondent.—The appellants are liable to be convicted under 7 & 8 Vict. c. 101, s. 33, for neglect of notice given under 11 & 12 Vict. c. 91, s. 7. It was not necessary to give all the overseers notice, as a notice by them may be valid without the signatures of all: *Rex* v. *Beeston*, 3 T. R. 592; *R.* v. *Yorkshire* (*North Riding*) *Justices*, 6 A. & E. 863. Service upon an assistant overseer is service upon the overseers: *Points* v. *Attwood*, 6 C. B. 38; *Caunter* v. *Adams*, 12 W. R. 1105, 15 C. B. N. S. 512. The assistant overseer has all the rights and duties of an overseer: *Baker* v. *Locke*, 13 W. R. 258, 18 C. B. N. S. 52. By article 59 of General Order for Accounts, 1867, the word "overseers" shall be taken to mean overseers of the poor and churchwardens. It was their duty to discover the time and place of audit and attend. Their duties as to the keeping of accounts are defined in article 1 of the same order. Where churchwardens are overseers, the accounts are to be left in a certain place for them to sign.

Wightman Wood, in reply.—The appellants are not "persons having the collection, receipt, or distribution of moneys" within 4 & 5 Will. 4, c. 76, s. 47. The Act of 7 & 8 Vict. c. 101, s. 33, does not repeal, but merely extends, the original Act. The notice read has no statutory authority, and it is not provided in the statute that notice to the assistant overseer is to be good against overseers. It is admitted that they did not receive notices, and in *quasi*-criminal matters notice to an agent cannot be notice to a principal unless specially provided for, whatever it might be in civil matters.

MATHEW, J.—This conviction cannot be upheld. I cannot come to the conclusion that there was wilful disobedience within the meaning of 4 & 5 Will. 4, c. 76, s. 96. That section exacts a penalty in case anyone shall wilfully neglect or disobey any of the rules, and was intended to punish contumacious contempt of the authorities as a criminal offence. The magistrates have not found the appellants guilty of contumacious disrespect, or of a disposition to repudiate their obligations as overseers. Although the notice might be taken as brought home to the appellants, I do not think, on the face of it, that their neglect to appear would constitute wilful disobedience. There is a significant memorandum at the end of the notice to the assistant overseer—namely, "personally attend." I do not think it contemplates having churchwardens and overseers there. The appellants are churchwardens of an ecclesiastical parish, and take no part in the poor law administration. Auditors had audited the parish accounts many times before without them, and there was nothing to indicate that they knew of or interfered with the business. They would reasonably conclude from the words in the notice that the attendance required was that of the assistant overseer, who had actual knowledge of the accounts for poor law purposes.

The conviction must be quashed.

A. L. SMITH, J.—I am of the same opinion. Having had my attention called to 7 & 8 Vict. c. 101, s. 33, and 11 & 12 Vict. c. 91, I think there was *primâ facie* evidence of disobedience, but it could be rebutted. In this case it has been.

The conviction must be set aside. No costs.

Solicitors for the appellants, *Paterson, Snow, & Bloxam*, for *Jepp & Son*, Chelmsford.

Solicitors for the respondent, *Duffield & Bruty*.

Q. B. Div. (Wills and Grantham, JJ.) Dec. 18.

COLLIS *v.* LEWIS.

CLARIDGE, *Claimant*. (*a*.)

County court—Interpleader—Appeal—19 & 20 Vict. c. 108, s. 68—30 & 31 *Vict.* c. 142, s. 13.

In an interpleader issue where neither the money claimed nor the value of the goods or the proceeds of them exceed £20, no appeal will lie from the county court either with or without leave. Section 13 *of the County Courts Act*, 1867, *enacting that, "with the leave of the judge, an appeal shall be allowed in actions in which an appeal does not now lie," only applies to actions, and not to interpleader issues.*

Appeal by Claridge in interpleader proceedings from the judgment of his Honour Judge Eddis at the Clerkenwell County Court.

Neither the money claimed nor the value of the goods exceeded £20, but the county court judge had given leave to appeal.

Hollenstein, for the respondent Collis, took the preliminary objection that there was no appeal in interpleader proceedings before 19 & 20 Vict. c. 108, and that section 68 of that Act limited such appeals to issues where the "money claimed or the value of the goods or the proceeds exceed £20": *Beswick* v. *Boffey*, 2 W. 156, 9 Ex. 325; *Mason* v. *Wirral Highway Board*, W. R. 676, 4 Q. B. D. 459; *Vallance* v. *Nash*, 6 W. 227, 27 L. J. Ex. 142.

Beaumont Morice, for the appellant.—By section 13 of the County Courts Act, 1867 (30 & 31 Vict. c. 142), "with the leave of the judge an appeal shall be allowed in actions in which an appeal is not now allowed."

WILLS, J.—The cases seem to decide quite clearly what I always thought to be the law, that there is no appeal in interpleader proceedings except that expressly allowed by section 68 of the County Courts Act of 1856. The provisions of the later Act of 1867 only apply to actions. Here the value of the goods claimed is under the limit laid down by the Act of 1856 and no appeal can lie even with leave.

GRANTHAM, J., concurred.

Appeal dismissed.

Solicitor for the appellant, *J. E. Coxwell*.

Solicitors for the respondent, *W. J. Child & Son*.

(*a*.) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

Q. B. Div. (Pollock, B., and Hawkins, J.) Dec. 17.

Ipswich Union, *Appellants.*
West Ham Union, *Respondents.* (*a.*)

Poor law—Irremoveability—Lunatic—Break of residence—9 & 10 Vict. c. 66, s. 1—28 & 29 Vict. c. 79, s. 8

A pauper is irremoveable if the periods during which he resided in the union and did not receive parochial relief, on being added together, constitute one year's residence, for the year's residence need not be continuous.

Case stated.

This was an appeal from an order of the Essex Quarter Sessions confirming an order of justices for the payment by the appellant union to the respondent union of a sum of money for the maintenance of a pauper lunatic, an inmate of the Essex County Lunatic Asylum.

The facts, as set out in the case, were as follows:—

The pauper, Sarah Anne Warne, was the wife of Thomas Warne. The pauper resided with her husband in the parish of St. Clement, Ipswich, in the appellant union, where he was legally settled, till September 23, 1883, when they went to reside at Leyton, in Essex, in the respondent union.

The pauper's husband resided at Leyton continuously from September 23, 1883, to March 1, 1886, when application was made for her removal to the Essex County Lunatic Asylum.

Between these dates the pauper was confined three times in the Essex County Lunatic Asylum, where she was at the date of the order, and once in Ipswich Lunatic Asylum, as a pauper lunatic. She resided with her husband at Leyton in the respondent union during her lucid intervals. In the whole period from September 23, 1883, to March 1, 1886, these amounted to 390 days. Between March 1, 1885, and March 1, 1886, she had a lucid interval of 276 days. Except as regards his wife's maintenance as a pauper lunatic, the husband of the pauper never, between September 23, 1883, and March 1, 1886, received parochial relief.

The costs of maintenance of irremoveable pauper lunatics are borne by the place from which they cannot be removed (16 & 17 Vict. c. 97, s. 102).

J. C. Earle (*Poland* with him), for the appellants.—The husband of the pauper was irremoveable at the date of the application to remove his wife. At that date he was within the scope of 9 & 10 Vict. c. 66, s. 1, 11 & 12 Vict. c. 111, and 28 & 29 Vict. c. 79, s. 8, and had resided in the respondent union for 390 days. This computation omits, as breaks of residence, all times during which he had received parochial relief on behalf of his wife—*i.e.*, for her maintenance as a pauper lunatic. If the husband is irremoveable, the wife is so: *Reg.* v. *Christchurch*, 18 L. J. (M. C.) 28; 11 & 12 Vict. c. 111.

Philbrick, Q.C. (*Woollett* with him), for the respondents.—The husband is removeable, and therefore his wife also. A qualifying year cannot be made up of parts of years, but must be without any break of residence.

Pollock, B.—It is admitted that the pauper is irremoveable by statute if her husband has acquired a *status* of irremoveability. Is the husband irremoveable from the respondent's union or not? This depends upon whether his year of residence can be made up out of portions of years during which he has not been, as during other portions of such years he has been, in receipt of parish relief owing to his wife having been maintained as a pauper lunatic. A similar point was raised in *Reg.* v. *Christchurch*.

The qualifying period then was five years. It was there decided that the proper way was, first, to eliminate any time during which there had been a statutory disability, and, next, to see whether five years of residence remained. But here the pauper's husband has resided for more than one year in the respondent union under no statutory disability. In my opinion he is irremoveable, and, because he is irremoveable, his wife (the pauper) is irremoveable by statute.

Hawkins, J., concurred.

Order quashed.

Solicitor for the appellants, *Rexworthy*, for *Vulliamy*, Ipswich.

Solicitors for the respondents, *Hilleary & Taylor.*

(*a.*) Reported by Sir Sherston Baker, Barrister-at-Law.

Q. B. Div. (Pollock, B., and Hawkins, J.) Dec. 16.

Pine *v.* Barnes. (*a.*)

*Licensed house—Consumption of intoxicating liquors after hour of closing—*Bonâ fide *guests of lodger—Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *ss.* 9, 10.

It is not an offence against section 9 of the Licensing Act, 1874, *for a publican to allow intoxicating liquors ordered by a lodger to be consumed by* bonâ fide *guests of the lodger after the hour of closing.*

Case stated by justices of Tonbridge under 20 & 21 Vict. c. 43 and 42 & 43 Vict. c. 49, s. 33.

A summons was issued against the appellant under section 9 of the Licensing Act, 1874, on an information preferred by the respondent, which alleged that the appellant, being a person licensed for the sale of intoxicating liquors, on the 4th of July, 1887, unlawfully did allow intoxicating liquors to be consumed on his licensed premises during the time that the same were required to be closed by and in pursuance of the Licensing Act, 1874.

Section 9 enacts that "any person who, during the time at which premises for the sale of intoxicating liquors are directed to be closed by or in pursuance of this Act, sells or exposes for sale in such premises any intoxicating liquor, or opens or keeps open such premises for the sale of intoxicating liquors, or allows any intoxicating liquors, although purchased before the hours of closing, to be consumed in the premises" shall be liable to a penalty.

Section 10 says that nothing in the Act shall preclude a licensed person from selling intoxicating liquor at any time to persons lodging in his house.

On the hearing of the summons it appeared that on the day in question a Mr. Le May had taken rooms at the appellant's hotel—viz., a sitting room and a bed room, and in the evening he gave a dinner in the sitting room to a number of his friends, and after ten o'clock, the hour of closing, they remained in the room drinking wine and other intoxicating liquors. All the liquor was supplied on the order of Mr. Le May, having been ordered by him before the hour of closing, and was paid for by him.

The justices found that the persons who were so drinking with Mr. Le May were his *bonâ fide* guests. They thought, however, that if they dismissed the summons they would be opening a door to an evasion of the

(*a.*) Reported by F. G. Rucker, Esq., Barrister-at-Law.

Act. They therefore convicted the appellant and fined him one shilling.

H. F. Dickens, for the appellant.—Here there was no contravention of the Act in the sale of the liquor. And section 9 deals entirely with cases of liquor sold in contravention of the Act. Otherwise, as section 10 only permits the sale of liquor to a lodger, and says nothing about when it may be drunk, it would be an offence for a publican to allow any intoxicating liquor to be drunk at all after the hour of closing.

The respondent did not appear.

Pollock, B.—It is clear that this conviction must be quashed. The magistrates thought they ought to prevent an evasion of the Act. But if a thing does not come within an Act it is useless to talk about evasion. This gentleman was a lodger at the inn, and he invited some friends to dinner and gave them wine, some of which was drunk after the hour of closing. That is not an offence against the Act. The magistrates find that they were *bonâ fide* guests; if there had been any pretence about the matter the case would be different.

Hawkins, J.—I am of the same opinion. The Act allows a publican to sell liquor to a lodger at any time. And there can be nothing to prevent a lodger who has bought liquor from allowing a *bonâ fide* guest to drink it with him after the hour of closing.

Conviction quashed.

Solicitors for the appellant, *Sole, Turner, & Co.*, for *W. C. Cripps & Son*, Tunbridge Wells.

Q. B. Div. (Pollock, B., and Hawkins, J.) Dec. 14, 15.

Mortgage Insurance Corporation v. Commissioners of Inland Revenue. (a.)

Stamp—Promissory note—Agreement—Stamp Act, 1870 (33 & 34 *Vict. c.* 97), *s.* 49.

The appellants executed an instrument which was called a policy of assurance, and by which they guaranteed to the assured the payment of £100 on the 18th of May, 1967, provided that, if the assured should be desirous at any time of surrendering the policy, the appellants would allow to the assured the surrender value thereof on the 18th of May next before the notice of surrender, such value to be fixed according to the appellants' tables for the time being in force with reference to surrenders.

Held, that the instrument was not chargeable with stamp duty as a promissory note, but was chargeable as an agreement only.

Case stated by the Commissioners of Inland Revenue under section 19 of the Stamp Act, 1870.

The instrument in question was a policy of assurance granted by the Mortgage Insurance Corporation, and was to the following effect:—The corporation, in consideration of a single premium of £9 17s. 4d., paid at the time when the policy was issued, guaranteed to the assured the payment of £100 on the 18th of May, 1967; provided that, if the assured should be desirous at any time of surrendering the policy, the corporation would allow to the assured the surrender value thereof on the 18th of May next before the notice of surrender, such value to be fixed according to the tables of the corporation for the time being in force with reference to surrenders.

The commissioners were required by the corporation, pursuant to section 18 of the Stamp Act, 1870, to [illegible] press their opinion as to the amount of stamp d[illegible] with which the said instrument was chargeable. [illegible] commissioners being of opinion that the instrument [illegible] chargeable as a promissory note, assessed the d[illegible] thereon at one shilling. The corporation appealed.

The question was whether the instrument was [illegible] chargeable as a promissory note, or whether it [illegible] chargeable with a sixpenny stamp only, as an ag[illegible] ment.

Sir H. James, Q.C. (*Moulton, Q.C.*, and *Regi[illegible] Brown*, with him), for the appellants.—This is n[illegible] promissory note in the ordinary sense; and even if [illegible] a promissory note within section 49 of the Stamp A[illegible] it is a promissory note and something more: *Br[illegible] India Steam Navigation Co.* v. *Commissioners of Inl[illegible] Revenue*, 29 W. R. 610, 7 Q. B. D. 165, where a d[illegible] ment, which was a promissory note within the word[illegible] the section, was held to be a debenture, and charge[illegible] as such. The test seems to be this—in order th[illegible] document may be a promissory note within the sect[illegible] and nothing more, there must not be any words [illegible] agreement beyond the mere promise to pay. Here [illegible] corporation do more than merely promise to pay a certa[illegible] sum on a certain date, they agree to do in the meanti[illegible] a certain thing of great benefit to the other party—[illegible] to pay him at any time the surrender value of the pol[illegible] as shown by the tables of the corporation, which [illegible] volves a promise on their part to keep such tab[illegible] This is clearly something more than a promis[illegible] note; it is an agreement, and ought to be charge[illegible] as such with a sixpenny stamp only. In *Yeo* v. *Du[illegible]* 33 W. R. 739, the majority of the Court of Ap[illegible] thought that the instrument there in question, the[illegible] it contained a promise to pay, was not a promis[illegible] note at all; and even the judgment of Bowen, L.J., who dissented, is in favour of this document not bei[illegible] chargeable as a promissory note.

Sir E. Clarke, S.G. (*Sir R. E. Webster, A.G.*, [illegible] *Dicey*, with him), for the respondents.—This is a p[illegible] missory note within section 49 of the Stamp Act, 1[illegible] which is as follows:—(1) "The term promissory [illegible] means and includes any document or writing (exc[illegible] bank note) containing a promise to pay any su[illegible] money." (2) "A note promising the payment of [illegible] sum of money out of any particular fund which m[illegible] may not be available, or upon any condition or co[illegible] gency which may or may not be performed or ha[illegible] is to be deemed for the purposes of this Act a prom[illegible] note for the said sum of money." The words are [illegible] wide, and a more comprehensive meaning is gi[illegible] the term promissory note than it had under th[illegible] vious Stamp Act: see 55 Geo. 3, c. 184, schedule. [illegible] is a promise to pay money and nothing more, [illegible] promise to pay £100 on a fixed day, and there is [illegible] an alternative promise to pay otherwise. The *B[illegible] India Steam Navigation case* is in favour of the resp[illegible] ents. Grove, J., treated the instrument in that ca[illegible] a promissory note, though he held that it was also [illegible] thing more; and Lindley, J., said that if it were [illegible] debenture, it would be a promissory note. The o[illegible] expressed by the Master of the Rolls in *Yeo* v. [illegible] would not apply to this instrument. And the judg[illegible] of Bowen, L.J., in that case makes section 49 [illegible] enough to include the present case.

Sir H. James, Q.C., replied.

Dec. 15.—Pollock, B.—The question is whe[illegible] this instrument, which is called a policy of assurance, [illegible] to be stamped as a promissory note, or whether a si[illegible] penny agreement stamp is sufficient. This depends [illegible] the true construction of section 49 of the Stamp Ac[illegible] 1870. It must be observed that we are not considerin[illegible] whether any duty is payable at all on this instrume[illegible]

(a.) Reported by F. G. Rucker, Esq., Barrister-at-Law.

whether it is a promissory note or nothing; but we are considering whether it is a promissory note or an agreement.

Now the words of the section, if taken alone, are clear, including any document containing a promise so pay. And the Solicitor-General reasonably argued that this Act intended to include under the term "promissory note" some instruments not within the earlier statutes. There seems to be necessarily included in the section everything which is clearly and absolutely a promise to pay. But then the question arises, What are we to say where we have a document, which is not merely a promise to pay, but contains other terms, terms of agreement. I think that we cannot hold it to be partly a promissory note and partly something else. I think we must ask ourselves the question, What is the dominant character, what is the substantial effect, of the document? Is it more like a promissory note? or more like an agreement? Some assistance is to be derived from the cases which have been cited, *British India Steam Navigation Co.* v. *Commissioners of Inland Revenue* and *Yeo* v. *Dawe*. The courts seem to have said that in dealing with such a document you must inquire what was the intention of the parties, and what is the common understanding of men of business who have to deal with such documents. This document, which is called a policy, guarantees the payment of a fixed sum on a fixed date, and then proceeds to provide for the surrender of the policy to the assured at a certain value to be calculated in a certain way. The assured, if he desires to surrender the policy, is to give notice to the corporation, who will then be able by reference to their tables to ascertain the surrender value of it. This involves an agreement on the part of the corporation that they shall have and keep proper tables. It makes the document something more than a promise to pay money; it shows an intention on the part of the parties to make an agreement on the terms expressed therein; and I think it would be regarded by men of business as an agreement. I am of opinion that such a transaction was not within the contemplation of those who drew section 49, and it is not within the words, "upon any condition or contingency which may or may not be performed or happen"; but is something more than that. Therefore, I am of opinion that this instrument is not chargeable as a promissory note, but as an agreement.

Hawkins, J.—If this document had consisted merely of the agreement to pay £100 on the 18th of May, 1967, and the proviso had been omitted, I should have thought it was a promissory note, though it was called a policy of assurance. But the proviso shows that the preceding words do not express the whole intention of the parties. Suppose the payee required early payment of the commuted sum. He would have to base his claim on the words of the proviso. It would then be necessary for him that the document should bear an agreement stamp. This is cogent proof that the two parts of the document must be read together, in order that we may determine what is its substantial effect. I do not forget sub-section 2 of section 49. But this is not a promise to pay on a contingency, but to pay a substituted sum. We ought not to look on this document as if no action could be brought on it till 1967. I think that, substantially, this is an agreement, and that it ought to be stamped as such with a sixpenny stamp, and that the judgment of the commissioners ought to be reversed.

Appeal allowed.

Solicitor for the appellants, *Linklater*.

Solicitor for the respondents, *Solicitor of Inland Revenue*.

Q. B. Div. (Wills and Grantham, JJ.) Dec. 12.

Reg. v. County Court Judge of Lambeth and Jonas. (a.)

County courts—Practice—Order for committal—Writ of attachment—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 4—9 & 10 *Vict. c.* 95, *s.* 113—*Judicature Act*, 1873, *s.* 89.

An order was made in an action in a county court upon one Harris, as acting manager of a certain partnership fund, to pay into court within fourteen days the sum of £65 odd, and to deliver up certain documents. Harris did deliver up the documents, but failed to pay in the money, whereupon an order of committal was made out by the county court judge, on the ground that Harris, in his fiduciary position, had been guilty of contempt of court by neglecting to obey the previous order. The committal order merely recited the terms of the original order, and did not specify any particular breach.

Held, that it was immaterial whether the process of committal was by an order of committal or a writ of attachment, since the distinction no longer existed in chancery practice, according to Harvey *v.* Harvey, 33 *W. R.* 76, 26 *Ch. D.* 644; *but that the above order was bad for uncertainty, since it did not specify in what particular Harris was guilty of contempt, so as to enable him to purge such contempt.*

Application adjourned by Field, J., from chambers to grant a writ of prohibition.

In an action before the county court between Jonas and Harris, the present applicant, in a matter of partnership accounts in a cricket club, an order had been made on May 10, 1887, appointing a receiver, and ordering Harris, as acting manager of the club, to pay into court within fourteen days the sum of £65 odd, and to deliver to the receiver certain documents, vouchers, &c., belonging to the partnership concern. On August 2 the following order, now complained of, was made, which, after reciting the previous order for the payment of the money and the delivery of the documents, &c., went on to say that, "the court being of opinion that the said Richard Harris in his fiduciary position has been guilty of contempt of court by neglecting to obey the said order," it was ordered that he be committed to Wandsworth Prison. Harris applied for a writ of prohibition to Field, J., at chambers, who adjourned the matter to the court.

Richmond, for the applicant Harris.—The committal order does not specify in what respect Harris has disobeyed the original order, it merely says "in his fiduciary capacity," and he cannot purge his contempt without knowing in what way he is to obey. He has sworn that he has delivered up all documents in his possession. The non-payment of the money is alone admitted: *Reg. Hemsworth*, 3 Q. B. 745. This is a committal order for an unlimited time. No such order was ever made. If it is for offences under the Debtors Act, 1869 (33 & 34 Vict. c. 62), s. 4, there should have been a writ of attachment and not an order for committal, which only applies to offences committed before the county court itself, under section 113 of 9 & 10 Vict. c. 95. The powers conferred by section 89 of the Judicature Act, 1873, on county courts are similar to those possessed by the High Court, and for these orders the practice of the Chancery Court must be followed, which distinguished the two processes of orders for committal and writs of attachment: *Reg.* v. *Lefroy*, 21 W. R. 332, L. R. 8 Q. B. 134; *Ex parte Hooson*, 21 W. R. 152, L. R. 8 Ch. 231; *Buist* v. *Bridge*, 29 W. R. 117; *Harvey* v.

(a.) Reported by Spencer L. Holland, Esq., Barrister-at-Law.

Harvey, 33 W. R. 76, 26 Ch. D. 644; *Weldon* v. *Weldon*, 33 W. R. 370, 10 P. D. 72; Pemberton on Judgments, p. 77; *Ex parte Martin*, 4 Q. B. D. 212.

Johnson Watson, for the respondent.—A writ of attachment is a High Court writ only. An order for committal is the proper order upon interlocutory applications: *Richards* v. *Cullerne*, 7 Q. B. D. 623, 30 W. R. Dig. 103; *Martin* v. *Bannister*, 28 W. R. 143, 4 Q. B. D. 491; ord. 51, r. 26, County Court Rules, 1886. The order of May 10 directed the payment of money by the defendant as well as the delivery of books. It was not necessary for the committal order to specify the default in the payment of money, since the committal of Harris as a person "acting in a fiduciary capacity" implied the non-payment of trust money.

Wills, J.—This appeal must be allowed. The committal order of the county court judge is bad on the face of it. It is alleged that it is bad in substance as well as in form. As to that there may have been evidence of justification for the defendant's failure to comply with the original order, but we cannot now go into that. One objection, however, to the order is only partially substantiated. It is said that the appropriate remedy for disobedience to the original order of the county court was by a writ of attachment instead of an order for committal. In my opinion that is a distinction without a difference. When the Judicature Act of 1873 provided, by section 89, that inferior courts should have the same powers as the superior courts over all causes within their jurisdiction, it was not necessarily intended that they should call all the remedies so given by the same names. In proceedings in the High Court obedience may be enforced (1) by writ of attachment; (2) by an order for committal. We can put aside cases where a writ of attachment for some such offence as failure to comply with answers to interrogatories or cases where such a writ is made bailable only in the High Court as having no application to the present case, because the order of committal here was not for any such purpose, but to enforce obedience to an order which was final. An order of this kind cannot be bailable. We need not, therefore, consider the cases cited where a writ of attachment properly became bailable. The question for us is, whether an order of committal or a writ of attachment is the proper form to enforce obedience to an order which is final? In my opinion it matters little by what name such a form is called in that case. Chitty, J., in *Harvey* v. *Harvey*, 26 Ch. D., at p. 654, appears to consider that there was now no practical difference between them. One was enforced by the tipstaff of the court and the other by the sheriff. That is all the distinction, and it comes to little, if anything. But when there was disobedience to any order for payment of money for which power of imprisonment was granted under section 4 of the Debtors Act, 1869, then a writ of attachment seems to have been the proper form of proceeding. If there was any substantial difference between such proceedings in the county courts, then undoubtedly such difference ought to be respected, and that court could not be allowed to administer harsher remedies than were allowed to the High Court. But I can see no real difference between the two processes. The county court acts through its bailiff instead of through the sheriff, by whom the warrant of committal is executed; there being no officer like the tipstaff of the High Court in the county court, the two forms are carried out by the same machinery in the latter court, and it therefore comes to a mere question of words. I think, therefore, that there is no objection to the committal order complained of on the ground that it was an order for committal instead of one for a writ of attachment.

As to the order itself, however, I consider it as bad as bad could be. The original order recites that the defendant should do a number of things—(1) to pay money; (2) to deliver up books, and so on. The order for committal recites that the county court judge had come to the conclusion that the defendant had disobeyed the said order, namely that "in his fiduciary position he had neglected to obey the said order." That is so expressed in order to make section 4, sub-section 3, of the Debtors Act, 1869, applicable. But the order is not necessarily confined to that. The county court judge from all that appears on the order for committal, may have ordered the committal on the ground that the defendant was a person in a fiduciary capacity, or that the defendant had disobeyed the portion of the original order requiring the payment of money or the delivery of books. It is quite uncertain. The order for the defendant's committal is no worse because he was a person acting in a fiduciary capacity than in the other cases. It cannot be read as embracing both charges, for if so it may, for aught one can tell, embrace a third or any more charges. Inasmuch as it can only be discharged by the person committed purging his contempt, no man ought to be imprisoned except for some act which ought to be clearly stated. I think, therefore, that this objection to the committal order is a good and valid one—namely, that this order does not clearly and distinctly specify in what respect or respects the disobedience to the original order has been incurred.

Grantham, J.—I am of the same opinion.

Appeal allowed.

Solicitors for the plaintiff, *Chas Robinson & Co.*

Solicitor for the defendant, *Geo. Johnson.*

Q. B. Div. (Pollock, B., and Hawkins, J.) Dec. 7.

Reg. *v.* Newport (Salop) County Court Judge. Ashley *v.* Norris. (*a.*)

County court — Execution — Judgment of one county court to be executed in different county court district — Neglect of bailiff of "foreign" court to levy — 9 & 10 Vict. c. 95, ss. 104, 115 — Order by judge of one court to bailiff of another — Prohibition — Acquiescence — Submission to court without jurisdiction.

The county court judge of one court has no power to order the bailiff of a court in a different district who has not levied execution in pursuance of the warrant of the first court to pay compensation under 9 & 10 Vict. c. 95, s. 115, or otherwise, to the party injured.

Where the bailiff of S. appeared before the county court judge of N. to justify his conduct in not making a levy, but was nevertheless ordered by the judge of N. to pay compensation,

Held, not to be such an acquiescence in the jurisdiction of the court of N. as would estop the bailiff from obtaining a prohibition against the order of the judge of N.

This was an application to set aside a writ of prohibition directed to the judge of the county court of Shropshire holden at Newport and to one William Ashley, under the following circumstances:—

Ashley, who resided within the district of the Newport County Court, obtained a judgment in that court against Emery for £1 1s. 5d. and 6s. costs. The judgment being unsatisfied, Ashley issued execution against Emery, who resided in the district of the Stone County Court. The warrant of execution was sent by the

(*a.*) Reported by Sir Sherston Baker, Barrister-at-Law.

registrar of the Newport County Court to John Buckley Norris, the registrar of the Stone County Court, requiring execution of the same. No return to this warrant was made to the registrar of Newport, and, after a lapse of over four months, the plaintiff applied to the county court judge of Newport, who, on hearing that the warrant had been sent in the usual way by post to Norris, the registrar of Stone (who was also the high bailiff of Stone), and that he had been written to several times since then, and that no answer had been received from him, ordered Norris, *quâ* high bailiff, to pay the sum of £1 10s. 5d. to Ashley as compensation for neglect to levy execution against the goods of Emery. Norris subsequently appeared before the judge and stated that he had not received the letters in question, and that he did not levy execution because the goods of Emery would not pay the costs of the same, but the judge refused to set aside the order. Thereupon Norris obtained *ex parte* a writ of prohibition on the ground that the alleged cause of action or complaint against him was for neglect, as high bailiff of the Stone County Court, to levy execution on goods within the district of the Stone County Court, and that no part of such alleged cause of action or complaint arose within the district or jurisdiction of the Newport County Court.

Corrie *Grant*, for the application to set aside the prohibition.—The county court judge was right. By 9 & 10 Vict. c. 95, s. 115, in case any bailiff who shall be employed to levy execution neglects to do so, and the fact is proved to the satisfaction of the judge, the judge shall order the bailiff to pay such damages as it shall appear that the plaintiff has sustained. Then, by section 104 of the same Act, a warrant of execution against the goods of a party out of the jurisdiction of a county court is to be sent to the registrar of that court in whose jurisdiction the defendant is, and the high bailiff of that court "shall be authorized and required" to act as if the warrant was issued by his own court. The words "authorized and required" show that a foreign bailiff is affected by the order of the judge from whose court the warrant issues, and therefore he may be punished by that judge. [Pollock, B.—It would be very inconvenient if a high bailiff were punishable by anyone but by his own judge. [Hawkins, J.—A bailiff should only be tried by his own judge.] The question of jurisdiction was not raised by the high bailiff before the county court judge of Newport. The bailiff then submitted to the jurisdiction of the court by appearing before it. [Pollock, B.—I think that point is settled by *Roberts* v. *Humby*, 3 M. & W. 120, and by *Mayor of London* v. *Cox*, L. R. 2 H. L. 239, 15 W. R. H. L. Dig. 10.] *Chichester* v. *Donegal*, 6 Madd. 395, and *Jones* v. *James*, 19 L. J. Q. B. 257, are in support of my contention.

Woodgate, in support of the prohibition, was not called on.

Pollock, B.—In this case the prohibition, when applied for *ex parte* at chambers, was granted at once on account of the urgency of the proceedings, and now we have this application to set it aside. [His lordship briefly recited the facts of the case.] There was *primâ facie* negligence in the bailiff of the Stone district, and the judge of the Newport district made an order on him to pay compensation to the orginal plaintiff. If a warrant be issued from a home court, is the bailiff of the foreign court amenable to the judge of the home court? By section 31 of 9 & 10 Vict. c. 95 there shall be a bailiff for every court, whom the judge may appoint and remove. Surely this must be the judge of the home court. Then, by 29 & 30 Vict. c. 14, s. 13, no person shall be appointed bailiff of more than one court. By section 33 of 9 & 10 Vict. c. 95 the bailiff shall attend every sitting of the court, and by section 115 of the same Act, if the bailiff should neglect to levy execution, he may be punished for his neglect by being made to pay compensation. Who is to be the judge of this? It must be the judge of that court to which the bailiff belongs. It has, indeed, been argued that this section is modified by section 104, by which a bailiff is "authorized and required" by a judge of another court. But I think it clear from the whole purview of the statute that this does not affect the general principle that each judge is to keep his own bailiff in order. Then on the ground of convenience, there can be no doubt that it would be most inconvenient for a county court judge at York to be able to sit in judgment on a bailiff of the county court of Exeter.

It has been argued that the bailiff submitted to the jurisdiction of the Newport Court by appearing before the judge of that court, but I do not think that it was sufficient to debar him from claiming a prohibition afterwards. It is a different thing from a man being summoned by mistake to the wrong court where two counties join, and submitting voluntarily to the jurisdiction. Here it appears, on the face of the proceedings, that the court below had no jurisdiction—that is, was *coram non judice*, and there was no voluntary acquiescence in the jurisdiction to debar the bailiff from seeking a prohibition.

Hawkins, J., concurred.

Application to set aside prohibition dismissed, with costs.

Solicitors for the applicant, *Oldman & Clabburn*, for *Elliott & Watson*, Newport.

Solicitors for the defendant, *Keen, Rogers, & Co.*, for *Middleton & Norris*, Stone.

Q. B. Div. (Pollock, B., and Hawkins, J.) Dec. 3.

Reg. v. Westmoreland County Court Judge.
Ingleton & Co. v. Maudsley. (*a*.)

County court—Jurisdiction—Suit for specific performance—County Courts Act, 1867 (30 & 31 *Vict. c.* 142), *s.* 9—*Practice—Prohibition—Separable claims.*

The county court has no jurisdiction, under the County Courts Act, 1867, *s.* 9, *to entertain a suit for specific performance of a parol agreement to grant a right of way.*

Where a plaint contains two claims, one of which is within and the other without the jurisdiction of the county court, a prohibition may be granted as to one only.

This was a rule calling upon the plaintiffs in the county court action of *Ingleton & Co.* v. *Maudsley* to show cause why a writ of prohibition should not issue to restrain them and the judge of the county court of Westmoreland from prosecuting the plaint in the case. It appeared that the defendant had entered into a parol agreement with the plaintiffs whereby he undertook to give them the sole use of a footpath at a certain rent, but he had subsequently turned the plaintiffs out of possession and allowed other persons to use the footpath. The plaintiffs thereupon brought an action under the County Courts Act, 1867, s. 9, for specific performance of the above agreement, and also claimed damages for breach of contract. The defendant obtained a rule *nisi* to prevent the plaint being heard, on the ground that there

(*a*.) Reported by Cecil Chapman, Esq., Barrister-at-Law.

was no jurisdiction, and the question now came on for hearing.

Lumley Smith, Q.C., showed cause against the rule. The verbal agreement to use the footpath is taken out of the Statute of Frauds by part performance, and amounts either to an agreement for a lease or a sale of the use of the footpath, and in either view can be enforced in an action for specific performance in the county court under section 9 of the County Courts Act, 1867. If the plaintiffs are not entitled to specific performance of this agreement in the county court, they are at any rate entitled to damages for breach of the second part of the agreement. And although a prohibition may be obtained for one part of the plaint, yet the other part is good, and should not be interfered with; *Walsh* v. *Ionides*, 1 E. & B. 383.

Cock, Q.C. (*Waddy, Q.C.*, with him).—The plaint shows, on the face of it, that the county court has no jurisdiction, therefore the whole plaint is the subject of prohibition. This is a suit for specific performance, therefore the question is whether the court has jurisdiction to entertain the suit at all. Now in this case the agreement does not amount to an agreement either for sale or a lease of any property, but is an agreement for an incorporeal hereditament, and, as a grant of an incorporeal heritament must be by deed, this agreement is not the subject of specific performance. That part of the plaint is therefore bad, and, part being bad, the whole plaint fails. *Ex parte Walsh* is distinguishable, for in that case there was no want of jurisdiction on the face of the plaint.

Pollock, B.—The real question raised in this case is whether, upon the plaint, the court had jurisdiction. It is clear that the facts are set forth in the plaint with a twofold object. In the first place, the plaintiffs endeavour to obtain specific performance of an agreement to grant a licence. In the second place, the plaint contains a separate claim for damages for breach of contract. The first of these claims is obviously founded on the jurisdiction given by section 9 of the County Courts Act, 1867. Looking at the limited language used by that Act, we conclude that, if that was the only claim, then the court would have no jurisdiction. But that is not all. The plaintiffs set out, not merely that the defendant did not allow the plaintiffs to use the footpath, but that he also broke an agreement not to allow others to use the way, and they claim £50 damages for that breach. How are those damages claimed? If they are claimed for something which appears in the statement of claim to be such as the court has jurisdiction to entertain, it would never do for us to prohibit the county court from entertaining the action, because it appears to be a hopeless one.

The remaining question comes to this, if, on the facts set forth, there be two claims made, one of which is within and the other without the jurisdiction, can one be prohibited and the other allowed to stand? After looking into the old books, and the law on the subject collected in Bacon's Abridgment, tit. Prohibition, I come to the conclusion that the claims are separable, and that is what this court decided in the recent case of *Godfrey* v. *Lazarus*, 4 *Times* Law Reports, 101. Therefore, it seems to me that the motion for a prohibition fails.

Hawkins, J.—I entirely agree. Assuming the claim set forth to be one which, ordinarily, the High Court has power to deal with, it is one for the specific performance of which the county court has no power to act. I think, therefore, all that is said in regard to the claim for specific performance may be rejected as immaterial. If, on the other hand, it is a nonsensical claim, and one of which no court could entertain jurisdiction, it is an additional reason for rejecting it, and is, therefore, a ground for a prohibition. Has the county court jurisdiction in anything that remains? There is a claim for breach of an agreement over which the county court can exercise jurisdiction. We may, therefore, grant a prohibition of the equitable plaint of the claim, leaving the parties to proceed on the common law plaint. The motion, therefore, as to the second part of the plaint fails.

Solicitors for Ingleton & Co., *Wheeler*, for *Robinson & Robinson*, Settle.

Solicitors for the defendant, *Learoyd & Jones*.

Q. B. Div. (Pollock, B., and Hawkins, J.) Dec.

Medway Union (Guardians of) v. Bedminster Union (Guardians of). (*a*.)

Poor law—Settlement—Three years' residence—A woman and widow—Divided Parishes Act, 1876 (39 & 40 *Vict.* c. 61), *ss.* 34, 35—9 & 10 *Vict.* c. 66, s. 8; *Union Chargeability Act*, 1865, *s.* 8.

A woman who has resided in a parish continuously for three years, partly with her husband and partly as a widow, thereby acquires a settlement as "a person who has resided for the term of three years" under 39 & 40 *Vict.* c. 61, *s.* 34.

Case stated by the Recorder of Bristol.

An order of justices was made for the removal of Caroline Baker, widow, and her three children, aged respectively five, three, and two years, from the Bedminster Union to the Medway Union, as the place of their last legal settlement, under 39 & 40 Vict. c. 61, s. 34. The recorder affirmed the order on appeal to quarter sessions, subject to a case.

The guardians of the Medway Union appealed.

The pauper and her husband had lived together and resided continuously in the parish of Gillingham, in the appellants' union, for two years and nine months immediately before the death of the husband, which occurred in March, 1886, and for upwards of three months after that she resided continuously in the same parish as a widow. The same rule would apply to the children as to her.

It was contended for the appellants that section 34 of the Divided Parishes Act did not apply, because the pauper could not be acquiring a settlement for herself as a *feme sole* at the same time as her husband was acquiring one for her which would be derivative, and that section 35 did not apply, because a widow could not be treated as a wife within the meaning of that section.

For the respondents it was contended that the two periods of residence as wife and widow coalesced so as to make up the three years' continuous residence required by law.

Kinglake (*D. Metcalfe* with him), for the appellants. The pauper has not acquired a settlement under section 34 of the Divided Parishes Act, 1876, because she must then have been *sui juris* for three years, whereas she was under coverture for most of the time. "A person" is a legal person other than married women and infants or others under disability. The husband's residence might give her a derivative settlement, but a break in his residence is a break in hers: *St. Giles, Reading*, v. *Eversley*, 1 Str. 580; *Reg.* v. *Manchester Overseers*, 8 Q. B. D. 50. The time, therefore, of her widowhood must be distinct, and cannot be added to a derivative

(*a*.) Reported by Cecil Chapman, Esq., Barrister-at-Law.

settlement. As to section 35, the pauper, being a widow, cannot claim a derivative settlement under this section: *Reg.* v. *Bridgnorth*, 31 W. R. 938, 11 Q. B. D. 314; *Reg.* v. *Edmonton*, 15 Q. B. D. 339; *Maidstone Union* v. *Holborn Union*, 17 Q. B. D. 817, 35 W. R. Dig. 148.

Poole (*J. C. Wall* with him), for the respondents.—The pauper has acquired a settlement by residence in the appellant union under section 34 because the words "any person" are general, and she has resided in the parish for three years "in such manner and under such circumstances in each of such years as would render her irremoveable" in accordance with 9 & 10 Vict. c. 66, s. 1, which deals with removals, and in accordance with the Union Chargeability Act, 1865 (28 & 29 Vict. c. 79), s. 8. She must therefore be "deemed to be settled in the parish." It was held in *Reg.* v. *Inhabitants of Glossop*, 12 Q. B. 117, that where a pauper resided for five years, first as a wife and then as a widow, the two periods coalesced so as to render her irremoveable under 9 & 10 Vict. c. 66, s. 1. And in *Reg.* v. *St. George's-in-the-East*, 18 W. R. 787, L. R. 5 Q. B. 364, where a woman resided for one year, first as a *feme sole* and then as a married woman, she was held to be irremoveable under 9 & 10 Vict. c. 66, and the Union Chargeability Act, 1865. It is not contended that any settlement was acquired under section 35.

POLLOCK, B.—I am of opinion that the order appealed from should be confirmed. We have to say whether the pauper is, within the meaning of section 34 of the Divided Parishes Act, 1876, "a person who has resided for the term of three years" in the parish of Gillingham in the appellants' union "in such manner and under such circumstances in each of such years as would, in accordance with the several statutes in that behalf, render her irremoveable." If she has resided for three years in the appellant union under these conditions of irremoveability, she has gained a settlement in the appellant union. The statutes in question are statute 9 & 10 Vict. c. 66, s. 1, a statute amending the law relating to the removal of paupers and the Union Chargeability Act, 1865, s. 8. The joint effect of these statutes is as follows:—No person is liable, after a year's unbroken residence in a parish, to be removed therefrom as a pauper. The year is to be computed from the application for the warrant of removal, and no period is to be computed as part of the year during which the pauper has been in receipt of parochial relief, or has come under any or certain other exceptions which are stated in statute 9 & 10 Vict. c. 66, s. 1. Here it is not denied that the pauper did reside in the appellant union for each of the three years necessary for gaining a settlement under section 34 of the Divided Parishes Act, 1876, "in such manner as would in accordance with" statute 9 & 10 Vict. c. 66, s. 1, and the Union Chargeability Act, 1865, s. 8, "render her irremoveable." She, in fact, resided for three years. There was not, in any of the three years, any legal break in her residence. None of the exceptions come into operation to prevent the time running in her favour. Section 34 of the Divided Parishes Act, 1876, takes no account of different kinds of irremoveability. It says nothing as to the suggested distinction between personal and vicarious residence. It does not say "irremoveable in his or her own right," but merely "irremoveable." As events would have it, the pauper has been "irremoveable" as a wife for two years and nine months, and "irremoveable" as a widow for upwards of three months, but she has, in fact, resided in a parish in the appellant union in an irremoveable condition for three years. And, having done so, she has, in my opinion, acquired a settlement by residence in the appellant union.

The cases of *Reg.* v. *Glossop* and *Reg.* v. *St. George's-in-the-East* were, it is true, decided before the passing of the Divided Parishes Act, 1876, but they are decisions on the parts of the previous Acts which are incorporated with the 34th section of that Act, and they constitute a clear authority for the proposition that periods of residence passed by a woman in a parish partly in a single, partly in a married, condition, may be joined together for the purpose of creating a *status* of irremoveability. The *status* of irremoveability thus created gives rise, when it has endured long enough, to a settlement by residence. For the purposes of this appeal it is not necessary to reconcile the 35th with the 34th section of the Divided Parishes Act, 1876.

HAWKINS, J.—I also think that the order appealed from should be confirmed. It is an order which adjudges that the settlement of the pauper is in the appellant union. The correctness of this order depends on whether, when it was made, the pauper had acquired by residence a settlement in the appellant union under section 34 of the Divided Parishes Act, 1876. Under this section a person acquires a settlement by residence for three years in a condition of irremoveability, as defined by 9 & 10 Vict. c. 66, s. 1, and the Union Chargeability Act, 1865, s. 8. In this case no doubt, as long as the marriage continued, either the irremoveability of the wife was the irremoveability of the husband, or, if she could acquire irremoveability on her own account, such irremoveability could always be interfered with by her husband's conduct. Whether personal to herself or derived from him, it was always liable to be interrupted by his becoming chargeable to the parish or otherwise forfeiting his own irremoveability. But nothing of the kind occurred, and she continued irremoveable, whether in her own or in her husband's right does not appear to me to matter, for two years and nine months. After this it is admitted that she resided in a condition of irremoveability on her own account for three months. I think that no authority is necessary to show that these periods of residence can be combined; but, if authority be necessary, it is supplied by *Reg.* v. *Glossop*.

Order of sessions confirmed.

Solicitors for the appellants, *Prall & Son*, Rochester.

Solicitors for the respondents, *O'Donoghue & Anson*, Bristol.

Q. B. Div. (Wills and Grantham, JJ.) Dec. 1.

VINEY *v.* BIGNOLD. (*a.*)

Fire insurance—Arbitration clauses—Condition precedent.

By a condition in a fire policy it was provided that, if any difference should arise in the adjustment of a loss, the amount to be paid should be submitted to arbitration, and the party insured should not be entitled to commence or maintain any action upon the policy until the amount of the loss should have been referred and determined as therein provided, and then only for the amount so awarded.

Held, that the determination of the loss by arbitration was a condition precedent to the plaintiff's right to recover in an action on the policy.

Action upon a fire insurance policy against the defendants, the Norwich Union Fire Insurance Society, represented by their public officer.

The case came before the court upon an order to set down for hearing points of law raised by the pleadings. By a condition indorsed upon the policy it was provided

(*a.*) Reported by A. H. TODD, Esq., Barrister-at-Law.

that, "If any difference shall arise in the adjustment of a loss, the amount (if any) to be paid by the society shall, whether the right to recover on the policy be disputed or not, and independently of all other questions, be submitted to the arbitration of some person to be chosen by both parties or of two independent persons, one to be chosen by the party insured and the other by the directors, and in case either party shall refuse or neglect to appoint an arbitrator within twenty-eight days after notice the other party shall appoint both arbitrators, and in case of the arbitrators differing, then the amount shall be submitted to the arbitration of an umpire to be chosen by the arbitrators before they proceed to act, and the award of the arbitrators or umpire (as the case may be) shall be conclusive evidence of the amount of the loss, and the party insured shall not be entitled to commence or maintain any action at law or suit in equity upon his policy until the amount of the loss shall have been referred and determined as hereinbefore provided, and then only for the amount so awarded."

By another condition indorsed upon the policy, the company reserved to themselves the right of reinstating the property injured.

The point to be decided by the court was whether a reference to arbitration was a condition precedent to the bringing of an action to recover the amount insured under the policy where differences had arisen between the parties as to the amount payable by the defendants.

R. Vaughan Williams and *Hansell*, for the plaintiff.—The covenant to refer to arbitration only amounts to a covenant not to sue, for the condition as to reinstatement implies a liability on the part of the company, who have, under the arbitration clause, provided for a method of ascertaining the amount. The agreement for arbitration is merely collateral: *Collins* v. *Locke*, 28 W. R. 189, 4 App. Cas. 674. This agreement is not in the form in *Scott* v. *Avery*, 4 W. R. 746, 5 H. L. Cas. 811.

They also cited *Roper* v. *Lendon*, 7 W. R. 441, 1 El. & El. 825; *Elliott* v. *Royal Exchange Insurance Co.*, 15 W. R. 907, L. R. 2 Ex. 237; *Dawson* v. *Lord Fitzgerald*, 24 W. R. 773, 1 Ex. D. 257.

Finlay, Q.C., and *W. Graham*, for the defendant, were not called upon.

Wills, J.—The principles applicable to this case are clear. If the parties have covenanted that the liability of the insurance company is to arise only after there has been a reference to arbitration, then we must hold that their liability is to arise only after the award. The policy here says that the society will only be liable subject to the terms and conditions thereupon indorsed. Of those conditions that as to arbitration is the only one that is material. In my judgment that condition provides that unless there has been such a reference and determination no liability is to fall upon the insurance company. The authorities cited do not seem to force us to give a construction different to the plain meaning of the words. *Collins* v. *Locke* is the only one that resembles this case. There were there two clauses relating to arbitration in the contract, one in general terms and the other to the effect that "the award of the arbitrators shall be conclusive, and that none of the parties shall be entitled to commence or maintain any action at law or suit in equity in respect of the matters so submitted as aforesaid, except for the amount or amounts by the said award determined to be paid by one or more of the parties," &c. In the judgment of the court the words "in respect of the matters so submitted as aforesaid" were held to apply only to the questions specifically submitted to arbitration. The two cases are, therefore, clearly distinguishable. In the present case I am of opinion that no action can be brought on the policy before us until the amount of the loss has been determined by arbitration. The expression "entitled" used in the condition seems to me to make it clear that there is no liability on the part of the society until that has been done. Our judgment, therefore, must be for the defendant.

Grantham, J.—I am of the same opinion, and entirely agree that the case of *Collins* v. *Locke* is really an authority much against the plaintiff. *Elliott* v. *Royal Exchange Assurance Co.* is in point, and there the majority of the court took the view that we have adopted in this case. In *Dawson* v. *Lord Fitzgerald* there were two distinct covenants, one that the lessee should keep only such a number of hares and rabbits as would do no injury to the crops, and the other that in case he should keep such a number as should injure the crops, he would pay a fair and reasonable compensation. The arbitration was to be as to the amount of the compensation only. That is entirely different from the present case, and the covenant was undoubtedly merely collateral.

Judgment for the defendant.

Solicitors for the plaintiff, *Clapham & Fitch.*

Solicitors for the defendant, *Hollams, Son, & Coward.*

Q. B. Div. (Denman, J.) Nov. 13, 28.

Crane v. Lewis. (a.)

Partnership—Bill of exchange—Compromise of action—Liability of retired partner.

The defendant was a partner in the firm of G. & Co. from January 1 to June 30, 1885, and no notice was ever given to the plaintiff of his retirement. Between those dates the plaintiff discounted an acceptance indorsed by G. & Co., which was dishonoured. The plaintiff sued G. & Co. for the amount, and G. & Co. brought a cross-action against the plaintiff for recovery of the bill. Both actions were stayed by order of court on G. & Co. giving to the plaintiff a second acceptance for the amount of the first and £10 for costs, and the plaintiff giving up certain securities for the debt which were in his possession. The second acceptance was dishonoured, and the plaintiff sued the defendant upon it as a member of the firm of G. & Co.

Held, that the defendant was not liable, as the bill of exchange was given in settlement of legal proceedings which involved a give-and-take between the parties, and was made without his knowledge or consent.

This was an action tried before Denman, J., without a jury.

The plaintiff sued upon a bill of exchange for £183 17s., indorsed by the firm of Goldsmith & Co. amongst others.

The defendant Lewis had joined the firm of Goldsmith & Co. as a partner on January 1, 1885, and in June 1885, the plaintiff discounted a bill drawn by the firm of Goldsmith & Co. for £173 17s. 10d., and special notice was given to him at the time that the defendant was a member of the firm. On June 30, 1885, the defendant retired from the firm, but no notice was given to the plaintiff of the fact, and he was not aware of it until after this action was brought. The bill for £173 17s. 10d. was dishonoured, and the plaintiff sued the parties to it, including the firm of Goldsmith & Co. for the amount. Goldsmith & Co., on the other hand

(a.) Reported by Cecil Chapman, Esq., Barrister-at-Law.

alleged that they had been defrauded of the bill with the knowledge of the plaintiff, and they sued him for the recovery of it. These actions proceeded until July 7, 1886, when they were stayed by order of court upon the terms that Goldsmith & Co. should indorse a bill for £183 17s. 10d., to be given to the plaintiff, and that the plaintiff should give up to the party paying the bill certain securities which he had received from the person at whose request he discounted the original bill. Upon presentation this bill was also dishonoured, and the plaintiff sued the defendant Lewis upon it as a member of the firm of Goldsmith & Co.

Cecil Chapman, for the plaintiff.—The defendant is liable upon the bill because he has not taken the proper steps to divest himself of liability. The plaintiff was in the position of an old customer and entitled to special notice. This was not an ordinary business transaction, but it was a continuation of an old transaction, and partners have an implied authority to do all that is necessary to wind up any matters not settled at the time when a partner retires. This bill was really a bill for the old debt, for which the defendant was undoubtedly liable. The fact that it was given after action brought can make no difference. It was a reasonable act done by the firm which they could hardly avoid, and which must, therefore, bind absent partners.

He cited *Lewis* v. *Reilly*, 12 B. 349; *Spenceley* v. Greenwood, 1 F. & F. 297; *Ex parte Williams*, 11 Ves. 5.

Pillar, for the defendant.—This bill of exchange is given in settlement of an action. One partner cannot bind another by a submission to arbitration: *Stead* v. *Salt*, 3 Bing. 101; and such a compromise as occurred in this case cannot be said to be part of the ordinary or necessary business of the firm: *Adams* v. *Bankart*, 1 Cr. M. & R. 681.

He referred also to *Hatton* v. *Boyle*, 3 H. & N. 500, 4 W. R. C. L. Dig. 5

Denman, J.—This action is brought on a bill of exchange drawn by Jones & Co., and indorsed by Goldsmith & Co., for the sum of £183 17s. 10d. The only question raised before me is whether S. G. Lewis, who was formerly a partner in the firm of Goldsmith & Co., is liable in respect of the bill.

It is contended that Lewis is liable, as the original debt was one for which he was liable, and no notice of his departure from the firm had been given to the plaintiff.

It appears that in May, 1885, Crane discounted a bill for £173 17s. 10d. drawn by Goldsmith & Co. at three months, and accepted by Jones & Co. Crane did so knowing that Lewis was a member of Goldsmith's firm. In July Lewis retired from the firm, but no notice was given to Crane of that fact. In August, 1885, Goldsmith & Co. brought an action against Crane to recover back the bill, and after the bill became due Crane pleaded its indorsement and dishonour, and counter-claimed against Goldsmith & Co. for the amount. In July, 1886, an order was made staying the actions upon terms, one of which was the giving by Goldsmith & Co. to Crane of the bill now sued upon. And it is now sought to make Lewis liable on this substituted bill, but no authority for this length has been cited to me. It was not a simple exchange of one bill for another, because there was give-and-take about it, for by the other terms of the order Crane gave up certain shares to Goldsmith & Co. It is impossible to say that this was a mere settlement of the affair on which Lewis could have been liable. It cannot be assumed that he was bound by it. He had no notice of it, and it is a different agreement from that for which he was liable, for the amounts are different. There is no evidence that he had any knowledge of it, and, looking at the complicated nature of the agreement, I cannot say it was a simple continuance of the original agreement, and I am of opinion that judgment must be for the defendant.

Solicitors for the plaintiff, *Harley, Jones, & Julius.*

Solicitor for the defendant, *H. Savidge.*

House of Lords.

From C. A. (England). July 15, 18, 19; Aug. 5.

Bentley v. Vilmont. (a.)

Criminal law—Goods obtained by false pretences—Bonâ fide purchase by third party in market overt—Conviction of fraudulent party—Order for restitution against purchaser—24 & 25 Vict. c. 96, s. 100.

A bonâ fide purchaser for value in market overt of goods obtained by his vendor under a contract of sale induced by fraud, even if he purchase before any avoidance of the contract, is liable, under section 100 of the Act 24 & 25 Vict. c. 96, when the person obtaining the goods by false pretences has been convicted, to have an order of restitution of the goods to the original owner made against him if he has possession of the goods at the time of the conviction.

Decision of the Court of Appeal (*reported* 35 *W. R.* 238, 18 *Q. B. D.* 322) *affirmed.*

Moyce v. Newington, 27 *W. R.* 319, 4 *Q. B. D.* 32, *overruled.*

This was an appeal from a decision of the Court of Appeal (Lord Esher, M.R., Lindley and Lopes, L.JJ.), reversing a decision of Denman, J., sitting without a jury.

The plaintiff (the present respondent) was a trustee for a French firm of Galpin & Cochard, cloth merchants at Amiens, in liquidation, who had carried on transactions with Klein & Hodder, professing to be traders in London. A large amount of goods were obtained from them by Klein & Hodder upon what were afterwards discovered to be false pretences. The goods were exposed for sale at the shop of one Starbuck, in the city of London, and a bargain of sale was executed between Hodder and the appellant which was admitted to be a sale in market overt. The appellant forwarded a cheque in payment, and Starbuck was instructed to hold for the appellant. Klein & Hodder were subsequently convicted on the prosecution of Galpin & Cochard, but before the conviction Galpin & Cochard discovered the goods a Starbuck's shop and claimed them. The appellant also brought an action against Starbuck, who interpleaded. An application was made upon the conviction for an order for restitution of the goods to the prosecutors, but this was refused.

At the trial of the interpleader issue Denman, J., considering himself bound by *Moyce* v. *Newington*, gave judgment for the appellant. The Court of Appeal reversed this decision and entered judgment for the respondent.

The appellant appealed to the House of Lords.

July 11, 18, 19.—*Sir R. E. Webster, A.G.*, and *Jelf, Q.C.* (*Attenborough* with them), for the appellant.—In the first place, section 100 is not applicable at all to the case of a contract voidable only, and not actually avoided; in the second, it is not applicable where there

(a.) Reported by C. G. Napier Trollope, Esq., Barrister-at-Law.

has been a *bonâ fide* purchase in market overt. At common law the contract could not have been avoided after a *bonâ fide* sale to a third party: *White* v. *Garden*, 10 C. B. 919. The word "owner" cannot refer to a person who has passed away the property in goods; at any rate, until he has avoided the contract. The interpretation clause and the provisoes to this section are in favour of the appellant's contention. *Moyce* v. *Newington*, which was approved in *Babcock* v. *Lawson*, 27 W. R. 886, 4 Q. B. D. 394, is in point. *Lindsay* v. *Cundy*, 26 W. R. 406, 3 App. Cas. 459, was decided on different grounds. *Scattergood* v. *Sylvester*, 15 Q. B. 506, is also distinguishable. The respondent is compelled to contend that section 100 creates a new title.

They also referred to *Horwood* v. *Smith*, 2 T. R. 750; *Chichester* v. *Hill*, 31 W. R. 245; *Reg.* v. *Kenrick*, 5 Q. B. 49; and *Reg.* v. *Stancliffe*, 11 Cox C. C. 318.

A. Charles, Q.C. (*C. W. Matthews* with him), for the respondent.—The effect of the decisions is that, in spite of a sale in market overt, the property and the right of property are reverted by the section in the original owner. The growth of the law on the point may be traced by the following references:—Bracton, vol. 2, p. 513 (Sir T. Twiss's edition); Staundforde's Pleas of the Crown, art. "Fresh Suit," pp. 165, 167; Britton, vol. 1, p. 59 (Nichol's edition); Glanvil, p. 272 (Beames' edition); Fleta, fol. 55; 21 Hen. 8, c. 11: 2 Coke's Inst., 714, c. 106; Kelynge's Rep., pp. 54, 77 (3rd ed.); 1 Hale's Pleas of the Crown, p. 540; Hawkins' Pleas of the Crown, c. 23, s. 54; 4 Blackstone's Comm., p. 363; *Golightly* v. *Reynolds*, Lofft. 88; *Horwood* v. *Smith*, 2 T. R. 750; 7 & 8 Geo. 4, c. 29, ss. 53, 57; *Scattergood* v. *Sylvester*, 15 Q. B. 506. Later cases in the respondent's favour are *Reg.* v. *Kenrick*; *Reg.* v. *Stancliffe*; *Reg.* v. *Ford*, 11 Cox C. C. 320; and *Reg.* v. *Horan*, 6 Ir. Rep. 293. *Lindsay* v. *Cundy* was decided in the Court of Appeal and the Queen's Bench Division, 25 W. R. 417, 2 Q. B. D. 96, 24 W. R. 730, 1 Q. B. D. 348, on grounds which are in our favour.

Sir R. E. Webster in reply.

Aug. 5.—Lord Watson.—In this case I have come, with very great reluctance, to the conclusion that the judgment of the Court of Appeal ought not to be disturbed.

The respondent parted with his goods under a voluntary contract of sale, which had the effect of vesting the property of the goods in the purchasers, Klein & Co. It now appears that the sale was induced by fraud, a circumstance which gives the seller the option, either of adhering to his bargain or of rescinding it, in a question with the fraudulent purchaser. The individual partners trading, or professing to trade, under the firm of Klein & Co. have been convicted, at the respondent's instance, of the statutory misdemeanour of obtaining the goods sold to them by fraudulent pretences. Before the prosecution was instituted, and before he had any notice that the goods had been fraudulently obtained, the appellant purchased them in good faith for an adequate price, paid the purchase-money, and obtained delivery. In these circumstances the respondent sues the appellant, under section 100 of the Act 24 & 25 Vict. c. 96, for restitution of the goods, which still remained in the possession of the appellant at the time when this action was raised.

I do not think that, apart from statute law, a *bonâ fide* purchaser from one who has acquired the property of the goods by a contract of sale tainted with fraud, stands in precisely the same relation to the original owner as a purchaser of stolen goods, without notice of the theft, in market overt. In the latter case the original owner and the purchaser in open market are to this extent in *pari casu*, that neither has done aught to mislead the other; whilst, in the former case, the original owner has intentionally given his fraudulent vendee an *ex facie* absolute and valid title to the goods, upon which purchasers without notice of the fraud are entitled to rely. I have great difficulty in supposing that the Legislature, as an incentive to the prosecution of crime, deliberately intended, in the case where the property has been passed by the act of the original owner, to deprive the honest purchaser both of his goods and of his money; but I have been unable to put a reasonable construction upon the language of section 100 which will avoid that inequitable result.

Section 100 enacts that if any person guilty of any felony or misdemeanour in "stealing" or in "obtaining" a chattel or other property shall be indicted of such offence by or on behalf of the "owner of the property" and convicted thereof, "in such case the property shall be restored to the owner or his representative." That enactment enables an owner who has brought himself within the provisions of the clause to sue for recovery of his property. It has been settled by a long series of authorities, under successive statutory enactments, of which 24 & 25 Vict. c. 96, s. 100, is the last, that the former owner of goods which were stolen from him, upon his prosecuting the thief to conviction, becomes entitled to recover the goods from a *bonâ fide* purchaser who has paid a full price in open market. To my mind these authorities are not reconcileable with any construction of the clause which does not attach to the expression "owner of the property" the same meaning as if it had been "the original owner of the property," or which does not attach the same meaning to the words "the property shall be restored to the owner," as if they had run thus: "the property shall re-vest in and shall be restored to the original owner." These expressions must, in my opinion, have the same force and must be similarly construed in the case of conviction for fraudulently obtaining goods as in the case of conviction for theft. The language of the clause leaves no room for making any distinction between goods obtained by fraudulent pretences without the property passing, and goods obtained by the same means under a voidable contract of sale; and it is for these reasons that I am constrained to hold that the respondent must prevail.

Upon two recent authorities cited at the bar I have these observations to make. In *Lindsay* v. *Cundy* one Blenkarn had been convicted of obtaining goods from the prosecutor by false pretences, but the defendant had purchased the goods from Blenkarn, and had resold them before his conviction. The judges of the Queen's Bench were of opinion that there was a voidable contract of sale which passed the property of the goods to Blenkarn; and they gave judgment for the defendant on the authority of *Horwood* v. *Smith*, in respect that the statute did not re-vest the property in the prosecutor until conviction, and that his statutory title did not relate back to the date of the original fraud. Blackburn, J., treated the case of purchase of stolen property from a thief in market overt as on all fours with that of purchase from a seller who has a title of property under a contract voidable on the ground of his own fraud. His lordship said, "When did the plaintiff's property begin, that is to say, begin after the time the defendants had got the goods in this case? Not till after the conviction of the party guilty of the fraud, because before that time the property had been altered by a *bonâ fide* purchase from a person who held it under a voidable but not void contract. Altering these few words, everything in the judgment of Buller, J. (*i.e.*, in *Horwood* v. *Smith*), is applicable to this case." A different view was taken of the true character of the original transaction both in the Court of Appeal and in this House. It was held that there was no contract, and that the property did not pass; and, upon that footing, the sale to them not having been in market overt, the defendants were made liable for the conversion of the goods before conviction. In

tions were made, either by the Lords Justices or e noble and learned lords who decided the case upon the effect of the Act of 1861, and their nts do not impair the authority of the views ex- upon that point in the Court of Queen's Bench. later case, of *Moyce* v. *Newington* would, if well d, be conclusive in favour of the appellant. I the defendant in that case did commit a legal in taking the sheep *brevi manû* out of the posses- the plaintiff before he had obtained the convic- his fraudulent vendee. The point decided was tion 100 does not give the original owner, who with his property under a contract of sale in- by fraud, the right to demand restitution from a *fide* purchaser who is in possession at the time of tution. I regret having to dissent from that ; but I cannot say that I have any hesitation in from the reasons assigned for it by Cockburn, which appear to me to be derived from an entire misconception of what was decided by the Court of in *Horwood* v. *Smith*, and by the Court of Bench in *Lindsay* v. *Cundy*.

am, therefore, of opinion that the order appealed ought to be affirmed, and the appeal dismissed costs; and I move accordingly.

Lord Bramwell.—I agree in the reasoning and con- of my noble and learned friend (Lord Watson). I agree also in his regret that our decision must be as it is, and in his remark that he does not think the Legis- could have so intended.

It is manifest from the old authorities—*Glanvil*, *The Mirror*, and others—cited by Mr. Charles, the case of stolen goods the plaintiff in a pro- by appeal in which he established the theft was to a restitution of stolen goods, though they sold in market overt. That, indeed, changed property, but that property was restored on the suc- the proceeding. It cannot be doubted that the of Henry VIII. (21 Hen. 8, c. 11) was intended the same effect and consequences. This is by the reason of the thing and the authorities, deed was admitted by the Attorney-General. then, were a case of stolen goods, the plaintiff's not be contested. But it is a case, not of goods, but of goods obtained under a contract tained by fraud and voidable. The question arise under the statute of Henry VIII., but it To hold that the cases differ would be to hold same words in the same place are to have dif- meanings as to different things. That cannot be. authorities are all one way and against the de- except *Moyce* v. *Newington*. That case was decided on a mistake as to the effect of *Lindsay* The law is that on conviction the property Until then it is not in the original owner if it sold in market overt or sold by a fraudulent to a *bonâ fide* purchaser from him.

Fitzgerald.—It seems to me unfortunate that not the facts before us as to the alleged con- between the claimants (Galpin and Cochard) and Hodder and Klein, and as to what was the of the false pretence by which the alleged was rendered voidable. The only statement we the facts is to be collected from the judgment of J.:—"Between January and March, 1885, obtained some goods from Galpin and Cochard must take to have been obtained by false pre- so that there was an obtaining of them, as far as by some bargain or other which was a bargain might have been avoided, but there was an ob- of them. Between March and May the goods pawned by this man Hodder who had so ob- them with a person of the name of Dobree, a broker, and Dobree not, I suppose, having premises of his own to store them in, stored them at the premises of a man named Starbuck."

The goods may have been obtained by falsehood on the part of the supposed vendee, which would lead to the conclusion that there never had been any contract of sale. The additional matters of fact are succinctly stated in the report, but I need not further advert to the particulars, for it seemed agreed by the parties on the argument that your lordships should dispose of the appeal on the basis that there had been a contract under which the property in the goods in question passed to the vendee (Hodder), but under such circumstances that the bargain was so vitiated by the false pretences of the vendee as to render it voidable at the option of the vendor.

We must, however, go further, and assume that the false pretence of Hodder was of some existing material fact false to his knowledge, by which he obtained not only the bargain, but the possession of the goods. Hodder having got possession of the goods (merinoes and cashmeres), pawned them with Dobree, but when exactly, or under what circumstances, does not appear, and Dobree sent them to be finished and exposed for sale at the shop of Starbuck, in the City of London, where Bentley, the defendant in the issue, bought them on the 30th of May, 1885, under circumstances not now impeached, which amounted to a sale in market overt. The appellant does not rest his claim on any other title than the purchase in market overt. Galpin and Cochard elected to avoid the contract. We must take it that they did so, but when or how does not appear, save that on their prosecution Hodder and Klein were committed for trial on the same 30th of May, and since tried and convicted, in September, 1885, of obtaining the goods in question by false pretences.

We have had a very able and interesting argument, but I need not follow it through all its details, for it was admitted by counsel for Bentley, looking to the long current of authorities, that if the goods had been stolen from Galpin and Cochard, though purchased by Bentley in market overt, he could not deny that, on conviction of the thief, the original owners, Galpin and Cochard, would have been entitled to the restoration of the goods. It seems to me that it was right to make this admission, for when we find a long train of decisions all pointing the same way we ought not to disturb them, even though we should think that it would have been more expedient, if practicable, to give full effect to a sale in market overt. The practice and current of authority has been the same in Ireland as in England, but especially since the decision in *R.* v. *Horan*, Ir. Rep. 6 Com. Law 293, in which, on a question reserved, ten judges took part and were unanimous.

The case before your lordships is thus reduced to the question whether *Moyce* v. *Newington* was well decided. If it was well decided, the appellant (Bentley) has established his right to succeed on the issue, for that case is exactly in point. I concur with my noble and learned friends in opinion that *Moyce* v. *Newington* cannot be supported, as it seems to me to rest, not on what the Legislature has expressed, but on what it ought to have said. I am unable to adopt the conclusion of Cockburn, C.J., that the language of the Legislature applies, and is obviously intended to apply, to cases, and to those only, in which possession has been obtained without the property passing. The Legislature has not said so, and, in my opinion, did not intend to say so. The Legislature seems rather, from the time at which it first made obtaining goods by false pretences a misdemeanour, to have put the misdemeanour and the cognate and closely allied offence of larceny on the same ground as to the right of restoration on conviction. I refer, *inter alia*, to 7 & 8 Geo. 4, c. 29, the title of which is "An Act for consolidating and amending the laws in England relative to larceny and other offences

connected therewith." Section 53 enacts: "And whereas a failure of justice frequently arises from the subtle distinction between larceny and fraud, for remedy thereof be it enacted that, if any person shall, by any false pretence, obtain from any other person any chattel, money, or valuable security with intent to defraud or cheat any person of the same, every such offender shall be guilty of a misdemeanour." "Provided always that, if upon the trial of any such person it shall be proved that he obtained the property in any such manner as to amount in law to larceny, he shall not, by reason thereof, be entitled to be acquitted." And section 47 enacts: "And to encourage the prosecution of offenders be it enacted that, if any person guilty of any such felony or misdemeanour in stealing, taking, obtaining, or converting, &c., any chattel, &c., shall be indicted for any such offence by or on behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative." And again, by 18 & 19 Vict. c. 126 (the Criminal Justice Act), where a summary jurisdiction is given in certain cases of larceny and false pretences, section 8 provides: "It shall be lawful for the justices by whom any person is convicted under this Act to order restitution of the property stolen, taken, or obtained by false pretences in those cases in which the court before whom the person convicted would have been tried but for this Act may be by law authorized to order restitution."

The Legislature seems to me, in these general statutes—including 24 & 25 Vict. c. 96, s. 100—to have dealt with and expressed the right to restoration of the goods on the conviction of the offender in the same language, and depending on the same event, whether the offence was felony or larceny or the misdemeanour of false pretences. If we were to adopt the view of Cockburn, C.J. (though it might be desirable to be able to do so), the consequences would probably be more extensive than at first sight appears—*e.g.*, it would seem, then, difficult in such case to sustain a conviction for obtaining goods by false pretences where the contract was such that, as between the vendor and the vendee, it was not absolutely void, but voidable only at the election of the vendor.

I have only to add that by this decision we do not intend to interfere with the principle established in *White* v. *Garden*.

Lord Macnaghten.—I agree in the opinions which have been delivered by my noble and learned friends, and I share the regret which has been expressed in being compelled to arrive at this decision.

Order appealed from affirmed; and appeal dismissed, with costs.

Solicitor for the appellant, *S. J. Attenborough.*

Solicitors for the respondent, *Blunt & Lawford.*

Court of Appeal.

From Chan. Div. March 20.

Waite v. Morland. (a.)

Husband and wife—Judicial separation—Property to separate use of wife without power of anticipation—Property accrued to wife before separation—Matrimonial Causes Act, 1857 (20 & 21 *Vict.* c. 85), *s.* 25.

Under section 25 *of* 20 & 21 *Vict.* c. 85, *a wife who has obtained a decree for judicial separation is to be considered as a* feme sole *with respect only to property which she may acquire or which may come to or devolve upon her after the separation decree; and the section does not apply to property to which the wife at the date of the separation decree was entitled in possession.*

Cooke *v.* Fuller, 26 *Beav.* 99, 8 *W. R. Ch. Dig.* 25, *questioned.*

Appeal from Kay, J.

This was a petition for the payment out of court of a fund which had been paid in in the administration of the estate of a testatrix who died in November, 1862. The petitioners were Mrs. Finney, the wife of T. Finney, and her only child, Alice Finney, who had attained twenty-one on June 1, 1887. Under the will and codicil of the testatrix, the fund in question had been limited to Sarah Ann Waite, who afterwards became Mrs. Finney, for life for her separate use without power of anticipation, and subject thereto for such of her children as she should appoint. The marriage of Mr. and Mrs. Finney took place in 1863, and no settlement was made on that marriage. In 1869, Mrs. Finney obtained a decree of judicial separation from her husband, who was still living, and the separation still continued. Mrs. Finney had appointed the *corpus* of the fund to her daughter, Alice Finney, and the petitioners prayed that the fund might be paid out to the present trustees of the will of the testatrix, or to the petitioners themselves. Kay, J., refused the application.

The petitioners appealed.

Dundas Gardiner, for the appellants.—After a decree for judicial separation, the wife, with respect to her property, is in the position of a *feme sole*, and, therefore, the restraint on anticipation is gone: 20 & 21 Vict. c. 85, ss. 25,* 21. The only restriction is that the wife may not marry again. That applies to property the title to which accrued to the wife before the decree of separation: *In re Insole*, 14 W. R. 160, L. R. 1 Eq. 470; during the separation the husband loses all rights to his wife's property, and the wife can give a good discharge for it: *In re Coward and Adam's Purchase*, 23 W. R. 605, L. R. 20 Eq. 179; *Dawes* v. *Creyke*, 33 W. R. 869, 30 Ch. D. 500. *Cooke* v. *Fuller*, 26 Beav. 99, 8 W. R. Ch. Dig. 25, governs this case, and is in our favour.

Whiteway, for the trustees.

Cotton, L.J.—This is a petition by a married lady who has got a decree for judicial separation, asking to have a fund in court paid out to her and her daughter

* 20 & 21 Vict. c. 85 (Matrimonial Causes Act, 1857), s. 25:—"In every case of a judicial separation the wife shall, from the date of the sentence and whilst the separation shall continue, be considered as a *feme sole* with respect to property of every description which she may acquire or which may come to or devolve upon her, and such property may be disposed of by her in all respects as a *feme sole*, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead."

(a.) Reported by M. J. Blake, Esq., Barrister-at-Law.

who is entitled to the *corpus* after the death of her mother. But there is a restraint on anticipation with regard to the fund in question, and to get rid of that latter section 25 of 20 & 21 Vict. c. 85 is relied on. [The Lord Justice read the section, and continued:—] The words of the section have no application to this case, the section does not provide that the wife is to be considered a *feme sole* in all respects, but in my opinion it limits the property in respect of which she is to be considered as a *feme sole*, and to which the section is to apply, to property which she may acquire or which may come to or devolve upon her after the order and during the continuance of the judicial separation. But in this case the lady was entitled to this fund before the decree for judicial separation, just as she is now entitled to it.

Several cases have been referred to. In *In re Insole* a reversionary interest fell into possession during the continuance of the judicial separation, and that might well be considered as therefore property "coming to or devolving upon" her within the meaning of section 25; but that has no application here. *In re Coward and Adam's Purchase* was the case of a legacy charged on land, and which Sir George Jessel, M.R., held that neither the wife nor husband could have required payment of while living together before the separation. But after an order for separation was made the person liable to pay the legacy offered to pay it to the wife, and under those circumstances the Master of the Rolls held that it "came to" her after separation within the meaning of the section. In *Dawes* v. *Creyke* property came to the wife after the decree of judicial separation and during the continuance of the separation, and Bacon, V.C., held that it was not bound under the covenant to settle after-acquired property contained in the marriage settlement. That point is not necessary to be decided here. As to the case of *Cooke* v. *Fuller*, it is no doubt like the present case, but we are not bound by it, if it is to be taken as a decision authorizing the payment to a wife as a *feme sole* of a fund which had belonged to her before the separation, we decline to follow it, and, indeed, overrule it. There may have been circumstances in that case justifying the decision arrived at, but no reasons are given in the report. In my opinion the present case this married woman is not entitled to the fund paid out to her.

Bowen, L.J.—I am of the same opinion. This property has not in any sense of the words been "acquired by" or "come to or devolved upon" the wife after the separation decree, and it cannot therefore come within section 25 of the statute mentioned. None of the cases cited come near it except *Cooke* v. *Fuller*. I do think that that case was in fact wrongly decided, for looking at it I find it was a case under section 21 of the 21 Vict. c. 85, and not under section 25. Now section 21 provides that "a wife deserted by her husband may at any time after such desertion . . . . . for an order to protect . . . property which she may become possessed of after such desertion . . . "; and in *Cooke* v. *Fuller* the property in question seems to have come to the wife after the desertion, and therefore it may have been considered that the protection order operated as from the time of desertion.

Fry, L.J.—I am of the same opinion. The words of section 25 are plain; they limit the property to which the section applies to property which the wife might acquire or which might come to or devolve upon her after the separation decree. The cases cited are not in point. I agree with what has been said by the Lords Justices who have preceded me as to *Cooke* v. *Fuller*. The language of the Act admits of no doubt.

Appeal dismissed.

Solicitors, *Dangerfield & Blythe.*

From Chan. Div. Nov. 16, 23

Liverpool Household Stores Association v. Smith. (a.)

Libel—Interlocutory injunction—Principles regulating the exercise of jurisdiction.

An interlocutory injunction to restrain the future publication of matters defamatory of an indefinite general description ought not to be granted, because, if granted, it would be left to the court to decide, on motion to commit, whether what might thereafter be published was libellous or not.

The principles laid down in Coulson v. Coulson, 3 *Times L. R.* 846, *as to granting interlocutory injunctions with respect to libels, approved.*

Decision of Kekewich, J., *affirmed.*

Appeal from Kekewich, J.

The action was brought against the proprietors of the *Liverpool Mercury*, and claimed damages for libel and an injunction. The plaintiffs were a company whose object was the carrying on the business of co-operative stores at Liverpool, and the company was registered on September 1, 1887.

On October 29 the plaintiff company moved for an interlocutory injunction to restrain the defendants from printing or publishing in the *Liverpool Mercury* "any articles, letters from correspondents, or any other matter containing assertions, imputations, or suggestions that the company was insolvent or incapable of carrying on its business with success, or that the shareholders did, at the general meeting, unanimously sign or propose a resolution to the effect that another general meeting of the company should be convened for the purpose of taking into consideration whether the company should be wound up . . . or any articles, correspondence, or other matter suggesting that a committee of the shareholders should be appointed . . . for that purpose . . . or imputing motives for the recent resignation of two of the directors of the company which tended to the prejudice of the company and to hamper the present directors from conducting the business of the company with success, or which might prevent other persons from applying for the allotment to them of shares in the company."

The material facts were these. On October 19, 1887, the first statutory meeting of the shareholders of the company was held. A reporter of the *Liverpool Mercury* was present at the invitation of some of the directors. At this meeting a resolution was proposed by one of the shareholders that a meeting should be called to consider the advisability of winding up the company. He was informed that a requisition by shareholders holding one-fifth of the capital was required for that purpose. The proposer of the resolution complained that the company had started with insufficient capital, and was in debt, and that two directors of the company, Messrs. Wrigley and Cullen, in reliance on whose names he had taken shares, had retired from the directorate. A full report of this meeting appeared in the *Liverpool Mercury* of October 20, and the accuracy of the report was not questioned. On October 21 there was published in the *Liverpool Mercury* a letter with reference to the company signed, "A Shareholder," in which the writer stated that he and a number of his friends who had taken shares in the company were surprised to learn at the statutory meeting the fact of the withdrawal of two of the directors, and contained the following statements:—"Had their retirement received the same publicity as the company's prospectus did, advertising their names as directors, the hard-earned savings of many working people would not be at present jeopardized"; and "I assume that they" (the directors

(a.) Reported by M. J. Blake, Esq., Barrister-at-Law.

referred to) "are aware that a requisition to call another meeting was unanimously signed for the purpose of taking into consideration whether the company should be wound up or otherwise liquidated." The company's solicitors wrote to the editor of the *Liverpool Mercury* immediately after the publication of this letter complaining that it attacked the solvency and credit of the company, and asking for the writer's name. The editor refused to give the writer's name, and said that the letter arose naturally out of the proceedings at the meeting of the 19th, and contained no imputation which was not publicly made thereat or reported in the papers. On October 24 another letter, signed "A Lady Shareholder," was published in the *Liverpool Mercury* indorsing the remarks of the writer of the former letter and suggesting the appointment of a shareholders' committee to wind up the company.

The company, immediately after the publication of the letter of October 24, issued the writ in the action. The defendants admitted that the statement in the letter of October 21 as to the unanimous requisition was incorrect, and evidence was given on behalf of the plaintiff company that the allegations of insolvency were unfounded.

Kekewich, J., refused to grant the plaintiff company the interlocutory injunction.

The plaintiff company appealed.

R. Neville and *Dunham*, for the appellants.—There is specific defamatory matter published, and a threat to continue such publication, and, therefore, no question as to determining whether there is *primâ facie* a libel or not arises on the motion for this injunction. In *Quartz Hill Consolidated Gold Mining Co.* v. *Beall*, 30 W. R. 583, 20 Ch. D. 501, it is said that three things are necessary in such cases for an injunction; first, the untruth of the statement; second, a threat to repeat it; third, no privilege. These three necessary conditions exist here. [COTTON, L.J.—You ask by the injunction to restrain, not merely the republication of what is defamatory, but generally the publication in future of anything bearing on this matter.] All publications containing similar defamatory matter; an order of this kind was made in *Hill* v. *Hart Davies*, 21 Ch. D. 798, 30 W. R. Dig. 157, and in *Hermann Loog* v. *Beall*, 32 W. R. 994, 26 Ch. D. 306, which was a case of slander merely. [COTTON, L.J.—In that case we corrected the order by confining the injunction to restraining the utterance of the words to "customers," and not generally to "other persons."] In *Thorley's Cattle Food Co.* v. *Mossam*, 28 W. R. 966, 14 Ch. D. 763, and *Briton Life Association* v. *Roberts*, 2 Times L. R. 319, interlocutory injunctions were granted. In *Armstrong* v. *Armit*, 2 Times L. R. 887, an injunction was refused, but it is no authority against us, because the statements were not proved to be untrue, and the occasion was privileged. [LOPES, L.J., referred to *Mulkern* v. *Ward*, L. R. 13 Eq. 619, 20 W. R. Ch. Dig. 38.] If the occasion is not privileged there is no difference between a false statement published in a newspaper and that published by a private individual: *Marks* v. *Conservative Newspaper Co.*, 3 Times L. R. 244. [COTTON, L.J.—That was a case of a publication in a paper of a public trial. I think there is a distinction, because, if a private individual takes on himself to publish a report of a trial it may be evidence of malice, because it is not usually done by him.] Section 2 of the Act 44 & 45 Vict. c. 60 shows that beyond what is stated in that section newspapers have no privilege. *Hibbins* v. *Lee*, 4 F. & F. 243; *Parsons* v. *Surgey*, 4 F. & F. 247; *Davis* v. *Cutbush*, 1 F. & F.; and *Davison* v. *Duncan*, 5 W. R. 253, 7 E & B. 229, illustrate this point. [LOPES, L.J., referred to *Fletcher* v. *Anderson*, Ir. App. Cas.] On the balance of convenience and inconvenience, we are entitled to an interlocutory injunction; the non-publication of statements relating to the plaintiff company cannot hurt the defendants, whereas the continued publication of such statements may destroy the company; interlocutory injunctions to restrain libels are grounded on the same principles as regulate all interlocutory injunctions. *Coulson* v. *Coulson*, 3 Times L. R. 846, only shows that in the case of libels interlocutory injunctions are to be granted with caution. [COTTON, L.J.—How can we grant an injunction in the terms you ask so as not to cover something which may not be libellous? I agree with what was said by the Master of the Rolls in *Coulson* v. *Coulson*, that we ought not to restrain the publication of what is not before us, or what a jury might reasonably consider not libellous.]

Warmington, Q.C., and *Chadwyck Healey*, for the respondents, were not called on.

COTTON, L.J.—This is an appeal from a decision of Kekewich, J., who declined to grant an interlocutory injunction in an action brought against the proprietors of a newspaper in respect of three alleged libels—the first being a report of a meeting of the shareholders of the plaintiff company published in the newspaper of the defendants, and the others being two letters published in the same newspaper. The injunction sought for is not to restrain the future publication of those alleged libels, and for this reason—that there is no probability of any republication in that paper of the report of the meeting, and no probability that those letters will be again sent to the paper. It is not necessary to decide the question how far, if those who regulate the affairs of a company invite the reporters of a newspaper to come to a private meeting, the company can afterwards sue the newspaper for publishing a full report of the meeting because statements made at the meeting were libellous. I think that would require some consideration. Nor is it necessary for us to consider how far the proprietors of the newspaper would be liable for inserting letters commenting on what was said at the meeting, of which they had published a report? We have not to decide these questions, because there is no probability that the report of the meeting or the letters will be repeated, and whether damages can be recovered for them is a question to be decided only at the trial of the action. There is also another question to be considered at the trial—whether a company issuing a prospectus asking shareholders to join does not to a certain extent, invite public comment on its constitution, its capital, and its prospects. The injunction now asked for is not an injunction to restrain the republication of the report or of the letters, but it is to restrain the defendants from publishing "any article letters from correspondents, or any other matter containing assertions, imputations, or suggestions that the plaintiff company is insolvent, or incapable of carrying on its business with success, or that the shareholders did at the general meeting, unanimously sign or propose a resolution to the effect that another general meeting of the company should be convened for the purpose of taking into consideration whether the company should be wound up." Now there is really no suggestion that the defendants threaten or intend to republish the statement as to the unanimous resolution. Ought we then to grant an injunction with reference to the future publication in this paper of things of the nature he complained of? No doubt it may be very truly said by the plaintiff: "I am not bound by the notice of motion; I am entitled to go for any injunction with regard to future publication that the court may grant me." But I agree with Kekewich, J., that there would be the very greatest difficulty in laying down the terms in which we, in the present case, could grant an injunction. In *Coulson* v. *Coulson* the Master of the Rolls said that to justify the court in granting an interlocutory injunction it must come to a decision on the question of libel or no libel before the jury decided whether it was

[illegible], and could not afterwards have it set aside. The [illegible]ndant was placed in this predicament by the order. [illegible] told that he must pay £34 into court or the [illegible]gment for £68 would stand, and execution might [illegible] for the larger amount. He paid the money into [illegible], not voluntarily, but under compulsion of the [illegible]. I cannot see any assent on his part to the [illegible]. The judges in the court below seem to have [illegible]red in opinion upon the point of practice, and to [illegible] assumed that they had jurisdiction to impose [illegible]. We have jurisdiction as to the costs, and can [illegible] it to impose terms. Therefore, if the defendant [illegible] pay the £34 now in court to the plaintiff, which I [illegible] he has agreed to do, he must have the costs [illegible] this appeal, and the costs below.

Lopes, L.J.—This appeal raises an important point of [illegible]. The question is whether the case comes with[illegible] rule 6 or rule 7 of order 21—in other words, whether [illegible] indorsement on the writ is or is not a statement of [illegible]. If it is a statement of claim, the case comes [illegible] rule 6; if not, it comes within rule 7. It seems [illegible] me that this question is disposed of by ord. 21, r. 1 [illegible]. The words "no further statement of claim" con[illegible] to my mind that that which has been delivered is a [illegible]ment of claim, and the rule goes on to say that [illegible] indorsement on the writ shall be deemed to be the [illegible]ment of claim." I am therefore of opinion that [illegible] indorsement on the writ is a statement of claim. That being so, the judgment was prematurely signed, [illegible] is irregular. It is said that the plaintiff is assisted [illegible] ord. 70, r. 1. I do not think that that rule applies [illegible] in cases like the present. It applies where the party [illegible] made a blunder, as, for instance, where he has [illegible] a statement of claim or defence too late. [illegible] present case is outside the rules, it having been a [illegible]ful act to sign judgment, and the defendant is [illegible] *ex debito justitiæ* to have it set aside. It was [illegible] urged that the defendant was precluded from [illegible] by having availed himself of the order of the [illegible]al Court. I do not think so, as he paid the [illegible] into court under stress of the order. As to the [illegible], they are in the discretion of the court, and it en[illegible] the court to impose terms. As the defendant's [illegible] has agreed to allow the £34 to be paid out to [illegible]intiff, the defendant must have the costs both [illegible] below.

[illegible] *accordingly.*

[illegible]itor for the plaintiff, *E. Betteley.*

[illegible]itors for the defendant, *Atkinson & Dresser.*

[illegible] Q. B. Div. March 5.

[illegible]don Founders' Association v. Clarke. (*a.*)

[illegible]act—*Sale of shares upon the Stock Exchange—[illegible]gistration of transferee—Obligation of vendor.*

[illegible] *defendant sold certain shares in a company [illegible]h a broker upon the London Stock Exchange. The [illegible]iff purchased the shares through a broker. The [illegible]fer was executed, and the price of the shares was [illegible] upon the delivery of the transfer in accordance with [illegible] rules and usages of the Stock Exchange; and this [illegible] done before any application could be made by the [illegible]feree to the company to register him in respect of [illegible]hares. The plaintiff then applied to the company to [illegible] his name entered upon the register as the transferee [illegible] shares, but the company declined to register him. [illegible] plaintiff thereupon brought an action against the defendant to recover back the price paid for the shares, as upon a total failure of consideration.*

Held (*affirming the judgment of* Stephen, J.), *that the defendant was not liable, as the contract of sale did not impose upon him the obligation of procuring the registration of the transferee by the company.*

Stray v. Russell, 7 *W. R.* 641, 1 *E. & E.* 888, *followed.*

Appeal from the judgment of Stephen, J., at the trial of the action without a jury.

The defendant sold through a broker upon the London Stock Exchange thirty shares in the National Conservative Industrial Dwellings Association (Limited), and the London Founders' Association purchased the shares through their broker upon the Stock Exchange for the sum of £142 10s.

Upon the proper day the name of Palmer was given as the transferee of the shares. The transfer to Palmer was prepared and executed, and the money was paid upon the transfer being handed over, in accordance with the rules and usages of the Stock Exchange, and this was done before the transferee could apply to be registered in respect of the shares. An application was thereupon made by Palmer to the National Conservative Dwellings Association to have his name entered upon the register of members in respect of the shares, but the directors declined to register him. By the articles of association of the National Conservative Dwellings Association the directors might, in their discretion, decline to register as a member any person claiming shares by transfer.

The plaintiffs, the London Founders' Association and Palmer, brought this action to recover back the money paid for the shares. Stephen, J., gave judgment for the defendant. The plaintiff Palmer appealed. Palmer was throughout the case treated as the real plaintiff in the action.

H. F. Dickens and *W. E. Gordon*, for the appellant.—A share in a company is a right to receive certain benefits from the company, and to do certain acts as a member of the company, and to be under certain liabilities: *Colonial Bank* v. *Whinney*, 33 W. R. 852, at p. 857, 30 Ch. D. 261, at p. 286, 34 W. R., at p. 707, 11 App. Cas., at p. 438. A shareholder has a *status* in the company in the above sense: *Emmerson's case*, 14 W. R. 905, L. R. 1 Ch. App. 433. The cases of *Wilkinson* v. *Lloyd*, 7 Q. B. 27; and *Bermingham* v. *Sheridan*, 12 W. R. 658, 33 Beav. 660, show that a contract for the sale of shares implies a condition subsequent that the purchaser shall be registered as a member. If the purchaser cannot obtain registration, he does not obtain what he contracted for—namely, a certain *status* in the company and as the contract is entire he can recover the price paid. The transfer is not the contract; the contract is not complete until registration. There is no distinction between a Stock Exchange contract and any other. The Stock Exchange rules regulate the mode of transfer, but do not affect the contract itself. The decision in *Stray* v. *Russell*, 7 W. R. 641, 1 E. & E. 888, in the Court of Queen's Bench is against this view, but the Exchequer Chamber (8 W. R. 240, 1 E. & E. 916) did not adopt the judgment upon that ground.

They also cited *Taylor* v. *Stray*, 5 W. R. 528, 761, 2 C. B. N. S. 175; *Remfry* v. *Butler*, 6 W. R. 230, 682, E. B. & E. 887; *Evans* v. *Wood*, 15 W. R. 476, L. R. 5 Eq. 9, at p. 14; *Paine* v. *Hutchinson*, 16 W. R. 553, L. R. 3 Ch. App. 388; *Hodgkinson* v. *Kelly*, 16 W. R. 1078, L. R. 6 Eq. 496; *Skinner* v. *City of London Marine Insurance Co.*, 33 W. R., at p. 629, 14 Q. B. D., at p. 887; and 1 Lindley on Partnership, 4th ed., 712.

Horne Payne, Q.C., and *A. G. McIntyre*, for the respondent, were not called upon.

Lord Esher, M.R.—This was a contract made upon

(*a*) Reported by W. F. Barry, Esq., Barrister-at-Law.

ant was entitled ex debito justitiæ *to have it set aside without terms, the irregularity not being a mere non-compliance with the rules within ord.* 70, *r.* 1.

Held, also, that the defendant, by asking for costs in the summons, did not give the court jurisdiction to impose terms, though the court, having discretion as to the costs, was enabled to exact terms as a condition of giving costs.

Held, also, that the defendant, by paying the money into court, had not so availed himself of the order of the Divisional Court as to be precluded from appealing.

A writ of summons, specially indorsed with a claim for £68, was served on the 21st of January, 1888, and the defendant entered an appearance on the 26th of January. Judgment was signed on the 7th of February for want of a statement of defence. The defendant thereupon took out a summons to have the judgment set aside, with costs, upon the ground that, under ord. 21, r. 6, he had ten days from the time limited for appearance within which to deliver his defence—that is to say, the last day for appearance being the 28th of January, he had ten days from that day to deliver a defence. The plaintiff contended that, under ord. 21, r. 7, the defendant had only ten days after his appearance within which to deliver a defence. Hawkins, J., dismissed the application. The Divisional Court (Huddleston, B., and Manisty, J.) made an order setting aside the judgment upon the defendant paying £34 into court within four days, otherwise the judgment to stand; costs to be costs in the cause.

The defendant appealed, having paid £34 into court.

J. G. Witt, for the defendant.—The indorsement on the writ is a statement of claim: ord. 20, r. 1 (*a*). It is headed "Statement of Claim," and gives full particulars, including the place of trial. The statement of claim was delivered when the writ was served: *Veale* v. *Automatic Boiler Co.*, 35 W. R. 454, 18 Q. B. D. 631. Ord. 21, r. 6, therefore applies, and the defendant had ten days from the time limited for appearance—namely, the 28th of January—to deliver a defence, and the judgment was premature and irregular. That being so, the defendant was entitled *ex debito justitiæ* to have the judgment set aside, and the court had no power to impose terms.

He also cited *Smith* v. *Sydney*, 18 W. R. 628, L. R. 5 Q. B. 203.

Israel Davis, for the plaintiff.—Ord. 21, r. 6, refers to a separate statement of claim, which must be delivered; a writ is served. A specially-indorsed writ is in lieu of a statement of claim. It can be served in the vacation: *Murray* v. *Stephenson*, 35 W. R. 666, 19 Q. B. D. 60; a statement of claim cannot. No statement of claim, therefore, has been delivered here, and ord. 21, r. 7, applies. Further, if the judgment was irregularly signed it was a non-compliance with the rules, and the court had power, under ord. 70, r. 1, to set the judgment aside upon terms. Again, even if the defendant is entitled to have the judgment set aside *ex debito justitiæ*, the court has power to impose terms if costs are asked for in the summons, the defendant thereby submitting himself to the discretion of the judge: *Bartlett* v. *Stinton*, 14 W. R. 614, L. R. 1 C. P. 483; *Abbott* v. *Greenwood*, 7 Dowl. 534. [FRY, L.J., referred to *Cash* v. *Wells*, 1 B. & Ad. 375.] Lastly, the defendant, having acted upon the order of the Divisional Court by paying the £34 into court, elected to take and avail himself of that order, and cannot now appeal against it: *Pearce* v. *Chaplin*, 9 Q. B. 802. He served the order upon the plaintiff with the indorsement of the payment into court upon it.

Witt replied upon the last point.

FRY, L.J.—This appeal raises several points. The first and most important one is a point of practice. The plaintiff served a specially-indorsed writ upon the defendant, the indorsement being headed "Statement of Claim," stating the place of trial, and giving the information usually given in a statement of claim. It was served on the 21st of January, and the defendant entered an appearance on the 26th. The question is, what is the earliest date on which the plaintiff can sign judgment for want of a statement of defence? That question depends on ord. 21, rr. 6, 7. By rule 6, where a statement is delivered, the defendant must deliver his defence "within ten days from the delivery of the statement of claim, or from the time limited for appearance, whichever shall be last." By rule 7, a defendant who has appeared and "who has neither received nor required the delivery of a statement of claim, must deliver his defence (if any) within ten days after his appearance." In the present case the last day for appearance was the 28th of January, and judgment was signed on the 7th of February. If the time ran from the last day limited for appearance, the judgment was wrongly signed. If the time ran from the actual appearance, it was right. We have therefore to consider whether a statement of claim has been delivered. In my opinion a statement of claim was delivered when the writ was served. That is made clear by ord. 20, r. 1 (*a*), which provides that, where a writ is specially indorsed, "no further statement of claim shall be delivered, but the indorsement on the writ shall be deemed to be the statement of claim." Two things are to be observed here. No "further statement of claim" is to be delivered. That implies that the special indorsement is a statement of claim. The rule also expressly provides that the indorsement shall be "deemed to be the statement of claim." Therefore the indorsement is the statement of claim, and the service of the writ is the delivery of the statement of claim. Accordingly the case falls within rule 6, and the defendant had ten days from the time limited for appearance to deliver his defence. Hence he had ten days from the 28th of January, and so the judgment signed on the 7th of February was premature and irregular. In the case of an irregular judgment the defendant has a right to have it set aside *ex debito justitiæ*.

It was said that under ord. 70, r. 1, the court was enabled to deal with this case in a different way from what it could otherwise do. That rule refers to non-compliance with the rules of practice, whereas here the plaintiff had no right to judgment. The case is, therefore, not within the rules. We must apply the practice independently of the rules. There is a great distinction between setting aside a judgment that is irregular, which is a matter *ex debito justitiæ*, and setting aside a judgment where the court has a discretion to exercise. In the latter case the court can impose terms; in the former case it cannot. But though that is so, the court always has a discretion to deal with the costs of the application, and by that means the court has been enabled to impose terms.

It was said that the court has a discretion in the matter where costs are asked for in the summons. *Bartlett* v. *Stinton* was cited in support of that proposition. There, however, the judge had made an order setting aside the execution, with costs, and I do not think that the language of Erle, C.J., would apply if the judge had refused to give costs, or that he intended to say that the judge could impose terms merely because costs were asked for in the summons. This view is in accordance with what Bayley, J., said in *Cash* v. *Wells*. When the court gives costs it may exact terms as a condition of giving the costs, but it has no right to impose terms merely because costs are asked for.

It was then said that the defendant had availed himself of the order of the Divisional Court, and was therefore precluded from appealing against it. It was said that he had acted upon the order by paying the £34 into

court, and could not afterwards have it set aside. The defendant was placed in this predicament by the order. He was told that he must pay £34 into court or the judgment for £68 would stand, and execution might issue for the larger amount. He paid the money into court, not voluntarily, but under compulsion of the order. I cannot see any assent on his part to the order. The judges in the court below seem to have differed in opinion upon the point of practice, and to have assumed that they had jurisdiction to impose terms. We have jurisdiction as to the costs, and can use it to impose terms. Therefore, if the defendant will pay the £34 now in court to the plaintiff, which I understand he has agreed to do, he must have the costs of this appeal, and the costs below.

Lopes, L.J.—This appeal raises an important point of practice. The question is whether the case comes within rule 6 or rule 7 of order 21—in other words, whether the indorsement on the writ is or is not a statement of claim. If it is a statement of claim, the case comes within rule 6; if not, it comes within rule 7. It seems to me that this question is disposed of by ord. 21, r. 1 (a). The words "no further statement of claim" convey to my mind that that which has been delivered is a statement of claim, and the rule goes on to say that "the indorsement on the writ shall be deemed to be the statement of claim." I am therefore of opinion that the indorsement on the writ is a statement of claim. That being so, the judgment was prematurely signed, and is irregular. It is said that the plaintiff is assisted by ord. 70, r. 1. I do not think that that rule applies to a case like the present. It applies where the party has made a blunder, as, for instance, where he has delivered a statement of claim or defence too late. The present case is outside the rules, it having been a wrongful act to sign judgment, and the defendant is entitled *ex debito justitiæ* to have it set aside. It was then urged that the defendant was precluded from appealing by having availed himself of the order of the Divisional Court. I do not think so, as he paid the money into court under stress of the order. As to the costs, they are in the discretion of the court, and it enables the court to impose terms. As the defendant's counsel has agreed to allow the £34 to be paid out to the plaintiff, the defendant must have the costs both here and below.

Order accordingly.

Solicitor for the plaintiff, *E. Betteley.*

Solicitors for the defendant, *Atkinson & Dresser.*

From Q. B. Div. March 5.

London Founders' Association *v.* Clarke. (*a.*)

Contract—Sale of shares upon the Stock Exchange—Registration of transferee—Obligation of vendor.

The defendant sold certain shares in a company through a broker upon the London Stock Exchange. The plaintiff purchased the shares through a broker. The transfer was executed, and the price of the shares was paid upon the delivery of the transfer in accordance with the rules and usages of the Stock Exchange; and this was done before any application could be made by the transferee to the company to register him in respect of the shares. The plaintiff then applied to the company to have his name entered upon the register as the transferee of the shares, but the company declined to register him. The plaintiff thereupon brought an action against the defendant to recover back the price paid for the shares, as upon a total failure of consideration.

Held (affirming the judgment of Stephen, J.), *that the defendant was not liable, as the contract of sale did not impose upon him the obligation of procuring the registration of the transferee by the company.*

Stray *v.* Russell, 7 *W. R.* 641, 1 *E. & E.* 888, *followed.*

Appeal from the judgment of Stephen, J., at the trial of the action without a jury.

The defendant sold through a broker upon the London Stock Exchange thirty shares in the National Conservative Industrial Dwellings Association (Limited), and the London Founders' Association purchased the shares through their broker upon the Stock Exchange for the sum of £142 10s.

Upon the proper day the name of Palmer was given as the transferee of the shares. The transfer to Palmer was prepared and executed, and the money was paid upon the transfer being handed over, in accordance with the rules and usages of the Stock Exchange, and this was done before the transferee could apply to be registered in respect of the shares. An application was thereupon made by Palmer to the National Conservative Dwellings Association to have his name entered upon the register of members in respect of the shares, but the directors declined to register him. By the articles of association of the National Conservative Dwellings Association the directors might, in their discretion, decline to register as a member any person claiming shares by transfer.

The plaintiffs, the London Founders' Association and Palmer, brought this action to recover back the money paid for the shares. Stephen, J., gave judgment for the defendant. The plaintiff Palmer appealed. Palmer was throughout the case treated as the real plaintiff in the action.

H. F. Dickens and *W. E. Gordon*, for the appellant.—A share in a company is a right to receive certain benefits from the company, and to do certain acts as a member of the company, and to be under certain liabilities: *Colonial Bank* v. *Whinney*, 33 W. R. 852, at p. 857, 30 Ch. D. 261, at p. 286, 34 W. R., at p. 707, 11 App. Cas., at p. 438. A shareholder has a *status* in the company in the above sense: *Emmerson's case*, 14 W. R. 905, L. R. 1 Ch. App. 433. The cases of *Wilkinson* v. *Lloyd*, 7 Q. B. 27; and *Bermingham* v. *Sheridan*, 12 W. R. 658, 33 Beav. 660, show that a contract for the sale of shares implies a condition subsequent that the purchaser shall be registered as a member. If the purchaser cannot obtain registration, he does not obtain what he contracted for—namely, a certain *status* in the company and as the contract is entire he can recover the price paid. The transfer is not the contract; the contract is not complete until registration. There is no distinction between a Stock Exchange contract and any other. The Stock Exchange rules regulate the mode of transfer, but do not affect the contract itself. The decision in *Stray* v. *Russell*, 7 W. R. 641, 1 E. & E. 888, in the Court of Queen's Bench is against this view, but the Exchequer Chamber (8 W. R. 240, 1 E. & E. 916) did not adopt the judgment upon that ground.

They also cited *Taylor* v. *Stray*, 5 W. R. 528, 761, 2 C. B. N. S. 175; *Remfry* v. *Butler*, 6 W. R. 230, 682, E. B. & E. 887; *Evans* v. *Wood*, 15 W. R. 476, L. R. 5 Eq. 9, at p. 14; *Paine* v. *Hutchinson*, 16 W. R. 553, L. R. 3 Ch. App. 388; *Hodgkinson* v. *Kelly*, 16 W. R. 1078, L. R. 6 Eq. 496; *Skinner* v. *City of London Marine Insurance Co.*, 33 W. R., at p. 629, 14 Q. B. D., at p. 887; and 1 Lindley on Partnership, 4th ed., 712.

Horne Payne, Q.C., and *A. G. McIntyre*, for the respondent, were not called upon.

Lord Esher, M.R.—This was a contract made upon

(a.) Reported by W. F. Barry, Esq., Barrister-at-Law.

the Stock Exchange with respect to the sale of certain shares in a limited company. By their articles of association the company may, in their discretion, decline to register the name of any transferee of shares. The contract was made between brokers upon the Stock Exchange, and I shall treat the case as if the present dispute was between the parties who had instructed the brokers. The plaintiff was the purchaser through a broker, the defendant was the seller through a broker. The transfer to the plaintiff was executed and handed over to the plaintiff's broker, and thereupon, according to the rules of the Stock Exchange, the agreed price was paid. The plaintiff's name was taken to the company for registration, and they declined to register it. This action was then brought to recover back the money paid for the shares. It was contended for the plaintiff that, although the transfere was to pay for the shares at the time the tranafer was handed over, which was done before his name was taken to the company for registration, yet there is implied in the contract a condition subsequent that if the company for any reason refuses to register the transferee, the contract is to be considered at an end, and the money is to be repaid, upon the ground of a total failure of consideration. That proposition depends upon two questions—Was there implied in the contract such a condition subsequent? and, if so, was there a total failure of consideration? It is unnecessary for us to consider the second question, because at this date it would be wrong to throw any doubt upon this, that in the case of a contract for the purchase of shares upon the Stock Exchange no such condition subsequent can be implied, the vendor not undertaking, absolutely, that the purchaser or his nominee will be registered by the company.

Now, in 1859 that very point came before the Court of Queen's Bench in *Stray* v. *Russell*. When the case of *Wilkinson* v. *Lloyd* was cited and relied upon for the plaintiff, Lord Campbell said (1 E. & E. 897): "You have to show that the vendor here was equally bound, as was the vendor in that case, to obtain the directors' consent." In delivering judgment he showed the distinction between *Wilkinson* v. *Lloyd* and the case then before the court, and proceeded (7 W. R. 642, 1 E. & E. 900): "Here the purchase of shares in a joint stock banking company was made at the request of the plaintiff by a broker on the Stock Exchange in London, and the contract must be considered as made with reference to all the established usages of the Stock Exchange. . . . According to these usages, the price of the shares is payable on the one broker handing over to the other the transfers and certificates. What does the vendor contract to sell and deliver? Genuine transfers and certificates, with the interests and rights which they convey. There might be a condition subsequent imposing upon the vendor the *onus* of procuring the consent of the directors to the transfer; but I find no evidence of such a condition." It was upon that ground that he distinguished the case from *Wilkinson* v. *Lloyd*. Crompton, J., also says (7 W. R. 644, 1 E. & E. 913): "In the first place, I am not satisfied that, according to the contract, the defendant engaged that the banking company should accept the plaintiff as a member of the co-partnership. By the contract, as explained by the usage of the Stock Exchange, the name was to be given on a certain day, so that the vendor might get the transfer made out to the vendee or to his nominee, and he was then to hand over the transfers and certificates of shares, and to receive his money; and there is nothing that satisfies me that anything more was to be done by the vendor. . . . The fact of the payment having to be made on the handing over the certificates and transfers, and the practice stated as to no prior consent being ever asked for, and as to no assent being ever refused, make it very probable that the vendee in such case bargains only for the delivery of the shares and transfers, and takes the chance of getting himself or his nominee or sub-vendee accepted and registered." He then refers to *Wilkinson* v. *Lloyd*, and proceeds: "But whatever may have been the case of the purchase of the partnership shares in the mines (real property to some extent) in that case, on a sale between the parties not according to any course of business on the Stock Exchange, I can make no such assumption in the present case, where the sale was according to the regulations of the Stock Exchange, which made the price payable on handing over the shares and transfers, and according to which it is at least probable that the vendee was to take upon himself the duty of getting the transfers completed and the shares registered, and where, from the nature of the transaction, it seems to me very unlikely that the vendor should undertake for the acceptance of any particular name or person, when he may have been entirely ignorant, at the time of the contract, of the name and responsibility of the intended transferee." The court decided that the vendor did not undertake to obtain the purchaser's registration. What was said about the plaintiff not being ready and willing to perform the contract, and about his knowledge of all the facts at the time the money was paid, only formed alternative grounds for the judgment. That was a decision upon an every-day mercantile contract, and even if we could not agree with it, we could not, nearly thirty years afterwards, in the face of the well-known rule by which we are guided, overrule it, when it must have formed the basis upon which a number of other Stock Exchange contracts have since been made. However, I think that view of the Queen's Bench was confirmed in the Exchequer Chamber. Williams, J., in delivering the judgment, said: "We all think that construing the contract in this case by the usage of the Stock Exchange, subject to which it was made, there was no undertaking by the vendor of the shares to obtain absolutely the consent of the directors to the transfer." That expressly negatives both the argument in that case and the argument addressed to us. There is no doubt that the vendor must not prevent, or do anything to prevent, the company from accepting the purchaser or his nominee; but it was not suggested that there was anything of the sort here. I do not wish to rely upon the company having the option of refusing to register a transferee; the result would be the same if the company had not the option. In my opinion, the vendor does not stipulate that the company will accept the purchaser or his nominee. He does not take that responsibility. He only agrees to hand over the transfers and certificates. I entirely agree with the decision in *Stray* v. *Russell*. Looking at this as a matter of business, it would be most foolish and improper for a man selling shares upon the Stock Exchange to agree to such a condition. I cannot conceive how anyone can be assumed to agree to it, and it is impossible to imply it. The appeal must, therefore, be dismissed.

FRY, L.J.—I also agree that this appeal fails. The first subject for inquiry is as to the nature of the contract. It was a contract for the sale of shares according to the rules and usages of the Stock Exchange, the shares requiring registration and the company having power in their discretion to decline to register. It was argued for the plaintiff that under the contract the purchaser, on the one hand, agreed to pay for the shares, and the vendor, on the other hand, agreed that the purchaser should become the registered owner of the shares, and, that being so, the purchaser had a right to rescind the contract and recover back his money upon the refusal of the company to register him, upon the ground that there was a total failure of consideration. The other view of the contract is that the vendor agreed

upon payment of the purchase-money to hand over, to use the language of Lord Campbell in *Stray* v. *Russell*, genuine transfers and certificates, with the interests and rights which they convey. These are the two views of the contract, and we have to determine which is the right one. The machinery of the Stock Exchange affords a strong argument to show that the latter is the true view. According to the rules and usages of the Stock Exchange, the name of the proposed transferee must be given on a certain day to enable the vendor to make out the transfer, and payment is to be made upon the transfer being executed and handed over. All this takes place before the purchaser applies to have his name entered on the register. The fact of the money passing before the application for registration, is strong to show that the obligation to procure the registration is no part of the contract which the vendor has entered into. For this reason, I am of opinion that the plaintiff fails. However, in addition to this, we have a decision of the Court of Queen's Bench in *Stray* v. *Russell* pronounced twenty-nine years ago. I should be very sorry to disturb that decision, upon the faith of which thousands of contracts must have been made. Mr. Dickens placed before us certain considerations to show that that decision was wrong. He instanced the case of an assignment of a lease where the lessor's consent was necessary. But there the lessor's consent must be obtained before the assignment, and without it the assignment could not be made. It is, therefore, a condition precedent to the execution of the assignment, while in this case the directors' acceptance of the transferee's name was not a condition of the contract at all. Nor also as to the decision in *Wilkinson* v. *Lloyd*, which was relied upon. The court there held that in that case, which was not the case of a sale of shares on the Stock Exchange, the consent of the directors was a condition precedent to the transfer being effectual, and without such consent there was a total failure of consideration. That being my view of the contract, it is unnecessary to go into the second inquiry as to whether, if such a condition were implied in the contract, there was a total failure of consideration.

Lindley, L.J.—In my opinion, the duty of the vendor is to hand over the securities at the time fixed by the rules of the Stock Exchange. He must execute a proper transfer. He must pay all calls due before the contract of sale was entered into. It is said, however, that he has a further duty—namely, to obtain the directors' acceptance of the purchaser's name for registration—and that if the directors decline to register the name, the purchaser can recover the price paid for the shares. It is sufficient for me to say that I cannot read any such condition subsequent into the contract, and for this conclusion *Stray* v. *Russell* is a good authority. In my opinion, the vendor does not undertake to procure the acceptance and registration of the purchaser by the directors.

Appeal dismissed.

Solicitors for the plaintiffs, *Robinson, Poole, & Johnson.*

Solicitors for the defendant, *Morley & Shirreff.*

From Q. B. Div. Feb. 21.

Mayor, &c., of Bury v. Lancashire and Yorkshire Railway Co. (a.)

Railways Clauses Act, 1845 (8 *Vict. c.* 20), *s.* 46—*Railway company*—"*Bridge*"—*Repair of road carried by bridge.*

A railway company which has carried a road over the railway by a bridge is bound, under section 46 *of the Railways Clauses Act*, 1845, *to repair and maintain the road over the bridge as well as the actual structure of the bridge.*

Appeal from a divisional court (Mathew and Cave, JJ.).

The action was brought for work done and materials provided by the plaintiffs in paving and flagging a railway bridge in Manchester-road, Bury.

A special case was, under ord. 34, r. 1, stated for the opinion of the court.

It appeared that the plaintiffs were the urban sanitary authority for the borough of Bury.

The defendants, acting in pursuance of powers given to them by their private Acts (which incorporated the Railways Clauses Act, 1845), in 1847 extended their railway to Bury, and in so doing passed under the turnpike road in a deep cutting. They accordingly supported the turnpike road, the level of which was unaltered, by two arches which constitute the bridge in question. It was admitted that the road had not been either widened or lengthened by the construction of the railway, and that no additional burden or expense in respect of the maintenance and repair of the roadway had been cast upon the plaintiffs.

The question for the opinion of the court was whether the defendants were liable, under the provisions of section 46 of the Railway Clauses Act, 1845, to keep the roadway of the bridge in repair.

The Divisional Court held themselves bound by authority, and gave judgment for the plaintiffs.

The defendants appealed.

By section 46, "If the line of railway cross any turnpike road or public highway, then (except where otherwise provided by the special Act) either such road shall be carried over the railway or the railway shall be carried over such road by means of a bridge of the height and width and with the ascent or descent by this or the special Act in that behalf provided, and such bridge, with the immediate approaches and all other necessary works connected therewith, shall be executed, and at all times thereafter maintained, at the expense of the company."

Sir R. E. Webster, A.G., and *Henn Collins, Q.C.* (*W. Graham* with them), for the defendants.—We are liable to repair the bridge, but not the road carried by the bridge. There is, no doubt, authority against us, but it is not binding on this court: *Leech* v. *North Staffordshire Railway Co.*, 8 W. R. 216, 5 H. & N. 160; *North Staffordshire Railway Co.* v. *Dale*, 8 E. & B. 836, 6 W. R. C. L. Dig. 89; *Waterford and Limerick Railway Co.* v. *Kearney*, 12 Ir. C. L. Rep. 224; *Fosberry* v. *Waterford Railway Co.*, 13 Ir. C. L. Rep. 494; *London and North-Western Railway Co.* v. *Skerton*, 5 B. & S. 559; *Reg.* v. *South-Eastern Railway Co.*, 32 L. T. 858, 23 W. R. Dig. 203. Section 46 must be read with sections 50—56. Section 53 applies to the maintenance of a road. The bridge in section 46 is only intended to carry the road, and does not include it. Here the road was carried over at a level, and there was no ascent or descent. Therefore this case does not come within section 46 at all.

(a.) Reported by A. P. Percival Kemp, Esq., Barrister-at-Law.

R. S. Wright, for the plaintiffs, referred to *Great Eastern Railway Co.* v. *Hackney Board of Works*, 31 W. R. 769, 8 App. Cas. 687.

Lord Esher, M.R.—I find that no less than sixteen judges have construed section 46 according to the plain meaning of plain English words. Even if I had any doubt on the subject myself—and I have none—I should be very slow to overrule them. The section deals specifically with a very plain state of things. If it stood alone there could be no doubt whatever of its meaning; but it is said that it must be read in conjunction with other sections which, although they are equally clear by themselves, yet if they are taken as referring to the same subject-matter as section 46, become also obscure. I think section 46 must be read by itself, and that it is the only section referring to the state of affairs in the present case. It is clear that whatever the company are bound by the section to execute, that they are also bound to maintain for ever. Now, is it not clear that where, as in this case, the road is carried over the railway, the railway company are bound to construct both the structure of the bridge and the road upon it? They have, as it were, to replace the road by a bridge. It has been contended that the word "bridge" does not include road, and that the bridge has only to carry the road. I do not think that is so. I think "bridge" must be read in the ordinary sense, which includes the road upon the bridge. That is, therefore, what the railway company are bound to execute, and that, therefore, is what they have to maintain. It is true that other sections of the Act have words which refer to bridges, but I do not think they refer to such a bridge as there is here. I do not think the general words used in those sections can in any way affect the specific enactment in section 46. I, therefore, feel no doubt on the subject. I think that the decision of the court below must be affirmed.

Fry, L.J.—I am entirely of the same opinion. It would, I think, be extremely difficult to overrule such a long line of decision. But I myself should have arrived at the same conclusion if the question was a new one. The section states the contingency to which the enactment applies. Mr. Henn Collins has urged that the contingency as there described does not cover this case, and that the section has no application when the road is carried over the railway at a level, although on a bridge, there being no ascent or descent. I think that is an idle distinction, and that all that is meant by ascent and descent in the section is to limit the amount of such ascent and descent, if any. Then it was urged that "bridge" did not include the road over the bridge. It has been, I think, part of the law of England that a bridge is part of a highway, being, in fact, the road supported on arches. The statute 22 Hen. 8, c. 5, is indeed silent on this point, but it is conceded that it did include road in the word "bridge." Then what is the meaning of "approaches"? It has been gravely argued that they do not include roadway. Surely the meaning is something by which the bridge may be approached by the kind of traffic generally using the highway. So also as to necessary works. They must be works to enable vehicular traffic to get to the bridge with safety and convenience, works which are necessary to the bridge as a useful and convenient part of the highway. There can be no doubt that metalling the roadway of the bridge and the approaches is so necessary. I do not think the other sections which have been cited apply to this case. It is covered by section 46, and I hold the plain meaning of that section to be that the railway company are bound to execute, and, therefore, to maintain, the roadway of the bridge as well as the actual structure.

Lopes, L.J.—It appears to me idle to contend that "bridge" in section 46 does not include roadway. The subsequent sections do not seem to me to apply, and cannot be called in aid to vary the plain meaning of section 46. Nor do I think the argument that the section does not apply to a level bridge is tenable. A road is carried over a railway just as much by a bridge on a level as if it were by an ascent and descent. I agree, therefore, that this appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Clarke, Woodcock, & Ryland*, for *C. Moorhouse*, Manchester.

Solicitor for the respondents, *Edwin Andrew*.

High Court of Justice.

Chan. Div. Kay, J. } Feb. 15, 16, 20.

Republic of Peru v. Dreyfus & Co. (a.)

Foreign country—Contract with Government of—Agreement to be bound by laws of—De facto *Government of, recognized by Government of contractor's country—Validity of acts of* de facto *Government unless ratified by subsequent* de jure *Government.*

The defendants, who were French subjects, contracted with the Peruvian Goverment for the purchase of guano, and agreed to be bound by the tribunals of Peru. Disputes arose on matters of account, and the matter was compromised between the defendants, who consented to this course, and the de facto *Government of Peru of the Dictator, Senor Pierola, which had been recognized by the French Government. After many years' litigation against other parties in other English courts, the defendants recovered a large sum to which they were entitled under the compromise, and this sum was still in court. The plaintiffs, who were the* de jure *Government of Peru, reconstituted in* 1886, *did not interfere in those proceedings, but they now moved to restrain the defendants from taking the money out of court, on the ground that the compromise was void unless ratified by the* de jure *Government when restored.*

Held, that it was a question of international law that the acts of the de facto *Government towards foreigners by whose Government it had been recognized did not require ratification and could not be repudiated by the* de jure *Government; that the compromise was therefore valid; and that, taking into consideration the balance of convenience and the attitude of the Peruvian Government during the recent litigation, and the fact that Senor Pierola's Government could not have recovered the money, the motion must be dismissed, with costs.*

Motion.

This was a motion to restrain the defendants from taking out of court a sum of £200,256 6s. 1d. Consols to which they had been declared entitled in an action, *Dreyfus* v. *Peruvian Guano Co.*, and the question in dispute was whether the present Government of the Republic of Peru was, as against Dreyfus & Co., who were French subjects, bound by the Acts of the de facto Government of Signor Pierola, Dictator of Peru from 1879 to 1881, which Government had been recognized by France; or whether Dreyfus & Co. had not, by agreeing to be bound by the laws of Peru, precluded themselves from claiming protection as foreigners, in which case a compromise entered into between them and Senor

(a.) Reported by H. C. Roper, Esq., Barrister-at-Law.

Pierola would be an internal act of State and void unless confirmed by the *de jure* Government on its restoration.

The material facts, as stated by Kay, J., were as follows:—In the year 1869 Messrs. Dreyfus & Co. entered into a contract with the then Government of Peru, under certain conditions expressed in a memorandum dated the 19th of August, 1869, which was signed in Paris on the 5th of July, 1869, for the purchase of 2,000,000 tons of guano at the price of 36 soles 50 cents per ton, and article 33 of that contract provided thus:—"All the differences to which the present contract may give rise shall be decided by the tribunals of the Republic of Peru. Dreyfus Bros. & Co. bind themselves to submit to the decision of the said tribunals, but they reserve to themselves on their part the exclusive right of submitting to the respective tribunals of the country of every consignment, whether directly or by the medium of the fiscal agent who may present himself to the Government, every difficulty which may occur or arise with the consignees in the course and for the execution of this contract."

By further agreements of the 17th of August, 1869, and the 14th of April, 1874, the contract was modified so as to make the price per ton which defendants were to pay variable, and a dispute afterwards arose between the defendants and the Peruvian Government as to the amount actually due from one to the other of them, the defendants claiming against the Government some four millions English money, while, on the other hand, the Government, upon an investigation of the accounts to which the defendants were not parties, claimed that nothing was due from them to the defendants, but that, on the contrary, the defendants were indebted to the Government in a sum of about £100,000. This result was stated in a document called a decree or resolution of the Government, dated the 7th of June, 1878, which is at page 16 of the book of documentary evidence. Against this Messrs. Dreyfus energetically protested, but no proceeding was taken either by them or by the Government to submit their difference to the tribunals of the Republic of Peru.

In this state of things, a war having broken out between Peru and Chili in April, 1879, Senor Nicolas de Pierola, on the 23rd of December, 1879, became dictator in Peru, the previously existing Government of that country being overthrown.

On the 13th of April, 1880, Senor Pierola was recognised by this country as the supreme ruler of Peru, and he was also recognized by the Government of France and other European States. Senor Pierola entered into negotiations with Messrs. Dreyfus, his first object, which, however, does not seem to have been successful, being obviously to raise money, by their assistance, for the purpose of the *de facto* Government of Peru, and especially to carry on the war.

A correspondence as to this is set out at page 45 of the book.

In 1880, during his dictatorship, eleven ships were being loaded with guano, which was to be dispatched to the Peruvian Guano Co. before mentioned; but, a dispute having arisen with that company, the bills of lading were sent to the financial agent of the Republic in Europe, with instructions that if the Peruvian Guano Co. refused to indorse them the cargoes were to be applied in payment to Messrs. Dreyfus Brothers, with whom a contract had been entered into by the Government of Senor Pierola dated the 7th of January, 1880. This contract purported to be made in order to put an end to the questions which had arisen between them and the Government of Peru. By it the parties agreed to cancel the previous contract of the 14th of April, 1874, and taking as a basis the claim of Messrs. Dreyfus—that is, the four millions of money—Messrs. Dreyfus were to export the number of tons of guano sufficient to cover the said balance and to credit it in account at the price which the new guano contractor might pay, and for want of any contract, at £5 sterling per ton. The transaction was to be a complete alienation of the guano, subject only to a condition, in order to prevent undue competition, for sale only in France and Belgium. The statements of account issued by the previous Administrations of Peru were not to be taken as final, but the decision of such accounts was to be given by the tribunals of Peru within the maximum term of six months.

On the 4th of June, 1880, the then Government of Peru, in pursuance of a decree of Senor Pierola as Supreme Chief of the Republic, with the unanimous submission of the Council of Secretaries of State and the consent of Messrs. Dreyfus, settled the account between the Government of Peru and Messrs. Dreyfus at £2,583,764 10s. due to them, thus reducing their claim by more than £1,400,000.

Other communications passed, but finally the amount due from the Government of Peru to Messrs. Dreyfus was agreed at a sum which the moneys they have recovered in the action against the Peruvian Guano Co. will not be sufficient to pay. The bills of lading of the eleven ships were handed to Messrs. Dreyfus, and in 1880 they commenced the action against the Peruvian Guano Co. to recover the cargoes of the eleven ships of guano, which action has now been decided in favour of Messrs. Dreyfus.

In November, 1881, Senor Pierola resigned, and, after an interval, in June, 1886, the Government of Peru was reconstituted in the form in which it had existed previously to his dictatorship.

On the 24th of October, 1886, the present Government passed a law declaring void all the internal acts of Government done by Senor Pierola.

The short result of these facts is this:—At the time when Senor Pierola seized upon the supreme power, there was a question pending between Messrs. Dreyfus and the Peruvian Government as to the result of the accounts of their dealings in guano under the first contract. By article 33 of that contract this question was to be settled by the tribunals of Peru. With the assent of Messrs. Dreyfus this provision was waived, and the amount due was settled by Senor Pierola's Government reducing the claim of Messrs. Dreyfus by more than £1,400,000. To this settlement Messrs. Dreyfus assented. They were not subjects of the State of Peru, but of France. The French Government had recognized Senor Pierola's Government as the *de facto* Government of Peru. Senor Pierola made provision for paying this amount by consigning fresh cargoes of guano to Messrs. Dreyfus. They have recovered these cargoes after long litigation with the Peruvian Guano Co., who claimed them, and the present Government of Peru are now seeking to deprive them of moneys, the proceeds of these cargoes, on the ground that by the law of Peru the arrangement with Senor Pierola's Government was void.

Bigby, Q.C., Bramwell Davis, and *G. M. Ballou,* for the motion.—In 1878 there was nothing due by us to the defendants; on the contrary, they owed us a large sum. Senor Pierola, of his own authority and without the intervention of the ordinary tribunals, compromised the claims and agreed that we were indebted to the defendants. He was a mere usurper, and all the internal acts of his Government were void unless ratified by the *de jure* Government on its restoration. This compromise was not ratified, and is void. It is not a question of international law, as the defendants agreed to be bound by the law of Peru. Senor Pierola had no power to release them from that agreement and settle the dispute himself.

Sir H. Davey, Q.C., and *M. Ingle Joyce,* for Dreyfus & Co.—It is a question of international law. We are

French subjects, and the French Government recognized that of Senor Pierola as the *de facto* Government of Peru. After that recognition a *de jure* Government could not annul the acts of the *de facto* Government as between Peru and French subjects: *Republic of Peru* v. *The Peruvian Guano Co.*, *ante*, p. 217, 36 Ch. D. 489; *Emperor of Austria* v. *Day*, 9 W. R. 712, 3 De G. F. & J. 217; *United States of America* v. *Prioleau*, 13 W. R. 1062, 2 H. & M. 559; *Folliott* v. *Ogden*, 1 H. Bl. 123, 3 T. R. 726; *Wolff* v. *Oxholm*, 6 M. & S. 92; *Lynch* v. *The Provisional Government of Paraguay*, 19 W. R. 982, L. R. 2 P. & D. 268.

Rigby, Q.C., replied.

Cur. adv. vult.

Feb. 20.—Kay, J.—By the motion in this case the Republic of Peru seek to restrain the defendants, Messrs. Dreyfus & Co., who are subjects of France, carrying on a large financial business in Paris, from taking out of court certain moneys which are standing to the credit of another action in this court—*Dreyfus* v. *The Peruvian Guano Co.*—in which the rights of these defendants, Messrs. Dreyfus & Co., to such moneys were established as between them and the Peruvian Guano Co. The present plaintiffs, the Republic of Peru, were not parties to that action. They watched the progress of it, and counsel attended on their behalf at the trial to observe what might take place. When I understood the object of the motion and the nature of the questions involved I suggested that the motion should stand till the trial, and that either party should have liberty to apply to advance such trial, the money being kept in court in the meantime. The defendants were not unwilling to assent to this if such trial could be arranged to come on within three months, and if the plaintiffs would agree that in case any further evidence was wanted as to Peruvian law the witnesses should be produced in court to avoid the expense of a commission to Peru. To this, however, the plaintiffs, the Peruvian Government, declined to assent. The defendants, Messrs. Dreyfus & Co., have been litigating with the Peruvian Guano Co. for about eight years, and the Peruvian Government during all that time have not intervened until, on the 22nd of November, 1886, they issued the writ in this action. [His lordship stated the facts, and continued:—] It is difficult to see how this can be determined by the law of Peru. It is a question of international law of the highest importance whether or not the citizens of a foreign State may safely have such dealings as existed in this case with a Government which such State has recognized. If they may not, of what value to the citizens of a foreign State is such recognition by its Government? There have been successive Governments in European countries—usurpations of the power of previous Governments overthrown, altering the constitution essentially. These have in turn been recognized by this and other nations. When the Government of this country recognized the third Emperor of the French, if any Englishman entered into contracts with his Government, could it be maintained that the validity of such contracts must depend upon the law of France as settled by decree of the Republic which was established on his deposition? Obviously it would follow that no Englishman could safely contract with the present Government of France, or, indeed, with any existing Government, lest it in turn should be displaced by another Government which might treat its acts as void. There is no authority for any such proposition. I must take the law to be that the Englishman or Frenchman might safely contract with Senor Pierola's Government, if not before, at any rate after, it was recognized by the Governments of England and France respectively. But an agreement between the Government of Peru and Messrs. Dreyfus containing a clause like article 33 of the original contract, submitting all questions upon such contract to the tribunals of Peru, might, of course, be modified by assent of both contracting parties, or of one of such parties and another Government who had succeeded to the rights of the former Government. If Senor Pierola's Government had succeeded to the rights of the former Government of Peru, of course a new convention between this Government and Messrs. Dreyfus modifying the contract in this respect would be as valid as if entered into with the Government who made the contract originally. This is what actually occurred. Senor Pierola's Government did settle with Messrs. Dreyfus the amount to be paid to them under the original agreement, without resort to the tribunals of Peru, just as the original contracting parties might have done. How can that be invalidated? Only by showing that Senor Pierola's Government had no authority—that is, that it was not for the time being the Government of Peru. But that question, as far as Messrs. Dreyfus are concerned, is settled by the recognition of Senor Pierola's Government by France, and is in no sense a question of the law which the Republic of Peru may now think fit to recognise. The decisions on the subject are completely in accordance with the law as I have stated it. I prefer to look somewhat further than the few cases cited at the bar; but all the authorities to which I shall refer are within the last 100 years. There has been in the history of the world during that period many revolutions and usurpations of supreme power among civilized nations who recognize international law. The plaintiffs' counsel have been unable to cite, nor can I find, any authority whatever in favour of their contention.

There is a case, *Barclay* v. *Russell*, 3 Ves. 424, in 1797, after the acknowledgment by this country of the independence of the United States, which was in 1783. In that state of things Lord Eldon refused to recognize the right of the United States of America to certain property in this country, consisting of bank stock, which had been purchased by the Government of Maryland in the names of trustees in this country before the war. America, upon the ground that the rights of Maryland in its former condition existed under letters patent granted by the Crown of England, and had not passed to the new State of Maryland. That State had, by the treaty of peace, passed an Act discharging the trustees, and appointing new trustees, and directing transfer of the bank stock in this country. [His lordship read part of Lord Eldon's judgment, and proceeded:—] And his lordship held that, the specific execution of the trust having become impossible, the right to dispose of the money was vested in the Crown.

In a later case of *Dolder* v. *Lord Huntingfield*, 11 Ves. 283, Lord Eldon explains that decision by stating that Maryland was only a corporation under the Great Seal of England, and was dissolved by means which the court of justice in this country was obliged to consider rebellious, and that therefore such court could not admit that the title passed to the independent State of America by an act which we were obliged to consider rebellion. But in the case then before him, which was a claim by the Republic of Switzerland to certain moneys which had been remitted by some of the cantons to this country before the consolidation of the Republic in 1798, Lord Eldon said: "This is perfectly different; no offence has been committed against this country by the dissolution of the former Government or the arrangement of the present Government in Switzerland. The question is, therefore, to be determined upon great principles of the law of nations without alluding to the situation of the defendants as subjects of this country." The defendants in that case were the agents of the Bank of England and the South Sea Co., to whom the property had been remitted. And the matter came on upon exceptions to their answers. Lord Eldon's opinion, as I have read it, was clear that the rights of the Swiss Govern-

meet over the property in question must be determined by international law.

In *The City of Berne, in Switzerland* v. *The Bank of England*, 9 Ves. 347, Lord Eldon refused to grant an injunction to restrain the Bank of England from permitting a transfer of certain funds standing in their names under a purchase by the old Government of Berne before the Revolution expressly on the ground that the existing Government of Switzerland, not having been acknowledged by the Government of this country, could not be noticed by this court, his lordship stating that whether the foreign Government is recognized or not is matter of public notoriety.

It appears from the note 9 Ves. 348 that this was followed in 1823 in a suit instituted by persons representing themselves as the Columbian Government, which was not recognized by the Government of this country. There are decisions that a government not so recognized cannot sue in the courts of a foreign country.

In *Gilton* v. *Hoyt*, 3 Wheaton's Rep. 246, 324, in the Supreme Court of the United States, the law is stated thus: "No doctrine is better established than that it belongs exclusively to governments to recognize new States in the revolutions which may occur in the world, and until such recognitions, either by our own Government or the Government to which the new State belonged, courts of justice are bound to consider the ancient state of things as remaining unaltered. This was expressly held by this court in the case of *Rose* v. Himely, 4 Cranch, 241, and to that decision on that point we adhere. And the same doctrine is clearly sustained by the judgment of foreign tribunals: *The Manilla*, Edwards Rep. 1; *The City of Berne* v. *The Bank of England*."

The case of *The Manilla* there referred to, and another case in the same book, *The Pelican*, Edward's Rep. App. D., were with reference to vessels which had been captured during the war with France on voyages from Port au Prince, in St. Domingo. That part of the island had revolted against France, and maintained an independent government. This had been, to some extent, recognized by Orders in Council in this country which did not expressly refer to Port au Prince, but Sir William Scott and Sir W. Grant, in these two cases, held that recognition sufficient to prevent the captures being good, on the ground that the ships were trading to and not of their own country from a colonial port of the enemy. The port, after that recognition, could not be treated as a port of the enemy.

In *The United States of America* v. *McRae*, 17 W. R. 764, L. R. 8 Eq. 69, James, L.J., then Eq., says:—[His lordship read part of the judgment, and also an extract from Wheaton's International Law, 2nd ed., p. 41, and continued:—] This distinguishes the dealings as to the public property of a State between the State and its own subjects from similar dealings with foreigners, which the succeeding Government, by international law, must treat as valid. Another objection was urged against this motion to which I have not heard any satisfactory answer. The plaintiffs are seeking to prevent the defendants from receiving the proceeds of eleven cargoes of guano which were consigned to them on certain terms by Senor Pierola's Government, disregarding the terms on which the consignment was made. In *United States* v. *McRae* a similar claim was made to goods which the rebellious States of America had sent to a citizen of this country. The rebellious States had been countenanced by the United States Government; they had never been recognized by England's Government. Yet it was held, and the decision has not been questioned, that the contract under which the goods were sent must be recognized, and that they could not be recovered in violation of that contract. It was not contended that the United States were entitled to all public property belonging to the rebellious States; but where these States had dealt for value with citizens of another country, such property could not be recovered by treating the contract as void. In a litigation with the foreigner, party to the contract, they must adopt the contract and merely take such rights as the *de facto* Government of the rebel States might have had under it.

This doctrine is recognized in some of the other citations already made, especially in the judgment of James, L.J., in *United States of America* v. *McRae*. It was applied even in the case of rebel States which had not been recognized by this court. It follows *à fortiori* in this case that the Republic of Peru can only recover the proceeds of the eleven cargoes of guano if Senor Pierola's Government could have done so. That Government certainly could not have recovered them in violation of its own contract, as the Republic of Peru are now seeking to do. The duty of the court upon a motion like this is to consider, upon the evidence before it, whether the plaintiffs show a probable case for relief at the hearing. If they do not, the court should be very reluctant to interfere with the rights of the defendants by interlocutory injunction. I am bound to say that I see no such case. If this were the trial I should decide against the plaintiffs without the slightest hesitation, and, as no facts are in dispute, and the law of Peru seems to me not to be in question, I cannot anticipate that the plaintiff's case may be improved at the trial. Another most important consideration is the relative convenience or inconvenience to the parties of granting or withholding an injunction. Where the plaintiffs do make out a probable case for ultimate relief, or where the evidence leaves this so much in doubt that the court must see there is a serious question of difficulty to try, then this matter of convenience becomes of paramount importance. I cannot think that to be the case here. But, if I must consider it, these are the facts. The sum in court in the other action is something more than £200,000 Consols. Of this amount about £100,000 may now, I understand, be taken out by the Messrs. Dreyfus under the final judgment in that action. They have been litigating the matter for eight years, during most part of which time the Peruvian Government have been passive but interested lookers-on. To retain in court £100,000, even if the interest at three per cent. were allowed to Messrs. Dreyfus, must occasion to a mercantile house a most serious inconvenience and loss. It has not been suggested that Messrs. Dreyfus will not be perfectly able to meet any claim made by the Peruvian Government in this action, if it should be established against them. The Peruvian Government have declined the offer which would have enabled me to advance the trial; and, after hearing the motion, the duty of the court to other suitors prevents it from allowing such precedence. The suit may drag on and not be finally decided for a long time. If the money be impounded, the Peruvian Government will have no particular interest in expediting matters, and will obtain a great advantage against the defendants to which, in my opinion, they have no right. They have given security for costs to a considerable amount, but whether it will cover the costs actually incurred already may be doubted. The balance of convenience and inconvenience is, I think, decidedly against granting the injunction. After full consideration, I think it the duty of the court not to encourage this litigation in any way, but to refuse the motion. And I also think the application so ill-founded that the defendants ought not to be subjected to further litigation unless the plaintiffs are ordered to pay the costs of this motion. I think it my duty to refuse the motion, with costs.

Solicitors, *G. M. Clements; Batten, Proffitt, & Scott.*

Chan. Div. } Chitty, J. } Nov. 25.

ROGERS v. DRURY. (a.)

Covenant in restraint of trade—Medical practice—Competition.

An agreement for the sale of a practice between two medical practitioners contained a covenant by the vendor not to solicit any patient within a certain radius, or otherwise directly or indirectly to enter into competition with the purchaser.

Held, that, the object of the covenant being to protect the business bought and paid for, the covenant was not confined to active competition, but prohibited the vendor coming into the defined area, thereby diminishing the purchaser's fair chance of obtaining a business.

An agreement between medical practitioners, whereby the plaintiff purchased from the defendant a practice within a certain radius. The agreement provided that the defendant would not practise or reside within such radius, or in any other manner whatsoever, directly or indirectly, enter into competition with the plaintiff in the practice or profession of a physician, surgeon, or accoucheur within such radius. By the agreement the defendant was to be at liberty to commence and carry on a new practice on his own account, and for his own benefit, outside the radius, and was also to be entitled to retain certain excepted patients, who were mentioned by name.

The plaintiff alleged that the defendant had attended patients within the radius other than those mentioned in the agreement. The defendant said that he had not solicited such patients, who came to him voluntarily, and he absolutely denied active competition.

This was a motion for an injunction to restrain a breach of the agreement under the circumstances aforesaid.

Romer, Q.C., and *C. James*, for the plaintiff, cited *Brampton* v. *Beddoes*, 11 W. R. 268, 13 C. B. N. S. 538.

Whitehorne, Q.C., and *McSwinney*, for the defendant.

CHITTY, J.—In this case the facts are, speaking generally, admitted. Moreover, there is no question as to the validity of the covenant, and all I have to ascertain is its meaning. The defendant says there has been no competition, because there cannot be competition without solicitation, and he also says that the competition contemplated by the agreement must be active competition. Neither of these propositions can be maintained. It is important to ascertain what is the object of the covenant. Its object is to protect the practice purchased. The agreement contains divers clauses to secure this object, and amongst them is this covenant. I decline to draw a distinction between active and passive competition. The covenant is not to enter into any competition in any way whatever. What I have to do is to give each of its terms its full and appropriate meaning, and doing this, and bearing in mind the object of the covenant, I think that it is clearly infringed, for it appears to me that the vendor, by coming into the area of the practice, is acting most injuriously towards the plaintiff, and, to my mind, diminishes the plaintiff's fair chance of obtaining that which he has purchased. The defendant has said that the patients would not have called in the plaintiff in any circumstances. To this it can be answered that there might be circumstances under which it would be most important to call in the doctor on the spot, and the skill of the plaintiff is not questioned.

Motion allowed, with costs.

Solicitors, *Collins & Wilkinson*, for *Jeffery, Parr, & Hazell*, Birmingham; *Mozley & Denison*, for *Tyler & Tanner*, Birmingham.

(a.) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

Chan. Div. } North, J. } Feb. 17.

KYSHE v. ALTURAS GOLD CO. (a.)

Company—Director—Exclusion by co-directors—Injunction.

An injunction will be granted in an action by a director of a company against his co-directors to restrain them from excluding him from acting as director, although, in the opinion of the directors, he is unfit to be a director of the company by reason of alleged misconduct.

Motion.

The action was brought by John B. Kyshe, a director of the Alturas Gold (Limited), against the Alturas Gold (Limited), and J. R. Armitage, F. Hodgkinson, W. A. Ellis, and G. Forman, the other directors of the company, both as directors and in their personal capacities, for (1) a declaration that the plaintiff was a director of the company and entitled to all the rights and privileges of a director, including the attending, voting at, and taking part in, all meetings of the board of directors of the company; (2) delivery to the plaintiff of certificates for 500 shares in the company agreed to be allotted to him, and payment of fees due to him; (3) an injunction to restrain the defendants, J. R. Armitage, F. Hodgkinson, W. A. Ellis, and G. Forman, or any of them, from excluding the plaintiff from any meeting of the said board of directors of the company and from holding any meetings of the said board without notice to him, and from in any way interfering with the plaintiff in the discharge of his duties as director.

The plaintiff had been duly elected a director of the company by the other directors, in accordance with the articles of association, which also contained an express provision for the removal of a director, before the expiration of his period of office, by a special resolution of the shareholders, at a meeting of the company.

The motion was made by the plaintiff for an injunction to restrain the defendants, other than the company, until the trial of the action or further order from excluding the plaintiff from any meeting of the board of directors of the company, and from holding any meetings of the board without notice to the plaintiff, and from in any way interfering with the plaintiff in the discharge of his duties as a director of the company.

Evidence was produced on behalf of the directors that the plaintiff had received his shares in the company which qualified him to be a director, as a present from the vendor of the property to the company; that he had gone out to America, where the property of the company was situated, to inspect and report upon the management of the business there; that he had at first, acting as was alleged, upon some understanding with the agent of the vendor, sent home favourable reports, but had afterwards quarrelled with the agent and sent home unfavourable reports, which were not warranted by the facts; and that if they had known the plaintiff's real position they would not have elected him a director.

The evidence on the part of the plaintiff put a different complexion on his conduct.

(a.) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

Cozens-Hardy, Q.C., and *Lemon*, for the motion.—The defendants have no right to interfere with the plaintiff in the discharge of his duties as a director of the company or exclude him from acting as a director: *Pulbrook* v. *Richmond Consolidated Mining Co.*, 27 W. R. 377, 9 Ch. D. 610. [They were stopped by the court.]

Cookson Crackanthorpe, Q.C., and *F. B. Palmer*, for the defendants.—The plaintiff has been guilty of breach of trust and misfeasance, and has abused his position as agent of the company, and therefore the court will not assist him by an injunction.

They referred to *In re Caerphilly Colliery Co., Pearson's case*, 25 W. R. 618, 5 Ch. D. 336; *In re Western of Canada Oil, Lands, and Works Co., Carling, Hespeler, and Walsh's cases*, 24 W. R. 165, 1 Ch. D. 115; *In re Canadian Oil Works Corporation, Hay's case*, 24 W. R. 191, L. R. 10 Ch. App. 593.

Cozens-Hardy, Q.C., in reply.—The defendants have no right to act as they have done in preventing the plaintiff from acting as director of the company.

North, J.—I should not have heard Mr. Hardy in reply if it had not been that statements were made which he might have wished to refute. The defendant directors were entitled to do everything they legally could do in the interests of the company. But the plaintiff was duly elected a director of the company. He had obtained a sufficient number of shares to qualify him to be a director. The circumstances under which he obtained them might be such as to make him a trustee of the shares for the company; but that does not prevent him from being and acting as a director of the company. It is necessary that a director should have an opportunity of being present at the meetings of the directors to take part in the business transacted by them. But in this case the other directors have taken upon themselves the power of excluding the plaintiff from their meetings and of carrying on the business of the company in his absence, which they have no right to do. The board of directors who manage the business of the company is made up of the whole number of directors, and not a selection from them. It is not in the power of any number of directors to appoint a committee of themselves to transact the business of the company to the exclusion of one of their number. Not that it is necessary that all the directors should be present at their meetings in order that the business of the company may be legally transacted; but every one of them should have the opportunity of being present. The company has the power to remove a director. If the other directors think that one of their number is unfit to act, their course is to bring the case before the shareholders and enable them to take such action as they think proper. Inasmuch as the plaintiff is a legal director, and the other directors exclude him from his legal rights, I must prevent them from doing so. It is said that the plaintiff, if his case were brought before the shareholders, would make statements injurious to the interests of the company; but the directors opposed to him would have the same power of bringing before the shareholders their reasons for what they had done, giving their views of the matter, and explaining the facts. The other directors have no right to take the matter into their own hands and exclude the plaintiff from acting as director; and I must grant the injunction asked for, until the hearing of the action or until further order, but the costs of both parties will be costs of the action.

Solicitors, *Shepheards; Wild, Browne, & Wild.*

Chan. Div. North, J. — Feb. 6.

London Steam Dyeing Co. *v.* Digby. (*a.*)

Practice—Costs—Judgment on admissions—Motion or summons—Rules of Supreme Court, 1883, *ord.* 32, *r.* 6; *ord.* 40, *r.* 1.

In an action to restrain the publication of a trade circular, the defendants, by their statement of defence, offered to submit to a perpetual injunction in the terms of an interim *injunction which had been previously granted, "to be obtained on a summons to be issued for that purpose." The plaintiffs set the action down on notice of motion for judgment on the admissions in the pleadings, and delivered to the defendants a copy of the minutes of the proposed judgment, which was identical with that to which the defendants had offered to submit.*

Held, that, under the circumstances, the plaintiffs ought to have proceeded by summons in chambers, and that, consequently, they would only be allowed such costs as would have been properly incurred if they had proceeded by summons.

Motion for judgment.

This action was brought to restrain the defendants from issuing a certain trade circular, or from making representations similar to those contained in the circular. The writ was issued on the 27th of January, 1887, and on the 25th of February, before the statement of claim, upon an interlocutory motion by the plaintiffs, North, J., granted an injunction, till the trial of the action or further order, in terms not quite as extensive as those claimed by the writ. By their statement of defence, delivered on the 2nd of April, 1887, the defendants offered to submit to a perpetual injunction in the terms of the *interim* order, "to be obtained on summons issued for that purpose, and they insist that that is the only relief to which the plaintiffs are in any event entitled, and that the plaintiffs ought, if in the result they fail to get any further or other relief, to pay all the costs of the action incurred after the date of the delivery of the defence." The plaintiffs did not apply for a perpetual injunction by summons, but served on the defendants a notice of motion for judgment on the admissions in the pleadings, and delivered to the defendants a copy of minutes of the judgment for which they intended to ask, the terms of which were equivalent to those to which the defendants had by their defence offered to consent. The plaintiffs now moved for judgment on the admissions in the pleadings.

Willis Bund, for the plaintiffs.

Oswald, for the defendants.—The plaintiffs ought to have proceeded by summons in chambers. They ought, therefore, only to have the costs of a summons, and they ought to pay the difference between the costs of a summons and this motion. Rule 6 of order 32 is wider than the old rule 11 of order 40. When there are admissions in pleadings, it is the practice to obtain judgment under ord. 32, r. 6, by motion or summons, and not to set the action down: *Hetherington* v. *Longrigg*, 27 W. R. 393, 10 Ch. D. 162. [North, J.—It is the practice now to set the action down.] Your lordship has jurisdiction to give judgment on admissions in chambers, and there was no necessity for the plaintiffs to incur the costs of this motion.

Willis Bund, in reply.—The plaintiffs have adopted the proper course. Rule 1 of order 40 directs that, except where by the Acts and Rules it is otherwise provided, the judgment of the court shall be obtained by motion, and Kay, J., in *Cook* v. *Heynes*, W. N., 1884, p. 75, said that the application for judgment under ord. 32, r. 6, should be by motion in court.

(*a.*) Reported by G. E. Jeffery, Esq., Barrister-at-Law.

North, J.—In this case, on an interlocutory application by the plaintiffs, I granted an injunction in terms not quite so wide as those claimed by the writ and notice of motion. The plaintiffs, however, accepted the order in that form, and the defendants offered to submit to a perpetual injunction in the terms of the *interim* order. The words in the statement of defence are:—[His lordship read the words in the statement of defence above set out, and continued:—] The question has been raised whether there is jurisdiction on a summons in chambers to give a judgment founded on admissions in pleadings. This is a case in which the defendants have offered to consent to as much as the plaintiffs now ask for, and I have no doubt whatever that when a defendant appears and consents to an order for a perpetual injunction in chambers, he is as much bound by it as if it had been obtained by an adverse order against him in court. The defendants, in my opinion, are right in their contention, and, therefore, I shall only allow the plaintiffs such costs as would have been incurred by a summons in chambers. The taxing master will decide what are the proper costs of such a summons, but I think the costs ought to include the costs of the minutes of the proposed judgment, because it is important to have a statement in writing of the order consented to. But I am also asked to order the plaintiffs to pay the defendants the extra costs occasioned by the proceedings in court; I clearly have jurisdiction to order such payment, and I should do so if I thought proceedings in court had been adopted for the purpose of making costs. But it does not appear, however, that costs have been incurred oppressively. And there is also a further reason why I should not order the plaintiffs to pay these costs, as, having regard to the case cited of *Cook* v. *Heynes*, the plaintiffs had some show of authority for the course they took. Moreover, I think that after the notice of motion the defendants might themselves have applied in chambers for judgment in accordance with their offer.

Solicitors for the plaintiffs, *J. F. & G. F. Marshall.*

Solicitor for the defendants, *A. W. Mills.*

Chan. Div. North, J. Dec. 9, 12.

Sachs v. Spielman. (a.)

Practice—Pleading—Principal and agent—Action for account—Allegation of fraud by plaintiff—Right of defendant to obtain particulars before delivery of defence—Rules of Court, 1883, ord. 19, rr. 6, 7, 26.

In an action by a principal against his agents to open settled accounts, the plaintiff, in his statement of claim, alleged a secret fraud by the defendants, but stated that the particulars of the transactions in which the fraud was committed were known to the defendants, but were not known to the plaintiff. The defendants, before delivering a defence, applied for particulars, but the application was ordered to stand over until a defence had been put in.

A defendant charged with fraud is not in all cases entitled to particulars before he puts in his defence; but a defendant who first puts in his defence does not thereby waive his right to particulars.

The action was brought by the plaintiff against the defendants as his stockbrokers for an account, payment of what should be found due to him, and damages. The statement of claim, after alleging that the plaintiff had employed the defendants to buy and sell for commission and carry over purchases and sales of stocks, shares, and securities, proceeded as follows:—

"2. The defendants, in breach of the terms of their employment, at the time they purported to act as the plaintiff's agents acted as principals in many of the transactions in which they were employed, and charged the plaintiff with moneys with which they were not entitled to charge him, and did not credit him with moneys with which he was entitled to credit.

"3. The defendants from time to time delivered to the plaintiff accounts containing accounts of such transactions, as if they had been entered into by them for the plaintiff in accordance with the terms of their employment, but in which they or some one or more of them had really acted as principals, and these accounts were from time to time settled by the plaintiff in ignorance of the frauds.

"4. The particulars of such transactions are known to the defendants, but are not known to the plaintiff, and until the plaintiff has obtained discovery and inspection of the defendants' books and other documents, and examined the defendants by interrogatories, he cannot state the particulars of such transactions."

The defendants, not having delivered a statement of defence, took out a summons in chambers asking that the plaintiff might be ordered to deliver, within seven days, particulars of the transactions in which the defendants had acted as principals when they purported to act as agents, and of the transactions in which the defendants had charged the plaintiff with moneys with which they were not entitled to charge him, and did not credit him with moneys for which he was entitled to credit, or, in the alternative, that paragraph 2 of the statement of claim might be struck out as embarrassing, and that the defendants might have a month's further time to deliver their defence after delivery of such particulars, but the summons was ordered to stand over until seven days after a statement of defence had been delivered.

This was a motion by the defendants to discharge the order made in chambers, and that an order might be made in terms of the summons, with a further alternative that the action might be dismissed on the ground that it disclosed no reasonable cause of action and was frivolous and vexatious.

Cozens-Hardy, Q.C., and *Grosvenor Woods*, for the motion.—The defendants are, under the circumstances, entitled to particulars of the plaintiff's charge before delivering their statement of defence: ord. 19, r. 6. The delivery by them of their statement of defence before they obtain particulars might be regarded as a waiver of their right to particulars: *Whyte* v. *Ahrens*, 32 W. R. 649, 26 Ch. D. 717; *Leitch* v. *Abbott*, 35 W. R. 306, 31 Ch. D. 374.

Cookson, Q.C., and *Wood Hill*, for the plaintiff.—The plaintiff is unable to deliver particulars until he has obtained discovery and seen the details of the transaction from the books of the defendants, and ought not to be required to deliver particulars until he has obtained the information which will enable him to do so. The defendants have full knowledge of the details of the transactions.

They referred to *Whyte* v. *Ahrens* and *Leitch* v. *Abbott*.

Cozens-Hardy, Q.C., replied.

Dec. 12.—North, J.—The defendants ask for three things; first, for delivery of particulars; secondly, to strike out the statement of claim as embarrassing; and thirdly, to dismiss the action as frivolous and vexatious. As regards the first point, the case is rested on ord. 19, r. 6. [His lordship read the rule, and continued:—] It does not say what is to happen if there is any non-compliance with that order. Then the next rule must

(a.) Reported by J. Trustram, Esq., Barrister-at-Law.

be looked at. [His lordship then read rules 7 and 26 of order 19, and ord. 70, r. 1, and proceeded:—].

The first question is, whether there is a sufficient statement of particulars under rule 6 standing alone. Now, in the absence of authority, I should have thought this pleading not sufficiently particular and precise for the purposes of the trial, and that further particulars should be given. But Bacon, V.C., in *Whyte* v. *Ahrens*, and Cotton, L.J., in that case and also in *Leitch* v. *Abbott*, considered that a general statement, such as is to be found here, might be sufficient. I do not think it necessary, at present, to decide that point, as the question now is whether the order made in chambers is right, by which I did not reject the defendants' demand for particulars, but postponed the consideration of that question until I knew what the issues raised by the defence were. Those two cases which were relied upon by the plaintiff seem to me in point. In *Whyte* v. *Ahrens* the facts were these:—The plaintiffs employed the defendants to purchase goods as their agents at the lowest prices. The plaintiffs sued for an account, and alleged in their statement of claim that the defendants had purchased goods at prices higher than the current prices, and had secretly received from the vendors allowances or commissions. The charges against the defendants were stated in general terms, no details being mentioned. The defence denied the statements of the plaintiffs, and pleaded settled accounts; and the plaintiffs, before putting in a reply, took out a summons for discovery of documents, which was adjourned into court. The defendants also applied for particulars of the fraud alleged, and this application was ordered to stand over. The Vice-Chancellor held that the plaintiffs were entitled to discovery before they had to do anything further. Cotton, L.J., took the same view, and observed:—"It was said that if this goes to the hearing, there being no particular allegation of fraud, the plaintiffs, even if they proved any particular items of fraud, would not be entitled to set aside the account. I will assume that is so, though I doubt whether there are not particular statements of fraud. But assume that that is so, then ord. 19, r. 6, is relied on, which says that a party must state, in his pleadings, if he relies on fraud, the particulars of that fraud. Here there has been an application for particulars, and that application has been ordered to stand over till the production of those books. Taking the two together, I think that is right. The production of the books will enable the plaintiffs to define and state what it is they require the defendants to meet at the hearing, and they must do that before the hearing in order to enable the defendants to meet it. But as it is conceded that, according to the old practice in this state of the pleadings, an order would have been made for the production of documents material to the question to be tried at the hearing, though, at present, from ignorance of what has taken place, the plaintiffs are not able to particularize them, so here, in my opinion, the judge was right in saying, notwithstanding the discretion given him by rule 20 of order 31, that he would make an order for the production of the documents." There Fry, L.J., took a different view, but the opinion of Cotton, L.J., prevailed, because he agreed with Bacon, V.C., and there were only two judges in the Court of Appeal.

The other case, *Leitch* v. *Abbott*, is, in its circumstances, very like the present. There the plaintiff Leitch alleged that he had employed Abbott as his stockbroker in the purchase and sale of shares and securities, that Abbott had, in breach of the terms of his employment, acted as principal in many of the transactions in which he was employed by Leitch, and charged Leitch with moneys not paid, and with sums in excess of the market price, and Leitch claimed an account and payment of what should be found due and damages. Abbott, by his statement of defence, indirectly admitted that he had been so employed, but denied all the allegations of having dealt with himself as principal, and all other improper conduct, and set up settled accounts. Then there were interrogatories which Abbott declined to answer, and Chitty, J., refused to make any order that he should answer, but the Court of Appeal took a different view. Cotton, L.J., says: "The contention of the defendant comes to this, that the judge is to decide whether he did or did not act in violation of his duty before he gives the discovery. It is said that *Whyte* v. *Ahrens* is an authority for this proposition. The defendant cannot however well rely on my judgment in that case, for, if the judge had a discretion, I think it has been wrongly exercised here. But no doubt Fry, L.J., did in that case think that, fraud being alleged by the plaintiff, particulars of the fraud ought to have been given before he could be entitled to discovery. Is that the effect of rule 6 of order 19? There is here a general allegation of fraud, and the plaintiff wants the discovery to enable him to prove his allegation. It may be that he will afterwards have to amend his pleadings, but to say that he must give details of the fraud in the first instance would be to reduce the right of discovery in cases of fraud to very narrow limits indeed. I do not, however, think that that case applies, for there is here a statement of the nature of the fraud alleged." There is no practical distinction between the statement there and the statement in the present case:—"The plaintiff may hereafter have to condescend to particulars, but, in my opinion, it would be wrong to say that he is not entitled to have this discovery now, because he has not given full details of the fraud which he alleges. We may possibly have to decide to what extent the defendant is obliged to go into all these matters, but, in my opinion, it would be wrong to say that the court has a discretion to deprive the plaintiff of discovery altogether, either until the trial of the action or until he has given details of the fraud which he alleges. He wants the discovery in order to enable him to give those details and to establish his right to relief at the trial. I think, therefore, the defendant must give a further answer to the interrogatories."

Then Bowen, L.J., says:—"I will assume that the plaintiff is met with an allegation of a settled account which throws upon him the obligation of proving fraud on the part of the defendant, but it does not deprive him of the right to obtain discovery from the defendant so as to enable him to prove the fraud." Then he refers to Wigram on Discovery, p. 26, and ord. 31, r. 20. Then he proceeds: "Then arises the question on which Cotton and Fry, L.JJ., are not entirely at one, and I am therefore obliged to state my own view. I do not think it necessary to say anything in order to show that the old rule of pleading is a good rule—that, in order to open a settled account, specific errors in the account must be stated." Then he refers to *Parkinson* v. *Hanbury*, 15 W. R. 642, L. R. 2 H. L. 1, and continues:—"I think rule 6 of order 19 is only a rule of pleading, and I believe that this has been so decided by the Court of Appeal. Though the omission of one party to comply with the rule gives a right to the opposite party to complain, yet it is an error in pleading and nothing more, and I should be prepared so to decide if the point had not already been decided. Ought, then, the generality of an allegation of fraud to be a bar to the right of discovery? It seems to me that the very fact that the pleader is unable to plead except in general terms is, in many cases, the very reason why he should have discovery from the other party so as to enable him to plead the fraud in detail. If at a particular stage of an action you are stopped by reason of your ignorance of some fact which is known only to the other party, that is the very reason why you should have discovery of that fact from him, and what difference does it make whether you are stopped at the trial or before? I say this in

order to show that rule 6 of order 19 is only a rule of pleading, and we ought not, I think, to scan the pleadings too narrowly upon a question of the right to discovery. But, being of opinion that in the present case the relation of principal and agent is the real ground of the plaintiff's right to discovery, I cannot see that we ought to deprive the plaintiff of the discovery which he wants in order to enable him to frame his case." Then Fry, L.J., says:—"I will only say that the inclination of my opinion is in favour of the judgment of the court below."

It has been contended that these two cases do not apply to the present, because in both the defence had been put in, and, therefore, the defendant had waived his right to have the particulars which he sought. But those cases do not seem to have turned on any such point. No judge said that the defendant had waived his right, or put that forward as a reason for his judgment, and the ground of decision was inconsistent with any such waiver; because, although the defence was in, it was held that the right to have particulars after discovery still existed. Instead of that right being waived by putting in the defence, the right was recognized, notwithstanding the defence, and the discovery was given to enable the plaintiff to do what the defendant had a right to call on him to do—namely, to give particulars of the fraud complained of. The fact, therefore, that the defence had been put in in those two cases does not in any way distinguish the present case from them.

Then it is said that the question actually decided in those two cases was as to the right of discovery and not as to the defence. In the present case it is precisely the same. The question now is not what is in issue between the parties. Nobody can say what that is until the defence is seen. That defence may admit that in all or in some of these transactions the allegations in the statement of claim are well founded, or it may deny that they are so. But until I know what matters are in issue between the parties, it is impossible to say that the plaintiff does not require further information. But it is not wanted to enable the defendant to put in his defence. Particulars by way of amendment cannot be given until after discovery, and I have ordered the summons to stand over until after the defence has been put in in order that I may know what the issues raised by the parties are. The general rule is that discovery is not allowed till after defence; but there are exceptions to that rule, and it follows from the two cases I have stated that if I held it necessary to require the plaintiff to give particulars before the defence is put in, I should also hold that this is one of the cases in which the plaintiff would have the right to have discovery before defence.

Then it is suggested that the defendants are embarrassed by the form in which the statement of claim is framed. But how can it be said that the defendants are embarrassed by not knowing these details? The plaintiff has stated in his statement of claim that he has not the means of giving these details. The defendants carried through the transactions, and have in their possession the books containing the full accounts. Therefore they have full knowledge, and can show precisely what the cases are (if any) in which they did do what the statement of claim alleges. I do not see how they can be embarrassed by not obtaining from the plaintiff the information they have in their own possession. Of course I can see why they press for these particulars. If the plaintiff were obliged to give particulars, and to specify the instances in which the defendants have done what he charges them with, the result might be that, from his imperfect knowledge, he would be unable to state in the particulars some cases in which they had actually done what he says they have done; and as, after particulars were given, their defence would be addressed only to those points, the ignorance of the plaintiff might relieve the defendants from being held liable for certain matters with respect to which they are open to the charge contained in the statement of claim.

The case of *Thompson* v. *Birkley*, 31 W. R. 230, is an authority on this point. An action was brought to recover damages for the seduction of the plaintiff's daughter, and it was alleged that the defendant seduced her and debauched her on various occasions. An application was made by the defendant that the plaintiff should give particulars of the times when, places where, and the manner in which the debauching took place, stating also when the seduction took place. The master declined to order any particulars, as there was no statement by affidavit that the defendant had not seduced the plaintiff's daughter. The judge also declined to order such particulars. Then the matter came before the Divisional Court, still without any affidavit, and the judgment of Hawkins, J., was this:—"This appeal must be dismissed. The master declined to entertain the application for particulars unless the defendant made an affidavit that he had not seduced the girl. In other words, the master required an affidavit to satisfy him that the defendant would be embarrassed in his defence by reason of his having no knowledge of the charges made against him. The judge ordered some particulars, but refused to order the particulars now sought for. There are no grounds for this appeal. There is no affidavit that the defendant does not know the nature of the charges against him, and that he will be embarrassed in his defence at the trial. The plaintiff alleges that the seduction took place while his daughter was in the defendant's service. The date of the birth of the child has been furnished voluntarily during the hearing. The whole of the matters are alleged to have taken place while the girl was in the defendant's house. It is very difficult for the plaintiff, in those circumstances, to give such particulars as are asked. The claim alleges a series of acts of indecency terminating in the birth of the child. No one knows better than the defendant to the truth of all these matters. So if he wants the particulars, let him make an affidavit, and if it appears from it that he knows nothing about these charges he will get particulars." Then Watkin Williams, L.J., observes:—"I concur. The order is right. The object of particulars is to prevent surprise at the trial, and to limit inquiry at the trial to the matters set out in the particulars. So I think particulars ought to be discouraged. They tend to narrow the issues. The proper principle is to order particulars only when, from the nature of the case, they are necessary to limit the inquiry, or are necessary by reason of matters brought forward on affidavit. Here there is nothing of the kind. If the defendant had shown that he would be placed at a disadvantage by not having these particulars, that would lay a foundation for his application. But he has not done so."

The present case is stronger, as in that case the matters with respect to which the defendant sought particulars were in the knowledge of the defendants, they were in the knowledge of the plaintiff also; but in the present case the particulars in question are in the knowledge of the defendants, but not in the knowledge of the plaintiff. Therefore this is, *à fortiori*, a case in which the plaintiff must have the opportunity of knowing what the facts are in order to enable him to furnish particulars. It is clear that the defendants will not be embarrassed, and there is no affidavit to show that there can be any embarrassment in putting in the defence before the particulars are furnished. It therefore is a case in which the defence ought to be put in before particulars are ordered, and I abide by the order in chambers.

Then there is the part of the case as to the action being dismissed, on the ground that there is no cause of action and that it is frivolous and vexatious.

depends on ord. 25, r. 4. [His lordship read the rule, and continued:—] But there is no doubt that the statement of claim discloses a sufficient cause of action; and as to its being vexatious, the only thing that I can see vexatious is this attempt by the defendants to embarrass the plaintiff by this application to me in chambers, and the pertinacity shown in bringing the same matter before me again in court.

Under these circumstances the application must be dismissed; the plaintiff's costs to be his in any event.

Solicitors, *Tatham, Son, & Lousada; Dawes & Sons.*

Chan. Div. } Nov. 2, 3, 7, 8, 9, 10, 14, 15;
North, J. } Dec. 5.

Bateman v. Poplar District Board of Works. (a.)

Metropolis Local Management Act, 1855 (18 & 19 *Vict.* c. 120), ss. 68, 72, 74, 76, 250—*Nuisance*—"*Sewer*"—"*Drain*"—*Vesting of sewers in district board*—*Drainage of contiguous houses by "combined operation"*—*Connection with drain illegally made without knowledge of board*—*Liability of board.*

The duty imposed by section 72 of the Metropolis Local Management Act, 1855, on a district board to keep the sewers which are by the Act vested in them so as not to be a nuisance, is not an absolute duty, but only a duty to use all reasonable care and diligence to keep the sewers in a proper condition, and, consequently, the board will not be liable for a nuisance caused by a drain which has, by reason of another drain being connected with it, become a "sewer," if they did not know before action brought, and could not, by the exercise of reasonable care, have discovered that the drain was a "sewer."

Action.

E. Bateman, one of the plaintiffs in this action, was the owner, for the residue of a term of twenty-one years, of a block of fifteen contiguous houses, known as Vulcan-terrace, situate on the north side of, and fronting upon, Wallis-road, Victoria-park, within the district of the defendants; the other plaintiff, James Meckiff, was the occupier of one of the houses. Under Wallis-road (which ran east and west) and in front of Vulcan-terrace was a 12-inch sewer, which was admitted to belong to the defendants. At the rear of Vulcan-terrace, and passing under the back yards or gardens of the houses, was a 9-inch sewer or drain, into which the sewage of the fifteen houses was carried by a drain from each house, and which carried the sewage of all the houses into a main sewer under Windsor-road, a road running north and south, and joining Wallis-road near the west end of Vulcan-terrace. This main sewer was the property of the Metropolitan Board of Works. The houses in Vulcan-terrace were numbered 1 to 15, from west to east.

The 9-inch drain was constructed in 1877, when Vulcan-terrace was built, with the approval of the defendants, upon the application of the then owner of the land.

The plaintiffs, by their statement of claim, said that they "have severally suffered damage from offensive and pestilential smells and vapours which the defendants have permitted to emanate from the sewers and drains in and under the control of the defendants situate near to, at the rear, and in front of, the plaintiffs' said premises, and to pervade the same," and they claimed an injunction to restrain the nuisance caused by the smells.

Upon a motion by the plaintiffs for an interlocutory injunction the Court of Appeal (reversing a decision of North, J.) held, 33 Ch. D. 360, that the 9-inch drain was not a "sewer" within the meaning of section 250 of the Metropolis Local Management Act, 1855, but that it was a "drain" within the meaning of that section, and, consequently, that it was not vested in, or the property of, the defendants, and that they were not responsible for it.

After the decision of the Court of Appeal the plaintiff Bateman had an investigation made by excavating the ground at the rear of Vulcan-terrace, and it was then discovered that, at a man-hole in the back yard or garden of the house No. 5 in Vulcan-terrace, a drain coming from a factory, belonging to a different owner and situate to the north of Vulcan-terrace, which drain itself also received drains from other premises belonging to other owners, was connected with the 9-inch drain, so that the drainage from the factory and other premises was there discharged into the 9-inch drain and flowed along it into the main sewer under Windsor-road. Before this discovery was made neither the plaintiffs nor the defendants were aware of the existence of this connection. The connection between the two drains could not have been legally made without the consent both of the defendants and of the Metropolitan Board, but, though a search had been made in the books of both boards, no record could be found of the consent of either board having been given to the connection. There was no evidence as to how or when the connection was made.

Waddy, Q.C., T. L. Wilkinson, and *Crispe*, for the plaintiffs.

Napier Higgins, Q.C., and *Borthwick*, for the defendants.—The connection of the 9-inch drain with the other drain, which was illegally made without the knowledge of the defendants, cannot make them responsible for a sewer of the existence of which, as a "sewer," they were entirely ignorant.

T. L. Wilkinson, in reply.—The question is, Who is the owner of the 9-inch drain to the west of the man-hole? The drainage from different curtilages is connected at the man-hole, and the drain to the west is, therefore, a "sewer" as defined by section 250 of the Act of 1855, and is vested by section 68 in the defendants.

Dec. 5.—North, J. (after stating the facts, continued:—).—It is now contended that, having regard to the discovery made by the plaintiffs since the hearing of the appeal motion, it is clear that the 9-inch drain is a "sewer" within the meaning of section 250 of the Act of 1885, at any rate as regards that part of it which lies to the west of the man-hole, because the drainage of the fifteen houses is connected with the drainage from the factory, and the 9-inch drain is not "used for the drainage of one building only or premises within the same curtilage," or a "drain for draining a block of houses by a combined operation." No explanation has been given as to when this newly-discovered drain was constructed. It has been argued that, by reason of the connection between this drain and the 9-inch drain having been made by some unknown person, the rights and liabilities of the plaintiff Bateman, or his predecessor in title, and of the defendants have been altered. It is clear that the connection could have been legally made only if the consent of the district board and the Metropolitan Board had been obtained. It was illegal to make the connection without the consent of both those bodies. But it has been argued that, however illegally the connection was made, the definition of the word "sewer" contained in section 250 settles the question who is the owner of the 9-inch drain and who is responsible for it. I am not at present prepared to hold that the unlawful act of a stranger, done without the consent of the owner of Vulcan-terrace, could affect his ownership of the 9-inch drain

(a.) Reported by G. E. Jeffery, Esq., Barrister-at-Law.

or the liability of the district board by vesting the drain in them, and then throwing the responsibility for it upon them; or even that, if the connection was made by the permission of the owner of Vulcan-terrace or his tenant, the responsibility of the board could be affected without their consent. This is an important question which should not be decided unless it necessarily arises for decision. I do not intend to decide it finally now, for there is a different ground on which I must decide the present case in favour of the defendants. The liability of the defendants in respect of the 9-inch drain, if they are liable at all, is imposed on them by section 72 of the Act, and it is said that, the 9-inch drain being a "sewer" within the meaning of section 250, the obligation of maintaining it in proper condition is cast upon the defendants, and that, if they to fail to perform this obligation, they are liable to an injunction and to damages. It would be a strange thing if section 72 imposed on a district board a liability in respect of a "sewer" of the existence of which they had no knowledge, or which they believed to be a "drain." An obligation arises only when there is a duty, and, even then, only when there is knowledge of the duty. In Comyn's Digest, tit. "Action upon the case for Misfeasance," it is said, "An action on the case does not lie where a man has not sufficient notice of his duty." That principle has been already applied to this very section 72 in *Hammond* v. *Vestry of St. Pancras*, 22 W. R. 826, L. R. 9 C. P. 316, a case the facts of which are very like those of the present case. Under the plaintiff's premises there was a brick drain which, though originally a private drain, had by reason of two other houses having been drained in it become a "sewer." The existence of this drain or sewer was unknown to the defendant's surveyor, nor had any notice of the alteration been given to him. The drain having by some means got out of repair and become choked up, the soil overflowed into the plaintiff's cellar and did damage.

There was evidence that the stoppage of the brick drain was probably occasioned by rats; also that the barrel drain or sewer in the public road, into which the brick drain should have emptied itself, was free from obstruction. The action was brought to recover damages from the defendants for the injury caused by the overflow of the sewage. In that case the action was not founded on any negligence of the defendants; it was only alleged that the defendants had permitted the sewage to flow into the plaintiff's cellar. The jury found that the brick drain was a "sewer"; that it was not known to the vestry, but that it might have been ascertained and known by the exercise of reasonable care and inquiry; that the obstruction was not known before the injury occurred, and that it could not have been known by reasonable care that the brick drain was obstructed. A verdict was thereupon entered for the plaintiffs for £50, leave being reserved to the defendants to move to enter the verdict for them if the court should be of opinion that, upon the evidence and upon the findings, no liability attached to the defendants. The defendants moved accordingly, and also for an arrest of judgment upon the ground that the declaration disclosed no cause of action; and the Court of Common Pleas held that they were entitled to the verdict and arrest of judgment. Brett, J., in giving judgment, said: "It was contended on behalf of the plaintiff that that section imposed upon the defendants an absolute duty to keep the sewers properly cleared and emptied, and that, by reason of their neglect of duty, the overflow complained of ensued. On the part of the defendants, it was insisted that section 72 does not impose upon the vestry or district board an absolute duty to keep the sewers cleansed at all events, but only the duty of using all reasonable care and diligence to keep them in proper and serviceable condition; and that if a sewer be foul and uncleansed, but without any want of reasonable care and diligence on the part of the vestry, if they have done all that careful and prudent men could do, they are not liable for the consequences." After stating the verdict and the material findings of the jury, the learned judge continued:—"It was contended on the part of the defendants that the fact that the brick drain existed was unknown to them absolved them from responsibility. But that seems to me to be answered by the finding of the jury, that they might have ascertained its existence by the exercise of reasonable care and inquiry. Ignorance, under the circumstances, cannot excuse them. I think the case must stand as if the vestry had knowledge of the existence of the brick drain. Upon the facts and findings, we must assume that the brick drain was a 'sewer'; and, therefore, we must take it that the defendants knew of the brick drain, and that the injury to the plaintiff happened through its not having been properly cleansed. Now if the 72nd section does throw upon the defendants an absolute duty or obligation to guarantee that the sewers shall be at all times kept cleansed, it follows that, if any injury arises to an individual from their not being so kept, the vestry are liable. The question, therefore, is, what is the proper construction of the Act of Parliament? That, as it seems to me, will dispose of both points, for both turn upon the construction of section 72. The declaration does not charge the defendants with having been guilty of negligence. It discloses no common law liability in the defendants, and can only be a valid declaration if it can be supported upon the statute." I can draw no distinction between the declaration in that case and the statement of claim in the present case.

The present plaintiffs put their case, not on the negligence of the defendants, but on their omission to perform a statutory duty. Brett, J., continues:—"The words of section 72 are susceptible of either meaning—that an absolute duty is cast upon the defendants, or that they are only bound to exercise due and reasonable care. What, then, is the proper rule of interpretation? The defendants are a public body having a duty imposed upon them by Parliament to do a thing which, even with the exercise of the utmost care and diligence, may not always be capable of being done. It is obvious that circumstances may arise in which a sewer, notwithstanding the exercise of reasonable care, may be obstructed. The terms of the finding in this case assume that. The jury find in effect that the brick drain was obstructed, but that the obstruction was not known to the defendants, and could not by the exercise of reasonable care have been known to them. It would seem to me to be contrary to natural justice to say that Parliament intended to impose upon a public body a liability for a thing which no reasonable care and skill could obviate. The duty may, notwithstanding, be absolute, but, if so, it ought to be imposed in the clearest possible terms. The intention of the Legislature is to be gathered from the language used and the subject-matter. Where the language used is consistent with either view it ought not to be so construed as to inflict a liability, unless the party sought to be charged has been wanting in the exercise of due and reasonable care in the performance of the duty imposed. According to my view of section 72, therefore, the vestry or district board are not to be held liable for not keeping their sewers cleansed at all events and under all circumstances; but only where by the exercise of reasonable care and diligence they can and ought to know that they require cleansing, and where by the exercise of reasonable care and skill they can be kept cleansed. I, therefore, think the rule should be made absolute to enter a verdict for the defendants, and to arrest the judgment." Denman, J., gave judgment to the same effect.

In that case it was held that the defendants were in

the same position as if they had known of the existence of the brick drain, and that it was a sewer, and yet that they were not responsible for the obstruction, because they could not by the exercise of reasonable care and inquiry have discovered it. The present case is a much stronger one in favour of the defendants, because I hold, not only that they did not know that the 9-inch drain was a "sewer," but also that they could not have discovered it by the exercise of reasonable care. The plaintiffs could not have told them anything about it, for they did not know it themselves. The present case, as it seems to me, is an *à fortiori* case, and, as the defendants in *Hammond* v. *Vestry of St. Pancras* were held not to be liable for an obstruction of which they did not know, and which they could not by the exercise of reasonable care have discovered, so the present defendants cannot be held liable for a sewer of the existence of which they did not know, and could not by reasonable care and inquiry have discovered. Even if, on the true construction of the Act, the 9-inch drain west of the manhole is a sewer, the defendants were not, in my opinion, at the time when the action was commenced, under any liability to, or subject to any right of action by, the plaintiffs in respect of it. [His lordship then reviewed the evidence as to the alleged nuisance caused by the sewer under Wallis-road, coming to the conclusion that the plaintiffs had failed to establish their case on this head; and he dismissed the action with costs.]

Solicitors for the plaintiffs, *Edward Clarke.*

Solicitors for the defendants, *Oldham & Clabburn.*

Chan. Div. }
Stirling, J. } Dec. 15, 20; Feb. 1, 15.

In re W. F. Bethell.
Bethell *v.* Hildyard. (*a.*)

Marriage—Validity of, by domiciled Englishman with woman of an uncivilized tribe according to native customs.

A domiciled Englishman married, according to the native rights, a girl belonging to an uncivilized South African tribe. Polygamy was permitted by the customs of the tribe, a man being allowed one great wife and several concubines.

Held, that, although the marriage entered into was a marriage according to the customs of the tribe, it did not possess the characteristics which are essential to a contract of marriage according to English law, which is, the voluntary union for life of one man and one woman to the exclusion of all others.

The testator, by his will, devised certain real estate to trustees upon trust for his son, Christopher Bethell, during his life, and, in case he should die, leaving a child or children, then upon trust for sale and to stand possessed of the proceeds in trust for such child or children. And in default of children of Christopher Bethell, there was a limitation in favour of another son of the testator. The testator died in 1879.

Christopher Bethell, in 1878, went to reside at the Cape of Good Hope, and remained in South Africa up to the time of his death, which took place in 1884. He received the income of the property devised by his father's will up to his death.

Upon the death of Christopher a summons was taken out to determine who was entitled to the property, and an inquiry was directed whether Christopher Bethell was ever married, and, if so, when and to whom, and whether he left any, and what, children him surviving.

The chief clerk, by his certificate, found that Christopher Bethell, in October, 1883, being then resident at Mafeking, in Bechuanaland, went through the form of marriage according to the custom of the Baralong tribe with Teepoo, a Baralong girl, and had issue by her a female child, which was born ten days after his death; that the Baralongs had no religion and no religious customs, and that polygamy was allowed; that at the time of the marriage the domicile of Christopher Bethell was English; and that, save as aforesaid, he had never married.

When the matter came on for further consideration, it was thought desirable that the infant child should be represented, and the official solicitor was accordingly appointed guardian. A summons was then taken out on behalf of the infant, asking that the chief clerk's certificate might be varied by finding that Christopher Bethell was married to Teepoo, and left one child him surviving, a girl born on the 9th of August, 1884. This summons now came on for hearing.

Upon the evidence adduced it appeared, as was stated by one witness, that among the Baralongs "each male is allowed one great wife and several concubines, who have almost the same *status* in the harem as the great or principal wife," and the chief of the tribe said "there are those who have three or four wives, but the first is the principal wife." The marriage ceremony was thus described:—"When the consent of the parents has been obtained, the bridegroom slaughters a sheep, a buck, an ox, or cow. The heads of these animals are taken to the bride's parents, as also is the hide, which is cleaned and softened. They are then considered married, and, after the birth of the first child, the number of the cattle previously agreed upon is handed over to the wife's parents." The chief of the Baralong tribe stated that Bethell came to him and said he (Bethell) wanted a woman to take and marry according to the Baralong custom; that the chief asked him, Would he not marry her in church? and Bethell said, "No; I am a Baralong. Did you marry your wife in church? Did you not also marry in the custom I am about to do?" The chief stated that he then told Bethell he might take a wife, and that Bethell took Teepoo and married her according to the Baralong custom, and that she was his wife, and not his paramour.

On December 3, 1883, Bethell signed a document, the material parts of which are follows:—

"I hereby desire that in the event of my decease here in Mafeking, and in the absence of any other will, Mr. E. Rowland shall take over all my arms, ammunition, cannon wagon, oxen, horses, and any other property that may be in my possession, and shall sell them to the best advantage. . . . And he shall inform my relatives in England of my decease and of the manner in which my property is disposed of. Always providing that before disposing of any of the proceeds of the sale of my property he shall purchase or put aside thirty heifers, ten three years old, ten two years old, ten one year old, and shall use them for the benefit of Teepoo in the following manner—he shall keep the heifers for the space of one year from my decease, and in case she (Teepoo) has no child by me he shall hand the said thirty heifers over to her for her own property and use. If she has a child after my decease, he shall keep the heifers and their produce until the said child be arrived at the age of twenty-one years, selling any full-grown oxen and old cows, and investing the proceeds in land or English Government securities. The milk of the cattle and the use of the young oxen to be applied to the use of Teepoo and the child. At the end of eight years the child is to be removed from its mother and placed at a school for the time of ten years, either in the colony or in England, and, if a boy, shall be taught a profession, or

(a.) Reported by L. S. Brisrowe, Esq., Barrister-at-Law.

enter her Majesty's service as a soldier. . . . In case Teepoo remarries or has any more children or conducts herself in an improper way, she shall be debarred from any participation in the heifers and shall give up the guardianship of the child at once to E. Rowland and shall receive ten yearly heifers only as a dowry. But in case she have no child by me at the expiration of the year, she will be at liberty to do as she likes, and will receive the thirty heifers as before mentioned. And Ragnassie, her father, shall receive eight young heifers as dowry, and thereby relinquishes by Bechuana law all command over Teepoo and the child.

In token my hand, C. Bethell.

Which can, if necessary, be verified by the Standard Bank (Limited)."

Christopher Bethell never mentioned this marriage to any of his family, although he constantly communicated with them. Nor did it appear that he had ever spoken of Teepoo as his wife to any European. One of the witnesses stated that he always called her "that girl of mine."

Pearson, Q.C., and *G. Williamson*, for the plaintiffs, stated the facts.

Borthwick, for the trustees.

Hastings, Q.C., and *Byrne, Q.C.*, for the infant child, argued that, as a rule, a marriage is valid if celebrated according to the *lex loci*: *Dalrymple* v. *Dalrymple*, 2 Hag. Consist. Cas. 54; *Brook* v. *Brook*, 9 W. R. 461, 9 H. L. Cas. 193; and that that rule applied although the marriage took place in an uncivilized country or in one where polygamy prevailed: *Sastry Velaider Aronegary* v. *Sembecutti Vaigalie*, 6 App. Cas. 364; *Conolly* v. *Woolrych*, 11 Lower Canad. Jur. 197; *Johnson* v. *Johnson*, 30 Mis. State Rep. 80. The other side must show that in every case marriage according to the ceremonies of a country in which polygamy prevails is necessarily not a marriage according to English law. This marriage was not polygamous. An Englishman who marries anywhere according to the local ceremonies intending to keep one wife does not make a polygamous marriage: *Warrender* v. *Warrender*, 2 Cl. & F. 488; *Shaw* v. *Gould*, L. R. 3 H. L. 89, 16 W. R. H. L. Dig. 16. These cases show that it is not conclusive that in the country of the marriage there is a possibility of polygamy: *Harvey* v. *Farnie*, 31 W. R. 433, 8 App. Cas. 43. The observations in *Hyde* v. *Hyde*, 14 W. R. 517, L. R. 1 P. & M. 130, do not apply to the case of a domiciled Englishman; they were addressed to the case of a man who was a polygamist by creed.

They also cited *In re Goodman's Trusts*, 29 W. R. 586, 17 Ch. D. 266; *Andros* v. *Andros*, 32 W. R. 30, 24 Ch. D. 637; *Ruding* v. *Smith*, 2 Hag. Consist. Cas. 371.

Pearson, Q.C., and *G. Williamson*, for the plaintiffs, contended that in England, as in all Christian countries, marriage means the exclusive union of one man with one woman for the whole of their lives. [They referred to *Armitage* v. *Armitage*, L. R. 3 Eq. 343, 15 W. R. Ch. Dig. 88; *Collins* v. *Hector*, 23 W. R. 485, L. R. 19 Eq. 334.] The judgment of Lord Penzance in *Hyde* v. *Hyde* is conclusive.

Hastings, Q.C., in reply.

Stirling, J., after stating the facts as above set forth, proceeded:—I have now to inquire what is the law applicable to this case. In *Warrender* v. *Warrender* Lord Brougham said: "Marriage is one and the same thing substantially all the Christian world over—our whole law of marriage assumes this; and it is important to observe that we regard it as a totally different thing, a different *status* from Turkish or other marriages among infidel nations, because we clearly should never recognize the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorize and validate. . . . Indeed, if we are to regard the nature of the contract in this respect as defined by the *lex loci*, it is difficult to see why we may not import from Turkey into England a marriage of such a nature as that it is capable of being followed by and subsisting with another—polygamy. These being the issues of the contract." This statement of the law was acted upon by Lord Penzance in *Hyde* v. *Hyde*, who—dealing with a Mormon marriage—held that "marriage as understood in Christendom may be defined as the voluntary union for life of one man and one woman to the exclusion of all others." Having regard to those authorities, I am bound to hold that a union formed between a man and a woman in a foreign country, although it may there bear the name of a marriage, and the parties to it may there be designated husband and wife, is not a valid marriage according to the law of England unless it be formed on the same basis as marriages throughout Christendom, and be in its essence "the voluntary union for life of one man and one woman to the exclusion of all others." Now, it is plain that C. Bethell intended that Teepoo should have a *status* different from and higher than that of a mere concubine, he intended that the relationship between himself and her should be that of husband and wife in the sense in which those terms are used among the Baralongs. To begin with, the cohabitation between C. Bethell and Teepoo lasted only a few months. During that time both resided in the Baralong country. Bethell, although he kept up communication with his relatives at home, never mentioned his marriage to them. He never introduced Teepoo or spoke of her to any European as his wife. In short there is an absence of that reputation of marriage (in the Christian sense) which has in many cases shown weighty evidence of the actual existence of such a union. Next, it is to be observed that Bethell refused to marry Teepoo in church, not on the ground that there was any difficulty in finding a place of religious worship where the marriage ceremony might have been performed, but upon the allegation that he was a Baralong and wished to marry according to Baralong customs. I think the inference is that he meant to enter into no other union than that which, between members of the tribe, was regarded as a marriage. This is confirmed by the document of December 3, 1883. If Bethell regarded his union with Teepoo as a marriage in the sense in which it is understood among Englishmen, and the child referred to in that document as legitimate, he would scarcely have made such provisions as are therein contained for the maintenance, education, and advancement of the child. He was in receipt of an income of £600 a year from an estate in Yorkshire; he knew of the provisions of his father's will, under which a legitimate child of his would succeed to the property; yet he directs his child by Teepoo to be maintained and educated up to the age of twenty one on the proceeds of thirty heifers to be purchased out of the proceeds of a sale of his property at Mafeking to be effected by his friend Mr. Rowland, who was a resident among the Baralongs. It is true that he speaks of the "marriage" of Teepoo, and makes provision for the "dowry" to be received by her, and her father; but, in my opinion, he used these terms in the sense in which they were understood among the Baralongs, and his instructions were directed simply to insure the fulfilment of obligations which he conceived to be cast upon him by their laws or customs. Finally, Teepoo herself has given no testimony in this case; there is nothing to show that she regarded herself as entering into any other union than such as prevails among the tribe to which she belongs. I am, therefore, of opinion that the union between C. Bethell and Teepoo was a marriage in the Baralong sense only, and

not a valid marriage according to the law of England. In the view which I have taken it is unnecessary for me to express any opinion on any of the numerous points relating to the law of marriage which were discussed before me, but I ought, perhaps, to refer to the two cases which were cited in support of the contention on behalf of the infant—viz., *Johnson* v. *Johnson* and *Conolly* v. *Woolrych*. These decisions are not, of course, binding on me, but they are entitled to most respectful consideration, and in the absence of direct English authority might exercise a weighty influence on my decision. The former of these cases was decided in 1850, before *Hyde* v. *Hyde*; in the latter, judgment was given on July 9, 1867, but *Hyde* v. *Hyde* (decided March 20, 1866) was not referred to. I am not sure that the learned judges who decided those cases took the same view of the law as is expressed by Lord Penzance, to which I consider myself to be bound; but in both cases the facts were very different from those in the present case; and circumstances were proved which might, in my judgment, lead to the conclusion (consistently with the doctrine laid down in *Hyde* v. *Hyde*) that the marriages there under consideration were valid according to the law of England. The summons must be dismissed, but the costs will come out of the estate.

Solicitor for the plaintiffs and the trustees, *Oldman & Chambers*.

Solicitor for the infant, *The Official Solicitor*.

Chitty, Div. Kekewich, J. } Feb. 8.

Gosnell v. Bishop. (a.)

Practice—"Motion to stand to trial"—Costs of action—Costs of motion included.

In a patent action a motion was made on behalf of the plaintiff for an interim injunction, but not heard on the merits, the order made being "motion to stand to trial." No mention was then made as to costs. On the trial judgment was given for the defendant, with costs; but nothing was said as to the costs of the motion, and the master, in drawing up the judgment, refused to include them.

Held, that, where a motion is adjourned or stands over to the trial, and no mention is made as to the costs of it then or at the trial, the judgment carries the costs of the motion.

Motion.

In this case the plaintiff sued the defendant for infringing a patent, and a motion for an *interim* injunction was made before Chitty, J., but the merits were not gone into, and the motion was adjourned to the trial, counsels' minutes being indorsed "Motion to stand to trial." No motion was made of costs, and no order was made as to them. The order that the motion was to stand over to the trial was not drawn up. The action was subsequently transferred for trial to Kekewich, J., and judgment given for the defendant, with costs on the higher scale. Nothing was said then as to the costs of the motion. The registrar, on drawing up the judgment, declined to include the defendant's costs of the motion, though requested to include them in the costs of the action. The defendant now moved that the order as drawn up should be varied by including his costs of the motion with the costs of the action.

Barber, Q.C., and *Carpmael*.—Where an order is made simply that the motion shall stand to the trial, the costs of it will be taxed by the taxing master without any further direction. The rule is that it is only when costs of a motion are reserved to the trial that they must be then dealt with.

Aston, Q.C., *Warmington, Q.C.*, and *Swinfen Eady*.—Costs of a motion must be expressly mentioned at the trial in order to entitle either party to them.

Kekewich, J., after stating the facts, said:—This motion raised a small, but important, question of practice. I thought it right to consult the taxing masters, and I stated the matter for their consideration, and their opinion is as follows: "We should, in taxing costs under a judgment dismissing the plaintiff's action, allow the defendant the costs of a motion of the plaintiff's, which was adjourned or stood over to the hearing, but not brought on."

Acting on this opinion, I direct that the judgment carries the costs of the motion, each party bearing his own costs of this motion to vary the minutes.

Solicitor for the plaintiff, *H. C. Gosnell*.

Solicitor for the defendant, *E. W. Parker*.

Q. B. Div. (Lord Coleridge, C.J., Pollock, B., and Hawkins, J). } Nov. 30.

Childs v. Cox. (a.)

Parliament—Registration—Borough rate—Notice of objection—Ordinary course of post—6 Vict. c. 18, ss. 17, 100.

Notices of objection addressed to voters residing in barracks were posted on August 20, in time to be delivered, in the ordinary course of post, at places in the borough other than the barracks on the same evening. There was no postal delivery at the barracks, but the letters were called for by orderlies. The letters were called for on the evening of August 20, and were distributed, some the same evening, and others on the following day.

Held, that the notices of objection were not delivered in the "ordinary course of post," within the meaning of 6 Vict. c. 18, s. 100.

Case stated by the revising barrister for the borough of Woolwich.

The appellant objected to the names of Robert Dendy, Frederick Francis Johnson, and others being retained on the general occupiers' list of voters for the parish of Woolwich in the said borough.

The following facts had been proved:—

Notices of objection addressed to Robert Dendy, 43, Staff-Sergeants' Quarters, R.A. Barracks; Frederick Francis Johnson, C., Field Officers' Quarters, C. & T.C. Barracks; and to the others, at similar addresses, were posted at the Woolwich Post Office shortly before 6 p.m. on the 20th of August, 1887.

Letters posted at that time would, in the ordinary course of post, be delivered at places in Woolwich other than the barracks the same evening.

There is no postal delivery into the barracks respectively inhabited by the said voters, but the letters are called for by orderlies from the barracks in accordance with military regulations and arrangements made with the postmaster.

On the evening of the 20th of August two orderlies called at the post office and received the letters for the barracks. Those for the officers were distributed the same evening. It was proved that some of the letters for the non-commissioned officers and men were delivered

(a.) Reported by J. W. Greig, Esq., Barrister-at-Law.

(a.) Reported by G. K. Paley, Esq., Barrister-at-Law.

the following morning, and there was no clear evidence as to when the rest were distributed.

The revising barrister held that there was no evidence that the objector had given the required notice of objection, as it did not appear that there was any ordinary course of post within the meaning of 6 Vict. c. 18, s. 100, by which the notices would have been delivered on the 20th of August.

Asquith, for the appellant.—Either the orderly must be regarded as the agent of the objector, and then the notice was "left" at the voter's address within the meaning of section 17 of 6 Vict. c. 18, or it was delivered in the ordinary course of post within the meaning of section 100. It is submitted that where a letter is delivered in the ordinary course of delivery according to arrangements made with the post office at any particular place, it is sufficient: *Lewis* v. *Evans*, 23 W. R. 244, L. R. 10 C. P. 297; *Hornsby* v. *Robson*, 26 L. J. C. P. 55, 5 W. R. Dig. 231.

Channell, Q.C., and *Rentoul*, for the respondent, were not called on.

Pollock, B.—The only question here is whether the notices were properly delivered according to the statute. Section 17 and section 100 give two different ways in which the notice of objection may be served. The latter section throws upon the objector the *onus* of proving that the delivery of the notice was "in the ordinary course of post." It appears that in this case there was no delivery at the voter's address by the ordinary course of post. The arrangement by which the orderlies called for and received letters at the post office and distributed them at the barracks was in substitution for the "ordinary course of post." I am of opinion, therefore, that this appeal must be dismissed.

Hawkins, J.—I am of the same opinion. If the orderly is regarded as the agent of the objector, there is insufficient evidence to show that the notices were delivered on the same evening. I do not, however, think that he can be regarded as the objector's agent, and the only question is whether there has been a sufficient service under section 100 of the statute. The case shows that no "ordinary course of post" existed which made the notices deliverable on the 20th of August. It is not alleged that it was the duty of the orderlies to deliver them the same evening, and I think, therefore, that there is no evidence that the notices were served on that day.

Lord Coleridge, C.J., concurred.

Appeal dismissed.

Solicitor for the appellant, *T. M. McDonnell.*

Solicitor for the respondent, *E. T. Hughes.*

Q. B. Div. (Mathew and A. L. Smith, JJ.) Feb. 10.

Reg. v. Directors of the Great Western Railway Co. (a.)

Coroner—Jurisdiction to quash inquisition for irregularity—Power of amendment—Coroners Act, 1887 (50 & 51 *Vict.* c. 71), s. 20.

A coroner's inquisition stated that the jury "say upon their oaths that the directors of the Great Western Railway Co. did feloniously kill and slay" the deceased.

Held, that the jurisdiction of the High Court to quash irregular inquisitions has not been affected by section 20 of the Coroners Act, 1887, *which gives power to "the court having cognisance of the case" to amend defects in inquisitions; and that, on an application for a writ of certiorari, such inquisition could not be amended, but must be quashed.*

Order *nisi* for a writ of *certiorari* to bring up and to quash a coroner's inquisition.

The inquisition purported to have been taken at the parish of Phillack, in the county of Cornwall, on the 30th of January, 1888, before G. P. Grenfell, one of the coroners for the said county, on view of the body of Theophilus John George, upon the oaths of twelve jurors, who, being charged to inquire when, where, and in what manner the deceased came to his death "say upon their oaths that the directors of the Great Western Railway Co., on the 28th of January, 1888, did feloniously kill and slay the said Theophilus John George." The deceased had been run over by a train and killed while passing over a level crossing on the line of the Great Western Railway Co.

The order, which was obtained at the instance of one of the directors, on the ground that the inquisition did not state the names of the persons who were charged with manslaughter, called upon the coroner, the public prosecutor, and the next of kin of the deceased to show cause why the inquisition should not be quashed by the High Court, and quashed on the ground that it was bad on the face of it.

Poland, for the Public Prosecutor.—The court has power to amend defects in an inquisition. Section 20 of the Coroners Act, 1887, says:—"If, in the opinion of the court having cognizance of the case, an inquisition finds sufficiently the matters required to be found thereby, and where it charges a person with murder or manslaughter, sufficiently designates that person and the offence charged, the inquisition shall not be quashed for any defects, and the court may order the proper officer of the court to amend any defect in the inquisition." The court has cognizance of the case, and it ought to exercise the power of amendment by substituting the names of the directors.

Asquith, for the next of kin.

Sir H. James, Q.C., and *R. S. Wright*, for the directors, were not called upon.

Mathew, J.—There can be no doubt that this inquisition is irregular. And the recent Act does not affect the jurisdiction of the court to quash an inquisition which is irregular upon the face of it. Section 20 seems to refer to the court before which the inquisition comes for trial, and confers upon it a discretionary power to amend mere formal defects. I am of opinion that this inquisition must be quashed.

A. L. Smith, J.—I am of the same opinion. I think the original jurisdiction of the court to quash irregular inquisitions is not touched by the Act of last year. But even if it were, I am not satisfied that so serious a defect as the present ought to be amended by any court. The section says that where an inquisition charging a person with murder or manslaughter sufficiently designates the person and the offence charged, any defect in the inquisition may be amended. But it is certainly a serious question here whether this inquisition can be said to sufficiently designate the persons who are charged. I therefore think the inquisition must be quashed.

Order absolute.

Solicitor for the directors, *R. R. Nelson.*

Solicitor for the Public Prosecutor, *Solicitor to the Treasury.*

Solicitors for the next of kin, *Bolton & Co.*, for Penzance.

(a.) Reported by F. G. Rucker, Esq., Barrister-at-Law.

Q. B. Div. (Wills and Grantham, JJ.) Dec. 14, 15.

ARROWSMITH v. DICKENSON. (a.)

Poor law—Liability of children to maintain mother who has married again—43 Eliz. c. 2, s. 6—4 & 5 Will. 4, c. 76, s. 56.

The children of a pauper woman are not relieved of their liability to maintain her under the Poor Law Acts by the fact of her marrying again.

Case stated by justices of the county of Chester under 20 & 21 Vict. c. 43 and 42 & 43 Vict. c. 49, s. 33.

A summons was issued against the respondents, James and Thomas Dickenson, under 43 Eliz. c. 2, s. 6, 59 Geo. 3, c. 12, s. 26, 4 & 5 Will. 4, c. 76, s. 56, and 31 & 32 Vict. c. 122, s. 36, on an information preferred by the appellant, acting on behalf of the Guardians of the Poor of Northwich Union, which alleged that Ann Egerton was poor and unable to maintain herself and was then chargeable to the union, and that the respondents were her sons, and were of sufficient ability to maintain her. On the hearing of the summons it was proved that the respondents were the sons of Ann Egerton, by a former marriage, and that she and her present husband, Samuel Egerton, were both in receipt of outdoor relief from the union, and that the respondents were single men living with their mother and step-father, and earning about twenty-two shillings a week. The justices dismissed the summons. The question was whether the respondents were, under the statutes, liable to maintain their mother while she remained the wife of Samuel Egerton and lived with him.

Marshall, for the appellant.—The justices ought to have convicted the respondents. The statute of Elizabeth enacts "that the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame, and impotent person, or other poor person not able to work, being of a sufficient ability, shall at their own charges relieve and maintain every such poor person." The statute of George III. empowers justices in petty sessions to make orders for the relief of such poor persons upon and by the father, grandfather, mother, grandmother, or child of any such poor person. Then section 56 of the Poor Law Act, 1834, says that all relief given to a wife shall be considered as given to the husband, but provides that nothing therein contained shall discharge the father and grandfather, mother and grandmother of any poor child from their liability to maintain such child. Section 57 makes a man liable to maintain the children of his wife by a former marriage. Although section 56 says that relief to a wife is relief to the husband, it is still for some purposes relief to the wife also: *Reg.* v. *Inhabitants of Kevington-cum-Gresty*, 17 Q. B. 48. The object of the enactment is shown by *Reg.* v. *St. Mary, Islington*, 21 L. J. M. C. 233, 10 W. R. O. L. Dig. 64. See also *Rex* v. *Inhabitants of Walthamstow*, 6 A. & E. 301.

Joseph Smith, for the respondents.—The cases cited do not support the contention of the appellant. The respondents are relieved from their responsibily to maintain their mother, who has married again, by section 56 of the Act of 1834. That section makes any relief given to a wife relief to the husband; and the respondents are not bound to maintain their stepfather. And the proviso to that section omits the words "or child" after "grandmother," which occur in section 26 of the Act of Geo. 3, and also in 43 Eliz. c. 2. The words must have been left out intentionally, and the court cannot insert them.

WILLS, J.—I am of opinion that the appeal must prevail. The respondents are called upon to satisfy their liability to maintain their pauper mother. They answer that she has married again. But the obligation is positive. And section 56 of the Act of 1834—that is, the first part of the section—leaves the obligation as it was before. Reliance is laid on the proviso; but it is not the right way of construing a section to look at the proviso first. The proper way is to look at the main words first. I think that the main words leave the obligation remaining, and that the proviso has no bearing on the present facts. The order ought to have been made.

GRANTHAM, J., concurred.

Case remitted to justices.

Solicitors for the appellant, *A. & J. E. Fletcher*, Northwich.

Solicitor for the respondents, *Thomas Cooper*, Congleton.

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

Q. B. Div. (Lord Coleridge, C.J., Pollock, B., and Hawkins, J.) Nov. 29.

BEAL v. TOWN CLERK OF EXETER. (a.)

Parliament — Registration — Borough vote — Residence during qualifying period—Right to exclusive use of room—2 & 3 Will. 4, c. 45, s. 31.

The claimant had the exclusive use of a separate bedroom in his father's house at Exeter, but, for the six calendar months during which residence is required by section 45 of 2 & 3 Will. c. 45, he was engaged in an occupation which would prevent him from actually residing at Exeter, except for a few days at a time.

Held, that this was not sufficient to constitute "residence" within the meaning of the above-mentioned section.

Case stated by the revising barrister for the borough of Exeter.

In January, 1887, one Louis Robins, who had previously resided continuously in his father's house at Exeter as a member of the family and with the exclusive use of a separate bedroom, went to London to seek employment.

During the six months before the 15th of July, 1887, he returned at intervals, when he was out of employment, to his father's house and occupied the same bedroom in the same manner as before; for the greater part of this period, however, he was engaged in a situation which required his continual presence in London, and made it impossible for him to return to Exeter, except occasionally from Saturday to Monday.

The revising barrister decided that there had been sufficient constructive residence in Exeter for six months before July 15, 1887, to satisfy 2 & 3 Will. 4, c. 45, s. 31.

The objector appealed.

J. A. Foote, for the appellant, cited *Powell* v. *Guest*, 13 W. R. 274; *Ford* v. *Drew*, 28 W. R. 137.

Lord COLERIDGE, C.J.—I am of opinion that the decision of the revising barrister must be reversed. We have to put a construction on the meaning of "residence during six calendar months." It is very difficult to define exhaustively what residence is. It is a question of good sense to be decided upon the facts. I think that the mere power or intention to return *per se* is not sufficient to constitute residence, for both might be consistent with three years' actual absence from Exeter. There is nothing of the nature of a constructive resi-

(a.) Reported by G. K. PALEY, Esq., Barrister-at-Law.

dence. An officer ordered on foreign service might, no doubt, claim a constructive residence by his wife, but such a case bears no resemblance to the present one. Here a constructive residence is claimed, not through a wife, but by the claimant himself, who is a single man actually residing in London, and unable, consistently with his occupation, to return to Exeter.

Pollock, B., and Hawkins, J., concurred.

Appeal allowed.

Solicitor for the appellant, *S. D. Hamilton*, for *Friend & Beal*, Exeter.

Q. B. Div. (Stephen and Charles, JJ.) Nov. 29.

Kaye v. Sutherland. (a.)

Practice—Ord. 11, *r.* 1, *paragraph* (b)—*Service out of the jurisdiction — Tenant-right — Custom of the country.*

An action by an outgoing tenant in Yorkshire to obtain compensation for tenant-right according to the custom of the country is an action to enforce "a contract, obligation, or liability affecting land" within paragraph (b) *of ord.* 11, *r.* 1, *and service of a writ of summons out of the jurisdiction will be permitted in that behalf.*

Agnew v. Usher, 33 *W. R.* 126, 14 *Q. B. D.* 78, *distinguished.*

Appeal from Charles J., at chambers, who had given leave for service of a writ of summons out of the jurisdiction.

The plaintiff claimed on the indorsed writ "for tenant-right and tenant's compensation in respect of a farm situate at N., in the county of York, and for breach of an agreement to pay tenant-right and tenant's compensation." The plaintiff was the outgoing tenant of the above farm, and claimed compensation under the custom of the country upon the expiration of his tenancy. The defendant was his landlord, whose ordinary place of residence and domicile were in Scotland, and who had no residence within the jurisdiction.

R. O. B. Lane, for the defendant.—The writ has been issued out of the jurisdiction under paragraph (*b*) of ord. 11, r. 1; but that paragraph does not apply here, for the action is not in respect of a contract affecting land, but is in respect of a mere personal obligation binding on the landlord. There is nothing in this contract which affects the property, or possession, or *status* of land, as explained by Lord Coleridge, C.J., in *Agnew* v. *Usher*, 33 W. R. 126, 14 Q. B. D. 78.

J. L. Walton, for the plaintiff.—On the ground of convenience alone it is desirable that the plaintiff should be able to sue in England, instead of in Scotland. But it is submitted that the obligation, being founded upon custom, does affect the land, and is, therefore, within paragraph (*b*) of ord. 11, r. 1. The custom casts upon the landlord as an incident of his ownership of the land the obligation to pay tenant-right. This liability arises from the land, not from a personal contract: *Mansel* v. *Norton*, 31 W. R. 325, 22 Ch. D. 769. "A custom is the *lex loci*, an ancient local law in some known district as a hamlet, town, or manor." Co. Litt. 110b; *Jones* v. *Robin*, 10 Q. B. 620. *Agnew* v. *Usher* turned upon the right of the plaintiff to sue the assignee of a lease for rent, and is distinguishable from this case.

R. O. B. Lane replied.

Stephen, J.—With regard to the question of convenience I accede to the argument that it would be a hardship to the plaintiff if he were compelled to sue in Scotland for compensation in respect of tenant-right according to the custom of the country; his farm being situated in Yorkshire. The hardship, however, would be just the same if the plaintiff had to bring his action within the jurisdiction for breach of a similar contract made with respect of land in Scotland. But the question of law which we have to decide is one of some difficulty and importance; it is whether this case falls within paragraph (*b*) of ord. 11, r. 1, or not. In my opinion it clearly falls within the terms of the first part of paragraph (*c*), but as the defendant ordinarily resides in Scotland, the exception at the end of that paragraph precludes service out of the jurisdiction being allowed. In *Agnew* v. *Usher* the court held that an action to recover rent due on a lease of land in England was not within paragraph (*b*); but is the present case covered by that decision? I think not. Lord Coleridge, C.J., said that he did not intend to give an exhaustive account of all possible proceedings "affecting land" which would probably fall within paragraph (*b*). The court only determined in that case that the action (which was to obtain payment of rent from the assignees of the lease) was not an action to enforce "any contract, obligation, or liability affecting land." Lord Coleridge also observed that, as a general rule, "actions of ejectment and of the like kind, when the land of which the property, or possession, or claim is disputed is English land, should be brought in England." The words on which the present case hinges are the words "affecting land," and I am of opinion that this is an action to enforce a contract, obligation, or liability affecting land within the meaning of paragraph (*b*). The plaintiff alleges that the land was let under a contract made subject to the custom of the country in respect of paying compensation for tenant-right; and that custom applies to all contracts made within the district subject to it, unless it is expressly excluded by the parties. The contract therefore affects a certain definite portion of land in the neighbourhood of the plaintiff's farm. It is true that the custom of the country is not so strong a case of land being affected by a custom as is the custom of gavelkind or of borough English. It appears to me however that this custom holds a middle position between contracts made subject to gavelkind or borough English on the one hand, and contracts to pay rent on the other. The land is affected in the sense that it is held under a contract which is subject to a custom of that part of the country.

Charles, J., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Elliott & Ash*, for *Robinson & Robinson*, Keighley.

Solicitors for the defendant, *Emmet, Son, & Stubbs.*

(a.) Reported by Sir Sherston Baker, Barrister-at-Law.

Q. B. Div. (Lord Coleridge, C.J., Pollock, B., and Hawkins, J.) Nov. 28.

McClean v. Prichard. (a.)

Parliament — Registration — Borough vote — Service franchise — Qualification for burgess roll — Representation of the People Act, 1884 (48 *Vict.* c. 3), s. 4 —*Municipal Corporations Act*, 1882 (45 & 46 *Vict.* c. 50), s. 9.

A voter who has been placed on the Parliamentary

(a.) Reported by Cecil Chapman, Esq., Barrister-at-Law

register for a borough as an inhabitant occupier by virtue of the service franchise under 48 Vict. c. 3, s. 8, is not thereby entitled to be placed on the burgess roll under the Municipal Corporations Act, 1882, s. 9, which requires occupation "as owner or tenant" in a legal, and not merely physical, sense.

Case stated by the revising barrister for the borough of Brighton.

At a court holden by me, as revising barrister for the borough of Brighton, on the 23rd of September, 1887, an objection to the name of the appellant being retained on division 1 of the occupiers' list for the parish of Brighthelmstone came on and was heard by me.

1. The name of the appellant appeared on division 1 of the occupiers' list for the parish of Brighthelmstone as Parliamentary voter for the Parliamentary borough of Brighton, and as a burgess for the municipal borough of Brighton, and he was objected to in respect of his Parliamentary and municipal vote.

2. The entry on division 1 is—McClean, Matthew, 14, Islingword-street, Brighton. House, 22, Carlton-hill, successive, 14, Islingwood-street; and the entry in the rate-book is—Owner, Mr. Reason; occupier, Matthew McClean, premises, house and clubroom, with one rating for the whole premises.

3. Mr. Reason is the owner of the premises 22, Carlton-hill, and the tenants are an association or committee of gentlemen, who have taken the premises for the purposes of a coffee-house. The premises consist of a single house, with entrance in front and at the rear.

4. The appellant was placed in the premises 22, Carlton-hill by the committee as manager, and he, with the assistance of his wife and daughter, was in charge of the premises, served the customers, took payment for the articles supplied, and accounted weekly with the committee for the receipts. For these services he received food, coal, lighting, and four shillings a week. He also inhabited with his family a portion of the premises. He paid no rent, but the furniture in the part inhabited by him was his own.

5. The rent and the rates for the whole of the premises 22, Carlton-hill were paid by the committee.

6. There was no separate rating for the part of the premises 22, Carlton-hill inhabited by the appellant and his family, but the whole of the premises were rated in his name, and the receipts for the rates were made out in his name.

7. It was admitted by the appellant and the respondent, Thomas Pritchard, respectively that the appellant had inhabited the premises 22, Carlton-hill by virtue of his service or employment as manager of the said coffee-house, and that the appellant was entitled to be placed on division 2 of the occupiers' list, under section 3 of the Representation of the People Act, 1884.

8. It was contended on behalf of the appellant that he was also entitled, under the circumstances above stated, to be enrolled as a burgess of the said borough of Brighton.

9. I held that the appellant was not entitled to be enrolled as a burgess of the said borough of Brighton, and I accordingly erased his name from division 1 of the said occupiers' list.

10. I held that the appellant had established his right, under section 3 of the Representation of the People Act, 1884, to be placed on division 2 of the said occupiers' list, and I accordingly inserted his name to division 2 of the occupiers' list.

11. If the court should be of opinion that I was wrong in removing the appellant's name from division 1 of the said occupiers' list, his name will be restored to division 1, and removed from division 2.

Clough, for the appellant.—The voter is entitled to be put on the burgess roll because occupation and rating are the only qualifications required by the Municipal Corporations Act (45 & 46 Vict. c. 50), s. 9, and it is admitted that he occupied and was rated for the house. The words in the Representation of the People Act (30 & 31 Vict. c. 102), that the person should occupy as "owner or tenant," do not occur in the municipal Acts. If there is actual physical occupation it is, therefore, sufficient. The provision in the Representation of the People Act (48 Vict. c. 3), s. 8, extends the rights of a servant as an inhabitant occupier.

Newson, for the other side, was not called upon.

Lord COLERIDGE, C.J.—This appeal must be dismissed. The claimant is rightly placed on the Parliamentary list, but he is not therefore entitled to be enrolled as a burgess. Within the older cases it is clear that he is not an "occupier" of the house, for he is not in occupation either as owner or tenant. The Representation of the People Act of 1884 only applies to the Parliamentary franchise.

POLLOCK, B., and HAWKINS, J., concurred.

Solicitor for the appellant, *R. Ballard*.

Solicitors for the respondent, *Boxall & Boxall*.

Q. B. Div. (Lord Coleridge, C.J., Pollock, B., and Hawkins, J.) } Nov. 28.

BRIDGES v. MILLER. (a.)

Parliament — Registration—Borough vote — Notice of objection—Defect or mistake—Power of amendment—Reform Act, 1832 (2 & 3 *Will.* 4, *c.* 45), *s.* 32—*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-section* 2.

By the Reform Act, 1832, *s.* 32, *no freeman of a city or borough may be registered as a Parliamentary voter "unless he shall have resided for six calendar months next previous to the last day of July (now altered to the 15th of July) in such year" within such city or borough or seven statute miles from the polling place.*

A notice of objection was served upon a freeman of Norwich, stating the ground of objection in the following words:—"That you do not reside at 12, Clifton-street, Norwich." The revising barrister held that the notice was sufficient, but he allowed an amendment to be made as follows:—"That you have not resided at 12, Clifton-street, Norwich, for six calendar months next preceding the 15th of July last, and that you have not throughout that period resided within the city of Norwich or seven miles thereof."

Held, that the notice was bad, and that the revising barrister had no power to amend it, as the defect was not a "mistake" within 41 & 42 *Vict. c.* 26, *s.* 18, *sub-section* 2.

This was a case stated by a revising barrister for the city of Norwich.

Henry Bridges, a freeman of Norwich, was objected to as not being entitled to be registered as a Parliamentary voter. The notice of objection was addressed to "Mr. Henry Bridges, of 12, Clifton-street, Norwich," and stated as the ground of objection "that you do not reside at the above address." Evidence was admitted to prove that the appellant had not resided at the address in question, nor within seven miles of Norwich, for six calendar months next previous to July 15, 1887.

It was contended for the appellant that the notice was bad as it did not refer to the qualifying period of six calendar months.

(a.) Reported by CECIL CHAPMAN, Esq., Barrister-at-Law.

The revising barrister held that the notice was sufficient, but he allowed an amendment to bring it within the exact words of section 32 of the Reform Act—namely, "that you have not resided at the above address for six calendar months next preceding the 15th day of July last, and that you have not resided within the city of Norwich, or within seven miles thereof." He then struck out the name of the appellant from the list of voters and seven others who were objected to in a similar way.

The case stated that if the court should be of opinion that the notice was originally bad, and could not be amended, the names of the appellant and the other seven were to be replaced on the list.

Asquith, for the appellant.—The notice was bad because it stated no statutory ground of objection at all. It is no ground of objection under section 32 that the voter is not residing at a particular place at the time of the notice. The question, therefore, of non-residence for six calendar months was not raised before the barrister, and evidence ought not to have been received upon it. There was no power of amendment, for the defect was no clerical error or mistake, it is a substantial deficiency and not a mistake within 41 & 42 Vict. c. 26, s. 28, sub-section 2.

R. S. Wright, for the respondent.—The revising barrister has merely inserted into the notice words which it was evidently intended to contain. Objection on the ground of "residence" can only refer to six months' residence, and would have been so understood by the persons objected to. The amendment dealt, therefore, with a mere formal mistake and ought to be allowed.

Lord Coleridge, C.J.—I am of opinion that the notice of objection was bad. In order to be registered as a Parliamentary voter a freeman of Norwich must have resided within seven miles of the city polling-booth for six months, which are now computed from July 15. The Reform Act makes such residence indispensable. An objection, therefore, on the ground of non-residence should, if it is to be valid, state that the freeman has not lived within this distance for this period. This objection, which is dated August 12, simply says, "You do not reside at 12, Clifton-street, Norwich." Take it that Clifton-street is in Norwich, and that the non-residence imputed is proved, there is still nothing to show that the freeman either has or has not resided for the six months required by law. The objection, therefore, is no objection at all. It has been amended by the revising barrister; but there are limits to his statutory power of amendment. He can "correct" a "mistake," but the defect in this objection is in no sense a "mistake." The objection is accurate enough in point of expression; its fault is that it is bad, and the revising barrister in making it good has exceeded his power of amendment.

This appeal must be allowed.

Pollock, B.—I also think that the appellant must succeed. I find nothing in either the letter or the spirit of the enactments with respect to a Parliamentary registration which can be supposed to give a revising barrister such an extensive power of amendment as the respondent has contended for.

Hawkins, J.—I am of the same opinion. The error of the objector probably arose from a mistaken view of the law as to residence. Clearly, however, the revising barrister had no power to correct the notice.

Appeal allowed.

Solicitor for the appellant, *Gover*, for *English*, Norwich.

Solicitors for the respondent, *Sharpe, Parkers, Pritchard, & Sharpe.*

Q. B. Div. (Lord Coleridge, C.J., Pollock, B., and Hawkins, J.) Nov. 28.

Humphrey v. Earle. (a.)

Parliament — Registration — County vote — Notice of objection — Objector's place of abode — Registration Act, 1885 (48 Vict. c. 15), s. 18, schedule 2, Form I., No. 2.

A notice of objection to a county voter was signed as follows:—"G. C., of Churchyard, on the list of Parliamentary voters for the parish of Petersfield."

Held, that the notice was bad, as the objector's place of abode was insufficiently described under 48 Vict. c. 15, s. 18.

Case stated by the revising barrister for the Petersfield division of the county of Hants.

William Humphrey, the appellant, and sixteen other persons, were objected to as not entitled to have their names upon the occupiers' list for Hambledon. The notice of objection was signed as follows:—

"George Chapman,
"Of Churchyard,
"On the list of Parliamentary voters for the parish of
"Petersfield."

The objector's proper address was Churchyard, Petersfield.

It was contended for the appellant that there was not a sufficient description of the objector's place of abode, but the barrister held that the notice was good, and he accordingly erased the names of those objected to under it.

If the court should be of opinion that he was wrong the names were to be restored.

J. A. Foote, for the appellant.—The notice is bad because it does not follow the form given in the schedule to the Registration Act, 1875, which is ordained by section 18 of the Act. The word "Churchyard" is not a proper description of the objector's abode, and the word "Petersfield" cannot be supplied from what follows, because the objector might be on that list for a property qualification without residing in Petersfield.

He cited *Woollett* v. *Davis*, 4 C. B. 115; *Sheldon* v. *Flatcher*, 17 L. J. C. P. 34; *Norris* v. *Felcher*, L. R. 4 C. P. 417; *Jones* v. *Pritchard*, L. R. 4 C. P. 414.

The respondent did not appear.

Lord Coleridge, C.J.—I am of opinion that the revising barrister was wrong. The description of the objector's place of abode, as given in the notice of objection, is not sufficient. There is, it appears, a churchyard at Petersfield, but the notice does not say "the Churchyard," and the objector need not live at Petersfield. The point is technical, but were we to decide against it we should, I fear, be opening a door to the very looseness which the Act was intended to prevent. The appeal will, therefore, be allowed.

Pollock, B.—I am of the same opinion. The words "on the list of Parliamentary voters for the parish of Petersfield" tell the voter nothing as to the objector's address. Unless he were on some list of voters for the county division in which the parish is he could not legally object, but he may be on the list for the parish of Petersfield in Hants, and may yet live anywhere in England. The words "of Churchyard" are also perfectly vague. They may refer to any parish or hamlet whether in Petersfield division or elsewhere. As my lord has said, the point is technical; but on the other hand it is important that these notices should strictly follow the statutory form, and I think that the court ought not to establish a kind of *cy-près* doctrine for the benefit of careless objectors.

(a.) Reported by Cecil Chapman, Esq., Barrister-at-Law.

Hawkins, J.—I am of the same opinion. The form under the Act requires the place of abode of the objector to be stated in the notice of objection. Here the words which purport to comply with this requirement are "of Churchyard." These words are followed by the Parliamentary qualification of the voter "on the list of Parliamentary voters for the parish of Petersfield." Were the franchise and the power of objecting limited to persons residing in Petersfield, it might, perhaps, be possible to supplement the description of the place of abode out of that of the qualification, so as to make up an address. But as persons living in all parts of England may be on the Petersfield list of voters, there is nothing to connect the statement as to the place of residence with that as to the Parliamentary qualification.

Appeal allowed.

Solicitors for the appellants, *Lambert, Petch, & Shakespear*, for *F. J. & J. C. Warner*, Winchester.

Prob. Div. & Adm. Div. Admiralty. } Jan. 19.

"The Prinz Heinrich." (*a.*)

Action in personam to enforce salvage agreement—Circumstances in which shipowners were held liable to pay an amount agreed to be paid by shipmaster in respect of salvage of ship, freight, and cargo.

A steamship which, when laden with cargo, had stranded on a rocky coast in the Gulf of Tartary and there received injury, was towed off the shore by another steamship. Before these salvage services had been rendered, the master of the stranded steamship entered into a salvage agreement, whereby he agreed to pay the master of the salving steamship or his order, in the event of the stranded steamship being got off or coming off the rocks during the continuance of the agreement, £2,000, with an additional sum of £200 for every day the salving steamship remained in attendance. On reaching port the cargo of the salved steamship was discharged, and the salved steamship, before being repaired, was sold for the sum of £3,500, £2,200 of this sum being deposited in the hands of third parties in London pending the settlement of the claim of the salvors. On the discharge of the cargo of the salved vessel, a bond for general average was given to the shipowners by the owners of the cargo. Subsequently the owners, master, and crew of the salving vessel brought an action in this court for money due under the above agreement, and for a declaration as to their rights with respect to the deposited sum of £2,200 against the owners of the salved steamship and the persons with whom the £2,200 was deposited. Before the hearing of the action the £2,200 was paid into court.

The court pronounced the sum of £2,200 in court to be due to the plaintiffs for the salvage services rendered, as specified in the agreement; and ordered that, unless an appeal was brought from its decision within a fortnight, the £2,200 brought into court should be paid to the plaintiffs in satisfaction of their claim.

Observations as to the construction of agreements by shipmasters to pay money in respect of salvage services.

This was an action *in personam* instituted on the 7th of April, 1887, on behalf of the owners of the steamship *Fei Lung* against the Anglian Steam Navigation Co. and Alfred Edwards and Arthur Holland.

The writ of summons in the action was indorsed as follows:—"The plaintiffs' claim is for remuneration for salvage services rendered to the steamship *Prinz Heinrich* in the Gulf of Tartary in the month of June, 1886, and for money due under an agreement with regard to such services, and for a declaration that the plaintiffs are entitled to the sum of £2,200 deposited in the joint names of the said Alfred Edwards and Arthur Holland, or that the rights of the plaintiffs therein may be ascertained and declared." Appearances were entered both for the owners of *The Prinz Heinrich* and for Alfred Edwards and Arthur Holland, and as the two last-named defendants had only been made defendants as the parties in whose hands the sum of £2,200, mentioned in the indorsement of the writ, had been deposited, the judge in chambers, on the 23rd of July last, by consent of all parties ordered that such sum should be paid by them into court, there to remain on the same terms as it was held when deposited, and that, upon paying the said sum into court, the said defendants should be discharged. The sum of £2,200 was thereupon, in pursuance of this order, paid into court, and the suit was subsequently carried on against the owners of *The Prinz Heinrich* alone.

The statement of claim alleged (*inter alia*) that *The Fei Lung*, a British steamship of 1,180 tons register, on the 29th of June, 1886, came up with the German steamship *Prinz Heinrich* near Castrace Bay, in the Gulf of Tartary, when the latter vessel, with a cargo worth £14,000 on board, was fast ashore on some rocks which had pierced one of her ballast tanks, and that an agreement was then entered into between the two masters in the following words:—"Memorandum of agreement entered into this day between Robert Crawford, master of the steamship *Fei Lung*, on the one part, and Harmann Reinmann, master of the German steamer *Prinz Heinrich*, on the other part. Whereas the said Robert Crawford, master of the steamship *Fei Lung*, agrees to stand by and assist by towing to remove the said steamer *Prinz Heinrich* from her present position, for which services, duly performed, Harmann Reinmann, master of the German steamer *Prinz Heinrich*, agrees to pay Robert Crawford, master of the steamship *Fei Lung*, or his order the sum of £200 (two hundred pounds sterling) per day of twenty-four hours, dating from noon, June 29, 1886, and for every day or part of a day the steamship *Fei Lung* is engaged in attendance, or, if necessary, absent obtaining stores or fuel to enable her to carry on the contract, until the vessel is got off, or has been given twenty-four hours' notice that the services of the steamship *Fei Lung* will no longer be required. And in the event of the stranded steamer *Prinz Heinrich* being got off or coming off the rocks during the continuance of this agreement, the sum of £2,000 sterling over and above the aforesaid £200 sterling to be paid to Robert Crawford, master of the steamship *Fei Lung*, in same manner and at same time as daily pay."

The statement of claim further alleged that afterwards *The Fei Lung* stood by *The Prinz Heinrich* and ultimately succeeded in towing *The Prinz Heinrich* off the rocks and into a place of safety; that the owners of *The Prinz Heinrich* had taken a bond from the owners of the cargo of *The Prinz Heinrich* to secure the latter's share of the £2,200, the sum acknowledged by the master of that vessel to be due in respect of the services rendered by getting *The Prinz Heinrich* off the rocks, and that negotiations had then taken place with the defendants for referring the settlement of the salvage claim of the plaintiffs to arbitration, but without result, in the course of which negotiations the above-mentioned sum of £2,200 had been remitted to the manager in London of the Hongkong and Shanghai Banking Corporation with instructions to hold the same to the disposal of the arbitrators of the said salvage claim.

The defendants in their defence, whilst admitting the

(*a.*) Reported by C. F. Jemmett, Esq., Barrister-at-Law.

making of the agreement that *The Fei Lung* had attempted to tow *The Prinz Heinrich* off the rocks and that the defendants had taken a bond for general average from the owners of the cargo of *The Prinz Heinrich*, alleged that *The Prinz Heinrich* had floated off the rocks without assistance; that the master of that vessel had no authority to enter into the agreement on behalf of the defendants, the said agreement being wholly unjust and inequitable and, as to the sum of £2,000, wholly unreasonable; and that the plaintiffs were seeking to recover against the defendants in respect of services rendered to ship, cargo, and freight, though the defendants were liable in respect of ship and freight only. And, further, that *The Prinz Heinrich* had been sold without being repaired, and of the proceeds of the sale £2,200 had been stopped by the plaintiffs in the hands of the purchasers, and had been deposited, as stated in the statement of claim, after negotiations for arbitration not carried out.

Jan. 18, 19.—The case was now heard before Mr. Justice Butt, assisted by two of the Elder Brethren of the Trinity House.

Cohen, Q.C., and *Barnes*, for the plaintiffs, contended that the court ought to enforce the agreement, as a reasonable agreement which the master had authority from the defendants to make, binding them to pay the actual sum there specified: *The Cumbrian*, 6 Mar. L. C. 151; *Anderson* v. *The Ocean Steamship Co.*, 10 App. Cas. 107; and, further, that the defendants had so conducted themselves as to lead the plaintiffs to alter their position with regard to the cargo-owners of *The Prinz Heinrich*, and that the defendants were, therefore, equitably liable to pay the entire amount agreed on.

They also referred to *The Medina*, 25 W. R. 156, 2 P. D. 5.

Myburgh, Q.C., and *J. P. Aspinall*, for the defendants.—A shipmaster is only the agent of the shipowner to bind him to pay for salvage services either rendered to his property or for his benefit; and in this case it is clear that £2,200 is an exhorbitant sum to award as salvage for saving the ship and freight alone. Further, the master is the agent of the cargo-owner where a necessity exists for procuring salvage services to be rendered to the cargo, and there is nothing on the face of the agreement to show that it ought to be construed as solely made by him in his capacity of agent for the ship-owner, and not also as agent for the freighters. In support of this proposition they referred to *The Raisby*, 33 W. R. 938, 10 P. D. 114.

BUTT, J.—There has been a great deal of discussion as to whether *The Prinz Heinrich* floated off the rocks in consequence of the jettisoning of the cargo without the assistance of *The Fei Lung*. I do not really think that is a very material question, because the agreement between the two masters is that the sum of £2,000 should be paid, not in the event of *The Fei Lung* getting *The Prinz Heinrich* off, but in the event of *The Prinz Heinrich* being got off or coming off the rocks. It is not easy to say which is the true version. On the whole, I confess I lean to the belief that *The Prinz Heinrich* was towed off. The hawser had been made fast the night before. The density of the fog rendered it very prudent for *The Fei Lung* to have her anchor down so that she might not herself get on the rocks. In any case, I cannot help thinking it was a valuable service. *The Prinz Heinrich* had no anchor out at the time. She had had a kedge out, which kept coming home as they drew on it, and but for the hawser of *The Fei Lung The Prinz Heinrich* might just as well have gone further on to the rocks instead of coming off. The question I have now to decide is whether the agreement in this case is so unreasonable and inequitable that it cannot stand. The sum absolutely secured by the agreement was only £200, for if on the evening of the day on which the services began *The Prinz Heinrich* had filled with water so that she could not have been moved, the present salvors could have recovered £200 only. What, again, was the position of the vessel? She had been on the rocks for three days, two or three large pieces of rock had gone through her bottom, and were projecting into the ship. The water ballast tank had been pierced, the top having been forced up so that the water flowed into the forehold and rose to the level of the surrounding water. In that position there was some strain from the weight of water as well as from the working of the ship. There must have been a strain on the bulkhead, and if that had given way and the next compartment had filled, it was possible that the ship also might have filled. Again, too, it is clear from the entries in the log that the vessel was thumping on the rocks. The coast, too, was rather a barbarous one, and few, if any, ships were passing. The elder brethren consider that this vessel was in a serious and pressing danger, and that a prudent master would not have hesitated to have made this agreement. I agree with them, and I hold that it is neither unreasonable nor inequitable. It has been argued on behalf of the defendants that they are not liable to pay this amount, because it is one agreed on for the whole of the salvage remuneration, and that the shipowners have only to bear the same proportion as £3,500, the value of the ship, bears to £14,000, the value of the cargo. To that proposition I could under no circumstances assent. Even if my opinion were different, I consider that the owners of *The Prinz Heinrich* have so conducted themselves as to make themselves liable. I refer to the negotiations, the appointment of arbitrators, and the deposit of the sum of £2,200 specified in the agreement in a bank, all of which circumstances would tend to make the defendants now liable for the entire sum if they were not originally so liable.

The result has been to put the plaintiffs to rest in this matter, to lead them to believe that this claim was safe. It is wholly unreasonable to expect them, some two years after the services had been rendered, to obtain the larger part of the reward by arresting such portions of the cargo as they might chance to find after this lapse of time. But, further, I am of opinion that when the captain of a ship reasonably and properly enters into an arrangement for the salvage of the ship for a particular sum, he binds the shipowners to pay the agreed amount. The cargo is on board, and the shipowners need not part with it till they have obtained security for any payments which they may have to make or have made in respect of it. In this very case the shipowners took a bond from the owners of the cargo for the payment of the amount stated in the agreement. It is said that the case of *The Raisby* is opposed to this view, but I am of opinion that it is inapplicable to the facts of the present case. In *The Raisby* Sir James Hannen points out that the so-called agreement did not purport to extend the liability of the shipowners, and that it did not carry the matter further than if the captain of *The Raisby* had simply accepted the services of the salving ship. The distinction is thus drawn between an agreement generally to tow or to salve a ship, and one for a salvage service for a particular sum. Moreover, there are *dicta* in *Anderson & Co.* v. *The Ocean Steamship Co.* in favour of the view I am now expressing. Therefore, I am of opinion that this ground of defence fails, and I give judgment for the amount claimed, with costs.

The following minute was subsequently entered in the registry:—The judge pronounced the sum of £2,200 to be due to the plaintiffs for the salvage services by them rendered to the steamship *Prinz Heinrich* and her cargo, as specified in the agreement pleaded in the statement of claim, together with costs, and decided that, unless,

before the expiration of a fortnight, the defendants filed a notice of appeal, the said sum of £2,200 heretofore brought into court by the defendants, be paid out to the plaintiffs in satisfaction of their claim, and he condemned the defendants in the said costs. The judge further, on the application of the defendants' counsel, directed the execution of the decree to be stayed for a fortnight.

Solicitors for the plaintiffs, *Waltons, Bubb, & Johnson.*

Solicitors for the defendants, *Botterell & Roche.*

Court of Appeal.

From Chan. Div. March 9.

SELWYN *v.* GARFIT. (*a.*)

Mortgage—Power of sale—Proviso restricting exercise of power—Notice to mortgagor—Waiver—Purchaser's protection clause.

A mortgage dated November 22, 1880, *contained a covenant by the mortgagor to repay the principal money and interest on May* 22, 1881, *and contained a clause giving the mortgagee power to sell at any time after the expiration of six months from the date of the mortgage, but the clause was followed by a proviso restricting the exercise of the power of sale by the mortgagee, "unless and until default shall have been made in payment at the time hereinbefore appointed for payment thereof of some principal money or interest, . . . and" the mortgagee "shall have given a notice in writing" to the mortgagor "to pay off the moneys for the time being owing . . . and default shall have been made in the payment of . . . such moneys for three calendar months from the time of giving . . . such notice." The mortgage also contained the usual clause for the protection of purchasers on any sale by the mortgagee purporting to be made in pursuance of the power.*

In January, 1881, *the mortgagee gave notice in writing to the mortgagor requiring payment of the principal moneys. In June,* 1881, *the principal moneys being then unpaid, the mortgagee sold the mortgaged premises, in professed exercise of his power of sale, to a purchaser for value.*

Held, affirming Kay, J., *in an action for that purpose instituted in March,* 1885, *by the executrix of the mortgagor, that the sale should be set aside, and should stand only as a transfer of the mortgage, on the ground that the power of sale had not arisen in June,* 1881, *and could not arise until at least nine months from the date of the mortgage.*

Held, also, on the evidence, that neither the mortgagor nor the plaintiff, his executrix, had waived the benefit of the proviso restricting the exercise of the power of sale.

Observations on the effect of the clause protecting purchasers with reference to waiver by the mortgagor of the restrictive proviso.

Appeal from Kay, J.

By an indenture of mortgage dated the 22nd of November, 1880, Congreve Selwyn assigned certain personalty, subject to certain prior mortgages, to E. Green, his executors, administrators, and assigns, with a proviso for redemption on the payment by Selwyn to Green, on the 22nd of May, 1881, of the sum of £800 and interest. The deed contained a power of sale enabling the mortgagee, his executors, administrators, or assigns, to sell the mortgaged premises "at any time or times after the expiration of six calendar months from the date" of the mortgage, with a proviso limiting the exercise of the power of sale as follows:—"Provided that the said E. Green, his executors, administrators, or assigns, shall not exercise the said power of sale unless and until default shall have been made in payment at the time hereinbefore appointed for payment thereof of some principal money or interest, the payment whereof is intended to be hereby secured, and he or they shall have given a notice in writing to the said Congreve Selwyn, his executors, administrators, or assigns, to pay off the moneys for the time being owing on the security of these presents, or left such notice at his usual or last-known place of abode in England, and default shall have been made in the payment of the whole or part of such moneys for three calendar months from the time of giving or leaving such notice, or unless and until the whole or some part of some half-yearly payment of interest which shall become due . . . shall have become in arrear for three calendar months . . . ." There was also a proviso that, upon any sale purporting to be made in pursuance of the aforesaid power in that behalf, the purchaser or purchasers should not be bound to see or inquire as to the propriety or regularity of such sale, and that, notwithstanding any impropriety or irregularity whatsoever in any such sale, the same should, so far as regarded the safety and protection of the purchaser or purchasers, be deemed to be within the aforesaid power in that behalf, and be valid and effectual accordingly, and the remedy of the mortgagor for any breach of the stipulations aforesaid should be in damages only.

On November 30, 1880, Congreve Selwyn, the mortgagor, created a further charge on the mortgaged premises in favour of Judith Southerden.

On January 19, 1881, Congreve Selwyn was served with notice in writing by the mortgagee Green, requiring payment of the principal and interest due to him.

By a deed dated the 20th of June, 1881, after reciting the mortgage to Green of November 22, 1880, and that Green, in exercise of the power of sale contained in that mortgage, had agreed with Frances Garfit for the absolute sale to her of the mortgaged premises, Green, in consideration of the payment of £740, assigned the mortgaged premises to Frances Garfit, her executors, administrators, and assigns, absolutely.

The mortgagor, Congreve Selwyn, died on the 22nd of May, 1882, and the plaintiff, Alice Selwyn, was his widow and executrix.

On the 15th of March, 1883, Southerden, the mortgagee subsequent to Green, issued a writ in an action against Garfit, Green, and Alice Selwyn, claiming to have the sale of the 20th of June, 1881, by Green to Garfit, set aside, either absolutely, or to have it declared a transfer only of the mortgage of the 22nd of November, 1880, and not an absolute sale. A defence to that action was delivered by Green on the 8th of August, 1883, but that action was, in June, 1885, dismissed for want of prosecution by the plaintiff Southerden.

On March 14, 1885, the present action was commenced by Alice Selwyn, as executrix of the mortgagor, Congreve Selwyn, against Garfit and Green, claiming to have the sale of the 20th of June, 1881, set aside altogether or declared to be only a transfer, on the ground that the power of sale contained in the mortgage of November 22, 1880, was not exercisable on the 20th of June, 1881, no proper notice requiring payment of principal and interest having been given as required by the mortgage of November 22, 1880, the period of three months not having elapsed since the moneys secured by the mortgage became due. Southerden, the mortgagee subsequent to Green, was also made a defendant to this action. Kay, J., held that the power of sale contained in the mortgage to Green of November 22, 1880, was not exercisable on June 20, 1881, and declared that the deed of June 20, 1881, should be set aside as a sale and stand

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

only as a transfer to Garfit of Green's mortgage. The defendant Garfit appealed.

Millar, Q.C., and *Simmonds*, for the appellant.—On May 22, 1881, six months after the date of the mortgage to Green, the principal money due on that mortgage became payable, and the power of sale was then exercisable, as Green had given notice to the mortgagor requiring payment three months previously—viz., on January 19, 1881. The three months' notice can be effectually given within the six months period. The mortgagor, before the sale by Green to Garfit, knew that Green intended to sell in exercise of his power of sale, and raised no objection. The lapse of time, from June, 1881, to March, 1885, when this action was brought, is evidence of waiver and acquiescence. The appellant, as a purchaser for value from a mortgagee professing to sell under the power of sale contained in the mortgage, is not concerned with the validity or invalidity of the notice. [COTTON, L.J.—If, on the true construction of this power to sell, the mortgagee could not exercise the power till nine months after the date of the mortgage, the purchaser must have known at the date of the purchase that the power of sale had not arisen.] The power to sell became exercisable on May 22, 1881. The proviso as to the exercise of the power of sale is in the common form: Davidson's Precedents, 4th ed., vol. 1, p. 277; Conveyancing Act, 1881, s. 19 (1) i., s. 20 (i.).

They referred to *Dicker* v. *Angerstein*, 24 W. R. 844, 3 Ch. D. 600.

Marten, Q.C., and *Kenyon Parker*, for the respondent, the plaintiff, were called on only with respect to the questions of waiver of the proviso relating to the non-exercise of the power of sale, and as to the proviso for the protection of purchasers.—First, as to waiver, the mortgagor was not in a position to waive the proviso as to non-exercise of the power of sale as he had at the time mortgaged the equity of redemption to Southerden, who had no notice of the intention of Green, the mortgagee, to sell to the appellant. Secondly, the appellant, the purchaser, through her solicitor, knew of the fact of the existence of Southerden's charge, and also that Southerden had no notice of Green's intention to sell.

They referred to *Hoole* v. *Smith*, 29 W. R. 601, 17 Ch. D. 434; *Jenkins* v. *Jones*, 8 W. R. 270, 2 Giff. 99.

Grosvenor Woods, for Southerden, the second mortgagee.

Millar, Q.C., in reply.—The mortgage to Southerden did not comprise the whole of the property mortgaged to Green. The point as to the existence of the mortgage to Southerden preventing a waiver by the mortgagor was not taken by the defendant Green in his defence.

COTTON, L.J.—This is an appeal from a decision of Kay, J., in an action to set aside a purchase from a mortgagee, by which he declared that on the true construction of the power of sale contained in this mortgage, the power of sale had not arisen, and that the sale accordingly should be set aside. Was he right as to the true construction of this power? I need not refer to the subject-matter of the mortgage, it is only necessary to look at the power of sale. [The Lord Justice read the words of the power of sale, and continued:—] The mortgagee is first of all given a power to sell at any time after the expiration of the six months term fixed for redemption; but then there is a proviso containing an express restriction on the exercise of that power. [The Lord Justice read the proviso referred to, and continued:—] In January, 1881, and, therefore, before the expiration of the six months term, the mortgagee served a notice on the mortgagor—not that after the expiration of three months, payment would be required, but that payment was then required. The money was not paid, and the mortgagee sold the mortgaged premises in June, 1881. Was that a good sale? Kay, J., held it was not, and I think he was perfectly right. A notice must be given, and there must have been default in payment for three months after the notice requiring payment has been given in order that the power of sale might arise. In my opinion the terms of the proviso are not complied with unless there has been a default in making payment for three months after the notice requiring payment; and there can be no default in not paying until that which is required to be paid has become payable, until then there is no obligation to pay. As between the mortgagor and mortgagee the power of sale and the proviso must be read together, and regard must be paid to the whole clause. Here, in my opinion, the power of sale could not be exercised until at least three months had elapsed after May 22, 1881.

As to the clause protecting purchasers, it is not intended to apply to a case where the purchaser, when making the purchase, knows that there has not been a compliance with the terms of the proviso restricting the exercise of the power of sale. The purchaser cannot, in that case, rely on the protection clause. Other objections have been raised by the appellant here, though not pressed before Kay, J. It has been urged that the proviso restricting the exercise of the power of sale might be waived, and that there had been a waiver here, or that, at all events, the purchaser was entitled to assume there had been a waiver. But, in my opinion, the protection clause does not enable a purchaser to assume that a restriction on the exercise of the power of sale, the existence of which restriction the purchaser is aware of, has been waived by the mortgagor; and here the purchaser must be taken to have known of the existence of this restriction just as well as the mortgagee. Again, there is no evidence of waiver, in my opinion, in this case. It was said that the correspondence showed that the mortgagor and his wife knew this sale would take place, but some of the letters showed that they thought it was only to be a transfer of the mortgage. As a matter of fact the mortgagor, at the time of the sale, was not in a position to waive the restriction, as he had mortgaged his equity of redemption. I asked Mr. Millar what prejudice the purchaser had suffered by the delay of the plaintiff in bringing this action, and he could only suggest that the purchaser had been allowed to remain in possession of the premises as if they were her own. That is no prejudice. In my opinion, on these grounds, the appeal fails.

LINDLEY, L.J.—I am of the same opinion. On the question as to the true construction of the power of sale I have little to say. I concur in the view taken by that by Kay, J., and Cotton, L.J. No sale of the premises could validly be made until at least nine months after the date of the mortgage. Kay, J., was perhaps a little hasty in as it were nonsuiting the purchaser when against him on the question of the construction of the power. I thought it was possible that the purchaser might have a right to uphold his purchase on the grounds that the mortgagor had waived his right to insist on the restriction. We have heard the purchaser on that point, and I am satisfied that there has been no miscarriage of justice, and that there could have been no waiver, on account of the fact of the existence of the subsequent encumbrance.

BOWEN, L.J.—On the broad question as to the construction of the power I have nothing to add. The other point I thought at first might have something in it. The delay and inaction of the mortgagor and the plaintiff an inference might *primâ facie* be raised of the fact of waiver. Delay or inaction, no doubt, does not of itself constitute a waiver, but it may be evidence of waiver, and if you can show that the mortgagor could waive and

said nothing, and allowed the sale to go on, then—though silence is not the same thing as speech—it may lead to the inference that consent was really given to the sale. But here the mortgagor was not in a position to consent to the sale, as he had parted with the equity of redemption in part of the mortgaged premises on November 30, 1880. That made it clear to me that the omission to plead waiver was intentional and to save expense, and when Mr. Millar was asked whether he was willing to go back and be allowed to amend his pleading he was mute. Therefore the point as to waiver fails. As to the effect of the protection clause in favour of purchasers, I do not feel quite satisfied that it could not apply to a case where the validity of the exercise of the power of sale depends on a condition precedent contained in the proviso being waived, when the mortgagor could as a matter of fact waive it. The case of *Parkinson* v. *Hanbury*, 15 W. R. 642, L. R. 1 H. L. 1, which was relied upon by Kay, J., as conclusive on this point, seems to me distinguishable from the present case, because in that case the notice to sell, the giving of which was requisite, was not given, and could not possibly have been given. I should like, therefore, to consider the point, as to the effect of the protection clause in favour of purchasers, still open.

Appeal dismissed.

Solicitors for the appellant, *Dubois, Reed, & Williams*, for *Clark, Sudbury, Williams, & Green*, Ludlow.

Solicitor for the respondent, the plaintiff, *Robert Cory Hanratt.*

Solicitors for the subsequent encumbrancer, *R. G. Marsden & Wilson.*

From Q. B. Div. [& Q. B. Div.] — Dec. 8; Feb. 24; March 22.

In re POLLARD. (*a.*)

Solicitor—Delivery of bill of costs—Non-contentious business—Jurisdiction of Master of the Rolls—6 & 7 Vict. c. 73, s. 37—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *ss.* 16, 34 (2)—*Judicature Act*, 1881 (44 & 45 *Vict. c.* 68), *ss.* 2, 24.

By section 37 *of* 6 & 7 *Vict. c.* 73, *power was conferred on the Lord Chancellor and the Master of the Rolls to order delivery of a solicitor's bill of costs where no part of the business contained in such bill had been transacted in any court. Application having been made to a judge of the Queen's Bench Division for such an order,*

Held (*reversing the decision of the* Divisional Court), *by* Fry *and* Lopes, L.JJ., Lord Esher, M.R., *dissenting, that the effect of the Judicature Acts was to transfer this power to the High Court, and that it might be exercised by any judge of that court, but that since, by section* 34, *sub-section* 2, *of the Judicature Act*, 1873, *matters under an Act of Parliament, by which exclusive jurisdiction in respect of such matters had been given to the Court of Chancery, were assigned to the Chancery Division, the application was irregular.*

This was an appeal by Messrs. Stevens, Bawtree, & Stevens, solicitors, from a decision of Field, J., at chambers, refusing to order delivery by Mr. S. R. Pollard, solicitor, of a bill of costs. No part of the business in respect of which the delivery of the bill of costs was sought had been transacted in any court of law or equity. Field, J., was of opinion that a judge of the Queen's Bench Division had no power to make such an order.

(*a.*) Reported by A. H. TODD and A. P. PERCEVAL KEEP, Esqs., Barristers-at-Law.

J. E. Bankes, for the appellants.—The learned judge had jurisdiction by statute and at the common law. The statute 6 & 7 Vict. c. 73, s. 37, gives jurisdiction both to the Lord Chancellor and to the Master of the Rolls in such matters. The jurisdiction of the Master of the Rolls has been transferred to the High Court of Justice by the Judicature Act, 1873, s. 16, excepting as to certain matters connected with the records. By the Judicature Act, 1881, s. 2, the Master of the Rolls became a judge of the Court of Appeal. Apart from the Solicitors Act, 1843, the common law judges had jurisdiction to order officers of the court to send in their bills of costs: *Clarkson* v. *Parker*, 7 Dowl. 87; *Smith* v. *Dunes*, 4 Ex. 32. It would be very inconvenient if it were necessary to apply to the Master of the Rolls, who has no chambers, in such matters.

Murphy, Q.C., and *S. Woolf*, for Mr. Pollard, referred to *In re Chaffers*, 15 Q. B. D. 467. [They were stopped.]

POLLOCK, B.—This is an appeal from the judgment of Field, J., refusing to order the delivery of a solicitor's bill for the purposes of taxation, on the ground that all the matters mentioned in the affidavit as having been transacted by the solicitor consisted of business which had been done out of court. The question is, whether the judge had jurisdiction to make the order. We think he had not. There used to be a broad distinction between the office of solicitor and that of attorney, the former being an equity, the latter a common law, practitioner. They were admitted as officers in the courts in which they were to practise, and at common law no court had jurisdiction over a solicitor or attorney of a different court to order them to do anything. The Legislature altered that by giving to any one common law court power to deal with the officer of any other common law court. That was the Act of 2 Geo. 2, c. 23, which is treated of in Lush's Practice, vol. i., pp. 298, 299, where the learned author says that "it is clear that, to give a court jurisdiction, some of the business must have been done in court." Up to the Act of 1843 no power existed in the common law courts to order the delivery by a solicitor of a bill of costs to his client. The case of *Becke* v. *Wells*, 1 C. & M. 75, shows this to have been the case. The costs which have been incurred in this case are, as I have said, for no business transacted either in a common law or chancery court. Then the only right that the applicant has is to go before the Lord Chancellor or the Master of the Rolls. In Lush's Practice it is said that the Vice-Chancellors also have power to deal with such matters as delegates of the Lord Chancellor, and no doubt that statement is correct, because many Acts have been passed enabling the Vice-Chancellors to act as such delegates. But nothing has been shown to us to prove that this authority was given to the Lord Chancellor and the Master of the Rolls merely as judges of the court of equity, and the contrary would seem to be the case, because they are appointed to undertake such matters *so nomine*. The reason, no doubt, was that common law judges knew nothing about what is called family business, whereas most of the matters that came before the Court of Chancery are connected with administration and such matters. It has been argued that section 16 of the Judicature Act of 1873 transferred the jurisdiction of the Master of the Rolls as judge or master of the Court of Chancery to the High Court of Justice, with certain exceptions. But it does not follow that jurisdiction which had been given to the Master of the Rolls as such, by an Act which does not state that it has been given him as a judge of the court of equity, has been also transferred. The jurisdiction which is conferred in express terms by one statute must be taken away in terms as express by another, or we cannot hold that it has in fact been put an end

to. The argument from inconvenience cannot prevail against the clear language of a statute.

Hawkins, J.—I am of the same opinion.

Messrs. Stevens, Bawtree, & Co. appealed.

Crump, Q.C., and *J. E. Bankes*, for the appellants.

Murphy, Q.C., and *Sidney Woolf*, for the respondent.

The arguments were the same as in the court below.

Cur. adv. vult.

March 22.—Lord Esher, M.R.—In this case a summons was taken out before a master for an order for the delivery of a bill of costs by a solicitor, none of the business in respect of which the costs were incurred having been transacted in any court of law or equity. The master refused the application, and his refusal was upheld by Field, J., at chambers, and by a divisional court. The matter really depends on the true construction of section 37 of 6 & 7 Vict. c. 73, and on the effect to be given to the Judicature Act, 1873. It is necessary, I think, first to consider the position of the Master of the Rolls before the passing of the Act 6 & 7 Vict. c. 73. He had two capacities and twofold duties. He was, in the first place, a judge of the Court of Chancery, but he had another capacity wholly distinct and independent from that office. He had a separate office such as was possessed by no other chancery judge. He had the custody of the roll of solicitors, and he had great and independent powers regarding solicitors. He dealt then, as he deals now, with questions as to the admission of solicitors, and then, as now, his jurisdiction in that behalf was subject to no appeal. The Petty Bag Office, where the roll of solicitors was kept, was subject to his jurisdiction alone, and he exercised his functions in respect of solicitors wholly independently of the Court of Chancery. As a judge of the Court of Chancery he had similar powers and jurisdiction to the Vice-Chancellors, although they were deputies of the Lord Chancellor, which he never was.

Such being the state of things before the Act of 1843, by section 37 it was enacted that, where delivery of a bill of costs was sought in respect of business no part of which had been transacted in any court of law or equity, or where any part of the business had been transacted in the Court of Chancery, the power to refer the bill for taxation was given to the Lord Chancellor or the Master of the Rolls. The section further provided for the reference of a bill for taxation by a judge of the Courts of Queen's Bench, Common Pleas, Exchequer, &c., where any part of the business in respect of which the costs had been incurred had been transacted in any such court. The latter part of the section provides that "it shall be lawful for the said respective courts and judges, in the same cases in which they are respectively authorized to refer a bill which has been so as aforesaid delivered, sent, or left, to make such order for the delivery, by any attorney or solicitor, of such bill as aforesaid . . . in the same manner as has heretofore been done as regards such attorney or solicitor by such courts or judges respectively, where any such business had been transacted in the court in which such order was made." I do not think that it was ever intended to designate the whole Court of Chancery by naming two individual judges of that court, and I think that to hold that the power bestowed by this Act on the Master of the Rolls and the Lord Chancellor was conferred on the Court of Chancery would be to misconstrue the statute. The jurisdiction was, in my opinion, given to the Lord Chancellor and the Master of the Rolls in their individual official capacities, and not as judges of the Court of Chancery. No doubt, since the Vice-Chancellors were appointed to assist the Lord Chancellor in his administrative functions, the powers bestowed on him by the Act were delegated to them, but they did not interfere with the jurisdiction of the Master of the Rolls.

As to business of which part had been transacted in the Court of Chancery, then the Court of Chancery had power to order the delivery of the bill; but when no part of the business was contentious, then the jurisdiction to order delivery of the bill was given to the Master of the Rolls and the Lord Chancellor only, and in their official capacity, not as judges of the Court of Chancery. This jurisdiction was always exercised by the Master of the Rolls. When the business was purely non-contentious petition was sent to the secretary to the Master of the Rolls, and was attended to by him. It is true that the subsequent part of the section speaks of courts and judges. I think those were the natural words to use. Courts have the power where part of the business was transacted in courts—the Master of the Rolls and the Lord Chancellor are referred to as judges. The power given by that section was invariably used down to the Judicature Act, 1873. Now does that Act alter the state of things? In my opinion section 16 only refers to the jurisdiction of the Master of the Rolls as a judge of the Court of Chancery, and does not affect his official character as Master of the Rolls. His jurisdiction as guardian of the roll of attorneys was not affected. How is his position affected by 44 & 45 Vict. c. 68? That Act preserves, by section 2, the duties of the Master of the Rolls excepting those as a judge of the High Court of Justice. In my opinion, therefore, his jurisdiction in his official capacity is still extant. Section 1 of 44 & 45 Vict. c. 68 assumes that he had duties other than those as a judge of the High Court of Justice. It is idle to say that those were solely his duties as head of the Record Office. Those other duties were his jurisdiction over attorneys. In my opinion that jurisdiction is still vested in him, and he still can order the delivery of a bill of costs where the business has been non-contentious. It is true that he has no longer a secretary, but the duties formerly performed by his secretary are delegated to the principal registrar of the Chancery Division. Therefore, whether I am right or wrong, the jurisdiction will be exercised by the same person in the same way. But I am of opinion that the Judicature Act was never intended to transfer any jurisdiction from any office then remaining in existence to any other office. There is absolutely no instance of such a transfer. I agree, therefore, with the court below, that a judge of the High Court has no power to order delivery of a bill, and I think that Field, J., and the Divisional Court were right in rejecting the jurisdiction. In my opinion this appeal should be dismissed.

Fry, L.J., read the judgment of Lopes, L.J., and himself:—

In this case persons alleging themselves to be clerks of Mr. Pollard, a solicitor, have taken out a summons in the Queen's Bench Division for delivery by him of a bill of costs in respect of business alleged to have been done for them, of which no part was transacted in any court of law or of equity. The Divisional Court have rejected the application, on the ground of the want of jurisdiction.

The application is made under the provisions of the 37th section of the statute 6 & 7 Vict. c. 73. By that section, on the delivery of a bill of costs, power was given to the Lord Chancellor and the Master of the Rolls to refer the bill to taxation in case the business charged for, or any part of it, had been (1) transacted in the High Court of Chancery or in any other court of equity, or (2) in bankruptcy, or (3) in lunacy, or (4) in case no part of such business had been transacted in any court, which is the case of the bill now in question. A similar power was given to the common law courts at Westminster and the Court of Pleas at Durham, or any judge of either of them, to refer bills relating to business

now transacted in any other courts—*i.e.*, courts not of equity, bankruptcy, or lunacy. The enactment went on to provide that the court or judge making such reference might restrain the solicitor from suing pending the reference; and, further (and this is the portion of the statute invoked by the present application), it gave "the said respective courts and judges," in the same cases in which they were respectively authorized to refer a bill delivered, power to make an order on the solicitor or attorney for delivery of his bill. This statute was only an enlargement of a jurisdiction over solicitors which existed previously, and certainly was exercised by the High Court of Chancery over solicitors, who, like attorneys, were officers of the court. In our opinion the powers thus given by statute were given to the Lord Chancellor and Master of the Rolls as judges; the clause vested in them judicial powers—*e.g.*, of making orders and restraining actions, and any breach of these orders would have been a contempt of court; the clause vested in them judicial discretions—*e.g.*, in respect of the discretions and conditions with and subject to which taxation was to be directed after a bill had been delivered for more than a month. Moreover, in the very words giving the powers of restraining actions, of imposing conditions on taxation after a month, and of ordering the delivery of a solicitor's bill, the Lord Chancellor and the Master of the Rolls are included in the general words "courts and judges," unless under the description of judges they never took any of these powers.

The jurisdiction thus vested in the Lord Chancellor and the Master of the Rolls was, before the passing of the Judicature Act, exercised in this way:—Orders under the section in question were divided into two classes—first, orders of course, where there was no dispute and no special circumstances requiring the exercise of a judicial mind; and, secondly, orders not of course, as where there was some matter in dispute or some special circumstance that demanded attention. Orders of course were made on petitions of course by the secretary of the Master of the Rolls. Special orders were made by the Master of the Rolls or any of the Chancellors (who, by their appointment, were bound to assist the Lord Chancellor in the discharge of his judicial duties) on summons in chambers: 2 Daniel's Practice, 1734, 5th ed.; *In re Inderwick*, 32 L. J. 541.

Thus matters stood at the passing of the Judicature Act, 1873. By the 16th section of that Act there was transferred to and vested in the High Court the jurisdiction then vested in or capable of being exercised by the Court of Chancery as a court of equity, including the powers given to the Court of Chancery, or to any judge of that court by statute. The jurisdiction and powers conferred by the statute 6 & 7 Vict. on the Lord Chancellor and the Master of the Rolls are, we think, sufficiently described by these words; and, consequently, we are of opinion that the power of ordering the delivery of a bill for business done in the Court of Chancery or not done in any court was taken out of the Lord Chancellor and the Master of the Rolls as judges of the late Court of Chancery, and was vested in the High Court, and in the Lord Chancellor and the Master of the Rolls as officers of that court.

If it were not so vested in the High Court, the judges of the Chancery Division would have no power to make orders for taxation of bills for business done in the Chancery Division or done out of court, and the orders of this kind which have been made daily are *ultrà vires*.

Thus matters stood till the passing of the statute of 1881, under which the Master of the Rolls ceased to be a member of the High Court, and, consequently, lost the power he had previously possessed of making original orders of the High Court, including the power of making such orders under the Solicitors Act. The 24th section of the Act of 1881 saved to him the disciplinary powers over solicitors which he possessed in common with the chiefs of the common law divisions, but contained no saving of the power to refer to taxation or to direct delivery of bills of costs.

Under the provisions of ord. 62, r. 18, the duties which were performed by the secretary of the Master of the Rolls when he was a judge of the High Court in making orders of course under the Solicitors Act are now vested in the registrar of the Chancery Division. The order sought in the present case, involving a question in dispute—namely, the retainer by the applicants—could not have been properly made by the registrar of that division.

For the reasons given we are not able to agree with the conclusions of the Divisional Court, that the original power to order the delivery of a solicitor's bill is still vested in the Master of the Rolls; on the contrary, we are of opinion that it has been transferred to the High Court, and may be exercised by any judge of that court.

But though we hold that the master and judge of the Queen's Bench Division had jurisdiction to make the order, we are of opinion that the application was irregular. Under section 34, sub-section 2, of the Judicature Act, 1873, the business to be done under the Solicitors Act, so far as it had previously been exercised by the Court of Chancery, was assigned to the Chancery Division as a matter under an Act of Parliament by which exclusive jurisdiction in respect of the matter had been given to the Court of Chancery or the judge thereof.

The applicants were, therefore, irregular in their application, and, considering the well-known practice of applying for orders of this description to the judges of the Chancery Division, we think their conduct in applying to the master of the Queen's Bench Division blameworthy.

Under these circumstances we think that the proper course will be to allow the applicants to obtain the leave of the President of the Chancery Division within fourteen days from to-day to transfer the matter to the Chancery Division.

As the appellants have applied to the wrong division, we think that, notwithstanding the modified order which we give them, they ought to pay the costs of this appeal.

Order accordingly.

Solicitors for the appellants, *Stevens, Bawtree, & Stevens.*

Solicitor for the respondent, *S. R. Pollard.*

From Q. B. Div. Feb. 9, 10, 23.

Reeve *v.* Berridge. (*a.*)

Agreement for purchase of lease—Constructive notice of contents of lease—Onerous covenants.

Upon an agreement to purchase a lease, the purchaser has constructive notice of the covenants of the lease only when he has a fair opportunity of ascertaining what those covenants are.

Hyde *v.* Warden, 26 *W. R.* 201, 3 *Ex. D.* 72, *followed.*

Appeal from the decision of Stephen, J.

The action was brought to recover £100 as liquidated damages for non-performance of an agreement, dated the 13th of August, 1886, for the purchase by the

(*a.*) Reported by Spencer L. Holland, Esq., Barrister-at-Law.

defendant from the plaintiff of a leasehold house, by which agreement the plaintiff undertook to make out a title to the house as leasehold. The defendant refused to complete the purchase, on the ground that the lease contained certain onerous covenants which were not usual covenants. The plaintiff contended that the defendant, having notice that the property was leasehold, must be taken to have notice of all the covenants in the lease.

The plaintiff, at the date of the agreement of the 13th of August, 1886, had an equitable right to demand the granting of a lease by the freeholder, but the lease had not, in fact, been granted. The defendant had no opportunity of inspecting the agreement under which the plaintiff was entitled to call for a lease, nor of ascertaining the provisions of that agreement.

At the trial of the action before Stephen, J., without a jury, the learned judge held that the defendant must be taken to have notice of all the covenants of the lease, but gave judgment for the defendant, on the ground that the plaintiff had, at the time for completion of the agreement with the defendant, only an equitable interest, and therefore had not that which he had contracted to sell.

The plaintiff appealed.

Gully, Q.C., and *H. A. Forman*, for the appellant.—The purchaser of leasehold property has constructive notice of the contents of the lease: *Grosvenor* v. *Green*, 7 W. R. 140. In that case Wood, V.C., expressly distinguished a contract to purchase leasehold from a contract to take an underlease. This case could not be questioned but for the decision in *Hyde* v. *Warden*, 26 W. R. 201, 3 Ex. D. 72, in which case *Grosvenor* v. *Green* is cited with approval.

They also cited *Martin* v. *Cotter*, 3 Jo. & Lat. 496; *Hall* v. *Smith*, 14 Ves. 426; *Pope* v. *Garland*, 4 Y. & C. 394; *Walter* v. *Maunde*, 1 Jac. & W. 181; *Cosser* v. *Collinge*, 3 M. & K. 283.

R. O. B. Lane, for the defendant.—The person who contracts to take an underlease has constructive notice of the contents of the original lease only when he has had a fair opportunity of ascertaining what they were, *Hyde* v. *Warden*; the reason being that restrictive covenants diminish the value of that which the under-lessee has contracted to take. The same reasoning applies to the case of an assignment of a lease.

Other points were raised in the argument which do not call for a report.

Cur. adv. vult.

The judgment of the COURT (Lord ESHER, M.R., and FRY and LOPES, L.JJ.) was delivered by

FRY, L.J.—The plaintiff in the present action had, on the 11th of March, 1886, entered into an agreement with Mr. Roupell, the owner of a building estate in Kent, under which he was entitled to leases of certain plots of land when houses were built thereon.

On the 13th of August, 1886, the plaintiff and defendant signed two documents which constitute an agreement between them. It was at one time suggested by the defendant that these documents did not disclose all the necessary terms of a contract, and that they did not satisfy the Statute of Frauds. These objections were very properly abandoned by the defendant, and therefore require no further notice from us.

By this agreement of the 13th of August the plaintiff Reeve agreed to sell, and the defendant Berridge agreed to purchase for £615, a house which had been built on one of the plots of land for the residue then unexpired of a term of about eighty and a half years from the 29th of September, 1886, at a ground-rent mentioned. The vendor agreed to make out a title to the property as leasehold, a deposit of £20 was paid, and by the agreement the vendor agreed, on payment on the 29th of September then next, to execute an assignment to the purchaser, and it was stipulated that if either party refused to perform the agreement on his part he should pay to the other of them who should be willing to complete the sum of £100, exclusive of the deposit; and it was further provided that on completion the purchaser should enter into the usual covenants to indemnify the vendor against the rent and covenants of the original lease.

The defendant, on the 29th of September, refused to complete, and the vendor, the plaintiff, has sued him for the £100, the stipulated payment for default, and £50 received on account of the purchase-money in addition to the original deposit of £20.

The defendant has not only defended, but has by counter-claim asserted that he is entitled to the £100, on the ground that it is the plaintiff who has really refused to perform the contract, and to the £70 already paid on account of the purchase-money.

The learned judge who tried the case has given judgment for the defendant on both claim and counter-claim. From this the plaintiff has appealed.

Two points were argued before Stephen, J., and also before us. The plaintiff asserted that he was able and willing to complete on the 29th of September, the day named for completion. The defendant denied this, and contended, first, that the plaintiff could not make out such a title as he was by law bound to do by reason of the existence of onerous covenants in the lease, and secondly, that the plaintiff had not, at the time fixed for completion, any lease vested in him which he could convey, and that the equitable interest, which alone he possessed on the 29th of September, would not support his right to enforce payment from the defendant. The learned judge decided for the plaintiff on the first of these contentions, and against him on the second.

The first point arises in this way. The vendor was under his building agreement, to take the lease subject to certain onerous covenants, such as one against carrying on certain trades, which are admitted not to be usual or ordinary covenants; the vendor, therefore, proposed to assign to the purchaser a lease thus burthened. To this the purchaser objected, and said that he was entitled to a lease subject only to the ordinary covenants. To this the vendor replied that the terms of the contract itself disclosed the fact that the property was leasehold, and that the purchaser must be taken to have had notice of the lease, and of all its contents, and consequently that he is precluded from now raising any objection based on the existence of anything in the lease. It is plain from the facts of this case that the lease was in fact not in existence at the date of the contract, that the agreement between the vendor and Mr. Roupell was not in fact shown to the purchaser, and that no opportunity was offered to the purchaser of inspecting the agreement or learning any particulars with relation to its contents. The question, therefore, is how far the mere notice of the lease in the contract, without any opportunity of inspecting it, or the agreement for a lease, affects the purchaser with notice of all the contents of the agreement. This question appears to us to be really covered by the authority of the case of *Hyde* v. *Warden*. In that case the question arose whether taking possession of property agreed to be under-leased with notice of the existence of the lease, was a waiver of all objections based on the terms of the lease. The question, therefore, so far as regards the question of notice, was the same as in the present case, and the court was pressed to decide that notice of the lease was notice of its contents, and on the authority of various cases including *Cosser* v. *Collinge*, the court rejected the argument and said, "We think it may be considered as settled that the principle of that case can only be applied where (as indeed was the case in *Cosser* v. *Collinge*) the

defendant had a fair opportunity of ascertaining for himself the provisions of the original lease": see *Grosvenor* v. *Green*; *Smith* v. *Capron*, 7 Hare, 185.

It was argued before us that the question in *Hyde* v. *Warden* arose on a contract for a sub-lease, whilst in the present instance the question arises with relation to a contract for the assignment of a lease. But we are of opinion that there is no substance in such a distinction, because in both cases alike the purchaser must know that his vendor can confer on him no interest except one, subject to the covenants contained in the lease, and the effect of notice must, therefore, be alike in both cases.

Criticisms on the case of *Hyde* v. *Warden* were also addressed to us, and, in particular, we were asked to hold it inconsistent with the case of *Grosvenor* v. *Green*, before Lord Hatherley when Vice-Chancellor. But in this court we are bound by the authority of *Hyde* v. *Warden*, and we cannot but observe that there is great practical convenience in requiring the vendor who knows his own title to disclose all that is necessary to protect himself rather than in requiring the purchaser to demand an inspection of the owner's title-deed before entering into a contract, a demand which the owners of property would in some cases be unwilling to concede, and which is not, in our opinion, in accordance with the usual course of business in sales by private contract.

Upon this point, therefore, we are not able to concur with Stephen, J., and we regret that the case of *Hyde* v. *Warden* was not cited to him.

The conclusion at which we have arrived on this point is sufficient to support the judgment of the court below, and it is therefore unnecessary to enter upon the inquiry as to the other objections to the vendor's title, on which Stephen, J., decided in favour of the purchaser. It was not argued that, if the plaintiff was really in default in performance of the contract on his part, the £100 could not be recovered. The appeal therefore fails, and must be dismissed, with costs.

Appeal dismissed.

Solicitor for the plaintiff, *E. Talfourd Hughes.*

Solicitors for the defendants, *H. H. Mason & Son.*

High Court of Justice.

Chan. Div. North, J. — Feb. 15.

In re Beard.

Simpson *v.* Beard. (*a.*)

Will—Construction—Partnership—"Share, right, and interest" in partnership business—Debt due from partnership to testator.

A testator, who carried on a partnership business, bequeathed to his wife all his personal estate not being partnership assets, property, and effects, and bequeathed to his son all his "share, right, and interest" in the partnership business, in trust for his wife for life, with remainder to his son and two daughters. There was due to the testator from the partnership a debt of considerable amount, on which interest was paid, in accordance with the articles of partnership and subsequent agreement between the partners.

Held, that the debt was not included in the disposition of the testator's share, right, and interest in the partnership business, but passed to the widow as part of the testator's personal estate.

Adjourned summons.

By his will of the 23rd of December, 1878, Barnes Beard, of Coggeshall, in the county of Essex, after bequeathing to his wife all his personal estate, not being partnership assets, property, and effects, to and for her own absolute use and benefit, and also giving her certain freehold property, proceeded as follows: "I direct that as soon as conveniently can be after my decease my executors and trustees shall cause an inventory, account, and valuation to be made and taken by some competent person of all my share and interest of and in the real and personal estate and effects employed by me and my partner, William Bright, in our business of brewers, maltsters, and corn dealers, which shall be carried on by me at the time of my decease, and in such inventory, account, and valuation shall be included my share and interest in all ready money and money standing to the credit of the partnership at our bankers, but not my share of the goodwill of the said businesses, and for the purpose of avoiding any dispute or difference as to what shall be considered to be partnership real estate, I declare that all the real estate which shall have been conveyed to me and my said partner, either as co-partners, joint tenants, or tenants in common, shall, for the purposes of this provision, be deemed partnership real estate. I give, devise, and bequeath to my son, Frank Beard, all that my right, share, and interest of and in the goodwill of the businesses which shall be carried on by me in conjunction with my said partner, William Bright, and also my share, right, and interest of and in the brewery and premises in Stoneham-street, Great Coggeshall, aforesaid, and all public-houses and other real estate forming part of the partnership property, and also all debts, chattels, money, and personal estate forming part of the assets thereof" upon trust to carry on the partnership business with the surviving partner of the testator, and to retain out of the profits the yearly sum of £150, and pay the residue of the profits to the testator's widow for life, and after her death to pay one-third part of the amount of the valuation of the testator's share in the partnership business to his daughter, Emily Crompton, and one other third part to his daughter, Clara Griffin, and the remaining third part to his son, Frank Beard.

The testator died on the 26th of January, 1887, being at the time of his death in partnership with William Bright in the business of brewers, maltsters, corn dealers, in Great Coggeshall, under articles of partnership dated the 21st of October, 1856, which provided that the stock in trade of the business, with the sum of £722 7*s.* advanced by the partners in equal proportion, should form the capital of the partnership, and also by clause 20 "That it shall be lawful for either of them, the said parties hereto, with the consent in writing of the other of them, during the continuance of the said co-partnership to advance unto and bring into the said joint stock or trade any sum or sums of money for better carrying on the said joint trade, and at any time or times afterwards of the free will of the party having so brought in the same, and giving three calendar months notice in writing in that behalf to the other of them, or entering such notice in the co-partnership ledger, to withdraw from the said co-partnership business the sum or sums of money so advanced by him or any part thereof, and if either of them, the said parties hereto, shall so lend or advance any sum or sums of money, the same shall be immediately entered in the said co-partnership books as a debt owing to the party lending or advancing the same, who shall be entitled during the continuance thereof in the co-partnership business to interest thereon at or after the rate of £5 per centum per annum."

There was evidence by the accountants who had been employed to make up the partnership accounts that the

(*a.*) Reported by J. Freeman, Esq., Barrister-at-Law.

partners did not accurately balance their books until the year 1881. In 1884 the partners came to an agreement, and signed an account according to which the capital of the partnership was to be taken to be £5,000 contributed by each partner, and the testator, who had more than that amount in the business, was treated as a creditor of the partnership to the amount of his surplus capital, which was regarded as a debt carrying interest under the 20th clause of the original articles of partnership, and the other partner, Mr. William Bright, who had less than the sum of £5,000 in the business, was treated as a debtor to the partnership with respect to the deficiency. The surplus due to the testator at the time of his death amounted to £3,866 11s. 10d.

By a memorandum of agreement dated the 21st of December, 1878, made between the partners, a further condition was added to the original articles of partnership for the purpose of enabling each partner to bequeath his share in the partnership business to his son, so that the son should be received as partner in his place.

This was an originating summons taken out by the executors for the determination of the question whether the debt of £3,866 11s. 10d. passed under the will to the testator's widow as part of his personal estate, or to his son, Frank Beard, as part of the testator's share, right, and interest in his business.

Swinfen Eady, for the summons, stated the facts.

Cozens-Hardy, Q.C., and *C. Lyttelton Chubb*, for the widow and Frank Beard, son of the testator.—The debt due to the testator from the partnership business is not included in the disposition of that business. The word "debts" only included debts due to the partnership; and the words "share, right, and interest" in the partnership business do not indicate a debt due from that business to the testator. That debt, therefore, passed to the widow as part of the testator's personal estate.

Everitt, Q.C., and *F. Thompson*, for the testator's daughters.—The debt due to the testator from the partnership business passed under the disposition of all the testator's "share, right, and interest" in the business. The testator had a lien on the partnership property for that debt, which is, therefore, included in his "share, right, and interest."

They referred to *Earl of Dundonald* v. *Masterman*, 17 W. R. 548, L. R. 7 Eq. 504, 513; *Bevan* v. *The Attorney-General*, 4 Giff. 361, 11 W. R. Ch. Dig. 124; *In re Russell, Russell* v. *Ohell*, 30 W. R. 454, 19 Ch. D. 432; 1 Lindley on Partnership, 680, 689.

Cozens-Hardy, Q.C., replied.

NORTH, J.—The question in this case is a difficult one. I do not feel at all satisfied what answer the testator would give if we could have him here and ask what he wished to be done. But I must do my best to arrive at the meaning of the words he has used. The conclusion I come to is that he did not intend this debt to pass to the son with the business and goodwill as a trustee for himself and the daughters. [His lordship read the words of the gift as set out above, and continued:—] The word "debts" there of course refers to debts due to the partnership, and has nothing to do with the liabilities of the partnership. The facts are shortly these:—[His lordship stated the facts and then read the 20th clause of the original articles of partnership as set out above, and proceeded:—] There is not the least doubt upon that clause in the articles under which they were acting, when in 1884 they came to an agreement that the capital of the partnership was then to be taken at £5,000 each, that the surplus over £5,000 belonging to the testator in the partnership at the time was treated as a debt due to that partner. The debt was slightly different at his death, but that is immaterial. The question is whether the amount th was due to him at his death as a creditor of the partner ship, and for which the partnership was indebted t him, passed by the disposition which I have read of hi share and interest in the partnership assets. It would ha taken very few words one way or another to turn the scal and make it perfectly clear either that it was intended t pass or that it was not. But, upon the whole, I com to the conclusion that it was not. First of all, I do no think it is accurate to describe a debt due to the partne from the firm as a part of his share and interest in th partnership assets. The words "share and interest" seem to me to be more addressed to his share an interest in something less than the whole, the othe share and interest in which would be in his co-partner and not to refer to a debt due from the partnership consisting of the two, to him as an outsider—not as outsider in one sense, no doubt because he could not compete with other outside creditors of the partner ship, but as between the partners on the one hand and the creditors on the other. The testator was a creditor, and not a partner, with respect to that debt, and his interest as a partner in the assets of the part nership and the interest of the other partner in the assets of the partnership could only be ascertained after all the liabilities to other parties had been discharged away, including liabilities to himself as well as to every other creditor of the partnership. The words, "share and interest in the partnership," seem to me addressed, therefore, to their share and interest in the clear ba proceeds remaining after the liabilities of the partner ship are cleared off.

Now, it is said that the testator had a lien on the partnership assets for this debt. In one sense, and in general sense, he had, but in the strict sense of lien do not think he had. His interest in the assets must have the shares ascertained; and, for that purpose, debt paid off. In that sense his right was to have assets realized so far as necessary for the purpose the liabilities satisfied and the surplus divided, nothing more than that. Although it is convenient describe it as a lien, in my opinion it is misleading, has been used in a misleading way in argument upon the footing that it was a lien pure and simple. my opinion it is not strictly a lien, although as Lin L.J., in his work makes use of the word it may described as a sort of equitable lien; and he does afterwards use the word "lien" as shortly to describe interest. His words, therefore, if they are strictly examined, do not seem to me to apply to a debt due a partner from the partnership. Further, there is important matter for consideration that leads me to conclusion that there is no disposition of the debt favour of the persons for whom the partner's share interest is given. There is no disposition in their fa of the interest upon this debt, which is payable, be all question, by the partnership to somebody. I can think it was out of the testator's contemplation, bec the last condition of the articles had been settled only days before the date of his will, and his will was with reference to the power expressly given by appendix to the articles of giving the devisee or the of the devisee the interest in the partnership, which to be continued as a going concern. He had, there the matter fully before him, and I cannot believe th he intended that the debt due to him from the part ship should be part of what was disposed of by w trust in the son for his widow and children that he w have omitted altogether to make any provision for application in the same way of the interest which payable by the partnership in respect of that debt. is clear that that interest would have to be set apart the partners and paid before any net profits whatev could be got at all. The widow was to take the gains and profits, minus the £150, just as the co

partner would take his share in the net gains and profits. But the interest would have to be deducted and paid first before those net gains and profits would be arrived at. Under these circumstances, I come to the conclusion that the £3,866 11s. 10d. is not included in the disposition of the business, but passed to the widow as part of the testator's personal estate.

Solicitors, *Beaumont, Son, & Rigden; Warburton & De Paula.*

Chan. Div. North, J. } Jan. 25.

Furniss v. Phear. (a.)

Will — Construction — Supplying blank — Name of annuitant.

A testator, after giving legacies to Mary Wyatt, Matthew Wyatt, Frederick Wyatt, Louisa Atwell (called Wyatt), Maria Weir, and Emily De Vere, proceeded: "I give and bequeath to , daughter of , holding some situation about the church , the sum of fifty pounds annually during the continuance of her natural life, and I direct my trustees or trustee for the time being to pay to the said the said annuity of fifty pounds, . . . and the receipt of the said shall be sufficient discharge to my trustees or trustee for the time being; and from the decease of the said I direct," &c. And the testator directed that, "in case any one of my said legatees, Mary Wyatt, Frederick Wyatt, Matthew Wyatt, Louisa Atwell (called Wyatt), Maria Weir, Emily De Vere, or Marian Elliott," should become bankrupt, &c., her or his legacy should determine, and that the trustees or trustee should pay to her or him, "if in the case of Mary Wyatt, Matthew Wyatt, and Frederick Wyatt, the sum of forty shillings a week," and "if in the case of Maria Weir and Emily De Vere, the sum of thirty shillings a week," and "if in the case of Marian Elliott, the sum of fifteen shillings a week."

Held, on an originating summons by Marian Furniss (formerly Marian Elliott), supported by an affidavit by her to the effect that she was the daughter of James Elliott, beadle of the parish church at Epsom, and that the testator was acquainted with her, that she was entitled to the annuity of fifty pounds given by the will.

Adjourned summons.

Sir Matthew Wyatt, by his will, dated the 28th day of June, 1862, after giving legacies to Mary Wyatt, Matthew Wyatt, Frederick Wyatt, Louisa Atwell (called Wyatt), Maria Weir, and Emily De Vere, proceeded as follows:—"I give and bequeath to , daughter of , holding some situation about the church, , the sum of £50 annually during the continuance of her natural life; and I direct my trustees or trustee for the time being to pay to the said the said annuity of £50 by equal quarterly payments, to be computed from the quarter day next preceding my decease, for her own sole use and benefit, free from the control of any husband until she shall die or until she shall become a bankrupt or insolvent debtor within the meaning of any Act of Parliament concerning bankrupts or for the relief of insolvent debtors, or shall assign or incumber the same, or any part thereof, or her interest therein, or until, by her own act or operation of law (except the case of marriage), the said annuity given to her for her life would become vested in, or payable to, or for the benefit of, any other person or persons, which shall first happen (and the receipt of the said shall be sufficient discharge to my trustees or trustee for the time being), and from the decease of the said I direct that the said annuity shall merge into, and form part of, my general estate and income." And, after making various other provisions, the testator directed that, "in case any one of the said legatees, Mary Wyatt, Frederick Wyatt, Matthew Wyatt, Louisa Atwell (called Wyatt), Maria Weir, Emily de Vere, or Marian Elliott" should become a bankrupt, &c., the legacy given to her or him should determine, and that the trustees or trustee should pay to her or him, "if in the case of Mary Wyatt, Matthew Wyatt, and Frederick Wyatt, the sum of forty shillings a week," and "if in the case of Maria Weir and Emily de Vere, the sum of thirty shillings a week," and "if in the case of Maria Elliott, the sum of fifteen shillings a week."

The testator died on the 19th of July, 1886, and his will was proved on the 5th of January, 1887.

The probate of the will contained the blanks as set out above, but it appeared from the will itself that certain words had been originally inserted in the blanks, but had been erased, so that it was quite impossible to see what the words were, and also that the words, "holding some situation about the church," had been struck through with a pen, but remained so clearly readable that they were inserted in the probate, which was granted in common form to J. B. Phear, the executor and sole acting trustee of the will.

This was an originating summons taken out by Marian Furniss, wife of Thomas Furniss, and who was formerly Marian Elliott, daughter of James Elliott, beadle of the parish church of Epsom, Surrey, asking for a declaration that she was the person for whom the annuity of fifty pounds was intended, and that she was entitled to such annuity accordingly. The summons was supported by an affidavit by Marian Furniss proving her parentage and marriage, and that she was known to the testator.

S. L. Druce, for the summons.—There is sufficient indication in the will that the annuity was given to Marian Elliott, now Marian Furniss, to entitle her to receive it.

He referred to *Price* v. *Page*, 4 Ves. 680; *Phillips* v. *Barker*, 2 W. R. 110, 1 Sm. & G. 583; *Martins* v. *Gardiner*, 8 Sim. 73; *Turner* v. *Hellard*, 34 W. R. 420, 30 Ch. D. 390.

Cozens-Hardy, Q.C., and *Dauney*, for J. B. Phear.—The description of the annuitant is not sufficient to entitle her to receive the annuity. *Martins* v. *Gardiner* does not apply. It must not be assumed that the name Marian Elliott was ever in the will.

He referred to *Mason* v. *Bateson*, 7 W. R. 225, 26 Beav. 404; 7 Will. 4 & 1 Vict. c. 26, s. 21.

North, J.—I think that the will shows with reasonable clearness what was intended. [His lordship read section 21 of 7 Will. 4 & 1 Vict. c. 26, and proceeded:—] If the name of a legatee is obliterated so as to be illegible the legacy cannot take effect, and the will takes effect as if the legacy had been revoked. The result is that if you cannot get at the name of the legatee it has the same effect as if the will was revoked as to the legacy.

In the present case it is clear what is meant. The words of the will show that a female was intended, and that she was the daughter of a man holding some subordinate position in the church, for it is not likely that an incumbent or curate would be described in such a manner. This is negative evidence to exclude any female whose father does not fall within the description. The affidavit of the plaintiff shows that she was the daughter of a beadle, and that she was a person with whom the testator was acquainted. Then the clauses in the latter part of the will provide that in case of the forfeiture of any legacy by bankruptcy or otherwise, the legatee is to receive a weekly sum of money, and that in

(a.) Reported by J. Trusham, Esq., Barrister-at-Law.

such case Marian Elliott, who is stated to be one of the legatees under the will, is to receive the sum of fifteen shillings a week. It is suggested that the name of Marian Elliott might have been inserted provisionally; but this suggestion would make the will a "solemn farce," as remarked by Lord Esher, M.R., in *Turner* v. *Hellard*. The subsequent clauses of the will convince me that the plaintiff is entitled to the annuity.

Solicitors, *Fardell & Dashwood*.

Q. B. Div. (Lord Coleridge, C.J., Pollock, B., and Hawkins, J.) Nov. 29.

WOOD *v.* CHANDLER. (*a*.)

Parliament — Registration — Borough vote — Notice of objection — Neglect of statutory form — Registration Act, 1885 (48 *Vict. c.* 15), *s.* 18, *schedule* 3, *Form I., No.* 2.

Where notice of objection was given to a voter under the Registration Act, 1885, *but the form of notice provided for the objector in the schedule of the said Act was not strictly complied with by him, it was held that the omission was a disregard of a substantive regulation, and not "an omission of any form or instruction" within section* 18 *which would not invalidate the notice.*

Case stated by the revising barrister for the borough of Battersea and Clapham.

"Raymond Batchelor objected to the name of John Wood being retained on the Clapham occupiers' list of Parliamentary voters for the Parliamentary borough of Battersea and Clapham." The said objector signed his notice of objection thus:—"Raymond Batchelor, of 624, Wandsworth-road, on the list of Parliamentary voters for the Parliamentary borough of Battersea and Clapham." Exception was taken to the said notice of objection on the ground that the description of the objector was not in literal compliance with Form (I.), No. 2, Schedule 3, to 48 Vict. c. 15.

The following facts were established by the evidence:—The borough of Battersea and Clapham contains two distinct parishes — one, the parish of St. Mary, Battersea, and the other the parish of Clapham—and is divided into two divisions—viz., the Battersea division of the said borough and the Clapham division of the said borough—which divisions consist of fourteen polling districts, Nos. 1, 2, 3, 4, 5, and 6 constituting the Battersea division, all of which are in the parish of St. Mary's, Battersea; and Nos. 7, 8, 9, 10, 11, 12, 13, and 14 constituting the Clapham division, of which Nos. 7, 8, 9, and 10 are in the parish of St. Mary's, Battersea, and Nos. 11, 12, 13, and 14 are in the parish of Clapham. Raymond Batchelor's name appeared on the occupiers' list of the parish of Clapham, Clapham division of the said borough. The names of twenty-five persons other than the said John Wood were objected to under similar circumstances.

The revising barrister decided that the description of the said objector was a sufficient compliance with the form in the schedule of the Act, and expunged the names of John Wood and of the twenty-five other persons from the said list. Due notice of appeal from that decision was given, and the appeals in all the before-mentioned cases were directed to be consolidated, and it was directed that if the court be of opinion that the decision of the barrister was wrong, the register was to be amended by inserting the names of John Wood and of the twenty-five other persons in the said list.

McCaskie, for the appellant.—The notice of objection is defective in substance, as it does not mention the division or parish in which the objector is registered. It only gives the borough. This was decided in *Ferrer* v. *Edmworth*, 16 L. J. C. P. 132, and *Crouthier* v. *Bradney*, 12 W. R. 176. In the case of *Samuels* v. *Hitchmough*, 11 W. R. 92, where the notice was held good, the reasons assigned affirm the appellant's contention. The case of *Oram* v. *Cole*, 13 W. R. 26, which was relied upon before the revising barrister, is distinguishable, for the division was sufficiently indicated. This defect is not a formal omission within section 18 of 48 Vict. c. 15, but a substantial one, so that the notice must be invalidated by it.

No person appeared in support of the notice.

Lord Coleridge, C.J.—This is not a case in which we have to determine whether the barrister might or might not have amended, as to which I express no opinion. There was no amendment, and the barrister has held the notice to be good as it stands. It certainly is not in the form given by the Act, and the 18th section says that the forms given shall be used. That appears to be imperative; and, though it is true that there follow words that "the disregard of any form shall not invalidate," those words do not mean that total disregard of all forms is protected. But I have no difficulty in saying that the form given has been disregarded, not in form, but in substance. The notice does not give the person objected to, the information as to the person objecting which the Act intends to be given, and the absence of which might put him to great inconvenience. I therefore hold that, in not following the form in this respect, the objector has not only not followed the form, but has in substance failed to comply with the enactment. I think, therefore, the revising barrister was wrong, and that his decision must be overruled and the notice held bad.

Pollock, B.—I have come to the same conclusion. The grounds given for such a conclusion in the cases cited are now stronger than they were at the time of the decisions referred to, as there might now be parishes partly in one division and partly in another, and therefore the objector, by omitting to mention the parish in which he resides, might put the voter to great trouble in finding out for himself in what parish or in what division the objector does reside, and omissions of that kind might cause enormous inconvenience. This is not a mere formality, for the omission withheld material information. Whether an amendment might have been made it is not necessary to decide.

Hawkins, J.—I concur in thinking the revising barrister was wrong. No person is entitled to make an objection unless he is on a list of voters for the place where the voter is qualified; and the 18th section requires that the party objected to should have the means of finding out whether the objector is qualified to object or not. The form required that it should be stated what is the parish or township on the list in which the objector is to be found, and, if the parish is not stated, the party objected to might have to search several lists—an inconvenience which the statute intended to prevent.

Appeal allowed, with costs.

Solicitor for the appellant, *H. W. Chatterton*.

(*a*.) Reported by Cecil Chapman, Esq., Barrister-at-Law.

Q. B. Div. (Lord Coleridge, C.J., and Field, J.) July 1.

In re Duty on the Institution of Civil Engineers. (*a.*)

Duty on property—Bodies corporate and incorporate—Customs and Inland Revenue Act, 1885 (48 *&* 49 *Vict. c.* 51), *s.* 11, *sub-section* 3—*Property for the promotion of education.*

The property of the Institution of Civil Engineers is not property appropriated and applied for the promotion of general education within the exemption of sub-section 3 *of section* 11 *of* 48 *&* 49 *Vict. c.* 51, *because it is appropriated and applied for the promotion of a particular branch of knowledge for the purpose of enabling members of the institution to practise the profession of a civil engineer most effectively and successfully.*

This was a writ of summons calling upon the secretary of the Institution of Civil Engineers to pay certain duties, assessed on that institution by the Commissioners of Inland Revenue in pursuance of the Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), or to show cause why default had been made in payment of the said duties. An appearance had been duly entered to the writ.

The commissioners had assessed the duty upon the property of the institution under section 11 of the Act, which enacts: "Whereas certain property, by reason of the same belonging to, or being vested in, bodies corporate or unincorporate, escapes liability to probate, legacy, or succession duties, and it is expedient to impose a duty thereon by way of compensation to the revenue: Be it therefore enacted that there shall be levied and paid to her Majesty in respect of all rent and personal property which shall have belonged to or been vested in any body corporate or unincorporate during the yearly period ending on the 5th day of April, 1885, or during any subsequent yearly period ending on the same day in any year, a duty at the rate of £5 per centum upon the annual value, income, or profits of such property accrued to such body corporate or unincorporate in the same yearly period, after deducting therefrom all necessary outgoings, including the receiver's remuneration, and costs, charges, and expenses properly incurred in the management of such property. Subject to exemption from such duty in favour of property of the descriptions following, that is to say:—

". . . (3) Property which, or the income or profits whereof, shall be legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts. . . .

"(6) Property acquired by or with funds voluntarily contributed to any body corporate or unincorporate within a period of thirty years immediately preceding."

The institution had not rendered an account for the assessment of duty to the commissioners under section 17 of the above Act, and the commissioners had not appointed any person to take an account of the same.

The property of the institution consists of premises No. 25, and part of No. 24, Great George-street, Westminster, which are partly freehold and partly leasehold, and of furniture, and of certain investments. The property is the product of donations, or of bequests, from members of the institution, or arises from savings made out of the annual subscriptions of members; but no part of the income arises from the sale of publications, or otherwise, to the public.

The institution was incorporated by royal charter under date of June 3, 1828. The charter defines the nature and objects of the institution thus:—"The general advancement of mechanical science, and more particularly for promoting the acquisition of that species of knowledge which constitutes the profession of a civil engineer, being the art of directing the great sources of power in nature for the use and convenience of man, as the means of production and of traffic in states, both for external and internal trade, as applied to the construction of roads, bridges, aqueducts, canals, river navigation, and docks for internal intercourse and exchange, and in the construction of ports, harbours, moles, breakwaters, and lighthouses, and in the art of navigation by artificial power for the purpose of commerce, and in the construction and adaption of machinery, and in the drainage of cities and towns."

In the last report of the council it is pointed out that, since the charter was drawn, the range of practice of the profession has become much enlarged, and after enumerating a great number of classes of works, with which practitioners in the art may now have to do, the report proceeds thus:—"This is a comprehensive, but by no means a complete catalogue, and if an estimate is attempted to be formed of the work done under it in the last century, and of the effect this work has had on the development of trade and commerce, on finance, and indeed on every possible aspect of human interest, it must be admitted that the profession of civil engineering has become a truly great power."

The whole property of the institution is and always has been exclusively devoted to the furtherance of these objects.

Section 11 of the bye-laws now in force refers to the constitution of the institution, and provides that it shall consist of corporate members and associates and honorary members, and that the institution may also have attached to it associates who are not entitled to the privileges of corporate membership, and students.

Sir E. Clarke, S.G. (*Sir R. E. Webster, A.G.*, and *A. Dicey* with him), for the Inland Revenue.—The property of the Institution of Civil Engineers is liable to pay duty under section 11 of 48 & 49 Vict. c. 51. The institution is unable to show that their property is exempt from payment of such duty, by reason of the protection offered by sub-section 3 of the above section. Sub-section 6 of the same section does not help them: *In re the Duty on the New University Club*, 35 W. R. 774, 18 Q. B. D. 720. The principle of the decision in *Reg.* v. *Institution of Civil Engineers*, 28 W. R. 253, 5 Q. B. D. 46, covers this case also. The Scotch case *The Society of Writers to the Signet* v. *Commissioners of Inland Revenue*, 14 Rettie, 34, is also in point.

A. Charles, Q.C. (*Sir H. Davey, Q.C.*, and *Radcliffe* with him), for the Institution of Civil Engineers.—The institution is within the exemption of sub-section 3 of section 11. It is an educating body and there is nothing in the Statute to limit "education" to general education. The word "exclusively," on which the decision in *Reg.* v. *Institution of Civil Engineers* is based, is omitted in this Statute.

Sir E. Clarke, S.G., in reply.

Lord Coleridge, C.J.—It is evident that the funds of the institution come within the general words of section 11 of the Customs and Inland Revenue Act, 1885, and are subject to the duty sought to be imposed, unless the exemption in sub-section 3 applies. What is sought to be exempted is substantially the whole, or nearly the whole, property of the Institution. The exemption is claimed on the ground that this is property which is, and the income and profits of which are, "legally appropriated and applied for the promotion of education, literature, science, or the fine arts," within the meaning of sub-section 3 of the above Act. The collocation of the words in that sub-section however throw some light upon the meaning of the particular words upon which

(*a.*) Reported by Sir Sherston Baker, Barrister-at-Law.

the claim for exemption is founded. I do not think that the words "for the promotion of education, literature, science, or the fine arts," mean the teaching of a particular thing connected with education, or literature, or science, or the fine arts, for if that were the meaning, the application of the exemption might be carried to almost any conceivable institution which taught anything conducing to education, to literature, to science, or to the fine arts; indeed it is very difficult to imagine, if such a definition were adopted, what institution would be excluded, for nearly all lawful institutions teach something or other which may be advantageous to education, literature, science, or the fine arts. An institution to teach people how to make shoes, for instance, might be within the exemption, because it is possible that the making of shoes extremely well would in a remote way aid the purposes of some portion of education, or of science, and so forth. The words of the exemption must receive a more reasonable construction. Those words must in my opinion be construed to mean general education, general literature, science considered as a branch of human knowledge, and the fine arts as extending to all those matters, great and small, with which the fine arts are connected.

That being so, does the Institution of Civil Engineers come within it? I do not doubt but that it may be a most excellent and valuable body, nor that it may contribute a great deal towards the general intelligence and advancement of this country, but it is instituted and carried on, not for the pure advancement of the laws of science, but for the promotion of such a study of the laws of science as shall, in the words of the charter, be conducive to "the general advancement of mechanical science, and more particularly for promoting that species of knowledge which constitutes the profession of a civil engineer." It is a profession prosecuted like all others for the purposes of honourable gain; it exists for the purpose of promoting such knowledge as will make civil engineers better civil engineers. I think that it is not an institution for the promotion of general education, literature, science, or fine arts generally, but for the promotion of a particular branch of knowledge for the purpose of increasing the intelligence and cultivation of the particular profession which deals with one branch of mechanical knowledge, and therefore that this institution is not brought within the words of the exemption. Further, there is authority on the subject which seems to me to conclude this case in principle. It is true that the case of *Reg.* v. *Institution of Civil Engineers* is not exactly in point, for the statute which had to be construed in that case contained the word "exclusively," which is not to be found in section 11 of the Act of 1885. But I think it makes very little practical difference whether you say that a thing is "exclusively" for the promotion of education, or (which is, I think, the true meaning of the words in section 11) that it is mainly and chiefly for the promotion of education, literature, science, and the fine arts. The difference in the wording of the statute in that case and in the present does not, to my mind, make any substantial distinction between the principle which was applied there and the principle which ought to be applied here. The grounds for the decision in that case seem to me to cover this case, and I think that the decision in the Scotch case proceeded on the same principle.

In the Scotch case the property of the Society of Writers to the Signet was proposed to be assessed. Objection was taken that the society was for the purposes of education; and it was answered that it was not for purposes of education, but for objects which were happily expressed by Lord Shand as follows:—"The maintenance of a body of professional men with recognised privileges—privileges which are of importance, and which were perhaps some years ago more extensive than they are now, and the object which the society has in view is not education, or the promotion of education, literature, or science, but that he shall become a member of the society in order to practise his profession as writer to the signet."

Now, without forgetting the distinction which undoubtedly exists between that case and this, I agree with Lord Shand that the object of the Society of Writers to the Signet is not to promote the study of the law, or the understanding of the theory of the general law, but to promote the wholesome practise of an honourable profession. The members of the society join it in order that they may more fitly and adequately practise that profession. In the present case the Institution of Civil Engineers is undoubtedly a teaching body, and persons become members or pupils, not for the purpose of the advancement of education or so forth, but in order that they may obtain certain technical knowledge of mechanics for the purpose of practising with more success the profession of a civil engineer. The distinction between the two cases is that no one in Scotland can become a writer to the signet without joining the society and going through the course which the society prescribes; but for a man to become a civil engineer it is not necessary that he should become a member of the Society of Civil Engineers. This distinction makes no valid difference in the principle to be applied, and for obvious reasons: no man is bound to be a writer to the signet, or to adopt that as his profession; but if he chooses to adopt it he must, in order to pursue it effectively, join the society. No man is bound, if he chooses to be a civil engineer, to join the Institution of Civil Engineers; but any man who wants to practise that profession effectively and successfully will join the institution and go through the course of teaching which it provides. The distinction does not appear to me to go to the root of the matter, or to prevent the principle of the Scotch case from applying here. Therefore, for the general reasons I have given, I think that the Crown is entitled to succeed.

FIELD, J., concurred.

Judgment for the Crown.

Solicitor for the Commissioners of Inland Revenue: *The Solicitor of Inland Revenue.*

Solicitors for the Institution of Civil Engineers: *Ashcliff, Cator, & Martineau.*

Q. B. Div. (Manisty and Hawkins, JJ.) March 2[illegible]

MULLENEISEN v. COULSON. (a.)

County court—Action remitted from High Court under the County Courts Act, 1867 (30 & 31 *Vict.* c. 1[illegible] s. 10—*New defendant added by order of county court judge—Prohibition.*

An action in which the plaintiff claimed £150 damages for illegal distress was, on the application of the defendant, remitted to a county court under section 10 *of the County Courts Act,* 1867. *The plaintiff then obtained an order from the judge of the county court, under which a new defendant was, against his will, added to the record.*

Held, that the county court judge had no power to make such an order.

Appeal from an order of A. L. Smith, J., directing the issue of a writ of prohibition to the judge of the Clerkenwell County Court.

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

The action was for illegal distress, the plaintiff claiming £150 damages, and was brought in the High Court against the defendant Coulson, on whose application it was remitted to the county court of Middlesex holden at Clerkenwell, under section 10 of the County Courts Act, 1867. At the hearing before the county court judge on the 17th of October, 1887, an order was made that the further hearing of the action should be adjourned generally, with leave to the plaintiff to amend the proceedings. The plaintiff thereupon added one Ferdinand Strausberg as a defendant to the action, and delivered amended particulars of demand. On the 9th of December notice was sent by the registrar of the court to Strausberg that he had been so added as defendant. On the 20th of January, 1888, the matter came on for further hearing, the plaintiff being the only party who appeared, when judgment was given for the plaintiff against both defendants for £121 10s. 2d. On the 17th of February Strausberg applied at chambers for a prohibition; and A. L. Smith, J., made an order restraining the county court judge from proceeding on the judgment so far as it affected the defendant Strausberg.

From this order the plaintiff appealed.

Overend, for the plaintiff.—The action, having been remitted under the Act of 1867, became a county court case; and the county court judge had jurisdiction to add a defendant under ord. 14, r. 2, of the County Court Rules, 1886.

G. S. Bower, for Strausberg.

Manisty, J.—The question is whether, in a case which has been remitted to the county court under section 10 of the Act of 1867, there is power in a county court judge to add a defendant against his will. That section says that in any action of tort brought in the superior court, on the defendant making an affidavit that the plaintiff has no visible means of paying the costs of the defendant, should a verdict be not found for the plaintiff, a judge may make an order that the cause be remitted for trial before a county court to be therein named; "and the county court so named shall have all the same powers and jurisdiction with respect to the cause as if both parties had agreed, by memorandum signed by them, that the said county court should have power to try the said action." Both parties—that is, the parties to the cause—are to be supposed to have agreed. But Strausberg, who is now sought to be made a defendant, was not one of the parties to the cause; neither did he ever agree. I think there was no power in the county court judge to order him to be made a defendant.

Hawkins, J.—I am of the same opinion. This was an action of tort, in which the plaintiff claimed against the original defendant £150, a sum beyond the jurisdiction of the county court. It was remitted to the county court at the instance of the then defendant. The plaintiff thereupon applied to the county court judge to add Strausberg as a new defendant. He objected, and the order adding him was made against his will. Now, does section 10 of the Act of 1867 give the county court judge jurisdiction to make such an order? The effect of that section, no doubt, is that, as between the original plaintiff and defendant, an action so remitted becomes a county court case to all intents and purposes, and is subject to the rules of the county court. But it was not intended to give the county court judge power to add a new defendant against his will in a case where, if it had not been for the order remitting the action, he could have had no jurisdiction. Therefore the order for prohibition was right.

Appeal dismissed.

Solicitor for the plaintiff, *G. W. Churchley.*

Solicitor for Strausberg, *W. Mitchell.*

IN BANKRUPTCY.

Q. B. Div. (Cave, J.) Dec. 10.

Ex parte Izard.
In re Vanderhaage. (*a.*)

Bankruptcy — Proof by creditor resident abroad — Rejection — Appeal — Security for costs—Practice—Bankruptcy Rules, 1886, *rr.* 131, 148.

Where the proof of a creditor resident abroad is rejected by the trustee in bankruptcy, and such creditor appeals from the rejection, the court has no jurisdiction to order him to give security for the costs of such appeal.

Application on behalf of the trustee in the bankruptcy that security for costs might be given by a creditor who had appealed against the rejection of a proof.

A proof for £12,000 against the estate of the bankrupt had been tendered by Madame de Viney, a French lady, resident in Paris, which proof had been rejected by the trustee. The creditor appealed from the rejection, and the trustee now applied that security for costs might be given.

F. C. Willis, for the trustee.—Considerable expense will be caused by the appeal, and the case is one in which security ought to be given.

Herbert Reed, for the creditor.—There is nothing in the Bankruptcy Act or the rules which gives the court jurisdiction to make such an order as this. Rule 131 applies only to appeals to the High Court, and rule 148 deals with the case where the petitioning creditor resides abroad. A trustee cannot compel a creditor resident abroad to give security for costs simply by rejecting his proof.

F. C. Willis in reply.—Even though there may be no special enactment in the Bankruptcy Act or rules, the practice under the Judicature Acts is applicable. The court has jurisdiction, as a branch of the High Court, to order security for costs to be given by a creditor resident out of the jurisdiction whenever it thinks it right to do so.

Cave, J.—In my opinion this application must be refused. No enactment or authority has been produced on behalf of the trustee that security for costs can be ordered to be given in such a case as this. The rules which have been referred to point out the cases in which such security can be required, and that being so a *primâ facie* inference is raised that such security cannot be enforced in cases which are not mentioned in the rules. In my opinion it would be somewhat oppressive to require a creditor, who is prosecuting his claim to prove against a bankrupt's estate here, to give security for costs of an appeal against the rejection of his proof by the trustee. If the application could be granted, a trustee in bankruptcy might be tempted to reject a proof without proper investigation in order that he might get security for the costs of investigating it before the court.

Application refused.

Solicitors for the trustee, *Foster & Co.*

Solicitors for the creditor, *Goldberg & Langdon.*

(*a.*) Reported by C. F. Morrell, Esq., Barrister-at-Law.

Q. B. Div. (Cave and A. L. Smith, JJ.) Dec. 7.

Ex parte RANKIN.
In re RANKIN. (*a*.)

Small bankruptcy — Discharge — Appeal — Leave not obtained—Right of appeal—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 28, 104, 121—*Bankruptcy Rules*, 1886, *r.* 273.

Rule 273 *of the Bankruptcy Rules*, 1886, *by which it is provided that, in a small bankruptcy, no appeal shall lie from any order of the court except by leave of the court, does not apply in the case of an order made upon application by a bankrupt for his discharge.*

Appeal on behalf of the bankrupt from an order of his Honour Judge Lushington in the county court at Croydon absolutely refusing an order of discharge.

Horne Payne, Q.C., and *McIntyre*, for the bankrupt.

Muir Mackenzie, for the official receiver, the respondent to the appeal, took a preliminary objection.—This is a small bankruptcy under section 121 of the Bankruptcy Act, 1883, and section 121, after specifying certain modifications which are in such case to be made in the Act, provides, by sub-section (3), that such other modifications may be made in the provisions of the Act as may be prescribed by general rules with the view of saving expense and simplifying procedure; "but nothing in this section shall permit the modification of the provisions of this Act relating to the examination or discharge of the debtor." By rule 273 of the Bankrupty Rules, 1886, in small bankruptcies "no appeal shall lie from any order of the court except by leave of the court." In the present case not only has no leave been obtained, but leave was applied for and refused. The refusal to give leave to appeal is an absolute bar in ordinary cases, but, this being an appeal from the refusal of a discharge, it is a question whether the rule prohibiting the appeal can apply.

CAVE, J.—I am of opinion that this preliminary objection cannot prevail, and that the appeal must be heard. It is only right, however, that the point should have been brought before us. Section 121, sub-section (3), provides that in the case of a small bankruptcy "such other modification may be made in the provisions of this Act as may be prescribed by general rules with the view of saving expense and simplifying procedure; but nothing in this section shall permit the modification of the provisions of this Act relating to the examination or discharge of the debtor." That seems to indicate an intention on the part of the Legislature that the provisions of the Act relating to discharge should not be modified. Those provisions are in section 28, and are coupled with the right of appeal given by section 104. They may certainly be said to be modified by a rule saying that there shall be no appeal.

A. L. SMITH, J., concurred.

Solicitors for the bankrupt, *Morley & Shirref*.

Solicitor for the official receiver, *The Solicitor to the Board of Trade*.

(*a*.) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

Q. B. Div. (Cave and A. L. Smith, JJ.) Nov. [illegible]

Ex parte CONDER.
In re WOODHAM. (*a*.)

Bankruptcy—Sheriff—Fi. fa.—Seizure of growing c[illegible] —Expenses—Costs of execution—Bankruptcy Act, 1[illegible] (46 & 47 *Vict. c.* 52), *s.* 46, *sub-section* (1).

After goods of a debtor had been taken in execu[illegible] a receiving order was made against him, and the sh[illegible] delivered the goods to the official receiver under se[illegible] 46, sub-section (1), *of the Bankruptcy Act*, 1883, *taxing the costs of the execution, certain expenses incu[illegible] whilst the sheriff was in possession for cutting, carry[illegible] and threshing corn were disallowed by the county co[illegible] registrar, but subsequently allowed by the judge.*

Held, that the expenses in question were not costs the execution within the meaning of section 46, su[illegible] section (1), *and were properly disallowed on taxation.*

Appeal from an order of his Honour Judge Bagnall[illegible] in the county court of Bedford allowing certain sheriff's charges as against the trustee in bankruptcy.

On the 16th of August, 1886, the sheriff of Huntingdonshire levied execution on certain goods, chattels, and growing crops of one Charles Woodham under a writ of *fi. fa.* On the 19th of August, 1886, the sheriff's officer was served with a notice claiming the said goods, chattels, and growing crops as the property of a third party, and an interpleader summons was issued returnable on the 30th of August, but on the 28th of August the claimant withdrew his claim. Prior to such withdrawal the sheriff's officer instructed a local firm of auctioneers to advertise a sale of the things seized for the 7th of September, 1886, but on the 1st of September, on going to the debtor's farm, he found that part of the corn had been cut and carried, but not threshed, and part was still standing. The part that had been cut and carried was not sufficient to satisfy the execution debt, and the sheriff's officer postponed the sale for a week, and gave orders for cutting and threshing the corn.

On the 8th of September, 1886, the sheriff's officer paid the sum of £10, and on the 10th of September a further sum of £15 for harvest wages for the cutting and carrying of the corn seized when standing, and on the 20th of September he paid £10 15s. for threshing and dressing the corn. The liability in respect of which the above payments were made was incurred by him before notice was received of the receiving order which was made against the debtor on the 11th of September, 1886, and the official receiver took over the possession of the said goods, chattels, and growing crops from the sheriff charged with the costs of the execution. The sheriff delivered his bill of costs to the official receiver which included a charge of £25, representing the £10 and £15 paid on account of harvest work done while in possession, and a charge of the £10 5s. for threshing corn whilst in possession. These charges were disallowed on taxation by the registrar of the county court, and the sheriff, without carrying in before the registrar objections in writing to the disallowance of the charges, or applying to him to review his taxation, once appealed to the county court judge for a review.

The county court judge allowed the charges, and the questions now raised on an appeal from that decision were (1) Whether it was competent for the judge, under the circumstances, to review the taxation of the registrar; and (2) Whether he properly allowed either or both of the said items?

(*a*.) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

Lindsell, for the trustee.—The judge was not entitled to review the decision of the registrar on taxation. Rule 118 of the Bankruptcy Rules, 1886, provides that "in any case in which, pursuant to section 46 (1) of the Act, a sheriff is required to deliver goods to the official receiver or trustee, such sheriff shall, without delay, bring in his bill of costs for taxation, which shall be taxed by the taxing officer of the court having jurisdiction in the bankruptcy." Then the Appendix to the said rules, Part II., section 7, is headed "General Regulations" and rule 16 of that section provides that any person who is dissatisfied with the allowance or disallowance by the taxing officer in any bill of costs taxed by him of the whole or any part of any items may, at any time before the certificate or allocatur is signed, carry in before the taxing officer an objection in writing to such allowance or disallowance, and may thereupon apply to the taxing officer to review the taxation in respect of the same. The county court judge held that that did not apply to a sheriff's bill of costs, but only to costs of solicitors. Moreover, these costs ought not to have been allowed in any event. The sheriff could not recover them against an execution creditor. The duty of the sheriff is to sell with all reasonable expedition, and he has no other duty.

He referred to *Playfair* v. *Musgrove*, 14 M. & W. 239.

Muir Mackenzie, for the sheriff.—The whole of Part II. of the Appendix to the Rules applies to solicitor's costs only. It is headed "Scale of Solicitor's Costs." No part of the regulations apply to sheriff's costs. Then under section 104 of the Bankruptcy Act, 1883, the judge is simply reviewing the order of the registrar. An order of the registrar as to costs is an order of the court, and subject both to review and appeal. Further, these charges were properly allowed, because a larger right is given to the sheriff where there is a bankruptcy, as is shown by section 145 of the Act.

CAVE, J.—I am of opinion that this appeal must be allowed, and it must be allowed on the merits, without regard to the question whether there was any right to go before the judge in this case or not. It is not necessary for the purposes of this case to express a definite opinion, but, for my own part, I entertain very great doubt whether there was any right to go before the judge at all on the question of taxation. At the same time I reserve the right to decide the point if it ever comes before me on a future occasion.

As to the other point, I am of opinion that these payments were properly disallowed. The sheriff's officer was not bound to incur these expenses, and there is no provision giving him liberty to incur them or providing for his being repaid if he does so. The sheriff may levy and sell, and if he desires to go further he must obtain the authority either of the execution creditor or of the execution debtor, but there is nothing in any statute relating to the office of sheriff showing that there is any duty on him to incur these expenses on his own motion without authority. In the present case it is alleged that what was done was to the advantage of the creditor, and presumably it would be to the advantage of the debtor, and, if so, the plain course was to apply to the creditor and the debtor for authority to incur the expenses. As a matter of fact the sheriff did incur expenses without the consent of the creditor or of the debtor which the law did not authorize him to incur. Under section 46 of the Bankruptcy Act, 1883, at any rate, those expenses cannot be recovered as part of the costs of the execution, and the decision of the registrar was quite right. If there is any other mode in which the sheriff can apply to get these costs he may take it. I do not say there is, but he has taken the wrong course in trying to get them as costs of the execution.

A. L. SMITH, J., concurred.

Appeal allowed, with costs.

Solicitors for the trustee, *Stibbard, Gibson, & Co.*, for *Hooper & Co.*, Biggleswade.

Solicitors for the sheriff, *Keen, Rogers, & Co.*

Prob. Div. & Adm. Div. } Oct. 26; March 5.
Divorce (Divl. Court). }

HEYES v. HEYES AND MASON. (a.)

Divorce — Adultery — Husband's petition — Petitioner's conduct—Delay—Appeal—Practice—Rule 62.

A decree of dissolution of marriage refused to a husband whose wife had been guilty of adultery, where, after living with her for eleven years, he had broken up the home in order to get rid of her because of her drunken habits, and had made no inquiries about her for eight years, when he discovered she had been cohabiting with another man during the interval, and five years after that he had filed his petition.

Decision of Butt, J., *affirmed.*

By rule 62 of the Rules in Divorce and Matrimonial Causes, an application for the rehearing of a cause should be made to a divisional court.

Hearing before Butt, J., without a jury, of husband's petition for dissolution of marriage on the ground of adultery.

The action was undefended, the respondent and co-respondent having filed no answer.

The parties, who were mill hands living in Lancashire, were married in 1863, and lived together until 1874, when the husband, owing to the drunken habits of his wife, left his home, but returned the next day and sold off all the furniture in order to get rid of her, she having in the meantime left the house, and he did not see her or hear of her till 1882, when he met her accidentally in the street. Soon after he ascertained that she had been cohabiting with the co-respondent since she left her home. The petitioner explained the delay by his want of means.

The adultery was proved.

Oct. 26.—*Middleton*, for the petitioner.

BUTT, J., refused to grant a decree, first, on the ground that the petitioner left his wife, made no inquiries about her for eight years, and when he found her living with another man said nothing; and, secondly, waited five or six years before coming to this court.

Petition dismissed.

The petitioner appealed by application to the Divisional Court for a re-hearing.

March 5.—*Middleton*, for the petitioner.—[HANNEN, P.—Ought not this application to have been to the Court of Appeal, as the case was tried without a jury?]—No, we come here under rule 62. It was the old practice under that rule, and that practice was preserved when the rule was amended by the Rules of August 12, 1885 (see 29 SOLICITORS' JOURNAL, p. 708). Rule 62, as amended, is—"An application for a new trial of issues of fact tried by a jury or for a re-hearing of a cause shall be made . . . to a divisional court of the Probate, Divorce, and Admiralty Division." [The COURT then proceeded to hear the case on the merits.] It appears that the wife, at the time of the separation, was earning £1 a week, and the husband £1, and therefore she was not left destitute. The con-

(a.) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

ditions in life of the parties must be looked at, and it does not seem unreasonable for a husband to break up his home, as his wife was a confirmed drunkard, and he could take no other course. It cannot, therefore, be said the separation was without excuse. His conduct cannot be so connected with the subsequent adultery as to justify a dismissal of the petition. As to the unreasonable delay, the husband's wages were only £1 a week, and it is now sworn to that he was out of work during the five or six years two periods of three months and six months respectively, which would necessarily cripple his resources.

Hannen, P.—We are of opinion that this is not a case for re-hearing. The question is, whether or not the petitioner has been guilty of conduct conducing to the adultery of the respondent? He had a drunken wife, and it is suggested that places him in a different position. We cannot reasonably be asked to say that any man, whether well off or not, is entitled, under such circumstances, to turn his wife out of doors without more. In casting her off altogether he is paying no heed to her future. Here the adultery is substantially after the home was broken up. Then the husband learns that his wife is living in adultery, and waits five years. The excuse made for this delay is want of means, but he appears to have the same means now as he had then. The application must be dismissed.

Manisty, J., concurred.

Appeal dismissed.

Solicitors, *Chester & Co.*

Prob. Div. & Adm. Div. } Jan. 31.
Probate. }

In the Goods of Nares (*deceased*). (*a.*)

Administration—Next of kin—Divorced wife—Indian divorce—Exclusion of wife.

Where a British subject married in the United Kingdom obtained a divorce from his wife in India, the court granted administration to his next of kin to the exclusion of the divorced wife.

Application for grant of letters of administration of the personal estate and effects of Henry Innes Nares to Sir George Strong Nares, the natural and lawful brother of the half blood, and one of the next of kin of the deceased, to the exclusion of the divorced wife of the deceased.

The original domicil of the deceased was English, and on the 13th of May, 1876, he married M. A. Hecker in Dublin. In November, 1876, they went to Central India with the regiment to which the deceased was attached, and he resided there till February, 1886, when he was ordered home.

On the 4th of May, 1883, he obtained a decree *nisi* in the Court of Judicature, Bombay, for dissolution of the marriage on the ground of his wife's adultery, and this decree was made absolute on the 6th of March, 1884. The wife had since married again, and up to September, 1887, was residing at a known address in the Pas de, Calais, but had left no address except with the postal authorities, who, in accordance with their regulations, refused to disclose it.

A notice of this application by registered prepaid letter had been sent to the last known address on the 17th of January and no reply received.

Middleton, in support of the application.—The divorce proceedings were effectual to bar the wife's right to administration. 24 & 25 Vict. c. 104, an Act for establishing High Courts of Judicature in India, section 1 defines the jurisdiction and powers of such high courts and confers (*inter alia*) on them matrimonial jurisdiction to be defined by letters patent. The letters patent issued originally under this Act were amended by others of the 28th of December, 1865, section 35 of which related to matrimonial jurisdiction, and were followed by the Indian Divorce Act (Act IV of 1869 of the Indian Legislature), section 2 of which provides that the Act shall extend only to Christian British subjects in British India who shall reside there at the time of presenting the petition, and either the marriage shall have been solemnized there or the adultery, &c., committed there. The result, therefore, is the same as if the divorce had taken place here.

Butt, J., allowed the grant to go to the applicant as next of kin to his brother as having died without wife or child.

Grant allowed.

Solicitors, *Neish & Howell.*

(*a.*) Reported by J. Gerard Laing, Esq., Barrister-at-Law.

Prob. Div. & Adm. Div. } Nov. 29.
Probate. }

In the Goods of Bushell. (*a.*)

Probate—Will—Mistake—Duly-executed draft correct—Grant with alteration.

A draft will was duly executed by a testator, bequeathing (inter alia) *a legacy to the Bristol Royal Infirmary. The testator subsequently executed the will, in which a mistake in the engrossment the legacy was given to the British Royal Infirmary.*

The court, on proof that there was no such institution as the last-mentioned, granted probate of the will, with the word "Bristol" substituted for "British."

Motion for probate of the will, dated November, 1885, of S. H. Bushell, with the substitution of the "Bristol" for "British" in a paragraph bequeathing a legacy of £5,000 to the "British" Royal Infirmary. The testator intended to bequeath this sum to the Bristol Royal Infirmary, and it was so inserted in a draft will, which was prepared by his solicitor, read over to him, and duly executed on the previous day. The mistake arose in the engrossment, and on the will being produced to the testator, and on his receiving an assurance that it corresponded with the draft, he executed it without reading it or requiring it to be read to him. The residuary legatees had given a written consent to the application.

Deane, in support of the motion, cited *Morrell v. Morrell*, 30 W. R. 491, 7 P. D. 68.

Butt, J., granted the motion, subject to the production of an affidavit that there was no such institution as the British Royal Infirmary.

Motion granted.

Solicitors, *Crowdy, Son, & Tarry.*

(*a.*) Reported by J. Gerard Laing, Esq., Barrister-at-Law.

Court of Appeal.

From Q. B. Div. April 10.

Graham v. Edge and Another (*the Official Liquidators of the* Blackburn and District Benefit Building Society). (a.)

Company — Unregistered company — Action against official liquidator in his personal capacity—Action stayed—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 87, 92, 199, 203.

The plaintiff sued the defendants personally to recover rent charged on property which had vested in them under section 203 *of the Companies Act,* 1862, *as official liquidators of an unregistered company in process of winding up.*

Held, that the action in that form was obviously not maintainable, and therefore ought to be stayed.

Appeal from the decision of a divisional court (Huddleston, B., and Manisty, J.) reported 20 Q. B. D. 538.

The action was brought to recover arrears of ground-rent. In June, 1872, the plaintiff conveyed land to certain persons, subject to a rent charge of £52 2s. 9d. per annum. In 1878 the land passed into the possession of the trustees of the Blackburn and District Benefit Building Society, which was an unregistered company. On October 25, 1881, an order was made for the winding up of the building society under the provisions of the Companies Act, 1862, relating to unregistered companies. On February 21, 1882, an order was made under section 203 of the Companies Act, 1862, vesting all property of the building society in the defendants as official liquidators. The defendants paid the rent up to May, 1885, but subsequently declined to do so. The action was brought without leave of the court in the winding-up proceedings. An application having been made to stay the action on the ground of non-compliance with section 87 of the Companies Act, 1862, ordered by Hawkins, J., at chambers, to the Divisional Court, by whom the action was stayed on that ground.

The plaintiff appealed.

J. W. Chitty, for the plaintiff.—The action is brought, not against the building society, but against the official liquidators. Section 87 of the Companies Act, 1862, only requires the leave of the court for actions brought against the company which is being wound up. The defendants, by taking possession of the property and receiving the rent, have made themselves personally liable. They are in the same position as a trustee in bankruptcy: *Hanson* v. *Stevenson*, 1 B. & A. 303; *Ex parte Fowler*, 27 W. R. 144, 9 Ch. D. 252.

Danckwerts, Q.C., and *Joseph Walton*, for the defendants, were not called upon to argue.

Lord Esher, M.R.—In this case an action is brought against the defendants to recover arrears of an annual ground-rent alleged to be due from the defendants to the plaintiff in consequence of the defendants having been in possession of the land which was subject to the ground-rent. The action is brought in such a form as to make the defendants personally liable, and it was totally declared by the plaintiff's counsel that the object of the action was to make the defendants and their property liable, and that it was not directed against the building society and its assets. It is true that in the heading of the writ the defendants are described as the official liquidators of the Blackburn and District Benefit Building Society, but no mention is made in the operative part of it of their official capacity, and it is plain that, if judgment were signed upon this writ, execution could be issued against them personally.

Now is there any colour for saying that the defendants are personally liable to such an action as this? The land in question vested in the defendants under the provisions of section 203 of the Companies Act, 1862, as official liquidators of the building society. By section 199 of the same Act the court has power to wind up an unregistered company just as if it were a registered company, and by section 92 the court has power to appoint official liquidators to conduct the proceedings in the winding up and to assist the court therein. The official liquidators are, therefore, officers of the court appointed to assist the court. Then, by section 203, the court may direct that all such property as may belong to the company, or to trustees on behalf of the company, should vest in the official liquidators by their official names, and "thereupon the same shall vest accordingly, and the official liquidators may in their official names . . . bring or defend any actions, suits, or other legal proceedings relating to any property vested in them." The official liquidators have no power to disobey the order of the court and to refuse to let the property vest in them. They are not in the position of trustees in bankruptcy, who can elect whether they will or will not disclaim. The official liquidators have no such power. The defendants cannot, therefore, be held to be personally liable on the ground that they elected to hold this property. They held it solely in their official capacity, and no action will lie against them in their personal and individual capacity in respect of it. That being so, there is no colour for the maintenance of this action against the defendants personally, and therefore the action cannot justly be allowed to proceed. It is the duty of the court to stay an action which cannot be maintained on the ground that it is frivolous and vexatious. We therefore agree with the Divisional Court, though not on the same grounds, that this action should be stayed. Whether the defendants can be sued in their official capacity for these arrears, and whether, if so, the leave of the court is necessary in order to bring the action, are questions which it is not necessary for us now to decide.

Bowen, L.J.—I am of the same opinion. The action has been brought against the defendants in their personal and individual capacity, and not in their official capacity as official liquidators. The intention of the action was to make them personally liable, and not to attach the assets of the company. It is therefore, in my opinion, unnecessary to decide whether, if the writ had been differently framed and the action had been brought against the defendants in their official capacity, the leave of the court would have been necessary. All that we have to decide is, whether there is any colour for the suggestion that the defendants can be made personally liable. I think that there is none. By section 203 the property is vested in the official liquidators by their official names. They are not clothed with the property except as official liquidators, and it is in that capacity only that they can be sued in respect of that property, if at all. It is the plain duty of the court to stay actions which are obviously untenable, as being oppressive, and I agree, therefore, that this appeal must be dismissed, and that the action must be stayed.

Appeal dismissed.

Solicitors for the plaintiff, *Pritchard, Englefield, & Co.*

Solicitor for the defendants, *Needham.*

(a.) Reported by A. P. Percival Keep, Esq., Barrister-at-Law.

From Q. B. Div. April 10.

JOWETT v. LOCAL BOARD OF IDLE. (a.)

Public Health Act, 1875 (38 & 39 *Vict. c.* 55)—*Meaning of "street" in section* 150—*Interpretation clause—Section* 4.

The definition of "street" given by section 4 *of the Public Health Act*, 1875, *must be read into section* 150, *according to the method of construction laid down in* Mayor of Portsmouth *v.* Smith, 13 *Q. B. D.* 184, 32 *W. R. Dig.* 123.

Decision of the Queen's Bench Division (ante, *p.* 138), *affirmed.*

Appeal from the decision of a divisional court (Stephen and Charles, JJ.), reported *ante*, p. 138.

The action was brought against the local board for trespass in entering upon a certain yard belonging to the plaintiff, for the purpose of paving the centre of the yard as a roadway, under the powers given them by section 150 of the Public Health Act, 1875.

At the trial before Manisty, J., judgment was entered for the plaintiff.

The facts of the case are set out in the report in the court below, and it is sufficient to state that the question raised was whether a yard which led to a mill, and through which there was no regular thoroughfare, was a "street" within the meaning of section 150 of the Public Health Act.

The Divisional Court held that they were bound by the decision of the Court of Appeal in *Mayor of Portsmouth* v. *Smith*, 13 Q. B. D. 184, 32 W. R. Dig. 123, to read into section 150 the definition of "street" given by section 4, and they entered judgment for the defendants accordingly.

The plaintiff appealed.

By section 4 of the Public Health Act, 1875, "street" includes any highway not being a turnpike road, and any public bridge not being a county bridge, and any road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not.

Tindal Atkinson, Q.C. (*Longstaffe* with him), for the plaintiff.—It is true that in *The Mayor of Portsmouth* v. *Smith* the Master of the Rolls and Bowen, L.J., considered that the interpretation clause must be read with the other sections, but that opinion was not material to the decision, and when the case was affirmed in the House of Lords (10 App. Cas. 364, 33 W. R. Dig. 128) Lord Blackburn (page 373) and Lord Watson (page 375) did not concur with that opinion.

Forbes, Q.C., and *Wilberforce*, for the defendants, were not called upon to argue.

Lord ESHER, M.R.—It is clear that if the interpretation clause is to be read into section 150 nothing more is to be said. I am still of the opinion which I expressed in the *Portsmouth case*, that the words of the interpretation clause must be read into the section. No doubt the House of Lords did not affirm the view I then took, but all that they said was that "at present" they were unable to concur with it. I therefore adhere to my opinion, and the plaintiff's only course is to go to the House of Lords to solve the doubt.

BOWEN, L.J., concurred.

Solicitors for the plaintiff, *Lancaster & Wright*, Bradford.

Solicitors for the defendants, *Killick, Hunter, & Vint*, Bradford.

(a.) Reported by A. P. PERCEVAL KEMP, Esq., Barrister-at-Law.

From Q. B. Div. March 27.

PRIM v. SMITH. (a.)

Mayor's Court—Removal of action before entry for trial, but more than a month after service of plaint—Mayor's Court Act, 1857 (20 *&* 21 *Vict. c.* 157), *s.* 17.

By section 17 *of the Mayor's Court Act*, 1857, *no cause depending in the Mayor's Court shall be removed before judgment therein into any superior court unless the writ removing such cause shall have been lodged with the proper officer of the court within one month after the service of the plaint, or unless such writ shall have been lodged with such officer before such action shall have been entered for trial.*

More than a month after the service of the plaint, but before the action was entered for trial, application was made for a writ of certiorari *to remove the action from the Mayor's Court to the High Court.*

Held, that the application was in time.

Appeal from the decision of a divisional court (Mathew and A. L. Smith, JJ.), reported 20 Q.B.D. 554.

The action was commenced in the Mayor's Court November 25, 1887, the plaint being served the next day. Appearance was entered on December 3. On January 17, the cause not having been entered for trial, the defendant took out a summons for a *certiorari* to remove the action into the High Court. This was granted by the master, but on appeal Field, J., referred the matter to the court. The Divisional Court differed, Mathew, J., holding that the summons was in time, and A. L. Smith, J., that it was not. A. L. Smith, J., as the junior judge, having withdrawn his judgment, the order of the master was affirmed, and the plaintiff appealed.

By section 17 of the Mayor's Court Act, 1857 (20 & 21 Vict. c. 157): "No cause depending in the Mayor's Court shall be removed before judgment therein into any superior court unless the writ removing such cause shall have been lodged with the proper officer of the court within one month after the service of the plaint, or unless such writ shall have been lodged with such officer before such action shall have been entered for trial according to the practice of the Mayor's Court.

Horne Payne, Q.C. (*R. F. Colam* with him), for the plaintiff.—The question is whether the section gives an alternative. We say that it does not, and that 'or' should be read as 'and.' More than a month had expired from the service of the plaint, and the summons was therefore out of time. If the action was set down for trial within the month it could not be removed after that.

Reginald Bray, for the defendant, was not called upon.

FRY, L.J.—In this case I should not have thought there was any difficulty, but the fact that the judges of the court below have differed shows that that is not so. It is a short point, and arises solely on the construction of section 17 of the Mayor's Court Act, 1857. Does that section give an alternative? May the cause be removed either within a month after the service of plaint or at any time before it is set down for trial? I think that the word "or" does express an alternative, and I see no reason to read it as equivalent to "and." The effect is to give the longer of two periods to the person seeking to remove the action. If it is entered for trial within the month he has a month from the service of the plaint, but if the month has elapsed, and the action is still not entered for trial, he may remove it at any

(a.) Reported by A. P. PERCEVAL KEMP, Esq., Barrister-at-Law.

time before it is so entered. He cannot therefore have less than a month, and he may have more. I can see nothing unreasonable in this construction, and I think Mathew, J., was right, and that this appeal must be dismissed.

LOPES, L.J.—I am of the same opinion. The point is, perhaps, a difficult one, but I must decide it according to the best of my ability. I think two alternative periods are given by the section for the lodging of the writ of *certiorari*. I do not think "or" should ever be read as "and," unless there are circumstances compelling us to vary its meaning. Here I can see nothing unjust or unreasonable in giving the word its natural and ordinary construction.

The appeal therefore fails.

Appeal dismissed.

Solicitors for the plaintiff, *Ranger & Burton.*

Solicitor for the defendant, *W. F. Tarn.*

From Q. B. Div. March 15.

GRUNDY *v.* TOWNSEND. (*a*.)

Account stated—Jurisdiction of Mayor's Court—Prohibition—Estoppel—Mayor's Court of London Procedure Act, 1857 (20 & 21 *Vict. c.* 157), *s.* 12.

The plaintiff's solicitor, who carried on business within the jurisdiction of the Mayor's Court of London, wrote to the defendant demanding payment of £7 6s. 6d. for goods sold and delivered by the plaintiff to the defendant. Neither of the parties resided or carried on business, nor was the contract entered into, within the jurisdiction. The defendant, in a letter written to the plaintiff's solicitor—posted outside, but received within, the jurisdiction—admitted that he owed £5 6s. 6d. to the plaintiff. The plaintiff having brought an action in the Mayor's Court to recover £7 6s. 6d. for goods sold and delivered, the defendant obtained a writ of prohibition staying proceedings therein. The plaintiff then brought second action to recover £5 6s. 6d. on an account stated, and the defendant obtained a second writ of prohibition. Held, that the prohibition in the first action was not an estoppel against the bringing of the second action; that the admission of the defendant and the bringing of the second action amounted to an account stated; that the account was stated within the jurisdiction of the Mayor's Court; that the plaintiff's solicitor was his agent to receive the admission and to state the account; and that, therefore, the Mayor's Court had jurisdiction to try the action.

Appeal from a decision of a divisional court (Mathew and A. L. Smith, JJ.).

In June, 1887, the plaintiff's solicitors, who carried on business within the jurisdiction of the Mayor's Court in the City of London, wrote to the defendant, who resided outside the jurisdiction, demanding payment of a sum of £7 6s. 6d. alleged to be due to the plaintiff, who resided at Liverpool, from the defendant for goods sold and delivered, the contract not having been entered into, nor wholly or in part performed within the jurisdiction. The defendant replied by letter, posted outside the jurisdiction, but received by the plaintiff's solicitors within the jurisdiction, wherein the defendant admitted that he owed the plaintiff £5 6s. 6d., but denied any further indebtedness. The plaintiff commenced an action in the Mayor's Court to recover £7 6s. 6d., and a reference was ordered by the court, but the defendant obtained a writ of prohibition staying all further proceedings in the action or on the award, on the ground that the Mayor's Court had no jurisdiction. Thereupon the plaintiff commenced a second action to recover the sum of £5 6s. 6d. on an account stated. The defendant having got a writ of prohibition staying the second action, the plaintiff obtained a rule *nisi* for a *supersedeas* setting aside the writ of prohibition. The rule *nisi* was discharged by Mathew and A. L. Smith, JJ. who held that the admission contained in the defendant's letter was never accepted by the plaintiff, and consequently that there was no account stated between the plaintiff and the defendant. The plaintiff appealed.

Section 12 of the Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. 157) in effect (omitting immaterial parts) gives the Mayor's Court jurisdiction in any action "where the debt or damage claimed shall not exceed £50 . . . if the cause of action either wholly or in part arose within the City of London or the liberties thereof."

Crump, Q.C., and *E. Lewis Thomas*, for the plaintiff.

R. B. Parkes, for the defendant.

The arguments sufficiently appear from the judgments.

The following cases were cited: *Evans* v. *Nicholson*, 32 L. T. N. S. 778; *Dunlop* v. *Higgins*, 1 H. L. Cas. 381; *Irving* v. *Veitch*, 3 M. & W. 91; *Taylor* v. *Nicholls*, 24 W. R. 673, 1 C P. D. 243; *Wallace* v. *Allen*, 23 W. R. 703, L. R. 10 C. P. 607; *Hughes* v. *Thorpe*, 5 M. & W. 657; *Cocking* v. *Ward*, 1 C. B. 858; *Bennett* v. *Cosgriff*, 38 L. T. N. S. 177, 26 W. R. Dig. 110; *Breckon* v. *Smith*, 1 A. & E. 488.

Cur. adv. vult.

March 27.—Lord ESHER, M.R. (after stating the facts above set out).—There were several points taken in this case; one was whether the fact of this claim having been made in the former action, and a prohibition having been granted, was not an estoppel against the new action. I have no doubt myself at all that a prohibition is not an estoppel, therefore that point fails. Then, it being said that this was an action on an account stated, it was urged by the defendant that there was no account stated anywhere, whether within or without the City, and the point was taken that an account stated must be an account accepted by both sides. I agree to that, but then it is true that an unqualified admission is evidence of a statement of account against the person who makes that unqualified admission. The other party must accept it as an admission or there is no account stated. How does the plaintiff accept it? He accepts it by bringing the action. The bringing the action on an account stated is an acceptance of that account by him; the unqualified admission is evidence of its being stated by the other side, and therefore you have a settlement of the account, and ever since one can recollect that has been the way in which many an account stated has been sued upon, and judgment has been recovered thereon. The next question was this: the admission was in a letter; that letter was posted outside the City, it was received within the City: where was the account stated? Is it stated at the time the letter is put in the post, or is it stated at the time when the letter is received by the person to whom it is addressed? I am of opinion that the account is stated at the time it is received by the person to whom it is addressed, because then he, if he is the principal, or if he is an agent who can accept the admission, has got to act upon it, and say whether he agrees to it. Therefore the admission here was made within the City.

Then another point arises. Whether the solicitor was the agent to state the account? I think the proper way to put the question is to ask yourself whether he was the agent to receive the admission. If a solicitor is authorized to make a claim, I am of opinion that he

(a) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

is by that alone made the agent to receive the answer to that application—if the answer is an admission, to receive that admission. I think, upon all the points, this was an admission received in the City, that that admission was made an account stated, that part of the cause of action arose within the City, and therefore there is jurisdiction in the Mayor's Court to try this case upon the account stated, and upon that alone. It is a thing to be noticed, as I noticed in the argument that, if two people are dealing in Liverpool, or Glasgow, if the claimant, instead of writing himself from Glasgow or Liverpool to his debtor, gets a solicitor in London to write the letter, and the person to whom that letter is written answers it to the solicitor in London, that gives the Mayor's Court in the City of London jurisdiction over matters that have happened in Glasgow or Liverpool. It seems absurd, but when you come to look at the law of it, the writing of the letter and the answer to it are in law the same as if the plaintiff and defendant had come to London and had stated an account between them, and settled the balance within the City. If they did that, no doubt the Mayor's Court would have jurisdiction.

FRY, L.J.—The learned judges of the Divisional Court, as far as I can understand, considered that, instead of there being any statement of account, the proceedings in the first action showed that the plaintiff did not accept or state to the defendant the account of £5 6s. 6d. That appears to me to have been the ground of their decision. If so, I do not think it can be maintained. It appears to me, on the contrary, that the subsequent action, and the unqualified admission of £5 6s. 6d. being due, were evidence of the account stated for that amount. That point appears to me to have been determined by the case of *Chisman* v. *Count*, 2 M. & G. 307. There one of the defendants was shown an account with the plaintiffs in their counting-house. He objected to one of the items, and made no remark upon the rest, whereupon an action was begun for the whole account, including the item objected to, and in the same declaration a count was contained of an account stated, and the plaintiff recovered on the account stated the smaller sum, although in the same action he had sued for the larger sum. With the single exception that in that case the attempt to recover the larger sum was in the same action as that in which the smaller sum was recovered, that case is precisely on all fours with this, and I think is an authority in favour of the contention of the appellant in this case.

Upon the other points to which reference has been made, I content myself with expressing my concurrence with the view of the Master of the Rolls.

LOPES, L.J.—It is clear law that is acted upon every day, and I may say many times a day, that an account stated is an admission of a sum of money being due from the defendant to the plaintiff which can be charged in an account stated as a distinct cause of action. The action lies upon an absolute acknowledgment made by the defendant to the plaintiff, or his agent authorized to receive such an admission of a debt due from him to the plaintiff, and payable at the time of action brought. I do not hesitate to say that is clear law, and I cannot understand how it can for one moment be doubted. There were two cases referred to here that I think it desirable to refer to. One was the case of *Evans* v. *Nicholson*, and the observations of Archibald, J., in that case, it appears to me, should be quoted with regard to the case now before us. Archibald, J., there says:—"The plaintiff based his case on two grounds, the first being upon a claim for goods sold and delivered. But, with reference to that claim, the circumstances showed that part certainly of the cause of action took place out of the jurisdiction, and to entitle the Mayor's Court, upon a prohibition being moved to issue to it, to proceed in the action, the whole cause must arise within the City. But he rested his case, also, upon a claim on an account stated. A letter written by the defendant in such terms as to be an absolute admission of the debt being due was posted out of the City and received in it." It will be observed those are circumstances similar to those in the present case. Then Archibald, J., proceeds: "The question is, Where is the account stated? Now, as soon as it was put in the post by the defendant there was an account stated as against him as decided by the cases of *Dunlop* v. *Higgins* and *Duncan* v. *Topham*, 8 C. B. 225. But it was a continuing statement, and I see no difference between an acceptance of a contract and a statement of account so far as the principle is concerned. It is true that in *Dunlop* v. *Higgins* it was not necessary for the court there to consider this point, but it is quite consistent with the judgment on the point decided that the acceptance was a continuing acceptance. This case of a statement is analogous, I think, to that of an acceptance, for the transaction shapes itself thus:—When a letter is written by the creditor asking the debtor: 'Do you owe me the sum mentioned in this account?' and the answer is 'Yes,' then, *I think*, the answer is continuous until it reaches the person to whom it is sent, and is a statement to him then and at the place where he receives it." The other case was Taylor v. *Nicholls*, which also seems to me to be in its circumstances very near the present case. That was a case where "the defendant ordered goods of the plaintiff's traveller in Battersea, and they were delivered to him at his place of business in Battersea where he resided. There was no statement as to the place from which the goods were sent, but, after they had been received by him, the defendant, in answer to a letter written to him by the plaintiff's solicitor in King William-street, City, demanding payment of the price, £8 8s. 6d., wrote to the solicitor (whether by post or otherwise did not appear):—'I will call at your office in the early part of next week, and hope to make some satisfactory arrangement for the payment of Mr. Taylor's claim.' Upon a rule for a prohibition to restrain the proceedings in an action brought in the Mayor's Court for goods sold and delivered at the defendant's request, and upon an account stated, held a sufficient admission of the debt to support an account stated, and to warrant the court assuming that there was a cause of action arising within the jurisdiction of the Mayor's Court." The two cases appear to me clearly to show that the Divisional Court were wrong. I agree with what has been said by the other members of the court, and I have much doubt if the facts of this case were made clear to the Divisional Court.

Appeal allowed.

Solicitors for the plaintiff, *Aird & Hood.*

Solicitors for the defendant, *Morris & Rickards.*

From Q. B. Div. Feb. 1

In re RIDDELL.

Ex parte EARL OF STRATHMORE. (a.)

Bankruptcy—"Final judgment"—Order for dismissal of action for want of prosecution—Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 4, sub-section 1 (g).

An order had been obtained by the defendant for the dismissal of an action (for the recovery of land, a declaration of title, and mesne profits) for want of prosecution and for the payment of costs.

Held, that such an order is not a final judgment within the meaning of section 4, sub-section 1 (g), of the

(a.) Reported by A. H. TODD, Esq., Barrister-at-Law.

Bankruptcy Act, 1883, *upon which the defendant is entitled to serve the plaintiff with a bankruptcy notice.*

This was an appeal by leave from an order of Cave and Grantham, JJ., reported *ante*, p. 304, 20 Q. B. D. 318, affirming an order of the Newcastle County Court, dismissing a bankruptcy petition.

An order had been made by North, J., in an action in the Chancery Division, for the recovery of possession of land, for a declaration of title, and for mesne profits, dismissing the action for want of prosecution, with costs. The costs were taxed at £52, and a bankruptcy notice was served upon the plaintiff, with which he did not comply. A bankruptcy petition against him was thereupon presented.

Napier Higgins, Q.C., and *H. Stephen*, for the appellant.—There has been a "final judgment" in this case. We got execution for the costs, to which the sheriff returned *nulla bonâ*, so that there was no seizure and sale of goods. The question decided by the court was as to who should pay the costs, and that was the only question the court was asked to decide, and that brings the case within *Ex parte Moore*, 33 W. R. 438, 14 Q. B. D. 627. In *Ex parte Schmitz*, 32 W. R. 812, 12 Q. B. D. 509, the order was by consent, and only stayed proceedings contingently. *Ex parte Whinney*, 13 Q. B. D. 476, 32 W. R. Dig. 11, and *Ex parte Chinery*, 32 W. R. 469, 12 Q. B. D. 342, are also distinguishable. By 1 & 2 Vict. c. 110 orders and decrees of the Court of Chancery are put on the same footing as judgments. Again, in an action for the possession of land the right of possession at the time of the writ is the only question to be decided, and that has been determined in this action. The defendant in an action of ejectment could not set up the plea of *res judicata*, even if the action had been fought out. The plaintiff can always bring a fresh action claiming possession from the date of the new writ. By the dismissal of the action for want of prosecution this particular action has reached all the finality of which it is capable.

S. Woolf, for the respondent, was not called upon.

Lord ESHER, M.R.—I think there are only two cases to be considered, *Ex parte Chinery* and *Ex parte Moore*, as the other cases on this point have been decided on their authority. The principle in *Ex parte Chinery* was stated by Cotton, L.J., to be that the word "judgment" in the statute is to be construed strictly, and to be understood to mean that which was known before in law as a judgment as distinguished from "order." Further, that judgment must be a final judgment.

Therefore, if the court comes to the conclusion that it is an order which is in dispute, and not a judgment, then no bankruptcy petition can be upheld. As to the words "final judgment," Cotton, L.J., said that they mean "a judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained or established." It has been suggested that that definition is not exact, and Lord Selborne, C., in *Ex parte Moore*, said: "To constitute an order a final judgment nothing more is necessary than that there should be a proper *litis contestatio* and a final adjudication between the parties to it on the merits." I think, perhaps, the words "on the merits" might have been omitted from this definition. Then as to the words "for existing liability," Lord Selborne added that "Those expressions must be taken in connection with the particular facts of the cases in relation to which they were used." I do not think that Lord Selborne wanted to contradict in the latter part of his judgment what he had previously laid down. I think that he was not pleased with the words "for existing liability," and that he wished to substitute "*litis contestatio*"—that is to say, a previously existing assertion of liability, by which the question as to whether a pre-existing right of the plaintiff against the defendant existed was ascertained. Either there would be, or there could not be, such a right, and in either case the question would be ascertained and determined. Cotton, L.J., finding that his former definition had been criticized, said that a final judgment is "a judgment in an action between parties brought to establish some right of the plaintiff against the defendant," and proceeded to add that a tort was included in that definition, for "if a defendant has committed a tort there is a previously existing liability on his part to the plaintiff to pay damages," and, further, "the order for the payment of costs did not enforce a pre-existing liability of the defendant, but that order is part of a final judgment which did." I do not pretend to say that the definition I am about to give is strictly accurate, but, in my opinion, a final judgment means a judgment obtained in an action by which the question as to whether there was a pre-existing right of the plaintiff against the defendant is finally determined in favour either of the plaintiff or defendant. I think that definition will govern most cases.

Is this, then, such a judgment? There was a claim of right which the plaintiff alleged existed before action. Was that finally determined? Certainly not on the merits, for no tribunal had heard the facts; but I do not think Lord Selborne meant that when he introduced the words, "on the merits." If a question between two parties cannot be raised again, then only can it be said to be finally determined. But the question can be raised again between the same two parties. I think that this judgment is only a judgment of nonsuit—that is to say, that the action has not been finally determined. It is said that this is an action for ejectment, and that that fact establishes a distinction, because the same question can never be raised again between the parties, because an action of ejectment only tries the question whether the plaintiff is entitled to possession at the date of the writ. It is said that is now determined, because in a new action the question to be tried would be as to the rights of the parties on the day of the new writ. I do not think that is so. Actions for ejectment have never been so treated during the last 300 years. When an action for ejectment has been brought and tried out, there is no law permitting a similar question to be argued out again. A judgment in such an action is final, and there is no difference between that form of action and any other. The appeal must fail.

FRY, L.J.—I am of the same opinion. An action was brought against the appellant to get possession of certain lands, for a declaration of title, and the recovery of mesne profits. That action was dismissed for want of prosecution. That order is in terms and substance an "order," and cannot be held to be a "judgment." Even supposing it to be a judgment, is it final? I shall not attempt to define what a final judgment is, but, according to the definitions of the Master of the Rolls, of Lord Selborne, and of Cotton, L.J., nothing can be a final judgment which does not give a final and conclusive determination between the parties of the matters in controversy. Is that the case here? It is said that there has been here as final a determination as is possible, because there is an action for ejectment, which can only determine the rights of the parties at the time of the writ. But this is more than an action of ejectment, for it seeks further relief. If a declaration of title had been made, it would have been a final and conclusive determination of the rights of the parties down to, and including, the time of the trial, and that declaration might have been pleaded as *res judicata* to a fresh action by the plaintiff.

LOPES, L.J.—I do not say whether this is a judgment or not, but certainly it is not final. I think that the following is a fair definition—though it may not be an exhaustive one—of the term, "final judgment." A final

judgment, in my opinion, is a final adjudication of the matters in contest in an action between the parties to the action. Such an order as this for the dismissal of an action for want of prosecution does not prevent the plaintiff from bringing a fresh action, and that fact seems to me to be conclusive.

Appeal dismissed.

Solicitors for the appellant, *Western & Sons.*

Solicitor for the respondent, *D. E. Stanford*, Newcastle-on-Tyne.

From Q. B. Div. Feb. 15.

FINLAY *v.* CHIRNEY. (*a.*)

Contract—Breach of promise of marriage—Death of promisor—Action against executors—Special damage—Actio personalis moritur cum personâ.

An action for breach of promise of marriage, where no special damage is alleged, does not survive against the personal representatives of the deceased promisor.

Special damage must consist in some loss to the property of the promisee flowing directly from the breach, or within the contemplation of both parties at the date of the promise as the probable result of the breach, according to the rule laid down in Hadley *v.* Baxendale, 2 *W. R.* 302, 9 *Ex.* 341; *and such special damage alone can be recovered.*

Chamberlain *v.* Williamson, 2 *M. & S.* 408, *approved and followed.*

This was an action brought against the executors of G. B. Chirney in respect of an alleged breach of promise of marriage committed by him in his lifetime. There was also an allegation that the plaintiff was seduced by him under cover of the promise to marry. At the trial Cave, J., nonsuited the plaintiff, on the ground that there was no corroboration of the plaintiff's evidence with respect to the promise as required by 32 & 33 Vict. c. 68, s. 2. Upon an application to the Divisional Court for a new trial, the defendants, in addition, raised the objection that the action would not lie. Field and Wills, JJ., held that there was evidence of corroboration, and, without expressing an opinion whether the action would lie in its present form, held, upon the authority of *Chamberlain* v. *Williamson*, 2 M. & S. 408, that it would lie where special damage was alleged and proved, and ordered a new trial, giving the plaintiff leave to amend by alleging special damage.

The defendants appealed.

Waddy, Q.C., and *H. F. Boyd* (*Ernest Pollock* with them), for the defendants.—This action will not lie against executors. In *Chamberlain* v. *Williamson* an action was brought by the administrator for breach of promise of marriage, and it was held that the action would not lie where no special damage was alleged. The principle of that decision is that executors and administrators represent the estate of the deceased, and not his wrongs or his contracts of a purely personal nature. A breach of promise of marriage imports only a personal injury, for which executors cannot be made liable. Actions of a merely personal nature, whether *ex contractu* or *ex delicto*, are not maintainable by or against executors: *Phillips* v. *Homfray*, 32 W. R. 6, 24 Ch. D. 439. It is submitted that this action will not lie even where special damage is alleged; at any rate, it will not lie without proof of special damage, and none can be alleged or proved in this case. Special damage must be something different from the damages ordinarily recoverable in actions for breach of promise of marriage. There must be some loss to the personal estate of the promisee: *per* Lord Ellenborough in *Chamberlain* v. *Williamson*. The American cases are to the same effect: *Stebbins* v. *Palmer*, 1 Pick. (Mass.) 71; *Lattimore* v. *Simmons*, 13 Serjeant and Rawle (Penn.) 183; *Smith* v. *Sherman*, 4 Cush. (Mass.) 408; *Hovey* v. *Page*, 56 Maine, 142.

Digby Seymour, Q.C., and *J. Lawson Walton*, for the plaintiff.—The maxim *Actio personalis moritur cum personâ* applies to actions of tort and to actions of a purely personal nature: Bacon's Abridgment, 7th ed., vol. 3, pp. 537, 539. An action for breach of promise of marriage, is not a purely personal action. Damages are given for loss of a valuable marriage. Wherever damage is suffered from breach of contract an action will lie against the deceased promisor's executors. In *Chamberlain* v. *Williamson* an administrator was trying to get damages when he could prove none. Besides, an action by executors is different from an action against them. If necessary, this court can overrule *Chamberlain* v. *Williamson*. Secondly, the action is maintainable where special damage is alleged, and the plaintiff has obtained leave to amend by alleging special damage.

They also referred to *Hambly* v. *Trott*, Cowp. 371; *Sollers* v. *Lawrence*, Willes, 421; *Siboni* v. Kirkman, 1 M. & W., at p. 423; *Wheatley* v. *Lane*, 1 Wms. Saund. 239; *Pinchon's case*, 9 Co. 88a; *Prince* v. Nicholson, 5 Taunt. 333; *Barry* v. *Robinson*, 1 New Rep. (Bos. & P.) 293; *Walker* v. *Hull*, 1 Lev. 177; *Beckham* v. *Drake*, 2 H. L. Cas., at p. 597; *Evans* v. *Stool*, 22 Scottish Law Reporter, 872; 1 Williams' on Executors, 6th ed., 807; 2 Williams' on Executors, 1,728; Com. Dig. tit. Covenant, c. 1.

Boyd, in reply.—Lord Ellenborough, in *Chamberlain* v. *Williamson*, used the phrase "special damage" in the sense in which it was used in *Kingdon* v. *Nottle*, 1 M. & S. 355, as damage to the personal estate of the deceased in his lifetime.

He also referred to Noy's Maxims, No. 14; *Brewster* v. *Lancashire and Yorkshire Railway Co.*, 23 W. R. 310, L. R. 10 C. P. 189; *Leggott* v. *Great Northern Railway Co.*, 24 W. R. 784, 1 Q. B. D. 599; *Pulling* v. *Great Eastern Railway Co.*, 30 W. R. 9 Q. B. D. 110.

Cur. adv. vult.

Feb. 15.—Lord ESHER, M.R.—This was an action against the executors of the deceased promisor for breach of promise of marriage. The action was tried before Cave, J., and a jury, when the objection was taken by the defendants that there was no corroboration of the plaintiff's evidence as to the promise. Cave, J., took this view, and nonsuited the plaintiff. The case was taken to the Divisional Court, and there a further contention was raised—namely, that the action was not maintainable. The court held that there was evidence of corroboration, but considered that it was not necessary to decide the new point raised, because they held that the action would lie upon proof of special damage, and as it was alleged that the plaintiff could prove special damage, they granted a new trial giving the plaintiff liberty to amend. Under those circumstances the appeal came before us.

We must first consider whether the action will lie without proof of special damage. There can be no doubt that the authority of English law is overwhelming to this effect, that no such action will lie against the personal representatives of a deceased promisor or against the personal representatives of a deceased promisee. I say the authority is overwhelming because it was decided by the Court of Queen's Bench in the time of Lord Ellenborough in *Chamberlain* v. *Williamson*, that the action was not maintainable by the administrators of the deceased promisee, and no case can be found in

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

English books in support of such an action, though circumstances must have occurred over and over again to give rise to it. From authority I come to principle, and inquire whether a breach of promise of marriage is of such a nature that the injury is solely personal to the promisor and promisee. It seems to me to be clear that the injury or complaint does not relate to the property, whether real or personal, of the party complaining. The cause of complaint—that is, the cause of action, is purely personal on both sides. It is true that the action is founded upon a breach of contract, but it has been often held that that does not prevent the complaint from being personal. In an action for breach of promise of marriage, although the cause of complaint is a breach of contract, yet the injury has always been treated as personal, and the damages treated as damages arising from a personal injury to the plaintiff. In assessing the damages the personal conduct of the defendant is taken into account, and evidence is always admissible of the conduct of both parties in aggravation or mitigation of damages. Besides conduct, other personal matters, such as the age of the parties, are taken into account. All this shows that, though the form of action is a breach of contract, the action is strictly personal, affecting only the person and not property; and therefore, both on principle and on authority, such an action, whether by or against personal representatives, is not maintainable. The authorities in America which have been cited to us are to the same effect. There being, therefore, no allegation of special damage, the defendants were entitled to judgment.

Then comes the second question, whether the action will lie where special damage is alleged. In *Chamberlain* v. *Williamson* it is stated that such an action will not lie, except where special damage has occurred, and in the American cases the same statement is made. I know of no case where the action has been maintained upon proof of special damage. For some time I had grave doubts whether it was not right to say that special damage did not enlarge the case at all. Upon consideration, however, I do not wish to go that length. Assuming special damage to be alleged and proved (I can hardly conceive a case of special damage), there arises the question whether the damages are limited to the special damage, or whether they are to include general damages as well. Is the whole question of damages thrown open, or is the action confined to the recovery of the special damage? If the whole matter is thereby thrown open, the principle that a personal action does not survive to or against personal representatives would be violated, and executors would have to pay out of the estate of the deceased damages for personal injury. Therefore I have no doubt that, even if this action will lie upon proof of special damage, it can only be brought to recover the special damage, and all other damages must be eliminated. The only damages that can be recovered are in respect of injury to the property of the promisee. Such special damage may arise where, at the time of the promise to marry there was another promise affecting the property of the promisee, but forming a part of the consideration for the promise to marry. If, again, there were circumstances existing at the time of the promise to marry such that the parties must reasonably have contemplated that the breach of the promise would affect property of the promisee, an action will lie for the loss to that property within the rule laid down in *Hadley* v. *Baxendale*, 9 Ex. 341. The conclusion I have arrived at is, that the action will not lie without special damage; if there is special damage, an action will lie to recover only that special damage, the cause of action still being the breach of promise; and such special damage may result from an express promise, part of the promise to marry, or may be such as the parties would reasonably contemplate as resulting from the breach of promise to marry. I may add that the American cases seem to me to point to the same conclusion.

That being so, the plaintiff was rightly nonsuited at the trial, as she neither alleged in the pleadings, nor proved, any special damage. The Divisional Court, however, ordered a new trial, giving her leave to amend by alleging special damage. In mercy to both sides, before putting the parties to the expense of a new trial, we thought it right to inquire what special damage could be alleged, and accordingly particulars of the special damage proposed to be proved have been furnished to us. Those particulars do not, in my opinion, disclose any special damage within the rule that I have enunciated. The first head of special damage relates to clothes which the plaintiff bought for the marriage. It can hardly be said that at the time of the promise to marry both parties may reasonably be taken to have contemplated that a woman in the position of the plaintiff would buy a trousseau. The plaintiff was manageress in a dairy belonging to the deceased promisor, who owned a farm. Even in a higher station in life the man has nothing to say to the trousseau. The girl's father, as a rule, buys it; and even if the girl were to buy it out of her own money, she would still have the clothes. Moreover, the preparation for the marriage has always been given in evidence to aggravate the ordinary damages for the breach of promise, and not as special damage. It was suggested that if the plaintiff had given up a valuable situation for the purpose of getting married, that would be special damage. If at the time of the promise to marry it had been brought to the knowledge of the man that the plaintiff would have to give up her situation to marry him, then, perhaps, it might be special damage, and come within the rule in *Hadley* v. *Baxendale*. Take one more case, a promise to marry, coupled with an invitation to seduction. The invitation to seduction is part of the negotiations, and is a matter existing at the time of the promise. The reason why it cannot be allowed to be given in evidence as special damage is that it is contrary to public policy and decency to recognize it as special damage, and is not a contractual relationship known to the law. No special damage having been alleged, and the plaintiff not being able to allege any, the order for a new trial must be discharged, and judgment must be entered for the defendants. We think, however, under the circumstances of this case, that the defendants should only have the costs of the trial, and that there should be no costs in the Divisional Court or in this court. I have thought it right to state the reasons for the conclusion at which I have arrived, and I also agree in the elaborate judgment which Bowen, L.J., will now read.

The judgment of Bowen and Fry, L.JJ., was read by

Bowen, L.J.—That there was in this case some evidence which, if the jury believed it, would be in corroboration of the plaintiff's own story, we do not doubt, for the reasons indicated during the course of the argument. But a more serious question has been raised as to the liability of an executor in respect of an alleged breach of promise of marriage by the testator whose estate he represents. The liability of an executor in respect of the acts and defaults of his testator has been in the English law a matter of slow growth. The maxim *Actio personalis moritur cum personâ* is one of some antiquity, but its origin is obscure and post-classical. Unless, indeed, some very restricted sense is affixed to the word *personalis*, it is by no means true at the present day that a personal action always dies with the person. Upon the other hand, if the meaning of the maxim is to be limited, it is difficult to reconcile its phraseology with the ordinary classifications of ancient English law. Judges and text-writers since the reign of Queen Elizabeth have been in the habit of ex-

plaining upon fit occasions that only actions *ex delicto* were within the operation of the principle. "The rule," says the learned editor of William's Saunders (vol. 1, p. 240), "was never extended to such personal actions as were founded upon any obligation, contract, debt, covenant, or any other duty to be performed." This remark is true, if confined to the law of recent times, but it is inexact if it be taken as applying to the older English law, under which actions based upon an obligation, as a rule, died with the person. As applied, however, to modern times, the proposition is supported by abundance of authority. "*Actio personalis*," says Willes, J., in *Sollers* v. *Lawrence*, "is always understood of a tort"; and similar expressions occur elsewhere in plenty. But though this gloss or limitation has been forced upon the Latin maxim in later times by the exigencies of a growing society, we are left still in the dark as to the maxim's exact meaning or source. The truth is, that in the earliest times of English law survival of causes of action was the exception; non-survival was the rule. Moreover, the clear line which we are accustomed at this day to draw between contract and tort in the classification of personal actions does not correspond with the early English law, nor with the history of old English writs and causes of action. Actions of trespass were formerly actions of a *quasi*-penal character, and based upon the supposition of personal wrong. It was not unnatural that such actions should die upon the death of the trespasser. "All private criminal injuries or wrongs, as well as all public crimes, are buried," says Lord Mansfield in *Hambly* v. *Trott*, 1 Cowp., at p. 375, "with the offender." But survival was also denied to other actions which did not fall within the category. In Bracton's time (fol. 101) the general law was that an obligation was got rid of by the death of either of the contracting parties. "Item tollitur morte alterius contrahentium vel utriusque, maxime si fuerit pœnalis vel simplex, si autem duplex, scilicet pœnalis et rei persecutoria, in hoc quod pœnalis est tollitur et non extenditur contra hœredes, nec datur hœredibus, quia pœna tenet suos auctores et extinguitur cum personâ." In debt the executor could not be sued where the testator could have waged his law: see *Pinchon's case;* a condition of things which continued even down to 1805: *Barry* v. *Robinson*. And when we consider that all actions on the case, as is said by Blackstone, J., in *Mast* v. *Goodson*, 2 W. Black. 849 (13 Geo. 3), were originally for torts, and that it was only in the time of Queen Elizabeth that the familiar action of assumpsit was, after a controversy, introduced, it becomes plain that it is within the last three centuries that the contractual liabilities of an executor have expanded to their present limits. Modern jurisprudence has, however, since the reign of Queen Elizabeth adopted a rough but convenient interpretation of the maxim which is set forth in the passage above cited from 1 William's Saunders, 240. On one side of the line of demarcation lie actions of tort. Remedies for wrongful acts, according to the present law, can only be pursued against the estate of a deceased person when property, or the proceeds or value of property belonging to another, have been appropriated by the deceased person and added to his own estate or moneys: *Phillips* v. *Homfray*, 32 W. R., at p. 9, 24 Ch. D., at p. 454. On the other side of the line lie actions founded on any contract, express or implied, "or any other duty to be performed." Early in the reign of James an action was allowed against executors for payment of a debt, if clothed in the form of an action on the case in assumpsit: *Pinchon's case;* and this remedial view of the law has been adopted and followed ever since.

The question we have to decide to-day relates to a class of action which, though in its form and substance contractual, differs from other forms of actions *ex contractu* in permitting damages to be given as for a wrong This double aspect of an action for breach of promise creates the perplexity in the present instance. On which side of the line is to fall an action which is based on the hypothesis of a broken contract, yet is attended with some of the special consequences of a personal wrong, and in which damages may be given of a vindictive and uncertain kind, not merely to repay the plaintiff for temporal loss, but to punish the defendant in an exemplary manner as well? How far is such an action within, how far without, the maxim *Actio personalis moritur cum personâ?* The problem is one which in the nature of things is of later date than the Year Books. Before the Reformation no action for breach of promise could be maintained, for marriage was a matter of spiritual jurisdiction. It was not till the middle of the 17th century that marriage was recognized by our law as a temporal benefit, and a breach of promise of marriage as cognizable by the temporal courts: *Baker* v. *Smith*, Styles, 295; *Rolle's Abridgment*, Action on case, p. 22, par. 20. See also *Hebden* v. *Rutter*, Siderfin, 180; and *Harrison* v. *Cage et uxor*, Carth. 467, a case supposed erroneously by Willes, J., in *Smith* v. *Woodfine*, 1 C. B. N. S., at p. 667, to be the earliest recorded of breach of promise of marriage. No authorities of a very early date can accordingly be expected to throw light upon the question, and it must be solved mainly upon principle. It is a striking and not an immaterial fact that no action for breach of promise of marriage against the executors of a deceased person is to be found in the books. We have, moreover, a case decided by Lord Ellenborough and the Court of Queen's Bench towards the beginning of the century which affords us some guidance in the matter. In *Chamberlain* v. *Williamson* the converse of the present case occurred in an action brought by the representatives of a deceased against a living person for breach of promise. It was held that an action of the sort in which no special damage was alleged would not lie, on the ground that, except when such special damage had been occasioned, the action was in reality an action arising out of a personal injury. "The general rule of law," says Lord Ellenborough, "is *Actio personalis moritur cum personâ*, under which rule are included all actions for injuries merely personal. Executors and administrators are the representatives of the temporal property—that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate." This judgment has been adopted as a guiding one by the American courts in the cases of *Stebbins* v. *Palmer*, A.D. 1822; *Lattimore* v. *Simmons*, A.D. 1825; *Smith* v. *Sherman*, A.D. 1849; and *Hovey* v. *Page*, A.D. 1867. It does not, indeed, follow that the same reasoning applies in toto to actions brought against the executors of a deceased person: *per* Bramwell, L.J., in *Twycross* v. *Grant*, 27 W. R. 87, 4 C. P. D. 40. But the decision in *Chamberlain* v. *Williamson* shows, at all events, that the courts of this country will, even although an action for breach of promise be an action arising out of contract, apply the general principles of the maxim *Actio personalis* to as much of the damages as are a remedy for mere personal wrong, and will allow only so much of the remedy to survive as seems to belong to the ordinary category of actions *ex contractu*. In order accurately to draw the dividing line it becomes necessary to analyze the damages which are recoverable in cases of breach of promise, and their measure and character has nowhere been better explained than in 2 Sedgwick on Damages, 7th ed., 146, cited with approval by Willes, J., in *Smith* v. *Woodfine*. "This action," says the learned author, "is given as an indemnity to the injured party for the loss she has sustained, and has been always held to embrace the injury to the feelings, affections, and wounded pride, as well as the loss of marriage. From the nature of the case it has been found impossible to fix the amount of

compensation by any precise rule; and, as in tort, the measure of damages is a question for the sound discretion of the jury in each particular instance, subject of course to the general restriction that a verdict influenced by prejudice, passion, or corruption will not be allowed to stand. Beyond this the power of the court is limited, as in cases of tort, almost exclusively to questions arising on the admissibility of evidence when offered by way of enhancing or mitigating damages." It is, as it seems to us, by way of enhancing damage, and not as a special head of damage flowing naturally from the breach, that evidence of the means of the defendant is usually given at the trial. If it were otherwise such head of damage would require special averment on the record. But it is treated as part of the history of the circumstances of the case, and as enabling the jury to estimate properly the conduct of the defendant. "The value of the defendant's property," says Cresswell, J., in *Smith* v. *Woodfine*, "is invariably gone into in cases of this sort." But where there is no special averment on the record of pecuniary loss arising out of the breach, the general allegation of the breach of promise imports, according to Lord Ellenborough in *Chamberlain* v. *Williamson*, only a personal injury, though the jury may consider such personal injury with reference to all the circumstances of the case. There may, of course, be an actual loss to the temporal estate of the promisee arising out of the breach of contract. If such loss is to be relied on as independent and special damage in an action against executors, it ought to be specially pleaded, and in order to see if such damage is in fact recoverable the ordinary line as to remoteness of damages will have to be drawn according to the well-known doctrine of *Hadley* v. *Baxendale*.

If the above is a correct account of the damages recoverable in an action of breach of promise, it would seem to follow that with the death of the promisor all claim to damages of an exemplary or sentimental kind ought to cease, and that such damages only ought to be left as represent compensation for a temporal and measurable loss flowing directly from the breach or within the contemplation of both parties at the date of the promise; and that in an action against executors such a temporal loss, if it is alleged, must be treated according to the ordinary rules as to remoteness as applied to the special facts of the case. In the present action there is no special averment of temporal loss, and we ought not to allow the pleadings at this late stage to be amended, and to send down the case to trial again, unless we are satisfied that there is a substantial claim under this head fit for the consideration of the jury. By special leave of the court the plaintiff has now filed an affidavit as to particulars of special damage. The only items which are entitled even to plausible consideration are two—first, the expense to which the plaintiff was put in maintaining herself as a *feme sole* subsequently to the breach; and, secondly, the amount expended by the plaintiff in the purchase of underclothing, &c., in preparation for her marriage. The plaintiff's expense in maintaining herself after she was forsaken clearly cannot be recovered. It cannot be a consequence naturally arising out of a breach of promise of marriage that the woman is to be entitled during the remainder of her life to charge the expenses of her living and maintenance to her faithless lover. With respect to the claim for underlinen, &c., it is sufficient to say that the materials furnished by the plaintiff's affidavit do not show that such purchase was made under circumstances which would bring the expenditure within the head of damages flowing directly from the alleged breach of contract, or within the contemplation of the parties at the time. We do not desire to intimate any opinion that expenditure in respect of a marriage trousseau, or other marriage preparation, must necessarily be too remote to be recovered against executors in an action for breach of promise of marriage; the matter must in each case depend upon the circumstances of the case; but, though invited to do so, the plaintiff has not given us the means of seeing that this particular head of damage can be sustained by evidence, or what case she has for asking for an amendment to be made in the statement of claim which would include it.

The action, therefore, must be dismissed, with costs; but as the only point taken by the defendants at the trial was one as to corroboration, and as that point was a bad one, we think that there ought to be no costs of the hearing in the Divisional Court or of this appeal.

Appeal allowed.

Solicitors for the plaintiff, *Harvey & Capron*, for *T. & R. Nicholson*, Morpeth.

Solicitors for the defendants, *Crosseman & Prichard*, for *G. & F. Brumell*, Morpeth.

From Q. B. Div. Feb. 13.

Leduc & Co. v. Ward. (a.)

Ship—Bill of lading—Contract of carriage—Voyage—Deviation—Liberty to call at any ports in any order.

Goods were shipped on board a general ship for carriage from Fiume to Dunkirk. The bill of lading contained the usual exception of perils of the sea, and stated that the goods were shipped "on board The A., *now lying at the port of Fiume, bound for Dunkirk, with liberty to call at any ports in any order."* The A. *proceeded first to Glasgow, and was lost on her voyage thither through a peril of the sea.*

Held, that evidence was inadmissible to vary the contract of carriage as contained in the bill of lading, and that the voyage to Glasgow was a deviation in excess of the liberty given by such contract, and that, therefore, the exception contained in the bill of lading did not apply.

Appeal from the decision of Denman, J.

The action was brought by the indorsee for value, of a bill of lading against the owners of the steamship *Austria* for the value of certain goods.

The goods were shipped on board *The Austria*, which was a general ship, at Fiume, for delivery at Dunkirk. The bill of lading contained the usual exceptions of sea perils, and stated that the goods were "shipped on board *The Austria*, now lying at the port of Fiume, bound for Dunkirk, with liberty to call at any ports in any order, and to deviate for the purpose of saving life or property. Goods to be delivered at Dunkirk to order or assigns."

The Austria, instead of going direct to Dunkirk, went first to Glasgow, and was lost on her voyage, being wrecked on Ailsa Craig. It was admitted that the loss was due to a peril of the sea. Evidence was given at the trial with the intention of showing that the shipper by whom the bill of lading had been indorsed to the plaintiff knew at the time the vessel left Fiume that she would go first to Glasgow. Denman, J., admitted the evidence, but considered it insufficient to prove such knowledge, and gave judgment for the plaintiff.

The defendants appealed.

Finlay, Q.C., and *Gainsford Bruce, Q.C.* (*Lawson Walton* with them), for the appellants.—A bill of lading is not a contract, and therefore evidence was admissible to show that the shipper had assented to this variation of the voyage: *Sewell* v. *Burdick*, 33 W. R. 461, 10 App. Cas., at p. 105. Liberty to call at any ports gives liberty to call at any ports in the world, including

(a.) Reported by A. P. Percival Kerr, Esq., Barrister-at-Law.

Glasgow: *Crookes* v. *Allan*, 28 W. R. 304, 5 Q. B. D. 39; *Ashley* v. *Pratt*, 16 M. & W. 471. *Lowry* v. *Russell*, 8 Pick. 360, is directly in our favour.

Sir Charles Russell, Q.C., and *J. G. Barnes*, for the respondent.—No parol evidence is admissible to vary this written contract: *Fraser* v. *Telegraph Construction Co.*, 20 W. R. 724, L. R. 7 Q. B. 566; *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*, 31 W. R. 445, 10 Q. B. D. 521; *Glyn, Mills, & Co.* v. *East and West India Dock Co.*, 31 W. R. 201, 7 App. Cas. 591.

They also referred to *The Delaware*, 14 Wall. 579; *May* v. *Babcock*, 4 Ohio, 334; and *Davis* v. *Garrett*, 6 Bing. 716.

Finlay, Q.C., replied.

Lord ESHER, M.R.—In this case the plaintiff is the indorsee of a bill of lading to whom the property had passed within the terms of the Bills of Lading Act. He is therefore the owner of goods which were shipped on board this ship to be carried from Fiume to Dunkirk. He brings the action as a party to the bill of lading on the ground that the goods were put on board upon the terms of the bill of lading, and that therefore he is entitled to have the goods so put on board delivered at Dunkirk. The defendants answer that the goods have been lost by a peril of the sea excepted by the bill of lading, and that they are therefore protected. To this it is replied that the goods were not lost by any peril of the sea excepted from the contract to deliver them at Dunkirk, but that they were lost at a time when a breach of such contract had been committed, and in a place where the shipowner could not rely on the exceptions in the contract, and that, therefore, although the loss was actually occasioned by perils of the sea, the shipowner is liable. The case was tried before Denman, J., who has given judgment for the plaintiff.

Now the questions are as to the meaning of the contract, and whether the contract is contained in the bill of lading.

It has been suggested that the bill of lading is nothing but a receipt for the goods, and contains no contract, or evidence of a contract, except that the goods have been received, and are to be delivered at the place named. A bill of lading is a mercantile document, which is generally drawn in a form known for hundreds of years in the mercantile world, and which has received, both there and in the courts, one and the same construction. A bill of lading signed under a charter-party and given to the charterer is, as between the charterer and the shipowner, only a receipt for the goods, because all other terms are determined by the charter-party. Such a bill of lading is, therefore, not a contract of carriage, but it is given to enable the charterer to deal with the goods by indorsing it over to a third party. But when a bill of lading is thus given and is indorsed over, inasmuch as the shipowner by giving it enables the shipper to pass it on as the contract of the shipowner, it is, as between shipper and shipowner, more than a receipt.

But where there is no charter-party the bill of lading is no doubt primarily a receipt for the goods, and, as such, is not conclusive as a receipt. It is a mere statement which can be contradicted by evidence. There is good reason for this, because the question whether it is something more than a receipt depends on whether the captain has received the goods on board, for he can make no contract of carriage in respect of goods which he has not received on board. Therefore, if the goods have not been received on board, the bill of lading cannot contain the terms of a contract of carriage with respect to them as against the shipowner. But if the goods have been received on board, the bill of lading is evidence in writing of what the contract of carriage is. The contract is usually made, no doubt, before the goods are sent on board; but when they are sent on board the captain can reduce into writing the terms of the contract, and he does this by giving and signing the bill of lading. The bill of lading, therefore, is a contract between the shipper and shipowner reduced into writing. By the general rule of law, where a contract has been reduced into writing, that writing is the only evidence, and the contract cannot be varied, except by showing the existence of a custom so well established and generally known that it must be taken to be incorporated into the written contract. Nothing else can be incorporated in the contract, because no evidence outside the written contract is admissible.

To say that this question has never been raised before is startling. In *Fraser* v. *Telegraph Construction Co.* Blackburn, J., said that the bill of lading contained the terms of the contract. In *The Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* I said: "The contract here has been, by the consent of the parties, reduced into the form of a bill of lading, and therefore the whole of the contract is contained in that bill of lading, and no terms of the contract outside of the bill of lading can be looked at." And in *Glyn, Mills, & Co.* v. *East and West India Dock Co.* Lord Selborne said: "The primary office and purpose of a bill of lading . . . is to express the terms of the contract between the shipper and the shipowner."

Therefore, to treat the bill of lading as being merely a receipt for the goods, and nothing else, seems to me untenable. The terms of the Bills of Lading Act also show that the Legislature takes the view that it is a contract.

The bill of lading being in this case the contract of carriage, is it part of that contract that the ship should go on the voyage mentioned in the bill of lading, and was the voyage actually taken a breach of the contract? The bill of lading is in ordinary terms—terms which have received common construction. It has been said that it is no part of the contract to carry the goods directly on the voyage named. Only consider what would be the result of such a construction. The goods might be transported anywhere, and it would be impossible for the buyer of the bill of lading to know when they were likely to arrive at the port of destination. So, in the case of insurance, it would be impossible to foretell where the goods might be taken or to what perils they might be subject. To suppose that the voyage forms no part of the contract would be to disregard the whole course of mercantile business.

It is a most important point of the contract of carriage by sea to determine the voyage on which the ship is to proceed. The contract is to carry the goods from the port of shipment to the port of destination along the agreed voyage. The bill of lading is almost always in one form, and declares that the goods are shipped on board the ship at the port of shipment, and are bound for such and such a destination. If the ship has to go to any other places they are named. What, then, is the construction of such a description of a voyage? The ordinary business description which has been used for hundreds of years has always been interpreted in this way, and has been recognized by all courts and in business, and it is that construction that the courts always adopt—namely, the ordinary track by ships on such a voyage. In this case, therefore, if the bill of lading contained no further provision, the voyage would be from Fiume to Dunkirk along the ordinary track of the sea of such a voyage, and to deviate from that track unless forced to do so would be a breach of the contract. Of course, the word track must be taken in a common sense way. The track may differ under different circumstances, and it does not mean an absolutely direct line.

But here some further liberty was given, and a vessel was allowed by the bill of lading to call at

ports. Can it be seriously contended that that gave the ship liberty to call at any ports in the world. I think not. The words have invariably been given one meaning, and have been held only to include ports that will be passed substantially on the main voyage. The liberty given enables the shipowner to go somewhat out of the ordinary track to call for the purposes of business at any of the ports which he passes. To call is a well-known sea term, and he is allowed to call at such ports as would be ports of call on the voyage named in the bill of lading. Where there is nothing more it is an invariable rule that he may only call at these ports in their geographical order. Here, however, further liberty is given, and he may call "in any order." The shipowner, therefore, had, upon the contract in this bill of lading, to go from Fiume to Dunkirk along the ordinary track of such a voyage, but he might call at any ports along that track in any order; but to go beyond that would be a breach of contract; and when, therefore, this ship passed from that track, a deviation was committed, and she was no longer on the voyage to which the exceptions contained in that contract applied, and therefore the shipowner was no longer protected by those exceptions.

These are plain principles, business principles, and well-recognized principles. I, for one, will not depart from them. It is said that there is an American case (*Lourie* v. *Russell*) which has decided that where a voyage is expressed in such a bill of lading in terms which can only be construed one way, that nevertheless evidence is admissible to show that the shipper knew that the ship was going to deviate from that voyage. If that was really said at all, which I am inclined to doubt, I think it was immaterial, as there was in that case a general custom proved; but it seems more probable that the case is misreported. Two other American cases (*The Delaware* and *May* v. *Babcock*) seem to state the right business principle, and therefore the American authority is more in favour of my view than against it.

I am of opinion, therefore, that this appeal must be dismissed.

Fry, L.J.—A greater part of the argument before us has been concluded by the Bills of Lading Act, 1855. That Act provides that every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass shall have all rights and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself. In this case the goods in question vested in the plaintiff by virtue of the indorsement of the bill of lading. The statute is a legislative declaration that there is a contract in the bill of lading, and that, in such a case as this, the benefit of that contract passes to the indorsee. I entirely agree with the Master of the Rolls as to the construction of that contract, and I do not doubt that all the rights of deviation which the shipowner had are contained in it. Does the right of deviation given by it allow her to pass Dunkirk and to go to Fiume? Clearly that is not a deviation contemplated by the contract.

As to the American authority which has been cited in addition to this view, I think that the statement there is mere *obiter dictum*. No effect can be given, in my opinion, to the knowledge of the shipper in respect of a contract which is assignable to a third person. The contract is express as to the extent and power of deviation, and repels the suggestion that there was any wider liberty than is expressly given. Nor do I think that the evidence, even if it had been rightly admitted, amounts to any variation of such liberty. I prefer, however, to rest my judgment on the fact that the contract is one assignable to a third person, who cannot have notice of any parol variation of its terms.

Lopes, L.J.—I entirely agree, and I do not think I can usefully add anything. The bill of lading is clear and express, and no parol evidence ought to be admitted to vary it. The deviation was entirely unjustified, and therefore the plaintiff is entitled to succeed.

Appeal dismissed.

Solicitors for the plaintiff, *Waltons, Bubb, & Johnson.*

Solicitors for the defendants, *Stokes, Saunders, & Stokes.*

From Prob. Div. & Adm. Div. March 14.

Dunn v. Dunn. (a.)

Divorce—Alimony—Verdict of jury finding wife guilty—Right to alimony pending appeal.

When there has been a verdict of a jury finding a wife guilty of adultery, the wife's right to alimony prima facie *then ceases, subject, however, to a discretion in the judge to order it to be continued pending a new trial if he consider it reasonable to do so.*

Wells v. Wells and Hudson, 3 *Sw. & T.* 542, 12 *W. R. Div. Dig.* 16, *explained.*

Appeal from Butt, J.

This was an appeal from an order of Butt, J., in chambers, refusing an application by the wife that a *fi. fa.* might be issued to enforce the payment of alimony *pendente lite.* On the 3rd of February, 1888, a decree *nisi* had been pronounced on the petition of the husband, on the ground of the wife's adultery; the jury having found a verdict in favour of the husband on all issues in cross actions by the husband against the wife, and the wife against the husband. An order for the payment of alimony had been made when the proceedings were first instituted, and the husband had tendered payment of the same up to the 3rd of February, but refused to make any payment after that day, though making no application to have the order for the payment of alimony set aside. The wife gave notice of motion for a new trial, and afterwards applied to the registrar, and then to Butt, J., in chambers for leave to issue a *fi. fa.* to enforce the payment of alimony subsequent to the 3rd of February, on the ground that the case of *Wells* v. *Wells*, 3 Sw. & Tr. 542, 12 W. R. Div. Dig. 16, was an authority that the wife was entitled to alimony pending the result of the motion for a new trial.

Butt, J., on the 28th of February, refused the application.

The wife appealed.

Fillan, for the appellant.—*Wells* v. *Wells and Hudson* is an authority expressly laying down the rule of practice that alimony *pendente lite* only ceases when, in a case tried before a jury, the time has elapsed for moving for a new trial, and, if a new trial is refused by the court, when the further time for appealing from such refusal has elapsed. Until such time has elapsed the decree is not final and the suit is not at an end: *Ellis* v. *Ellis*, 31 W. R. 942, 8 P. D. 188; and a wife is entitled to alimony while she still remains a wife, which she does until the decree for dissolution of the marriage becomes final: *Stanhope* v. *Stanhope*, 34 W. R. 446, 11 P. D. 103. An order for alimony was made when this action was instituted, and that order is still in force, the husband not having made any application to have it set aside: *Jones* v. *Jones*, 20 W. R. 449, L. R. 2 P. & D. 333. The order for alimony is made under section 32 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), and rule 203 of the Rules in Divorce and Matrimonial Causes shows that a writ of *fi. fa.* shall be issued as of course on default in

(a.) Reported by M. J. Blake, Esq., Barrister-at-Law.

payment of any sum of money ordered to be paid. [Lindley, L.J.—Rule 110 seems to qualify that. Cotton, L.J.—An appeal, no doubt, does not operate as a stay of execution, but is it not a matter of discretion in the judge to stay payment of alimony pending an appeal?] Butt, J., did not base his refusal on the ground of exercise of discretion.

Inderwick, Q.C., and *Middleton*, for the respondent, were not called on.

Cotton, L.J.—This is an appeal from a decision of Butt, J., and as he gave no reasons for his decision it is left to us to decide the question without having the advantage of knowing his reasons. The question is, does the case of *Wells* v. *Wells* lay down a rule adopted in the Divorce Court, that where there has been a verdict of a jury finding a wife guilty of adultery, notwithstanding that verdict, alimony is to be continued to be paid until the time for appealing had expired? No doubt in that case the judge allowed the alimony to be continued, but is it a matter of right where the guilt of the wife has been established, though subject to appeal to this court or to the House of Lords, that alimony should continue to be paid after the verdict of the jury, unless some application is made by the husband to have it stopped? What is the reason for requiring payment of alimony? It is this, that until it has been proved that a wife has broken her marriage vow she is entitled to support from her husband. But when once it is established that she has been guilty of adultery, the whole foundation of the right to alimony is gone. She is, no doubt, still a wife, but she loses the right to alimony. The husband here has offered to pay alimony up to the time when the verdict of the jury was given, but has declined to pay after that date, and the judge has refused to order him to do so. I think that is right. The proper rule is that *primâ facie* where there is a verdict of guilty by a jury, the wife's right to alimony ceases, subject, however, to a discretion in the judge to order it to continue pending a new trial, if he consider it reasonable to do so. A different rule would have this effect—viz., that, merely by continuing litigation without any reasonable hope of success, alimony would be kept up pending an appeal, perhaps, to the House of Lords. *Ellis* v. *Ellis* is an entirely different case from the present, that was a suit by a wife who had not in any way forfeited her right to support by her husband, and therefore it was held that alimony ought to be continued to be paid after the decree *nisi* and until the decree was made absolute.

Lindley, L.J.—I am of the same opinion. It seems startling and anomalous that alimony should as a matter of right continue after a verdict finding the wife guilty of adultery. We have been informed that *Wells* v. *Wells* has not as a matter of practice been acted on. In my opinion it lies on the wife to show why alimony should be continued, but it would be monstrous to say that she is always as of right entitled to it until the House of Lords had decided as to her guilt. In my opinion she is only entitled to alimony until the court is judicially informed that she has been guilty of adultery.

Bowen, L.J.—I am of the same opinion. I have seen the President of the Divorce Division, and he considers that in our statement of the rule we are in no way deviating from what the practice in that court has been, *Wells* v. *Wells* notwithstanding. Under the circumstances we do not give costs against the wife.

Appeal dismissed.

Solicitors for the appellant, *Thomas Beard & Sons.*

Solicitor for the respondent, *T. Allingham*

From Prob. Div. & Adm. Div. March 19.

"The Cella." (a.)

Ship—Repairs—Action in rem—Arrest of ship—Lien—Security—Admiralty Court Act, 1861 (24 *Vict.* c. 10), *ss.* 4, 35.

In an action in rem *under the Admiralty Court Act*, 1861, *the ship from the date of arrest is a security in the hands of the court for the plaintiffs' claim as subsequently determined by the judgment, and this security is not affected by the bankruptcy or liquidation of the ship-owners between the date of the arrest and the judgment.*

Appeal from the judgment of Hannen, P.

In January, 1885, the steamship *Cella*, owned by the Cella Steamship Co., put into Halifax, Nova Scotia, for repairs, and the plaintiff effected the repairs necessary to enable her to complete her voyage to the United Kingdom, which she did. The master drew a bill at ninety days upon the Cella Steamship Co. for £963, the cost of the repairs. The bill was accepted, but was dishonoured at maturity. The plaintiff brought an action against the steamship company in the Queen's Bench Division, and on the 13th of August, 1885, recovered judgment, but this judgment remained unsatisfied.

On the 28th of May, 1885, the master commenced an action *in rem* in the Admiralty Division for his wages and disbursements, and on the same day *The Cella* was arrested. On the 15th of June, Wood the mortgagee of the ship, intervened in that action, and paid the master £120 in full discharge of his claim, and a release of *The Cella* in that action issued On the 8th of June, 1885, the plaintiff, while *The Cella* was under arrest, commenced this action *in rem*, under section 4 of the Admiralty Court Act, 1861. The company did not appear to this action. On the 15th of June Wood intervened in this action, and a few days later the following order was made:—"Upon agreement of counsel and James Marke Wood, the intervener, by counsel, undertaking to pay to plaintiff whatever plaintiff could, if arrest continued, recover from the ship after satisfying prior incumbrances, it is ordered that the ship *Cella* be released forthwith." Wood took possession of the ship, and sold her for £4,500.

On the 8th of August, 1885, the Cella Co was ordered to be wound up, and in October a liquidator was appointed.

Under an order of the court Wood furnished accounts, and the registrar found that, after allowing for the expenses of the sale, and after satisfying all prior incumbrances, including his own mortgage, there remained a balance of £937 in his hands, and this sum was ordered to be paid into court to abide further order pending an inquiry into the amount of the plaintiff's claim. The registrar reported that the plaintiff's claim amounted to £819 8s. 10d., and upon application by the plaintiff that this sum be paid out to him, the liquidator of the Cella Co. intervened and claimed the whole sum in court.

The President (Sir James Hannen) held that the plaintiff was entitled to be paid his claim out of the money in court. He held that the plaintiff had a lien on the ship from the commencement of the action *in rem* and the proceedings taken against the ship, and that the rights of the plaintiff under Wood's undertaking must be determined by the rights which the plaintiff had against the ship at the time she was released. He therefore ordered that the amount of the plaintiff's claim be paid out to him.

The liquidator appealed.

Stokes (*J. Gorell Barnes, Q.C.*, with him), for the appellant.—The plaintiff in an action *in rem* has no owner

(a.) Reported by W F. Barry, Esq., Barrister-at-Law.

ity by reason of the arrest of the ship. He has no security until judgment. The rights of the parties are not affected by the commencement of the action, and as the Celia Steamship Co. went into liquidation before the judgment in the action, the liquidator is entitled to the proceeds in court, the plaintiff not being a secured creditor in the liquidation. Under section 87 of the Companies Act, 1862, the Admiralty Court ought not to proceed with the action. Proceedings *in rem* are matter of procedure only. There are some expressions in *The Two Ellens*, 20 W. R. 592, L. R. 4 P. C. 161, and *The Pieve Superiore*, 22 W. R. 777, L. R. 5 P. C. 482, which are against this contention, but they are only *dicta*.

He also referred to *The William F. Safford*, Lush. 69, 3 W. R. Adm. Dig. 22; *The Heinrich Bjorn*, 33 W. R. 719, 10 P. D. 44; s.c., 11 App. Cas. 270; 34 W. R. Dig. 179.

J. P. Aspinall, for the plaintiff.—In an action *in rem* in the Admiralty Court the writ and the warrant of arrest are served by being nailed on the ship's mast, the Admiralty marshal serving the warrant, and from that moment the ship is taken possession of by the court, and held as security for the plaintiff's claim. It is analogous to the case of money paid into court to abide the result of the action where the money in court is security for the plaintiff: *Ex parte Banner*, L. R. 9 Ch. App. 379, 22 W. R. Dig. 20; *Ex parte Bouchard*, 28 W. R. 129, 12 Ch. D. 26. The court holds the ship as security from the date of the arrest, and subsequent bankruptcy or liquidation cannot affect that security. [He was then stopped.]

Skinner replied.*

Lord Esher, M.R.—This case seems to me to be decided by authority, and depends upon the true construction and effect of the Admiralty Court Act, 1861.

The order of events was as follows:—Repairs were done to the ship by the plaintiff at Halifax, and upon the ship reaching this country she was arrested by the Admiralty Court at the suit of the master, and while under arrest the plaintiff commenced this action *in rem*. The steamship company then went into liquidation, and afterwards came the judgment in the Admiralty Court establishing the plaintiff's claim. The question is whether the plaintiff is not entitled as against the liquidator of the company to the proceeds of the sale of the ship after the incumbrances have been paid. It is clear that the Admiralty Court Act, 1861, gives no maritime lien in respect of the repairs. But section 4 gives the court jurisdiction over any claim for repairs to a ship when the ship or the proceeds thereof are under arrest of the court, and section 35 provides that the jurisdiction may be exercised either by proceedings *in rem* or by proceedings *in personam*. In this case the action was instituted by proceedings *in rem*. A maritime lien differs from a common law lien in this, that the latter depends upon possession, whereas the former may exist without possession. A maritime lien is enforced in the Admiralty Court by an action *in rem*. Now this lien for repairs may be enforced in the same way. In an action *in rem* the warrant of arrest is served by the Admiralty marshal nailing it to the ship's mast. The court of Admiralty takes possession of the ship as security for the claim of the plaintiff at whose suit the ship has been seized, and then proceeds to adjudicate upon the claim. The judgment of the court deals with the rights of the plaintiff at the time of the service of the writ in the action. That is so in every action. When an action is *in personam*, bankruptcy law may intervene and affect the rights of the parties. But when the money or the *res* is in court, the court gives effect to its judgment, as if it were pronounced the moment after the money or the *res* were in the possession of the court. The two cases cited by the plaintiff's counsel are strong to that effect. In *Ex parte Banner* James, L.J., said: "The plaintiff is ordered to pay into court the amount claimed in the action. It belongs to the party who is found eventually to be entitled to the sum in dispute." That is still more elaborated by the same learned judge in *Ex parte Bouchard*:—"I am of opinion that the equitable title of the petitioning creditor to the money was complete when it was paid into court to abide the event of the action. After that the only question was, what was the event of the action? The money was to be the money of the creditor if he succeeded in establishing his title to it in the action, and he did succeed in so doing. It would be idle to make such a provision if the whole thing was afterwards liable to be defeated by the relation back of the title of the trustee appointed under the petition of another creditor to the act of bankruptcy committed on the debtor's summons." Thesiger, L.J., said: "I think the payment into court was, when his debt was established, equivalent to a payment to him as of the date when the payment into court was made." The analogy of those two cases seems to me to conclude the present case.

So, again, in the cases in which the point was discussed. In *The Two Ellens* Mellish, L.J., in delivering the judgment of the court, said "That that section (section 4 of the Admiralty Court Act, 1861) at any rate does not give any maritime lien, but merely entitles the person who has done the repairs or built the ship to be paid out of the proceeds, in preference, at any rate, to the owner." Then, further on: "The jurisdiction of the Court of Admiralty is not made by this section (section 5) to depend upon what is the state of things at the time when the supply is furnished, but is made to depend upon what is the state of things at the time when the suit is instituted." And at the end of the judgment he said: "According to the true construction of this section (section 5) the *res*, the ship, does not become chargeable with the debt for necessaries until the suit is actually instituted?" Again, in *The Pieve Superiore* the court said that "The object of the statute is only to found a jurisdiction against the owner who is liable for the damage, and to give the security of the ship, the *res*, from the time of the arrest. This is clearly explained by Dr. Lushington in *The Alexander Larsen*, 1 W. Rob. 288, 294, and *The Pacific*, 2 Br. & Lush. 243, and by this committee in *The Two Ellens*." The judgment, therefore, shows that the ship is the security from the time of the arrest. That seems to me to be the deliberate judgment of the Privy Council, and not a mere *dictum*. Then in *The Heinrich Bjorn* this court, after expressing an opinion that the two statutes of 1840 and 1861 ought to be construed *in pari materiâ*, said that, "Whilst the statute of 1840 has enabled the material man to enforce his claim in the Admiralty Court, and as one means has given him a right to arrest the ship, it has given him no maritime lien, and, consequently, no right against the ship till action brought." Those three successive judgments indicated the same view as that expressed in the two judgments in the Court of Chancery. Though there is no maritime lien, from the moment of arrest the ship is a security in the hands of the court for the rights of the plaintiff as subsequently determined by the judgment. The judgment is a judgment *in rem* good against all the world. Therefore, I am of opinion that, according to the true meaning of the statute, and having regard to the true effect of the arrest, the ship from the time of arrest is security for the claim as determined by the subsequent judgment of the court, and nothing intervening between the arrest and the judgment can

* It was also contended that the judgment in the Queen's Bench Division was a bar to the action *in rem*, but this argument was not pressed. *The Bengal*, Sw. 1, and *Cambefort & Co.* v. *Chapman*, 35 W. R. 838, 55 L. R. D. 229, were referred to.

affect that security. I am of opinion, for these reasons, that this appeal should be dismissed.

FRY, L.J.—I am of the same mind. Section 4 of the Admiralty Court Act, 1861, gives the Court of Admiralty jurisdiction over any claim for repairing any ship, if at the time of the institution of the cause the ship or the proceeds thereof are under arrest of the court; and section 35 provides that the jurisdiction may be exercised either by proceedings *in rem* or by proceedings *in personam*. We must inquire what was the nature of proceedings *in rem* at the date of the Act. Dr. Lushington explained it in *The Volant*, 1 W. Rob. 383, and at p. 387 he says that "The damage confers no lien upon the ship, but an arrest offers the greatest security for obtaining substantial justice in furnishing a security for prompt and immediate payment." He treats the arrest as creating a security for payment of the claim. The proceeding appears to me to be analogous to the payment of money into court to abide the result of a suit. The arrest operates to secure the ship, and relieves the party from the result of anything happening between arrest and judgment. That appears to me to be the meaning of Dr. Lushington's judgment, and I think it is perfectly correct. That view has not been explained away or departed from since; indeed, when the Legislature dealt with the matter in 1861, it expressed no dissent from it. The subsequent cases of *The Two Ellens* and *The Pieve Superiore* are in strict accordance with it. It is analogous to the decisions of the court in *Ex parte Banner* and *Ex parte Bouchard* as to the security afforded by the payment of money into court. Lastly, it is in entire accordance with the practice in the Admiralty Court in proceedings *in rem*. I have, therefore, no hesitation in coming to the conclusion that the arrest of the ship provides a security for the party instituting the proceedings *in rem*.

LOPES, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Botterell & Roche.*

Solicitors for the liquidator, *Stokes, Saunders, & Stokes.*

High Court of Justice.

Chan. Div. Chitty, J. — April 10.

In re TUCKETT'S TRUSTS. (a.)

Trustees—Will—Power to invest in Consols—No power to change or vary investments—National Debt (Conversion) Act, 1888 (51 *Vict. c.* 2).

Trustees of a fund were by a will directed to invest the fund in £3 per cent. Consols, but without power to vary or change the investment when made, and out of the income of the Consols to pay certain annuities, and after the deaths of the annuitants the trust funds were directed to go over. The fund was duly invested. The annuities were not charged on the corpus.

Held, that sections 26 *and* 8 *of the National Debt (Conversion) Act*, 1888, *authorized trustees to exchange £3 per cent. Consols for the new stock, and that section* 27 *of the same Act authorized trustees to sell any stock converted or exchanged by virtue of that Act, and to invest the proceeds in any of the securities for the time being authorized for the investment of cash under the control of the High Court of Justice; and held also that the trustees of the will were justified in selling the £3 per cent. Consols representing the trust funds and investing the proceeds of such sale in any of the securities now authorized for the investment of cash under the control of the High Court.*

This was a petition by the trustees of the will of a testatrix asking for the advice of the court whether the trustees could safely sell Consols subject to the trusts of the will and invest the proceeds in such investments as the court authorises for cash under its control.

By her will the testatrix directed the trustees to appropriate part of the residue of her estate in the purchase of £3 per cent. Consols, and out of the income thereof to pay certain annuities, and after the payment of the annuities, which were not charged on the corpus of the estate of the testatrix, there was a gift over of the *corpus* and income. The will contained no power of changing or varying the investments. The trustees had duly made the investment in Consols, and now asked leave to sell the Consols and invest the proceeds as above mentioned, on the ground that if they agreed to accept the new stock under the National Debt (Conversion) Act, 1888, each annuity would be reduced by one-twelfth during the next fourteen years, and that, if the trustees accepted the new stock in exchange and then sold the new stock and invested the proceeds in such securities as the court authorises for the investment of cash under its control, the trust estate would be put to the expense of a double instead of a single operation. No remaindermen were served.

E. Ford, for the trustees, referred to sections 13, 20, 26, and 27 of the National Debt (Conversion) Act, 1888 (51 Vict. c. 2), and to *In re Wedderburn's Trusts*, 37 W. R. 53, 9 Ch. D. 112.

Benjamin Eyre, for the annuitants, supported the application.

CHITTY, J., after stating the facts of the case as above set out, continued as follows:—I think there is no question but the trustees have power under the Act to exchange the Consols for the new stock, because section 8 of the Act expressly authorises trustees to make such exchange. If anything more is needed it is found in section 8. By that section any holder of any amount of Consols may, at the time mentioned in the Act, exchange that amount for an equal nominal amount of new stock, and such an exchange shall not be considered to be a change or variation of investment by the holder. Obviously the latter portion of this provision is meant to apply to holders who are trustees, as the fact of an exchange being a change or variation cannot affect the person who holds absolutely.

Now section 27 is material. It provides that where any stock converted or exchanged by virtue of this Act into new stock, is held by a trustee, such trustee shall be at liberty to sell the same and to invest the proceeds arising from such sale in any of the securities for the time being authorised for the investment of cash under the control of the High Court, notwithstanding anything to the contrary contained in the instrument creating the trust. Trustees could, therefore, take the new stock and, by section 27, sell and invest it as I have mentioned. In the present case it would clearly be for the benefit of the annuitants that the trustees should sell the Consols and invest in such securities as cash under the control of the court is invested in, and I can advise the trustees they may safely so do.

Solicitors, *Fielder & Sumner.*

(a.) Reported by A. D. MACLAREN, Esq., Barrister-at-Law.

Chan. Div. North, J. Feb. 9, 10.

In re Randell.
Randell *v.* Dixon. (*a.*)

Will—Charitable legacy—Condition of forfeiture—Perpetuity—General charitable gift.

A testatrix bequeathed a sum of money to trustees upon trust to invest and pay the income to the incumbent of a certain church and his successors so long as they allowed the sittings in the church to be occupied free from pew rents; but, in case any incumbent should receive payment in respect of sittings in the church, then the testatrix directed that the money and income should fall into the residue of her estate.

Held, that the condition of forfeiture of the legacy was not void on the ground of perpetuity, and that the legacy would cease if any future incumbent should receive payment for sittings in the church; also that it was not a gift for the general purpose of charity with respect to which a scheme could be made.

Elizabeth Randell by her will bequeathed a sum of £14,000 to trustees, upon trust, to invest the same, and if the Rev. John Ingrave Penfold Wyatt, the then incumbent of the district church of Holy Trinity, Hawley, should hold that position on her death, then, upon trust, that they "do and shall during his incumbency, or during such part thereof as he shall permit all the sittings in the said district church to be occupied free from all claim for pew rents, pay to him the interest, dividends, and annual proceeds arising from the sum of £14,000, and the investments thereof; and from and after the determination of the said incumbency of the said John Ingrave Penfold Wyatt, either by his death or otherwise, do and shall so long as his successors, incumbents of the said district church of the Holy Trinity at Hawley, shall permit all the sittings in the said district church to be occupied free of all claims for pew rents, pay the interest, dividends, and annual proceeds of the stocks, funds, and securities in or upon which the said sum of £14,000 may be invested, to the incumbent for the time being of the said district church; and I direct and declare that in case any such incumbent shall make any claim for and receive any such payment as aforesaid in respect of the occupation of any pews or sittings in the said district church, that from thenceforth the trust moneys and the interest, dividends, and annual income arising therefrom shall fall into and be dealt with as part of my testatrix's ordinary personal estate." "I give, devise, and bequeath all that piece of arable land called 'Red Lion Field,' situate at the rear of the Red Lion Inn, at Blackwater, in the county of Hants, and which contains about three acres, now in the occupation of the said John Ingrave Penfold Wyatt, to the said John Charles Randell and the Rev. John Frewen Moor, their heirs, executors, administrators, and assigns, as trustees for the benefit of the said district church of the Holy Trinity at Hawley, upon the same trusts and conditions as those respecting the sum of £14,000 hereby bequeathed."

The testatrix died on the 2nd of March, 1887.

This was an originating summons taken out by the trustees of the will for the determination (among other questions) of the question whether the gift over of the £14,000 offended against the rules as to perpetuities, and was consequently void; and whether, in the event of a breach of the condition as to free sittings, the court would direct a scheme of the £14,000 as being given for general charitable purposes.

Medd, for the trustees of the will, stated the facts, and referred to the case of *Christ's Hospital* v. *Grainger*, 1 Mac. & G. 460.

Cozens-Hardy, Q.C., and *Vaughan Hawkins*, for the incumbent of Holy Trinity.—The condition of defeasance or forfeiture is valid as to the life interest of the present incumbent, but, as regards the rest of the gift, it is void for remoteness and cannot take effect. The gift is a good charitable gift, dedicated generally to charitable purposes, and the condition that the money should revert to the legatees is void, so that the court or the Charity Commissioners have power to make a new scheme with respect to it. The case of *Christ's Hospital* v. *Grainger* is inapplicable to the present case.

Carson, for a pecuniary legatee.

G. F. Hamilton, for the residuary legatees.

North, J.—The gift of the £14,000 is as follows:—[His lordship read the gift, as set out above, and proceeded:—] The effect of that is that the gift of the income of this £14,000 is a charitable gift, and is not in itself obnoxious to any rule against perpetuities. But it seems to me that the charitable gift is one for a definite limited particular purpose, and no other purpose. It is intended to be devoted to one thing and nothing else, it is intended to continue so long as the pews in the church are allowed to be used without payment of any pew rents of any sort, and no longer. Then the gift over is (whatever its construction may be) important as showing that the testatrix intended the gift to be for a limited special purpose and no other, because it says, in case the definite purpose hereinbefore specified can no longer be carried into effect, then the property is to fall into the residue of my personal estate. Under these circumstances it seems to me that there is a charity created for a definite limited time and no longer, and there is no general purpose of charity with respect to which a scheme could be made altering entirely the destination of the income of these investments.

It seems to me startling to say that the Charity Commissioners might, if they pleased, make a new scheme for the application of this income in any way they thought fit, possibly for the benefit of the incumbent, and possibly not, and that when they have done that, although the very purpose for which the scheme is created, and for which the money is given can no longer be carried into effect, yet the money is to be applied for a totally different purpose. I know no case at all exactly like it, but the case that most resembles it, I think, is *Walsh* v. *Secretary of State for India*, 11 W. R. 823, 10 H. L. Cas. 367, which came before the House of Lords not very long since, in which Lord Clive had devoted a sum of nearly £200,000 to provide pensions for officers and others being Europeans in the military or naval service of the East India Co., with a proviso which took the form of a covenant in that case, that, if at any time after 1784, the East India Co. should cease to employ a military force, and to use vessels for the purpose of trading, the money paid to them should be paid back to Lord Clive and his family, their executors, administrators, or assigns. Somewhere about the year 1834, I think, they ceased to be a trading company employing ships. They continued to employ a military force until after the Indian Mutiny, when we know that the whole power of the East India Co. to employ military troops was put an end to, and the Secretary of State succeeded to and performed the duty which previously the East India Co. had performed. When that took place in 1858, after the Indian Mutiny, the then legal personal representatives of Lord Clive filed a bill for the purpose of having it declared that the purposes for which that fund, which was obviously a charity in itself, was created had come to an end, and that the fund might be paid back to his family. When the case

(*a.*) Reported by J. Trustram, Esq., Barrister-at-Law.

came before the Master of the Rolls, in the first instance, he held that there was a clear trust for this purpose, which beyond all question was a charitable purpose, but as soon as the time arrived at which it came to an end the trust would have ceased, and the money would have been payable to Lord Clive, but for the fact that, as he held, the Acts of Parliament transferring the powers, the property, and so on of the East India Co. to the Secretary of State for India had transferred this fund, this trust fund he called it, with its liabilities, and had cast upon the Secretary of State the same duties with respect to it which the East India Co. had previously performed." Upon that ground, and upon that ground only, he thought that the trust had not come to an end, and that, therefore, the action failed. That case was carried to the House of Lords, and the House of Lords took a different view. They said there was no trust fund appropriated. The money was given to the East India Co., there was no trust fund set apart, it was mixed with their general funds, and they were not answerable for the trust fund in their hands. The Acts, therefore, transferring the property did not apply, but the liability was at an end; and at the end of upwards of eighty years after the time when the original charitable institution was founded, it was held that the obligation to repay the money, not to transfer the trust funds, because the House did not consider it to be a trust fund, remained, and the money was handed back to the person who at that time had taken out representation to Lord Clive for the purpose of bringing that action. A part of the fund was not subject to that covenant, but the original gift of five lacs of rupees was subject to it, and the money was paid over.

That seems to be a case very like the present. There was, beyond all question, a trust for charity for a limited period; but it was held that when the trust came to an end it fell into the estate of Lord Clive. In the present case it seems to me that there is a definite particular special charitable bequest, which must have effect given to it so long as it lasts, and no more, and that, when it comes to an end, there is no general devotion of it to charitable purposes at all, the intention of the testatrix being distinctly opposite. On the construction of the will the charity is a charity for a particular limited purpose, and nothing beyond that is declared. As soon as that particular purpose comes to an end the fund which was subjected to that particular trust falls into the residue of the estate; and it would do so just as much if there was no such limitation as this in the will as it does when the limitation is found here. The limitation is that in that case "the trust moneys, and the interest, dividends, and annual income arising therefrom, shall fall into and be dealt with as part of my residuary personal estate." If the testatrix had said that it would fall into and form part of her residuary personal estate, she would simply have been stating what the law is; but saying that it shall do so, is simply saying what the law would do without such a statement. In my opinion a direction that, in a particular event, a fund shall go in a way in which the law would make it go in the absence of such a direction, cannot be said to be an invalid gift, or contrary to the policy of the law. In my opinion this direction means that the fund is to go as the law, independently of direction, would give it, and that therefore the gift is not obnoxious to any rules of law.

That being so, it belongs (subject, of course, to the trust created) to the residuary legatees, and they take it just as they would take it if there were no gift, or if the gift failed for perpetuity. It goes to them as part of the estate of the testatrix.

I prefer to answer the question in this summons in this way, that the direction in the will, in the events therein mentioned—"that the trust moneys arising from the investment of the £14,000, and the interest, dividends, and annual produce thereof, shall fall into and be dealt with as part of my residuary personal estate"—is not void on the ground of perpetuity.

Solicitors, *Houseman & Co.*; *Maples, Teesdale, & Co.*; *Reep, Lane, & Co.*

Chan. Div. } Jan. 26.
North, J. }

In re BETTESWORTH AND RICHER'S CONTRACT. (a.)

Public Health Act, 1875 (38 & 39 *Vict.* c. 55), *ss.* 150, 257—*New street—Expenses of sewering, &c.—Frontage owner—Liability.*

The frontage owner who is liable under sections 150 and 257 of the Public Health Act, 1875, *for the expense of work done under section 150 by the local authority in a new street is the frontage owner at the time the work is completed.*

Adjourned summons.

In September, 1886, Bettesworth contracted to sell to Richer for £100 two leasehold houses situate in the district of the Willesden Local Board, and which partly abutted on a private road, subject to certain mortgages, the purchase to be completed in December, 1886.

Previously to the contract, the Willesden Local Board had, in November, 1885, in pursuance of the 150th section of the Public Health Act, 1875, given notice to the owners of the property abutting on the private road to sewer, level, pave, and do other work to the road. The owners, however, made default in complying with the notice, and the board thereupon executed the work themselves, which was actually completed on the [illegible] of June, 1886.

In October, 1886, notice of apportionment of the expenses incurred by the board in the execution of the work was served on the frontage owners; and the amount of the expenses apportioned by the surveyor of the board as payable in respect of the two leasehold houses contracted to be sold was £41 14s. 6d.

In January, 1887, notice of demand for payment of the £41 14s. 6d. was served by the board in pursuance of the 257th section of the Public Health Act, 1875.

The title to the property had been accepted without reference to the expenses incurred by the board, and the draft conveyance approved by the purchaser, but he required the vendor to pay the £41 14s. 6d. before the completion of the purchase.

This was a summons by the vendor under the Vendors and Purchasers Act, 1874, to determine, as between vendor and purchaser, by whom the £41 14s. 6d. ought to be paid.

Swinfen Eady, for the summons.—The purchaser ought to pay the local board expenses as outgoings at the time for the completion of purchase. The payment of the money did not become enforceable until January, 1887, and it did not constitute a charge upon the property until that date. The owner of the property at the time when the charge became enforceable was liable.

He referred to the Public Health Act, 1875, ss. 150, 257; *Grece* v. *Hunt*, 25 W. R. 543, 2 Q. B. D. [illegible]; *The Queen* v. *Swindon Local Board*, 27 W. R. 73[illegible], Q. B. D. 305.

Grosvenor Woods, for the purchaser.—The money was a charge upon the property before December, 1886, the time for completion of the purchase, which ought to be paid by the vendor. The work was completed in June, 1886, and under sections 150 and 257 of the Act [illegible]

(a.) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

person liable to the board was the owner of the property at that time.

He referred to *Tottenham Local Board of Health* v. *Rowell*, 29 W. R. 36, 15 Ch. D. 378; *Corporation of Birmingham* v. *Baker*, 17 Ch. D. 782, 30 W. R. Dig. 121.

North, J. (after stating the facts, proceeded as follows:—).—The vendor contends that the expenses in question are outgoings arising after the time for completion of the purchase, which ought to be paid by the purchaser. The purchaser says that these expenses were a charge upon the property at the date of the contract which the vendor ought to satisfy. In my opinion the expenses became a charge upon the property, at any rate, on the 26th of June, 1886. The 150th section of the Public Health Act, 1875, provides that when work under that section is required, the urban authority may, by notice addressed to the respective owners or occupiers of the premises abutting on the street, require them to do the work, and if the notice is not complied with the urban authority may execute the work mentioned in the notice, "and may recover in a summary manner the expenses incurred by them in so doing from the owners in default according to the frontage of their respective premises, and in such proportion as may be settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act." The meaning of the words "owners in default" was the question in dispute in the case of *The Queen* v. *Swindon Local Board*, where it was decided that they refer to the owners at the time when the work is completed. The 257th section provides that the expenses incurred may be recovered, together with interest at a rate not exceeding five pounds per centum per annum from the date of service of a demand for the same till payment thereof, from any person who is owner of such premises when the works are completed for which such expenses have been incurred, and until recovery the same shall be a charge on the premises in respect of which they were incurred.

It appears from the case of *Tottenham Local Board of Health* v. *Rowell*, which was decided on the 62nd section of the Local Government Act of 1858 (21 & 22 Vict. c. 98), which is not distinguishable from the 257th section of the Public Health Act, 1875, that the expenses are a charge upon the premises from the time of the completion of the work. The payment of the expenses cannot be compelled and the charge cannot be enforced until three months after the expenses have been apportioned, but the person who, under the 257th section, is the owner of the premises at the time the work is completed is the person bound to pay the expenses. There is no conflict between the opinion of Cockburn, C.J., in the case of *The Queen* v. *Swindon Local Board* and the opinion I have expressed. There Cockburn, C.J., says: "I cannot think it was ever intended by the Legislature that when the owner has parted with his property, and somebody else is in possession of it, and therefore getting the benefit of the work done, and who ought, therefore, to pay the expenses incurred, it should be competent for the local authority to follow him up wherever he may have gone and hold him personally liable. I think that defect is remedied by the 257th section, which treats owners upon whom notice was originally served, and who are the owners at the time the work is completed and the expenses demanded, as the persons upon whom the local board shall be able to come for the expenses. I cannot suppose it was intended that both should be liable—the owner who made default originally in not doing the work, and the owner who is the person who has become the owner at the time the work is completed. What was meant was this: if the owner who is called upon to do the work and who makes default in doing it continues the owner at the time the work is executed, and when the money laid out upon it is demanded, then he is liable under the 150th section; but if in the meantime he has ceased to be owner, he cannot be said to be the owner in default at the time the money is demanded and when another has stepped into his shoes and become the owner." That is describing a person who is owner at both periods—when the work is completed and when payment is demanded. The present case, where one person is owner of the premises when the work is completed and another is owner of the premises when payment is demanded, was not before the court. The words of section 257 are, "from any person who is owner of such premises when the works are completed for which such expenses have been incurred, and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred." It does not say owner at the date of demand. I am not bound by the opinion expressed in the case of *The Queen* v. *Swindon Local Board*. I think that this was a charge upon the premises from the 26th of June, 1886, and was an incumbrance which ought to be discharged by the vendor.

Summons dismissed, with costs.

Solicitors, *Chester, Mayhew, & Co.; G. F. Mellows.*

Chan. Div. North, J. — Jan. 18.

In re Vickers.

Vickers *v.* Vickers. (*a.*)

Ademption—Bequest of property, including business, equally between sons and daughters—Subsequent transfer of business to sons.

A testator by his will bequeathed the residue of his estate equally between his two sons and three daughters, and directed his business premises, goodwill, stock-in-trade, and effects to be sold and to fall into the residue. Afterwards he determined to retire from his business in favour of his two sons, and by deed assigned his business to the elder son, with a provision enabling the younger to become partner on attaining full age, and reserving to himself an annuity payable out of the profits of the business.

Held, that the shares of the two sons in the residue were adeemed to extent of the value, at the date of the assignment, of the gift to them of the business, and that such value must be taken into consideration in estimating the daughter's shares.

Adjourned summons.

By his will, dated the 30th of April, 1867, George William Vickers, after making certain specific bequests as therein mentioned, provided as follows:—

"And as to all my moneys in the English funds at my decease and all other my estate and effects (excluding the before and hereinafter-mentioned specific bequests), I give the *corpus* or principal equally between all my children, each son's share to be transferred to him at twenty-one years of age, and each daughter's to be held in trust, such trust to commence at her attaining the age of twenty-one years or marriage (whichever should first happen) as follows—viz., the dividends and interest for her separate use for her life, and after her death for all her children equally who shall attain the age of twenty-one years or marry, if more than one, if one only then to such one child (when the principal of each of my daughter's shares is to be paid and transferred), to her child or children, as the case may be, and in case any of

(*a.*) Reported by J. Trustram, Esq., Barrister-at-Law.

my daughters shall have no such issue then the principal share of each such daughter shall go to her next of kin as if she had died unmarried. And in case any of my children should die, being a son under the said age or being a daughter under that age or marriage, the share of my children so dying (as well original as accruing under this provision) shall go to the survivors or survivor of my said children upon the trusts as if such share had (in each case) been originally bequeathed. And as to the dividends and interest to arise from each of my said children's shares as aforesaid (as to each son's share until the said age and as to each daughter's until the like age or marriage previously) upon trust to permit my said wife to receive the same dividends and interest respectively during her widowhood, and afterwards (in case that event should happen) upon trust to lay out the dividends and interest of each child's share for his or her use, maintenance, education, and advancement in life. And I direct my said executors to sell and convert into money the lease, goodwill, book debts, stock-in-trade and effects of, in, and at my said premises in Angel-court either wholly or in part by public auction or private contract, and their receipts shall fully discharge the purchaser without seeing to the application of the purchaser and to invest the net proceeds in the English funds, and to permit my said wife to take the dividends thereof during her widowhood, and from the determination of that event my will is that the same shall fall into and form part of my money in the funds and residuary estate hereinbefore bequeathed, and be disposed of accordingly. . . . And I authorize my trustees and executors to apply any reasonable portion of each of my son's presumptive share during his minority for apprenticeship or advancement in life in case circumstances should so require."

The testator's wife died in 1876.

Afterwards the testator determined to retire from his business in favour of his two sons, William Edward Vickers and George William Vickers, of whom the latter was an infant, and by an indenture dated the 10th of June, 1886, it was, among other things, provided as follows:—

"1. In consideration of the facts and circumstances hereinbefore recited, and also in consideration of the covenants on the part of the said William Edward Vickers hereinafter contained, the said George William Vickers, as beneficial owner, hereby assigns unto the said William Edward Vickers all the beneficial interest and goodwill of the said George William Vickers in the business so carried on by him as aforesaid, and also all the book and other debts now due and owing to him on account of the said business, and all securities for the same, and also all contracts and engagements, benefits and advantages, in or to which the said George William Vickers is interested or entitled on account or in respect of the said business, and also the stock-in-trade, goods, fixtures, articles, and things which now belong to the said George William Vickers on account of the said business, or are used for the purposes thereof, to hold unto the said William Edward Vickers absolutely, but nevertheless upon the trusts and subject to the provisions hereinafter contained.

"2. The said William Edward Vickers shall stand possessed of the said leasehold premises when assigned to him and of the said banking balance and the premises hereby assigned, upon trust, to carry on the said business at No. 1, Angel-court aforesaid, under the style or firm of George Vickers, and either alone or in partnership with the said George Frederick Vickers after he shall have attained the age of twenty-one years, so long as any of the other trusts of these presents shall be subsisting.

"3. If the said George William Vickers shall die during the minority of the said George Frederick Vickers, the weekly sums hereinafter by paragraph 5 made payable to the said William Edward Vickers and George Frederick Vickers respectively shall thenceforth during the minority of the said George Frederick Vickers be increased to £6 and £3 per week respectively.

"4. The net moneys received by the said William Edward Vickers by virtue of the foregoing assignment (including the earnings of the business) shall be paid to the banking account of the business.

"5. During the minority of the said George Frederick Vickers, provided the said George William Vickers shall so long live, the said William Edward Vickers, out of the moneys for the time being standing to the credit of the banking account of the business, shall pay to the said George William Vickers the weekly sum of £10 and to or for the benefit of the said George Frederick Vickers the weekly sum of £1 for one year from the date hereof, and weekly sum of £2 after the expiration of such one year, and shall be entitled to retain for his own use the weekly sum of £2 during one year from the date hereof, and the weekly sum of £3 during the remainder of the minority of the said George Frederick Vickers.

"6. If on attaining the age of twenty-one years the said George Frederick Vickers shall be willing to enter into partnership with the said William Edward Vickers, or the said George William Vickers wishes him to do so, the said William Edward Vickers, shall be bound to admit the said George Frederick Vickers forthwith into partnership and to an equal share in the property and profits of the business if both partners devote their whole time and attention thereto. . . .

"11. If the said George Frederick Vickers shall be under the age of twenty-one years, or when of full age shall decline to enter into partnership with the said William Edward Vickers, it shall be lawful for the said William Edward Vickers to carry on the said business on his own account, and if the said George Frederick Vickers when of full age shall be willing to enter into partnership, but the said William Edward Vickers shall desire to retire, or shall decline to enter into partnership with the said George Frederick Vickers, it shall be lawful for the said George Frederick Vickers to carry on the said business on his own account, but whichever of the two shall become entitled to carry on the said business alone (except in the event of the said George Frederick Vickers dying under the age of twenty-one years) shall pay or secure to the other the value of one moiety of the trust premises as follows—that is to say, one-fifth shall be paid immediately, and the balance by eight equal yearly instalments bearing interest at £5 per cent. per annum, such value to be ascertained by arbitration in case of dispute.

"12. The said William Edward Vickers hereby covenants with the said George William Vickers that the said William Edward Vickers and George Frederick Vickers or one of them will, on the said 31st day of August, 1886, pay to the said George William Vickers the said sum of £500 so advanced by him to the said business as aforesaid, with interest thereon in the meantime after the rate of £5 per cent. per annum computed from the date of these presents, and also so long as on that day as any principal money remains due in respect of the said sum of £500 to pay to him interest thereon after the same rate by equal quarterly payments, and also that the said William Edward Vickers and George Frederick Vickers or one of them will from time to time and at all times hereafter keep indemnified the said George William Vickers and his estate and effects from and against all debts and liabilities in respect of the said business, and from all actions, claims, and expenses in relation thereto."

George William Vickers died on the 6th of July, 1887, leaving two sons, William Edward Vickers and George

Frederick Vickers, an infant, having been born on the 2nd of July, 1868, and three daughters.

The present summons was taken out by two of the daughters as administratrices with the will annexed against the two sons and remaining daughter for the determination of the question whether the shares of William Edward Vickers and George Frederick Vickers or either of them were ademed to any and what extent

Farwell, for the summons.—A gift of money or residue may be ademed by a gift of a share in a business: *Bengough* v. *Walker*, 15 Ves. 507; *In re Lawes*, 30 W. R. 33, 20 Ch. D. 31. There can be ademption *pro tanto*: *Pym* v. *Lockyer*, 5 My. & Cr. 29; but it was formerly held that there could only be ademption *in toto*: *Grave* v. *Earl of Salisbury*, 1 Bro. C. C. 425. In *Holmes* v. *Holmes*, 1 Bro. C. C. 555, it was decided that a father did not ademe a legacy to his son by taking him into partnership and giving him a share of capital; but that decision has not been followed in later cases. In this case the testator in his will expressly directed his business to be sold, and the proceeds to fall into the residue of his estate.

He also referred to *Montefiore* v. *Guedalla*, 8 W. R. 53, 1 De G. F. & J. 93; *Leighton* v. *Leighton*, 22 W. R. 727, L. R. 18 Eq. 458.

Everitt, Q.C., and *Monckton*, for the defendants.—There is such a difference between a share of residue and a share of a business as to prevent the one from being taken to be in satisfaction of the other: *Holmes* v. *Holmes*. In the cases of *Bengough* v. *Walker* and *In re Lawes* there were special circumstances, and the gifts of capital really amounted to gifts of sums of money. Here the sons take the business subject to conditions, and their interests in it are not absolute. In fact the transaction really amounts to a sale of the business to the sons, who are to pay the father an annuity, and who also covenant to pay him £500 and interest, and to indemnify him against the creditors of the business.

Farwell, in reply.—The transaction was meant to be a provision for the two sons, and to benefit them. The payment of the annuity to the father, and the conditions, must be considered as lessening the value of the gift, but not making it a sale. The value must be ascertained at the date of the gift.

He cited *Watson* v. *Watson*, 33 Beav. 574; *Chichester* v. *Coventry*, 15 W. R. 849, L. R. 2 E. & I. 71.

North, J.—[After stating the facts and reading the provisions of the will and the clauses of the deed set out above, his lordship proceeded:—] The question is whether a gift by will of a share of residue is ademed by the gift by deed of a business which formed part of the residue. The circumstances are somewhat peculiar, because the property comprised in the deed is specially dealt with by the will as part of the residue. It is hardly a case in which the testator can be said to have estimated the value of the gift; that is not necessary. There is, in substance, a handing over of the whole business, whatever its value, to one or both of the sons. I will treat it as if it were to one son only.

There does not seem such a want of harmony in the subject-matter of the gift in the will and the subject of the gift in the deed as to create a difficulty in saying that the one can be taken in satisfaction for the other. I see nothing in the nature of the property given to prevent the rule against double portions applying, and the gift of the business to both or either of the sons being a satisfaction *pro tanto* of his or their share in the residue. The cases of *Bengough* v. *Walker* and *In re Lawes* show that there is nothing in the nature of the property to rebut the presumption against double portions. The case of *Holmes* v. *Holmes* seems to have been recognized in *In re Lawes* as a special case depending on special circumstances; but in both the other cases it was recognized that a share in a business is a thing capable of being taken in satisfaction of a gift of personal estate. In *Bengough* v. *Walker*, which was a case of satisfaction, not ademption, the thing given by will was a share in powder works. There had been a previous covenant by the testator, the father, to pay a sum of £2,000, then the bequest was a bequest to the son of all the testator's "capital, share, interest, and concern in certain powder works"; the father also bequeathed to the son "so much money as, being added to the capital of the said powder works concern at the last settlement before the testator's decease, should make up in the whole the full and complete sum of £10,000, he, Abraham Elton, paying thereout to Mrs. Prout for life £20 a year." What was given there was the capital in a business. I do not see that it was in any way appreciated or had any value put upon it by the testator. It is true that he said that at some time and for some purposes a value must be put on it, for it was intended to give an amount up to £10,000; but he did not put any value on it at the time of making his will; and it seems to me from the report that the effect would have been precisely the same, and the operation on the covenant to pay £2,000 must have been the same if there had been no direction to make up the gift to £10,000, and that part of the gift had been left out.

Then, again, in the case of *In re Lawes* there was a bond to pay the obligor's reputed son £10,000 on a certain day four years later. Shortly before the day for payment he took the son into partnership, and it was provided by the articles of partnership that the capital should consist of £37,500 to be brought in by him, of which £19,000 should be considered as belonging to the son. The £10,000 was never paid. It was held in a suit to administer the father's estate that the rule against double portions applied. The late Master of the Rolls, after pointing out that the case of *Holmes* v. *Holmes* was a case not so sufficiently reported as to be useful as a guide in the case before him (which remark, in my opinion, applies also to the present case), referred to the following passage, relating to the older authorities, from the judgment of Sir William Grant in *Bengough* v. *Walker*: "But it is to be observed that in none of those cases did the party making the advance or the bequest ever make either with reference to a definite amount to which he intended it should reach. These are all cases in which the testator, without reference to the pecuniary value of the thing he was giving, has given it; and the question was whether, as upon entering into a computation of the value of the thing given, it turned out equal to the portion, or the legacy, it should be taken as a satisfaction, the testator not having indicated any idea of his own whether it was or was not correspondent in value to the debt which he owed or the legacy he gave. Those cases, therefore, would not precisely apply."

Upon that the Master of the Rolls said:—"The true meaning of that is that, where a testator gives to a child a beneficial lease or share of works, or any other thing, and says nothing about the value, he is not to be taken to be giving it in satisfaction of a pecuniary bequest; but, where he does refer to the value, the presumption of satisfaction may arise." Now what I understand him to be doing is to be commenting on the meaning of language used by a former judge in a case decided at a time when it was considered that a gift of something to go in ademption of a legacy must be something that would satisfy the legacy altogether, and not *pro tanto*, and he was not expressing his own view of the law at the time he was speaking. The view of the Master of the Rolls and of the whole court in that case was that a gift of a share in a business, in that case more valuable than a legacy, was of itself sufficient to ademe the legacy, and that the rule that there is a *primâ facie* presumption against double portions applied, and that in that case there was nothing to rebut it.

Another ground taken by Mr. Everitt was that the transaction carried out by the deed was a sale out and out for valuable consideration, and not an advancement. In my opinion it was not a sale out and out, but was a transaction by means of which the testator intended to provide for his two sons. The mere fact that some benefits were given to the testator would not be enough to prevent the transaction being treated as an advancement that would work an ademption. It is clear that the obligation of the legatee in *Bengough* v. *Walker* to pay an annuity of £20 a year was not considered enough. Therefore, in the present case it must be considered whether what was done was intended as a gift by way of portion. In considering that, the obligations entered into by the eldest son form an element to be taken into account. It is suggested that, as a matter of principle, instead of its being a boon, what was done was a bargain, and cannot operate as a portion. There is no doubt that an advance made by a father to a son on marriage will operate as an ademption, and yet in that case consideration is given; there is the consideration of marriage in every case, and property may or may not be brought in by the wife. The fact that there was some contract between the father and the son is not enough to prevent the operation of the rule against double portions. Looking at the nature of the agreement, there is nothing to prevent what the son received in trust for the two being taken as a portion or portions. The fact that the father was to be paid £520 a year out of the business is not material for the present purpose, but it is a matter to be taken into consideration in considering what the value of the gift was. The value of what the eldest or both sons take under the deed is to be taken into consideration in estimating the daughters' shares; but it is not possible now to say precisely what that value is. It is sufficient to declare that, in ascertaining the value of the daughters' shares, the value of the gift of the business assigned by the deed at the time it was made must be taken into consideration. There must be an inquiry as to the value of the gift at the date of the deed.

Solicitors, *Monckton, Long, & Gardiner.*

Chan. Div. North, J. } Jan. 17, 18.

In re Natt.

Walker *v.* Gammage. (*a.*)

Statute of Distributions—(22 & 23 *Car.* 2, *c.* 10), *ss.* 3, 5, 6, 7—*Administration of personal estate—Intestacy—Next of kin—Grandchildren*—Per stirpes *or* per capita.

A testatrix (a widow) died intestate as to a share of her residuary personal estate, owing to the death of a legatee in her lifetime. She had only two children, a son and a daughter, both of whom died before her. Three children of the son and one child of the daughter survived the testatrix.

Held, that, under the Statute of Distributions, the grandchildren took the share per stirpes *and not* per capita.

In re Ross's Trusts, 20 *W. R.* 231, *L. R.* 13 *Eq.* 286, *approved.*

Adjourned summons.

This was an originating summons taken out by the trustees and executors of the will of Sarah Natt (widow), who died on the 25th of March, 1879, to determine the question as to how one-sixth share of the residue of the personal estate bequeathed by a residuary gift in the will but which had lapsed by the death of the legatee in the lifetime of the testatrix, and was undisposed of, was to be divided among her four grandchildren, who were her only next of kin—whether the division was to be *per stirpes* or *per capita.* The testatrix was married twice, the name of her first husband being John Bassett, by whom she had two children—viz., Henry John Bassett and Sarah Underhill, who married George Collin. They both died in the lifetime of the testatrix. By her second husband she had no children. Henry John Bassett had five children, three only of whom survived the testatrix—viz., Mrs. Head, Harry Bassett, and James Bassett. Harry Bassett was the heir-at-law of the testatrix. Mrs. Collin had two children, one only of whom, G. N. Collin, survived the testatrix. G. N. Collin died on the 20th of April, 1886, a bachelor.

The summons was adjourned into court.

Marcy, for the plaintiffs.—The question is whether, having regard to section 7 of the Statute of Distributions, the one-sixth share of the residue, so far as it consisted of personal estate, devolved on the four grandchildren *per stirpes* or *per capita.* The only recent authority bearing on the question is *In re Ross's Trusts*, 20 W. R. 231, L. R. 13 Eq. 286.

R. F. Norton, for the children of Henry John Bassett.—The next of kin being all of the same degree, the division must be *per capita.* That is the proper construction of section 7 of the Act. *In re Ross's Trusts* only decides that, when descendants of an intestate are in different degrees, they take by representation *per stirpes.* In the present case, however, there is no necessity for representation; all the next of kin, being in the same degree, take in their own right. The children in grandchildren by representation only in a manner which otherwise they would take nothing. The text-books do not all agree on this point.

He referred to Williams on Executors, 8th ed., vol. 3, p. 1,503; Watkins on Descents, 4th ed., p. 10; Burton's Compendium, 7th ed., p. 438, plac. 1,403 n.; and William's note to Watkins on Descents, 4th ed., p. 259 n.

F. L. Wright, for the representative of G. N. Collin.—Lord Hardwicke, in *Lockyer* v. *Vade*, Barnardiston C. 444, a case the facts of which were similar to those of the present case, expressed his opinion in favour of a division *per stirpes*, and Mr. Hargrave, Jurisconsult Exercitations, vol. 1, p. 271, adopted the same view. [He was stopped by the court.]

Bunting, for the heir-at-law of the testatrix.

North, J.—I observe that Lord Hardwicke, in *Lockyer* v. *Vade*, said that upon the opening of the cause "he inclined to be of a contrary opinion" to that which he expressed at the close of the hearing, viz., that, there being grandchildren living at the death of an intestate, but no children, the grandchildren should take *per stirpes.* I must confess that when this case was first opened I also was inclined to think that the rule was as it is stated in Williams on Executors. But on further consideration I have come to the conclusion that it is not so, and I think that *In re Ross's Trusts* is really an authority to the contrary. I think that section 3 of the Act points out distinctly a difference between the "wife and children or children's children, if any such be," of the dead man and his "next of kindred." I read the words "children's children" as meaning "issue of children," and I think that section 3 distinguishes clearly between children and descendants of children on the one hand, and "next of kindred" on the other hand. Then section 5 provides that the distribution is to be as follows, one-third to the wife

a.) Reported by G. E. Jeffery, Esq., Barrister-at-Law.

the intestate, and the residue equally amongst the children and "such persons as legally represent such children, in case any of the said children be then dead." It was decided long ago that the persons who "legally represent" the children are their descendants in any degree. I think the words, "in case any of the said children be then dead," apply to the case of an only child being dead. The effect, therefore, of section 5, putting it shortly, is to give one-third of the surplus of the estate to the wife of the intestate and the other two-thirds equally among his children and such persons as legally represented the children in case any of them be then dead. Then section 6 provides for the case of an intestate leaving a wife but "no children nor any legal representatives of them"—that is, no children living in themselves or in their descendants. In that case half of the surplus is allotted to the wife and the other half is "to be distributed equally to every of the next of kindred of the intestate who are in equal degree and those who legally represent them." Then comes section 7, which (omitting the first proviso) provides that "in case there be no wife" all the estate is "to be distributed equally to and amongst the children; and in case there be no child, then to the next of kindred in equal degree of or unto the intestate and their legal representatives as aforesaid." The proviso at the beginning of section 7 is, "Provided that there be no representations admitted among collaterals after brother's and sister's children." I think that proviso is really an appendix to both section 6 and section 7, and that the two sections would read more clearly if the proviso were placed at the end of section 7 and the two sections were then read as one.

Section 6 provides for the case of an intestate leaving a wife, but leaving no children, either living themselves or represented by their descendants, and in that case half the estate is to go to the wife and the other half is to be divided equally among "the next of kindred who are in equal degree and those who legally represent them." But there are other possible cases for which the statute proceeds to provide. There might be no wife living at the death of the intestate, but there might be children living, or there might be no child living; and section 7 provides for both those cases. Mr. Norton construes section 7 as if it had said that the estate is "to be distributed equally to and amongst the children; and, in case there be no child, then to the next of kindred in equal degree of the intestate, including the descendants of deceased children and their legal representatives as aforesaid." I think it would make no difference whether the word "representatives" is read as applying to "children" or not. But I think the true construction is, that the words "next of kindred" mean next of kindred exclusive of issue of the intestate. If there is no wife of the intestate living, the entirety of the estate is to go to his children, in the same way as two-thirds go to them under section 5 if there is a wife to share with them. The words "to and amongst the children" are not intended to define exactly how the estate is to go to them; they are merely words of reference to what has gone before, implying that the distribution of the whole is to be as already directed in the case of the two-thirds. The last clause of section 7 provides for the case of there being no child of the intestate. It does not say, "in case of there being no child or representative of any child," but I think it means "no child living either in person or in its descendants." The provision for "next of kindred" is addressed merely to the case of children—*i.e.*, children living either in themselves or in their descendants, being out of the way. I admit that this view of the meaning of the statute is contrary to that taken in Williams on Executors following the older work, Toller on Executors, and which has been adopted by some other text-writers. But the cases which are cited as authorities in support of the proposition applied to a different state of circumstances. They were all cases relating to collaterals, not to children of the intestate in the statutory meaning of the word "children."

The second rule, stated in Williams on Executors, 8th ed., vol. 2, p. 1,503, is as follows:—"Where the intestate's children are all dead, all of them having left children, if a father have three children, John, Mary, and Henry, and they all die before the father, John leaving, for instance, two children, Mary three, and Henry four, and afterwards the father die intestate, in that case all his grandchildren shall have an equal share, for, as his children are all dead, their children shall take as next of kin. Such, also, would be the case with respect to the great-grandchildren of the intestate if both his children and grandchildren had all died before him. In these instances the parties are said to take *per capita*, or, in other words, equal shares in their own right."

That view is, however, at variance with the view taken in Burton's Compendium. There it is said: It has been thought, however, that, where the claimants are all in the same degree of lineal descent from the intestate (as grandchildren, after the death of all his children), the distribution is not to be made on the principle of representation, but by the more simple rule of personal equality, or, as it is commonly expressed, *per capita*, and not *per stirpes* (see Toller on Executors). But it may be doubted whether this was the intention of the statute; and the authorities (as *Davers* v. *Dewes*, 3 P. Wms. 40; *Lloyd* v. *Tench*, 2 Ves. sen. 213) which establish that mode of distribution in the case of collaterals, under section 6, are grounded upon a reason which does not apply to the issue of the intestate—viz., that, where all take equally as next of kin, the words of the statute afford no room for the introduction of representative claims, for there is no mention of the next of kin in any part of the statute which precedes the supposition of a failure of the intestate's issue."

A passage similar to that which I have read from Williams on Executors is to be found in the text of Watkins on Descent, 4th ed., p. 259. But in the fourth edition there is this note by Mr. Joshua Williams:—"The authorities here referred to do not support the position taken in the text. They are all cases of the children of the deceased brothers of the intestate taking *per capita*, there being no mother, brother, or sister of the intestate living at his death. But in these cases the children of the brothers take as next of kindred, and not by representation, whereas the descendants of the children of an intestate take under the description of 'such persons as legally represent such children.' It would seem, therefore, that the grandchildren ought to be entitled *per stirpes*."

I have looked at the passage in Mr. Hargrave's Jurisconsult Exercitationes, vol. 1, p. 271, which was referred to by Wickens, V.C., in his judgment in *In re Ross's Trusts*, and I find that that learned writer takes a view at variance with that taken by Williams and Toller. Mr. Hargrave says: "A very distinguished civilian of the present times (to whom his country already stands highly indebted for his elegant and masterly edition of Justinian's Institutions, and to whom it may owe far more if he should prosecute his design of a more enlarged commentary), seems to have been almost aware of this difficulty; and, as if he thought consistency required it, he openly contends on our Statute of Distributions for excluding the distribution *per stirpes*, even as amongst grandchildren, when they are only claimants; though he candidly confesses that by Justinian's law it was clearly otherwise, and that he did not meet with any judicial determination to prove the doctrine in respect to our own law. But it may be doubted whether our courts of equity would be easily induced thus to extend this restrictive construction of the distribution

per stirpes to descendants. It was once, indeed, attempted before Hardwicke, L.C. But, after hearing the point discussed, he discouraged the idea of a distribution *per capita*, and gave an opinion against it, though not a final one." It is clear, therefore, that the opinion of Lord Hardwicke, after hearing the point fully argued in *Lockyer* v. *Vade*, was in favour of a distribution *per stirpes* among grandchildren, and he arrived at his ultimate conclusion after having begun with taking a contrary view. There is, therefore, not merely a conflict of opinion among the text-writers, but there is what I must consider the decision of Lord Hardwicke that the division be *per stirpes*. There is, moreover, the case of *In re Ross's Trusts* before Wickens, V.C. If I am right in my construction of the statute, that it gives nothing in terms to the grandchildren of the intestate, but that the provision for "children" covers all the descendants of children, the decision in *In re Ross's Trusts* is directly in point. If Mr. Norton's argument is correct, the fund in that case should have been divided into sevenths instead of into moieties, and the distinction which he has attempted to draw does not seem to me to alter the effect of the decision. *In re Ross's Trusts* confirms my view of the construction of the statute, and it adopts that of Lord Hardwicke.

Under these circumstances I hold that the one-sixth share of residue which is undisposed of in the present case must, so far as it consists of personal estate, be divided into moieties. One of the moieties will be equally divided between the three children of Henry John Bassett, the other will go to the representative of G. N. Collin. The lapsed share, so far as it consists of realty, will go the heir-at-law of the testatrix.

Solicitors for all parties, *Walker & Battiscombe*.

Chan. Div. North, J. — Aug. 2, 3.

In re Commercial Bank of South Australia. (*a*.)

Bill of exchange — Dishonour — Damages — Bill dishonoured abroad — Interest — Re-exchange — Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 57.

A bill of exchange drawn in South Australia, by a banking company carrying on business in South Australia and in England, for acceptance in England by their English branch bank, was dishonoured when presented in England.

Held, on a claim by the holder to prove in the winding up of the company in England for interest on the amount of the bill, at the rate of ten per cent. (the Australian rate of interest), that the claim for interest was wrong, and that the only remedy of the holder was by way of damages for the amount payable for re-exchange.

Ex parte Roberts, 35 *W. R.* 128, 18 *Q. B. D.* 286, *followed*.

Adjourned summons.

The Commercial Bank of South Australia was incorporated by an Act of the South Australian Legislature, and was not registered in England. It carried on the business of bankers in Australia and also in London, the head office being in Australia, and there being a branch office in London.

In February, 1886, the company suspended payment, both in Australia and London. There were a considerable number of creditors and assets to a large amount in England, and some of the shareholders were resident in England.

On the 8th of June, 1886, an order was made by North, J., on the petition of some English creditors, for the compulsory winding up of the company. A winding-up order had been made in Australia on the 12th of April, 1886.

In January, 1886, the Commercial Banking Co. of Sydney (hereinafter called the Sydney Co.) purchased from the Commercial Co. at Adelaide, in South Australia, a bill of exchange for £15,000, dated the 21st of January, 1886, drawn by the Commercial Co. on their London branch in favour of the Sydney Co., and payable sixty days after sight. This bill was presented to the London branch for acceptance on the 1st of March, 1886, when acceptance was refused, because the bank had then stopped payment, and the bill was not paid at maturity.

The Sydney Co. claimed in the English winding up to be paid the amount of the bill, with interest thereon at the rate of ten per cent. per annum (that being the Australian rate of interest) from the date when the bill became due to the date of payment. Interest was claimed because it was admitted that the assets of the Commercial Bank would be more than sufficient to pay their creditors in full.

The chief clerk admitted the claim, with interest at five per cent., without prejudice to the right of the Sydney Co. to receive additional interest at the rate of five per cent. if the court should hold that they were entitled to the colonial rate of interest.

The Sydney Co. now claimed the additional interest.

The court in Adelaide had allowed interest at ten per cent. on similar bills which had been proved in the Australian winding up.

Theobald, for the Sydney Co.—If this bill had been sent out to Australia and proved in the winding up, the colonial court would have allowed interest at ten per cent. as it has done in similar cases; and I submit the creditors ought not to be put in a worse position by proving here instead of sending the bill to Australia. By the course the creditors have adopted they have saved the company the expense of re-exchange. Your lordship said when the winding-up order was made that the winding up in this country was auxiliary to the winding up in Australia. Interest is given by way of damages, and the damages ought to be assessed according to the law of the place at which the bill was drawn. *Allen* v. *Kemble*, 6 Moo. P. C. 314; *Gibbs* v. *Fremont*, 9 Ex. 25.

Cozens-Hardy, Q.C., and *Chadwyck Healey*, for the English liquidator.—This case is governed by the South Australian Bills of Exchange Act, 1884 (47 & 48 Vict. No. 312). Section 57 of that Act is identical with section 57 of the English Bills of Exchange Act, 1882, except that in the former Act words fixing the rate of interest at ten per cent are introduced in clause (*b*) of sub-section 1. Under sub-section 2, when a bill is dishonoured abroad the holder is entitled to recover "the amount of the re-exchange, with interest": *Ex parte Roberts*, 35 W. R. 128, 18 Q. B. D. 286. The present claim is not for re-exchange, and it is, therefore, misconceived. The bill of exchange is really a promissory note, the same company being both drawers and acceptors, and the breach of contract took place in London, where the bill was dishonoured.

Pollard appeared for the colonial liquidators, but the court declined to hear him.

Theobald, in reply.

Aug. 3.—North, J., stated the facts, and continued:—The question is whether the claimants are entitled to be allowed additional interest at five per cent. so as to make up ten per cent. in the whole. It was contended that the bill, being drawn by the company in Australia upon its London branch, was really drawn by the company upon itself; that it was, therefore,

(*a*.) Reported by G. E. Jeffery, Esq., Barrister-at-Law.

in the nature of a promissory note, and that the mercantile law applicable to bills of exchange does not apply. But in *Willans* v. *Ayers*, 3 App. Cas. 133, 26 W. R. Dig. 32, it was decided that it did not lie in the mouth of the drawer or acceptor of such a bill to raise that objection, and that, if the holder chose to treat the document as a bill of exchange, he was entitled to do so. It comes, therefore, to this, that the holders of this bill, who are, no doubt, indorsees of the drawers, have entered into a contract with the drawers, and the drawers with them, that the bill shall be presented for acceptance at the branch of the bank in London on which it is drawn, that it shall be accepted when presented, and that it shall be paid at maturity. In consequence of the stoppage of the bank before the bill was presented, it was not accepted, and there has been a breach of contract on the part of the drawers towards the holders, and the drawers are liable to the holders in damages for that breach.

The question is, What those damages are? In some cases, no doubt, it has been held that the holder of a bill may recover as damages interest at the rate payable in the country in which the contract was made, the breach of which gives rise to the claim. *Allen* v. *Kemble* and *Gibbs* v. *Fremont* were cited as authorities for the proposition that interest is payable. In *Gibbs* v. *Fremont* Mr. Willes, whose argument was successful, cited the following passage from Story on the Conflict of Laws:—"The drawer and indorsers do not contract to pay the money in the foreign place on which the bill is drawn, but only to guarantee its acceptance and payment in that place by the drawee; and, in default of such payment, they agree, upon due notice, to reimburse the holder in principal and damages at the place where they respectively entered into the contract." That place, in the present case, was South Australia. Then Martin, B., in the course of the argument, referred to *Allen* v. *Kemble*, and read this passage from it:—"There it is said, 'The drawer, by his contract, undertakes that the drawee shall accept, and shall afterwards pay the bill, according to its tenor, at the place and domicil of the drawee, if it be drawn and accepted generally; at the place appointed for payment, if it be drawn and accepted payable at a different place from the place of domicil of the drawee. If this contract of the drawer be broken by the drawee, either by non-acceptance or non-payment, the drawer is liable for payment of the bill, not where the bill was to be sold by the drawee, but where he (the drawer) made his contract, with such interest, damages, and costs as the law of the country where he contracted may allow." Alderson, B., delivered the judgment of the court, and stated the point as expressly decided in *Allen* v. *Kemble*. He said, "And this is not to be left to the jury, for it depends on the rule of law. The amount of the interest in each place is to be so left" (that is, to be left to the jury), "and so also is the question whether any damage has been sustained requiring the payment of interest at all, for those are questions of fact." Then I proceeded to deal with the case on the footing that these questions have been before the jury, and that they had found what the facts were. Those cases, therefore, show clearly that the liability to damages is to be measured according to the law of the country where the contract which is broken was entered into.

In the present case there can be no doubt about the law of the country, because the South Australian Act relating to bills of exchange has been put in evidence, and it is substantially the same as the English Act of 1882 on the same subject. The 57th section, which bears on this point, corresponds exactly with section 57 of the English Act, except that, instead of giving interest generally, it gives interest at the rate of ten per cent., no doubt because that is the ordinary rate of interest in South Australia. [His lordship read section 57 of the Australian Act, and continued:—] I was inclined at one time to think that the remedy given by sub-section 2 in the case of a bill dishonoured abroad was an alternative remedy, and that the holder had an option of proceeding either under sub-section 1 or under sub-section 2. But on consideration I do not think that is the real meaning. Sub-section 1 is not in terms limited to the case of a bill dishonoured at home, but still I think the true construction is that, when the bill is dishonoured abroad, the damages mentioned in sub-section 2 are the only damages which can be recovered.

There is very excellent authority to assist me on this point in the case of *Ex parte Robarts*, in which the construction of section 57 of the English Act came in question. There Lindley, L.J., who delivered the judgment of the court, in speaking of the consequences of the breach of contract arising from the non-payment of a bill of exchange, said:—"These consequences are dealt with in section 57. Sub-section 1 deals with bills dishonoured at home, and sub-section 2 deals with bills dishonoured abroad. The bills now in question were drawn abroad, but they were payable, and accepted, and dishonoured in this country, and therefore, if provided for at all, they fall within sub-section 1, and not sub-section 2. But, according to sub-section 1, neither the acceptor, nor anyone else, is liable to pay more than the amount of the bill and interest, and expenses of noting and protest. But this sub-section does not appear to be addressed to the case of a bill the drawer of which is liable to damages for re-exchange." That, therefore, is a decision on section 57 of the English Act, which is identical with that with which I have now to deal, that, in the case of a bill dishonoured abroad—that is, in a place foreign to that where it is drawn and indorsed—the remedy is under sub-section 2 for re-exchange. That sub-section in each of the Acts is founded, not upon anything peculiar to the law either of England or of Australia, but upon the general law of merchants, and is of international application. It is clear that this is so as regards England. For this I may refer to *De Tastet* v. *Baring*, 11 East, 265, and *Suse* v. *Pompe*, 9 W. R. 15, 8 C. B. N. S. 538. The law of England is fully stated in Chitty on Bills and in Byles on Bills. As regards continental nations, the law is stated in Pothier, and as regards America, in Kent's Commentaries and Story on Bills, and many other text-books. It seems to me, therefore, that this claim for interest is wrong.

The way in which the re-exchange is reckoned is pointed out very clearly in Chitty on Bills, 10th ed., p. 337, thus:—"In foreign countries, especially in France, when a bill has been duly protested for non-payment, the holder has a right to reimburse himself by drawing a second bill of exchange (called by the French *retraite*) on the drawer or one of the indorsers of the first, for an amount which is composed, first, of the principal sum and interest from the day of the protest; secondly, of the expenses of the protest; thirdly, of other legal expenses, such as bank commission or brokerage, and of journeys, when requisite, to obtain payment; and, fourthly, of the stamp and of the postage of letters which the default of payment rendered it necessary to write. These charges must not exceed what ought, of right, to be demanded, and the vouchers for such charges should accompany the bill. The evidence in support of the charges is established by an account called *compte de retour*, which ought to be annexed to the *retraite*, together with the protest, or a copy thereof. This account ought to name the person on whom the *retraite* is drawn, in order to show that it relates to such bill, and to avoid the frauds that might result from the omission. The account ought also to announce the rate of exchange at which the *retraite* is negotiable, and which the law terms re-exchange." That shows clearly the details to be gone through in order to arrive at the amount payable by way of re-

exchange. But it is clearly not necessary that all those processes should be strictly followed, for, as is said in Byles on Bills, 14th ed., p. 449: "According to English practice, the *retraite*, or re-exchange bill, is now seldom drawn, but the right of the holder to draw it is settled by the law-merchant of all nations, and it is only by a reference to this supposed bill that the re-exchange, in other words, the true damages in an action on the original bill, can be scientifically understood and computed." That shows that it is immaterial that in the present case the bill has not been sent out to Australia. The amount of damages for re-exchange can be ascertained without that formality being gone through. It is clear, therefore, that the amount payable by way of re-exchange depends upon various complicated matters, such as the expenses incurred in the particular case, and the rate of exchange at the moment between the two countries which are concerned in the transaction. Therefore, it is impossible to say what is the precise sum payable, except by going through the computation in the particular case.

In some countries a different rule has been adopted in order to avoid the trouble of this computation. For instance, it appears from *Francis* v. *Rucker*, Amb. 672, that a liquidated sum of twenty per cent. was substituted for re-exchange in the State of Pennsylvania, and from *Ex parte Roberts* it appears that in Tobago a liquidated sum of ten per cent. has been substituted for re-exchange. I have considered whether it would be possible to treat the ten per cent. in the present case as really a liquidated sum in lieu of re-exchange. But there are difficulties about that, particularly having regard to *Willans* v. *Ayers*. In that case South Australia was the foreign country, and an attempt was made to prove that there was a custom existing there for ten per cent. to be taken as liquidated damages instead of re-exchange, but the Privy Council held that the custom was not proved, and refused to act upon it. The claimants are also in this difficulty, that they are not claiming upon the footing of a breach of the contract, but they have proved for the amount of the bill with interest, and, interest having been allowed at five per cent. (that being the rate of interest payable upon bills of exchange in this country when the rate is not specially agreed upon), they have accepted interest at that rate, and they now make a claim, not for damages, but for additional interest as on a contract which they affirm, and not one for the breach of which they are suing. I feel, therefore, an insuperable difficulty in attempting to remould the claim, or in allowing an amendment, so as to make it a claim for re-exchange instead of interest, as I have no means of ascertaining what the amount of re-exchange would be, or of forming any opinion whether the case is similar to *Willans* v. *Ayers*, and whether any sum would be payable for re-exchange.

I think the claim for interest is altogether misconceived, and I have no materials which enable me to substitute any other claim for it. The claim fails, and I must dismiss it, with costs.

Solicitors for the claimants, *Donnithorne & Ewer*.

Solicitor for the English liquidator, *Edwin Andrew*.

Solicitors for the Australian liquidators, *Hancock, Sharp, & Hales*.

Q. B. Div. (Lord Coleridge, C.J., and Mathew, J.) April

DAVYS v. RICHARDSON. (a.)

Practice—Payment of money into court—Tender in satisfaction before action — Defence denying liability — Payment out—Order when necessary—Rules of Supreme Court, 1883, *ord.* 22, *rr.* 5, 6 (c).

In an action for wrongful dismissal, with claim one year's salary in lieu of notice, defendant denied liability for more than one month's salary, or, alternatively, for more than three months' salary, which he amount he tendered in satisfaction before action, on plaintiff's refusal of acceptance, paid it into court. Plaintiff obtained a verdict that one month's salary was due, but, on the application of his solicitor, the amount paid in was paid out to his solicitor under 22, *r.* 5 (c).

Held, that an order was necessary before the money should have been paid out under ord. 22, *r.* 6 (c), *on the ground that the defence in substance denied liability for the whole amount; that rule* 5 (c) *of order* 22 *only applied to defences of "tender" where the old plea of "tender" could, under the circumstances, have been maintained; that, the defence being in substance a denial of liability, the money should only have been paid out under an order of court; and that the plaintiff's solicitor, having received the money wrongly so paid out, must refund the balance in excess of the one month's salary recovered by him.*

Appeal from Pollock, B., at chambers.

The plaintiff in this action had sued the defendant for wrongful dismissal under an agreement, and claimed one year's salary in lieu of notice. The defendant in his statement of defence pleaded (*inter alia*) that "by the agreement the plaintiff was only entitled to one month's notice at the time when he received the notice," or, "alternatively that the plaintiff under the agreement was not entitled to more than three months' notice or salary in lieu thereof," and, "further, by the whole statement of claim, the defendant made tender before action of £163, which the plaintiff refused, and the defendant has paid the said amount of £163 into court, and says it is enough to satisfy the plaintiff's claim." The said £163 was made up of a sum admittedly due to the plaintiff, and of three months' salary in lieu of notice. The sum so paid in was receipted on the pleadings by the Bank of England, Law Courts Branch as being "paid in with defence setting up tender." On the trial Day, J., held that the plaintiff was only entitled to one month's notice, and judgment was given in those terms. The plaintiff's solicitor immediately applied for and obtained the money paid into court on the written request of the plaintiff under ord. 22, r. 5 (c). The defendant claimed repayment of the balance paid in beyond one month's salary on the ground that the money should not have been paid out without an order to the effect under ord. 22, r. 6 (c). Pollock, B., held that the payment into court had been made without denial of liability, and, therefore, that rule 5 (c) of order was applicable, and the money could be taken out by the plaintiff on his request or paid to his solicitor on the plaintiff's written authority." From this decision the defendant now appealed.

Henn Collins, Q.C., and *Morton Smith*, for the defendant.—The defence amounted to a denial of liability for six months' salary and for any more than

(a.) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

month's salary, but in the alternative three months' salary was tendered if the plaintiff would accept that in satisfaction. The plaintiff had not accepted that amount in satisfaction. The money, therefore, became subject to rule 6 (c) of order 22, and should not have been paid out without an order of the court or of a judge. The judge had held that one month's salary was sufficient satisfaction. The defendant could not lay claim to more than that amount, and the balance ought to be ordered to be repaid to the defendant: *Maple & Co.* v. *The Earl of Shrewsbury*, 35 W. R. 819, 19 Q. B. D. 463.

Lumley Smith, Q.C., and *Horace Browne*, for the plaintiff and for his solicitor.—The money was paid in by way of tender, without denial of liability. By the forms of the Paymaster's office money can be paid in "with defence setting up tender," and it can then be paid out at the request of the plaintiff under rule 5 (c) of order 22, or it may be paid in "with defence denying liability," and then it can only be paid out under an order under rule 6 (c) of order 22. The defendant's solicitor here paid in the money under the first form "setting up tender," and the plaintiff's solicitor was justified in taking out all the money so paid in under the written request of the plaintiff without any order being necessary. The judgment at the trial was in effect that "the money paid in was enough." The money was properly paid out at the request of the plaintiff without further order under order 44 of the Supreme Court Funds Rules, 1886. At any rate, the plaintiff's solicitor should not be called upon to refund the money, as he was misled by the form in which the defendant's solicitor chose to pay in the money.

Lord Coleridge, C.J.—I am of opinion that the order of Pollock, B., must be rescinded, and that this appeal be allowed—namely, this application for an order for the plaintiff's solicitor to repay the balance of this money over and above the amount of one month's salary to the defendant.

It is not necessary to detail the circumstances of this case. It is sufficient to pass to the fact that the money paid into court by the defendant was, in the result, in excess of that which it was held could properly be demanded by the plaintiff. That money might have been properly taken out by the plaintiff in satisfaction at the time, and all further proceedings been stayed. The plaintiff did not do so. He did not accept the sum paid in in satisfaction of his claim. He chose to go on with his action, thus necessarily implying that he claimed more than had been paid in. In that claim he failed. The money was clearly shown in the result to have been in excess of that which need have been paid, and equally clearly it was shown that the plaintiff had not been satisfied by its tender. The plaintiff, however, still maintains that under ord. 22, r. 5 (c), money may be paid in under the old and well-understood plea of "tender," and that where it has been so paid in it may be taken out without any order of court by the plaintiff. That is so, but then the money must have been paid in under circumstances under which the old plea of "tender" could have been set up. Here the statements in the pleadings are inconsistent with any such plea. They do not bring the case within the rule at all. There is a second conclusive objection which follows upon this against the plaintiff's claim. Rule 5 must be taken with rule 6 of the same order. Now the facts of this case seem to bring it exactly within rule 6, under which when the liability of the defendant for the whole claim, as pressed, is denied, as it clearly was here looking at the pleadings as a whole, and when the sum so paid in is not accepted by the plaintiff in satisfaction, as it was not in this case, then the money can only be obtained by an order. The plaintiff's claim was for more than three months' salary. The defendant denied his liability in any event for more than three months, and, as he contended, for more than one month. That is a denial of liability which satisfies the condition of the preamble of rule 6; and sub-section (c) of that rule makes the case still more complete. The money was not accepted in satisfaction, hence the action proceeded. It cannot not now be got back without an order, and it ought never to have been paid out without an order. What is to be done? It was paid into the hands of the plaintiff's solicitor—at the plaintiff's request, I quite allow. It must not be supposed that anything dishonourable whatever is so much as hinted at against the solicitor. He made a mistake, that is all; and he was led into that mistake by the form which the defendant's solicitor adopted in paying the money into court. But he took that money out when he ought not to have done so. Under the circumstances he must replace the balance so wrongly taken out, but we will give no costs against him.

Mathew, J.—I concur.

Appeal allowed.

Solicitor for the plaintiff, *J. G. Clabburn.*

Solicitors for the defendant, *Kisch & Norman.*

Q. B. Div. (Mathew, J.) Nov. 19, 21.

Whitely v. Barley. (a.)

Corporation—Officer of local authority—"Concerned or interested" in contract—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 189, 193, 126.

A local authority entered into contracts respecting certain sewage and drainage works, and they employed the defendant, who was their town surveyor, to prepare bills of quantities and to superintend the construction of the drainage works. It was provided by the local authority that he should receive in respect of each employment a percentage (1) *on the amounts certified by him to be due under the contract; and* (2) *on the sums paid for the works under his superintendence.*

Held, that the defendant was "concerned or interested" in the contracts within the meaning of section 193 *of the Public Health Act*, 1875, *and had incurred the penalty therein provided.*

Further consideration before Mathew, J.

This was an action to recover penalties under section 193 of the Public Health Act, 1875.

The defendant was town surveyor to the Corporation of Ramsgate, which is the "local authority" within the meaning of the Act, and the penalties sought to be recovered were in respect of three contracts entered into by the corporation in 1884 and 1885 for the sewering and paving of new streets. The defendant had been employed to take out the quantities, and it was provided in each contract that for this service he should be paid two and a half per cent. on the amount of the contract. This amount the contractor was to receive upon obtaining the defendant's certificate that the works had been completed to his satisfaction.

The plaintiff further claimed penalties in respect of seven contracts entered into by the corporation for the construction of sewage works at Ramsgate. The defendant had prepared a scheme and had been appointed engineer by the corporation to superintend the works and the corporation had passed a special resolution allowing him percentages on the sums to be paid for the works. Under these contracts also he was to receive one and a half per cent. commission on such sums for taking out the quantities.

(a.) Reported by G. K. Paley, Esq., Barrister-at-Law.

Kemp, Q.C., and *Dickens*, for the plaintiff.—The definition given in section 326 of the Public Health Act, 1875, of the duties of the surveyor to a local authority includes the superintendence of sewering and paving works. "Taking out the quantities" also comes within his ordinary duties. The defendant was either "concerned or interested" or these percentages must be considered as "fees exacted" within the meaning of section 193: *Burgess* v. *Clark*, 33 W. R. 269, 14 Q. B. D. 735; *Towsey* v. *White*, 5 B. & C. 125. The local authority cannot appoint their surveyor to act as their engineer, because he is unable to contract with them: *Mellies* v. *Shirley Local Board*, 34 W. R. 187, 16 Q. B. D. 446.

Finlay, Q.C., *Tindal Atkinson*, and *Crispe*, for the defendant.—The superintendence of the drainage scheme and the "taking out the quantities" are both outside the ordinary duties of surveyor to a local authority. The corporation, therefore, were justified in making the defendant an "allowance," and these percentages must be regarded as "allowances" within the meaning of section 189 of the Act.

Kemp, Q.C., replied.

Mathew, J.—This action was brought to recover penalties alleged to have been incurred by the defendant under section 193 of the Public Health Act, 1875.

The defendant is town surveyor of the Corporation of Ramsgate, and it was not disputed that he was an officer employed by the corporation as the local authority within the description in the section.

It appeared that under three contracts with builders made by the corporation for the purposes of the Act the defendant had been employed to take out the quantities. For this service it was provided in each contract that he should be paid two and a half per cent. on the amount of the contract. This amount the contractor was to receive upon obtaining the defendant's certificate that the works had been completed to his satisfaction.

The first question was whether the defendant was "concerned or interested" in these contracts within the meaning of the section.

I am of opinion that he was, and that he has incurred the penalty sought to be recovered in respect of each of these contracts. The object of the statute is to prevent an officer of the local authority from being placed in a position where his duties to his employers conflict with his personal interests. With respect to each contract, the defendant had a duty to the corporation, first, to advise as to the estimate of quantities and the amount to be paid to each contractor, and, secondly, to decide that the work for which he was to certify had been properly executed. In the performance of this duty he was exposed to the temptation from which the statute was intended to protect him.

The plaintiff further sought to recover seven penalties in respect of contracts entered into by the corporation for the construction of extensive sewage works at Ramsgate. The defendant had prepared a scheme for carrying out a system of main drainage in the town which had been approved by the Local Government Board. The corporation had appointed the defendant their engineer to superintend the execution of the necessary works. By special resolution of the corporation the defendant was to be paid for his services percentages on the sums to be paid for the works, which were not to exceed £780. He was also to receive, as in the case of the other contracts referred to, a commission of one and a half per cent. for taking out the quantities.

An attempt was made at the trial to show that the whole payment to the defendant was an "allowance" which, under the Act, the corporation was empowered to make him, and with that view it was sought to establish that the arrangement made as to the one and a half per cent. was that the defendant was to account to the corporation for the amounts received by him less his expenses out of pocket. The jury were not satisfied that there had been any such contract. I have no doubt that the jury were right in this conclusion, and that the respectable witnesses who were called for the defendant had persuaded themselves that the resolution of the corporation entitled the defendant to no more than £780 and fell into the mistake of supposing that their view of the contract had been the subject of an express bargain.

I cannot doubt that, in respect of this employment of the defendant by the local authority, he has incurred a further penalty. The cases of *Burgess* v. *Clark*, *Todd* v. *Robinson*, 14 Q. B. D. 739, 33 W. R. Dig. 127, and *Mellies* v. *Shirley Local Board* seem to me decisive of the question.

It was contended by the counsel for the plaintiff that in respect of the sewage works, the defendant had incurred not one but seven different penalties, and to this end it was pointed out that two different percentages were payable under the resolution appointing the defendant as engineer, and that there had been five agreements for the execution of the works entered into by different contractors, in each of which had been inserted the provision that one and a half per cent. should be paid to the defendant for taking out the quantities. I am of opinion that the evidence showed there was one contract only with the defendant in respect of the sewage works, and that the corporation intended that he should have for his services as engineer the percentages mentioned in the resolution, and also those provided for by the contracts.

I regret the conclusion to which I have been compelled to come to, and I think it right to add that there was no evidence and no suggestion at the trial that the defendant had been guilty of discreditable or dishonourable conduct in his office of town surveyor. With respect to the main drainage scheme, he received a moderate recompense for very valuable work, and I see no reason to doubt that he had served the Corporation of Ramsgate with equal integrity and ability. The defendant would seem to be the victim of the law which in his case operates harshly. The motives for bringing this action were not disclosed at the trial, and I am not concerned in making them the subject of inquiry or comment.

Judgment accordingly.

Solicitors for the plaintiff, *Kingsford, Dorman & Co.*, for *Hills*, Margate.

Solicitors for the defendant, *Meredith, Roberts & Mills*, for *Hubbard*, Ramsgate.

Q. B. Div. (A. L. Smith, J.) Nov. 3, 1887.

Crampton v. Ridley & Co. (a.)

Arbitration—Costs—Mercantile reference—Remuneration of arbitrators and umpire—Implied contract.

Where parties in a mercantile dispute agree to refer matters in difference to arbitration, an implied contract is thereby created to pay the arbitrators and umpire acted in the reference reasonable remuneration for their services.

Virany v. Warne, 4 *Esp.* 47, and Barroughes v. Clarke, 1 *Dowl.* 48, *distinguished.*

(a.) Reported by Cecil Chapman, Esq., Barrister-at-Law.

This was an action tried before A. L. Smith, J., without a jury.

The action was brought to recover £328 as fees payable to certain arbitrators and an umpire for their services in a mercantile reference.

The facts and arguments appear in the judgment.

Pitt-Lewis, Q.C., and *F. Radcliffe*, for the plaintiffs, Crampton and Holt.

Bigham, Q.C., and *Danckwertz*, for the defendants, Ridley & Co.

Danckwertz appeared for the defendant McNay.

The defendant Mackay, who was trustee in bankruptcy of F. C. Winby, did not appear.

A. L. Smith, J.—This is an action brought by an umpire and an arbitrator to recover the sum of £328, being umpire's and arbitrator's fees payable, as it is alleged, to them by the defendants.

The facts of the case are as follows:—

By indenture dated July 2, 1878, Frederick Charles Winby, whose trustee in bankruptcy is one of the defendants, granted the sole and exclusive licence to the defendants, Ridley & Co., to use his invention for improvement in rails for steam tramways, subject to the terms and provisions in the indenture contained. In and prior to the year 1882 disputes arose between Winby and Ridley & Co. touching and concerning the licence so granted and the user thereof, whereupon, on July 10, 1882, it was agreed between Winby and Ridley & Co. that such disputes should be referred to the award of William L. Holt and Thomas Fothergill McNay, civil engineers, or, in case of disagreement, to their umpire. By this submission to arbitration it was also agreed "That the arbitrators or their umpire, as the case might be, might by their or his award order and determine what should be done by either party, and that the costs of the reference and award should be in the direction of the arbitrators or their umpire, who might award by whom, to whom, and in what manner the same should be paid."

Winby appointed Holt as his arbitrator and Ridley & Co. appointed McNay as theirs, and each undertook their respective appointments. The arbitrators thereupon agreed to appoint as umpire the plaintiff, Mr. W. R. Crampton, the well-known engineer of 4, Victoria-street, Westminster, which appointment was made and accepted in the following letters:—

"October 17, 1882.

"Dear Sir,—Mr. McNay informs us that he and Mr. Holt have agreed to appoint you as umpire, and he asked us to inquire whether you will undertake the office, and, if so, to forward you the agreement of reference.

"Will you kindly let us know whether you will be good enough to accept the appointment?

"Yours truly,

"R. P. & H. Phillipson & Cooper."

These gentlemen were solicitors for Messrs. Ridley & Co.

"4, Victoria-street, Westminster,

"October 18, 1882.

"Dear Sirs,—In reply to yours of the 17th, requesting to know whether I will act as umpire in the case of Messrs. Ridley & Co. and Mr. Winby, I beg to say that I shall be happy to do so.

"Yours faithfully,

"W. R. Crampton."

The first meeting upon the reference took place before the two arbitrators sitting without an umpire, and at a meeting held on April 7, 1883, a question arose as to the costs of the arbitration, and after a discussion, which appears from the shorthand notes before me, an agreement in writing was come to between the parties to the litigation through their respective representatives, bearing date April 7, 1883. That agreement was as follows:—"In the matter of an arbitration between Frederick Charles Winby and Ridley & Co., it is agreed between the parties that the arbitrators (Messrs. Holt & McNay) may, if they think fit, intimate their decision, each party agreeing to be bound thereby previously to the making of the final and formal award, and the parties undertake that such of them as may be directed by the arbitrators shall pay such costs and charges of the arbitrators as they may direct." Contemporaneously with this agreement, and indorsed thereon, it was also agreed between the parties "that, in the event of the arbitrators disagreeing, the matter should be referred to the umpire, W. R. Crampton, by the arbitrators, and that the umpire should with them proceed to consider the matter, and should make his award without the presence of counsel, solicitor, or witnesses, except that he might require the presence of either or both of the parties." On October 12, 1883, Mr. Holt and Mr. McNay formally, by letter, appointed Mr. Crampton as umpire, and therein expressed their desire that he would be good enough to take care that their fees, past and future, be paid to him on their behalf.

Before Mr. Crampton moved in the matter the two contemporaneous agreements of April 7, 1883, and the submission to reference of July 10, 1882, were forwarded to him, and after the receipt of these documents on December 20, 1883, he first sat as umpire.

Mr. Crampton and the two arbitrators sat from time to time to consider the matters referred to them, and difficulties arose which do not appear to me material. Ultimately, however, on July 3, 1885, Mr. Crampton made his award, and thereby, among other things, awarded that Winby and Ridley & Co. should each bear his, or their own costs of reference, and pay half costs of the award, and that if either party should, in the first instance, pay the whole or more than half the costs of the award, the other party should repay him or them so much of the amount as should exceed the half of the costs. The amount sued for—viz. £328—is made up as follows:—

	£	s.	d.	
Holt's fees as arbitrator	94	10	0	
McNay's fees as arbitrator	94	10	0	
Crampton's fees as umpire	63	0	0	or £139
Out of pocket expenses	76	0	0	
making in all the	328	0	0	sued for.

It has been agreed that this amount is to be subject to taxation.

The question is whether the whole or part, and, if so, what part, of these fees can be recovered in the present action, and, if so, from whom?

On the part of the plaintiff it was, in the first place, contended that by the appointment of Mr. Holt as arbitrator and Mr. Crampton as umpire under the circumstances above narrated, and apart from any special bargain, those gentlemen became entitled at law to recover their fees from the parties litigating, or in other words that there existed an implied joint undertaking by the parties litigating to pay the plaintiffs their fees, being reasonable remuneration for the services respectively rendered by them. In the second place, the plaintiffs contended that, even if this were not so, there was an express bargain in the present case, and that upon the express bargain the action was maintainable.

Both these propositions were denied by the defendants. It was said that by the law of England, apart from express bargain, an arbitrator or umpire could maintain no action for remuneration for his services, for that there existed no implied promise by the parties appointing to pay, and that the only remedy the arbitrator or umpire had was a lien upon the award or possibly by attachment. They also insisted that there

was no express bargain or evidence of an express promise by the defendants to pay the plaintiffs their fees in the present case.

If I were not fettered by authority, and were asked the simple question whether, upon a purely mercantile and business arbitration as this was, where men in the positions in which the arbitrator and umpire in this case were were appointed, there was or was not an implied promise by the parties appointing jointly to pay them reasonable remuneration for their services, I should not have hesitated to answer the question in the affirmative. This is not the case of a dispute among friends upon social or such like matters, asking mutual friends to settle the dispute between them, in which case I should agree that there was no implied undertaking to pay for the services to be rendered. Nor is it a case of counsel being retained to adjudicate. It is a purely business transaction of common daily occurrence, and which during the last half-century has become more and more in practice as a well-known way of settling mercantile and business disputes without having recourse to the courts of law; in all which cases, and I have never in my experience known one to the contrary, except there may have been an express bargain on the subject, the arbitrators and umpire have universally looked for, and been paid, remuneration for their services rendered. In fact, such arbitrators and umpires, as is well known, make the adjudicating upon such claims part of their daily and ordinary avocation, and in such cases, apart from authority, I should have held that there was the implied promise to pay insisted upon by the plaintiffs. It is said, however, that the cases have decided otherwise, and I am bound thereby.

In the year 1801, in the case of *Virany* v. *Warne*, 4 Esp. 47, Lord Kenyon certainly ruled at *Nisi Prius* that the appointment of an arbitrator to settle a dispute which had arisen between partners was not of such a nature as to raise a demand for payment, and that the plaintiff could recover nothing unless he could prove an express promise. In 1818, in *Swinford* v. *Byrne*, Gow's N. P. 5, Dallas, C.J., would certainly seem to have thought that an arbitrator could demand what he called compensation for his trouble, but he said he would reserve the point.

In the year 1831, in *Burroughes* v. *Clarke*, 1 Dowl. 48, Taunton, J., remembering the case before Lord Kenyon of, I take it, *Virany* v. *Warne*, held upon that authority that an arbitrator could not sue for his fees, "the office, as ruled by Lord Kenyon, being altogether honorary" as he said.

In 1842 came the case of *Hoggins and others* v. *Gordon*, 3 Q. B. 466. In this case an argument took place upon special demurrer as to whether the declaration was sufficient, it being an action by an umpire and two arbitrators to recover their fees from the parties litigant. The court decided in the case that an express promise would be intended from the averments stated in the declaration, and so gave judgment for the plaintiffs upon special demurrer. It was insisted by the defendants that there was a direct decision of the court of Queen's Bench that without an express promise no action could be maintained. It should, however, be noticed in this case that Patterson, J., referred to the decision of Dallas, C.J., in *Swinford* v. *Byrne* certainly without disapproval. Whether this is an authority binding upon me that in an arbitration such as the present no promise is to be implied to pay the arbitrators and umpire, I do not stop to discuss for reasons hereinafter appearing. I wish, however, to point out that the last decision is nearly half a century ago, when arbitrations, such as we are now considering, were not in vogue, and had not become of every-day practice, as in the last quarter of a century they have.

In 1851, however, Parke, B., in *In re Coombs*, 4 Ex., p. 841 (and this is the latest case upon the subject to which I have been referred), appears to have thought that arbitrator might possibly sue for his fees without an press contract, for that learned judge there said doubt he has a lien upon the award for his services, perhaps he might maintain an action for work labour." The learned judge is not likely to overlooked what was actually decided in *Hoggins* *Gordon*.

I should notice that the law of America is that fees can be sued for: see Parsons on Contracts, 5th vol. 2, p. 55. In my opinion if the point now in ever comes to be decided by a court of review, if that necessary, it will be held, and I believe the law to that upon an arbitration such as we are now deal with there is an implied promise by the parties appo ing the arbitrators and umpire jointly to pay them their services. In my judgment, in the cases abo referred to, courts were not dealing with the class arbitrators and umpires to which the case in ha applies.

But the plaintiffs did not rest their case upon an im plied undertaking to pay, but insisted that in this case there was evidence from which I should infer an express promise to pay, and in my judgment the plaintiffs are right in their contention, and if this be so the express promise would obviously override any implied promise that might otherwise exist. It seems to me that when, upon April 7, 1883, the arbitrators raised the point as to their fees, the parties then and there undertook, not only to pay them, the arbitrators, but also the umpire to be appointed, their and his fees as directed by the award to be made. By the contract of submission to arbitration of July 10, 1882, the parties to the litigation agreed *inter se* that the costs of reference and award should be in the discretion of the arbitrators or umpire as the case might be, and as was pointed out by Parke B., in *Bates* v. *Townley*, 2 Ex., at p. 165, although the submission is not a contract between the arbitrators and umpire on the one part, and the parties litigating on the other, yet "the contract of the two parties is evidence by their own admission that the arbitrators were to be paid for their trouble, and might be used for that purpose, if the arbitrators had to sue the parties for their services."

This, coupled with the agreements of April 7, 18 made directly with the arbitrators, both communicated as they were to Mr. Crampton before he acted, in my judgment is ample evidence of an express promise to pay as contended for by the plaintiffs, and I accordingly find such contract to have been made.

But then arises the question, express promise to what and by whom? Why, as stated in the agreement of April, 7, 1883, as I read them, an express promise by the parties litigant to pay in such manner as may be directed by the award. The award determined that each party was to pay his own costs of reference and half costs of award. This means each party has to pay his own costs of counsel, solicitor, witnesses, and so forth—viz., the cost of his conduct of his case—and each party has to pay half costs of what I will call the costs—*i.e.*, of umpire, arbitrators, and award—and no more. In my judgment the true reading of the award by which the parties to the litigation have bound themselves is that each party was to pay half costs of award, as above defined, and if either paid more he was to be entitled to get the excess so paid from the other party. When either party had paid his half costs of award, then in my judgment, his liability ceased, and over and above such half neither umpire nor arbitrator had any claim against either litigant upon the contract. This, in my judgment, is the effect of the special bargain made by the parties to the litigation between themselves.

Mr. Crampton is, therefore, entitled to recover from the defendants, Messrs. Ridley & Co., upon the special contract, half his costs—viz., half of £139—

£69 10s., and no more. He is also entitled to a declaration that he is entitled to prove against the estate of Winby, for the other half of his charge—viz., £69 10s.—subject to any objection which may hereafter be made to such proof by the trustee. Messrs. Ridley & Co. have, in my judgment, in good faith paid their half of the costs to McNay, and are not liable to pay any more.

Holt is entitled to prove against the estate of Winby for his costs—viz., £94 10s., and has no claim against Messrs. Ridley & Co.

As to McNay, why he ever was made a defendant has not been satisfactorily explained to me. I quite understand why he was made a plaintiff, but when he wished to take no part in the litigation, or to claim at all, why he should have been made a defendant I do not understand. Anyhow he was, but no relief was claimed against him in the statement of claim. He, however, need not have appeared at the trial at all.

I give judgment for the plaintiff Crampton for £69 10s. against Ridley & Co. with costs, together with a declaration of right of proof for £69 10s. with costs against Winby's estate. I declare the plaintiff Holt is entitled to prove, subject to all just exceptions, for the amount of £94 10s. with costs against the estate of Winby. I dismiss McNay from the suit without costs on either side. If either party desire these fees to be taxed they may do so.

Judgment for the plaintiffs accordingly.

Solicitors for the plaintiffs, *Radcliffes, Cator, & Martineau.*

Solicitors for the defendants Ridley & Co., *Crossman, Crossman, & Prichard*, for *Philipson, Cooper, & Goodger*, Newcastle-on-Tyne.

Solicitors for the defendant McNay, *Tahourdins & Hargreaves.*

Q. B. Div. (Stephen and Charles, JJ.) Nov. 3.

Deutsche Springstoff Actien Gesellschaft v. Briscoe. (a.)

Arbitration—Revocation of submission—General agreement to refer—Particular arbitrators—Common Law Procedure Act, 1854, *s.* 11.

An arbitration clause provided that any disputes which should arise between the parties should be referred to two arbitrators (naming them). A dispute having arisen, the defendant desired to proceed to arbitration; the plaintiffs nevertheless commenced an action against the defendant, and revoked their submission.

Held, that the defendant was not entitled to have the action stayed under section 11 *of the Common Law Procedure Act*, 1854, *because, the submission having been revoked, there was no subsisting agreement to refer capable of being carried into effect.*

Appeal from Pollock, B., at chambers.

The plaintiffs (a German firm) employed the defendant as their agent in this country, under an agreement in writing. They claimed certain moneys from the defendant under this agreement. The defendant gave notice to the plaintiffs that he should proceed to arbitration under clause 14 of the agreement. The plaintiffs nevertheless issued their writ in this action. The defendant having taken out a summons to stay proceedings under section 11 of the Common Law Procedure Act, 1854, the plaintiffs revoked the submission to the arbitrators who were named in the agreement.

The 14th clause of the agreement was:—"If any dispute, question, difference, or controversy shall arise between the parties hereto, or their respective successors, executors, or administrators, touching this agreement, or any clause, matter, or thing herein contained, or the construction hereof, or anything to be done under any of the clauses herein contained, or any matter in any way connected with this agreement, or the operation thereof, or the agreement herein contained, or the respective rights, duties, or liabilities of either party in connection with the premises, then and in every such case the matter in difference shall be referred to the said S. B. Smith and A. F. Warr, or their umpire, pursuant to, and so as with regard to, the mode and consequence of the reference, and in all other respects to conform to the provisions in that behalf contained in the Common Law Procedure Act, 1854, or any then subsisting statutory modification thereof, and such arbitrators or their umpire shall have power to award and determine how and by whom the costs of the reference are to be paid."

A. J. Ashton, for the defendant.—This is a general agreement to refer, and it cannot be revoked: *Piercy* v. *Young*, 28 W. R. 845, 14 Ch. D. 200. The fact that two particular arbitrators are named in the agreement makes no difference. The plaintiffs doubtless may revoke the submission to the particular arbitrators; but the general agreement to refer remains untouched, and cannot be revoked by virtue of section 11 of the Common Law Procedure Act, 1854.

He cited *Parkes* v. *Smith*, 15 Q. B. 297; *Fraser* v. *Ehrensperger*, 12 Q. B. D. 310; and *Randell* v. *Thompson*, 24 W. R. 665, 1 Q. B. D. 748.

Bremner, for the plaintiffs.—When arbitrators are named, as in this agreement, the agreement ceases to be a general agreement to refer, and, therefore, it can be revoked. *In re Rouse and Meier*, 19 W. R. 438, 6 C. P. 212, *Piercy* v. *Young*, and *Fraser* v. *Ehrensperger* do not apply here, because in those cases no arbitrator was named. Here there is no "agreement capable of being carried into effect" within the judgment of Mellish, L.J., in *Randell* v. *Thompson*, and as laid down in *Mills* v. *Bailey*, 11 W. R. 598, 2 H. & C. 36. Therefore, section 11 of the Common Law Procedure Act, 1854, does not apply.

A. J. Ashton replied.

Stephen, J.—I am of opinion that some passages of the judgments in *Randell* v. *Thompson* indicate the right principles upon which we ought to decide this case. The Court of Appeal there held that, in order to make the provisions of section 11 of the Common Law Procedure Act, 1854, apply, there must be a subsisting agreement to refer capable of being enforced. It is true that the agreement to refer in this case is certainly general from one point of view, but it is not general with respect to the appointment of arbitrators. If nothing further had happened there was a submission of the dispute to the two particular arbitrators named in the agreement. Now that submission could be, and has been, revoked. It has been argued with much ingenuity on behalf of the defendant that he could then fall back upon the agreement, as being a general subsisting agreement to refer independently of the named arbitrators, and that this general agreement could not be revoked by the plaintiffs. This does not seem to be a very reasonable view. I think the true answer is that there is a general subsisting agreement to refer all matters in difference, and that the differences, when and as they arise, are to be referred to the named arbitrators. But the submission to those arbitrators being revocable, and having been revoked with respect to this particular dispute, there is no subsisting agreement to refer capable

(a.) Reported by Sir Sherston Baker, Barrister-at-Law.

of being enforced. I do not say that a reference may not be enforced under the crude agreement (the submission now having been revoked) with respect to future disputes, but my decision is only with respect to the particular dispute before us.

CHARLES, J., concurred.

Motion dismissed.

Solicitors for the plaintiffs, *Ashurst, Morris, & Co.*

Solicitors for the defendants, *F. Venn & Co.*

IN BANKRUPTCY.

Q. B. Div. (Cave and A. L. Smith, JJ.) Dec. 6.

Ex parte BAKER.
In re BAKER. (*a.*)

Bankruptcy—Petition by creditor—Purchase of debt—Motive—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 4, 6.

It is not an abuse of the process of the Bankruptcy Court for one creditor, whose debt may be insufficient to found bankruptcy proceedings, to purchase the debt of another creditor in order to found such proceedings bonâ fide *for the purpose of preserving the estate of the debtor and of having it administered according to the bankruptcy laws.*

Appeal from an order of the registrar of the Barnstaple County Court making a receiving order.

The debtor, Baker, was a member, and also acted as assistant secretary, of a death club, his duties being to receive sums collected from the members and to keep the accounts, and also to pay claims which had accrued due to persons interested under the rules of the club.

In December, 1886, the yearly account was carried in by the debtor, which showed the payment of several claims, but on the receipts being asked for it was discovered that in six cases appearing on the account payment had not been made. The debtor ultimately took this liability upon himself, and on the 29th of March, 1887, he gave to two out of the six persons, named respectively Hunt and Marsh, the sum of £50 and a promissory note for £45 each.

In June, 1887, at a meeting of the committee of the club, a deficiency was discovered in the cash box to the extent of £119, for which the debtor also assumed the responsibility, and promised that matters should be put straight within a month.

The debtor did not attend a meeting held on the 5th of July, 1887, when the discovery was made that a further sum of £119 was deficient, which, however, he subsequently promised to make good, but on the same day he left his home and went, as he alleged, to Cardiff.

On the 12th of July, 1887, with the sanction of a resolution of the club committee, Hunt purchased from Marsh his bill of £45 for the sum of £15, and on the 15th of July Hunt presented a petition against the debtor, the act of bankruptcy alleged being that he departed from his dwelling-house with intent to defeat or delay his creditors within section 4, sub-section 1 (*d*), of the Bankruptcy Act, 1883.

On the 16th of July an *interim* receiver was appointed and a warrant obtained for the debtor's arrest, upon which he was taken at Barnstaple on the 21st of July, but subsequently discharged. Upon the hearing of the petition, however, a receiving order was made by the county court registrar, and from that order the debtor now appealed, it being contended on his behalf—(1) that no act of bankruptcy had been committed, and (2) that the petition was an abuse of the process of the court.

The case raised the question whether the purchase by one creditor, whose debt is insufficient to found bankruptcy proceedings, of the debt of another for the purpose of founding such proceedings is an abuse of the process of the Bankruptcy Court.

E. Cooper Willis, Q.C., and *Herbert Reed,* for the debtor.—There was no act of bankruptcy committed. Moreover, the debt was bought up after the alleged act of bankruptcy for the purpose of making the debtor a bankrupt in order to punish him in relation to the club transactions. There was no liability on the debtor for this money; and, further, if a person buys a debt with the object that he may make a man a bankrupt the court will not uphold it. Two persons may petition; but if one will not join, the other may not buy the debt in order to enable himself to petition. The purchase of a debt for the purpose of founding bankruptcy proceedings will not be allowed.

They referred to *Ex parte Griffin, In re Adams,* 28 W. R. 208, 12 Ch. D. 480; *Ex parte Harper, In re Pooley,* 30 W. R. 650, 20 Ch. D. 685; *Ex parte Gratton,* 2 M. D. & De. G. 401.

Thorne, for the petitioning creditor, was not called upon.

CAVE, J., after reviewing the evidence, said: I am of opinion, therefore, that the debtor did depart from his house with intent to defeat or delay his creditors. Then, as to the second point, the debtor had disappeared no one knew where, and thereupon it was desired to take steps to obtain repayment of these moneys. Hunt, who was a creditor for £45, desired to take proceedings in bankruptcy, but his debt was not sufficient, and he went to Marsh and bought Marsh's debt for £15. It is said that that is an abuse of the process of the court, and we have been referred to three cases. Now it was first said that to buy a debt under any circumstances in order to found a bankruptcy petition on it is an abuse of the process of the court. There appears to be no case, however, where that is laid down—where the mere buying of a debt in order to found a petition is an abuse. What was said in the case of *Ex parte Griffin, In re Adams,* was that when the court sees that a bankruptcy petition is presented, not with the *bonâ fide* view of obtaining an adjudication, but for a collateral purpose, and with the view of putting pressure on the debtor, it will refuse to make an adjudication. In that case the registrar reported that the debt had been acquired simply and solely to enable the person acquiring it to enforce his personal purposes against the debtor by means of the intimidation of proceedings in the Bankruptcy Court; the purpose being to stifle proceedings on the part of the debtor; and the registrar held that he was bound to dismiss the petition as being wholly outside the legitimate purposes of bankruptcy, as based upon proceedings altogether illegal, inequitable, vexatious, and oppressive. It is obvious that that case differs totally from the present one. The object was not to wind up the affairs of the debtor in bankruptcy at all. So also in *Ex parte Harper, In re Pooley,* it was held that to purchase a debt for the purpose of making the debtor a bankrupt with the view, not of recovering the debt, but of putting pressure upon him for a collateral object or of injurying him in some way, is an abuse of the bankruptcy law, and, undoubtedly, in that case the late Master of the Rolls said: "I must take it then that Mr. Harper knew that the object of buying up the debt was not the recovery of the debt, but to make the debtor a

(*a.*) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

d (as I consider to be a fair inference) with removing him from being trustee. But if other than the first proposition, it is a gross e bankruptcy law." I quite agree that ght for a person having no interest to go debt for the purpose of making a man a f a man does so there must be some in- He must have some object in his mind *bonâ fide*, and I agree that if I found a interest buying a debt for such purpose I he had some indirect motive to serve.

ase of *Ex parte Gratton* was cited for the n one sense I quite agree with it, but if it is an abuse for a man to take proceedings e of getting all the debts paid out of the e bankrupt, that is not supported by the Cross in his judgment said: "The *fiat* was he petitioning creditor, not for the purpose payment of his own debt, but for another legitimate purpose," and if the bankruptcy force for an illegitimate purpose it is an here Hunt was no stranger to the affairs. elf a creditor for £45, and he had consider- in the affairs of this club. He had bought d was interested as a subscriber. It was mitted by the debtor Baker that he was 0 of the money of the club, and there was d for fearing that his liability was much had a direct interest in having the property rupt preserved and administered by the Court y. His difficulty was that his debt was only gets over that by purchasing Marsh's debt. *mala fide*? Was it done to force the other than in the course of bankruptcy the club? Had he any collateral object? I y. The debtor had admitted £240 debt, disappeared no one knew where. What do who had any interest in the affairs of They would get a receiving order made, property taken care of. It is absurd to say g pressure on the bankrupt. You cannot n a man who has gone away, and the only have the property taken care of. Under nces I decline to carry the cases cited a urther than is necessary, and to set a pre- my opinion the proceedings of Hunt were , and the receiving order was rightly made.

rn, J.—I am of the same opinion. There is nce that the debt was due from Baker to the also that he was absent with intent to defeat his creditors. Then we come to the question ankruptcy proceedings can be founded on a ht to found them. It is shown that Hunt bill for £15 in order to take bankruptcy ; and it was argued that, even if it was honestly, it was an abuse. Now let us he cases. In *Ex parte Gratton* the *fiat* was "for a wholly illegitimate purpose." In *Ex a, In re Adams*, the proceedings were taken, tribute the debtor's property, but to make up a just debt due to him, and Cotton, L.J., most accurate judge, said: "The proceedings ptcy were not taken to obtain payment of the the debt was purchased in order to take the gs in bankruptcy." The words are, "the gs," and there is nothing to show that, if the gs had been otherwise than oppressive, it would buse. Then, in *Ex parte Harper, In re Pooley*, L.J., said: "It appears to me very clear that gross abuse of the bankruptcy laws for persons debts which are due by other people for no other e than that of enabling them to carry the choice trustee in bankruptcy or to place anybody in a on of control with reference to the bankrupt's affairs." But in the present case all the elements of illegitimacy are wanting, and I do not think any case which has been cited can be held to be an authority for the proposition that a debt cannot be bought for the legitimate purpose of distributing the assets.

Appeal dismissed.

Solicitors for the debtor, *Clarke, Woodcock, & Ryland*, for *Ffinch & Chanter*, East Stonehouse.

Solicitors for the petitioning creditor, *Church & Co.*

Prob. Div. & Adm. Div. / Admiralty. } Nov. 29.

"The W. A. Scholten." (*a.*)

Practice—Writ of summons for service within jurisdiction directed to foreign corporation without address set aside as irregular—Ord. 2, r. 3; ord. 9, r. 8.

A writ of summons for service within the jurisdiction directed to a foreign corporation, but not containing any address, either of the corporation or of one of the officers of the corporation upon whom the writ may be served, under ord. 9, r. 8, will, on application of any person served with such writ, be set aside as irregularly issued.

This was a motion on behalf of the Netherlands American Steam Navigation Co., a Dutch company carrying on business at Rotterdam, in the Kingdom of Holland, to set aside the service of the writ of summons in an action of damage *in personam* instituted on behalf of the owners of the British steamship *Rosa Mary* against the said company for the recovery of the damages sustained by *The Rosa Mary* on the 19th of November last, when *The W. A. Scholten*, a steamship belonging to that company, came into collision with *The Rosa Mary* in the English channel off Dover without the territorial jurisdiction of the court. The writ of summons, the service of which was sought to be set aside, was in accordance with the form prescribed by ord. 2, r. 5, of the Supreme Court Rules of 1883 as the general form for writs of summons in actions *in personam* issued out of the Central Office for service within the jurisdiction, with this exception, that the spaces in that form intended for the address and county of the defendant were neither filled up with the address where the Netherlands American Steam Navigation Co. carried on business in Holland, nor with any other address. It appeared, from an affidavit in support of the motion, that the Netherlands American Steam Navigation Co. had no office or place of business in England, but that the writ of summons had been served within the jurisdiction on the managing director of the company, who was domiciled and ordinarily resided abroad, but was, at the time of the service, temporarily in this country. It also appeared that no application as to the issue of the writ had been made to the judge or to the Admiralty Registrar, the writ having been taken out in the Central Office of the Supreme Court in the ordinary course without any order.

The motion was now heard before Butt, J.

Finlay, Q.C., and *Stokes*, for the defendants, in support of the motion.—The defendant company is a foreign corporation not having an office or place of business within the jurisdiction, and the present Rules of Court do not contemplate any writ of summons being issued against such a foreign corporation other than a writ notice of which is intended to be given without the jurisdiction, and which must be in form 5 or form 6 of the forms of writs of summons in Appendix A, part 1, to the present Rules, and cannot be issued without

(*a.*) Reported by C. F. Jemmett, Esq., Barrister-at-Law.

the leave of a judge: *Sedwick* v. *Yedras Mining Co.*, W. N., 1887, p. 94. The writ issued in this case is evidently intended to be in the form of writ prescribed for service within the jurisdiction: Rules of Court, 1883, Appendix A, part 1, forms 1, 2; and was issued without the leave of a judge or the Admiralty Registrar, and it is invalid on that ground alone. Further, it deviates from the prescribed form, as it does not contain the address of the defendant. Moreover, even if the writ is a good writ, there has been no valid service of it. Service on a sub-agent is not service on the corporation of which the person served is sub-agent, and service on the manager of a foreign corporation is only good if made within the jurisdiction where the corporation carries on business and is deemed to reside. A corporation cannot be said to reside wherever its officers may happen to be.

Sir W. Phillimore, Q.C., and *Stubbs*, for the plaintiffs, *contrà*.—The writ of summons is good in form, has been properly issued, and has been properly served under ord. 9, r. 8, as it was served on the manager of the company when he was within the jurisdiction on the business of the company in connection with the collision in this case. It is true there is no address of the company on the writ, but the address of the defendant on a writ of summons is only required as a means of identification, and is not necessary in cases like the present, where no mistake as to identification could occur. Even if the service of the writ is bad, the rules of procedure now in force ought not to be construed as having deprived the plaintiffs of the right of issuing a writ against a foreign corporation for service within the jurisdiction, and thereby keeping his claim alive by renewing the writ as occasion may require. A trading corporation like the defendant company might at any time during the pendency of the writ open an office in this country, and then the writ could at once be served: *The Helenslea*, 7 P. D. 57; and see *Westman* v. *Aktiebolaget Ekmans Mekaniska Snickare Fabrik*, 1 Ex. D. 240, where Bramwell, B. (now Lord Bramwell), said:—"I am of opinion that we ought not to set aside the order permitting the issue of this writ, because a foreign corporation is suable in this country, and so a writ may lie against it. Suppose, for example, the company should establish an office in England next year, the writ might be kept alive and made available against it so as to defeat what might otherwise be a successful plea of the Statute of Limitations." See also *Palmer* v. *Gould's Manufacturing Co.*, W. N., 1884, p. 63. The forms appended to the Rules of Court are merely intended for the guidance of the practitioner in ordinary cases.

Butt, J.—The question in this case is whether the writ of summons should be set aside. If the writ ought to be set aside, nothing need be said as to whether service of it was bad or good. I have caused inquiries to be made at the Central Office, and in answer to these inquiries I am told that it is a most clear rule there that they will not, without the leave of the judge, issue a writ against a defendant whose address on the writ is a foreign one. I am further told that the clerk who sealed this writ took part of the name of the defendant for the address, and did not notice that there was no address, and that he would not have issued the writ if he had noticed the omission. By the form prescribed for use in actions *in personam* by the Rules of the Supreme Court now in force, the address of the defendant, as well as the name of the defendant, is required to be inserted in the writ. I am perfectly aware that the writ in this case is a writ for service within the jurisdiction, but it is clear that it would not have been sealed if the clerk whose duty it was to seal it if it was a proper writ and had been properly filled up had observed that there was no address of the defendant inserted in it, or had found that the proper addres the defendant company had been inserted in it, and t that address was an address out of the jurisdiction. seems to me quite clear that in this case the addres the defendant company was purposely left out of t writ, and I certainly shall not allow the writ to rem This being my decision, it is not necessary for me discuss the further question whether there has or not been a good service of the writ. The party appl for the issue of this writ has contravened the r which are laid down as to what is required to be c tained in a writ of summons. He has contravened t rules purposely, and I am clearly of opinion that writ has issued irregularly. Consequently, the itself must be set aside.

Solicitors for the plaintiffs, *Pritchard & Sons.*

Solicitors for the defendants, *Stokes, Saunders, Stokes.*

Prob. Div. & Adm. Div. Admiralty. } Nov. 28.

"The Wexford." (a.)

Damage—Application by plaintiff for sale of belonging to him, under his control, and not arrest—Want of jurisdiction.

The owners of a vessel seriously damaged in a who had issued but had not served a writ in an action damage in rem instituted against the vessel with their vessel came into collision, applied, whilst their was under their control and without the territorial diction of the court, that the court should order their vessel.

The court refused the application as unprec

This was an action of damage *in rem* behalf of the owners of the barque *Mary* the vessel *Wexford* to recover for the damage by *The Mary Evans* on an occasion when the collision with *The Wexford*. *The Mary* been seriously damaged in the collision, but her and crew did not abandon her after the collision the owners of *The Wexford* never rendered salvage vices to her or had her in their possession.

Barnes, on behalf of the plaintiffs, now m judge in court for an order for the sale of *The Evans*.—The plaintiffs, in selling their vessel, wish under the control of the court, and not behind the of the owners of *The Wexford*.

He referred to *The Columbus*, 3 W. Rob. 166.

J. P. Aspinall, for the owners of *The Wexford*, not called on.

Butt, J.—The persons who make this application the owners of a vessel over which they have authority, and which is not in the hands of the and if they desire to sell the vessel they have power to do so without applying to the court. motion is quite unprecedented, and I dismiss it, costs.

Solicitors for the plaintiffs, *Pritchard & Sons.*

Solicitors for the defendants, *Botterell & Roche.*

(a.) Reported by C. F. Jemmitt, Esq., Barrister-at-

Court of Appeal.

From Chan. Div. Jan. 27.

In re PRATER.

DESINGE *v.* BEARE. (*a.*)

Will—Construction—Gift of property at R.'s bank—Share certificates.

A testator who had a cash balance and also share certificates, some of which were inscribed in his name, and others payable to bearer at R.'s bank, made a bequest of "half my property at R.'s bank."

Held, that half of the cash balance and also half of the shares passed under the bequest.

Decision of Chitty, J. (*reported* ante, *p.* 179, 36 *Ch. D.* 473), *reversed.*

Appeal from a decision of Chitty, J., reported *ante*, p. 179, 36 Ch. D. 473.

Horatio Prater, M.D., a domiciled Englishman, who died in 1885, by his will, dated the 25th of October, 1875, gave £500 to the Société Protectrice des Animaux, and also "half my property at Rothschild's bank," and the remaining half of his property to be divided between two public libraries in Paris—namely, the Mazarin and the library in the Rue Richelieu.

At the time of the testator's death there was a balance of about £320 in English money standing to his account at Rothschild's bank. There were also deposited in his name at the same bank certain shares in the Paris, Lyons, and Mediterranean Railway Co. These shares were *actions au porteur* (payable to bearer) and *actions nominatives* (shares inscribed in the testator's name) of the value of about £7,000. The latter shares show on their face the name of the owner, and pass by what is equivalent to transfer and registration, but payment may be obtained by the bearer.

On a summons taken out for the purpose of obtaining a decision whether these shares passed by the gift of "my property at Rothschild's Bank," Chitty, J., held that only the cash balance passed.

The plaintiffs appealed.

Sir Arthur Watson, Q.C., and *R. F. Norton*, for the appellants.

Romer, Q.C., and *Ingle Joyce*, for the executors, referred to *Marquis of Hertford* v. *Lowther*, 7 Beav. 1; *Moore* v. *Moore*, 1 Bro. C. C. 127; *Fleming* v. *Brook*, 1 Sch. & Lef. 318; *Earl of Tyrone* v. *Marquis of Waterford*, 8 W. R. 454, 1 De G. F. & J. 613; *Guthrie* v. *Walrond*, 31 W. R. 285, 22 Ch. D. 573; *Arnold* v *Arnold*, 2 My. & K. 365; *Stuart* v. *Marquis of Bute*, 11 Ves. 657.

Lord HALSBURY, C.—We are called upon to construe this instrument, such as it is, and, speaking for myself, I certainly do not mean to lay down any general canon of construction applicable to cases of this nature, because I do not believe it possible to give any abstract meaning to words of this description. The word "property" is as wide as anything can be. But here the words are "property at Rothschild's bank." If those words are taken in their strict and proper signification there was nothing to answer to them, for there was no property at the bank. I do not think that the cases which show that debts due from persons in a particular district are included in the words "property of any kind or description whatsoever" in that district are applicable to this case, because here the words are used by the testator as part of the description of the property disposed of, and he makes it part of the description of the property that it is property at the bank. Mr. Romer has, I think, very candidly admitted that the description is inaccurate, and did not strictly apply, either to the titles to these shares in different commercial adventures or to the balance which the bankers owed to their customer. If, therefore, it is once conceded that the words were intended to operate on something, and to give something to the object of the testator's bounty, we must see what the testator intended, and consider what an ordinary testator, not possessed of special legal knowledge, using language with reference to this particular subject-matter, must be intended to mean by the use of these words. Chitty, J., says, and in that I agree with him, that you must take the ordinary and popular meaning of the words to be found in the instrument.

Now what is the ordinary and popular meaning of these words? Did anybody ever hear a man denote his cash balance by such a phrase as "my property at my bankers"? I should say, if a distinction were to be taken, that if a man had at his bankers what we popularly call a cash balance, and the bank had possession of documents of title belonging to him, he would be more likely to refer by that expression to those documents of title than to his cash balance. I am unable, however, to draw such a distinction. The testator having, in the earlier part of his will, given pecuniary legacies, gives to this society a legacy of £500, "also half of," not my money, not my cash balance, but "half of my property at Rothschild's Bank." On the most ordinary principles of construction there is nothing to cut down the wide, general term "property," and on that ground, with the additional enforcement arising from the fact that in the preceding part of the will he had words before him which point to mere money as distinguished from property, I come to the conclusion that when he said "property at Rothschild's Bank" he meant everything belonging to him with which the bank was concerned. I am unable to derive any assistance from any of the circumstances outside the will itself. I do not see anything in the circumstances which existed at the time of the making of the will, as distinguished from those existing at the time of the death, to throw any light on the meaning of the testator. I am therefore remitted to the words in the will, and, putting myself as well as I can in the position of the testator, I think that, by the language which he used, he intended to describe whatever the bank had of his, and which, on his demand, they would have been bound to give up.

I am therefore unable to concur with the learned judge in the construction he has put upon these words, and I think his judgment must be reversed.

COTTON, L.J.—What we have to decide is, what is the true construction of a gift of "also half of my property at Rothschild's Bank" in the testator's will following this: "I give to the Société Protectrice des Animaux the sum of £500." Chitty, J., has come to the conclusion that "half of the property" only meant half of the balance appearing due to the testator on his account with his bankers. I am unable to agree with that conclusion. It is true that in the previous part of his will he speaks of giving "the following pecuniary legacies," but I think that means the legacies he has expressed by sums of money. He gives to this society a legacy which he expresses in a sum of money, £500. But then he gives something which he expresses in different language. At the time of making his will, and at the time of his death, there was, in my opinion, nothing which would properly come within the description "of my property at Rothschild's Bank, Rue Lafitte." But at both times he had a balance due to him from these bankers, and he was in the habit of leaving with them the certificates of certain shares. Some of them were shares which passed by mere delivery of the certificates, and with regard to the others, as I understand the last

(*a.*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

evidence read to us, although they are *nominatives*, yet if anyone was entitled to have the certificates, then, on production of those certificates, his name would be inscribed as the owner of the shares instead of the name of the person to whom the *nominative* certificates were granted. Now, there being nothing to answer strictly the description of "property at my bankers," because I think that neither the balance due by the bankers nor the certificates of these shares could strictly or properly be described as property at his bankers, we must consider what the testator is to be taken to have meant. Property at his bankers is not an expression which a person would use to describe the balance at his bankers, he would describe it as money at his bankers. Here we have "property." Property is a word of the very largest description, and, looking at this will, I see nothing to cut it down to money so as to make it pass only the banker's balance. Though people would not ordinarily describe a cash balance at their bankers as property at their bankers, yet they might do so, but why may not the testator so describe these shares, which are not really property at his bankers, but are so in this sense, that the certificates, without which the title to these shares cannot be asserted, are in the hands of the bankers. As to the shares which are not *nominative*, the certificates would give the holders of them a right to the shares. As regards the other shares, it appears that whoever had a title to the certificates would be entitled to have the shares put into his name and receive the dividends. The shares might then very well be popularly spoken of as property at his bankers.

It is said that authority is against us. No doubt there are a great many cases which lay down that *choses in action* cannot be referred to as of any particular locality. Again, there are cases where a gift of property in any particular locality has been held to include debts due from persons in that locality. I think these latter cases go upon this—that there was in the wills a sufficient indication of intention to include, under the description of property in a particular place, that which really cannot have any locality. Those cases, in my opinion, show that the rule that *choses in action* have no locality, must not deter us from holding them to be included in a gift of property in a particular locality if we come to the conclusion that the intention of the testator was to include them.

Mr. Romer referred to the case of *Fleming* v. *Brook*, decided on the authority of *Moore* v. *Moore*. But in *Moore* v. *Moore* the words were "goods and chattels," and Lord Redesdale said that "goods and chattels did not properly apply to notes, bills of exchange, or bonds, and there was not anything in the context to give a more enlarged meaning to those words." I do not think that this case of *Moore* v. *Moore* has the effect which Lord Redesdale, according to the report, seems to have attributed to it. I do not at all dissent from, or desire to say that we should overrule, if we could, any of these decisions which have been quoted to us; but, having regard to the facts existing at the time when the testator made his will, I have come clearly to the conclusion that what he intended was to give, not only half the balance at his bankers, but also half the shares the certificates of which were at his bankers. It would be a very different thing if they were title deeds of real estate. I do not think that anyone would describe an estate in Suffolk, the title deeds of which were at his bankers, as a property at his bankers. There is a wide difference between real estate, having a particular locality, and shares, which may, I think, be described, by a person not having any great legal knowledge, as in the place where the certificates are. In my opinion we ought to say the bequest in question includes, not only half the balance due from the bankers, but also half the shares the certificates of which were at the bankers at the testator's death.

BOWEN, L.J.—I am of the same opinion, and if it were not for the usual practice of this court when it differs from the learned judge who has decided the case in the tribunal of first instance to pronounce severally our views, I should say nothing, but leave the matter upon the language, much better than my own, which has already been used. But out of respect to the learned judge I add my own individual conclusion in my own way.

The question we have to decide is the meaning to be given in this will to the words, "my property at Rothschild's bank." We have been pressed with a great many cases of gifts of property described as situate in or connected with a particular locality, from which cases the learned counsel for the respondents suppose that some principle can be deduced which ought to lead us to support the judgment of Chitty, J. With regard to all such cases, it seems to me to be important to remember that they must all be decisions upon the language of particular wills. The term property at a bank, or property situate locally at any other place than a bank, is not a language which has received, or is capable of receiving, a stereotyped meaning which is to last for all time and to apply to every will by whomsoever made, but is an expression which must receive light or colour from one or other of two sources—the context, and the circumstances of the testator. Though ninety-nine out of one hundred cases in which similar words have been used may have been decided in the same way, they are no authority for the hundredth case if the circumstances and the context in the hundredth case are such as to be sufficient to make a difference in the meaning of the words. As regards the context of the present will, as the Lord Chancellor has pointed out, we find that, in the pecuniary legacies strictly so called, when money is given, money is spoken of, and when for the first and only time a gift will the testator passes to the larger term "property," there is nothing in the context which should lead us to suppose he may not have intended a distinction between the larger and the narrower term.

Then as to the circumstances of this case. The testator had at this bank a money balance. He had in the bank the certificates of two classes of actual shares in commercial undertakings in France, the distinction between which classes may, I think, be neglected for all purposes of this case. With regard to one of them the effective value of the documents is gone according to French law, so that the person who has them possesses, at all events, something which would be of considerable value in enforcing his right to the shares, and, in fact, the documents represent, according to French law, nearly as much as in popular language the right to the shares. The testator, then, uses the words "my property at Rothschild's bank." If we were to apply the strictest and narrowest construction, those words, nothing that the testator possessed in connection with the bank, neither his money balance in their hands nor these shares, can properly be described as property at the bank. But to say that the testator had nothing at all at the bank would be to render the bequest insensible. We must, therefore, search and find, if we can, some popular, though less accurate, use of the term "property at the bank" which will satisfy the exigencies of the case and render sensible a disposition which was meant to have some legal effect.

Then we find this double class of property, as it may be called, at the bank, the cash balance and the certificates of the shares. Are we to draw a line between the two and say the term "property" meant one thing and not the other? Why so? I agree with what the Lord Chancellor has said, and the Lord Justice has followed him in affirming, that if one were to press on the mind in the direction of severe and strict criticism, the rights which were evidenced by share documents kept in a banker's box at the bank would much more naturally

satisfy the popular description of "property at the bank" than even the cash balance. But certainly I can see no reason for excluding the shares, and including the cash balance, which is the judgment of the court below. For the reasons given by the Lord Chancellor it seems to me that we are driven to put a popular construction on words which, under other circumstances and with a different context, might well receive a different construction.

I will only add that in *Stuart* v. *Marquis of Bute*, which was relied on in the court below, there were other matters which would satisfy the words of the will without including *choses in action*, and in *Moore* v. *Moore*, as has been pointed out, the court had to interpret the words "goods and chattels," and the only decision in that case was that a bond in the house did not come within the description of goods or chattels in that house. I agree with the Lord Chancellor and Cotton, L.J., that this decision must be reversed.

Appeal allowed.

Solicitors, *G. Parker Dixon; Wilkinson & Howlett.*

From Lancaster Palatine Ct. of Cham. } Jan. 12; March 8, 10.

In re YATES.

BATCHELOR *v.* YATES. (*a.*)

Bill of sale—Mortgage—Trade machinery—Bills of Sale Act, 1878 (41 & 42 *Vict.* c. 31), *ss.* 3, 4, 5, 7—*Conveyancing Act*, 1881 (44 & 45 *Vict.* c. 41), *ss.* 6 (2), 19.

A mortgagor by deed conveyed, "as beneficial owner," by way of mortgage, a piece of land, "with the dwelling-house and buildings thereon erected," to the mortgagee in fee. The mortgage deed provided that the power of sale should be by section 19 *of the Conveyancing Act*, 1881, *was* [illegible], *but otherwise contained no express power of sale. The buildings in part consisted of a workshop, in which was affixed "trade machinery" of the kind mentioned by the Bills of Sale Act*, 1878, *to be "personal chattels," but this trade machinery was not separately mentioned or specially mentioned at all in the mortgage.*

Held, that the mortgagee was, by the instrument of mortgage, entitled to the possession of the trade machinery as part of the freehold, and that he was not entitled—either by the terms of the instrument itself or by the power to sell "the mortgaged property or any part thereof, either together or in lots," conferred by section 6 *of the Conveyancing Act*, 1881—*to seize, sever, or sell the trade machinery apart from the land, and therefore the instrument was not, within the meaning of the Bills of Sale Act*, 1878, *a bill of sale as regards the trade machinery, and did not require to be registered.*

Ex parte Daglish, 21 *W. R.* 893, *L. R.* 8 *Ch. App.* 1, *distinguished.*

Ex parte Barclay, 22 *W. R.* 608, *L. R.* 9 *Ch. App.* 1, *and* Mather *v.* Fraser, 4 *W. R.* 387, 2 *K. & J.* 536, *followed.*

Decision of Bristowe, V.C., *affirmed.*

Appeal from Bristowe, Vice-Chancellor of the County Palatine of Lancaster.

By a mortgage deed executed in August, 1886, the mortgagor, "as beneficial owner," granted and conveyed to the mortgagee "all that piece of land, with the dwelling-house and buildings thereon erected, situate," [illegible] "to hold the same unto and to the use of the mortgagee in fee simple," subject to a proviso for reconveyance on payment of the mortgage-money, with interest, on the 7th of February, 1887. And it was thereby agreed and declared "that the powers contained in section 19 of the Conveyancing Act, 1881, shall be exercisable at any time after the 7th of February, 1887, without its being necessary to serve the notice required by section 20 of the same Act." There was on the land some fixed "trade machinery" which was not in any way mentioned or referred to in the deed. This action was brought for the administration of the estate of the deceased mortgagor, and it sought a declaration that the mortgage was a bill of sale, and was bad as not having been registered under the Bills of Sale Act, 1878, and that the property comprised in the mortgage security should be handed over to the receiver in the action.

Bristowe, V.C., held that the mortgage was not a bill of sale, and was valid in all respects.

The receiver appealed.

The appeal was first argued on January 12, 1888, before Cotton, Bowen, and Fry, L.JJ., and it was then contended that, by reason of non-compliance with the Bills of Sale Acts, the mortgage, because it operated to pass the "trade machinery" to the mortgagee, was void altogether. The appeal was directed to stand over for re-argument for the purpose of considering the effect on the mortgage of the power of sale given by section 19 of the Conveyancing Act, 1881. The appeal was re-argued on March 8 before the Court of Appeal as then constituted; but, owing to the decision of the Court of Appeal in *In re Burdett, Ex parte Byrne, ante*, p. 345, 20 Q. B. D. 310, it was not contended on the re-argument that the mortgage instrument was altogether bad, but it was contended that the deed was, at any rate, void so far as it operated to pass the "trade machinery" to the mortgagee. Section 19 of the Conveyancing Act provides that a mortgagee by deed shall, by virtue of the Act, have certain powers "to the same extent as if they had been in terms conferred by the mortgage deed, but no further" (*inter alia*)—"a power, when the mortgage-money has become due, to sell the mortgaged property, or any part thereof, and either together or in lots."

Section 6, sub-section (2), of the Conveyancing Act provides that "A conveyance of land having houses or other buildings thereon shall be deemed to include, and shall, by virtue of this Act, operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, &c., . . . appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof. . . ."

The sections of the Bills of Sale Act, 1878, so far as material to the case, are as follows:—

Section 3.—"This Act shall apply to every bill of sale . . . whereby the holder or grantee has power, with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels comprised in or made subject to such bill of sale."

Section 4.—"The expression 'bill of sale' shall include bills of sale, assignments, transfers, . . . and other assurances of personal chattels, and also . . . licences to take possession of personal chattels as a security for any debt. . . . The expression 'personal chattels' shall mean goods, furniture, . . . and (when separately assigned or charged) fixtures, . . . but shall not include . . . fixtures (except trade machinery as hereinafter defined) when assigned together with a freehold or leasehold interest in any land or building to which they are affixed. . . ."

Section 5.—". . . Trade machinery shall for the purposes of this Act be deemed to be personal chattels, and any mode of disposition of trade machinery by the owner thereof which would be a bill of sale as to any other personal chattels shall be deemed to be a bill of sale within the meaning of this Act. . . .

Section 7.—No fixtures . . . shall be deemed

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

under this Act to be separately assigned or charged by reason only that they are assigned by separate words or that power is given to sever them from the land or building to which they are affixed . . . without otherwise taking possession of or dealing with such land or building if by the same instrument any freehold or leasehold interest in the land or building to which such fixtures are affixed . . . is also conveyed or assigned to the same person or persons."

Cozens-Hardy, Q.C., and *Arkle*, for the appellants.

French, Q.C., and *Maberley*, for the respondents.

The arguments appear sufficiently from the judgments, where also the cases relied on are dealt with.

COTTON, L.J.—This is an appeal from the Vice-Chancellor of the Palatine of Lancaster, and the appeal asks for a declaration that this instrument of mortgage was a bill of sale, and that the receiver in the action should account for the proceeds of certain chattels which he had disposed of, on the ground that the bill of sale as regards them was bad. We have had the case twice argued, for reasons I will presently mention. The mortgage in question was a mortgage of freehold property on which there happened to be some trade machinery, but the mortgage was a mortgage in fee simple on the face of it—a mortgage of the lands and buildings on the lands. The mortgage does mention the buildings, though that of course was unnecessary, because a mortgage of land would carry all buildings and fixtures on the land. There is no power of sale actually inserted in the instrument, but it introduces the power of sale given in the Conveyancing Act, 1881.

Mr. Cozens-Hardy contended on behalf of the appellants that the instrument was a bill of sale under the Act of 1878, and was altogether bad by reason of the requisitions of the Bills of Sale Acts not being complied with. Since the case was first argued there has been a decision of the Court of Appeal that where an instrument assigned certain trade machinery which would, under the Act of 1878, be considered personal chattels, and also certain other fixtures which did not come within the Act of 1878, if the instrument was bad as a bill of sale of the trade machinery which the Act made chattels, it was bad only as regards that, and not bad altogether. Therefore, when the present case was re-argued before us the contention, that if this was a bill of sale within the meaning of the Act of 1878 the instrument was bad altogether, was given up, and it was only contended that the instrument must be treated as void as regards the trade machinery which the Act declared to be personal chattels. That is the question we have to consider. [The Lord Justice then read sections 3, 4, and 5 of the Act of 1878, and continued:—] Section 5 causes the difficulty in this case, and it arises from the fact of the Act of Parliament saying that a thing is to be deemed to be that which in fact it is not. I think the true interpretation of the latter part of section 5 was that put on it by Mr. Cozens-Hardy—viz., that it intended only to exclude those modes of disposition of trade machinery declared by the Act to be personal chattels, which would be excluded by the previous definition of the expression "bill of sale," and which would not operate as a bill of sale as to any other personal chattels under the Act. Any instrument which disposes of trade machinery in the way indicated by the Act will operate as a bill of sale if it would have operated as a bill of sale as regards other personal chattels. It is said that this instrument does operate as an assignment of personal chattels; but it in no way assigns personal chattels, and it only assigns this trade machinery, which the Act says is personal chattels, by a conveyance of the land.

Then we come to section 7, which undoubtedly does make a broad distinction (indicated also in section 4) between trade machinery, as a particular class of fixtures, and fixtures other than trade machinery. [The Lord Justice read section 7, and continued:—] I think the real effect of this section is to exclude from the operation of the decisions in *Ex parte Daglish*, 21 W. R. 893, L. R. 8 Ch. App. 1072, and *Ex parte Barclay*, 22 W. R. 608, L. R. 9 Ch. App. 576, those trade fixtures which are not trade machinery, and to bring them within the protection given by section 7. I do not think, however, that section 7 decides how we ought to deal with the question arising on this conveyance of land with respect to the trade machinery that is upon the land.

Can this instrument be considered, within the meaning of the Act of 1878, as an assurance of personal chattels, or as an authority to take possession of personal chattels, or can it be considered that by this instrument the mortgagee has power, either with or without notice, to take possession of any personal chattels comprised in or made subject to such bill of sale, within the words of section 3? On both points I am against the appellants. This instrument is a conveyance of land, and although it does give a right to all fixtures on the land, including this trade machinery, yet it does so, not as an assurance of that trade machinery or of those things which the Act says are to be considered as personal chattels, but merely as conveying and assigning all the land and everything so fixed to the freehold as to be passed by a conveyance of the land. It does not in my opinion enable the mortgagee to seize or take possession of these personal chattels within section 3. It enables the mortgagee to take possession of the land and thereby to get possession of the trade machinery as part of the land, but in no other way. In my opinion it would be wrong to hold that this is such an instrument as is pointed at and hit by the Bills of Sale Act. In this mortgage the mortgagee has no right to sever these fixtures from the land. He could only do so if so empowered by the terms of the power of sale, and here, though the smithy shop and yard are referred to, neither the house nor the workshop nor the machinery are in any way dealt with as anything to be severed, or as capable of being severed from the freehold to which they are affixed. Until recent legislation a mortgagee, under the ordinary power of sale, could not sell minerals—any more than trees could—separate from the fee; and in my opinion a mortgagee could give a good title, to a purchaser from him, to fixtures which he severed from the land—independently and in the absence of a power given to him, a fair construction of the power of sale to do so. If sold, the transaction would operate only as a transfer of a redeemable security. He has, therefore, no power to treat fixtures as severable from the land under the mere ordinary power to sell contained in every mortgage.

We had this case re-argued because it occurred to a member of the court that possibly the power of sale given by the Conveyancing Act, 1881, might be treated as an authority given to sever the fixtures for the purposes of sale, and might, therefore, bring the case within the principle of *Ex parte Daglish*, and also within what is the true construction of the present Act. The words which raised the doubt are that there is a power "when the mortgage money becomes due to sell the mortgaged property or any part thereof either together or in lots," and it was suggested that that might give power to sever the machinery and sell it separately from the land. In my opinion that is not so. [The Lord Justice referred to the subject-matter of the mortgage, and continued:—] Mr. French admitted that if the mortgage consisted of a house this power might enable the mortgagee to sell the flats. I think he made an admission too much against himself. In my opinion the power of sale does not enable the mortgagee to break up the state of things existing at the time of the mortgage, and does not enable him to sell this machinery as severed from the land. It would not enable him to sell the minerals as separated from the remainder of the fee. In my opinion it might

fairly be construed thus: that though what is conveyed is a piece of land with a yard and a workshop, he might break that up into lots, if advisable so to do, and sell the house separately.

Then it was urged by Mr. Cozens-Hardy that, having regard to section 6, sub-section (2), of the Conveyancing Act, 1881, this instrument ought to be construed and dealt with as if it had expressed on its face everything that passed by a conveyance of the land—viz., the house, the workshop, the yard, and trade machinery, which is a fixture upon the yard. It is true that this Act does, in order to prevent the consequences arising from the use of unnecessary words, say that the one conveyance of land shall include all these things which are sometimes expressed by conveyancers, but which really pass by the conveyance of the land. But, although that is the effect given by the Act as a matter of construction to a mere conveyance of land where these words are not put in, the effect may be different where the words are put in, because then a power to sell the mortgaged property or any part thereof might be said to mean that some of this trade machinery might be sold. But, as a matter of construction, when these words are not used it would be wrong to say that the terms of this power of sale authorize the mortgagee to do that which without the power of sale he could not do —viz., to break up that which was conveyed to him and to sell the trade machinery separately from the land to which it was affixed, and by the conveyance of which land it passed to the mortgagee.

That is my opinion of the case on the mere construction of the Acts and the mortgage, independently of authority. I think, however, that the decisions in *Ex parte Daglish* and *Ex parte Barclay*, on the previous Bills of Sale Act (1854), which is not, it is true, quite in the same terms, have a considerable bearing on the true construction of the power of sale and on the question whether this instrument ought to be considered a bill of sale within the definition in section 4 of the Act of 1878, or within section 3 of that Act. [The Lord Justice read section 7 of the Act of 1854, and continued:—] The definition of personal chattels in the Act of 1854 included all fixtures; the definition in the Act of 1878 does not include all fixtures, but does include trade machinery, which is what we are now dealing with. In *Ex parte Daglish* there was a mortgage with a power of sale in express terms authorizing the mortgagee to sell, as separate from the land, the fixtures that were on the land. The Lords Justices, in effect, said, 'This may not be an assignment of fixtures so as in that way to make this a bill of sale within the Act of 1854, but the power of sale does enable the mortgagee to take possession of and seize them as severed from the land, and therefore it comes within the definition of bill of sale, and we must apply the law to it.' In *Ex parte Barclay* there was a mortgage of land with fixtures on it, and a power to sell the property or any part thereof, and there both James and Mellish, L.JJ., held that that was not a bill of sale; they said that, though the instrument passed the chattels—passed what the Act declared to be chattels—as annexed to, and as part of, the land demised, it was not an assignment of chattels within the meaning of the Act, and that the power of sale did not authorize the mortgagee to deal with the chattels under the Act as separate from the freehold. [The Lord Justice read passages from the judgments of James and Mellish, L.JJ., and continued:—] That case, in my opinion, lays down this principle, that where there is a mere conveyance of land, which conveyance of itself gives to the mortgagee the right to all the fixtures, including trade machinery, on the land, it is not to be considered as an assurance of personal chattels (notwithstanding that the Act makes the fixtures personal chattels) so as to come within the description of a bill of sale within the Act and require registration. It was said that *Ex parte Barclay* turned on the fact that the mortgage was a mortgage merely by way of demise. But that contention cannot hold good. No doubt the position of a mere tenant for a term of years is different from that of an owner in fee as regards trade fixtures; but that has no bearing on the question. I do not decide this case on the authority of the cases I have mentioned, but, having expressed my own opinion as to the true construction of the Act and its effect as regards this instrument, I thought it right not to pass over those cases, because, in my opinion, they bear materially on the question of the construction of this Act and its effect as regards this instrument. The decision of the Vice-Chancellor, therefore, is, in my opinion, right, and the appeal must be dismissed.

LINDLEY, L.J.—I am of the same opinion. The case is an important one, because it raises the question as to what are the rights of a mortgagee of cotton mills, and mortgages of that kind, where the mortgaged property includes valuable trade machinery, are frequent in the North of England. The practical question we have to decide is this, whether a mortgagee of a mill, under a mortgage framed as this is, can seize, sever, or sell, apart from the land, the mill and the trade machinery on it. If he can, then it strikes me that, as regards trade machinery, it would be impossible to avoid the conclusion that this is a bill of sale, and void because it is not registered. We must look at the mortgage and see what it is. Like other mortgages it consists of two distinct parts, first, there is the assignment or conveyance, subject to the proviso for redemption, and then there is the power of sale. These two parts must be considered separately, for it is necessary for the purposes of the Bills of Sale Acts to ascertain the character of the instrument as a conveyance or assignment. It is impossible for anyone to say with any accurate use of language that a mortgage of land in fee simple is an assurance of personal chattels, and it is not the less impossible because the land in legal acceptation carries with it things that are affixed to it, but which can be removed, and when removed are personal chattels. Trade machinery, which follows the land, does not become personal chattels for the purpose of considering the question whether there is an assignment or conveyance of it. It follows as a portion of the land, not as personal chattels at all, and, looking at this conveyance, one cannot find from first to last anything about personal chattels at all. If all the general words found in section 6, sub-section (2), of the Conveyancing Act, 1881, be imported into it, still I cannot come to the conclusion that this is an assurance of personal chattels in the proper acceptation of the word. It is a mortgage of land, nothing more, nothing less.

Pausing there, I think the point is clearly covered by authority. Precisely the same point was raised and decided by Wood, V.C., in *Mather* v. *Fraser*, 4 W. R. 387, 2 K. & J. 536, which was a case under the Act of 1854. The Vice-Chancellor says in his judgment, at p. 558, 2 K. & J.:—"If the fixtures passed in the manner I have described by the mere grant of the land and mills or factories, it was conceded . . . that the question as to the Act for Registration of Bills of Sale does not arise. It does not seem to me possible that it can arise. The Act only says that where a person makes a bill of sale of any part of his chattels, including fixtures, that bill of sale must be registered in a particular way. Here no bill of sale was ever required to be made. A conveyance is made of the freehold, and that conveyance carries fixtures. To hold that an Act of Parliament which says that where bills of sale are used they shall be dealt with in a particular manner, applies to a case where no such thing is used or required to be used, but where the whole of the property passes by the conveyance of the fee simple, would be to give a

construction to the Act far beyond anything which was within its purview."

That case has been followed by many others, and, although the language of the Act of 1878 varies considerably from the Act of 1854, it appears to me those observations are just as applicable to the one Act as the other.

Then comes the other point, which is totally distinct—viz., What is the effect of this power of sale? The power of sale possessed by the mortgagee here is that conferred on him by section 19 of the Conveyancing Act, 1881. [The Lord Justice read the section, and continued:—] What is the true effect of this power "to sell the mortgaged property or any part thereof"? What is the mortgaged property? It is land. "Any part thereof" is any part of the mortgaged property, which is land, and it appears to me we should be forcing this language if we held that a mortgagee of land could sell, not part of the land, but a chattel as distinct from the land. That would be a forced construction not warranted by the words or by the ordinary practice of conveyancers.

I am fortified in that observation by a precedent in Mr. Davidson's valuable "Conveyancing Precedents," 4th ed., vol. 2, part 2, precedent 6, p. 369. [The Lord Justice read the words of the power of sale in the form referred to, and continued:—] That shows pretty well what the understanding of conveyancers is. The practical result, therefore, in my opinion, is that a mortgagee of land, in a mortgage of this form, has the trade fixtures and so on as part of his security, and he can sell the land wholly or in part, but he cannot sever the fixtures and sell them separately; the power of sale does not reach to that. And if the mortgagee of a mill like this wants to have the power of selling the trade machinery apart from the mortgaged property, he must have a bill of sale and register. The Bills of Sale Acts do not touch this security in any way.

BOWEN, L.J.—I am of the same opinion. What we have to decide in the present case is whether or not this mortgage is a bill of sale of the trade machinery. In order to make it a bill of sale of trade machinery, assuming that trade machinery is to be treated as personal chattels under the Act, it must be an assurance of such trade machinery within the Act, or a licence to take possession of them in the sense in which an assurance is defined with regard to other personal chattels, and in the sense in which a licence to take possession is defined. That raises neatly the point whether the mortgagee of premises such as these, under such a general mortgage as this, can seize and sever the trade machinery. The question may be divided into two branches—first, what would be the law supposing there was no power of sale incorporated from the Conveyancing Act, 1881; and, secondly, does section 19 of that Act make any difference in that respect?

On the first point I entertain no doubt that a mortgage of land, apart from a special power of sale, is not a bill of sale of trade machinery on it unless it assures the trade machinery as such, or gives a licence to take possession of it as such. Section 3 of the Act of 1878 indicates the scope and area over which the Act is to prevail, and provides that the Act is to apply to certain bills of sale whereby powers are given to the holder or grantee, but it leaves open for definition the question of what is a bill of sale. To find out that we must look at section 4 of the Act, the language of which has received elucidation from a judgment of this court delivered not long since,* in which we pointed out that the essence of a bill of sale was that it must be an assurance of a personal chattel or a licence to seize or take possession of it within the meaning of section 4. Section 5 really causes the whole difficulty here as to trade machinery, because it enacts that for the purposes of the Act trade machinery is to be deemed that which it is not otherwise, and which no lawyer would recognise that it is—namely, a personal chattel. But I think section 5 intends only to exclude such dispositions as would be excluded by the definition "personal chattels." In other words, assuming that for the purposes of the Act trade machinery is a personal chattel to all intents and purposes, we still have to come back to section 4 and find out whether this is an assurance of trade machinery in the sense in which the term "assurance" is used as to a personal chattel. The section does not seem to give any right to the mortgagee to sever the trade machinery from the land unless the mortgage itself gives such power. The trade machinery simply follows the land as the shadow follows the substance.

But then we have this power of sale introduced by the Conveyancing Act, 1881, and no doubt a serious question arises as to whether or not, having regard to its special terms, enabling mortgagees to break up into lots, and to sell in lots, the mortgaged property, or any part thereof, it enables a person who takes a mortgage of land, with trade machinery affixed thereon, in the ordinary form, to sever the fixtures and sell them as if they were a part of the mortgaged property. I cannot think that that was the intention of the section. I think that those who drew it intended that what was sold was to be a part of the mortgaged property in the sense in which it was subject to the mortgage. Take the case of a mortgage of a house. I cannot think that the mortgagee could sell the chimney without selling the rest of the house, or could sell the fixtures—mantelpieces, for instance—in the house as part of the house. They are a part of the house in the sense that they follow the land on which the house is, as a necessary concomitant of it in a conveyance of the land, but they are not part of the house for the purposes of this section. In applying the Act of 1881 regard must be had to the subject-matter of the conveyance or mortgage; when, therefore, you have a mortgage of a workshop with machinery in it, I do not think the section enables you to sell the machinery apart from the shop any more than it enables you to sell the chimneys of the house. Some light is thrown in that direction by the 4th sub-section of section 19, which seems to show that, but for this special sub-section, it would not have been in the power of a mortgagee to sell the timber of the estate, although the timber would pass as an incident of the land. For these reasons it seems to me that the decision of the court below is right.

I agree that, if a mortgagee desire to have the power to sell the trade machinery, he cannot do so without having a bill of sale of the trade machinery. With regard to what has fallen from Cotton, L.J., as to the previous decisions, I wish to add nothing, and, indeed, I should have added nothing on the main portion of this case if it were not that the matter is one of such importance.

Appeal dismissed.

Solicitors, *Pritchard, Englefield, & Co.*, for *Barrow, Rodway, & Co.*, Liverpool; *J. H. Lydall*, for *T. & J. Martin, Webb, & Hime*, Bootle.

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* *North Central Wagon Co.* v. *Manchester, Sheffield, &c., Railway Co.* (*No.* 1), 35 W. R. 443, 35 Ch. D. 191, is probably the case referred to.

Bankruptcy. April 13.

Ex parte PHILLIPS.
In re HARVEY. (a.)

Bankruptcy—Receiving order—Composition deed—Secret bargain with particular creditor—Fraudulent preference.

By a composition deed the creditors of H., in consideration of the payment of the composition, agreed to release to H. all debts owing from him to them respectively, on condition that, if H. made default in payment of the composition, the deed should be void. P., one of the creditors, at the time of executing the deed, made a secret bargain with H., by which he was to receive from H. a larger proportion of his debt than any of the other creditors. H. having made default in paying the composition, P. presented a bankruptcy petition against him. The registrar refused to make a receiving order.

Held, that the effect of the secret bargain was that the release of P.'s debt was absolute and the condition void, and that the refusal of the registrar to make a receiving order was right.

Appeal from the refusal of Mr. Registrar Brougham to make a receiving order against G. C. Harvey on the petition of W. Phillips.

In June, 1886, Phillips, who was a judgment creditor of Harvey for £300, presented a bankruptcy petition against him, on which a receiving order was made. It was then agreed that the receiving order should be stayed for a time, in order that a composition might be arranged between Harvey and his creditors. Subsequently a deed of composition was executed, whereby the creditors, in consideration of the payment of a composition of 2s. 6d. in the pound, respectively released unto the debtor all debts and demands which they severally had against him, but it was provided that, in case the debtor made default in paying the composition, the deed should become void, and the creditors should not be bound by its provisions. Phillips executed this deed on the terms of receiving a secret payment in excess of the other creditors. The debtor paid part of this to Phillips, but beyond that he failed to pay anything under the composition. Thereupon Phillips presented a second bankruptcy petition against Harvey, but on receiving from him a certain sum of money partly in cash and partly in bills, he withdrew it. On the bills being dishonoured, Phillips presented a third bankruptcy petition against Harvey in respect of his original debt; and on this petition Mr. Registrar Brougham refused to make a receiving order.

Phillips appealed.

Cooper Willis, Q.C., and *R. G. Glenn*, for the appellant.—The registrar ought to have made a receiving order. The composition deed was not an absolute release of the debtor's debts; it was provided that, in case he made default in paying the composition, the deed should become void. It is submitted that, notwithstanding *Ex parte Oliver, In re Hodgson*, 4 De G. & Sm. 354, and *Mallalieu* v. *Hodgson*, 16 Q. B. 689, the debtor ought not to be allowed to set up fraud, to which, if it was fraud, he was a party.

Sidney Woolf, for the debtor, was not called upon.

Lord HALSBURY, C.—I am of opinion that this appeal must be dismissed. I am not disposed to quarrel with the decision arrived at in 1851, and since acted on, that where there is an agreement by a creditor to release his debt subject to conditions, and there is at the same time a secret understanding which is a fraud on the other creditors, such agreement to release is binding, even though the conditions are not performed. It is clear that that decision rests on a sound basis of law. In Sheppard's Touchstone, p. 132, speaking of illegal conditions, it is said, "If the condition be subsequent to the estate, the condition only is void, and the estate good and absolute." The effect of the present transaction is this: I release the debt you owe me provided you pay me that which will be a larger proportion of what you ought to pay than any other creditor will get. Such a condition is tainted with illegality, and it can make no difference that, instead of being expressed in the deed, it was come to by a secret arrangement. The result is, that the release of the debt remains absolute, and the condition, which creates a fraudulent preference, is void. Therefore the decision of the registrar was right.

Lord ESHER, M.R.—This case comes within the authorities which have been cited, and I agree with what was said in the case of *In re Cross*, reported in a note to *Ex parte Oliver*: "It is a universal rule that a fraudulent deed though operative against the fraudulent party to it, is not operative for him, and therefore confers on him no rights whatever." This deed is not void, the release remains absolute. But the condition, being a fraudulent condition made with the intention of deceiving all the other creditors, is void, and the fraudulent party has lost both his original debt and the composition.

BOWEN, L.J., concurred.

Appeal dismissed.

Solicitors for the appellant, *Young & Sons.*

Solicitors for the debtor, *Snell, Son, & Greenip.*

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

Bankruptcy. Feb. 3.

Ex parte HENDERSON.
In re HENDERSON. (a.)

Bankruptcy—"Final judgment"—Order for payment of alimony pendente lite*—Bankruptcy notice—Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (g).

An order against a husband for the payment of alimony pendente lite *is not a "final judgment" within sub-section* 1 (g) *of section* 4 *of the Bankruptcy Act*, 1883, *upon which a bankruptcy notice can be founded in respect of arrears payable thereunder.*

Appeal of a petitioning creditor against the order of Mr. Registrar Brougham, refusing to make a receiving order.

The facts of the case were as follows:—

The President of the Divorce Division made an order that the respondent should pay monthly to the wife alimony pending the action at the rate of £120 per annum. The respondent allowed five monthly instalments to remain unpaid, and did not comply with a bankruptcy notice served upon him in respect of these arrears. The registrar decided that the order was not a "final judgment" in respect of which a bankruptcy notice could issue, and the wife appealed.

S. Woolf, for the appellant.—The order to pay alimony is a final order in an independent proceeding: *Ex parte Moore*, 14 Q. B. D. 627, 33 W. R. 438. Orders for such payments can be enforced in the same way as judgments in the Chancery Division: 20 & 21 Vict. c. 85, s. 52. Though it has been decided in *Ex parte Linton, In re Linton*, 33 W. R. 714, 15 Q. B. D. 239, that future payments cannot be proved for in bankruptcy there is nothing to prevent such an order as this being made the foundation for bankruptcy proceedings: *Dickens* v. *Dickens*, 31 L. J. P. 183, 11 W. R. Div. Dig.

(a.) Reported by A. H. TODD, Esq., Barrister-at-Law.

13; *Prescott* v. *Prescott*, 20 L. T. N. S. 331, 17 W. R. Div. Dig. 25.

Muir Mackenzie, for the respondent, was not called upon.

Lord ESHER, M.R.—This appeal must be dismissed. It seems to me that the question whether an order which may be called a judgment is a judgment within the meaning of the Act must be determined on a view of the order taken at the time it was made. If, at that time, it was not a final judgment, it cannot be made final by the fact of its not being obeyed. This is an order to pay alimony *pendente lite*, and, according to the practice of the court in which it was made, it can be varied *pendente lite*. It is as much an interlocutory order as any that can be imagined. The case of *Ex parte Moore* does not go far enough to support the appellant's contention. It was only decided there that an order for the payment of costs, which formed part of a final judgment, could itself be treated as a final judgment. The order to pay £10 monthly is only part of an interlocutory order.

FRY, L.J.—I am of the same opinion. In the first place the order to pay alimony *pendente lite* is not a judgment, it is a simple order. In the second place it is not final. No order could be more wanting in the characteristics of finality than this order. It must come to an end when the final judgment is pronounced, and is always subject to review. In *Ex parte Moore* the judgment pronounced finally settled the rights of the parties in the action, and declared that a right to damages existed. The reference involved in the judgment, it was decided, did not affect the final determination of the parties' rights in the action.

LOPES, L.J., concurred.

Appeal dismissed.

Solicitors for the appellant, *Lewis & Lewis.*

Solicitors for the respondent, *Tyrrel, Lewis, & Co.*

High Court of Justice.

Chan. Div. Kay, J. — March 16, 17, 19, 24.

In re HAMLET.

STEPHEN *v.* CUNNINGHAM. (*a.*)

Will—Construction—Vesting—Gift over without "leaving" children "surviving"—"Portions"—Loco parentis.

A gift by a testator, not standing in loco parentis *to his grandchildren, to his daughter for life, and after her death to her children at twenty-one or marriage, with benefit of survivorship in case any died without having obtained a vested interest, and a declaration that, until the vesting of the "portions" thereby provided for the daughter's children, the income was, after her death, to be applied for their maintenance, and, in case of the daughter's death, "without leaving any child or children her surviving," then over. Of the daughter's children, two attained twenty-one, and all died in her lifetime unmarried.*

Held, that the rule laid down in Emperor *v.* Rolfe, 1 *Ves. sen.* 208, *that the vested interests of children were not to be divested by their death in their parents' lifetime, although applicable to portions given by will, as well as to cases of settlements, was not applicable to the case of portions to children to whom the testator was not in loco parentis, and that, the terms of the gift being unambiguous, the gift over took effect.*

Adjourned summons.

The facts, as stated in the judgment of the court, were as follows:—

John Hamlet, by his will, dated in 1825, gave his real and personal estate to trustees upon trust to sell, and, after payment of debts, to invest the residue of the proceeds and pay the income to his daughter Elizabeth during her life, and, after her death, as to the capital, "in trust to pay, and I do hereby give and bequeath the same unto all and every the children and child of her my said daughter Elizabeth Ann who, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or marry, to be divided between or amongst them, if more than one, in equal shares and proportions (with benefit of survivorship between and amongst them in case any or either of them shall happen to die without having obtained a vested interest therein), and, in case my said daughter Elizabeth Ann shall happen to die without leaving any child or children her surviving, or, leaving such, they shall all die without having obtained a vested interest in the said trust money, and without leaving any issue them, him, or her surviving, then" the testator gave the said trust moneys to Wm. Bennett and Frank Goodwin absolutely, and he declared that in the meantime, and until the vesting or payment of the "portions" thereby provided for the children of his said daughter, the trustees should, after her death, apply the income for their maintenance.

The testator had no child except his daughter mentioned in his will. He died in 1825. His daughter was then unmarried. In 1840 his daughter married a Mr. Cunningham. She had five children, of whom only two attained twenty-one, and all died unmarried in the lifetime of their mother. On the 11th of January, 1881, the mother died.

The question raised by the summons was whether the gift over, upon her death without leaving any child her surviving, had taken effect.

H. Stephen, for the trustees of the will, stated the case.

Vaughan Hawkins, for the representatives of the two children who attained twenty-one.—The benefits given by the testator to his daughter's children were in the nature of portions; their interests, therefore, were not divested by their death before their mother, and the gift over does not take effect. The rule is stated in Emperor v. *Rolfe*, 1 Ves. sen. 208, and recognized in *Wakefield* v. *Maffett*, 10 App. Cas. 422, 33 W. R. Dig. 184.

He also referred to *Howgrave* v. *Cartier*, 3 Ves. & B. 79; *Perfect* v. *Curzon*, 5 Madd. 442; *Maitland* v. *Chalie*, 6 Madd. 243; *In re Thompson's Trust*, 5 De G. & S. 667; *Dalton* v. *Hill*, 10 W. R. 396; *Swallow* v. *Binns*, 1 K. & J. 417, 3 W. R. Ch. Dig. 87; *Currie* v. *Larkins*, 12 W. R. 515, 4 De G. J. & S. 248; *Bythesea* v. *Bythesea*, 2 W. R. 677; *Jackson* v. *Dover*, 12 W. R. 855, 2 H. & M. 209; *Woodcock* v. *Duke of Dorset*, 2 Bro. C. C. 569; *Kennedy* v. *Sidgwick*, 3 K. & J. 540, 3 W. R. Ch. Dig. 107; *Joyes* v. *Savage*, 23 W. R. 70, L. R. 10 Ch. 555.

Beaumont, for persons claiming under the gift over.—The gifts to the children were divested by their deaths in their mother's lifetime, and the gift over takes effect. *Young* v. *Turner*, 1 B. & S. 550, 10 W. R. C. L. Dig. 89. [KAY, J.—The case most against your contention is *Torres* v. *Franco*, 1 R. & M. 649, where the terms of the gift are almost identical with those in the present case.]

Bramwell Davis, for persons in the same interest.

(*a.*) Reported by H. F. AMEDROZ, Esq., Barrister-at-Law.

referred to *Chadwick* v. *Greenall*, 3 Giff. 221, 10 W. R. Ch. Dig. 101, and *In re Leader's Estate*, 17 L. R. Ir. 279, 34 W. R. Dig. 139.

V. Hawkins replied.

Cur. adv. vult.

March 24.—Kay, J., after stating the facts as above set out, went on to say:—On the grammatical construction of the will I should come to the conclusion that, in the events that have happened, the gift over took effect. Elizabeth has died without "leaving any child or children her surviving." The other branch of the gift over, in my opinion, refers to the death, under twenty-one, of children who might survive her.

It is argued that these are portions given to Elizabeth's children by their grandfather, who for this purpose had placed himself *loco parentis*, and that the artificial rule of construction adopted in *Emperor* v. *Rolfe*, and a long series of subsequent cases upon settlements, where the court has overcome express words which, taken literally, would divest an interest which by previous words of gift was vested in a child, applies to portions given by will as well as to cases of settlements. I cannot deny that this doctrine may apply to gifts by will in certain cases. It was so decided in *Farrer* v. *Barker*, 9 Hare, 737; *Jackson* v. *Dover*; and *In re Knowles*, 31 W. R. 182, 21 Ch. D. 806.

But has any decision gone so far as to disregard such express words of gift over as I find in this will? Most of the authorities are with reference to a limitation in a settlement in trust for the parent for life, then to children who attain twenty-one, and, if the parent die without leaving children, over. If children attain twenty-one, and all die in the parent's lifetime, the court, to prevent the vested interests from being divested, has read the word "leaving" as though it were "having" or "having had"—a considerable liberty being thus taken with the actual words to effectuate what the court conceives to be the paramount intention in a marriage settlement, of securing portions to the children who live to attain a vested interest in them. But it cannot be denied that some of the cases on marriage settlements have gone beyond this. Generally speaking they are all cases in which there was some ambiguity in the expressions used.

In *Torres* v. *Franco*, by a marriage settlement stock was to be held in trust for the husband and wife, and if the wife survived, then, after her death, if there should be any child or children living at the time of her decease, upon trust for such of the said children as should attain twenty-one or be married, as tenants in common, and if there should be but one such child who should live to attain that age or be married, then for the sole use of such child, the dividends of the apparent share of an infant to be applied, after the mother's death, for its maintenance; and in case the mother should die "without leaving any child or children at the time of her decease, or in case there should be one or more such children or child then living, yet all of them shall die under the age of twenty-one years and unmarried," then there was a limitation over. Sir J. Leach said:—"The gift over is not to take effect unless all the children die under age and unmarried. This is inconsistent with the clause which imports that a child to take must survive the mother, and where clauses are conflicting the rational presumption is that a child attaining twenty-one takes a vested interest."

The words of the gift over in that case resemble those in the case before me. I confess I should have thought that the gift over in case there should be a child or children living at the mother's death, "yet all of them should die," referred only to such children as might be then living, but it was not so construed. Such a decision seems to justify the words of Turner, L.J., in *Currie* v. *Larkins*, that where in the first part of the settlement it is clear that children are to take vested interests, a gift over if they die in the lifetime of the parents would not divest them.

Lord Cottenham, in *Whatford* v. *Moore*, 3 My. & Cr. 270, said that in these cases it may be thought that courts have gone the full length that is justifiable, and that "the cases on this subject are so little reconcilable that the only reasonable course is to lean in favour of a construction which includes all the children, if the instrument affords fair grounds for doing so; but, if not, to give effect to the plain meaning of the words used."

This was approved by Turner, L.J., in *Farrer* v. *Barker*, which was a case under a will, where he said that, although "the same rule of constructions" upon this subject was applicable to wills and settlements, yet the different character of the instrument was a circumstance to be weighed, and in the case before him, although the gifts were to grandchildren of the testator, there was nothing to show that he stood *in loco parentis*, and accordingly the court declined to apply the rule.

In *Young* v. *Turner* there was a devise of real estate in trust for the testator's niece for life, and after her death to her issue, to be divided at twenty-one or marriage, and to their heirs and assigns, but if the niece should die leaving only one child, then to that only child in fee, but in case she should die without leaving any issue of her body at the time of her decease, or in case all such issue should die under twenty-one and unmarried, there was a gift over. The niece had only one child, a daughter, who attained twenty-one, and died in her mother's lifetime, and it was held that the gift over took effect. This case was brought to the attention of Lord Hatherley in *White* v. *Hill*, L. R. 4 Eq. 265, who said that it would be much more difficult to turn "leaving at the time of her decease" into "having" than "leaving" simply. The words "at her decease" distinguish the case from *In re Thompson's Trust*.

The result of these decisions is that these words in a will, if the case is not a case of portions to children to whom the testator was *in loco parentis*, would receive a construction according to their grammatical meaning which would exclude a child who attained twenty-one and died in the lifetime of the tenant for life. But in a settlement, or in a will where the testator was *in loco parentis* to the children intended to be benefited, the gift over might either be differently construed or disregarded.

The important question, therefore, is, was the testator in the case before me *in loco parentis* to the possible children of his daughter Elizabeth, who did not marry until after his death. The only ground for suggesting this is that in the maintenance clause he speaks of the shares of the possible grandchildren as portions. But if that is sufficient to place the testator *in loco parentis* to grandchildren, not one of whom was born in his lifetime, I do not see how it could be denied that any gift by a testator to his grandchildren, or any settlement under which grandchildren of the settlor would take a benefit, would put him *in loco parentis* to such grandchildren, whether he ever saw them or not.

In *Ex parte Pye*, 18 Ves. 140, Lord Eldon defines "*locus parentis*" as being "the situation of the person described as the lawful father of that child." This definition, which is little more than a literal translation, is adopted by Lord Cottenham in *Powys* v. *Mansfield*, 3 My. & Cr. 367; and in *Pym* v. *Lockyer*, 5 My. & Cr. 35, the same learned judge said that for the purpose of the rule against double portions, whether the donor had assumed the office of a parent may be proved by extrinsic evidence such as the general conduct of the donor towards the children, or by intrinsic evidence from the nature and terms of the gift.

In *Tucker* v. *Burrows*, 13 W. R. 771, 2 H. & M. 515, with regard to the presumption of advancement,

Lord Hatherley said that it had been applied to the case of an illegitimate child, a grandchild after its father's death, and a person towards whom the purchaser had assumed the position of a parent. But he repeats a question of Knight Bruce, L.J., "Is there any case of grandfather, father, and son, the father alive?"

No case was cited, nor do I know of any which has carried the doctrine of a testator placing himself *in loco parentis* to grandchildren, objects of his bounty, by the mere words of the will, anything like so far as I am asked to carry it in this case.

I decline to do this for the purpose of introducing a rule of construction which does violence to the actual words of the will. In one of the last cases on this subject, *Jeyes* v. *Savage*, which was the case of a settlement, the court intimated that these authorities had been carried far enough, and declined to apply the rule under the terms of that deed. I confess that is my own opinion. If this had been the case of a settlement, in construing which the paramount consideration of making a provision for children of the marriage who attained twenty-one might be allowed to control words of defeasance, the true principle is that before the court can do so it must be satisfied that there is an ambiguity in the terms of the instrument. I, on the contrary, am satisfied that in this case there is no such ambiguity, and I should hesitate long before I applied the rule to the words I have to deal with if they were in a settlement. This is not the case of a settlement, but of a will, to which no such stringent rule is applicable.

I must therefore construe these words according to their obvious meaning, and I accordingly hold that, in the events that have happened, the gift over to Wm. Bennett and Sarah Goodwin took effect.

Solicitors, *Prideaux & Sons; T. D. Francis; Munns & Longden.*

Chan. Div. } Kay, J. } Jan. 12.

In re LAND DEVELOPMENT ASSOCIATION. KENT'S CASE. (*a*.)

Company—Winding up—Shareholder—Contributory—Payment of shares in cash—Agreement to apply debt of company for future calls—Companies Act, 1867 (30 *&* 31 *Vict. c.* 131), *s.* 25.

A shareholder in a company which had power, under its articles of association, to receive in advance from its members the balance due on their shares, bought up a debt owing from the company, and requested the directors to transfer to him from the amount of the debt a sum sufficient to pay up his shares in full. The directors passed a resolution to this effect, but, excepting the minute of this resolution, no entry was made in the company's books of the shares being fully paid up, nor was any contract registered under section 25 *of the Companies Act,* 1867. *In the winding up of the company,*

Held, that there had been nothing equivalent to payment in cash for the shares within section 25, *and that the shareholder was therefore liable for calls.*

Ferrao's case, 22 *W. R.* 386, *L. R.* 9 *Ch.* 355, *distinguished.*

Adjourned summons.

The 11th article of association of the above company provided that "the directors may, if they think fit, receive from any member willing to advance the same, all or any parts of the moneys due upon the shares or shares held by him beyond the sums actually called for."

H. Kent was the holder of about 800 shares of £10 in the company, and having bought up a debt of about £16,000, which was owing by the company to W. Eichholz, he, on the 18th of March, 1886, presented a creditor's petition for the winding up of the company, but the petition was not advertised, and it was withdrawn on the 17th of April, 1886. The purchase of the debt had been completed on the 2nd of April, on which day it had been resolved at a meeting of the directors of the company, "that the seal of the association be affixed to the assignment from Mr. W. Eichholz to Mr. H. Kent of the association's indebtedness to Mr. W. Eichholz, as expressed therein." On the same day Kent wrote to the directors as follows:—"Gentlemen, I request you to transfer from the amount due from the association to me in respect of the debt assigned by Mr. Eichholz to me, a sum sufficient to pay up in full the shares standing in Mr. W. Shury's name in the books of the association, and also the shares standing in my name in the said association, except those that I transferred by me to Mr. H. B. Dry." And on the same day the directors passed a resolution that "the debt assigned by Mr. Eichholz to Mr. Kent as aforesaid be applied in paying up in full the shares mentioned in Mr. Kent's letter of this date."

Beyond the minutes of these resolutions there was no entry in the company's books with reference to the transaction, nor was any contract in writing relating to these shares filed with the registrar of joint stock companies.

On the 5th of April, 1886, a creditor's petition was presented for winding up the company, on which an order was made on the 20th of April. This order was taken out by the liquidator for the purpose of enforcing payment by Kent of a call of £[illegible] on his shares, in respect of which he had been placed on the list of contributories.

Marten, Q.C., and *Vernon Smith*, for the liquidator. There was no payment in cash for Kent's shares within section 25 of the Companies Act, 1867. But as at the date of the transaction Kent's petition for winding up the company was pending, the alleged payment cannot be supported: Companies Act, 1862, s. [illegible]

The respondent, Kent, in person.—The letter of the 2nd of April, and the directors' resolution, entered in the minute book, constitute a good appropriation of a sufficient part of the debt to satisfy future calls. This is a valid set-off of the debt against the calls: Williams, Bankruptcy, 4th ed., p. 112; *Rose* v. *Hart*, 8 Taunt. [illegible]; 2 Sm. L. C., 9th ed., p. 324; *Bailey* v. *Finch*, 20 W. R. 294, L. R. 7 Q. B. 34; Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 38; Companies Act, 1862, s. 67. The shares were paid for in cash within section 25 of the Companies Act, 1867; *Spargo's case*, 21 W. R. [illegible], L. R. 8 Ch. 407, and *Ferrao's case*, 22 W. R. 386, L. R. 9 Ch. 355.

KAY, J.—In this case, which has been very [illegible] argued, the point raised is a very short one. The facts, as I understand them, are as follows: The respondent Mr. Kent, being a holder of shares in this company, purchased a debt due by the company to a Mr. Eichholz, and agreed with the directors of the company that the debt which he had so purchased should be applied under the articles of association it might be applied in payment of calls that had been made upon his shares, but in paying up his shares in full in anticipation of calls that might be made. It is clear that such a transaction could not come within any doctrine of set-off. It is essential to the existence of a right of set-off that there should be debts on both sides; that is, in this case

(*a*.) Reported by H. F. AMBROSE, Esq., Barrister-at-Law.

a debt due from the company to Mr. Kent, and a debt due from him to the company. There was no debt due from him to the company. What he wanted to do was, not to pay any debt due from him to the company, but to anticipate possible calls, which might never be made at all if the company was prosperous. It was clearly necessary that an arrangement of that kind between him and the directors should be carried out by some formal proceeding. What took place was that Mr. Kent, on the 2nd of April, 1886, wrote to the directors as follows:—[His lordship read the letter of that date, and continued:—] That is a request that part of this debt should be applied in payment up in full of the shares which are mentioned. On the same day, there being three directors present, at a board meeting this resolution was passed:—[His lordship read the second resolution of the 2nd of April, 1886:—] There I find patent *primâ facie* evidence of an agreement between the directors and Mr. Kent that a sufficient part of the debt of Mr. Eichholz which Mr. Kent had bought should be applied in paying up his shares in anticipation of calls which might thereafter be made. The question is, was that payment? There was no entry in the books of the company showing that the shares had been paid up, and nothing except what I have read was done to carry out the arrangement entered into between Mr. Kent and the directors. It appears that the winding up occurred very soon afterwards, and those books were taken away by the liquidator. Practically, nothing further was done in the matter. In my opinion that transaction was not payment, but only an agreement that the debt should be applied in payment. I am referred to *Ferrao's case*, which confirms me in the opinion I have formed.

In *Ferrao's case* what was done was this. A Mr. Webb had brought an action against the company which was compromised, and a judge's order was made by consent; the terms being that the company were to pay Webb £3,900, whereof £3,200 was to be paid by bills of exchange, and the company were to credit fifty shares standing in the name of Ferrao with £700, so as to make the same fully paid up. If the case had stopped there there would have been merely a contract for payment. But the case did not stop there. Bills to that effect were accordingly made in the books of the company. Then there follows the winding-up order, and Mellish, L.J., in his judgment, after referring to the judge's order, said this:—"In my opinion, the moment the company, in pursuance of that judge's order, did credit the shares of Ferrao with the £700 so as to make them fully paid-up shares, that moment the £700 was paid by the company to Webb just as much as if it was paid in cash." He does not say—"the moment the judge's order was made," the judge's order was merely a contract, but the moment the contract was carried out by crediting the shares with the £700 in the company's books. And that is made more clear by what he says later on in the judgment:—"It is exactly the same thing as if Webb had gone to the company, and the company had handed over to Webb £700 in bank notes, and then Webb had said, 'I wish to pay for the shares of my friend Ferrao, there is the £700 in bank notes back again.' There was no need to go through that form; and, in my opinion, writing it off the books is perfectly equivalent to payment." Before all question the *ratio decidendi* was, not that the contract was a sufficient payment, but that the actual writing off the amount in the books of the company was equivalent to payment—that is, that it was not necessary to go through the form of handing the money over and taking it back again. That is exactly the point in which this case fails to be equivalent to *Ferrao's case*. There there was nothing but the agreement with the directors, which was not carried out by any entry in the books or in any other way whatever. Then, of course, comes in the Companies Act, 1867, which enacts by section 25 that "every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the Registrar of Joint Stock Companies at or before the issue of such shares." Nothing of that kind has been done. The agreement, even if it would otherwise satisfy the terms of the statute, has not been registered. Therefore, I am afraid that on this ground I must hold this gentleman liable for the calls made in the winding up in respect of the shares held by him.

Solicitors, *Badham & Williams; H. C. Morris.*

Chan. Div. Chitty, J. March 16.

Wills v. Luff. (a.)

Practice—Mortgagor and mortgagee—Equitable jurisdiction—Receiver—Foreclosure absolute—Judicature Act, 1873, s. 24, sub-section 7.

Judgment for foreclosure absolute ends a foreclosure action, and therefore the plaintiff cannot obtain a receiver, even though the conveyance of the property has not been settled.

This was a foreclosure action. The mortgage was an equitable mortgage by memorandum on six leasehold houses held under a demise less three days for a long term of years. The mortgagor had, before the commencement of the action, mortgaged the property to an insurance company for more than its value without disclosing the existence of the equitable charge.

The plaintiff had obtained an order for foreclosure absolute, but had not yet called for a conveyance of the defendant's interest.

The mortgagee was in receipt of the rents and profits, and applying the same to his own purposes.

The plaintiff took out a summons, which now came on to be heard by way of motion, for the appointment of a receiver without prejudice to the rights of any prior incumbrancer, and for directions that the tenants be ordered to attorn and pay their rents to the receiver, and that the receiver out of such rents pay and keep down the ground-rent and perform and observe the covenants in the superior lease, and pay the balance of such rents to the plaintiff.

Sir A. Watson, Q.C., and *Rowden*, for the plaintiff, based the application on the equitable jurisdiction of the court in appointing receivers: Judicature Act, 1873, s. 24, sub-section 7.

They referred to *Salt* v. *Cooper*, 29 W. R. 553, 16 Ch. D. 545.

Romer, Q.C., and *A. dB. Berrell*, for the mortgagee.

Chitty, J.—This is a summons which I adjourned from chambers to come on by way of motion for argument in court. The plaintiff obtained a foreclosure decree, which was afterwards made absolute. That being so, all that would remain to be said would be that the action was at an end, with the exception of one thing, and that was that the conveyance remained to be settled, and that, if the plaintiff requires a conveyance, he has the right to take proceedings to obtain it. The action, in fact, is worked out subject to that one matter. The court has no power to add to the foreclosure decree with the exception of settling the conveyance, although

(a.) Reported by V. de S. Fowke, Esq., Barrister-at-Law.

in a proper case it may, of course, open the foreclosure, where the defendant shows special circumstances for the reconsideration of the judgment. Subject to these observations, I hold that after foreclosure absolute an action for foreclosure is at an end.

But the plaintiff here asks for a receiver on the analogy of asking for equitable execution. But he is in error in supposing that there is any analogy. Equitable execution is a process by which the court enables a judgment creditor to obtain payment when ordinary execution will not reach the debtor. It is a process which enables the judgment creditor to reach any interests in land which ordinary execution will not reach. But the receiver is receiver of what? Why, of some portion of the defendant's real estate which is already charged, but which there is difficulty in reaching. The receiver is, in fact, a receiver of the debtor's interest in the property and of nobody else's, and the property affected is confined to the debtor's interest in it. A receivership order is a mere mode of execution. Here, however, there is no judgment on which execution can go. There is nothing in the judgment of Jessel, M.R., in *Salt* v. *Cooper*, nor is there anything in the Judicature Act, 1873, which says that in such a case as the present a receivership order should be made, because the judgment otherwise cannot be worked out. I say that the judgment has been worked out subject to what I have said as to the settling of the conveyance still remaining.

I am not, however, saying anything as to whether the plaintiff is entitled to an order for possession. The plaintiff, however, is not asking for that, because he appears to be under the apprehension that if he takes possession he may become subject to the burthen of covenants towards persons not parties to the action, and also perhaps be subject to covenants with reference to the peculiar nature of the property, with the result that he will get nothing out of the property whatever. There are, to my mind, some difficulties in the way of getting an order for possession, but I do not wish to be taken to be saying anything which may prejudice that question.

I can, however, find no ground whatever for acceding to the present motion. The defendant denies that he is in possession. He has no right whatever to the rents. If, however, I were to make the order the plaintiff asks for, I should be making, as it were, an order for a receivership in the air. The plaintiff is, in fact, asking for a receivership order against himself, for a receiver acts for all parties to the action, and the plaintiff may now be said to be the only interested party.

I decline to say anything as to the merits of the case, for the question before me is a purely technical one.

The motion is dismissed, with costs.

Solicitors for the plaintiff, *E. Bromley*.

Solicitors for the defendant, *B. H. Van Tromp*.

Chan. Div. North, J. — April 18.

In re Hasties & Crawfurd. (*a*.)

Solicitor — Remuneration — Lease — Rent — Shares — Money payment or premium—Solicitors' Remuneration Order, 1882, *schedule* 1, *part* 2, *r.* 5.

A firm of solicitors were employed by a lessor to prepare for him a lease of certain property for twenty-one years to a company, the consideration for the lease being a rent of £80 and the issue of 400 shares of the nominal value of £10. None of the company's shares had been sold, so that no market value had been placed upon them; and 200 of the 400 shares had not been issued.

The solicitors charged the scale fee on the rent of £80, and also the scale fee for deducing title, perusing and completing deed as upon a premium of £4,000, the amount of the nominal value of the 400 shares.

Held, that they were not entitled to make the last charge, as the value of the shares could not be estimated, and rule 5, part 2, schedule 1, of the Remuneration Order, 1882, did not apply to such a case.

Adjourned summons.

Messrs. Hasties & Crawfurd were employed by Lord Wallscourt, the tenant for life of the Ardree Estates, the county of Galway, to prepare for him a lease of certain property to the Ardree Fishery Co. (Limited). The lease and counterpart were duly prepared, and the lease was executed by Lord Wallscourt, but the counterpart was not executed by the company. Messrs. Hasties & Crawfurd alleged that Lord Wallscourt had agreed to pay to them the scale fee for the preparation of the lease.

It was witnessed in the lease that, in consideration of the "rent and profits" thereinafter reserved and the covenants thereinafter contained, and on the part of the company to be observed and performed, the lessor thereby demised unto the company the property therein described, and the consideration was as follows: "Yielding and paying unto the lessor, his heirs, successors, and assigns, in respect of the premises hereby demised, the clear yearly rent of £80, to be paid by equal half-yearly payments, . . . and also yielding and paying unto the lessor, his heirs, successors, and assigns, the profits accruing on an issue to him or to proper parties on his behalf, of 200 shares of the nominal value of £10, such shares to be allotted and issued to the lessor or to such parties as aforesaid, and fully paid up at the time of allotment; and also yielding and paying unto the lessor, his heirs, successors, and assigns, the profits accruing on a further issue aforesaid of 200 shares of the nominal value of £10, such last-mentioned shares to be allotted to and issued to the lessor or to proper parties on his behalf as aforesaid, paid only as when the unpaid portion of £5 per share, or any part thereof, shall be called up upon the partly paid-up shares in the proportion of two fully paid shares of £10 each for each 1s. por share called up on the said partially paid shares."

The first 200 shares had been allotted to trustees for Lord Wallscourt, but the other 200 shares had not been allotted. No market value had been placed on the shares of the company, none of which had been sold.

In their bill of costs delivered to Lord Wallscourt Messrs. Hasties & Crawfurd charged, as the scale fee for deducing title, perusing and completing deed upon a premium of £4,000 in shares, £40—viz, one and a half per cent. on the first £1,000, £15; one per cent. on the second and third £1,000, £20; and one-half per cent. on the fourth £1,000, £5.

On taxation the taxing master held that the scale fee did not apply to, and could not be charged in, such a case; and, in the presence of the parties, allowed them a list of fees which appeared to him fair and customary in such circumstances.

Messrs. Hasties & Crawfurd submitted objections that the taxing master was bound by the general order and should allow the scale charge, and, if not, that he had no authority to say what sum they were entitled to without affording them an opportunity of delivering a detailed bill of costs, but the taxing master disallowed their objections, giving his reasons as follows:—"Remuneration by scale is not, as it appears to me, the proper mode of remuneration for the preparation of a lease in question, as the lease does not afford a basis for assessment of a scale fee—a premium, the value of which

(*a*.) Reported by J. Trustram, Esq., Barrister-at-Law.

cannot be estimated (the shares in the fishery company not having, and never having had, a marketable value), having been given for the lease in addition to the rent (£80) reserved by it. The solicitors alleged on the 15th of December that they could produce evidence, by letters, of an agreement on the part of the petitioner to pay the scale fee demanded, but they failed to produce such evidence on either of the occasions (the 16th and 20th of December) when the matter was again before the taxing master. The list of fees in detail allowed by the taxing master for the preparation of the lease and counterpart . . . was prepared by the taxing master on the 20th of December in the presence of the parties, and Mr. Hastie himself sent to his office for documents to enable the taxing master to prepare it—the allowances are in the discretion of the taxing master, these allowed in the present case being, in my opinion, fair, and such as are customary under similar circumstances. Mr. Hastie did not at the time offer and has never offered, any objection to the allowances, beyond putting forward his claim to remuneration by scale on the basis suggested by the bill of costs under taxation."

Messrs. Hasties & Crawfurd then took out the present summons for a review of taxation.

The General Remuneration Order, 1882, sched. 1, part 2, r. 5, provides: "Where a conveyance or lease is partly in consideration of a money payment or premium and partly of a rent, then, in addition to the remuneration hereby prescribed in respect of the rent, there shall be paid a further sum equal to the remuneration on a purchase at a price equal to such money payment or premium."

Cozens-Hardy, Q.C., and *Swinfen Eady*, for the summons.—The solicitors are entitled to charge the scale fee on the premium of £4,000, the nominal value of the 400 shares which form part of the consideration for the lease. For the purpose of stamp duty on the lease the shares had to be estimated at their nominal value. [They referred to the General Remuneration Order, 1882, schedule 1, part 2, r. 5; 33 & 34 Vict. c. 97, s. 97.] The taxing master ought to have directed the solicitors to make up another bill of costs to be taxed, and not allowed them a list of fees which he thought reasonable.

[NORTH, J.—I do not think that the stamp duty on the lease has anything to do with the question.]

Bramwell Davis, contrd.—The solicitors have no right to charge the scale fee for deducing title, perusing and completing deed as upon a premium of £4,000 in shares. The scale fee does not apply to a case where the value of the premium cannot be estimated. The shares of the company have no marketable value, and the second 200 shares mentioned in the lease have not yet been issued.

Cozens-Hardy, Q.C., replied.

NORTH, J.—The lessee is to receive £80 a year, and that is what is meant by the rent of the lease. The witnessing part says, "In consideration of rent and profits hereinafter reserved," and there is a distinction made between rent and profits. [His lordship then read the clause of the lease stating the consideration as set out above, and continued:—] The question is, whether this is a case coming within rule 5, part 2, schedule 1 of the General Order of 1882. [His lordship read the rule as set out above, and proceeded:—] To entitle the solicitors to more than the remuneration in respect of the rent proper, they must make out that there was some further money payment or premium within rule 5. If they admitted that they were not entitled to more than the remuneration in respect of the £80 they might have that. But they ask for the scale fee in respect of the rent and of shares, some of which have not been allotted, and they are not entitled to it. Then they claim to make out another bill. [His lordship then read the taxing master's answer to the objections to the taxation, and continued:—] That must be taken as accurate; and, under the circumstances, I do not think the taxing master was wrong in the course he took. I must dismiss the summons, with costs.

Solicitors, *Hasties & Crawfurd; H. C. Barker.*

Chan. Div. Kekewich, J. — April 13.

WILLIAMS v. JONES. (*a.*)

Specific performance—Variation of written agreement by oral proviso.

By the terms of a written agreement J. agreed to lease to W. "a shop and premises . . . which are to be built at a cost not to exceed £400, . . . at the annual rental of £75. . . ."

J. expended £750 in building the premises, and refused to grant a lease to W. at the annual rent of £75.

In an action by W. against J. for specific performance of the written agreement, the defendant set up as a defence a contemporaneous parol proviso to the agreement, to the effect that, if the outlay exceeded £400, the rent was to be raised in proportion.

Held, that, as such parol proviso did not contradict, but merely explained, the terms of the written instrument, evidence of it was admissible; and, as the evidence proved that the plaintiff had agreed to such parol proviso, that the action must be dismissed.

Lord Townshend v. Stangroom, 6 *Ves.* 328, *followed.*

This was an action for specific performance of an agreement to grant a lease. The agreement was in the following terms:—"March 19, 1886, I, John Morris Jones, hereby agree to lease to Walter Williams, a shop and premises, 86, Taff-street, Pontypridd, which are to be built at a cost not to exceed £400, in accordance with plans and specifications prepared by Mr. Rowlands, of Pontypridd, for a term of fourteen years, at the annual rental of £75 payable quarterly, to be taken from date of completion of premises.—J. Morris Jones. Witness, Frederick Pearse."

The defendant expended £750 in the completion of the house, and refused to grant the lease for £75, asserting that it was verbally agreed, before the agreement was signed, that if the cost of the building exceeded £400, the annual rent should be, not £75, but such sum as bore the same proportion to the defendant's outlay as £75 bore to £400, and he counter-claimed for specific performance of the oral and written agreement, and damages. The counter-claim was, however, abandoned at the trial. The plaintiff, in his evidence, stated that before the agreement was signed the defendant abandoned a demand which he had made that the rent should be increased in the event of the outlay being more than £400. The defendant's witnesses, however, substantially proved that the arrangement as to the increase was to hold good, and that the plaintiff knew it to be a term of the written contract.

J. G. Wood (*Warmington, Q.C.*, with him), for the plaintiff.—I rely upon the written contract. The terms are perfectly plain. The defence attempted to be set up does not vary the agreement, it contradicts it. Oral evidence will not be admitted to alter the terms of a contract to the extent of completely nullifying it. It is one thing to agree to pay £75 a year for a house, and another to agree to pay rent upon any sum the lessor likes to say will be necessary to recoup him for his original outlay. The defendant, in the latter case, is

(*a.*) Reported by P. F. WHEELER, Esq., Barrister-at-Law.

left with a free hand, he might expend £1,000 or £1,200 and then say pay me a proportionate rent.

B. B. Rogers and *W. Evans*, for the defendant.—The oral agreement merely explains the written contract. The defendant could not make sure of getting the house built for £400—he is not a builder. In case the outlay exceeded that sum, it does not appear from the writing what are to be the terms of letting. Oral evidence, then, is necessary to show what is to take place in this event. The plaintiff knew perfectly well that there was to be this further development of the arrangement, as is conclusively proved by the evidence. Both parties acted in accordance with what they considered the contract to be, and in that case the plaintiff cannot recover.

He cited *Lord Townshend* v. *Stangroom*, 6 Ves. 328.

Wood replied.

Kekewich, J.—This is an action for specific performance of an agreement to grant a lease. [His lordship read the agreement above set out.] Now what is the meaning of the words, "which are to be built at a cost not to exceed £400"? The defendant says they are inserted for his benefit and protection, that he is not to be compelled to expend more than that sum, and I agree with this view. But there is no proviso that if he do expend more he need not be compelled to grant the lease. Upon the construction, therefore, of this contract alone, and if this were the only question in the case, I should hold that the plaintiff was entitled to succeed.

But, according to a well-known doctrine of equity, a man may set up a parol agreement as a defence to an action of this kind—it must be compatible with and must not contradict the written instrument. Now what do the witnesses say? [His lordship examined the evidence and came to the conclusion that the plaintiff was aware that the rent was to be raised in proportion as the outlay exceeded £400.] This being the case, the oral agreement does not operate as a contradiction of the written instrument, but only as a proviso, and therefore, as the outlay came to more than £400, the defendant is not bound to let the plaintiff have the house for £75 a year.

The defendant having abandoned his counter-claim at the trial, both claim and counter-claim will be dismissed, with costs.

Solicitors for the plaintiff, *Gosling & Co.*, for *Grover & Grover*, Pontypridd.

Solicitors for the defendant, *Purkis & Co.*, for *D. Rosser*, Pontypridd.

Q. B. Div. (Lord Coleridge, C.J., and Mathew, J.) April 18.

Lewis *v.* Graham. (*a.*)

Mayor's Court—Jurisdiction—Carry on business—Solicitor's clerk—Mayor's Court of London Procedure Act, 1857 (20 & 21 *Vict. c. clvii.*), *s.* 12.

A clerk employed by a solicitor whose office is in the City of London does not "carry on business within the City of London" within the meaning of the Mayor's Court of London Procedure Act, 1857, *s.* 12.

This was an application for a prohibition to the judge of the Mayor's Court, and had been referred by Denman, J., to the court.

The action had been brought in the Mayor's Court by the plaintiff, who resided at Lewisham, against the defendant, who also resided there, for £50 damages for a trespass in breaking and entering the plaintiff's dwelling-house at that place. The defendant was clerk to a solicitor whose office was situate within the jurisdiction of the Mayor's Court. This application was made on the ground that the defendant did not carry on business in the City of London within the meaning of the Mayor's Court Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 12.

That section provides that "where the debt or damages claimed in any action shall not exceed the sum of £50 no plea to the jurisdiction shall be allowed, provided the defendant or one of the defendants shall dwell or carry on business within the City of London or the liberties thereof at the time of action brought," &c.

Lewis Glyn, for the defendant.—A solicitor's clerk cannot be said to "carry on business" at his employer's office: *Buckley* v. *Hann*, 5 Ex. 43; *Sangster* v. *Kay*, 5 Ex. 386. The words of the statute on which the cases were decided are practically identical with the words of the statute now in question. The case of *Ex parte Brewell, In re Bowie*, 29 W. R. 299, 16 Ch. D. 484, seems to be against me, but that was a bankruptcy matter, and it was only decided that under the Bankruptcy Act and Rules the jurisdiction of the court was universal, and that a division had been made in the exercise of that jurisdiction for the convenience of debtors. In that case the Exchequer decisions were not referred to. Further, the terms of the Mayor's Court Act have always been strictly construed: *Tailleur* v. *South-Eastern Railway*, 3 C. P. D. 10, 26 W. R. Dig. 109.

Probyn, for the plaintiff.—This Act must be construed as much as the Bankruptcy Acts and Rules with reference to the convenience of defendants: *Dewhurst* v. *Patterson*, 6 W. R. 768. The language of the judges in *Ex parte Brewell* support the view that the defendant must be taken to carry on business at the office where he was employed. In *Buckley* v. *Hann* and *Sangster* v. *Kay* the words of the Act in question were "carry on business." In the Exchequer cases the defendant was in no business, but in the employ of a State department.

Lewis Glyn was not called upon to reply.

Lord Coleridge, C.J.—I am of opinion that this prohibition must go. We have to interpret the words of this section, which enacts that an action may be brought in the Mayor's Court if the defendant dwells or carries on business within the City of London or has done so within a certain time before action brought. We must look at what was intended by the Legislature to see, according to good sense, this person did carry on business within the jurisdiction. I agree with the obvious sense of the Lords Justices in the case of *Ex parte Brewell* that the words, "carry on business," are elastic, and that an exhaustive definition which will embrace all questions which may arise upon them cannot be made. Their meaning must be determined by considerations of good sense and by a reference to the object of the Act in question. In the present case, if the matter were *res integra*, I should determine in favour of the defendant's contention without hesitation. It seems to me it would extend the jurisdiction of the Mayor's Court far beyond the contemplation of Parliament if in every case a person employed in any capacity in the office of any other person who does carry on a business within the City of London were to be held to be within the jurisdiction of the Mayor's Court. I think the section means that he must carry on some business over which he has some control. Porters or messengers without authority or control over the operations of the business in which they are occupied cannot be said to carry on that business. It was admitted by counsel for the plaintiff that the decisions in the Exchequer, which were delivered by very learned judges, are directly

(*a.*) Reported by A. H. Todd, Esq., Barrister-at-Law.

opposed to his contention, if they cannot be distinguished. In those cases it was held that a clerk in the Privy Council or Admiralty offices, though undoubtedly employed in a business, did not "carry on his business" within the jurisdiction of the local court, because he was a mere servant of a department of State. Those cases are directly in point, except for the omission in this section of the Mayor's Court Act of the word "his." I think that no real distinction exists. The words, "carry on business," are equivalent to "carry on his business." If the matter had been present to the minds of the Lords Justices who decided *Ex parte Brewell*, it would seem that the application of that decision would be the same to a clerk in a bank as to a clerk in a public office. There is, further, a series of decisions as to railways by which it has been decided that, though a railway company carries on a large part of its business at an office within the City of London, it need not be within the jurisdiction of the Mayor's Court. I am aware that there are Acts which enact that companies are to be dealt with by the courts in whose jurisdiction their head offices are situate, but the decisions I am referring to did not turn on that ground.

Those cases support the authority of the decisions in the Exchequer. Against that has been set up the judgment of the Court of Appeal, which, however, was not taken on this particular Act of Parliament. The court was dealing with different circumstances and a different Act. The question was as to an unlimited jurisdiction, and as to the manner in which rules which distributed this unlimited jurisdiction were to be determined. There are expressions of the judges in that case which favour the plaintiff's contention, but there can be no question that the decision was arrived at not as to the limit of jurisdiction but the distribution of business. Further, the court had not before it these judgments in the Exchequer, which would without doubt have been treated with respect, and the Lords Justices pointedly abstain from overruling cases which support the present defendant's contention, pointing out that they are to be considered from a different point of view and construction. Therefore I arrive at the conclusion that a series of cases is in favour of the present application, that only one is apparently against it, and that that decision is distinguishable. The prohibition must go.

MATHEW, J.—I am of the same opinion. If we decided for the plaintiff, the jurisdiction of the Mayor's Court would be very greatly extended. Many people who serve within, dwell outside that jurisdiction, and no one would suppose at first sight that it could be argued that a clerk or porter could have been intended by the words of this section. The importance insisted on with regard to the word "his" imports a distinction without a difference. The words of the section imply something beyond mere service, such as exists in the case of a solicitor's clerk, who carries on his master's business wherever he is instructed to do so, and is not necessarily engaged in work at his master's office. The Exchequer cases have been acted upon for many years, and the Court of Appeal decision cannot be taken to have silently overruled them.

Rule absolute for a prohibition.

Solicitors for the plaintiff, *Aird & Hood.*

Solicitors for the defendant, *Groom & Co.*

NOTE.—In the report of the case of *Davys* v. *Richardson*, *ante*, p. 552, the statement, to the effect that the plaintiff's solicitor immediately after the judgment of Day, J., on the trial of the action, applied for and obtained payment out of the money paid into court, is inaccurate. The application for and receipt of the money, in fact, took place immediately after the delivery of the statement of defence, and, therefore, some time previous to the trial of and judgment in the action.

C. C. R. April 21.

REG. v. OWEN. (*a*.)

Criminal Law Amendment Act, 1885 (48 & 49 *Vict. c.* 69), *s.* 20—*Evidence of prisoner—Conviction for common assault.*

Upon the hearing of a charge of indecent assault, the evidence of the prisoner had been received under section 20 *of the Criminal Law Amendment Act*, 1885.

Held, that such evidence was admissible to support a conviction for a common assault on another count of the indictment.

The prisoner had been tried at the Worcestershire County Sessions on an indictment charging him in the first count with an indecent assault, and in the second count with a common assault, upon Julia Bevan.

Evidence having been given for the prosecution, the prisoner and a man named John Drew were called for the defence. The former was called under the provisions of the statute 48 & 49 Vict. c. 69, s. 20 (the Criminal Law Amendment Act) and being sworn admitted that he had put his arm round Julia Bevan, but denied that he had indecently or otherwise assaulted her.

No objection to his evidence was taken by the counsel for the prosecution.

The chairman directed the jury that in any case there was clear evidence of a common assault; that the question of an indecent assault depended on whether the jury believed the prosecutrix or the defendant; if they believed the prosecutrix there was ample evidence in law to convict the defendant of an indecent assault, but it was for them to say if they thought an indecent assault or only a common assault had been committed.

The jury acquitted the prisoner of indecent assault, but convicted him of a common assault.

Counsel for the prisoner then urged that the conviction could not be sustained as the evidence of the prisoner was only admissible on the charges specified in the 20th section of the statute 48 & 49 Vict. c. 69, and no other; that by law this evidence in case of a common assault was inadmissible, and that, as the Court for Crown Cases Reserved had held in the case of *Reg.* v. *Gibson*, 35 W. R. 411, 18 Q. B. D. 537, if any evidence on a charge not legally admissible is allowed to go to the jury the conviction cannot be sustained.

These objections were overruled, and the question of law for the opinion of this court was whether, on an indictment for an indecent assault which contains a count for a common assault, after the prisoner is called as a witness for the defence under the statute 48 & 49 Vict. c. 69, s. 20, he can be legally convicted of a common assault only?

Harington, for the prisoner.—On a charge of common assault the prisoner is not a competent witness, and where the indictment contains two counts it must be treated as though there were two separate juries trying two separate indictments: *R.* v. *Latham*, 33 L. J. M. C., at p. 199; therefore, the evidence of the prisoner was inadmissible upon the charge of which he was convicted, and the conviction is, consequently, bad: *R.* v. *Gibson*, 18 Q. B. D. 537. The evidence given on the one charge is not made admissible upon the other: *R.* v. *Fuidge*, 12 W. R. 351. The chairman also misdirected the jury in not telling them to disregard the evidence of the prisoner when considering their verdict upon the second count.

Amphlett, for the prosecution, was not called upon.

Lord COLERIDGE, C.J.—In this case the prisoner voluntarily tendered himself as a witness, and gave his account of the facts. It would, perhaps, have been a

(*a*.) Reported by R. E. MELSHEIMER, Esq., Barrister-at-Law.

more complete direction to the jury if they had been told that the evidence of the prisoner was only admissible on the first count of the indictment, and that they should determine the second count as far as they could without reference to his evidence. But I am not at all sure that this is necessary, because, by these Acts of Parliament, the whole *status* of prisoners in respect of evidence given on oath is now altered. The admission of a prisoner was always receivable in evidence if not made upon oath, and now it is competent to a prisoner, upon a certain charge being made against him, to make a statement upon oath. If he chooses to avail himself of this privilege, and if, in giving his evidence, he makes any admissions, I think those admissions must stand upon the same footing as an admission formerly stood when made by a prisoner, since the law now sanctions the oath being administered, which it formerly did not.

In all probability the chairman did direct the jury that there were two cases presented for their consideration, the one quite clear, and the other a case upon which they might convict upon a certain view of the evidence. But whether there was or was not any misdirection is not a question which is open to this court, inasmuch as it is not stated in the case.

I think the prisoner's statements were rightly before the jury, and that the conviction is good.

MANISTY, HAWKINS, MATHEW, and A. L. SMITH, JJ., concurred.

Solicitor for the prosecution, *F. Brooke*, for *Coventry*, Upton-on-Severn.

C. C. R. April 21.

THE QUEEN *v.* THOMAS WEALAND. (*a.*)

Criminal Law Amendment Act, 1885 (48 & 49 *Vict.* c. 69), *ss.* 4, 9—*Evidence given not upon oath—Conviction for common assault.*

Upon the hearing of a charge under section 4 *of the Criminal Law Amendment Act*, 1885, *the evidence of a child had been received, though not given upon oath.*

Held, that such evidence was admissible to support a conviction for a common assault under section 9 *of the same statute.*

The prisoner had been tried before Hawkins, J., at the Central Criminal Court upon an indictment under section 4 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), charging him with unlawfully and carnally knowing Eliza Wheal, a girl under the age of thirteen years—to wit, of the age of five years and nine months.

The evidence of Eliza Wheal was received, though not given upon oath, under the provision contained in the same section of the Act, and she was corroborated as required.

The jury acquitted the accused of the charge under the 4th section, but found him guilty of an indecent assault under section 9.

Without the girl's evidence the evidence would have been insufficient to justify a conviction.

In the statute there is nothing to make the evidence of the girl admissible without oath upon a simple indictment for indecent assault.

The only question for this court was whether the conviction could, under the circumstances, be supported.

No counsel appeared.

Lord COLERIDGE, C.J.—This case involves a question of some importance, upon which there have been conflicting opinions, and which it is, therefore, desirable to have finally settled. I am of opinion that the conviction was perfectly good, and that, on the words of the statute, evidence is receivable under section 4, even although the conviction is obtained under section 9. The consequences may be somewhat anomalous, in that if the prisoner had been indicted for the lesser offence most material evidence could not have been given, while it would involve serious results if a prisoner were to be indicted for the serious offence in order to let in such evidence when it is only really proposed to prove the lesser offence.

MANISTY, HAWKINS, MATHEW, and A. L. SMITH, JJ., concurred.

(*a.*) Reported by R. E. MELSHEIMER, Esq., Barrister-at-Law.

Prob. Div. & Adm. Div. Probate. } Jan. 14.

In the Goods of MOORE.

KER *v.* AUBERT. (*a.*)

Practice—Executor intermeddling before probate against co-executor's wishes—Injunction—Writ by co-executor.

Immediately after the death of a testator who had left a will duly executed appointing two executors, and before probate, one of the executors, contrary to the wishes of the other executor, proceeded to deal with the personal property, which was of considerable value, by depositing precious stones in his own name and making preparations for the sale of furniture, &c. The other executor desired to issue a writ in the Probate, Divorce, and Admiralty Division for an injunction and restraint, and filed an affidavit for that purpose in accordance with ord. 5, *r.* 15.

The registrar refused to issue his certificate that the affidavit had been filed (rule 3 *of the Practice Master's Rules), on the ground of irregularity.*

The court, on motion, granted leave to issue the writ.

Motion for leave to issue a writ in a probate action.

W. E. Moore, late of Dunster, in the county of Somerset, died on January 4, 1888, leaving a will executed by which he appointed J. Campbell Ker and William Aubert his executors and trustees. The property of the deceased, which was of considerable value, consisted of jewellery, precious stones, coins, &c., and a reversionary interest. Before any application for probate was made, and within a few days after the testator's death, the executor, William Aubert, began to intermeddle with the estate by depositing precious stones to the value of £1,000 in the National Safe Deposit Co. in his own name; he went through the deceased's papers and destroyed some of them; he also made preparations, without consulting his co-executor, for a sale of the furniture, pictures, plate, linen, &c. The other executor remonstrated against these proceedings before probate, and, not receiving any satisfactory answer, proposed to issue a writ claiming an injunction to restrain the defendant, Aubert, from removing, dealing, or interfering with the property of the testator, and for the appointment of a receiver until the granting of probate of the will, and for an order that all property of the estate of the deceased standing in defendant's name be transferred by the defendant into the name and to the order of the receiver. He accordingly, as required in probate actions by ord. 5, r. 15, of the Rules of the Supreme Court, filed an affidavit in verification of the indorsement on the writ. Rule 3 of the Practice Master's Rules provides

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

that "No writs are to be issued in Probate Division causes unless on a certificate that the affidavit required by ord. 5, r. 15, has been filed."

The registrar refused the certificate on the ground that the proceeding was irregular.

Robert Tunstall Moore, one of the residuary legatees under the will, was a co-plaintiff, and joined in the present application.

Beaumont, in support of the motion.—In *Dearing* v. *Brooks, In re Parkers*, 54 L. J. Ch. 694, 33 W. R. Dig. 162, Chitty, J., held that such application must be made in the Probate Division.

HANNEN, P., allowed the motion.

Motion allowed.

Solicitors, *Hudson, Matthews, & Co.*

Court of Appeal.

From Chan. Div. Jan. 19, 20, 27.

MAGNUS *v.* QUEENSLAND NATIONAL BANK. (*a.*)

Mortgagor and mortgagee—Bank—Loan on security of stock by joint holders—Re-transfer to one only—Bank's liability for loss of stock.

A stockbroker obtained a loan from a bank of which he was a customer, on the security of a transfer of stock which was vested in himself and two other persons upon certain trusts, he being the acting trustee. He procured the co-trustee's execution of the deed of transfer by proposing to sell the stock and buy certain other stock instead. The transfer was expressed to be for a nominal consideration, and in favour of two persons named, who were trustees for the bank, and the bank believed that their customer was authorized by the transfer to pledge the stock to them. The customer subsequently paid off the loan, when the bank, instead of re-transferring the stock to the three former holders, without notice to them caused it to be transferred to buyers from their customer, and he received the price. He then bought therewith the same stock, as proposed to his co-trustees, but in his sole name. This he afterwards sold, and appropriated the proceeds to his own use. In an account which he delivered later to his co-trustees, he included this stock as part of the trust fund, and went on accounting to his cestui que trusts for the dividends. He absconded and became bankrupt, and the co-trustees sought to make the bank liable for the original stock.

Held, that the bank, by allowing the purchase-money of the stock to get into the hands of the customer without the consent of his co-trustees, had occasioned the loss to the trust estate, and were therefore liable to make it good. Decision of Kay, J. (35 *W. R.* 752, 36 *Ch. D.* 25), *reversed.*

Appeal from a decision of Kay, J. (reported 35 W. R. 752, 36 Ch. D. 25).

The facts are fully stated in the report of the case in the court below, and also in the judgment of Cotton, L.J., and may be sufficiently gathered from the above headnote.

Cookson Crackanthorpe, Q.C., Rigby, Q.C., and *Farwell*, for the appellants.

Romer, Q.C., and *Henderson*, for the plaintiffs.

The arguments were the same as in the court below.

Cur. adv. vult.

(a.) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

Jan. 27.—Lord HALSBURY, C.—In this case it is not denied that the defendant bank are in default. They received from three persons a certain amount of railway stock as security for a loan, and upon the loan being paid off (I will deal presently with the form of loan) the bank transferred the stock to purchasers, and allowed the purchase-money to be received by one of the three. Now it is not denied that, upon general principles, the bank were under an obligation, having received the stock from the three, to restore it to the three upon the repayment of the money which they had advanced. The doubts that I entertained in the course of the argument were, whether it could properly be alleged that the loss which is complained of, and against which relief is sought in these proceedings, was consequent upon the breach of duty by the bank. I am, however, disposed to think it clear that when once the fact is established that money belonging to this trust has got into the hands of one of the three trustees without the consent of the others, and that by the default of the bank we are not at liberty to speculate whether the same result might not have followed whether the bank had been guilty of that default or not. The bank have, in fact, been guilty of default.

As a matter of fact they concurred in the money being handed to a person who had no authority, in my view of the facts, to receive it. They ought to have taken care that the three persons interested in the fund should receive the money, and they have not done so. I think the evidence, to which reference was made, is rather calculated to mislead one from the true question which the court has to determine. I was very much struck by the accounts which were rendered to the two other trustees in the month of February; but upon looking at them more carefully those accounts are perfectly consistent with a strict compliance by the defaulting trustee with the authority conferred upon him by his fellows. Those accounts would have borne exactly the same appearance—would have exhibited the same results—if, instead of doing what has been done, the defaulting trustee had performed the function which he was intrusted to perform, and sold for the purpose of re-investing in the other investment authorized by the other trustees. In truth, the sole question which, as it appears to me, the court has a right to determine is, whether upon these facts the authority which was given to the defaulting trustee to sell was pursued? He had authority to dispose of the stock for the purpose of sale—the ultimate object being re-investment in another form of security, and he placed in the hands of the bank that which was trust property, the bank knowing at the time that two other persons were interested in it. When the money advanced by the bank was repaid the bank had before them the fact that two other persons were interested in the stock, and without authority from them, or notice to them, they pay the purchase-money of that stock, or allow it to be paid, to one. I think that the loss to the trust happened when, instead of being re-invested in the names of the three trustees, it was placed in the hands of Goldsmid alone. The inference I should derive from the evidence would be this—not what was urged upon us, that this gentleman was intrusted by his co-trustees with plenary authority to do whatever he pleased, but in fact that they trusted to him so much that whenever he came to them and said, "Now I have got a fresh investment to make, you will sanction it, and I will send a proper transfer," they did it, and I have very little doubt that he might have defrauded the trust in some other way. But as a matter of fact the specific authority given to him with reference to this particular investment was confined to the particular instrument which they then executed; and, as I say, I am not entitled to speculate whether he might have cheated his co-trustees in any other form. As a matter of fact, what he did was this. There was no authority from the other trustees to

the bank to allow this money to be paid to any but the three; and under those circumstances it seems to me that the loss has happened by reason of the default of the bank, and that the bank is, therefore, responsible. For these reasons I am of opinion that the judgment of the learned judge below should be affirmed.

COTTON, L.J.—I am of the same opinion. The facts are short but I think I had better state them. On the 27th of January, 1882, the bank received from Goldsmid, who was a customer of theirs, a transfer executed by him and by his co-trustees (I shall deal afterwards with the question raised by Mr. Rigby whether in this case we ought to hold that there was an effectual transfer), and they took that transfer from him as security for a loan, the transfer being to certain persons who were their officers and trustees for them. Now that advance which was made to Goldsmid was paid off before the 15th of February, and then the bank, knowing, as appeared on the face of the transaction, that the equity of redemption belonged not to Goldsmid alone, but to him and his two co-trustees, do not re-transfer to Goldsmid and to his two co-trustees, but, by the direction of Goldsmid, they sell the stock to purchasers and allow Goldsmid to receive the money.

Now as the loan which they had made had been paid off, although the transferees, the purchasers, got a good title as against the co-trustees, the bank would be liable to account for the money which they got for those shares. If the purchasers had known the facts they would not have got a good title, but as they did not know them they got a good title, but the bank was accountable to the trustees for the purchase-money. The only defence they could set up would be that they paid the money to, or allowed it to be received by, a person authorized on behalf of the trustee to receive and give a good discharge for it. Now we must consider whether in fact Goldsmid had on that sale any authority whatever to receive and give a discharge for the money. As I understand the case made by the bank is this: Goldsmid was a trustee, but he was also a broker; he was authorized by his co-trustees to sell, and if he was authorized as a broker to sell, that must carry with it an authority to receive the purchase-money arising from the sale, since in the ordinary course it is paid to the broker. But we must look at the evidence for the purpose of seeing what authority was really given to Goldsmid, and I think that we must decide the case as regards his authority by the documents which are before us. I think so for this reason. Although undoubtedly in cross-examination, one at least of the plaintiffs, if not both of them, said, "Well, I suppose I authorized Goldsmid to sell," yet that is only when they were referred to the transfer which had been executed by them, and of course they would say, "Well, looking at that, I cannot deny that I gave him authority to do what I contemplated would be done by that instrument of transfer." But the documents begin by a letter of the 26th of January, the day before the execution of the transfer, and that is a letter not to both of the trustees, but to one of the trustees, written by Mr. Goldsmid saying that he intended and advised a change of investment by selling the London and Brighton Stock, and by investing in North-Eastern, and then he says, "If you agree I will bring or send to you the transfers." We do not know what then took place except that one of the trustees went to the office of Goldsmid and there executed the transfer, as appears by the attestation, and the other executed it also.

Now, in my opinion, after that letter, the trustees might reasonably have considered, and would have considered, that the instrument which was so sent was to carry into effect that which had been proposed by Goldsmid to them—that is to say, they looked upon it as a transfer in order to effect a sale which undoubtedly they knew was intended, and undoubtedly they assented to its being done by means of that instrument. It is [illegible] that the instrument which they executed was expressed to be for a nominal consideration of 5s., and [illegible] therefore, they could not have meant it to be the instrument to give effect to what they had authorized—[illegible] sale of the securities and reinvestment in a different stock. But in my opinion not only do they say [illegible] they are certain that they never executed an instrument with a nominal consideration, but I think that the proper inference is that the trustees, relying as they did on [illegible] of their number who was also a broker, when, after the letter, an instrument was sent to them which was a transfer of this stock, with a sufficient stamp upon it would not look to see whether it was for a nominal consideration only, but would consider that it was executed in order to carry the sale into effect, in order that by that instrument there might be a sale and conversion into money of stock to be reinvested in other stock. And undoubtedly they must be taken to have authorized him as a broker to carry into effect the transaction of which that transfer was to be part. Now it was [illegible] here, I think both by Mr. Cookson and by Mr. Rigby, that this instrument, this transfer for a nominal consideration to certain persons who were to be trustees, was [illegible] of the ordinary mode in which brokers deal with property which they have to sell, but there was no [illegible] to that effect, and I should think it decidedly contrary, reason, because on the transfer of this security, even [illegible] nominal consideration, a heavy stamp had to be paid [illegible] it was not suggested by any person knowing anything about such transactions that a transfer to trustees where a broker is authorized to sell is part of the ordinary way of carrying out the sale. The only document referred to before Kay, J., besides the transfer [illegible] was an account of October, 1884, in which the sale of this stock was mentioned and in which the re-investment in different stock in the names of the trustees of [illegible] never took place was also mentioned. But what [illegible] more striking was an account which was rendered [illegible] previous date—we do not know when—an account down to the 15th of February, 1882. But to my mind although it is undisputed here that the co-trustees authorized a sale by Goldsmid as broker in accordance with the tranfer which they had executed, yet [illegible] no way shows that they gave him any [illegible] authority.

It is entirely consistent with their supposing and believing that he, as broker, had acted on that transfer which they had given to him, and that he then had invested the money. Now Goldsmid did not use the authority which was given to him to transfer the stock to a purchaser by means of that transfer executed by his co-trustees, he used that transfer improperly to obtain, for his own purposes, a loan from his bank, and, in my opinion, that does not justify the bank in saying that his co-trustees authorized him as broker to act for them in a subsequent sale by the bank. In my opinion the judge was quite right, though he expressed his opinion in somewhat different language from [illegible] I have done, in saying that the authority of Goldsmid as a broker was at an end before this sale by the bank. I say in different language, but to the same effect, that there is nothing to justify us in holding that Goldsmid as broker, was authorized to act as broker for the trustees on the occasion of a sale not by the trustees but by the bank, and, therefore, in my opinion, the bank having taken upon themselves to act on his authority, and having paid to him the purchase-money [illegible] person authorized on behalf of his co-trustees to receive it, must take the consequences of his not being authorized, and must be liable to pay the purchase-money to the trustees, to whom they knew that [illegible] ought to have re-transferred the property.

I should mention a point to which I said that I should revert—that urged by Mr. Rigby—that the [illegible]

made by the pleadings, which we must assume to be correct, is that this transfer was not executed so as to be an effectual transfer. The statement of claim does undoubtedly allege that it had never been executed by the plaintiffs so as to be a perfect instrument. But the bank say entirely the contrary, and as they allege that it was a perfect instrument when brought to them, we thought, in my opinion, to decide, notwithstanding the allegation in the statement of claim, in accordance with that which, as between these parties and against the bank, must be taken to be the true state of things. There was no evidence in support of the allegation in the statement of claim, and we have the allegation and statement by the bank to the contrary, they being the persons who received this instrument when it was executed. Then there is one other point with which one ought to deal. It was urged very strongly that the negligence of the trustees was the real cause of the loss to the trust, and I agree that they were negligent. They ought to have seen that the North-Eastern stock had been put into their names. It never was. But in the view which I take of the case it is not necessary to consider that point, because, if the bank having this stock, in respect of which, the loan having been paid off, they were accountable to the trustees, paid the money arising from that property, not to the trustees, nor to any person authorized by the trustees to give a good receipt for it, they, in my opinion, must be held answerable to the trustees just as if the money was still in their hands. In my opinion the appeal must be dismissed with costs.

BOWEN, L.J.—The question we have to decide is a very short one—namely, whether the property of a trust has been lost through any wrongful conduct on the part of the bank. It will be found, I think, upon reflection, that the strength of the argument on behalf of the appellants rests upon a fallacious and misleading use of the expression, "loss caused by the conduct of the bank," and that the learned counsel for the appellants in pressing home the argument that, whatever the conduct of the bank may have been, it did not cause the loss to the estate, was using the term in a popular and not a legal sense, and one which is not sufficient to support the proposition. When was the property of the trust lost? At the time when it first passed into unauthorized hands. The contention of the plaintiffs is, that the bank, knowing, as they must have known, that they were mere mortgagees, believing, as they no doubt believed, that Goldsmid had authority to mortgage to them, but having no reason to suppose that he had authority to do anything else, had no right when the purchase-money from the ultimate purchaser found its way into their hands, to transfer that purchase-money to Goldsmid, he having no actual authority to receive it, and no apparent authority to receive it. If that proposition is made out then the loss occurred at the moment when the trust money was diverted by the bank into hands which were not authorized to receive it. The case accordingly turns upon this—had Goldsmid authority to receive the purchase-money, or had the bank the right to suppose, from the way in which the stock had been dealt with, that he had such authority? It seems to me that he certainly had no such authority in fact. He cannot, in my opinion, be held to have had any further authority than that which can be collected either from the documents or from the accounts, for I entirely assent to what has been said by the Lord Chancellor and the Lord Justice, that the general language used in cross-examination by the trustees is not really a statement by them of any incidents present to their own memory, but merely a summing up in general language of what they themselves deemed to be a reasonable deduction to be made from the documents already in evidence. We must, therefore, look to the documents to see what was the authority conferred upon Goldsmid.

Before we begin we must ask ourselves what the state of the crucial and important document was at the time it passed into his hands from the trustees. It was said on one side that it was not filled up but was in blank at the time when the trustees passed it to him, and on the other that it must be taken to have been at that time filled up in the way in which it now appears to be filled up. It is a question of *onus* of evidence, and it seems to me, though I do not in any way dissent or desire to express any different opinion from that which has fallen from the Lord Justice, that the question may be decided by applying the simple principle of law that, in the absence of evidence, no illegality or irregular proceeding in the transaction of business is to be presumed. It is to be presumed that the law has been carried out, not that it has been broken. The document, therefore, I think, must be taken in the first instance to have passed into the hands of Goldsmid in the form in which he used it. What was the authority of which that document is the evidence? The accounts which were afterwards accepted show no more than that the trustees imagined that whatever had been done had been done regularly; they fall short of showing that they were at all aware of what had really occurred. It seems to me that the document in question is only evidence of an authority at most to sell the shares and raise the money in the ordinary and usual way in which such a document would be used for the purpose. Either the trustees must be taken to have read the document, which is in a peculiar form, or not to have read it. If they had read it they would have seen, I think, that they were committing a breach of trust in signing a document in that shape; that they ought to have seen that the proper names of the purchasers and the proper statement of the consideration appeared on the document itself. If they did not read it they must have assumed that they were placing an ordinary document in ordinary shape in the hands of their broker, and they cannot be considered to have intrusted him with anything more than an authority to sell the shares in the ordinary business way. But it seems to me he had no authority to sell the shares in the irregular way in which he did, by first mortgaging, by then paying off the mortgage, and by then nominating persons to whom the legal estate should be conveyed by the mortgagees, and who should pay the purchase-money to the bankers, who were to pay it over again to himself. But had the bank any right to assume that there was such authority? The document itself, which expresses no consideration except that of 5s., is, to my mind, cogent and complete evidence to show that the bank, as, indeed, appears from the facts generally, had nothing at all to lead them to suppose that Goldsmid's authority was anything beyond what it really was. Indeed, the learned counsel for the appellants hardly argued this matter upon the view that Goldsmid had an apparent authority in excess of his acting as broker.

Now, as soon as the conclusion is arrived at that Goldsmid had no authority to receive the purchase-money, it seems to me that the conclusion of the learned judge in the court below follows. We were asked, indeed, to believe that whatever the breach of duty on the part of the bank was, it did not ultimately lead to the loss to the fund which has been sustained. That really is an illusion; it is an ocular illusion to present the case in that way. The loss occurred as soon as the money which belonged to the trust was diverted into the hands of a person who had no right to represent the trust. The proposition presented to us by the appellants, if divested of its popular and specious look, is this, that we ought not to visit those who lose trust property with the consequence of having to make it good, provided it can be shown or surmised that, if they had made it

good, somebody else would have lost it over again. Is that a tenable proposition? A man knocks me down in Pall Mall, and when I complain that my purse has been taken the man says: "Oh, but if I had handed it back again you would have been robbed over again by somebody else in the adjoining street." That is the argument of the learned counsel for the appellants as soon as the proposition for which they have contended is reduced to its bare bones. I am therefore of opinion that the appeal ought to be dismissed, with costs.

Appeal dismissed.

Solicitors for the appellants, *Stretton, Hilliard, Dale, & Newman.*

Solicitors for the plaintiffs, *Futvoye, Field, & Baker.*

From Chan. Div. Jan. 25.

PORTER *v.* PORTER. (*a.*)

Practice — Parties — Partition action—Partition Act, 1868 (31 *&* 32 *Vict. c.* 40), *ss.* 3, 4—*Partition Act,* 1876 (39 *&* 40 *Vict. c.* 17), *s.* 6—*Person of unsound mind not so found—Next friend.*

A partition action may be brought by a person of unsound mind not so found by a next friend.

Halfhide *v.* Robinson, 22 *W. R.* 448, *L. R.* 9 *Ch.* 373, *distinguished.*

An action for sale under the Partition Acts having been brought by two tenants in common, one of whom, stated to be of weak mind, sued by the other as his next friend, the court held that an action in this form, being primâ facie *for his benefit, could be maintained, and refused to strike out his name as co-plaintiff.*

Semble, *a request for sale at the trial by a next friend on behalf of a person of unsound mind not so found, assuming that such a request can be effectually made, cannot be acted upon in the same way as a request by a person not under disability, nor unless the court is satisfied that the sale is for his benefit.*

This was an appeal from North, J. (reported 32 SOLICITORS' JOURNAL, 91).

The question was whether a partition action can be brought by a person of unsound mind, not so found, by a next friend.

This action was brought by Edward Endymion Porter and William Henry Porter (a person of weak mind, by his brother and next friend, the said E. E. Porter) against Florence Susanna Porter; and the claim was for a declaration that a sale of real estate (to which the plaintiffs and defendant and three other persons were absolutely entitled in equal shares) would be more beneficial than a partition, and that a sale might be ordered, and for ancillary relief.

A motion was made on behalf of the defendant and the plaintiff, William H. Porter, that the name of William H. Porter might be struck out as plaintiff, and that an allegation contained in the statement of claim that he was of weak mind and unable to manage his affairs or attend to business might be struck out as being unnecessary, scandalous, or irrelevant.

North, J., refused the motion.

The applicants appealed.

Cookson-Crackanthorpe, Q.C., and *Rawlins,* for the appeal.

Cozens-Hardy, Q.C., and *Jason Smith, contrâ.*

The following authorities were cited:—*Halfhide* v. *Robinson,* 22 W. R. 448, L. R. 9 Ch. 373; Partition Act, 1868 (31 & 32 Vict. c. 40), ss. 3. 4; Partition Act, 1876 (39 & 40 Vict. c. 17), s. 6; R. S. C., 1875, ord. 18; R. S. C., 1883, ord. 16, rr. 16, 17; *Wallace* v. *Greenwood,* 25 Ch. D. 362, 29 W. R. Dig. 148; *In re Barker,* 25 W. R. 873, 17 Ch. D. 241; *Watt* v. *Leach,* 26 W. R. 475; *Platt* v. *Platt,* 28 W. R. 533; *Rimington* v. *Hartley,* 14 Ch. D. 630, 28 W. R. Dig. 154; *Jones* v. *Lloyd,* 22 W. R. 785, L. R. 18 Eq. 265.

COTTON, L.J.—This is an appeal from a decision of North, J., dismissing a motion on behalf of the defendant to strike out the name of one of the plaintiffs, who is described as of unsound mind, and consequentially to strike out certain allegations in the statement of claim. The question does not now arise as to what the court ought to do at the trial of the action, whether it should without inquiry treat as sufficient an assent to a sale request for a sale given or made on behalf of the person of unsound mind by his next friend. In my opinion the Act of 1868, s. 4, does not make it imperative on the court to direct a sale where such a majority as is mentioned desires it, but only says that the court may order a sale, unless it sees good reason to the contrary. I think that, without deciding that the next friend of a person of unsound mind is not the person to make a request, it is not a matter of course that the court, where the majority is obtained under circumstances like those of the present case, will direct a sale without considering what is for the benefit of the person of unsound mind. To act upon such a consent without inquiry would enable a person who took upon himself the position of next friend to obtain a sale without there being anything to satisfy the court (as is necessary in the case of a lunatic with a committee) that the sale is for the benefit of the person of unsound mind. The court, I think, may say, "Although there is the request of the next friend is authorized to give, I shall not order a sale unless it is shown to be for the benefit of the lunatic. The Act says I shall direct a sale unless I see good reason to the contrary, and until the sale is shown to be for the benefit of the lunatic I do see good reason to the contrary."

But, as I have said, that question does not yet arise. The case to be made out by the applicants must be that before the Act of 1868, such an action could have been brought by a next friend on behalf of a person of unsound mind, and I do not think that such was the law.

What is the principle on which the court allows a person of unsound mind to sue by a next friend? When the person is incapable of acting for himself the court allows any one of the Queen's subjects to take proceedings on his behalf as regards that which is *primâ facie* for his benefit. In my opinion a partition is, *primâ facie,* for the benefit of a holder of an undivided share. That was recognized by the Act of Hen. 8, giving the right of partition, and although that Act of Parliament has gone, yet an action for partition is merely obtained in a different way the benefit intended to be given without action by that statute to all persons who were tenants in common. I think therefore that, *primâ facie,* an action for partition is for the benefit of the person who is of unsound mind, and who holds an undivided share in the property.

Now, is it for the plaintiff, bringing such an action, to show that it is really, in this particular case, for his benefit? I think not. It is for those who suggest that the action is not duly constituted to show that it cannot be really for the benefit of the person of unsound mind. I do not say what would be required to satisfy the court in coming to that conclusion; that, I think, is what a person who objects to the use of the name of a person of unsound mind as plaintiff ought to make out in order to induce the court to say that, if the person of unsound mind is the only plaintiff, the action must not

(*a.*) Reported by C. HERBERT BROWN, Esq., Barrister-at-Law.

go on, or that, if he is one of several plaintiffs, his name must be struck out.

Now, do the Acts of Parliament make any difference? I do not think that they do. They enable the court in a suit for partition to direct a sale, and, that being so, it does not make the action improper that the plaintiff alleges that a sale will be more beneficial than a partition, and then asks the court for a sale. The action, which is *primâ facie* for his benefit, does not become improper because he asks for something which he may not be able to get.

No doubt the case of *Halfhide* v. *Robinson* causes a difficulty, but James, L.J., does not lay down that there can be no bill filed for partition by a person of unsound mind by his next friend, he only asks whether there is any authority for it. I asked whether there was any authority one way or the other, but none could be produced. The question is whether we are not bound by what was said by James, L.J., at the end of his judgment: "I wish it to be understood that a bill cannot be filed by a next friend on behalf of a person of unsound mind not so found by inquisition for dealing with his real estate. The consequences of such a course might be monstrous." I think to a considerable extent the difficulty is obviated by the 6th section of the Act of 1868, which recognizes the fact that, as regards the property of persons of unsound mind, the guardian *ad litem*, and possibly also the next friend, has authority to consent to a sale of the property. That seems to show that without applying in Lunacy a sale may be directed of their real estate of a person of unsound mind. I think what James, L.J., meant was in substance this: "There is a mode given by the Legislature under the Lunacy Regulation Act, 1862, which enables the sale to be made in a different way, and that is the proper course to be taken; and it is improper that a bill should be filed for a sale in order to avoid adopting the course to be taken under the Lunacy Regulation Acts." In that case, as was pointed out by Mr. Cozens-Hardy, the court was not asked to carry out an order for sale made in a lunacy action. Apparently the application was not under any of the provisions of the Act, but was by a petition presented in the suit, not for carrying the decree into effect, but for vesting the share of a person who was of unsound mind in one of the other parties to the suit. Taking the judgment of James, L.J., reasonably, I think he only meant that the course taken was not the proper course, but that there should be a petition to the Lords Justices under the Lunacy Regulation Act, 1862, and then the court might make the order. If I had felt that James, L.J., had really decided the point which we have now to decide, such respect is due to his opinion that I should not give the judgment which I have given, but my opinion is that which I have stated, and I do not think that *Halfhide* v. *Robinson* ought to prevent me from acting upon it. The application ought to have been by the defendant alone, but as it is refused it is not necessary to amend it.

BOWEN, L.J.—This application is made on the broad ground that an action for partition cannot be brought by a next friend on behalf of a person of unsound mind not so found by inquisition, and that as a person of unsound mind cannot by his next friend bring such an action himself, so he cannot be joined as a plaintiff in a suit for the same thing in another shape. Mr. Cook-Crackanthorpe says that before the Act of 1868 no such action for partition could be brought, and that there is nothing in the Acts to alter the law in that respect. This argument rests upon the *dictum* of James, L.J., apparently assented to by Mellish, L.J., in *Halfhide* v. *Robinson*, which has been read by Cotton, L.J. Before discussing that case and seeing whether we are bound by it or not, or to what extent it is a binding authority, I should like to examine the proposition in order to see on what principle it can rest. Why, in the first place, should it be confined to real property? and, secondly, what is the true ground upon which a next friend is allowed to ask for the intervention of the court on behalf of a person of unsound mind not so found by inquisition? It seems to me to be this, as was said in substance in *Beall* v. *Smith*, 22 W. R. 121, L. R. 9 Ch. 85, and *Jones* v. *Lloyd*, that when there is a person of unsound mind who, although not so found by inquisition, nevertheless stands in need of the protection or the intervention of the court as regards his property, real or personal, then supposing he would, if sane, be entitled to the intervention of the court, a third person, a stranger, may come forward and do that which is clearly for the benefit of the person of weak mind. That that is the ground for suing by a next friend is shown by the judgment in *Jones* v. *Lloyd* if it were not otherwise clear. In that case a bill was filed for a dissolution of partnership which alleged a dissolution to be for the benefit of the person of unsound mind, and on demurrer the Master of the Rolls held that the allegation was sufficient to justify the bill, and therefore overruled the demurrer. He cited with approval the language of James, L.J., in *Beall* v. *Smith*.

Now what sort of limit ought to be put on that rule? It is obvious that, in the absence of the principal person concerned, his property ought to be left, as far as possible, and so far as his interest permits, in the condition in which it was, *quieta non movere*. But still, if it is for his obvious benefit, then the court ought to interfere to give him, while his senses are sleeping, the same sort of protection to which he would be entitled if they were awake and he could act for himself.

We have, in this case, to apply these considerations to an action for partition. A partition, as we all know, has for some centuries been recognized as being generally a benefit to persons who share property with others. When an action for partition is brought it certainly may be for the benefit of the person of unsound mind, and it is *primâ facie* to be presumed to be so. The question is, are we to stop it on the threshold on the mere suggestion that it is not an action which can possibly be for his benefit. I am disposed to think that the court, before making a decree dealing with a person's property at the instance of a plaintiff who is also the next friend, ought to be satisfied that it is interfering for the benefit or for the protection of the person of unsound mind; but that is a point to be considered at the trial.

Then I come back to the question, ought the case to be stopped *in limine*? If the appellant's counsel could have shown that this was an abuse of the process of the court, and that the partition action was not *bonâ fide* for the benefit of the lunatic, then, even at this early stage, the court might have done what is asked. But there is before us no evidence whatever to justify us in supposing that this action will not be for the benefit of the person of unsound mind. If he turns out to be of unsound mind at the trial that will be a matter to be considered before the court can make an order at the instance of a stranger affecting his property. The Lord Justice, I believe, agrees with me in that. The court ought to be satisfied, so to speak, of the title of the next friend to intervene, and that the person is of unsound mind, and that he stands in need of protection as regards his property, and it ought to be shown that it would be for his interest that the court should exercise its jurisdiction. It is not necessary to decide as a matter of strict law upon whom the *onus* rests of showing that a partition is for his benefit. When the case comes on for trial the question of *onus* and matters of that sort will have faded into unimportance, and the court will sift the whole thing and consider it.

I therefore can see nothing in reason to prevent an action for partition being maintained, when it is for the

benefit of the alleged lunatic, that it should be so maintained by a next friend or a stranger, before the Act of 1876; and this is not the moment at which, nor have we the materials on which to decide, that this action is not *bonâ fide* brought with a view to the lunatic's benefit.

Then, if that is so, what we have to consider is really, not whether the Act of 1876, s. 6, creates this right, but we have only to see that it does not destroy it. I can see nothing in the section that prevents an action for partition being brought in any case where it could be brought before that Act was passed. I abstain from giving an opinion upon the construction of section 6, not because I have not a view upon the subject, but because this is not the time for expressing it. It will remain for serious consideration hereafter whether section 6 enables a request to be made by a next friend, and, if so, in what way, and whether the court is bound to attend to it if made.

As regards the case of *Halfhide* v. *Robinson*, I entirely concur in the view taken by Cotton, L.J. It seems to me to be distinguishable on the ground which has been stated. I do not fail to observe that in that particular case the person of unsound mind who sued by his next friend was the sole plaintiff, and the peculiar circumstances of that case were no doubt the pivot on which the reasoning in the mind of James, L.J., turned.

Appeal dismissed.

Solicitors, *Bolton, Robbins, Busk, & Co.*, for *Jones & Forrester*, Malmesbury; *Tylee & Co.*

Bankruptcy. March 3.

In re LORD COLIN CAMPBELL. (*a.*)

Bankruptcy—Disqualifications of bankrupt—Certificate that bankruptcy was caused by "misfortune without misconduct"—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 32, *sub-section* 2 (b).

In a suit for dissolution of marriage on the ground of the wife's alleged adultery, the jury found that the wife had not committed adultery, and the petition was dismissed. In consequence of the costs incurred in these proceedings the petitioner was adjudicated bankrupt. Subsequently the bankrupt, having obtained an immediate unconditional order of discharge, applied, under section 32, *sub-section* 2 (b), *for a certificate that "his bankruptcy was caused by misfortune, without any misconduct on his part."*

Held, that the certificate must be refused, as the bankruptcy was not caused by "misfortune," the bankruptcy being solely caused by the costs incurred in the divorce proceedings which the bankrupt had commenced of his own free will, and which were under his complete control.

Appeal by Lord Colin Campbell from the decision of Mr. Registrar Giffard refusing to grant him a certificate under section 32, sub-section 2 (*b*), of the Bankruptcy Act, 1883, that his bankruptcy was caused by "misfortune without any misconduct on his part."

The appellant had presented a petition for dissolution of marriage on the ground of his wife's alleged adultery with four co-respondents. The jury found that the wife had not committed adultery, and the petition was dismissed, the appellant being ordered to pay the costs. Subsequently, in May, 1887, a receiving order was made against the appellant upon the petition of one of the co-respondents, the petitioning creditor's debt amounting to £971, the amount of his taxed costs in the divorce suit, and the appellant was adjudicated bankrupt. His unsecured liabilities amounted to £8,622, of which £4,943 were for costs in the divorce suit, including the costs due to his own solicitors, and his assets amounted to about £144. He attributed his bankruptcy entirely to the result of the divorce proceedings, and to the costs thereby incurred, the trial having lasted eighteen days. It appeared that his wife first presented a petition for dissolution of marriage, and that he then, acting upon the advice of counsel, presented his petition. The wife's petition was also dismissed.

On the 21st of December, 1887, the appellant obtained an immediate unconditional order of discharge, and he thereupon applied for a certificate as above. The registrar refused the certificate on the ground that the bankruptcy was not caused by "misfortune."

Section 32 of the Bankruptcy Act, 1883, provides that "(1) Where a debtor is adjudged bankrupt he shall, subject to the provisions of this Act, be disqualified for, &c. (enumerating the disqualifications); (2) The disqualifications to which a bankrupt is subject under this section shall be removed and cease if and when (*a*) the adjudication of bankruptcy against him is annulled, or (*b*) he obtains from the court his discharge with a certificate to the effect that his bankruptcy was caused by misfortune without any misconduct on his part."

Finlay, Q.C., and *H. Reed*, for the appellant.—His bankruptcy was caused by misfortune. The appellant acted upon the advice of counsel in instituting the divorce proceedings, and he acted *bonâ fide* throughout. He had reasonable grounds, upon the evidence of his own witnesses, for instituting the proceedings. He could not foresee the evidence on the other side, nor could he foresee the length of the trial, which increased the costs enormously. Misfortune is a piece of ill-luck happening to a man without his fault. Misfortune denotes the same idea as "without misconduct." The misfortune here was the unforeseen verdict of the jury.

They referred to Webster's Dictionary and Johnson's Dictionary, "Misfortune."

Sidney Woolf, for the trustee.—It was misconduct for a man of such slender means as the appellant to institute the divorce proceedings. He knew that if he failed he would not be able to pay the costs. His bankruptcy, therefore, was not caused "without misconduct." At any rate his bankruptcy was not caused by misfortune. He was responsible for the divorce proceedings. "Misfortune" has been defined to be something unforeseen that came upon a man without any possibility of remedy, or which could not be guarded against: *Ex parte Burgess*, 35 W. R. 702, 4 Morrell's Bank. Rep. 186, at p. 188.

Finlay, Q.C., replied.

LORD ESHER, M.R.—We must first express our opinion as to the construction of section 32 without regard to the circumstances of the present case. One ought first to consider section 28, though the two sections are not connected with each other. In section 28 certain cases are enumerated which, if they occurred, would prevent the bankrupt from obtaining an unconditional order of discharge. They may be called cases of misconduct. Section 32 deals with cases where a discharge has been obtained, and cannot come into operation where there has been such misconduct as will prevent a bankrupt getting his discharge under section 28. Yet section 32 is a highly penal section, imposing disabilities as to a bankrupt's future life. It must therefore be construed strictly, but at the same time no words must be struck out, and the words must receive their ordinary meaning. Section 32 enacts certain disqualifications attaching to a discharged bankrupt from the mere fact of bankruptcy, with a proviso that those disqualifications shall be removed and cease if and when the adjudication of bankruptcy against him is annulled, or he obtains from the

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

court his discharge with a certificate that his bankruptcy was caused by misfortune without any misconduct on his part. Those words must be construed strictly, but, as I have said, we cannot strike out any of the words, nor can we give them a meaning other than their ordinary meaning. We have no right to strike out the word "misfortune." Mr. Finlay asked us in effect to do so, because he argued that if there were no misconduct there was misfortune. To accede to that argument we should have to read the words thus, "that the bankruptcy was caused without any misconduct." I cannot think that we are entitled to strike out the word misfortune.

Now it is impossible for me, considering the great number of different cases that may hereafter come before the court, to give an exhaustive definition of the word "misfortune" which will cover all cases. Still, I think that when the bankruptcy is not solely the result of some accident over which or over the direct conducing causes of which the bankrupt has no control, then the bankruptcy is not caused by misfortune. When the bankruptcy is caused partly by misfortune and partly by misconduct, and the misfortune is wholly independent of the misconduct, the certificate cannot be granted. The bankruptcy, therefore, must be solely the result of some accident over which or over the direct conducing causes of which the bankrupt has no control to bring the case within the words, "bankruptcy caused by misfortune without misconduct."

I come now to the facts of the present case. The accident which caused the bankruptcy was the adverse verdict of the jury. A verdict of a jury must, in a court of justice, be assumed to be a right verdict. Therefore the bankruptcy was caused by a right and proper verdict. The direct conducing cause of the verdict was the presentation of the petition and the prosecution of the proceedings. All that was absolutely within the control of Lord Colin Campbell. The suit was brought by him and the evidence was produced under his direction. Therefore the direct cause of the verdict was his presenting the petition and carrying on the proceedings up to the verdict. Whether the effect of the evidence produced on behalf of the respondent and co-respondents was to throw doubt upon the petitioner's evidence or not, the result was that the petitioner commenced a suit which his evidence failed to establish. Therefore the direct cause of the verdict was under the control of Lord Colin Campbell. Without saying that there was any misconduct on his part, and without expressing any opinion whether it was too rash for him to institute the proceedings under the circumstances, we must dismiss the appeal on the ground that the appellant has not brought his case within the provisions of section 32, sub-section 2 (*b*).

Fry, L.J.—I am of the same opinion. Misfortune is a word as familiar in common language as it is in the affairs of ordinary life. But this is the first time, so far as I know, that it is used in a section of an Act of Parliament. The difficulty of defining it arises from the vague thought expressed by the word. We must look at the connection in which the word is used. Section 32 imposes certain disqualifications upon a person who has been adjudged bankrupt, those disqualifications ranging from the House of Lords to a select vestry. The guiding notion underlying this legislation seems to be that he who has made shipwreck of his own affairs is not fit to be trusted with the management of other persons'. By sub-section 2, however, the disqualifications may be removed by the adjudication being annulled, or by the court granting a certificate that the bankruptcy was caused by misfortune without any misconduct on his part, and the refusal of the certificate is to be subject to appeal. That enactment throws the *onus* of proof upon the bankrupt. He has to make out that his bankruptcy was caused by misfortune without any misconduct on his part. The Legislature seemed to think that there might be circumstances under which a person might be made bankrupt without any slur resting upon him. That seems to be the general notion of the clause. Mr. Finlay urged that that view was not the correct one, because the adjudication might be annulled merely upon payment of the creditors in full. The Legislature, however, may well have considered that if a bankrupt is able at a later date to pay his debts in full, either by means of friends or out of his own earnings, he has shown sufficient control over himself to entitle him to be rehabilitated. A man might lose his money by an unforeseen misfortune, and in that case there could be no doubt bankruptcy would be caused by misfortune without misconduct. On the other hand, if a man lost his fortune by gambling, his bankruptcy would not be caused by misfortune. Like the Master of the Rolls, I shall not attempt to give an exhaustive definition of "misfortune." We are as yet at too early a stage of the legislative development of the word. Nevertheless, we may take some steps towards a definition. For the purposes of this case I think that "misfortune" must be an adverse event not immediately dependent upon the action and will of him who suffers from it, and of so unexpected a character that a prudent man would not take it into his calculation. Mr. Finlay says that misfortune means without misconduct. I cannot agree with that construction. Coming, then, to the facts of this case, it appears that a man of slender means filed a petition in the Divorce Court, being under the impression that he would be successful. He failed, and had to pay the costs, and thereupon he was adjudicated bankrupt. I cannot think that the bankruptcy was caused by "misfortune" without any misconduct on his part. The whole control of the action rested with him. The proceedings were directly dependent upon the will and under the control of the petitioner, and so I cannot come to the conclusion that the bankruptcy was caused by misfortune without misconduct within section 32, sub-section 2 (*b*).

Lopes, L.J.—I also do not profess to give an exhaustive definition of the phrase "misfortune without misconduct." "Misfortune," however, must be an adverse event over which the person has no control, and over which he could not by ordinary prudence have any control. In my opinion, when the party to proceedings is master of those proceedings throughout, and bankruptcy ensues therefrom, the bankruptcy cannot be said to be caused by misfortune. I cannot agree with the argument that misfortune means without misconduct. Misfortune seems to me to be the governing word, and unless there is misfortune the certificate cannot be granted. In the present case the verdict was the cause of the bankruptcy, and the verdict was brought about by the petitioner proceeding with the action. The bankruptcy, therefore, was not caused by misfortune.

Leave to appeal to the House of Lords was granted.

Appeal dismissed.

Solicitors for the appellants, *C. O. Humphreys & Sons.*

Solicitors for the trustee, *Lewis & Lewis.*

Bankruptcy. March 2.

Ex parte BROWN.

In re SUFFIELD & WATTS. (*a.*)

Solicitor—Charging order—Priority—Claim of landlord for rent—Solicitors Act, 1860 (23 *&* 24 *Vict. c.* 127), *s.* 28—*Bankruptcy court—Jurisdiction—Rehearing—Bankruptcy Act,* 1883 (46 *&* 47 *Vict. c.* 52), *s.* 104.

A solicitor had obtained a charging order for his costs under section 28 *of the Solicitors Act,* 1860, *from* Cave, J., *sitting in Bankruptcy, in respect of partnership property recovered or preserved by him in an action for a dissolution of partnership between partners who afterwards became bankrupt. There existed a landlord's claim for rent against the partnership. Before payment of the solicitor's costs, an application was made by the receiver of the partnership assets to* Cave, J., *as to the application of the assets, and* Cave, J., *held that the former order, having been made in ignorance of the landlord's claim, must be amended, and the landlord's claim discharged in priority to the solicitor's charge.*

Held, on appeal, that the charging order must have priority over the landlord's claim for rent, and that Cave, J., *had no jurisdiction under the Bankruptcy Act,* 1883, *s.* 104, *or otherwise, to vary his first order.*

This was an appeal from a decision of Cave, J. (reported *ante*, p. 303).

An action had been brought in the Chancery Division of the High Court of Justice by Suffield against Watts for a dissolution of partnership. Judgment was given for a dissolution and the taking of an account, and a receiver was appointed. Both partners became bankrupt, and the action was transferred to the Queen's Bench Division in Bankruptcy. The solicitor to the plaintiff in the partnership action applied to Cave, J., sitting in Bankruptcy, for an order under section 28 of the Solicitors Act of 1860 declaring that he was entitled to a charge on the assets in the hands of the receiver, and an order was made on the 6th of April, 1887, directing the receiver out of those assets to pay the solicitor his taxed costs of the action. The order as drawn up was entitled in the bankruptcy, in the action, and in the matter of the Solicitors Act and of the solicitor. Before the order was made application had been made to the receiver by the landlord of the premises in which the bankrupts had carried on their business for the payment of three quarters' rent, two of which had become due before the bankruptcy. The landlord had not distrained. Cave, J., was not informed of the landlord's claim till the receiver, having moneys in his hands, applied to Cave, J., for directions.

The solicitor and the landlord were both represented on the hearing of this application.

The receiver had £84 in his hands; the solicitor's claim was for £100, and the landlord's for £49.

Cave, J., held that the landlord was entitled to priority, and ordered the payment of his claim out of the assets, and the residue of the sum in the receiver's hands to the solicitor.

This order was entitled only in the bankruptcy and in the action.

The solicitor appealed.

Dundas Gardiner, for the appellant.—Section 28 of the Solicitors Act, 1860 (23 & 24 Vict. c. 127), is conclusive to show that a solicitor who has recovered or preserved property is entitled to the declaration by the judge before whom the proceeding has been heard, or is depending, of a charge for his taxed costs upon any property so recovered or preserved except as against a *bonâ fide* purchaser for value. Such has been the case here, and a liberal interpretation has always been given to the Act: *Pinkerton* v. *Easton*, 21 W. R. 943, L. R. 16 Eq. 490; *Bulley* v. *Bulley*, 26 W. R. 638, 8 Ch. D. 479; *Greer* v. *Young*, 31 W. R. 930, 24 Ch. D. 545; *Bayley* v. *Burchall*, 2 H. & M. 371, 13 W. R. Ch. Dig. 78. In *Dallow* v. *Garrold*, 33 W. R. 219, 14 Q. B. D. 543, a solicitor with notice of a prior garnishee summons obtained an order under this section.

He also cited *Shippey* v. *Goby*, 28 W. R. 877, 49 L. J. Q. B. 524.

F. Cooper Willis, for the landlord.—It is in the discretion of the court whether such an order should be made. Cave, J., did not know at the time he made the order that the landlord's claim for rent, which he could then have enforced by distress, existed. The order was made under a misapprehension, and, as it was made in bankruptcy, the judge was entitled, under section 104, of the Act of 1883, to vary it.

Lord ESHER, M.R.—In this case it was not denied that the solicitor had in fact preserved property by his action and therefore, if nothing stood in his way, he would be entitled to a charging order on the fund preserved under the Solicitors Act, which is the only statute which enables such an order to be made. This charging order was made by Cave, J., in the court in which he exercised jurisdiction under the Bankruptcy Act. Sitting in that court, and exercising jurisdiction under that Act, he also had the jurisdiction of a judge of the High Court, which he could exercise in respect of the Solicitors Act. On the 6th of April the solicitor applied for a charging order in his favour, and, as a judge of the High Court, Cave, J., granted his application. After he had made that order he could not alter it. He had no jurisdiction to rehear, for the order had not been made under the jurisdiction conferred on him by the Bankruptcy Act. He was not asked to rehear the application, and in fact did not do so. While this order remained good and unimpeachable the receiver in the suit asked for directions as to the money in his hands in the suit—that is to say, whether the claim for rent due to the landlord should or should not have priority over the charge made in favour of the solicitor. It seems to me that a succession of cases has decided that so long as the money in question has not been paid over to anyone a charging order has effect in priority over every other claim and under circumstances, except against a *bonâ fide* purchaser for value without notice. In *Dallow* v. *Garrold* it was held in terms that this was the result of such an order. It is clear that the landlord was not a *bonâ fide* purchaser for value. That case adopted and approved of the case of *Shippey* v. *Goby*, where Lord Bramwell, Baggallay, L.J., and I came to the same conclusion. Therefore, on the authorities this charging order has priority over the landlord's claim for rent not recovered by execution or distress. But it is said that this charging order was made in bankruptcy, and that the judge had jurisdiction to rehear. I have answered that point already. The order was not made under the bankruptcy jurisdiction of the court.

FRY, L.J.—I agree with the Master of the Rolls. In the action in the Chancery Division for the dissolution of the partnership an order was made for the appointment of a receiver. After that both partners became bankrupt. The chancery action was transferred to the Queen's Bench Division, and application was made to the judge for a charging order under the Solicitors Act. That application was granted and the order was made in the matter of the solicitor and in the matter of the Act by Cave, J. That order was not made in bankruptcy but under the jurisdiction Cave, J., had under the Solicitors Act. Then the question arises whether it was competent to Cave, J., to modify the order of the 5th of April. When the order had been perfected Cave, J., had

(*a.*) Reported by A. H. TODD, Esq., Barrister-at-Law.

no jurisdiction to rehear the matter, and there was no application to rehear and no attempt to vary that order till after it had been made and perfected. It has been suggested that the landlord in this case stands in some different position to other creditors by virtue of his power of distress, but in that respect he only has a right to distrain—he cannot follow his tenant's goods when they are off his land. The language of the statute is clear; therefore, even if Cave, J., had known that the landlord had given notice of a claim, it would have been no reason for altering the order for a charge which had been made.

LOPES, L.J.—This charging order was made under the Solicitors Act by a judge of the High Court sitting in Bankruptcy. Is this a subsisting and binding order? It is said to have been discharged, but there was no application to rehear it, and it was not discharged or varied by the directions which the learned judge gave. Indeed, I think that, according to the case of *In re St. Nazaire Co.*, 27 W. R. 854, 12 Ch. D. 88, there was no jurisdiction to rehear it.

Appeal allowed.

Solicitor for the appellant, *T. J. Pullen.*

Solicitors for the respondent, *Jennings & Son.*

Bankruptcy. April 20.

In re KELDAY.

Ex parte MESTON. (*a.*)

Bankruptcy—Notice in bankruptcy—Foreclosure decree —"Judgment of which execution has not been stayed" —Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (g).

A creditor who, as equitable mortgagee, has obtained a foreclosure decree and an order for sale of the property of the debtor is still, if no such sale is found to be possible, at liberty to serve a bankruptcy notice on the debtor and to take further proceedings; and the fact of such an order for sale not having been carried out is not sufficient ground for an adjournment by the registrar of further proceedings on the notice on the application of the debtor under rule 139 *of the Bankruptcy Rules,* 1886.

Appeal from Mr. Registrar Hazlitt ordering proceedings on a bankruptcy notice to stand adjourned on an application of the debtor under the Bankruptcy Rules, 1886, r. 139.

The petitioning creditor, Meston, had lent money to the debtor, Kelday, on the security of a building agreement. In an action by the creditor as equitable mortgagee on this agreement in the Chancery Division, Kekewich, J., had ordered a decree in the form of a decree in a foreclosure suit. Accounts were to be taken of the money due, and in default of payment power of foreclosure was given, together with an order for the sale of the property if necessary. The creditor, as plaintiff, subsequently applied for an order to enforce the sale, the proceeds to be paid into court; a sale, however, was found to be impossible on account of the inability of the debtor to give the creditor a title to dispose of the property. The creditor, thereupon, served the usual bankruptcy notice upon the debtor, but upon the petition being heard before the registrar the debtor urged that the order for sale in the chancery suit acted as a stay of the bankruptcy proceedings, and the registrar, thereupon, adjourned the creditor's petition. The creditor now appealed.

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

Yate-Lee, for the appellant.—The registrar had no power to adjourn the petition on such grounds. The order of sale was no stay of proceedings: sections 4 (1) (*g*) and 7 (2) of the Bankruptcy Act, 1869, and Bankruptcy Rules, 1886, rr. 138 and 139, *Lockhart* v. *Hardy*, 9 Beav. 349.

H. Reed, for the respondent.—The mortgagee is not entitled to proceed with bankruptcy proceedings so long as the order for sale has not been executed. *Lockhart* v. *Hardy* is in his favour: *Walker* v. *Jones*, 14 W. R. 484, L. R. 1 P. C. 50; *Palmer* v. *Hendrie*, 27 Beav. 349; *Ex parte Budd*, 1 M. D. & De G. 436. The order for adjournment of the petition is within the discretion of the registrar. *Ex parte Ford*, 18 Q. B. D. 369, 35 W. R. Dig. 19.

Yate-Lee, in reply, cited *Ex parte Lindsey, In re Bates*, 35 W. R. 668.

Lord ESHER, M.R.—The debtor, the respondent, was indebted to certain creditors, of whom appellant is one, to an amount upwards of £5,000. The appellant had at the same time a security on the debtor's property equivalent to an equitable mortgage. To secure his debt the creditor did what he had a right to do in law and equity, he applied to the court for a judgment on a debt, and at the same time asked for a decree of foreclosure on the mortgage and an order to sell the property. Under these circumstances he was in a position to claim a judgment debt together with an order to sell under a foreclosure suit. The appellant then, as such judgment creditor, served a bankruptcy notice on the debtor. It is said on the one side that the said order to sell had no effect upon the appellant's rights as a judgment creditor under the Bankruptcy Act, under which, upon notice and default after seven days, he can take proceedings in bankruptcy. On the other side Mr. Reed says that the obtaining of the order to sell is either a stay of proceedings or equivalent to such. That there is anything in the Bankruptcy Act saying that such an order is to act as a stay cannot be maintained. But is there anything in such circumstance to induce the court to stay such proceedings under statutes or in equity which may empower the court to interfere with the ordinary course of bankruptcy notice? By section 4 of the Bankruptcy Act, 1883, if a creditor has obtained a final judgment against the debtor, for any amount, and, execution thereon not having been stayed, has served on the debtor a bankruptcy notice under this Act, and if the debtor does not within seven days comply with the requisition bankruptcy proceedings take place. I am not inclined to chain the power of the court as to the interpretation of the meaning of the words "execution thereon not having been stayed." Although there may be circumstances under which the court might consider that it ought to stay, I shall not say that is conclusive on this point. But where is there any equitable doctrine or justice here in saying that the obtaining of an order to sell the property which has not been executed at all, because as a fact any sale was found to be impossible, ought to act as a stay of proceedings, or ought to induce the court to order a stay. The property has not been sold. It has only been ordered to be sold. I apprehend no court of equity would interfere with the right of the creditor to obtain judgment against the debtor. There is nothing to prevent a man going on with bankruptcy proceedings in order to obtain his debt. It would be contrary to justice to say that where a man has two rights, the attempt to execute one should prevent him from carrying out the other. There is no rule of court or equity to prevent him carrying out his remedies to the full extent. I cannot, therefore, think that the registrar should have postponed judgment. This was not a matter of simple adjournment. It would alter the rights of the judgment creditor, and would post-

pone the period of time in which he might recover his debt if rule 139 were allowed thus to apply. There is no discretion in the registrar under such circumstances. He is bound to give a decision at once, and in this case he should have dismissed the application so that the creditor's rights might at once have taken effect. As to the creditor's taking advantage of judgment after seven days' default in spite of a possible sale of the property, I see nothing to prevent a creditor from taking such advantage. The debtor is bound to pay at once after receiving the notice within the interval of seven days. If he pays within that time there is no bankruptcy. This application of the debtor's ought to have been dismissed by the registrar, and this appeal must be allowed.

Lindley, L.J.—I am of the same opinion. The point is an important one. The appellant is equitable mortgagee and also creditor of the mortgagor. He gets from the Chancery Division an order for payment of the mortgage, or, in default, an ordinary foreclosure judgment, and, in the alternative, an order for a sale, with, in addition, liberty to apply to sell, if he finds he can do so. For reasons given he cannot sell his security, as he finds the debtor cannot give him a title to do so. There is no evidence offered to show us that the creditor, if diligent, could sell. There is no evidence contradicting the appellant's version. He then serves a bankruptcy notice on the debtor under section 4 of the Act. He is entitled to do that by the Act. He has got foreclosure and judgment, but execution is now sought to be stayed. Has anything happened to render a stay right and to show us that execution ought not to issue? It has been argued that the order for sale was equivalent to a stay of execution. If it be asked whether the court can stay any execution under any circumstances which might render it unjust to levy execution, it must be answered that terms can be imposed such as are laid down in *Lockhart* v. *Hardy* and *Ex parte Budd*. But those cases do not apply here. A mortgagee, such as the appellant, may have recourse to all his remedies at once —foreclosure, ejectment, &c. The only limitation is that he cannot have the estate pledged and the money too. That is clear. To prevent any such injustice an ordinary power of sale came to be inserted among the orders in foreclosure suits. This case is not within the principle of the cases, nor the terms of rule 139; the registrar ought, in regard to the evidence, to have refused the application.

Bowen, L.J., concurred.

Appeal allowed.

Solicitor for the appellant, *Jos. Barrett.*

Solicitors for the respondent, *Wilkins & Fanshaw.*

High Court of Justice.

Chan. Div. North, J. March 24.

Bates v. Moore. (a.)

Practice—Payment out of court—Petition or summons—Fund exceeding £1,000—Rules of Supreme Court, 1883, ord. 55, r. 2, sub-section 1.

The mere fact that a fund in court exceeds £1,000 is not of itself sufficient to justify the presentation of a petition for payment out if the title to the fund depends only upon proof of the identity or the birth, marriage, or death of any person.

Petition.

This was a petition for the payment out of court of a sum of £2,849 6s. 11d. Consols, and a sum of £98 [illegible] cash, standing in court to an account entitled, "The account of the infant defendant, Mary Elizabeth Moore."

By an order made on the further consideration of the action on the 17th of July, 1872, it was ordered that one moiety of the residue of a sum of £[illegible] (after providing for certain payments thereby directed to be made) should be carried over to a separate account entitled, "The account of the infant defendant, Mary Elizabeth Moore." The moneys were duly carried over and invested in Three per Cent. Consolidated Annuities, and the dividends thereon (subject to the payment thereout to the infant's father of an allowance of £[illegible] a year for her maintenance and education, pursuant to an order dated the 17th of February, 1873) were accumulated. The infant attained twenty-one on the [illegible] of February, 1888. The petition was presented by her and her father, and it asked that out of the cash sum of £6 17s. might be paid to the father in respect of the allowance for maintenance from the 16th of January, 1888, to the 28th of February, 1888, and that the residue of the cash and the Consols might be respectively paid and transferred to Mary Elizabeth Moore.

The petition was not served on anyone.

Dibdin, for the petition.—[North, J., asked why the application was not made by summons in chambers under rule 2, sub-rule 1, of order 55.] Having regard to the decision of Pearson, J., in *In re Rhodes*, [illegible] W. R. 270, 31 Ch. D. 499, it was thought that the application ought to be by petition.

He referred to *In re Broadwood*, 55 L. J. Ch. [illegible], [illegible] W. R. Dig. 214.

North, J.—In the present case I will not [illegible] the costs of the petition, but I can see no reason why this application should not have been made by summons in chambers. In any case of real difficulty I [illegible] always allow the costs of a petition even if the application might have been made by summons, but I [illegible] go the length of saying that in all cases where the sum exceeds £1,000 a petition should be presented. I do not think the mere fact that the fund exceeds £1,000 is sufficient to justify the presentation of a petition. Rule 2, sub-rule 1, of order 55 prescribes no limit of amount in a case where the title to the fund "depends only upon proof of the identity or the birth, marriage, or death of any person." If Pearson, J., in *In re Rhodes*, intended to decide that a petition could properly be presented in every case in which the fund exceeds £1,000, I cannot agree with him. I do not, however, think he did so intend to decide. The [illegible] in *In re Rhodes* shows that the title of the account in that case must have been entirely different from that of the account in the present case. Under the circumstances, however, the fund belonging to the petitioner I will allow the costs of the petition.

Solicitors, *Bridges, Sautell, & Co.*

(a.) Reported by G. R. Jeffery, Esq., Barrister-at-Law.

Chan. Div.
North, J. } Feb. 7.

In re DAVIES.
DAVIES *v.* DAVIES. (*a.*)

Practice—Jurisdiction—Originating summons—Question arising between legal devisee and another person—Rules of Supreme Court, 1883, *ord.* 55, *rr.* 3, 5.

The court has no jurisdiction, under ord. 55, *r.* 3, *to decide, on an originating summons as between a legal devisee and another person, any question which would not have arisen in the administration of the testator's estate or the trusts of his will.*

Originating summons.

This was an originating summons taken out by John Davies, one of the legal devisees under the will of William Davies (who died on September 20, 1846), for an order declaring that upon the true construction of the will the freehold hereditaments mentioned therein were devised to, and became vested in, the plaintiff and Timothy Davies in fee simple as joint tenants and not as tenants in common. Timothy Davies was dead, and the summons was served on the devisees in trust and the residuary devisees under his will. The executors and trustees of the original will were not served.

The summons was adjourned into court.

J. G. Wood, for the plaintiff.

Everitt, Q.C., and *Stutfield*, for the defendants.—The court has no jurisdiction under ord. 55, r. 3, to decide questions arising between a legal devisee and someone else, and which would not have arisen in the administration of the estate or the execution of the trusts of the will, and this is shown by rule 5 (*b*), which directs that where the summons is taken out by any person other than the executors, administrators, or trustees the summons must be served on the executors, administrators, or trustees.

They referred to *In re Carlyon, Carlyon* v. *Carlyon*, 35 W. R. 155.

NORTH, J.—I am of opinion that I have no jurisdiction to decide this question on an originating summons. In my opinion rule 3 of order 55 only gives the court jurisdiction to try on an originating summons questions arising in the administration of an estate or the execution of the trusts of a will, and which under the old practice could not have been decided without a general decree for administration of the estate or execution of the trusts.

It does not give the court jurisdiction to decide between a legal devisee and someone else any question which would not have arisen in the administration of the estate. I adhere to the view which I expressed in *In re Carlyon*. The summons must be dismissed, with costs, but, as the objection to the jurisdiction was not taken in chambers, I shall not allow the defendants the costs of the adjournment into court.

Solicitors, *Helder & Roberts; Thomas Levell.*

Chan. Div.
Kekewich, J. } April 20, 21, 23.

WHELAN *v.* PALMER. (*b.*)

Power to jointure—Escrow—Corrupt bargain for the benefit of third party.

W. had, under his father's will, a power of appointment to the extent of £200 per annum for the purpose of jointuring his wife. An arrangement was come to between W. and his wife, from whom he was living apart, in pursuance of which W. was to execute an appointment to that amount in favour of his wife, who was thereupon to assign £60 per annum, part of the appointed sum, to one T., with whom W. was living. The deed of appointment was executed, but the wife refused to execute the assignment of the £60 to T.

Held, in an action by the wife claiming a declaration that the power of appointment was validly exercised to the extent of £140, that the appointment would never have been made at all except for effectuating an unauthorized purpose, and, therefore, that the action must be dismissed.

The statement of the law in Sugden on Powers, 8th ed., p. 712, *disapproved, but followed.*

Held, also, that the appointment in favour of the wife was an escrow, being intended, to the knowledge of the husband and wife, only to take effect on condition of the wife assigning a portion of the jointure-moneys to a third party not an object of the power.

In April, 1886, W. H. C. Whelan had, under the will of his late father, a power of appointing in favour of his wife a rent-charge not exceeding £200, to be charged on certain estates devised by the will. Whelan was, however, at this time separated from his wife (the plaintiff) and was living with a Miss Thompson. He had no property at his disposal, but was anxious to make some provision for Miss Thompson. The person entitled to his father's estate after his death was his sister, Mrs. Palmer, the first defendant, and he at first attempted to make an arrangement with her, under which the power of jointuring was not to be exercised at all if Mrs. Palmer made a provision for Miss Thompson. This, however, never came to anything, and Whelan accordingly entered into negotiations with the plaintiff for an arrangement under which he was to execute the power of jointuring to the full extent (£200 a year) in her favour, and she was to execute a deed securing an annual sum of £60 to Miss Thompson. On the 23rd of April, 1886, he accordingly signed and sealed a deed poll appointing, as from the day of his decease, a rent-charge of £200 a year out of the estate. Three days afterwards Whelan died. The £60 a year was never secured to Miss Thompson, and in the present action Mrs. Whelan sought a declaration that she was entitled to a rent-charge of £140 a year, and consequential relief.

Barber, Q.C., and *R. J. Parker*, for the plaintiff.—The law is more favourable to the recognition of the execution of powers when the power is one of jointuring the wife—this power is validly exercised to the extent of £140 for the wife's benefit: *Aleyn* v. *Belchier*, 1 Eden. 132, 1 W. & T. L. C. in Equity, 6th ed., at p. 437; *Lane* v. *Page*, Amb. 233; *Baldwin* v. *Roche*, 5 Ir. Eq. 110. The exercise of a power by a father in favour of his children is a different thing, and it is this that distinguishes *Daubeny* v. *Cockburn*, 1 Mer. 626. There is no fraud on the power—the remainderman is not injured by this appointment. We admit the appointment is bad as to the £60, but we say it is good as to the rest: Sugden on Powers, 7th ed., vol. 2, p. 188, 8th ed., pp. 609, 612; *Rowley* v. *Rowley*, Kay, 242, 259, 2 W. R. Dig. 22. The court will lean towards upholding this appointment, as, but for the bargain, we do not know that the appointor would have exercised his power at all, in which case the wife would have been worse off.

Warmington, Q.C., and *Alexander Young*, for the defendants.—The plaintiff is entitled to relief neither on the law nor the facts. [KEKEWICH, J.—If Lord St. Leonards and Wood, V.C., treat the question as settled would it be right for me, as a judge of first instance, to treat it as unsettled?] Lord St. Leonards cannot alter the effect of the decisions. *Daubeny* v. *Cockburn*

(*a.*) Reported by G. E. JEFFERY, Esq., Barrister-at-Law.
(*b.*) Reported by C. H. F. CRESSER, Esq., Barrister-at-Law.

is directly against the plaintiff: *Topham* v. *Duke of Portland*, 11 W. R. 507, 1 De G. J. & S. 517. Here the first object is to benefit Miss Thompson, but the appointment expresses the wishes of the appointor, without mentioning her; you cannot give effect to an intention against the clear and express wish shown in the deed. It would be a fraud on the appointor. Again, Whelan never appointed at all. The appointment was subject to the performance of a condition which was never fulfilled, therefore the appointment never took place, and the instrument is merely an escrow. The plaintiff wants to have the benefit without complying with the condition. This the court will not assent to. The desire to benefit Miss Thompson was the *causa sine quâ non*, so the appointment is bad: *In re Turner's Settled Estates*, 33 W. R. 265, 267, 28 Ch. D. 205, 217, per Fry, L.J.

Barber, in reply.—There is no fraud on the appointor; he made a bargain with the plaintiff, which she agreed to. As to the question of escrow, the plaintiff has merely to execute the agreement as to the £60 now, and that will make the deed good. [KEKEWICH, J., referred to *Columbine* v. *Penhall*, 1 W. R. 272, 1 Sm. & Giff. 228, and *Fraser* v. *Thompson*, 7 W. R. 678, 4 De G. & Jo. 659.]

Farwell, for the trustees of the will.

KEKEWICH, J.—This case raises a question which has not been raised for a great many years. The plaintiff's main argument is that, although the appointment to Mrs. Whelan, if made under any other sort of power, could not have stood, the law makes an exception in the case of appointments under powers of jointuring. This contention is based upon a passage in Sugden on Powers (vol. 2, p. 188, 7th ed.) and the case of *Rowley* v. *Rowley*, Kay, at p. 259, where Wood, V.C., comments upon Lord St. Leonards' deductions; and the learned author, in his 8th edition, p. 612, refers to this case before Wood, V.C., as supporting his own previous statement. With all respect to the memory of Lord St. Leonards, I am unable to see how he arrived at the conclusion stated by him, or how the cases he cites support it. Wood, V.C., at p. 260, quotes Sugden on Powers as follows:—"Notwithstanding the case of *Daubeny* v. *Cockburn*, 1 Mer. 626, it is now too late to have that principle as to jointures changed," and he considers himself bound by these words, though he does not approve of them, and is careful not to make them his own. I have been urged to disregard this case, but the judgment was pronounced thirty-four years ago. No doubt numerous deeds have been executed on the faith of its being a correct and reliable statement of the law, and I cannot, as a judge of first instance, disregard it. I do not hesitate to say I do not understand it—it warps the principle of *Lane* v. *Page*, Amb. 233; but I am bound by it, and any departure from this principle must begin in a higher court. But the defendants took the point that the instrument was never delivered as a deed, but was merely an escrow. If the evidence of what occurred when the appointment was made had stood alone, I should have held that there was a good deed by delivery. But the deed was intended to benefit Miss Thompson, for whom Whelan was morally bound to provide. He had then no property of his own, and, with the help of his solicitor (who acted perfectly rightly in the interests of his client), availed himself of his power to jointure. But he had no intention of benefiting his wife. They were living apart, and he had revoked a will he formerly made in her favour, his intention being to benefit Miss Thompson, and, the bargaining with the remaindermen under his father's will having come to nothing, negotiations were made with the plaintiff to carry out an arrangement by which Miss Thompson was to have £60 a year out of the £200, for that is the effect of it, though this does not appear on the face of the deed. On the face of it it is a simple deed of appointment in favour of Mrs. Whelan, but, with her concurrence, there had been a deed prepared, securing £60 a year to Miss Thompson, and she knew that the jointure to herself was only to be made on these terms.

It is not surprising, therefore, that the appointment was taken by the lawyer's clerk to Mrs. Whelan with instructions that it was not to be delivered unless she executed the other deed. As far as Whelan could, he made her execution of that deed a condition precedent. When he executed the appointment it remained on the table, and was not taken possession of by anyone. It is not necessary, in delivering an instrument as an escrow, to say that it is so delivered; if the instrument is delivered upon condition, that constitutes it an escrow: *Nash* v. *Flyn*, 1 Jo. & Lat., at p. 175; *Kidner* v. *Keith*, 15 C. B. N. S., at p. 43. I have no doubt that the delivery was not intended to be absolute till the condition as to the provision for Miss Thompson was fulfilled, so the instrument was merely an escrow, as Mrs. Whelan had not fulfilled her part of the arrangement, and declined to do so. Mr. Barber says the condition is even now capable of fulfilment. The point is not at present open for decision, but it may some time be worth considering whether Mrs. Whelan can now fulfil it or whether she has not already elected to refuse to do so. Another point taken was, that the appointment of £200 was a fraud on the power. I dismiss the term "fraud" and prefer to speak of "execution." In law there was an execution of the power, but I know of no reason or authority why a power to jointure should be different from any other power with regard to the necessity for its being honestly exercised. Was this an honest exercise of the power—that is to say, for the purpose contemplated by the instrument creating the power? The power was created for the benefit of the wife, and it is said that to exercise it in any other way would be a fraud by defeating the object of the power. Without saying it was a fraud on the appointor, it might have that effect on the remaindermen, who get less by there being a charge on the estate under what was not a proper exercise of the power.

This view is supported by the cases cited in argument: *Wigson* v. *Garrat*, cited Ventr. 278, and Raym. 2[illegible]; *Digges' case*, 1 Rep. 173. On the evidence I hold that Whelan would never have given anything to his wife unless she would have benefited Miss Thompson. The bargain between them was that Mrs. Whelan was to have £200 if £60 a year out of it went to Miss Thompson. I look at the purpose of the parties and if the purpose is not an honest exercise of the power, the exercise of it is not good: *Topham* v. *Duke of Portland*. The power was exercised only for the benefit of Miss Thompson, and to hold that that was a good exercise of the power would be to decide that it might be exercised to effect something which was never intended by the settlor. On the other hand, to hold it good, excluding Miss Thompson, would be quite contrary to the intention of the parties. It was settled in *Topham* v. *Duke of Portland*, that where the honest part could be severed, effect could be given to that; and it is said here that £140 was attributable to honesty. The answer is that an appointment for an authorized purpose would never have been made at all except for effectuating the unauthorized purpose. The action must be dismissed with costs, including those of the trustees.

Solicitors for the plaintiff, *Kime & Hammond*.

Solicitors for the defendants, the Palmers, *Flux, Sc[illegible] & Co.*

Solicitors for the trustees, *Fladgate & Fladgate*.

Q. B. Div. (Cave and A. L. Smith, JJ.) April 13, 23.

REG. v. JORDAN. (a.)

County courts—Committal for contempt—Jurisdiction of superior court to review committal—Form of warrant for "fine or imprisonment in default"—Form of release—County Courts Act, 1856 (9 & 10 *Vict. c.* 95), *s.* 113—*County Court Rules,* 1886, *ord.* 25, *r.* 35, *and Forms* 55 *and* 297.

The superior court will decline to exercise any appellate jurisdiction over the county court in matters of fine or committal for contempt, except where there is no reasonable evidence of any contempt having been committed, and the liberty of the subject requires protection.

Ex parte Pater, 12 *W. R.* 823, 33 *L. J. M. C.* 142, *followed.*

In cases of committal for imprisonment simply, or for imprisonment in default of payment of a fine, the form of warrant No. 297 *in the County Court Rules,* 1886, *is the only one applicable, and the gaoler has no power to remise the fine or to discharge the prisoner upon its payment, but the fine must be paid into court and application be made to the judge who committed the prisoner to order his discharge. The form of the order for commitment under the Debtors Act,* 1869 (32 & 33 *Vict. c.* 62), *given in Form* 55 *of the County Court Rules,* 1886, *does not apply to imprisonments in default of the payment of a fine.*

To observe to a judge, in the course of and in reference to his judgment, that "That is a most unjust remark" is an insult to the court in whatever manner expressed, and, if not withdrawn, it amounts to such a "wilful insult" as is contemplated by section 113 *of the County Courts Act,* 1856.

Appeal by way of rule *nisi* to show cause why an order of committal made by his Honour Judge Jordan in the county court of Staffordshire, sitting at Newcastle-under-Lyme, should not be quashed.

The facts of this case were as follows:—

An action had been tried in the county court at Newcastle-under-Lyme between a Mrs. Rose, as plaintiff, and William Turner, a solicitor, as defendant, for the recovery of £10 which the plaintiff said that she had paid to Turner for the purpose of obtaining a Queen's Counsel's opinion, but which she alleged had not been so expended. The jury found a verdict for the plaintiff. Turner applied to Judge Jordan for a new trial. While the judge was in the act of refusing the application, Turner remarked that he was about to take proceedings against the plaintiff for perjury. The judge said that "because the jury had found a verdict against him, he (Turner) thought they must be wrong. Turner was now threatening the plaintiff with a prosecution and all sorts of things, but he (the judge) might say that he would have found the same verdict himself, for he considered that Turner had got the £10 from the plaintiff in order to obtain counsel's opinion, which he did not get." Thereupon Turner rose and said, "That is a most unjust remark." The judge committed Turner into custody for contempt, and upon his declining to apologize at the end of the sitting, on the ground that to submit to such remarks would be a reflection on his own character which he could not admit was due, the judge ordered him to pay a fine of £5, or, in default, to be imprisoned for six days.

The warrant was subsequently made out in the form given under the County Court Rules, 1886, for warrants of attachment, reciting that, "Whereas, at a court holden on this day, A. B. wilfully insulted his Honour the Judge during his sitting in court. These are, therefore, to require you, the said high bailiff, &c., to take the said A. B. and to deliver him to the governor of the above-named prison, and you, the said governor, to receive the said A. B. and him safely to keep in the said prison for days from the arrest under this warrant or until he shall be sooner discharged in due course of law."

The appellant obtained a rule *nisi* to show cause why the above order of and commitment by Judge Jordan should not be quashed.

Henn Collins, Q.C., and *C. Russell,* showed cause for the county court judge against the rule.—The words used imported contempt such as the judge had power to deal with under section 113 of 9 & 10 Vict. c. 95. This court will not review the exercise of such discretion: *Ex parte Pater,* 12 W. R. 823, 33 L. J. M. C. 142. The judge has either power absolutely to commit or to impose a fine, with imprisonment only in case of default of its payment. Here he imposed a fine and committed in default, not until payment of the fine. The warrant need not disclose any other sentence than the committal: Heywood's County Court Practice, p. 809.

Willes, Q.C., and *V. Williams,* for the appellant, in support of the rule.—There was no "wilful insult"; there was no evidence of "intentional" insult. The judge's sentence was £5 fine or in default six days' imprisonment. The warrant was only in the form for committals under the ordinary jurisdiction of the court. The prisoner was ordered to be detained for six days without any power to obtain release on payment of the fine. This is expressly given by the form of warrant in schedule A of the Debtors Act (32 & 33 Vict. c. 62). The warrant should be made out exactly in the terms of the order, and the only order is on the judge's note to the above effect. "Fine of £5 or six days' imprisonment."

Cur. adv. vult.

April 23.—CAVE, J.—A rule was obtained in this case to show cause why a writ of *certiorari* should not issue to remove into this court all orders made by Judge Jordan, in a county court held at Newcastle-under-Lyme, against one Turner, a solicitor, for contempt of court, for the purpose of having such orders quashed; on the ground, first, that there was no reasonable ground for the court to conclude that a wilful insult had been offered, and, secondly, that the commitment of Turner was illegal in form. The proceedings were taken under the County Courts Act, 1846 (9 & 10 Vict. c. 95), s. 113, under which, "If any person shall wilfully insult the judge . . . during his sitting or attendance in court . . . or shall wilfully interrupt the proceedings of the court, or otherwise misbehave in court, it shall be lawful for any bailiff or officer of the court, by the order of the judge, to take such offender into custody and detain him until the rising of the court; and the judge shall be empowered, if he shall think fit, by a warrant under his hand, and sealed, to commit any such offender to prison . . . for any time not exceeding seven days, or to impose upon such offender a fine not exceeding £5 for every such offence, and in default of payment thereof to commit the offender to prison for any time not exceeding seven days, unless the said fine be sooner paid."

Now it has been decided in *Ex parte Pater* that this court is not a court of appeal from inferior courts in matters of contempt. Its only power to interfere is to protect the liberty of the subject where there is no reasonable evidence on which the inferior court could come to the conclusion that any contempt had been committed or wilful insult been offered. I am not sure that even then the court was not going somewhat beyond its

(a.) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

jurisdiction in regard to ordinary cases of contempt. That case, at any rate, must not be pressed as a precedent for the interference of this court in every case where it is alleged that there has been an excess of jurisdiction. It simply lays down the rule that for the protection of the liberty of the subject, where there has been no reasonable evidence before the inferior court of any contempt or insult, this court may interfere. In this case there is abundant evidence upon which the county court judge could conclude that a contempt had been committed. Turner interrupted the judge in the course of his judgment with the observation, "That is a most unjust remark." However said, such an observation is a gross insult to any court of justice. To accuse a judge of corruption might be a worse insult, but a charge of injustice is as gross an insult as can be imagined short of that; and justice cannot be administered with respect if every disappointed suitor is to be allowed to indulge in such observations to the court. That would be enough to dispose of this case on its merits, but having regard to the preservation of due respect for, and decorum in, county courts, I must express my own view of this case more fully. [The judge here recapitulated the facts of the case, and expressed his opinion to the effect that, although in applications for new trials judges might generally confine themselves to remarking that there was sufficient evidence upon which the jury might rightly have come to their decision, yet, in this case, when the judge learnt from Turner that proceedings for perjury were to be taken against the plaintiff, he would have been wrong in keeping silence, and was right in not letting such proceedings be announced without his expressing an opinion that they did not seem to him justifiable, as the verdict of the jury was one in which he absolutely concurred.] As to the argument that there was no evidence that the insult was "wilful," that might have been reasonably maintained had Turner afterwards expressed any regret for words possibly uttered in the heat of the moment; but he did not do so. On the contrary, he insisted on the propriety of the observation, and declined to make any adequate apology.

On the second point, as to the informality of the commitment, on the ground that the sentence of the judge was for a "fine of £5 or imprisonment in default," while the warrant did not express such a sentence, but merely ordered "imprisonment for six days or until discharged in due course of law," I have to observe that the warrant is in the only form given by the County Court Rules, 1886. Only one form is given for commitment, whether for imprisonment simply, or for imprisonment in default of payment of a fine. It is said that the warrant ought to have included the words "or until he shall pay £5," under the form given in schedule A of the Debtors Act, 1869 (32 & 33 Vict. c. 62), and in accordance with the provisions of section 5 of that Act. But on examination of the case of commitment under the Debtors Act, 1869, there is a difference in practice in two respects from commitment in default of fine for contempt. By ord. 25, r. 35, of the County Court Rules of 1886 it is provided, as to commitments under the Debtors Act, that "the sum indorsed on the order of commitment as that upon payment of which the prisoner may be discharged may be paid into the court from which the commitment order was issued, or to the gaoler in whose custody the prisoner is." That order expressly applies to cases of commitment under the Debtors Act, 1869. Mr. Willes could not point to any section of an Act, or any order, which give power to the gaoler to receive payment of fines in such a case as this of commitment for default of payment of a fine. There is a further difference. In commitment for non-payment of a judgment debt the warrant is really in the same form as the present warrant—namely, in the form given under Form 55 of the Rules of 1886 ending with the words "or until discharged by due process of law"—but the gaoler has power to receive the amount of money due under a judgment debt as stated in the order of commitment, which statement is necessary for the information of the gaoler, on tender of which, by virtue of the order, the prisoner is entitled to his discharge. There is no form of order here which entitles a prisoner committed for a wilful insult to a judge to his discharge upon such tender of the fine, nor is the gaoler entitled by any order to receive it. The ordinary rule, therefore, prevails. The money must be paid into the court whence the order for commitment issued, and on the certificate of the registrar of such payment application is made to the judge for an order of discharge. That is the only way, so far as I can discern, by which a prisoner committed for the non-payment of a fine can obtain his release. On the merits, therefore, of the case the order of the county court judge was clearly right, committing Turner for contempt, and on the technical objection the order is clearly good and within the authority of the Act. The motion, therefore, fails, and the rule must be discharged.

A. L. SMITH, J.—I agree.

Motion dismissed.

Solicitor for the appellant, *G. H. Carthew.*

Solicitors for the respondent, *Smiles, Blayney, Ollard*, for *Slaney*, Newcastle-under-Lyme.

Q. B. Div. (Field and Wills, JJ.) April 11.

FARMER v. LONDON AND NORTH-WESTERN RAILWAY CO. (*a.*)

Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), *s.* 133—*Liability of railway company to make good deficiency in poor rate—County rate—Borough rate—County Rates Act*, 1852 (15 & 16 Vict. c. 81), 26—*Municipal Corporations Act*, 1882 (45 & 46 Vict. c. 50), *s.* 145.

Where a railway company is liable to make good deficiency in a poor rate under section 133 *of the Lands Clauses Consolidation Act*, 1845, *in calculating the deficiency both the county rate and, in the case of a parish wholly within a borough, the borough rate are to be included in the poor rate.*

Special case.

The plaintiffs, the overseers of the township of Salford, claimed from the defendant railway company the payment of a sum of money to make good a deficiency in a poor rate caused by certain land having been taken and used for the purposes of the defendant's railway. The land was in the township of Salford, and had been taken by the company under the powers of their special Act, with which the Land Clauses Consolidation Act, 1845, was incorporated; and in consequence of the land being so taken and used there was a deficiency for the year 1886-7 in the assessment to the poor rate in respect of the said land.

Section 133 of the Lands Clauses Act enacts that the promoters become possessed under their compulsory powers "of any lands charged with the land tax or liable to be assessed to the poor's rate, they shall from time to time, until the works shall be completed, be assessed to such land tax or poor's rate, be liable to make good the deficiency in the several assessments of land tax and poor's rate, by reason of such lands having been taken or used for the purposes of the works."

The township of Salford was situate within the borough of Salford, and was, therefore, liable to each

(*a.* Reported by F. G. RUCKER, Esq., Barrister-at-Law.

bute to the borough rate; it was also within the county of Lancaster, and, therefore, liable to contribute to the county rate. The plaintiffs claimed that they were entitled to reckon both the borough rate and the county rate as parts of the poor rate for the purpose of calculating the deficiency. The defendants contended that neither the borough rate nor the county rate ought to be so reckoned.

Henn Collins, Q.C. (*Howland Roberts* with him), for the plaintiffs.—By section 145 of the Municipal Corporations Act, 1882, the plaintiffs, as overseers, are expressly bound to pay the contribution of the parish to the borough rate out of the poor rate. By section 26 of 15 & 16 Vict. c. 81, the county rate is to be paid by the overseers, and the only fund out of which the overseers can get the money is the poor rate. Clearly, borough rate and county rate are included in poor rate.

Bousquet, Q.C. (*Moon* with him), for the defendants.—Section 133 of the Lands Clauses Act ought to be construed according to the intention of the Legislature in 1845. At that time borough rates and county rates existed and were well known, and were quite distinct from the poor rate; and section 133 imposes on the railway company a liability to make good two things only—viz., the land tax and the poor rate. The county rate is imposed by the justices, and was at the time of the passing of the Lands Clauses Act regulated by 55 Geo. 3, c. 51: see section 12.. And 15 & 16 Vict. c. 81 does not say that the county rate is to come out of the poor rate. Similarly, the borough rate was then regulated by the Muncipal Corporations Act, 1835, s. 92, which created a borough rate in the nature of a county rate. Moreover, under the present Act of 1882 the borough rate may, in the case of a divided parish, be assessed and levied as a separate rate: see section 146.

Field, J.—This case raises an important question with regard to the liability of the defendants to make good a deficiency in the assessment to the poor rate of certain property which they have taken for the purposes of their railway—viz., whether in estimating the deficiency they are entitled to deduct certain amounts included in the poor rate assessment as and for a borough rate and as and for a county rate. The question turns on the construction of section 133 of the Lands Clauses Act. [His lordship read the section.] Is the amount contributed by the overseers in respect of the borough rate and the amount contributed as county rate to be taken into account in calculating the deficiency? I think there is a difference between the question as to the borough rate and the question as to the county rate. As to the borough rate, the matter appears very simple. The borough rate is the creation of the Municipal Corporations Act, 1835, section 92 of that Act enabling the council to make a borough rate in the nature of a county rate. But that Act is now repealed, and by the Act of 1882, s. 145, where a parish is wholly within a borough, the overseers are to pay the borough rate out of the poor rate. This does not apply to the case where a parish is partly within a borough and partly without, which case is provided for in the next section, and as to which I do not intend to give any decision. But Salford is a parish wholly within a borough; therefore, clearly section 145 applies, and the borough rate has to come out of the poor rate; and consequently the deficiency in the borough rate is a deficiency which the defendants are liable to make good. As to the county rate, the matter is not quite so clear. Originally the county rate was made on a distinct assessment. But 15 & 16 Vict. c. 81 has provided a machinery by which it is to be raised. The justices make the rate, and send precepts to the guardians, and the guardians have to raise the moneys required in the same manner as the money required for the relief of the poor. That is, it is raised by precepts sent to the overseers. And it must be that they are to pay it out of the poor rate, as they have no other source from which they could pay it. Therefore I think that the borough rate and the county rate are parts of the assessment to the poor rate, and that the defendants are liable to make good the deficiency therein.

Wills, J., concurred.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Chester, Mayhew, Broome, & Griffiths*, for *Brett & Barclay*, Manchester.

Solicitor for the defendants, *C. H. Mason.*

Q. B. Div. (Field and Wills, JJ.) April 17.

Masters *v.* Green. (*a.*)

Landlord and tenant—Exclusive right of grazing—Protection from distress—46 & 47 Vict. c. 61, s. 45.

Cattle placed in a field under an agreement between their owner and the tenant for the exclusive right of grazing the field are not "taken in to be fed" by the tenant so as to be protected from distress for rent by virtue of the Agricultural Holdings Act, 1883 (46 & 47 *Vict. c.* 61), *s.* 45.

Semble, 46 & 47 *Vict. c.* 61, *s.* 45, *only applies to stock which is agisted, the words of the Act being a mere paraphrase of that term.*

This was an appeal from a decision of the county court judge of Bath. It appeared that the defendant Green was the landlord and one Sterry was the tenant of a certain field. Sterry verbally agreed with the plaintiff Masters that he (Masters) should have "the exclusive right of eating the grass of the said field for four months" at a certain price. Rent being due from Sterry to the defendant, the defendant distrained on some beasts belonging to the plaintiff which were in the said field, and thereupon the plaintiff brought his action against the defendant in the county court. Judgment being given for the defendant, the plaintiff appealed.

Clay, for the plaintiff.—These animals are within the limitations in the Agricultural Holdings Act, 1883, s. 45. That Act was intended to protect any animals of third persons which are on the land of a tenant, and the words of the enactment should have a wide and popular meaning given to them.

Blake-Odgers, for the defendant, was not called on.

Field, J.—This point arises in an action by a grazier against a landlord for distraining his cattle. The county court judge, looking at the facts of the case, construed the 45th section of the Agricultural Holdings Act, 1883, as not protecting these cattle. The question for us to decide is whether that construction be the correct one, and whether these cattle do come within the protection of the section. Looking at the ordinary course of farming practice, the farmer having surplus eatage and wishing to turn it to profit may do so in two ways, he may either take in other persons' stock along with his own—a proceeding which is known as agistment—or he may sell the right of occupying the surface of the soil for a given period of time. The latter of these courses was pursued in the present case; and although there is authority for saying that such a transaction amounts to a letting, yet in the present case we are not bound to decide whether it does or does not do so, because Mr. Clay has to satisfy us that this transaction is within the statute. The section enacts that stock taken

(*a.*) Reported by Cecil Chapman, Esq., Barrister-at-Law.

in by the tenant to be fed at a fair price shall not be distrained where there is other sufficient distress to be found, and if distrained, there shall not be recovered by such distress a sum exceeding the amount agreed to be paid for the feeding. The landlord can still distrain the beasts, but he cannot get more than the price of the agistment. In this case there was no "taking in by the tenant," and I very much doubt whether there was a fair price, for the price was paid for the occupation of the land, not for the feeding. It seems to me, therefore, that the case does not come within the statute, and that this appeal must therefore be dismissed.

Wills, J.—The only question for us to decide is whether the agreement come to between the parties falls within the Agricultural Holdings Act, 1883, s. 45. And the answer to this question depends on the further question whether in this case live stock has been taken in by the tenant to be fed at a fair price. It is no doubt the case that this statute was passed to prevent the property of one person being taken for another's debt, but it is also quite plain the words of the statute do not cover all cases in which a person may thus suffer. The only safe rule is to follow the words of the statute, and these only apply to a proceeding perfectly well known as agistment; and it must not be taken that the Act which paraphrases this term and accurately describes this proceeding ought to be construed to mean something else. The transaction between the parties in this case, which was the granting of an exclusive right to feed any number of cattle for a lump sum, cannot be called an agistment, and therefore does not fall within the statute. In my opinion the county court judge was right and this appeal must be dismissed.

Solicitors for the plaintiff, *Bolton, Robbins, Busk, & Co.*, for *Hobbs & Davies*, Wells, Somerset.

Solicitors for the defendant, *Prior, Church, & Adams*, for *Welsh, Son, & Chubb*, Wells, Somerset.

IN BANKRUPTCY.

Q. B. Div. (Cave, J.) April 26.

Ex parte Harris. *In re* Gallard. (*a.*)

Solicitor—Costs—Sale of mortgaged property by trustee in bankruptcy—Percentage—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44), *General Order, s.* 2, *and schedule* 1—*Bankruptcy Rules*, 1886, *Appendix, part* 2, *s.* 7, *r.* 2.

Certain property of the bankrupt which was subject to a mortgage was sold by the official receiver as trustee in the bankruptcy, the mortgagee executing a reconveyance, and his debt being paid out of the purchase-money.

Held, that a percentage on the whole amount received for the said property was properly allowed by the taxing master to the solicitors who acted for the official receiver in carrying out the sale.

Appeal by the trustee in bankruptcy from the taxation by the registrar of the Brighton County Court of certain bills of costs.

The case raised the important question whether, upon a sale of property of the bankrupt which is subject to a mortgage by the official receiver as trustee, his solicitor is entitled to be paid a percentage under the Solicitors' Remuneration Act upon the whole amount received or only upon the value of the equity.

On July 26, 1887, a petition was presented against the debtor Gallard, upon which he was adjudicated bankrupt, the official receiver acting as trustee in the bankruptcy until October 14, when a creditor's trustee was appointed and received his certificate.

During the time that he was trustee the official receiver entered into a contract for the sale of certain property of the bankrupt for £4,750, the property being subject to a mortgage for £3,000, and on October 18 the sale was duly completed by the trustee and the official receiver. The mortgagee did not join, but a reconveyance was executed by him, and the trustee paid the £3,000 out of the purchase-money.

On taxation the county court registrar allowed to Messrs. Griffiths & Eggar, who had acted throughout for the official receiver, a percentage upon the whole amount of £4,750, but an objection to this allowance was taken by the trustee in bankruptcy.

Sidney Woolf, for the trustee.—What the trustee contends is that the percentage should only be allowed on the £1,750 which the estate actually received. The effect of rule 2 of section 7, part 2 of the appendix to the Bankruptcy Rules, 1886, is to give the trustee's solicitor his percentage only on the proceeds of sale so far as the trust estate receives them. He is to be paid only out of the proceeds of sale. If the trustee's solicitor is to receive a commission on the whole amount, including the mortgage, the estate would be very heavily burdened, especially where, as in this case, there are several incumbered properties.

He referred to the General Order made in pursuance of the Solicitors' Remuneration Act, 1881, s. 2, and also to *In re Greys Brewery Co.*, 56 L. T. N. S. 298, 35 W. R. Dig. 193.

Muir Mackenzie, for the solicitors.—The matter is clear under the Solicitors' Remuneration Act and the Bankruptcy Rules. No part of the proceeds of sale were chargeable with the percentage of the mortgagee's solicitor, and the trustee's solicitors are entitled to percentage on the whole amount.

Cave, J.—The decision of the taxing master was right, though some little difficulty does seem to arise on the Bankruptcy Rules. The provisions in the Solicitors' Remuneration Act are tolerably clear. Where there is a vendor of mortgaged property, and the solicitor sells free from incumbrance, there is no reason why he should not have his percentage on the amount received. Occasionally the property is sold subject to incumbrance, and such a case is provided for by rule 9 of the schedule to the General Order under the Solicitors' Remuneration Act, 1881. The incumbrance is to be deemed part of the purchase-money, and the solicitor gets his percentage. Whether the solicitor sells subject to or free from incumbrance, therefore, his percentage is reckoned on the total value of the estate. Then we come to the Bankruptcy Rules, 1886. If rule 2 of section 7, part 2 of the appendix to those rules stopped at the words immediately preceding the proviso it is clear that the solicitor would be entitled to percentage on the gross value of the property. But the rule goes on, "Provided that, in cases of sales of mortgaged properties, the trustee's solicitor, if his remuneration shall be under schedule 1 of the existing order, shall only be entitled to percentage upon so much of the proceeds of sale as shall not be chargeable by the mortgagee's solicitor with the percentage, and such percentage shall be payable only out of the proceeds of sale." Now, whether there is or is not a state of affairs to which that is applicable I cannot pretend to say offhand. The taxing master, who is a man of great experience, appears to doubt whether any such state of affairs can arise. But, whether the circumstances can occur or not, it is clear that the meaning is that the percentage is not to be paid twice over—once to the mortgagee's solicitor and once to the trustee's solicitor—so that the estate may not be charged with a double

(*a.*) Reported by C. F. Morrell, Esq., Barrister-at-Law.

percentage. Here the mortgagee's solicitor is not entitled to any part of the percentage. He had nothing to do with the sale, and the appeal must be dismissed, with costs.

Appeal dismissed, with costs.

Solicitors for the trustee, *Ashurst, Morris, & Crisp.*

Solicitors for the solicitors, *Griffiths & Eggar.*

Court of Appeal.

From Chan. Div. May 8, 9, 10.

In re ALMADA AND TIRITO CO.
ALLEN'S CASE. (*a.*)

*Company—Issue of shares at a discount—Registered contract—*Ultrà vires—*Companies Act,* 1862 (25 & 26 *Vict. c.* 89), *ss.* 7, 8, 12—*Companies Act,* 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

A company incorporated under the Companies Act, 1862, as a company limited by shares cannot, either by means of a stipulation for that purpose contained in its articles of association or by special resolution, issue shares on such a footing as to render the shareholder only liable to pay, in the event of a winding up, a sum less than the amount unpaid on each share having regard to the amount—i.e., the money value—of each share as fixed by the memorandum of association under the requirements of section 8, *sub-section* (5), *of the Act of 1862; and therefore an issue of shares on such terms, even though made under a contract in that behalf which has been duly registered under section* 25 *of the Act of 1867 is* ultrà vires.

In re Plaskynaston Tube Co., 23 *Ch. D.* 542, 32 *W. R. Dig.* 41, *and* In re Ince Hall Rolling Mills Co., 1 *Ch. D.* 545n, *overruled.*

The memorandum of association of a company incorporated under the Companies Acts as a company limited by shares stated its capital to be £210,000, *divided into* 210,000 *shares of* £1 *each, and that, on any increase of capital by special resolution, the company might attach to shares any preferential rights as to dividend or capital or any other special incidents or restrictions. By a special resolution duly passed and confirmed, it was declared that the capital of the company should be increased to* 420,000 *shares by the issue of* 210,000 *shares of* £1 *each, credited with* 18s. *per share paid. By a contract in writing made between the company and certain applicants for shares whose names were subscribed to the contract, it was agreed that the company should allot and issue to each subscriber the number of shares specified opposite their respective names, and that the shares should be issued and held as shares of* £1 *each,* 18s. *per share credited as paid up thereon, making, on a deposit of* 1s. *per share, the sum of* 19s. *paid up on each share. This contract was duly registered under section* 25 *of the Act of* 1867, *and each subscriber received notice of the issue and of the allotment, but no certificate for these shares had been given. One of the allottees, while the company was still a going concern and solvent, applied, under section* 35 *of the Act of* 1862, *to have his name taken off the register.*

Held, that the issue of the shares on such a footing, and notwithstanding the registered contract, was ultrà vires, *and that the application should be granted.*

Appeal from a decision of Chitty, J. (reported 32 SOLICITORS' JOURNAL, 240).

On the 1st of April, 1885, a company called the Almada and Tirito Co. (Limited) was incorporated under the Companies Acts. The objects of the company, as stated in the memorandum of association, were to acquire the undertaking and property of a former company called the Almada and Tirito Consolidated Silver Mining Co. (Limited), thereinafter referred to as the old company, to carry on the business of mining in all its branches and to purchase, work, hold, and sell mines and property for such purposes.

Clause 5 of the memorandum of association was as follows:—"The capital of the company is £210,000, divided into 210,000 shares of £1 each, and on any increase of capital by special resolution the company may attach to shares any preferential rights as to dividend or capital or any other special incidents or restrictions."

The articles of association provided as follows:—

Article 1.—The regulations of Table A. in the schedule to the Companies Act, 1862, shall apply to the company, except so far as the same are modified by or are repugnant to the following regulations.

Article 2.—The company may reduce its capital in the manner and with any of the incidents prescribed or allowed by the Companies Acts, 1867 and 1877.

Article 3.—The company may accept surrenders of shares, but no part of the company's assets shall be employed in the purchase of the company's own shares.

The greater portion of the original 210,000 shares was issued to persons who had been shareholders in the old company, and the directors of the new company, finding the capital of the company insufficient to properly develop and carry on the business of the company, communicated with the shareholders, and the following special resolution was duly passed at an extraordinary general meeting of the members of the company held on the 6th of June, 1887, and confirmed at a subsequent extraordinary general meeting on the 22nd of June—viz., "That the capital of the company be increased from 210,000 shares of £1 each to 420,000 shares of £1 each by the issue of 210,000 shares of £1 each, credited with 18s. per share paid with a deposit of 6d. per share."

This resolution was registered at the registry of joint-stock companies on the 7th of July.

On the 25th of June, 1887, the directors issued a circular referring to this special resolution, and proposing to offer the above 210,000 shares with 18s. per share credited as paid, and proposing that the sum of 6d. per share be paid on application, and the remaining 1s. 6d. per share be called up in sums of 6d. per share at intervals of not less than three months between each date of payment. There was appended to the circular this form of application to the directors for shares: "Gentlemen, having paid to your bankers the sum of £ , 1s. per share on shares of £1 each, being a deposit of 6d. and first call of 6d., with 18s. per share credited as paid thereon in the above company, I hereby agree to accept such shares and to pay the remaining calls thereon as mentioned in the circular of June 25, 1887; and I hereby authorize you to enter my name as owner of the said shares on the register . . .; and I hereby further authorize Mr. James Arthur Morgan to execute an agreement on my behalf for the purpose of effectually carrying out the resolution under which the new capital of 210,000 shares of £1 each was created by issuing the said shares, with 18s. credited as paid thereon."

On the 21st of December, 1887, the present appellant, T. C. Allen, signed the above form of application for 200 shares, and paid the sum of £10 to the company's bankers. On the 4th of January, 1888, an agreement was made between the company and James Arthur Morgan, on behalf of persons whose names appeared in the schedule thereto as applicants for the number of shares to be issued under the said special resolution set opposite their names respectively; the agreement, after

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

reciting the special resolution, and that the subscribers to the agreement had respectively applied for the number of shares to be issued under such special resolution set opposite their names respectively, and had deposited with such application a sum equal to 1s. per share on the number of shares which the subscribers had respectively applied for, declared that the company should forthwith procure the agreement to be filed with the Registrar of Joint-Stock Companies, and after the filing thereof should forthwith allot and issue to each subscriber the number of shares specified opposite their respective names; and that the said shares should be issued and held as shares of £1 each, with 18s. per share credited as paid up thereon, making, with the said deposit of 1s. per share, the sum of 19s. paid up on each share. Allen's name was entered in the schedule as a subscriber for 200 shares, numbered on the register 379,101 to 379,300. This agreement was duly filed with the Registrar of Joint-Stock Companies on the 4th of January.

On January 5 the directors sent an allotment notice to Allen informing him that he had been allotted, in accordance with his request, 200 shares in the company, and had been duly registered in the books of the company as the owner of the shares specified with 19s. paid thereon. No certificates of the new shares had as yet been issued. Allen and other shareholders subsequently became acquainted with the judgment of the Court of Appeal in *In re Addlestone Linoleum Co.* (*ante* p. 227, 37 Ch. D. 191), and on January 14 Allen and other shareholders wrote requesting to have their applications for shares at once cancelled and their names struck off the register, and a return of the amounts respectively paid by them, on the grounds that the judges in the case referred to had expressed an opinion that shares issued as partly paid up under special resolution were really issued at a discount, and that if so, even if an agreement had been registered the shareholders remained liable to pay the full amount of their shares in the event of a winding up, and, therefore, that the company were not in a position to carry out their undertaking to issue shares as 18s. paid. The company refused to accede to this, contending that the issue of the shares with 18s. credited as paid was legal, and that Allen and the other shareholders were not subject to any liability further than the liability of 1s. per share.

On February 3 Allen moved before Chitty, J., under section 35 of the Companies Act, 1862, to have the company's register rectified by striking out the applicant's name as the holder of the shares referred to, and for repayment of the amount paid by him on application for the same.

Counsel for the applicant, on the motion, admitted that the case was governed by the decision of Chitty, J., in *In re Ince Hall Rolling Mills Co.*, 23 Ch. D. 545n, but stated that doubts had been thrown on that decision by the *dicta* in the *Addlestone Linoleum Co. case*, and, therefore, that it was desired to have the matter in question decided by the Court of Appeal. It was admitted both at the hearing of the motion and on the appeal that the company was solvent and a going concern. Chitty, J., following his own decision in *In re Ince Hall Rolling Mills Co.*, dismissed the application.

Allen appealed.

Buckley, Q.C., and *Grosvenor Woods*, for the appellant.—In *In re Addlestone Linoleum Co.* both Cotton and Lindley, L.JJ., expressed an opinion that the issue, by a company incorporated under the Act of 1862, of shares at a discount in pursuance of a contract entered into with the subscriber for that purpose is invalid, even though the contract be registered under section 25 of the Act of 1867. No doubt Chitty, J., in *In re Ince Hall Rolling Mills Co.* and in *In re Plashynaston Tube Co.*, 23 Ch. D. 543, 32 W. R. Dig. 41, had previously decided that a power to issue shares at a discount contained in the articles of association of a company was not *ultrâ vires*, and, therefore, that a contract made with subscribers in pursuance of that power and duly registered under section 25 of the Act of 1867 was valid. Those decisions are inconsistent, however, with the *dicta* in *In re Addlestone Linoleum Co.* and also with the principles laid down in *Trevor* v. *Whitworth*, *ante*, p. 145, 12 App. Cas. 409; *per* Lord Macnaghten, p. 432 of 12 App. Cas. Section 8 of the Act of 1862 shows that the provisions of the memorandum of association are to define particularly the capital of the company for the express purpose of defining the amount of each of the shares, and it has been held in *Trevor* v. *Whitworth* that the company cannot vary that by a special resolution diverting the money to repurchase shares, and the same principle applies to the issue of shares at a discount. The contract which the company purported to make with the appellant is therefore *ultrâ vires*, and is not helped by registration; the appellant is therefore entitled to the relief he claims. [COTTON, L.J.—Was it a contract entered into by the appellant to take the shares as fully paid-up shares and run the risk?] No; the appellant when he applied for the shares, believed the company had power to make the contract to issue them at a discount; he has done nothing to ratify the contract, and there has been no intervention of other rights.

Phipson Beddle, Q.C., and *Chadwyck Healey*, for the respondent company.—*In re Ince Hall Rolling Mills Co.* decides that a power to issue shares at a discount may be given by the articles of association, and if such power may be conferred, as here, by a special resolution. [COTTON, L.J.—We shall have to consider if that case was rightly decided.] There is nothing in the statute to make this bargain illegal. The capital of a company which the statute refers to is the nominal capital; the capital is the sum agreed to be treated as the liability of the shareholders, a liability on capital account. [COTTON, L.J.—The Act does not speak of issuing capital, but of issuing shares which would entitle the company to call for so much money.] *Trevor* v. *Whitworth* is distinguishable, for the effect of purchase of its own shares by a company is either to wipe out that which appears as a liability on capital account or to put down as an asset that which is in fact such. Here the agreement of the company with the appellant was this, "Find us 2s. only, and, with the consent of the other shareholders, you shall be put on an equality with them." The liability of the shareholder is to be measured by his contract as based upon the documents which the statute requires to be registered for the purpose of protecting both shareholders and creditors. *Waterhouse* v. *Jamieson*, L. R. 2 Sc. App. 29, 32 W. R. H. L. Dig. 8. [COTTON, L.J.—In that case the memorandum of association stated that so much of the capital had been paid up, and that so much remained unpaid, and the allottee took the shares on that footing; but here the memorandum does not state that the 18s. has been paid on these shares. The Legislature only requires the contract to be registered, and the adequacy of consideration for the contract cannot be gone into so as to make the contract illegal: *Anderson's case*, 26 W. R. 442, 7 Ch. D. 67; *Spargo's case*, 21 W. R. 306, L. R. 8 Ch. 407; *Ex parte Beer*, 33 W. R. 233, 9 App. Cas. 605; *Cumbrian v. Wane*, 1 Str. 426. If the contract had been to accept from the appellant a Russian bond as consideration for the issue to him of a £1 share and the contract had been registered, that would have been valid. It is a common practice among companies to give commission to get capital subscribed; and that has never been held illegal.

They also referred to *Hippisley's case*, 22 W. R. 113, L. R. 9 Ch. 12; *In re West India and Pacific Steamship Co.*, L. R. 9 Ch. 11n.

Grosvenor Woods, in reply.—The argument on the other side is that two is or may be equal to twenty. No doubt x may equal twenty, as there is potentiality of increase there. The expression "The whole or a part of the amount remaining unpaid on any share or shares" in section 24, sub-section (2), of the Act of 1867 shows that the amount of the shares is not an imaginary thing.

COTTON, L.J.—I understand Mr. Beale that it has been agreed between the parties that the result of this application is to depend on our decision as to the validity of the contract, and that you do not take any objection as to the form of the application.

Phipson Beale.—That is so.

COTTON, L.J.—This is an appeal from a decision of Chitty, J., who really did not decide the question, but only made an order in accordance with previous decisions of his, and sent the parties here. The question is this: The directors and shareholders of this company determined that there should be an increase of capital of £1 shares, but that they should be issued on this footing—that 18s. should be credited as paid, and that those who took the shares should only be liable to pay 2s. That was in accordance with resolutions of the company which were passed, and there was an offer of shares on that footing to Mr. Allen and others who have accepted those shares. Is that right? Were the directors in a position to give the shares which they offered to their shareholders, and which some of the shareholders have accepted? In my opinion they could not do so, because it is really saying that these shares, which are £1 shares, shall be taken on the footing of 2s. only being paid. That, it appears to me, is quite wrong. I decide it on the provisions of the Act of 1862, also taking into consideration the Act of 1867, on which both Mr. Phipson Beale and Mr. Chadwyck Healey relied. When one looks at the Act of 1862, one finds that that is an Act giving limited liability, and on what terms does it give limited liability? There is to be a memorandum of association, and there are to be articles of association. I will assume that here there is that which is equivalent to an article of association enabling what has been proposed to be done to be done. In my opinion that could not effectively be done in order to protect anyone who held shares, and who had only paid, in accordance with that article, 2s., from being called upon at some future time, if this company is wound up, to pay 18s. more.

Now let us look at section 7 of the Act of 1862. "The liability of the members of a company formed under this Act may, according to the memorandum of association, be limited either to the amount, if any, unpaid on the shares respectively held by them, or to such amount as the members may respectively undertake by the memorandum of association to contribute to the assets of the company in the event of its being wound up." Of course, I need not consider the latter part of that, because it applies to companies of a different description. This was a company limited by shares, and we shall find presently the number of shares and the amount of the shares is to be defined by the memorandum of association, and the liability of the members in such a company depends on the question of what amount they had paid on the shares, having regard to the amount fixed by the memorandum. This appears from section 8, which is this: "Where a company is formed on the principle of having the liability of its members limited to the amount unpaid on their shares, hereinafter referred to as a company limited by shares," that is this company, "the memorandum of association shall contain the following things"—the name of the proposed company; the part of the kingdom in which its registered office is; the objects for which it is established; a declaration that the liability of the members is limited; the amount of capital with which the company proposes to be registered divided into shares of a certain fixed amount. Now, going on those two sections only, this being a company to be limited by shares, the memorandum of association is to define how many shares there are to be and the fixed amount—that is the amount fixed by money—of each of those shares. Then everyone is liable for so much of that amount fixed by the memorandum as it can be shown he has not paid. Then is there any power to alter in that respect the memorandum of association?

That is shown in section 12, and there we find how, and how only, the memorandum can be varied: "Any company limited by shares may so far modify the conditions contained in the memorandum of association, if authorized to do so by its regulations as originally framed, or as altered by special resolution in manner hereinafter mentioned, as to increase its capital by the issue of new shares of such amount as it thinks expedient, or to consolidate and divide its capital into shares of a larger amount than its existing shares, or to convert its paid-up shares into stock; but save as aforesaid, and save as is hereinafter provided in the case of a change of name, no alteration shall be made by any company in the conditions contained in its memorandum of association"; that is to say, it cannot diminish the quantum of its shares, the money amount of its shares, and it cannot limit the liability to pay that amount so as to limit each shareholder and protect him against being called upon to pay what under the 7th section he is liable to pay in the event of being wound up. One must remember one is not dealing with a case where the liability is imposed by the Act itself on persons who join in these companies, but with a case where the liability which they otherwise would have incurred if this Act had not been passed is limited. I do not, of course, refer to the power given by a subsequent Act to reduce the amount of capital, which has not been followed here, but in my opinion, looking to those sections of the Act of 1862 only, it is perfectly clear that an agreement that you should pay 2s. on the shares you take and not pay up the other 18s. which would make up the amount in money fixed by the memorandum of association would be entirely *ultrà vires*. It has been held that no company can return to its shareholders any of the money which they have paid, and in my opinion, without relying upon the fact that this is in substance returning the money as if it had been paid and then paid back again, there is no power to limit the liability of the shareholders to pay the amount unpaid on their shares. In my opinion it is tolerably clear here that the terms offered to the shareholders were, not that the 18s. should be treated as paid in a particular way, but that the 18s. should not be paid, just the same as if there had been a release given by the company for 18s. of the amount (Mr. Beale calls it the nominal amount, but I call it the amount) fixed in accordance with the Act of Parliament by the memorandum of association. That being so, so far the company and the directors could not issue shares such as they proposed to issue in this case.

Then there comes the Act of 1867, the 25th section of which was relied upon. Does that cover it? I will not rely on the opinion expressed by Lindley, L.J., and I think also by myself, in the *Addlestone Linoleum Co. case*, for the point really was not for our decision there. I will deal with it as entirely free from and untouched by the expression of opinion in that case. Section 25 enacts that "Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in

cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed." Was that intended to enable this to be done: that the sum fixed by the memorandum of association should not be paid at all in any way? One must see what difficulties had arisen in these companies at the time when this Act was passed. There had been shares taken and there had been agreements entered into—some perfectly fairly—that the amount of the shares should be treated as satisfied by goods to be supplied or goods which had been supplied to the company by the persons who took the shares. That was the prominent mischief intended to be dealt with by this section, and it was therefore really pointing only to the way in which payments for the shares should be made, and not to the question whether the whole amount of the shares should or should not be required to be paid some way or other. In my opinion that is the true construction of this section. If it is paid otherwise than in that which is the ordinary common measure of value—viz., money—then that must be done under some agreement which is to be registered, such as an agreement that persons who shall supply goods shall be paid for those goods in shares, and that they shall be taken as payment for the shares, and that they shall not be paid for in money. It was asked in the argument, "How can you measure the value of goods which are to be given and to be taken in payment of the shares?" If the contract does not define their value, then, unless that contract is set aside as fraudulent, that will fix the shares as paid up, if the contract is that a certain property or quantity of goods is to be taken in payment in full of the shares in the company. But suppose in such a case as this there was a contract that the person taking the shares should give to the company goods or an acre of land fixed by the contract and fixed by the parties as worth, not the amount of the shares, but only 10s., then, although it does not arise for decision here, I in no way intimate any opinion that if such a company were wound up, a person who took shares on an admission that he was only giving half their value would not be held liable for the remainder as a sum which, on his own admission, and on the contract on which he took the shares, must be considered as only payment of part of the amount of the shares, leaving the other half unpaid, and therefore to be called up if there was a winding up. That we have not to decide. But here it is so perfectly clear that 2s. never can be in any way treated as payment of 20s.—because that is what they propose here, and really it is not even put in that way, but thus—that the directors are to treat 18s. as paid and only to call upon the person who takes the shares for 2s. That is equivalent to this: You take the shares, pay 2s., and we will give you a release for the other 18s. However valuable it might be, and however important to the company it might be to get the 2s., yet that, in my opinion, can never make the amount unpaid on these shares less than 18s.

In my opinion that is the true effect, as I mentioned, of this section 25; and I may add this—if it had been intended by this section to do away with those provisions in the Act of 1862, to which I have referred, requiring the amount in money of the shares to be fixed by the memorandum—requiring the number of shares to be stated, and making every shareholder liable for everything which was unpaid on the shares, in my opinion Parliament would have put the section in very different language, and would have really provided for something which they have not provided for here, and stated that there might be a modification of those terms of the original Act in the way in which it is suggested by Mr. Beale it can be done under this 25th section. In my opinion the 25th section in no way intended to provide for any portion of the money value of shares not being paid, but only provided that it might be paid by money value and not by mere money. In my opinion, therefore, there was no power at all to issue shares on the footing of this resolution. If these shareholders were put on the list and remained on the list, they would, in the event of winding up, be liable to pay, not only the unpaid shilling which is now unpaid, but the whole 19s. which still remains unpaid—that being the limit of their liability, and the only limit of their liability in accordance with section 7 and the other sections of the Act of 1862.

The result, therefore, must be that, as the company has put these gentlemen on the list of shareholders, and they did nothing which in any way was an assent to that being done, the contract being one which the company could not carry into effect, we must make an order that their names be removed from the register.

There is no question raised as to the return of the money they have paid. It might probably come within this—that we might direct payment of such damages as we may think right; but, there being no question raised on that point, the order will be to take them off the register of shareholders, and to return to each of them the money per share which they have paid.

FRY, L.J.—I am of the same opinion, and I find myself quite unable to agree in the decision of the learned judge. The question which we have to solve, I think, is simply and shortly answered by a reference to this inquiry—what is the nature of an agreement to take a share in a limited company? In my opinion it is an agreement to become liable to pay to the company the amount for which that share has been created. Further, it appears to me to be clear that the liability of the shareholder is limited only by the amount unpaid on the shares. Now, observe, it is the amount unpaid; it is not the amount remaining due. The result is that a release by the company will not diminish the liability—accord and satisfaction between the company and the shareholders will not diminish the liability; nothing will diminish and extinguish that liability but payment. The consequence is we are driven to this short inquiry, Is an agreement to take 2s. for 20s. a payment of 18s.? I say it is not. That appears to me to be the whole question.

Then a supplemental question is raised in this way. It is said that, however it stood under the Act of 1862, the result is to be altered by the 25th section of the Act of 1867. That section is in these words. [The Lord Justice read the section and continued:—] What the exact words to which "the same" refer may be, it is a little difficult to ascertain; but I think the view suggested by Mr. Phipson Beale is the true one—that it means unless terms of payment otherwise have been determined.

Then we come to the inquiry, Is an agreement to take 2s. for 20s. a term or mode of paying 18s.? I have already said in my judgment it is not a payment of 18s. It, therefore, cannot be a term or mode of payment. Consequently the registration of this agreement, which is an agreement in effect to release the 18s., is entirely inoperative under the 25th section of the Act of 1867. When we have determined this question the rest of the matter is arranged between the parties. Mr. Beale has, I think very properly, not thought fit to argue whether such a contract as this, entered into under a common mistake of law, is or is not capable of being rescinded, or whether the 1s. can be returned as damages. It has been agreed between the parties that the result of our application is to depend upon our decision as to the real nature of the contract.

LOPES, L.J.—I entirely agree with the judgments which have been delivered, and I will in a very few words express my views. Every limited company is required to state in its memorandum the amount of capital with which it proposes to be registered divided into shares of a certain fixed amount. Now to my mind this cannot be intended to be an idle or objectless re-

quirement, but the amount of the share is to be the real sum to be paid, either in cash or subject to the restrictions of section 25, that is, in kind, which the company contracts to accept as of that cash value. In section 25 there can be found no provision of any sort or kind excepting the shares from being paid up in full. I can see no practical distinction between issuing shares at a discount and returning to the member a portion of the capital to which the creditors have a right to look as that out of which they are to be paid. Issuing the shares at a discount, to my mind, would be rendering one of the statutory requirements of the Act an empty form. The case of *Trevor* v. *Whitworth* has been referred to, and it appears to me the reasoning and the decision in that case is applicable here. Another case referred to was the case of the *Addlestone Linoleum Co.*, where, no doubt, this question whether shares might be issued at a discount was not directly raised it is perfectly true, but there are expressions of opinion by Cotton, L.J., and Bowen, L.J., with which I concur entirely, in harmony with the decision at which the court has now arrived. I am of opinion, therefore, that there is no power to issue these shares at a discount, and that the names of the shareholders in question must be removed from the register.

COTTON, L.J.—I did not in my judgment refer to the case of *Waterhouse* v. *Jamieson* in the House of Lords, as I thought I had sufficiently disposed of it in the course of the argument. I do not think it has any application in this case.

Appeal allowed.

Solicitors for the appellant, *Stackpoole, Batters, & Co.*

Solicitors for the respondent company, *Wilkins, Blyth, & Dutton.*

From Chan. Div. Jan. 13.

In re TIPPETT AND NEWBOULD'S CONTRACT. (*a.*)

Vendor and purchaser—Summons under Vendor and Purchaser Act, 1874, *s.* 9—*Jurisdiction—Question not affecting purchaser—Married woman—Separate use—Restraint on anticipation.*

The court has no jurisdiction, upon a summons under the Vendor and Purchaser Act, 1874, *to decide the question whether a restraint on anticipation affects the purchase-money, the question being one which does not concern the purchaser.*

Where a fund has, subject to a trust for accumulation for a particular period, been bequeathed to a married woman for her separate use absolutely with a restraint on anticipation, that restraint will be construed as operable only to the antecedent period when, and only when, the testator has shown an intention inconsistent with the confinement of the restraint to that period.

In re Bown, O'Halloran *v.* King, 33 *W. R.* 58, 27 *Ch. D.* 411, *distinguished.*

Decision of Kay, J., *affirmed.*

Appeal from a decision of Kay, J.

Leonard Lloyd, by his will, dated the 1st of March, 1869, devised his real estates and chattels real to trustees in fee, upon trust to accumulate the rents thereof, with the income of his residuary personalty, until his youngest child should attain twenty-one, and after that period he directed his trustees to stand possessed of his residuary personal estate and the accumulated income thereof, upon trust for his three children, Annie Maud, Alice, and Alexander, share and share alike, as tenants in common; provided always that the share of each of the daughters should be for her sole and separate use, and that she should not have power to dispose or deprive herself of the benefit thereof by anticipation.

The testator died in 1877. The youngest child, Alexander, attained twenty-one in 1882. Both the daughters married, and in 1883 Alexander assigned his share in the leasehold house, which formed part of the testator's estate, to H. Hall, the husband of Alice.

In 1885 the two daughters and Hall entered into a contract to sell the house. The purchaser objected that by reason of the restraint on anticipation contained in the will the married women could not sell the property. A summons under the Vendor and Purchaser Act, 1874, was taken out by the vendors, asking for a declaration that they had power to sell.

On the hearing of this summons in chambers, Kay, J., was of opinion that the sale was beneficial to the married women, and he directed that, notwithstanding the restraint on anticipation, if it was in force, their interests should be bound for the purpose of giving effect to the contract of sale, and that the purchase-money should be paid to the trustees of the will. And upon the question whether the interests of the married women in the purchase-money were bound by the restraint on anticipation, Kay, J., adjourned the summons into court and directed that the trustees should be served with it. This was done, and, upon the subsequent hearing of the summons in court, Kay, J., held that the married women were, during their respective covertures, entitled only to receive the income of their respective shares of the purchase-money without power of anticipation.

The vendors appealed.

A. Underhill, for the appellants.

[The COURT (Lord COLERIDGE, C.J., and COTTON and BOWEN, L.JJ.), held that there was no jurisdiction, upon a summons under the Vendor and Purchaser Act, 1874, to decide the question whether the restraint on anticipation affected the purchase-money, this question being one which did not concern the purchaser. But the court gave leave to amend the summons by making it an originating summons to obtain the opinion of the court upon the construction of the will. And as the trustees were before the court the argument was allowed to proceed on the undertaking of the appellants to amend the summons accordingly.]

The gift to the married women being an absolute one for their separate use after the termination of the trust for accumulation, the restraint on anticipation applies only during the continuance of the particular estate: *In re Bown, O'Halloran* v. *King*, 33 W. R. 58, 27 Ch. D. 411. The case of *In re Grey's Settlements, Acason* v. *Greenwood*, 35 W. R. 287, 560, 34 Ch. D. 85, 712, is distinguishable. There the gift was immediate.

A. J. Allen, for the trustees, was not called upon.

Lord COLERIDGE, C.J.—I am of opinion that the order under appeal is right. In construing a will the object is to arrive at the intention of the testator, and in considering what intention is to be gathered from his language we must assume him to have used words in their legal sense, unless there is something in the context to show the contrary. In the present case what we have to determine is, whether the testator meant his daughters to take shares of the capital absolutely, or whether he intended their shares of capital to be held by his trustees for them during their coverture with a restraint on their anticipating the income. Apart from authority, I should have thought it clear that he intended the share of each married daughter to be held in trust for her with a restraint on anticipation. If there had been judicial decisions on words similar to those in the present will, we must have given due weight to them, but there are none. Two cases were cited, but

(*a.*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

the one which was relied upon by the appellants is quite distinguishable from the present. In that case, *In re Bown*, it was held that the testator intended the legatees to have the capital paid to them; but in the other case, *In re Grey's Settlements*, it was decided that the testator must be taken to have intended the legacies to remain in the hands of the trustees, with a restraint on anticipation by the legatees. Both these decisions are, in my judgment, right, and consistent with each other. In *In re Bown* there was a direction to "pay" to the legatee after the death of the tenant for life. This showed the testator's intention to be that the shares of that legatee should then be handed over to her, and the restraint on anticipation was, therefore, held to be confined to the antecedent period. In *In re Grey's Settlements* there were no words showing an intention that the legacies should be paid over, and the restraint on anticipation was held to be general.

COTTON, L.J.—I am of the same opinion. The point we have to decide is, whether this case comes within *In re Bown* or within *In re Grey's Settlements*. In each case the principle is the same. The point to be ascertained is, did the testator mean the money to be handed over to the legatee, or to be held by the trustees for her subject to a restraint on anticipation? In *In re Bown* there was a direction to pay to the legatee at the death of the tenant for life, which was inconsistent with her being restrained from anticipation after that period; and it was, therefore, held that the restraint was only intended to prevent her from dealing with her share before it came into possession. In *In re Grey's Settlements* there was no expression of intention that the shares should be paid over to the legatees, and full effect was given to the restraint on anticipation according to its terms.

BOWEN, L.J.—I am of the same opinion.

Solicitors, *Thomas White & Sons*, for *J. Clark*, Willenhall.

From Q. B. Div. March 22.

In re DUTY ON THE ESTATE OF THE INSTITUTION OF CIVIL ENGINEERS. (*a.*)

Revenue—Duty on property belonging to corporate body—Exemption—Property appropriated and applied for the promotion of science—Customs and Inland Revenue Act, 1885 (48 & 49 *Vict. c.* 51), *s.* 11, *sub-section* 3.

By section 11 *of the Customs and Inland Revenue Act*, 1885, *a duty is imposed in respect of all real and personal property of any body corporate or unincorporate, at the rate of £5 per cent. upon the annual value, income, or profits of such property, subject to exemption in favour of* (*sub-section* 3) "*property which, or the income or profits whereof, shall be legally appropriated and applied . . . for the promotion of education, literature, science, or the fine arts.*"

Held (*by* Lord Esher, M.R., *and* Fry, L.J., Lopes, L.J., *dissenting, reversing the judgment of the* Queen's Bench Division, ante, *p.* 523, 19 *Q. B. D.* 610), *that the property of the Institution of Civil Engineers was entitled to the benefit of the exemption, as it was property which, in the main and as its chief object, was appropriated and applied for the promotion of mechanical science.*

Appeal from the judgment of the Queen's Bench Division (*ante*, p. 523, 19 Q. B. D. 610) in favour of the Crown.

The facts are fully stated in the report below. The question was whether the property of the Institution of Civil Engineers came within the exemption in sub-section 3 of section 11 of the Customs and Inland Revenue Act, 1885, section 11 imposing a duty in respect of all real and personal property of any body corporate or unincorporate at the rate of £5 per cent. upon the annual value, income, or profits of such property, subject to exemption from such duty in favour of (sub-section 3) "property which, or the income or profits whereof, shall be legally appropriated and applied . . . for the promotion of education, literature, science, or the fine arts."

Sir Horace Davey, Q.C., and *Moulton, Q.C.* (*Radcliffe* with them), for the Institution of Civil Engineers.

Sir Edward Clarke, S.G., and *A. V. Dicey*, for the Commissioners of Inland Revenue.

The arguments were the same as in the court below. *Reg.* v. *Royal Medical Society*, 21 J. P. 789, 30 L. T. (O. S.) 133, was referred to as well as the cases cited below.

Cur. adv. vult.

March 22.—Lord ESHER, M.R.—The question in this appeal arises under section 11 of the Customs and Inland Revenue Act, 1885, which, by sub-section 3, exempts from duty "property which, or the income or profits whereof, shall be legally appropriated and applied for the promotion of education, literature, science, or the fine arts." The question we have to determine is whether, within the meaning of the statute, the Institution of Civil Engineers is in receipt of an income which is legally appropriated and applied for the promotion of science.

The interpretation of the statute is not in dispute. It is well expressed by the Lord President in the case of *The Society of Writers to the Signet* v. *Commissioners of Inland Revenue*, 14 Court of Sess. Cas., 4th series, 34, where he said:—"But I apprehend that the meaning of this clause of exemption is that the property or income shall be, if not exclusively, yet certainly in the main and as its chief object, devoted to the promotion of education, literature, science, or the fine arts." By this I understand that an institution or body of persons may still be said to exist for the promotion of science, though it may have another and subsidiary object. The question always is, What is the main object. The interpretation of the statute is not in dispute, and upon that we do not differ from the court below. The question we have to determine is whether the subject-matter object of this institution and the application of its property are for the promotion of science.

Now this institution is incorporated, and the charter defines its nature and object as being for "the general advancement of mechanical science, and more particularly for promoting the acquisition of that special knowledge which constitutes the profession of a civil engineer"—not for promoting the profession of a civil engineer—"being the art of directing the great sources of power in nature for the use and convenience of man." The question depends largely upon the way in which that object has been carried out. Giving the best consideration I can to the case, I do not think that the institution is a mere school for civil engineers. I do not think that the object, or the mode of carrying out the object, can be said to be for the promotion of the practice of the civil engineers' profession. The case is not like that of the *Society of Writers to the Signet*. It is not necessary for a civil engineer to belong to this institution, though it may perhaps give him a higher rank in the profession if he does. It is true that no one can enter as a student there without declaring his intention of becoming a civil engineer; but, as I have said, a man may be a civil engineer without being a member. The object, therefore, does not seem to me to be to educate

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

men as practical engineers; indeed, I think a man must be a qualified civil engineer before he can appreciate the lectures. I think that the main object of this institution, and the mode in which that object is carried out, are for the promotion of the highest form of mechanical science.

FRY, L.J.—The question which has to be determined in this case is whether the funds of this institution are property which, or the income or profits whereof, are legally appropriated and applied for the promotion of science. Before going further, let me make one or two observations on the construction of the statute. It appears to me that, in order that the exemption may apply, it must be shown, in the first place, that the property or income is legally appropriated for promoting science; furthermore, it must be shown that it is applied—that is, that it is actually applied—to the promotion of science. The two questions, it is obvious, are distinct. In the next place, I express my concurrence in the rule laid down by the Lord President in the Scottish case (wherever that rule can be found to be applicable), that the inquiry is not whether the property is exclusively, but whether, in the main and as its chief object, it is devoted to the promotion of science. One other observation upon the statute. There is no qualification of the word "science." It is not required that it shall be science in all its branches, nor is it required that it shall be science which produces no practical result; it is not necessarily useless science. The science described does not cease to be science because it may prove, in the language of a great master of science, to be "a rich storehouse for the relief of man's estate." And, again, there is nothing in the statute which indicates that the persons who promote the science must be of a general character; there is nothing to prevent the exception applying, even where the class of persons who are advancing the science may be defined or limited in some particular manner.

Now let me take the first of the two questions which have to be answered in this case. Is the fund in question legally appropriated to the promotion of science as its main object? That question must be answered by a consideration of the charter of the institution. The preamble to that charter shows that a voluntary society then existed for the general advancement of mechanical science, "and more particularly for promoting the acquisition of that species of knowledge that constitutes the profession of a civil engineer;" and then the Crown constitutes the Institution of Civil Engineers as a body corporate for the purposes aforesaid. It appears to me that the fair result of that charter is this, that the society was made a body corporate for the purpose of advancing mechanical science, but that that advancement was anticipated from the activity and the intelligence of a body of men, who were indicated by the name of the association and by the description of the science which was to be advanced—namely, that practised by civil engineers. The question which arises upon this charter may be stated in this way: Is the object of the charter the promotion of the interests of a body of men by their acquisition of science, or, on the other hand, is it the promotion of science by the activity of the men of a particular profession? In my view it is the promotion of mechanical science by the activity of the body of civil engineers. I think, therefore, that the main object to which the fund is appropriated is the promotion of science.

Then arises the second question, which is this: Is the fund or its income actually applied for the promotion of science? In order to answer that question we must consider in what mode this Institution of Civil Engineers acts. On the one side I find that all the corporate members are members of the profession; that all students who are admitted to the lectures of the institution must be the pupils of corporate members; and that there is no sale to the public of the transactions or proceedings of the society. Those three facts tend towards the view that the body is a professional one. But on the other hand it must be observed that membership of this institution is not essential to the exercise of the profession of a civil engineer; that the institution has claimed and exercised no jurisdiction whatever with regard to the professional remuneration or charges of engineers, with regard to the etiquette of the profession or the conduct of its members; and, further, that it does not appear ever to have taken any steps to promote the interests of the profession as contrasted with the general interests of the public. Furthermore, their proceedings are of a highly scientific character, and, though not sold to the public generally, are distributed to a considerable extent to various libraries and persons who are likely to be interested in them. Looking at all these facts, my conclusion is that the institution has not departed from the purposes indicated by its charter, and that the money is in fact applied for the promotion of science through the activity of the members of the Institution of Civil Engineers. I think, therefore, that the money is actually applied for the promotion of science as well as legally dedicated to it. One other observation I will make, which is this: It has been pressed upon us that the membership in this society is of pecuniary value to engineers, and I have no doubt that that is the case; but the observation does not appear to me to go far. It is obvious that membership in many bodies formed for the cultivation of science is of pecuniary value to certain classes of persons. A fellowship in the Royal Society is undoubtedly of pecuniary value to medical men, to engineers, chemists, and others; nevertheless, it is plain that the object of that society is the promotion of science.

In the result I agree with the Master of the Rolls, and I am unable to concur in the judgment of the court below.

LOPES, L.J.—I am unable to agree with the conclusion arrived at by the rest of the court. I agree with the interpretation placed upon the words of the exemption in question, but I am unable to concur with the application of that interpretation to the facts of this case.

The funds of the institution are clearly within section 11 of the Customs and Inland Revenue Act, 1885, and would be subject to duty unless the exemption in subsection 3 applies. This exemption is in favour of "property which, or the income or profits whereof, shall be legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts." The question which arises in this case is whether the income or profits of this institution are legally appropriated and applied to science within the meaning of the exemption —*i.e.*, legally appropriated by the charter, and, in fact, applied.

In the case of *Reg.* v. *Institution of Civil Engineers*, 28 W. R. 253, 5 Q. B. D. 48, the question arose whether the same institution was exempted from payment of poor rates under section 1 of 6 & 7 Vict. c. 36 (which exempts from rateability societies instituted "exclusively" for the purpose of science, literature, or the fine arts), and it was held that the exemption did not apply, because it was property appropriated and applied, not for the promotion of general education or science, but for the promotion of a particular branch of knowledge in order to enable the members of the institution to practise with more success the profession of a civil engineer. It is true the statute in that case contained the word "exclusively," which does not occur in section 11 of the Act of 1885, but I do not think that makes any substantial distinction between the principle which applied there and the principle which ought to be applied here.

The Scotch case decided in 1886 was a decision on

the exemption now in question. The eminent judges who decided that case seem to have proceeded on the same principle as the learned judges proceeded in the case of *Reg.* v. *Institution of Civil Engineers* just cited. The Lord President says:—"I apprehend that the meaning of this clause of exemption is that the property or income shall be, if not exclusively, yet certainly in the main and as its chief object, devoted to the promotion of education, literature, science, or the fine arts." Lord Shand says:—"The object of this society is the maintenance of a permanent body of professional men, with recognized privileges, and the object which anyone joining the society has in view is not education, or the promotion of education, literature, or science, but that he shall become a member of the society in order to the practise of his profession as a writer to the signet." Recognizing the distinction between that case and the present—viz., that it is essential that anyone intending to become a writer to the signet should join the Society of Writers to the Signet, and that it is not essential or necessary that anyone intending to be a civil engineer should join the Institution of Civil Engineers—I am still of opinion the principle of the Scotch case applies and governs the case now before the court. In my opinion the test of exemption or non-exemption may be thus stated: If the primary and direct object for which the institution exists is the promotion of science it is within the exemption, and the fact that it indirectly and subordinately promotes the advancement of a particular class will not deprive it of the protection of the exemption. If, on the other hand, the primary and direct object of the institution is the advancement of its members in a particular profession so as to enable them with more success to practise their profession in a particular branch of science (such advancement of its members being the primary and direct, and the promotion of science the secondary and subordinate object), it is not within the exemption.

I have now to determine under which of these two descriptions the Institution of Civil Engineers should be classed. I think under the latter for reasons, some of which I will state. The institution in the charter and bye-laws is called "The Institution of Civil Engineers," and the declared object of the society is "for the general advancement of mechanical science, and more particularly for promoting the acquisition of that species of knowledge which constitutes the profession of a civil engineer." Under the head of "Constitution" the bye-laws state that the Institution of Civil Engineers shall consist of three classes—members, associates, and honorary members, with a class of students attached. Students are defined as persons not under eighteen years of age, who are or have been pupils of members or associates of the institution, and who have the object or intention of becoming civil engineers. It is of members or intending members of the profession of a civil engineer that the society is composed; the slight admixture of persons other than members of this profession fails to destroy the distinctive character of its constitution. Everything in the bye-laws, the regulations, and the reports, and in the application of the funds of the society points in the same direction. The predominating idea is the education and advancement of civil engineering as a profession. I am of opinion, therefore, that the primary and direct object of the institution is the advancement of its members in the profession of a civil engineer, so as to enable them with more success to practise that profession, and not the promotion of science within the meaning of section 11, sub-section 3, of the Act.

In my opinion the decision of the court below was right and should be affirmed.

Appeal allowed.

Solicitors for the Institution of Civil Engineers, *Radcliffe, Cator, & Martineau.*

Solicitor for the Crown, *Solicitor of Inland Revenue.*

From Q. B. Div. Jan. 13.

REG. *v.* KING AND JUSTICES OF MANCHESTER. (a.)

Intoxicating liquor licences—Beer licences existing 1869—*Application by holder for wine licence—Juri diction to refuse—Return by justices to* mandamus—*Wine and Beerhouse Act,* 1869 (32 & 33 *Vict.* c. 27 *ss.* 7, 19.

The holder of a beer licence existing on May 1, 186 *is not thereby entitled to apply for a wine licence on t renewal of his beer licence under section* 19 *of the Wi and Beerhouse Act,* 1869, *and the justices are entitled refuse at their discretion any application for a lic other than for the licence originally existing at that da*

A return to a mandamus *can be pleaded to where t reply traverses the fact that the justices have "heard a determined."*

Appeal from Charles, J.

This was an appeal from the judgment of Charles, J in favour of the Crown, at the trial of a return to *mandamus*, whereby the defendants, justices for t city of Manchester, were ordered to hear and determin pursuant to the statutes in that behalf, the matter of t application for a certificate authorising Richard Mo "to hold an excise licence to sell by retail, wine, to consumed on or off the premises, or that they show ca to the contrary thereof." The return and answer of th defendants was that they had "heard and determined the application, to which there was a reply traversing th return, and alleging that the premises were licensed f the sale of beer on May 1, 1869, to which there was rejoinder that the reply was bad in law, on which issu was joined.

Morley was the assignee of a licence to sell beer existing on May 1, 1869. He had applied for a wine licence to the justices of Manchester at the licensing sessions in 1887, who refused to entertain the application. Morley then applied for a *mandamus* to the justices to hear and determine his application, on the ground that he was entitled to it by way of renewal, as being the holder of a beer licence existing on May 1, 186 The justices treated the application as one for a new licence, and refused it on general grounds.

Henn Collins, Q.C., and *R. Wright*, for the appellants.—The justices here were ordered to "hold adjourned sessions to hear and determine, in pursuance of the statute," the application of the prosecutor. The return is that they have done so. That is a plea "obedience," and cannot be replied to where there is question raised of the non-exercise of their jurisdiction *In re Mainwaring*, 6 W. R. 594, 27 L. J. M. C. 278; *R* v. *Justices of Middlesex*, 25 W. R. 510, 2 Q. B. D. 5 The application for a wine licence was not for a renew subject only to the four conditions under section 8 the Wine and Beerhouse Act, 1869, nor is it made by transferee under section 7 of the Wine and Beerhou Act, 1870. It is an application for a new licence for t sale of wine by the assignee of a beer licence exist on May 1, 1869, and it may be granted or refused at t absolute discretion of the justices.

Bosanquet, Q.C., and *Patterson*, for the respondent The return of the justices to the *mandamus* can pleaded to where they have assumed jurisdiction wh did not properly belong to them, as here, where, ass ing the application to be one for a renewal of a lice the justices can only refuse it on one of the four grou specified in section 8. But they have admittedly refu the application on general grounds. Alternatively t may be said to have declined to "hear and determine the matter as an application for a renewal: *Reg.* v. *J*

(a.) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

tices of Pire Hill, 33 W. R. 205, 14 Q. B. D. 13. By section 19 of the Act of 1869 any existing holder of a beer, cider, or wine licence might apply for a renewal of any one or more of those licences, provided he held an existing licence on May 1, 1869. Section 10 of 24 & 25 Vict. c. 91, explaining 23 Vict. c. 27, especially specifies holders of beer or cider licences as entitled to wine licences. All their then existing rights are preserved by section 14 of the Act of 1869.

Lord ESHER, M.R.—In this case a *mandamus* had been issued ordering the justices "to hear and determine" certain matters in regard to the licence in dispute. The justices have pleaded in effect that they have obeyed this order, and have "heard and determined" the matter in question. To that the prosecutor replies, traversing as a matter of fact this return of the justices, and alleging that they have not so "heard and determined." To that the replication of the justices is in form what looks like a demurrer. If so, that is an admission by them of the reply, but an allegation that no such reply can be legally made to their return. Where justices, then, make a general return of "obedience" to a writ of *mandamus*, can any answer be made to that return, or is the court bound to accept it? That question was discussed in *Reg.* v. *Justices of Pire Hill*, and it was there determined that some answer can be made, and in certain cases ought to, and legally must, be allowed—namely, where there is a direct traverse of the truth of the statement that the justices have heard and determined the matter. On the true construction of the statutory rules and orders there is an opening left for some answer. Unless it were so, the justices might, from motives of policy or of right, however much they rightly think or justly decide, oust the jurisdiction of the superior courts wherever they decided matters within their jurisdiction, and thus prevent parties questioning the legality of their decision, except by putting them to the expense of raising the question by some other form of procedure. Some answer clearly can be made to the return. The question is, to what extent can that answer go? It is clear that if the replication to the return admits that the justices have heard and determined, but states only that their determination was wrong in law and fact, that is no answer. But if the replication is a traverse of the fact that the justices had heard and determined, that alone might be a bad return. Can the replication, however, go further? If it showed that the justices had declined to exercise jurisdiction in a matter which properly belonged to them, but had exercised it in a matter which did not, then the justices either have not "heard and determined" the matter at all, or, if we are to adopt the true construction on the replication in this case, the justices have declined to entertain one question which it is alleged ought to be within their jurisdiction, but did decide on another matter in regard to which they had no jurisdiction at all. In either case the replication can raise the question whether the justices have fulfilled the order under the *mandamus* wherever, upon the true construction of the statute, the justices had jurisdiction to entertain the matter, but declined to entertain it. Any such replication, I should say, would be good. The question, therefore, can be raised and determined now by us whether the justices have truly exercised their jurisdiction in this matter in that they have declined to enter upon the question urged by the prosecutor, and in that the true construction of the replication to their return is that they did not in fact enter upon the question which they were ordered to hear and determine at all, but decided only another matter. The justices wholly refused to consider the application of the prosecutor as coming within the conditions for the renewal of licences, and declined the application on other grounds. It would have been no answer to their return had it been alleged merely that they had wrongly decided the application on one of the four grounds on which they are entitled to refuse such applications. The next question for us is, therefore, had the justices any jurisdiction upon this application for a licence to enter upon other questions than those four, which limit their jurisdiction in regard to refusing the renewal of licences? Had they jurisdiction to deal with any matters other than those four named in the statute 32 & 33 Vict. c. 27, s. 8? That depends upon what is the true construction of section 19 of that statute. For that purpose section 10 of 23 Vict. c. 27 has been alluded to, but I am of opinion that that section does not assist or derogate from the argument on either side. It affirms nothing, except that there had been a doubt raised as to the construction of a former statute of 1840 (3 & 4 Vict. c. 61), and is merely declaratory of what was always intended to be the true construction of that statute. It is not a new enactment at all. Now two arguments are presented to us. It is said first that if a person had on the 1st of May, 1869, in respect of the premises which he then occupied, a licence to sell cider, or beer, or wine, he was entitled to have under that Act, not only a renewal of the licence for the sale of one or other of those articles which he then held, but also to have one or both of the other two licences, provided that he was not disqualified for holding these by not complying with the four conditions laid down in section 8. It is said, on the other hand, that if such a person had at that date only one of those three licences, he was only entitled to the renewal of that one identical licence subject to the four above-mentioned conditions; that, in fact, he was not entitled to the other licences as a matter of right, but was in the position of a person subject to all the discretion of the justices when hearing an application for a licence for the first time.

It is suggested that the ordinary grammatical construction must apply to section 19, unless there is something contradictory in that construction to the general purport of the section, but is the grammatical construction in any way repugnant to the view urged upon us by the appellant? To avoid any confusion it would have been best to use no conjunction or disjunction at all, but to make each sentence run separately; but it is customary to use conjunctions and disjunctions in English. To get at the true construction of this section, however, you have only to construe the sentence separately in regard to each of the several licences alluded to. Thus, where, on the 1st of May, 1869, a licence under any of the recited Acts is in force with respect to any house or shop for the sale by retail therein of beer . . . it shall not be lawful for the justices to refuse an application for a certificate for the sale of beer . . . in respect of such house or shop, except upon one or more of the grounds upon which an application for a certificate under this Act in respect of a licence for the sale of beer . . . may be refused. By repeating such sentence separately in regard to licences for cider and for wine, the grammatical construction is made quite plain, and the meaning comes to be that if a man holds, on the date specified, one or more of these licences, and applies for its or their renewal, such renewal only applies to the licence or licences which he then holds, and as to these can only be refused upon one of the four conditions specified, but on an application by such a holder of one of these licences for another of the licences specified, that is an application for a new licence altogether, and can be refused at the discretion of the justices. The fact of the applicant's holding a beer licence does not in any affect any application he may make for a wine or a cider licence, and the notice required under section 7 of this Act is equally necessary as in the case of any other application for a new licence. That is my opinion of

section 7. If it is wrong as regards that section, can that section be said to be so clear as to overrule our construction of section 19? That would be to explain one puzzle by presenting another puzzle. Even if our construction of section 7 be wrong, I think that makes no difference to our construction of section 19, which is clear, and I am of opinion that our construction is right as regards section 7 as well as regards section 19. I am of opinion, therefore, that the justices had full discretion to grant or refuse the application for the wine licence in this case, and, if so, they have acted within their jurisdiction. This appeal must be allowed; the judgment of the court below must be set aside; and the return of the justices to the writ of *mandamus* must be held to be good.

FRY, L.J.—Two grounds have been placed before us for this appeal. One is, that if the justices have returned an answer to the *mandamus* of "obedience," that is a plea within order 53, and is a sufficient answer to any question as to the doubt of such a return. However that may be, it seems to me that here the appellants have not so pleaded. The return by the justices says that they have "heard and determined." This the prosecutor denies by stating certain specific facts. To this the justices rejoin that the reply of the prosecutor to their return is "bad in law and in substance," and then they go on to show this by stating that "the matter alleged did not entitle the prosecutor to apply for a renewal of his licence, nor limit the justices to the four conditions upon which alone they may refuse to renew licences." That amounts to a plea that the justices have admittedly acted out of their jurisdiction if they were, under section 8 of the Beerhouse Act, 1869, limited to refuse the licence only on one of the four conditions applicable therein for the renewal of certain licences, but that if they were not so limited then they had acted within their jurisdiction. Had they jurisdiction, then, to refuse the licence on general grounds? That depends upon the construction to be given to section 19 of the Act of 1869. That construction has been already rightly given by the Master of the Rolls. To construe such a section correctly one must consider two things; the circumstances existing at the time the statute was passed, and the object of the statute. What were the circumstances applicable when this statute was passed? There were, then, two kinds of licences. There were those granted at the discretion of the justices for the keeping of refreshment houses, and those granted by the excise for the sale of beer or cider to any keeper of a beershop, and of wine to any keeper of a refreshment house.

The preamble of the statute recites and declares the system of granting licences at the time, and then proceeds to place beer and cider licences on the same footing as the wine licences to be granted at the discretion of the justices. It further deals with what was to be considered the "moral" rights of persons already holding beer or cider or wine licences, and fixes a date on which those rights are to be determined to accrue. Continuance of life is assured to three classes of those holders of existing licences subject to the four conditions, for non-compliance with which their renewal may be refused. But it is not intended, as it appears to me, that a holder of one or of one or more of these three classes of licences should be qualified to have the other licence or licences which he did not hold at that date. With regard to any such licence, the person applying is put on the same footing as any other of her Majesty's subjects, to be determined in the like manner. The scope of the statute is to effect a continuity for then existing licences and no more. As to the construction of the particular language of the sections referred to, I agree with the Master of the Rolls. The sentence of section 19 contemplates three classes of cases and three distinct classes of licences. Three events are contemplated as following on this hypothesis, and the section must be construed on the well-known principle of *Singula singulis reddendo*. That is the effect of the grammatical construction, and I am unable to agree with the construction put upon it by Charles, J. As to section 10 of 24 & 25 Vict. c. 91, and the plea urged before us on that section, that the holder of a beer licence was granted by it some special right to claim a wine and spirit licence as well, that was merely enacted because some doubt had arisen as to whether the holder of a beer licence could, under any circumstances, claim a wine licence. That doubt was removed by this enactment, which is merely declaratory, and prevents the preclusion of a beer-licence holder from holding a wine licence. It does not qualify him for holding it.

LOPES, L.J.—I am of the same opinion. The return of the justices here to the *mandamus* amounts to a plea of "obedience." I think that such a return can be questioned where the reply is that the justices did not "hear and determine" the matter ordered to be heard and determined. Or, again, in cases where the justices have declined to "hear and determine" a matter on the ground that it would be exceeding their jurisdiction, the reply would be good that they "had not heard and determined." But if the reply was merely to the effect that they had determined the matter wrongly, that would be a bad plea, and the justices' return would be a sufficient answer to it. Here the reply says that the justices did decline to hear and determine the matter submitted to them. That is sufficient to enable us to review the question whether they have, in fact and according to law, obeyed the *mandamus*. As to the construction of section 19, I should feel no difficulty as to its grammatical construction had not Charles, J., come to a different conclusion. I still think it is clear, for an Act of Parliament. Having regard to the state of things when this Act was passed, I am of opinion that it was intended to provide for the then existing licences only. Such existing licence was to be renewable subject to the four conditions on which refusal to renew is allowed. The holder of such licence must be taken to have a vested interest in that particular licence and in that only; and, in regard to any licence which he did not then hold, he had no vested interest, but must be treated as any other applicant for a new licence was to be treated under the statute.

Appeal allowed.

Solicitors for the appellants, *Peacock & Goddard.*

Solicitors for the respondent, *Radford & Frank.*

High Court of Justice.

Chan. Div. } May 4.
Kay, J. }

MAGNUS *v.* NATIONAL BANK OF SCOTLAND. (a.)

Practice — Plaintiff in default — Action dismissed for want of prosecution — Order by consent — Effect on subsequent claim by plaintiff.

A consent order dismissing an action for want of prosecution, unless it proceed upon a compromise of the cause of action, is no bar to another action between the same parties for the same matter. The former practice of the Court of Chancery on this point is unaffected by the Rules of Court under the Judicature Act.

The plaintiffs, having made default in making

(a.) Reported by H. F. AMEDROZ, Esq., Barrister-at-Law.

covery and answering interrogatories, told the defendants they intended to abandon the action, and would pay their costs. Not having done this, the defendants issued a summons to dismiss the action for want of prosecution. The plaintiffs thereupon paid the defendants' costs, and at the hearing of the summons they appeared, and consented to an order dismissing the action as against the defendants. The plaintiffs having brought a fresh action against the same defendants for the same matter, the defendants raised the question of law whether the plaintiffs were not estopped by reason of the order on the summons.

Held, that the order, not having proceeded upon a compromise of the cause of action, was no bar to the fresh action.

Motion.

On the 13th of May, 1885, the present plaintiffs brought an action against the present defendants and the Great Eastern Railway Co., claiming that a transfer of certain preference stock in that undertaking, purporting to have been executed by the plaintiffs Magnus and Halford, and by B. G. Goldsmid, in favour of the defendants Robertson and Ness was void, and that the railway company should be compelled to register the stock in the plaintiffs' names; or, in the alternative, that the defendant bank might be declared answerable for the value of the stock.

The statement of claim was delivered on the 1st of June, and the statement of defence on the 21st of July, 1885. On the following day the defendants obtained an order on the plaintiffs to file an affidavit of documents, and leave to deliver interrogatories to the plaintiffs. The plaintiffs neither made discovery nor answered the defendants' interrogatories within the time allowed, nor had they delivered a reply. Thereupon the clerk to the defendants' solicitors called on the plaintiffs' solicitors and asked them whether, as they had abandoned similar actions against other banks, they intended to abandon their action against the defendant bank. The plaintiffs' solicitors replied that this was their intention, and they offered to pay the defendants' costs. The bill was sent in to them on the 27th of August, and on the 26th of October they wrote to the defendants' solicitors, again promising to pay their costs shortly. In the interval the time for the plaintiffs to give notice of trial had elapsed.

On the 26th of November the defendants' solicitors issued a summons, returnable on the 7th of December, for dismissal of the action for want of prosecution, and wrote to the plaintiffs' solicitors that, unless the costs were paid on or before the 4th of December, they would file evidence in support of the summons.

On the 4th of December the plaintiffs' solicitors paid the defendants' costs, and on the 7th of December they attended with the defendants' solicitors before the chief clerk upon the summons of the 26th of November, and an order was made in the following form:—"Upon the application of the defendants, and upon hearing the solicitors for the applicants and for the plaintiffs, and upon reading the certificate of the fund in court"—which consisted of the sums paid into court by each party to a "security for costs account" to answer the costs of interrogatories—"it is by consent ordered that this action do stand dismissed out of this court as against the applicants, the defendants." The fund in court was accordingly ordered to be paid out to the defendants.

On the 14th of February, 1888, the writ in the present action was issued by the same plaintiffs against the same defendants, except the Great Eastern Railway Co., in respect to the same sum of stock; and on the 24th of March the statement of claim was delivered.

Both this and the former action were occasioned by frauds committed by Bartle Goldsmid, who was co-trustee with the plaintiffs of the stock in question, and through whose acts the fund had been lost to the trust under circumstances which will be found stated in the report of the case of *Magnus* v. *Queensland National Bank*, 35 W. R. 752, 36 Ch. D. 25, on appeal, *ante*, p. 577, 37 Ch. D. 466, which was commenced on the same day as the plaintiffs' former action against the present defendants.

The defendants now applied by motion that the question of law might be tried, before any evidence was given or issue of fact tried, "whether the plaintiffs are not estopped from bringing the present action by reason of the order made on the 7th of December, 1885 (in an action wherein the same parties were plaintiffs and the same parties defendants, and the relief sought was the same as in the present action), dismissing the said action by consent after hearing the solicitors for the plaintiffs and defendants," and that in the meantime all other proceedings in this action might be stayed.

Marten, Q.C., and *Farwell*, for the motion.—The order by consent dismissing the former action is a bar to this action. Under the old practice dismissal was no bar to another suit unless the order was made at the hearing, but under the present rules dismissal on the plaintiffs' application is equivalent to a dismissal on the merits: see ord. 26, r. 4; ord. 36, r. 12. In *Parker* v. *Simpson*, 18 W. R. 205, the dismissal of a bill by consent was held to be a bar to another suit for the same matter.

Renshaw, Q.C., and *G. Henderson*, for the plaintiffs, were not called on.

KAY, J.—The practice in this court was well settled long before I went to the bar. In Lord Redesdale's book I find the law thus stated on p. 238 of the original edition:—"A decree or order dismissing a former bill for the same matter may be pleaded in bar to a new bill, if the dismission was upon hearing, and was not in terms directed to be without prejudice. But an order of dismission is a bar only when the court determined that the plaintiff had no title to the relief sought by his bill, and therefore an order dismissing a bill for want of prosecution is not a bar to another bill." That practice was somewhat modified by the Consolidated Orders, 1860, ord. 23, r. 13, which has since been repealed. That rule provided that, "If the plaintiff, after the cause is set down to be heard, causes the bill to be dismissed on his own application, or if the cause is called on to be heard in court and the plaintiff makes default, and by reason thereof the bill is dismissed, such dismissal, unless the court shall otherwise direct, shall be equivalent to a dismissal on the merits, and may be pleaded in bar to another suit for the same matter." That order is repealed, and if you look at the Rules of 1883, ord. 72, r. 2, you find, "Where no other provision is made by the Acts or these rules, the present procedure and practice remains in force." That surely cannot be intended to keep on foot a repealed order. I should imagine that to mean the general jurisdiction and practice of the court, such as they are stated to be in the passage I have read from Lord Redesdale. Then in the orders there are directions for the discontinuance of an action before reply. That would be no bar whatever to the bringing of a new action.

The facts I have to deal with are these. The plaintiffs in this action brought, I am told, on the same day, similar actions against other defendants, all of them arising out of the same cause of action, though relating to different subjects, the cause being the dishonest appropriation of certain moneys, to which the plaintiffs are entitled, by a notorious swindler. The plaintiffs have prosecuted one of these actions, and have succeeded, but, pending the prosecution of that action, they were in default in this action, because, the writ having been issued

on the 13th of May, 1885, and the statement of claim delivered on the 1st of June, on the 22nd of July, 1885, an order was made against them to deliver an affidavit of documents, and interrogatories were administered. They made default and did not answer, and on the 25th of August, according to an affidavit before me by a clerk to the defendants' solicitors, that clerk called upon the plaintiffs' solicitors, and asked them whether they intended to abandon their action against the National Bank of Scotland, as they had done in actions against other banks. The answer was that they did, and would pay the defendants' costs of the action.

Now if they had merely discontinued the action that would have been no bar whatever to another action. The costs were not sent. The 22nd of September was the last day for giving notice of trial, and the notice was not given, and then there was another inquiry by the defendants' solicitors whether the defendants' costs would be paid. The answer was that they would be paid shortly. Then, that answer having been made on the 23rd of October, the defendants were not content to leave the matter in abeyance. Accordingly, on the 26th of November, they issued a summons to dismiss the action for want of prosecution. That was right, and, as everybody knows, such an order would have been no bar whatever to another action. Then came a letter from the defendants' solicitors saying to the plaintiffs that unless the costs were paid by the 4th of December they should file affidavits in support of the summons. That was answered by a letter of the plaintiffs' solicitors enclosing a cheque in payment of the costs of the action. And on the 7th of December, the day when the summons was returnable, the solicitors on both sides attended before the chief clerk on the summons to dismiss for want of prosecution, and, be it noticed, an order was made in this form: [His lordship read the order, and continued:—] Now if that consent order had proceeded on a compromise of the cause of action, it would have been an absolute bar to a new action. But here the order was made on a summons to dismiss for want of prosecution, an order on which would not be a bar, and therefore, unless it is shown that the consent proceeded upon the compromise of the cause of action, I cannot see how it is possible to say this would be a bar. Can it be said that when you attend on a summons to dismiss for want of prosecution, and submit to an order by consent, that order is a bar to another action? That seems to me against all the rules of the court. There is a great deal more in this than mere technicality, because the principle of the court is that unless the merits of the case have been dealt with, the dismissal of one action is not a bar to another action of the same kind. That is a very ancient rule of the Court of Chancery which I should be sorry to see disturbed. Now when I come to the facts of the case I find there never was any compromise of the action, nor anything like a compromise. It is quite true the plaintiffs were in default, and proceedings might have been taken against them for contempt in order to compel them to put in an answer to interrogatories. But no such proceedings were taken. The object of this summons to dismiss for want of prosecution was to prevent the plaintiffs going on with that action. Everybody knows that would not prevent another action being brought. Of course the plaintiffs were compelled by the terms of the order to pay all the costs of that action.

Now there being no attempt to compromise the cause of action, no agreement whatever amounting to a compromise of the cause of action, how can it be justly said that this order taken on summons to dismiss for want of prosecution, and taken by consent, *ipso facto* prevented another action being brought? It seems to me that where an order obtained on such a summons is expressed to be made by consent, the court may look behind the order, and see upon what terms that consent was given, and whether there be any ground for saying that it was intended to compromise the action altogether. On the other hand, if it is plain that there was no such agreement, no agreement whatever to put an end to the cause of action by compromise, then the mere fact that the order was worded "by consent" does not, in my opinion, in the least degree prevent the bringing of this action. But the order having been taken in that form, I do not see how it is possible to give any costs on this motion, which I dismiss.

The order should be in this form:—The court being of opinion that there was no agreement to compromise the cause of action, and therefore that the order made on the summons to dismiss for want of prosecution, although expressed to be made by consent, is no bar to the present action, dismiss the motion, but without costs.

Motion dismissed.

Solicitors, *Murray, Hutchings, & Stirling; Fulton, Field, & Baker.*

Chan. Div. } Jan. 5.
Chitty, J. }

BESLEY v. BESLEY. (a.)

Practice — Parties — Amendment — Adding plaintiff — Consent — Trustee and cestui que trust — *R. S. C.*, 1883, *ord.* 16, *rr.* 2. 11.

The rule of practice that no person shall be added as a plaintiff without his own consent in writing thereto does not admit of an exception where the plaintiff in an action seek to add as a co-plaintiff a person who is a trustee for the plaintiffs.

This was an application by procedure summons on the part of the plaintiffs to amend the writ and pleadings in their action by the addition of the name of C. R. Besley as a co-plaintiff.

By ord. 16, r. 11, of the Rules of the Supreme Court, 1883, it is (*inter alia*) provided that "No person shall be added as a plaintiff" . . . "without his own consent in writing thereto," and a question was raised whether this provision was not subject to qualification where the person proposed to be added as co-plaintiff was a trustee for the plaintiffs.

The facts were as follows:—

By an indenture of lease, dated the 23rd of February, 1871, Ellen Besley and C. R. Besley demised to the defendants certain leasehold hereditaments for a term of twenty-one years, subject to the covenants and conditions therein contained, including a covenant by the defendants not to assign and a power for the lessors to determine the lease and resume possession upon breach of any covenant.

Ellen Besley and C. R. Besley were the executors and trustees of the will of a testator, who was the father of the plaintiffs, who were beneficially interested under the will.

In the year 1885 Ellen Besley died.

In the month of February, 1887, the defendants were alleged to have committed a breach of their covenant not to assign.

On the 13th of May, 1887, the plaintiffs became entitled to the reversion expectant on the termination of the lease of the 23rd of February, 1871.

On the 1st of June, 1887, the plaintiffs commenced an action to recover possession of the premises.

By the defence it was pleaded that in the month of February, 1887, the plaintiffs were not entitled to the legal estate in the reversion.

(a.) Reported by A. D. MACLAREN, Esq., Barrister-at-Law.

Another action was commenced by the plaintiffs for administration of the estate of their father, the testator, and on the 12th of December, 1887, an order was made in the administration action that the plaintiffs might be at liberty to take such proceedings as they might be advised in the name of C. R. Besley (who was a defendant in the administration action) for obtaining possession of the premises and for rent and mesne profits in respect thereof upon the plaintiffs indemnifying C. R. Besley against any liability for costs, such indemnity, unless agreed upon, to be settled by the judge, and the order provided expressly as follows:—"But this order is to be without prejudice to any right which the said C. R. Besley may have to object to his name being added as a co-plaintiff in the existing action, *Besley* v. *Besley* [1887 B. 2751], if the plaintiffs shall apply for leave to add him."

C. R. Besley refused to give his consent in writing to be added as co-plaintiff with the plaintiffs in this action [1887 B. 2751], and the plaintiffs accordingly took out this summons.

Maclean, Q.C., and *Swinfen Eady* referred to ord. 16, rr. 2, 11, and contended that the provision in rule 11, that no person shall be added as plaintiff without his own consent in writing thereto, only applied when the person whom it is sought to add as plaintiff is a stranger to the applicants: *Tryon* v. *National Provident Institution*, 34 W. R. 398, 16 Q. B. D. 678; but does not apply when that person is a trustee and the applicants are his *cestui que trusts* who are entitled to require their trustee to protect them. [CHITTY, J., referred to *Mason* v. *Harris*, 27 W. R. 699, 11 Ch. D. 97, and to *Duckett* v. *Gover*, 25 W. R. 455, 6 Ch. D. 82.]

Romer, Q.C., and *Oswald, Stallard*, and *Bremner*, who appeared for parties opposing the summons, were not called on.

CHITTY, J.—In an existing action the plaintiffs apply to join a co-plaintiff, and the person whom they propose to join will not consent. The question depends on ord. 16, rr. 2 and 11. Unquestionably those two rules must be read together. In rule 11 there is an express statement that no person shall be joined as a plaintiff without his own consent in writing. I am asked to modify in some way or other those words, and dispense with the consent in writing of the proposed co-plaintiff on the ground that he is a mere trustee for the applicants. I am unable to do so. It is a negative clearly expressed and without any exception, and I consider that I am not at liberty to introduce an exception into the general rule of the court on the ground that it might be convenient so to do. The observations of counsel for the applicant might or might not have weight with those who framed the rules, but as a judge sitting here to interpret the rule I must take it exactly as it is.

It is said that the plaintiffs who propose to join this person have a right to use his name, he being a trustee, and that it has been decided in the administration action that they have such right. But the order in that action was made without prejudice to any right which the gentleman proposed to be added, who was the trustee, may have to object to his name being added as co-plaintiff to this action. So that the order which was made giving the plaintiffs liberty to use the name of the trustee was made particularly without prejudice to this question.

The argument in substance is, that I ought to introduce, by way of exception, words which would exclude from this negative proposition the case of a trustee where the *cestui que trust* has a right to use his name. In my opinion I cannot introduce that exception, and the conclusion I have come to, independently of the case that has been mentioned, is, that I am not at liberty to depart from the express language of the order. It is said that the point now before me was not decided in *Tryon* v. *National Provident Institution*, because it does not appear from that case that the person proposed to be joined as co-plaintiff was a trustee for the persons who proposed to join him. I am not satisfied that that is a correct statement of the case. It appears to me, as well as I can make out the facts, though I am not clear on all the facts, that the person proposed to be joined did stand in the relation of trustee to the person who proposed to join him. If so, that would be an express decision on the point. But, however that may be, I decide this case as if it were new, on the express words of ord. 16, r. 11, which are sufficiently clear to enable me to dispense with authorities.

Solicitors, *Lowe & Co.; Saunders, Hawksford, Bennett, & Co.; Anderson & Sons.*

Q. B. Div. (Cave and A. L. Smith, JJ.) April 19.

GASCOYNE *v.* RISLEY AND OTHERS. (*a.*)

Inn—Licence—Renewal—Objection by justices—No notice—No evidence on oath—35 & 36 *Vict. c.* 94, *s.* 42, *sub-sections* 2, 3.

It is not competent for justices to refuse to grant the renewal of a licence on account of an objection originated by themselves, unless they have first given notice of objection and taken evidence in accordance with the provisions contained in the Licensing Act, 1872, *s.* 42, *sub-sections* 2, 3.

This was a case stated for the opinion of a divisional court by the chairman of the Oxfordshire Quarter Sessions.

At the general annual licensing meeting of the justices for the North Wootton Division of the County of Oxford, held on the 2nd day of September, 1887, the appellant, though he had not been required to attend, applied in person for the renewal of his licence to sell intoxicating liquors by retail, to be consumed either on or off the premises, at his house, known as the Pole Axe Inn, situate in the village of South Newington, in the county of Oxford, he being a licensed person entitled to apply for such renewal. No objection to the renewal of the licence was made at any time by any outside objector, nor was any notice of an intention to oppose the renewal served upon the appellant, nor was any adjournment of the granting of the licence to a future day made. But the justices refused to grant the renewal of the licence.

The appellant appealed to the next General Quarter Sessions of the Peace of the County of Oxford, which court confirmed the decision of the justices, subject to the opinion of a divisional court as to whether the provisions of the 42nd section of the Licensing Act, 1872, applied, "not only to an objection preferred before the licensing justices by some person other than such justices, but also to an objection arising in the minds of the licensing justices themselves and actuating them to refuse to grant a licence." If the court should be of opinion that the said section did apply to such an objection by the justices themselves, then the order of the quarter sessions confirming the justices to be quashed.

The material parts of the 42nd section of the Licensing Act, 1872, are as follows:—

"Where a licensed person applies for the renewal of his licence:

"(2) The justices shall not entertain any objection to the renewal of such licence, or take any evidence with respect to the renewal thereof, unless written notice of

(*a.*) Reported by CECIL CHAPMAN, Esq., Barrister-at-Law.

an intention to oppose the renewal of such licence has been served on such holder not less than seven days before the commencement of the general annual licensing meeting. Provided that the licensing justices may, notwithstanding that no notice has been given, on an objection being made, adjourn the granting of any licence to a future day, and require the attendance of the holder of the licence on such day, when the case will be heard and the objection considered as if the notice hereinbefore prescribed had been given"; and

"The justices shall not receive any evidence with respect to the renewal of such licence which is not given on oath.

"Subject as aforesaid licences shall be renewed, and the powers and discretion of justices relative to such renewal shall be exercised as heretofore."

Mackarness, for the appellant, contended that the justices were bound to comply with the provisions of the section, and that they had not done so in this case.

He cited *Ruddick* v. *Justices of Liverpool*, 42 J. P. 406, and *R.* v. *Merthyr Tydfil Justices*, 14 Q. B. D. 584, 33 W. R. Dig. 122.

No counsel appeared for the magistrates.

Cave, J.—Under the 42nd section of the Licensing Act, 1872, the evidence against the renewal of a licence must be upon oath. Here the magistrates entertained an objection in their own minds in regard to which no evidence on oath was taken. It is most important that the functions of judge and litigant should be kept distinct. The magistrates must comply with all the provisions of the statute, which enacts that all evidence must be given upon oath.

The order of quarter sessions, and consequently the order of the justices refusing the renewal of the licence, must be quashed.

A. L. Smith, J.—I agree. I think that, if the requirements of the section had been complied with, it would be open to the magistrates to start an objection to the renewal. In giving this decision it seems to me that we are only following the cases of *R.* v. *Liverpool Justices* and *R.* v. *Merthyr Tydfil Justices*.

Solicitors for the appellant, *Warriner & Kinch*.

Q. B. Div. (Cave and A. L. Smith, JJ.) April 12.

Thomas *v.* Peek. (*a*.)

County courts — High bailiff — Wrongful execution — Recovery of possession-money — County Court Rules, 1886, *ord.* 27, *r.* 1.

A high bailiff of a county court sued an execution creditor for four days' possession-money on a wrongful execution levied upon goods other than those of the judgment debtor, and therefore ineffective.

Held, that, under 19 *&* 20 *Vict. c.* 108, *s.* 83, *taken with* 30 *&* 31 *Vict. c.* 142, *s.* 31, *it is within the discretion of the county court judge to award such fee to the high bailiff as is allowed by schedule C. of* 19 *&* 20 *Vict. c.* 108, *taken with schedule B., parts* 1 *and* 3, *of the County Court Rules*, 1886, *subject only to the limitations laid down in ord.* 27, *r.* 1, *of the said rules.*

Ord. 27, *r.* 1, *of the said rules is* intrà vires, *in that it does not allow a new fee, but only limits such award up to the date on which the execution creditor admits the title of the claimant to the goods so wrongfully levied upon.*

A high bailiff, being a creation of statute, is not in an analogous position to a sheriff.

(*a*.) Reported by Spencer L. Holland, Esq., Barrister-at-Law.

Appeal from his Honour Judge Williams, sitting at the county court of Swansea.

This was an action brought by the high bailiff of the county court of Swansea to recover from the defendant, a judgment creditor, the costs of four days' possession of premises taken under a writ of execution, but in which the execution had been fruitless owing to the goods being seized not having been found to belong to the judgment debtor. Judge Williams held that the plaintiff could so recover, from which decision the defendant now appealed.

J. G. Witt, for the defendant.—The fee of 3s. 6d. per day for every day in which possession is kept under an execution is here claimed by the plaintiff as high bailiff, and the county court judge held that such fee was payable, notwithstanding that the execution was fruitless, under the County Court Rules, 1886, ord. 27, r. 1, and schedule B., part 1 and part 3. Assuming the validity of such order, the order only applies to cases of interpleader, and impliedly negatives any claim to the fee where the execution has failed owing to the wrong goods having been seized. The order and fee given in the schedule are invalid. The only subjects for fees allowable are those enumerated in schedule C. of 19 & 20 Vict. c. 108—*i.e.*, the fee of 6d. per pound on value of goods seized and a charge for possession, to be allowed at the judge's discretion in actions of interpleader. The County Court Rules are authorized under sections 32, 78, and 79 of that Act and section 16 of 28 & 29 Vict. c. 99, but such powers only extend to the matters scheduled and to the drawing up of new tables of fees. The rules cannot make fees payable for other occasions. A high bailiff is in a similar position to a high sheriff. No fees can be charged for a public duty unless expressly given by statute. A rule or schedule allowing such a new fee is *ultrà vires*. Fees for possession where there have been no beneficial results from execution have been disallowed for sheriffs by the courts: *Newman* v. *Merriman*, 36 L. T. N. S. 397, 20 W. R. C. L. Dig. 78; *Royle* v. *Busby & Son*, 29 W. R. 315, 6 Q. B. D. 171. As to sheriffs' fees, see 28 Eliz. c. 4; 7 Will. 4 & 1 Vict. c. 55.

Henn Collins, Q.C., and *Wills*, for the plaintiff.—Ord. 27, r. 1, is *intrà vires*. It merely gives the high bailiff the right to claim such fee in cases of interpleader as he had already in other cases. No limitation is mentioned as to when the fee shall not be payable. The schedule simply says "keeping possession, for every day the bailiff is actually in possession, 3s. 6d." The high bailiff is of statutory creation, and is not comparable to the analogous office of high sheriff. His rights in interpleader cases are specially protected by section 72 of 30 & 31 Vict. c. 142. The rules of 1886 only adapt and apply the power given to the court to allow fees for possession under schedule C. of 19 & 20 Vict. c. 108.

Witt replied.

Cur. adv. vult.

April 13.—A. L. Smith, J., delivered the written judgment of the court.

In this case the plaintiff, the high bailiff of the county court of Swansea, sought to recover from the defendant four days' possession-money, at the rate of 3s. 6d. per diem, for having recovered the possession of certain goods under an execution issued, in which the plaintiff defendant was execution creditor. The county court judge gave judgment for the plaintiff. The defendant has now appealed, and on his behalf it has been argued that the judge was wrong, because no authority could be shown by which the high bailiff, in the events that have happened, could possibly be entitled to the possession-money he claimed from the execution creditor.

It must be taken, in my judgment, as a fact in this case, that the execution levied by the plaintiff was useless to the defendant—in other words, that the execution

levied was not upon the goods of the execution debtor. It was argued as follows—that the high bailiff could only recover from the public fees which by statute were appended to his office, and if no such fees were appended he could recover none. To that proposition I agree. It was further argued that a high bailiff was analogous to a sheriff, and that if a sheriff levies and recovers possession of goods other than those of the execution debtor, without any special order from the execution creditor, he cannot recover possession-money from the creditor for such possession.

As regards a sheriff that is so, and the case cited of *Newman* v. *Merriman* supports that contention. In my judgment, however, it is fallacious to liken a high bailiff to a sheriff, for the high bailiff is the creation of statute, and it is by what the statute enacts, no more and no less, that he and his office is regulated. The real question is, what do the statutes and orders made pursuant thereto enact?

By the County Courts Act of 1856 (19 & 20 Vict. c. 108, s. 83), the high bailiff is to be paid by salary, and the fees are appointed for keeping possession of goods under execution. By section 78 of the same Act such fees are to be those set forth in schedule C. By this schedule it is provided as follows, "High Bailiff's Fee.—For keeping possession of goods till sale, per day, not exceeding five days, 6d. in the pound on the value of goods seized, to be paid by appraisement." This is re-enacted in the rules of 1886. This, as it seems to me, applies when the bailiff has taken the execution debtor's goods in execution, and not when he has taken another man's goods. Also, in cases of interpleader it is enacted that the judge may allow at the hearing the actual costs incurred by the high bailiff in keeping possession of the goods claimed, and no more. By section 79 of this Act power was given to the Commissioners of the Treasury to alter these fees, and a large general power to lay down a scale of fees to be levied is also contained in section 7 of 38 & 39 Vict. c. 50. I find that, in pursuance of this statute an order of the Commissioners of the Treasury, regulating fees, was made, dated the 30th of December, 1867, and also another dated the 26th of October, 1875; both of which are set out on pp. 44 and 45 of Mr. Pitt-Lewis's book on County Courts (ed. 1880.) It would seem that, upon reading these two orders, the result is that only those fees included in schedule C. of the Act of 1856 are abolished, for which new fees are substituted in lieu thereof. The regulation, therefore, *quoad* costs of possession to be allowed by a judge to the high bailiff under schedule C., remains intact, except so far as the order hereafter referred to may have cut down the power to award such costs of possession to a high bailiff in certain circumstances. In the year 1886 the County Court Rules of that year were duly framed and promulgated pursuant to statute. The all-important rule upon the question in hand is ord. 27, r. 1, which will be found on p. 622 of Mr. Heywood's County Court Practice (4th ed., 1886.) The material parts are as follows: "Where a claim is made in respect of goods taken in execution," if the execution creditor admits such claim, and gives notice thereof in manner by rule provided, . . . "he shall only be liable to the high bailiff for any fees of possession or other expenses incurred prior to the receipt of such notice." The appellant argued that this rule did not give the right to the fee now claimed. The respondent urged that it did. In my judgment it did not, but the true construction of the rule is that it is a limitation of a right which theretofore existed in the high bailiff to get the judge to give him possession-money if he could. As I read the legislation upon this point, by schedule C. of the Act of 1856 the judge may allow at the hearing of an interpleader to the high bailiff the actual costs of possession incurred by him. By section 31 of the Act of 1867 (30 & 31 Vict. c. 142) the high bailiff may set in motion an interpleader where a claim is made to the goods he has taken in execution, and in such proceedings the judge may award to the high bailiff the costs of possession. It seems to me that there is here no limitation upon the power of the judge so to award as is suggested by the appellant, nor that he could only award possession-money where the execution was effective to the execution creditor," though, obviously, if not effective, that might be a good ground for the judge refusing the same. There may, however, be circumstances in which, although the sheriff has taken and held wrong goods, he should be entitled to possession-money. The judge, in my judgment, had the power to award such possession-money to the high bailiff, though the execution had been non-effective by reason of not having been upon goods of the execution debtor, and whether he would do so or not was a matter purely for his discretion. The difference in this respect between a sheriff and a high bailiff, as it seems to me, is that under the scale of fees set forth under 7 Will. 4 & 1 Vict. c. 55 the sheriff is not entitled to his 3s. 6d. per diem possession-money if he has levied on the wrong goods, because that statute does not give such fees in that event, whereas, in the case of a high bailiff, he may, under like circumstances, get possession-money if the judge so directs. In my judgment provision is made by ord. 27, r. 1, that where an execution creditor admits the claimant's claim to the goods seized as by the rule provided, such execution creditor is only to be liable for the high bailiff's possession fee or expenses up to the date on which he (the execution creditor) gives notice that he admits the claim and not after, and in such a case the judge could not award him more; whereas, before this rule, he would have been liable to have been mulcted by the judge of the whole possession-money up to the date of hearing, if possession had been so long kept, and if the judge had so determined. In my judgment ord. 27, r. 1, not being a grant of a new fee, but, as before stated, a limitation put upon what might theretofore have been allowed by a judge against an execution creditor in favour of a high bailiff, is well within the powers given by the statute to make rules and regulations relating to procedure and practice.

I will also add that, in my opinion, considering the eminent persons by whom the rule was passed and adopted, the phraseology of it is cogent to show that there had existed theretofore the power in the judge to award costs of possession as I have before pointed out in fact to have existed. I am therefore of opinion that, under the circumstances, the county court judge had the power to award the plaintiff possession-money for the four days he was in, that there was no excess of jurisdiction or error in law in his having done so, and that this appeal must be dismissed. The judgment must stand against the execution creditor alone, and not against his solicitor, if it has been so entered, but as each party was wrong in the position he took up before the judge—viz., the one insisting that by law he was entitled to the fees and the other that by law he was not—the appeal should be dismissed, without costs.

I think the defendant is entitled, if he desires it, to go before the county court judge in order to contend that such award being, as we hold, within his discretion, he, the defendant, should not have the whole amount here claimed awarded against him. Otherwise the judgment of the county court must stand.

Appeal dismissed.

Solicitors for the plaintiff, *Gregory & Co.*, for *E. A. Williams*, Swansea.

Solicitors for the defendant, *Pritchard & Sons*, for *Hearfield & Lambert*, Hull.

Q. B. Div. (Cave and Grantham, JJ.) Jan. 23.

Ex parte SMITH.

In re STANIAR, ROBERTS, & Co. (*a*.)

Bankruptcy—Scheme of arrangement—Sale of assets without the jurisdiction—Amount of security—Discretion of court—Benefit of general body of creditors—Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), *s.* 18, *sub-section* 6.

A proposed scheme of arrangement between creditors and debtors who had assets in America, without the jurisdiction, provided (inter alia) *that the American assets should be sold at rather more than their estimated value to one of the American partners, the only provision as to security being that the trustee in bankruptcy should insure the purchaser's life for about one-sixth of the purchase-money. The scheme was approved by the trustee, by the committee of inspection, consisting of creditors to a large amount, by the accountant employed by them to examine into the Chilian affairs, and by the official receiver.*

Held (*reversing the decision of the county court judge*), *that the scheme ought to be approved as being reasonable and for the benefit of the general body of the creditors within the meaning of the Bankruptcy Act*, 1883, *s.* 18, *sub-section* 6.

Appeal from the decision of the county court judge sitting at Manchester.

The appellants were a firm of merchants carrying on business in Manchester and Chili. Their unsecured liabilities amounted to £63,000 and their American assets to about £50,000. A scheme of arrangement with creditors was proposed as follows:—

(1) That the American assets should be sold to Mr. Hodgkinson, one of the Chilian partners.

(2) That the trustee and the committee of inspection should have an absolute discretion to decide as they thought proper all claims by creditors to liens or security.

(3) That the payment of the purchase-money was to be guaranteed by a policy on Mr. Hodgkinson's life for £10,000.

This scheme, which it was thought probable would produce a dividend of 12s. 6d. in the pound, was agreed to and recommended by the committee of inspection, acting on the report of an accountant whom they had sent to examine the affairs of the Chilian house, by the purchaser, and by the trustee in bankruptcy. It was objected to by the respondents, Messrs. Samuel & Isaac, of Manchester, creditors for £7,000, for £4,000 of which they held security in America, on the ground that it involved a too complete surrender of the American assets without containing any adequate security for the payment of the purchase-money. Before the learned county court judge also they had made certain imputations on the conduct of Mr. Hodgkinson, which were subsequently shown to be baseless.

The official receiver also approved of the scheme as reasonable and for the general benefit of the creditors, leaving it, however, to the court to decide the question of sufficiency of security.

The judge refused to approve the scheme on the ground that it was "not calculated to benefit the general body of creditors" within the meaning of section 18, sub-section 6, of the Bankruptcy Act, 1883.

Sir C. Russell, Q.C., Henn Collins, Q.C., and *G. W. Lawrence*, for the appellants.

Bigham, Q.C., and *Woolf*, for the respondents.

Muir Mackenzie, for the official receiver.

The following cases were cited:—*Ex parte Campbell, In re Wallace*, 15 Q. B. D. 213, 33 W. R. Dig. 14; *Ex parte Reed, In re Reed*, 34 W. R. 493, 17 Q. B. D. 244; *Ex parte Kearsley, In re Genese*, 18 Q. B. D. 168, 35 W. R. Dig. 15.

CAVE, J.—I am of opinion that this appeal should be allowed. The approval of a scheme of arrangement is no doubt a matter for the discretion of the court, and I am not disposed to interfere unless I think, as I do in this case, that the court has not proceeded upon right principles.

The case is peculiar. The assets are nearly all in Chili, out of the jurisdiction of the court, and the collection of them by the trustee would be most expensive, and might result in a very small dividend or in no dividend at all.

Under these circumstances one of the Chilian partners offers to buy the Chilian assets for a sum representing about their estimated value, the purchase-money to be payable in sixteen instalments within four years. The committee of inspection, composed as it is of competent men of business, who are acting on the report of an experienced accountant whom they sent to Chili to examine the affairs of the Chilian house, are in favour of the sale.

The trustee proposes the scheme, and the official receiver, as the representative of the Board of Trade, approves it as reasonable and for the general benefit of the creditors. It is an obvious feature of the scheme that it contains no provision whatever by way of guarantee, but depends solely for its success on the honesty and capacity of Mr. Hodgkinson. This feature of the scheme the committee, who are creditors of the firm for a large amount and who have had opportunities of forming a just estimate of Mr. Hodgkinson's character, perfectly well understood when they gave it their sanction.

The refusal of the learned judge to approve the scheme seems to have been due partly to imputations on Mr. Hodgkinson's conduct, which were unfortunately made at the hearing, and which have now been shown to be baseless, partly to the feature of the scheme to which I have alluded—the absence of any guarantee. It is said that this is a matter with respect to which the judge was entitled to exercise an absolute discretion; but I cannot assent to this. If the judge supposed that no scheme of arrangement, involving a sale of assets difficult to collect, can ever be approved by this court unless the payment of the purchase-money is to some extent guaranteed, his view was, in my opinion, erroneous. There is and ought to be no such general doctrine. If Mr. Hodgkinson were proved to have wealthy friends, there would be more force in the contention that he ought to find a surety, but this is not proved. As to the suggestion that the payment of the claims of the creditors who disapprove of the scheme should be guaranteed by the creditors who approve of it, nothing can be more unreasonable.

The scheme, then, may be expected to turn out well if Mr. Hodgkinson proves honest and capable, but not otherwise. The majority of the creditors, who are well qualified to judge, believe Mr. Hodgkinson to be both honest and capable, and there is nothing before the court to show that they are mistaken in their opinion, or that the scheme is otherwise than reasonable and for the general benefit of the creditors. The scheme ought, therefore, to be allowed.

GRANTHAM, J.—I am of the same opinion. No doubt caution is very desirable as regards the approval of schemes of composition and arrangement, but want of security is not of itself a sufficient reason for rejecting a scheme of this nature. The question is commercial rather than legal, and a scheme approved by such a com-

(*a*.) Reported by G. K. PALEY, Esq., Barrister-at-Law.

mittee and sanctioned by the Board of Trade ought not to be rejected without some very adequate reason.

Appeal allowed.

Solicitors for the appellant, *Grundy, Kershaw, Saxon, & Samson.*

Solicitor for the respondents, *H. Montague.*

Solicitor for the official receiver, *Solicitor to the Board of Trade.*

Court of Appeal.

From Chan. Div. Dec. 16, 17.

SOCIÉTÉ GÉNÉRALE DE PARIS *v.* DREYFUS BROS. (*a.*)

Practice—Service of writ out of jurisdiction—Discharge of order on ground that no cause of action—R. S. C., 1883, *ord.* 11, *r.* 1, *sub-section* (*f*).

On an application under order 11 *for leave to serve a writ out of the jurisdiction, it is the duty of the court, in considering whether or not such service ought to be allowed, to go into the facts of the case in order to see if there is any probable cause of action.*

Decision of Pearson, J. (33 *W. R.* 823, 29 *Ch. D.* 239), *reversed.*

Appeal from a decision of Pearson, J., reported 33 W. R. 823, 29 Ch. D. 239, where the facts are fully stated. They were shortly as follows:—

Dreyfus Bros. brought an action against the Peruvian Guano Co., claiming, by virtue of a *traité* with the Peruvian Government, the ownership of certain cargoes of guano. On the 13th of January, 1885, the proceeds of sale of the disputed cargoes which came to England, to the amount of nearly £200,000, were paid into court to the credit of the action of *Dreyfus* v. *Peruvian Guano Co.*

The present action was brought by the Société Générale de Paris, a French company, whose offices were in Paris, against A. Dreyfus, a domiciled Frenchman resident in Paris, and sued as Dreyfus Bros., the Peruvian Guano Co., an English company, and Premsel, a domiciled Frenchman resident in Paris, claiming a declaration that the money in court to the credit of *Dreyfus* v. *Peruvian Guano Co.* belonged to the Société Générale and other parties interested under a contract of the 6th of July, 1869, for a receiver, and for an injunction restraining Dreyfus Bros. from receiving or dealing with these funds.

On an application by the plaintiffs for leave to serve the defendants with the writ out of the jurisdiction under ord. 11, r. 1, sub-section (*f*), Pearson, J., held that the evidence showed that there was a possibility of a good cause of action, and in the exercise of his discretion, gave the necessary relief.

From this decision the defendants appealed.

Since that decision it had been decided by the French courts that the defendants had an unfettered right to receive the proceeds of the guano, subject only to the liability to account to the plaintiffs.

Sir H. Davey, Q.C., and *Ingle Joyce*, for the appellants.

Rigby, Q.C., Cozens-Hardy, Q.C., and *Butcher*, for the plaintiffs, took the preliminary objection that the order allowing service out of the jurisdiction was a matter of course; and that, at any rate, it must depend on the facts before the judge when service was allowed whether the order was rightly made.

They referred to *Call* v. *Oppenheim*, 1 Times L. R. 622.

The COURT overruled the objection.

The appeal was then proceeded with.

COTTON, L.J.—This is a motion by way of appeal from a decision of Pearson, J., to discharge an order made by him for the issue of a writ for service out of the jurisdiction, and for liberty to serve notice of that writ out of the jurisdiction—namely, in France. It is a somewhat singular case, because both plaintiffs and defendants are French people domiciled in France, and there are courts in that country. But the plaintiffs come here saying that it is a case which is within ord. 11, r. 1, for it is an action in which it is sought to get an injunction with reference to a large sum of money which is in court in this country. That is so, and it is really, therefore, within one of th sub-divisions of ord. 11, r. 1. But was it right to bring the action here? Or was it right, of the court, in the discretion given to it to authorize the issue of the writ, and to authorize notice of that to be served in France?

When the case was before Pearson, J., on the evidence by affidavit he declined to discharge the order, and, as I understand, he declined to discharge it on a view of what were the rights of the parties under a particular clause in the contract of participation which had been entered into between the plaintiffs and defendants. He thought that the evidence was doubtful on what must be a question of fact—namely, the rights of the parties under this contract, which was a French contract made between domiciled Frenchmen. I call the Société, Frenchmen because it is a French society. But now we have a great deal more. At the time the order was made by Pearson, J., there was an action brought by Dreyfus in France, in order to have the rights established under the contract as against the other contracting parties, but since that order was made by Pearson, J., refusing to discharge the issue of the writ and the order for service, there have been other proceedings taken by the Société as against Dreyfus in order to have it established in the French courts that the Société had a right to receive this sum, either under the general law applicable to such cases, or under the particular terms of the contract on which Pearson, J., rested his decision. That has been through all the courts there, and the Court of Appeal in Paris and the Court de Cassation have decided against the claims which were raised by the Société.

Now, that really shows that the Société were wrong in trying to establish their claim to this fund in England on the grounds which were relied on by them. In the writ which was authorized to be served they put their claim in this way—these funds are assets of a partnership, we have a right to receive them as against Dreyfus, or, at any rate, the court ought to grant a receiver and injunction. That was expressly decided against the Société in these proceedings taken by them, and so it was ultimately conceded by Mr. Rigby. That being so, we must take it that on that point as to the right to a receiver, and the right to receive the fund personally, the Société were wrong in their contention as plaintiffs here.

Then it was said there was another point, although not raised before the tribunals in France, which would, on the evidence before us, entitle the Société to a receiver, or make it probable that the Société was entitled to that relief. That was the evidence of Mr. Barboux who is their witness. It is pointed out, and it has not been displaced at all either by Mr. Rigby or Mr. Cozens-Hardy, that the very fact on which Mr. Barboux says the further right to get a receiver would

(*a.*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

depend—namely, that the participation or partnership was in liquidation—was actually before the Court of Appeal when the proceedings were before it, and when it made the order of the 22nd of April, 1886, affirming the decision of the court of first instance, which decided that the Société had no right personally to receive and no right to get a receiver of this fund.

That being so, really the whole case of the defendants has been proved. That is to say, it has been established by the best evidence possible that the matter of fact on which the right of the plaintiffs in England depends does not exist.

Then what ought we to do? If we are satisfied that the tribunals in Paris had not power to protect this fund if they thought right to do so, I should hesitate about discharging the order for the issue of this writ, and for service abroad. But Mr. Barboux's affidavit, on which reliance was placed by Mr. Rigby and Mr. Cozens-Hardy, in my opinion shows quite the contrary. He explains why a receiver would not be granted when the Société was not in liquidation, because it would interfere with the rights and powers and duties of the manager, who in this case was Mr. Dreyfus, the manager of the business which was carried on by the Société. But when the Société is in liquidation, which to my mind can have no other meaning than this, when it is only carrying on its business so far as necessary for the purpose of winding up its affairs, paying its debts, and distributing its proceeds, that does not apply. If that is so, if in fact they will, in consequence of that liquidation being so established or existing, be entitled in France to get a receiver, they can do it, but in my opinion, if it comes before us as a question of fact, I should say that the highest tribunal has decided what the French law is, and therefore gives us positive evidence that they are not entitled there, or consequently here, to get any receiver of this fund.

That being so, what ought we to do? In my opinion, although we determine this matter on evidence now brought before us which was not before the court below, showing conclusively what the French law, as a matter of fact, for us to decide is, we ought not to allow this action to go on. The defendants have not appeared, that is to say, they have only appeared conditionally in order to discharge the order which has been made by Pearson, J., for liberty to issue the writ and for service of notice abroad. I think, therefore, the proper thing to be done is to discharge the order in chambers and Pearson, J.'s order and to discharge the writ. That will put an end to this action.

It is said that we are wrong in considering these questions into which I have entered. That argument was principally based on a case before the other branch of the Court of Appeal, but there are enormous differences between that case and this. There there was an English contract, because it was a bill of exchange accepted in France but accepted payable in England, and there were grave questions as to what was the effect and validity of that judgment which had been given in France with reference to the matter. That is a very different matter from that which appears before us now, where we have this judgment of the highest tribunal in France, which really decides the matter.

As a rule, one ought not to enter into the questions which are to be decided at the trial of the action. But then rule 4 of this order requires that every application for leave to serve such writ shall be supported by an affidavit or other evidence stating that in the belief of the deponent the plaintiff had a good cause for action. Now that affidavit was made. The fact that such an affidavit is to be made shows that the court ought to consider whether there is a probable cause of action in respect of which the writ is sought to be issued and notice to be served abroad. Here that depended not on a question of English law but on a question of fact. Now that fact has been established by the best possible evidence, by the courts which can decide what is French law deciding what the fact is, and the fact is shown to be that there is no cause of action.

Therefore, in my opinion, having regard to that rule, not only are we justified, but we ought, in a case like this, to inquire into any matter which is brought before us by the parties served, showing that the supposition upon which the judge made the order for the issue of the writ was erroneous, and does not exist.

In my opinion, therefore, the appellants are entitled to the order for which they ask.

Then as to costs, that I doubted about, as we were hearing the matter here on evidence not before Pearson, J. But it is shown now that the affidavits which were before Pearson, J., on behalf of Dreyfus correctly stated the fact that was disputed by the other side. They ought never to have stated to the court that a fund existed which the tribunals in Paris, the Court of Appeal, and the Court de Cassation have shown to have never did exist. This also is to be considered, that the matter stood over after the appeal was presented, and before it came before us, in order that the plaintiffs, the Société, might bring the matter before the French tribunals to decide this matter between the parties in order to get their decision to show which was right and which was wrong in the allegations of fact which were raised before Pearson, J.

I think, therefore, we cannot do otherwise than, in discharging the order made by Pearson, J., to give the appellants, Messrs. Dreyfus, the costs both here and below.

LINDLEY, L.J.—I am of the same opinion, and I cannot help thinking if the facts now before us had been before Pearson, J., leave to serve this writ abroad would never have been granted.

The controversy is of this nature. The Société Générale de Paris and Messrs. Dreyfus and some other gentlemen entered into a French contract, all being French subjects, for the participation of profits in a certain adventure, and their rights upon that contract depend upon the French law, and French law only, there is no English law in the matter. It so happens that there is standing to the credit of a cause in the High Court a very considerable fund which has been ordered to be paid out to Messrs. Dreyfus, and the Société Générale, by their writ in this action, ask for a declaration that they are entitled to have that fund, and ask for a receiver, and an injunction to restrain Messrs. Dreyfus from receiving it. Under those circumstances they apply for leave to serve the writ in that action against Messrs. Dreyfus.

We have now the matter established clearly enough to enable us to see our way with perfect precision. It is established beyond all possibility of controversy that by French law, the Société Générale are not entitled to receive that money, that they are not entitled to prevent Messrs. Dreyfus from receiving the money, and that Messrs. Dreyfus are the proper people to get it. It is also not in controversy at all that when Messrs. Dreyfus have got it it must be brought into account and accounted for by them as part of the moneys which are subject to the contract to which I have referred. They are the people to get it. Even according to the affidavit which we have last had before us, and relied on by Mr. Rigby, it seems to me to be quite plain that the proper mode of proceeding, even in France, is that they let Messrs. Dreyfus get in that outstanding asset. Whether, when they have got it, matters are in such a liquidation to enable the Société Générale to have it deposited is a question for the French courts, not for us; but it is impossible for Messrs. Dreyfus even to comply with any order of that kind unless they get the fund from us. It is an outstanding asset which the French

courts say Messrs. Dreyfus are to get in, and no one has a right to say they shall not get it in. That appears to be the simple answer to the case.

We are referred to order 11, and it is contended that, inasmuch as an injunction is asked, and as an affidavit has been made in the terms required by that order, we have no right to refuse leave to serve this writ, and it has been contended, upon the authority of *Call* v. *Oppenheim*, that if we do we shall be running counter to a decision of the other branch of this court. I differ entirely from every one of those allegations. In the first place order 11 enumerates certain circumstances under which, and under which alone, the court can give leave to serve writs out of the jurisdiction. It does not say that when those circumstances occur the court is bound to give leave. On the contrary, the language is that service out of the jurisdiction "may be allowed by the court or a judge" in certain specified events. This shows that the court has a discretion, and is bound to exercise its discretion. This becomes still plainer by turning to rule 2, which states certain matters which the court is bound to have regard to when it is asked for leave to serve a writ in Ireland or Scotland. It is not that you are entitled to have leave simply because you bring your case within one or the other of the eleven rules of order 11. You cannot get the leave unless you do, but it does not follow if you do you are to have the leave. The court has a discretion, and that discretion must, of course, be exercised judicially, and upon proper grounds.

Then it is said you cannot go into the merits. That is quite true. Of course you cannot properly, upon an application to serve a writ, try the action. The object in giving leave to serve the writ is to put the parties in a position to try the action by-and-bye, but at the same time a judge cannot perform the duty imposed upon him by this order unless he so far looks into the matter as to see whether the plaintiff has a probable cause of action or not. I do not think the court ought to look into the defence as distinguished from the plaintiff's case. The court must look at the plaintiff's case and see whether he has a probable cause of action. If he has no probable cause of action, and if the cause of action depends entirely on foreign law, and the proper foreign tribunal has decided against him, that he has no cause of action, there is no ground for exercising the discretion of the court, and the court ought to refuse the leave to serve the writ. That is not contrary to *Call* v. *Oppenheim* as I understand it, but quite the reverse. *Call* v. *Oppenheim* does not contain a word which goes to show that if the court sees the plaintiff has no case, and if it has already been decided by a competent court that he has no such right as he alleges, this court should go through the farce of giving leave to serve a writ out of the jurisdiction when there is nothing to be gained by it. Therefore it appears to me, now we have the materials before us in the shape in which we have, that this is a case in which leave to serve the writ abroad ought not to be given, and the appeal must be allowed.

Then, as regards the costs, no doubt there is a little difficulty in consequence of fresh facts having come forward, but the broad result is this, that Messrs. Dreyfus were right throughout. This was a very speculative action. When one foreigner sues another in the courts of this country on a foreign contract he is making a very hazardous experiment in asking for leave to serve the defendant, a foreigner, out of the jurisdiction. If he is wrong, if his opponent is right from the first, I cannot see on what principle the defendant ought not to be indemnified and should not have costs. It appears to me, therefore, the appeal ought to be allowed, with costs here and below.

Lopes, L.J.—Allowing or disallowing service out of the jurisdiction is a matter of discretion. If a *primâ facie* case is made on the affidavits that there is a cause of action within order 11, and the rules of that order, the court in its discretion permits the service. If, on the other hand, no such case is made out, or if it is shown by the party on whom service is sought to be effected that there is a clear and complete defence, the court in its discretion does not grant, but refuses, such service. Applying that to the present case it appears to me that if this action proceeded, and the judgments in the French courts were pleaded, they would furnish a complete answer to the case which the plaintiff now sets up on the ground of *res judicata*. Therefore to permit the service to continue would be vexatious and oppressive towards the defendants. I think, therefore, the service should not be allowed.

But it is said that this decision is not in accordance with the decision of *Call* v. *Oppenheim* in the other division of this court. In my opinion the decision is in no way inconsistent with that case. It is said that on an application like the present the court is not entitled to go into the merits of the case. That is perfectly true. The court does not go into the merits in the sense of deciding the case, but it is clear that the court must, to a certain extent, go into the facts in order to determine whether or not there is a cause of action, or whether or not there is a complete answer to that cause of action which can be furnished by the defendants. The appeal, in my opinion, therefore succeeds.

Appeal allowed.

Solicitors, *G. M. Clements; Michael Abrahams, Son, & Co.*

From Q. B. Div. March 15.

Bethell & Co. *v.* Clark & Co. (*a*.)

Stoppage in transitu—*Goods bought for shipment—Directions to vendor to ship—Delivery on board ship—Termination of transit.*

Certain goods having been purchased in England, the purchaser sent a consignment note to the vendors "to consign the ten hogsheads hollow ware to The Darling Downs, *to Melbourne, loading in the East India Docks here." The goods were accordingly delivered by the vendors to carriers for shipment on board* The Darling Downs. *The vendors, having heard of the insolvency of the purchasers, telegraphed to the carriers to stop the goods, but this telegram arrived too late to prevent the goods being shipped on board* The Darling Downs, *which then sailed for Melbourne. The vendors thereupon, before the arrival of the ship at Melbourne, gave the shipowners notice that they claimed the goods.*

Held, that the transit was not at an end until the arrival of the goods at Melbourne, and that the notice to stop was good.

Judgment of the Queen's Bench Division (ante, *p.* 185, 19 *Q. B. D.* 553), *affirmed.*

Appeal by the trustee of the estate of Messrs. Tickle & Co., the purchasers of certain goods, from the judgment of the Divisional Court (Mathew and Cave, JJ.) in favour of the unpaid vendors, who claimed the goods under a notice to stop *in transitu*.

The facts are fully set out in the report of the case below (*ante*, p. 185, 19 Q. B. D. 553). It is only necessary to add that on August 8, 1885, Clark & Co., the unpaid vendors, wrote to Bethell & Co., the shipowners, claiming the ten hogsheads as their property, and upon September 21 paid Bethell & Co. the freight to Melbourne. On October 15 *The Darling Downs* arrived at Melbourne.

(*a*.) Reported by W. F. Barry, Esq., Barrister-at-Law.

The arguments were the same as in the court below, *Valpy* v. *Gibson*, 4 C. B. 837, being referred to in addition to the authorities there cited.

Willis, Q.C., and *G. E. Lyon*, for the trustee.

R. T. Reid, Q.C., *O. M. Plumptree*, and *C. Lacey Smith*, for the vendors, were not called upon.

Lord ESHER, M.R.—The purchasers being insolvent, the unpaid vendors had the right to stop the goods *in transitu*. The right to stop goods *in transitu* is derived from the custom of merchants, and has been adopted by the courts. It is, therefore, useless to argue the question upon principle; it is a right to stop goods *in transitu*, although in every respect the goods have become the property of the vendee. The right has always been construed liberally in favour of the unpaid vendor. The doctrine has been frequently stated. If goods which are purchased have not been delivered to the purchaser or to anyone for him otherwise than as a carrier, as long as the goods are in the hands of a carrier for the purpose of carriage, even though the carrier may be the agent of the purchaser to accept delivery of the goods so as to pass the property, the goods may be stopped *in transitu* by the unpaid vendor. Difficulties have arisen in some cases where the goods are in the hands of a carrier, but the original transit is at an end. Where the transit arises from the terms of the contract or from the directions given by the purchaser to the vendor, the doctrine applies. But where the goods are in the hands of the carrier, not by reason of the terms of the contract or of the directions of the purchaser to the vendor, but by reason of fresh directions given by the purchaser, the transit is at an end—that is to say, if the purchaser gives directions to the vendor to send the goods by carrier to a particular place, to be kept there till a new order is given as to their future transit, the transit is at an end when the goods arrive at that place. The question is, under which head this case comes. Whether the purchaser gave the vendor directions for the carriage to a particular place is a question of fact in each case. The question here is whether the purchasers gave directions to the vendors for the carriage to Melbourne; if so, as long as the goods were in the hands of any of the carriers in obedience to those directions, until arrival at Melbourne, the vendors were entitled to stop them *in transitu*. The goods were purchased at Wolverhampton. Nothing was said in the contract as to where they were to be sent. The purchasers only gave one set of directions contained in the consignment note received by the vendors on the 28th of June. Is the true meaning of that document that the goods were to be sent to *The Darling Downs* to be kept there as in a warehouse, subject to fresh orders from the purchasers as to their future transit, and that the transit was at an end when the goods were delivered on board the ship? The ship was in the docks loading for Melbourne. The mate would have no authority to receive the goods on board to be kept as in a warehouse. If the mate had such authority the ship might be kept in the docks for an indefinite time. The business meaning of the document is that the goods were to be delivered on board the ship to be carried to Melbourne. The mode of doing that would be to bring the goods alongside, to take the mate's receipt, and then to take a bill of lading. That was what was done. The mate's receipt meant that the goods were received on board for carriage to Melbourne. The bills of lading were made out in accordance therewith. The goods, therefore, were in the carrier's hands as carriers from the time they left Wolverhampton until they arrived at Melbourne. Fresh directions from the purchasers were not necessary, as the carriage would continue to Melbourne upon their original directions to the vendors.

The argument advanced on behalf of the purchasers is met by a passage from the judgment of Bowen, L.J., in *Kendal* v. *Marshall*, 31 W. R. 597, 11 Q. B. D. 356:—"But when goods are bought to be afterwards despatched as the vendee shall direct, and it is not part of the bargain that the goods shall be sent to any particular place, in that case the transit only ends when the goods reach the place ultimately named by the vendee as their destination." That is this very case. We acted upon that rule in *Ex parte Miles*, 15 Q. B. D. 33 W. R. Dig. 215, where I said:—"In *Dixon* v. *Baldwin*, 5 East, 175, Lord Ellenborough, C.J., said that 'the goods had so far gotten to the end of their journey that they waited for new orders from the purchaser to put them again in motion to communicate to them another substantial destination, and that without such orders they would continue stationary.' So here the goods, when they reached Southampton, had got to the end of a journey, but so that at that place they waited for new orders from the purchaser to put them again in motion." That is not the case here. The goods would continue in motion without any new orders until their arrival at Melbourne. Therefore the vendors had a right to stop them *in transitu* until their arrival there.

Was, then, the notice to stop sufficient? It was not a mere paper notice which could not be carried out. The shipowners were able to stop the goods by telegraph upon their arrival at Melbourne. The notice was a good one. The appeal must therefore be dismissed.

FRY, L.J.—It is clear that every delivery to an agent of the purchaser is not a determination of the transit. If the agent is an agent to hold the goods, the transit is at an end. But if delivery is to an agent whose duty it is simply to transmit the goods on, however many such agents there may be, the transit continues until final delivery at the place of destination. I desire to refer to one authority only—*Berndtson* v. *Strang*, 16 W. R. 1168, L. R. 4 Eq. 481, where Lord Hatherley (then Vice-Chancellor) said:—"In that ordinary case of chartering it appears to me that the captain or master is a person interposed between vendor and purchaser in such a way that the *transitus* is not at an end, and that the goods will not be parted with, and the consignee will not receive them into his possession, until the voyage has terminated and the freight paid according to the arrangement in the charter-party." In the present case I have come to the conclusion that the railway company, the Thames Lighterage Co., and the shipowners were agents of the purchasers to carry out the transit. The transit was not at an end until the arrival of the goods at Melbourne, and therefore the vendors had a right to stop the goods *in transitu*.

LOPES, L.J.—I am of the same opinion. The rule upon the subject, in the words of Lord Ellenborough in *Dixon* v. *Baldwin*, is that if the goods have so far gone to the end of their journey that they have to wait for new orders from the purchaser to put them again in motion, to communicate to them another substantial destination, and if without such orders the goods would continue stationary, then the transit is at an end. Now when a place is named by the purchaser to the seller as the ultimate place of destination, the transit is not at an end until the goods have reached that destination, and *à fortiori*, that would be the case when the place of destination is named in the contract. The present case turns upon the true meaning of the consignment note. It seems to me to mean that the vendors were to send the goods to Melbourne. The carriage was to Melbourne. Until the goods arrived at Melbourne the transit would continue, and the right to stop *in transitu* would continue also.

Appeal dismissed.

Solicitor for the trustee of the vendees, *W. Beck.*

Solicitor for the vendors, *G. R. Hubbard.*

From Q. B. Div. March 12, 13.

WERLE & CO., *Appellants.*
COLQUHOUN, *Respondent.* (a.)

Income tax—Foreign firm—Trade exercised within the United Kingdom—Profits arising therefrom—5 & 6 Vict. c. 35, ss. 41, 44—16 & 17 Vict. c. 34, s. 2, schedule D.

The appellants, who were wine merchants domiciled and resident at Reims, in France, employed a London firm of wine merchants as their sole agents in the United Kingdom for the sale of their wine, the agents being paid a commission (upon which they paid income tax) on all wines sold by the appellants in the United Kingdom, and paying all expenses. The agents' office was taken in their own name and on their own sole account, and they carried on their own business there. The appellants' name was inserted in the list of wine merchants in the "London Directory." Price lists and circulars were from time to time issued by the agents to wine merchants, with the authority of the appellants, giving the price of the wine and the terms of sale. Orders for wine were transmitted by the agents to the appellants at Reims, and the appellants forwarded the wine direct to the customers, and the goods were invoiced in the appellants' name as vendors, the contracts for the wine being made by the agents in England. The terms of sale were that the wine was sold as it was stored in the cellars at Reims, the cost of packing and carriage being paid by the purchaser, and the wine being at his risk from the time it left the cellars. The appellants kept no wine in England, and had no banking account there. The purchasers either paid the agents, who remitted the amount to the appellants, or paid the appellants direct, and the appellants sent receipts to the purchasers for all payments.

Held, that a trade was exercised within the United Kingdom within the second clause of schedule D. to section 2 of 16 & 17 Vict. c. 34, and that the appellants were assessable to the income tax upon the annual profits or gains arising therefrom.

Held, also, that section 41 of 5 & 6 Vict. c. 35 did not limit the language of schedule D., but was intended to aid the commissioners in recovering the tax.

Case stated under 43 & 44 Vict. c. 19, s. 59, by the Commissioners of Income Tax for the City of London upon an appeal by Werle & Co. against an assessment of £4,000, under schedule D. of 16 & 17 Vict. c. 34, made upon them in the name of their agents, Fenwick, Parrot, & Co.

The appellants' firm was composed of three persons, all of whom were French subjects, domiciled and residing in France. The business of the firm was that of vineyard proprietors, champagne makers, and champagne merchants at Reims, in France.

The appellants, in pursuance of their business, were in the habit of forwarding and sending champagne to England. The yearly quantity so forwarded and sent was very considerable, and the transactions extended over many years. In addition to the wine sent to England, the appellants carried on a very large business in various other parts of the world, and very large quantities of champagne were annually sold by them for delivery in other countries besides England. Such sales were made on the same terms as those relating to sales to English consumers hereinafter mentioned.

Advertisements in the *Wine Trade Review* and *Gilley & Co.'s Wine and Spirit Circular*, both publications circulating exclusively among the wine trade, were from time to time issued and published in England of the appellants' wine, and price lists and circulars were from time to time issued and distributed in England by Fenwick, Parrot, & Co., with the authority of the appellants, detailing the price and terms of sale of the appellants' wine. These circulars were sent to wine merchants and dealers, and not to private consumers. The price lists contained the prices of wines of other manufacturers as well as of the appellants, and at the foot was printed the signature, "Fenwick, Parrot, & Co., sole agents for the United Kingdom." The circulars were dated from Reims, and the signature of the appellants was lithographed on them. At the foot was printed, "With best compliments of Fenwick, Parrot, & Co., sole agents in the United Kingdom.

The appellants had an arrangement with Fenwick, Parrot, & Co., who carried on business as wine merchants, under which the latter acted as the sole representatives in England of the appellants for the sale of their champagne at such prices as were from time to time furnished by the appellants, who paid Fenwick, Parrot, & Co. a commission on all wines sold by the appellants in England, whether through the agency of Fenwick, Parrot, & Co., or otherwise. The appellants did not otherwise remunerate Fenwick, Parrot, & Co., who paid their own office and other expenses.

Fenwick, Parrot, & Co.'s place of business consisted of a set of offices at 124, Fenchurch-street, in the City of London, which premises were taken in their own name and on their own sole account, and where they carried on their own business as wine merchants. The name of Fenwick, Parrot, & Co. alone appeared on the outer door, but on an inside window, which could only be seen from the staircase leading to the office of Fenwick, Parrot, & Co., the following names appeared:—Werle & Co., successors Veuve Clicquot Ponsardin, Reims; Fenwick, Parrot, & Co., agents, late Robert Selby & Sons.

Fenwick, Parrot, & Co. caused the following entry to be inserted in the list of wine merchants in the "London Directory":—"Clicquot Ponsardin Veuve, 124, Fenchurch-street, E.C." Fenwick, Parrot, & Co. made a special payment on their own account to obtain the above insertion. Fenwick, Parrot, & Co. were duly taxed on all profits made by them, including their profits made as representatives of the appellants.

Fenwick, Parrot, & Co. sought for orders for the appellants' champagne in various parts of England. All orders for the appellants' wine were sought and taken for and on behalf of the appellants by Fenwick, Parrot, & Co. as their agents. The orders so obtained were transmitted by Fenwick, Parrot, & Co. direct to the appellants at Reims. In response to the order so received the appellants forwarded the wine direct to the customer, and the goods were invoiced to him in the appellants' name as vendors.

The purchasers paid the equivalent of the amount of the invoice in English money, or by bill on Paris in French money to Fenwick, Parrot, & Co., at 124, Fenchurch-street, and Fenwick, Parrot, & Co. at once remitted the amount to the appellants, or the amount was remitted by the purchaser direct to the appellants at Reims. If paid to Fenwick, Parrot, & Co. it was not carried to the credit of the appellants in any current account. Some amounts due in respect of the wine so sold were paid by bills of exchange drawn by the appellants on the purchasers, and forwarded by the appellants to Fenwick, Parrot, & Co., at 124, Fenchurch-street, in order that they might obtain the acceptance of the bills, which, when obtained, were then held on behalf of the appellants. The appellants sent from Reims formal receipts to the purchasers for all payments, whether made direct or through Fenwick, Parrot, & Co.

The appellants took all gains and suffered all losses occasioned on the sale of any wine in England, and Fenwick, Parrot, & Co. had no interest in any such sale other than their agents' commission on each transaction.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

It had occasionally happened that purchasers had not paid for wine supplied by the appellants, and thereupon proceedings had been taken in the English courts in the name of the appellants, and proof in bankruptcy had been made in their own name against a bankrupt debtor.

The terms of sale were that all wine was sold as it was then stored in the appellants' cellars at Reims. The cost of packing and forwarding the wine was paid by the buyer, who also paid the carriage and freight, and the wine was at his risk from the time it left the appellants' cellars. The appellants kept a large stock of wine in Reims for sale in any part of the world, but they kept no wine in England.

The question for the court was whether, on the above facts, a trade, employment, or vocation was exercised within the United Kingdom which rendered the appellants liable to be assessed for duties on profits under schedule D. of 16 & 17 Vict. c. 34.

The Queen's Bench Division (Lord Coleridge, C.J., and Field, J.), held that the appellants were liable to be assessed upon the authority of *Pommery* v. *Apthorpe*, 35 W. R. 307.

By 16 & 17 Vict c. 34, s. 2, schedule D., duties are imposed "for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of her Majesty or not, although not resident within the United Kingdom, from any property whatever in the United Kingdom, or any profession, trade, employment, or vocation exercised within the United Kingdom. . . ." By section 5 the duties thereby granted are to be assessed under the regulations and provisions of 5 & 6 Vict c. 35.

Cohen, Q.C., and *F. W. Hollams*, for the appellants.—A foreigner resident abroad cannot be assessed to income tax unless he has an agent in this country in receipt of the gains or profits: 5 & 6 Vict. c. 35, ss. 41, 44, 51—53. If the agent is in receipt of the profits he alone can be assessed, but he is assessed on behalf of the foreign principal. The Legislature cannot be taken as intending to tax foreigners not resident here; there is no machinery in the Act for doing so; it can only assess the agent here in receipt of the profits: *Sulley* v. *The Attorney-General*, 8 W. R. 472, 5 H. & N. 711. Secondly, the appellants do not exercise a trade in England. They carry on a trade with England, not in England. It must be admitted, as the case has not found the contrary, that the contracts with the purchasers are made here by the appellants' agents, but the appellants have no office here and no clerks, and no banking account. The property in the wine passed to the purchaser at Reims; delivery being given to him in the cellars there, from which time it was at his risk. The trade is exercised where the profits come home—that is, at Reims: *Sulley* v. *The Attorney-General*. The facts in *Tischler* v. *Apthorpe*, 33 W. R. 548, and *Pommery* v. *Apthorpe* were much stronger than in the present case.

They also referred to *Erichsen* v. *Last*, 30 W. R. 301, 8 Q. B. D.414.

Sir Edward Clarke, S.G. (*Dicey* with him), for the respondent.—It is sufficient if a trade is carried on here. If so, the profits are assessable. The appellants carry on a trade in England, and they are assessable through their agent here. Profitable contracts are made here: *per* Brett, L.J., in *Erichsen* v. *Last*. *Pommery* v. *Apthorpe* is not distinguishable. Whether a banking account or a stock of wine is kept in this country or not can make no difference, it is simply a question of convenience to the appellants.

Cohen, Q.C., replied.

Lord Esher, M.R.—The question is whether the appellants are assessable to the income tax, that is to say, whether they are assessable for and in respect of the annual profits or gains arising or accruing to them, although not resident within the United Kingdom, from any trade exercised within the United Kingdom. The only question asked of us is whether, upon the facts stated, a trade, employment, or vocation is exercised within the United Kingdom which renders the appellants liable to be assessed under schedule D. of 16 & 17 Vict. c. 34. There is no question asked as to whether they have been assessed in proper form, or whether the right person has been assessed in form. Now if there is a trade carried on in England, it is not disputed that the appellants receive the profits of it. Therefore, the question is this, was there a trade in this wine carried on in England? I agree with Cockburn, C.J., in *Sulley* v. *The Attorney-General*, that in each case it is a question of fact where the trade is carried on. The question is divisible into two parts. Is there a trade carried on, and, if so, is the trade carried on in England? It being a question of fact in each case, it is impossible to give an exhaustive exposition of the facts which constitute carrying on a trade. The question must depend upon the facts proved in each particular case. The facts in each case may be different, and yet in each there may be a carrying on a trade. The sole question is whether the facts in this case lead to the conclusion that there was a trade carried on in England. The facts here seem to be these: the appellants, who are wine growers and merchants, keep a large quantity of wine at Reims. They desire to do business in England. Their trade is the selling of wine. They carry on the trade at Reims, but they desire to sell wine in England. They appoint an agent to act for them in England, and they authorize him to send out circulars containing orders, inviting business, and they authorize him to name a certain price for the wine in England, and thereby invite orders for the wine at that price. If [illegible] they authorize him to put their name in the "London directory," the meaning being that they want to do business in England. The agent, with their authority, sends out the circulars in order to obtain orders for the wine at the English price. It is suggested that he had no authority to receive those orders as contracts, but only to transmit them to Reims for acceptance. The inference seems to me to be irresistible as a matter of business that he had authority to receive the orders as contracts to be fulfilled by the appellants. The purchaser wants delivery of the wine in England. The appellants contract to select wine from their store, to pack it, and to dispatch it to the address given in England. They stipulate that they will do that, but they stipulate that they will not pay the cost of the packing and the carriage. But if that is so, it is obvious that the carriers abroad would look to the appellants for payment: the carriers and packers would not be content to look to people in England for payment; though as between the appellants and their customers, the customers are to pay the cost of the packing and the carriage.

Then as to the mode of payment. I have no doubt that if the payment was made to the London agents it would be a good payment. The customers sometimes paid the appellants direct; but the agents here were authorized to receive the money. But in my opinion it is not necessary to decide whether the money is paid in England, because that is not essential to the carrying on trade in England. The fundamental object of a [illegible] of wine is to obtain contracts for the purchase of wine, which he is to fulfil by forwarding the wine. Therefore the contract is the foundation of the trade. The giving the order and its acceptance form the contract by means of which the appellants make their profit. The sale was the substance of the whole matter, the trade being to sell wine. Now was that trade carried on in England within the meaning of the statute. I maintain that one way of testing it is the enunciation by me in *Erichsen* v. *Last*. If what I said there takes place the trade is carried on in England. I said that "where

ever profitable contracts are habitually made in England by or for foreigners with persons in England, because they are in England, to do something for or supply something to those persons, such foreigners are exercising a profitable trade in England, even though everything to be done by them in order to fulfil the contracts is done abroad." It would be more accurate, instead of saying "such foreigners are exercising a profitable trade in England," to say "a profitable trade is then exercised in England." I think that both the learned judges in that case really said the same thing. Cotton, L.J., said: "When a person habitually does and contracts to do a thing capable of producing profit, and for the purpose of producing profit, he carries on a trade or business." He would naturally go on to say that where that is done in England there is a trade carried on in England, and in effect he does say so. In the present case the appellants contract to sell wine for the purpose of producing profit. If they do it habitually and the contracts are made in England, the trade is carried on in England. So, too, the late Master of the Rolls said the same thing. He said: "There are a multitude of things which together make up the carrying on of trade, but I know no one distinguishing incident, for it is a compound fact made up of a variety of things." Later on he says: "The company habitually receive money in this country from English subjects for messages sent from England to places abroad, and they transmit those messages from stations in this country to places abroad. This, I think, makes it a carrying on of trade in this country." There the trade was sending messages and receiving money for it, and he says that because the messages were sent from England there was a trade carried on in England. In none of those three expositions is any reliance placed on there being, as a necessary condition, an establishment in England. In none is reliance placed upon profits being received in England. The profits may be received abroad, yet none the less may they be profits received from a trade carried on in England. If the profits are received in England, that is a strong circumstance; if there is an establishment in England, that is a strong circumstance; but neither of them is essential. If the trade consists in making profitable contracts, and those contracts are made in England, then the trade is carried on in England. Therefore, upon the authority of that case I have no doubt that here there was a trade carried on in England, because the contracts were made in England, and the making of the contracts is the whole essence of the business. The appellants, therefore, carry on a trade in England.

Then as to the case of *Pommery* v. *Apthorpe*, I entirely agree with it. The facts were stronger there than in this case, but that does not show that the facts here are not sufficient. The only other argument raised was this, that if you cannot find anyone to be assessed in England under section 41, there is no trade carried on in England within the meaning of the statute. In other words, though a trade is carried on on behalf of a foreigner not resident here, if he has no such agent as is mentioned in section 41 the statute does not apply. As to this I agree with the judgment of Mathew, J., in *Tischler* v. *Apthorpe*, where he said:—"When one looks at the section (section 41) and then at section 44, it is clear that section 41 is intended to aid the commissioners in recovering the tax, and not to alter the incidence of taxation in any way." If the Crown can find such an agent as is mentioned in section 41, it can assess him; but if they cannot, that does not derogate from their right if there is a person assessable. The Crown must by some means or other get at that person. We cannot limit schedule D. by reason of section 41, that section being only machinery. I am therefore of opinion that there was a trade carried on in England.

FRY, L.J.—I am of the same opinion. The question is not whether a trade has been carried on by the appellants, but whether there is any trade exercised within the United Kingdom, from which it is admitted, if there be such a trade, the appellants receive the profits. I shall not attempt to define what is exercising a trade within the United Kingdom. I agree with the late Master of the Rolls in *Erichsen* v. *Last* that whatever else it may mean it includes carrying on a trade. I also agree with him that the question is not one of law, but is a compound fact made up of a variety of things. It is obvious that in many cases there would be no difficulty in determining whether a trade had been carried on at a particular place. A shopkeeper who sells his own wares in his shop and delivers them there plainly carries on business in that shop. But the question becomes more difficult when the trade is carried on, as in this case, in a more complicated manner; when it is carried on by the intervention of agents, and when the contract may be made in one place, the goods may be in another, delivery in another, and the principal in some other place. We have to take all the relevant facts, and the mode in which the business is carried on, and to consider whether that business be or be not carried on within the United Kingdom. It seems to me that the same business may in a sense be carried on in many places. The head office, the place where the goods are manufactured, the place where the contracts are made, may all be places where the business or parts of it is or are carried on.

Now in the present case the appellants, who reside in France, carry on there the business of vineyard proprietors, champagne makers, and champagne merchants. A portion of that business is that of champagne merchants. That means the selling of champagne, and that business they carry on in England through the intervention of agents. They are in the habit of making contracts through those agents. The agents are appointed for the purpose of making contracts for the sale of champagne in England. We have therefore the most essential part of the business of champagne merchants exercised through the intervention of their agents in the United Kingdom. But the matter does not stop there, as, without saying what circumstances are essential, I propose to consider all the circumstances which can in any way be material. The payment is usually made in England by the English purchasers to the appellants' agents. No doubt it is made for transmission to the appellants in France. Then through the intervention of the French carrying agents the goods are sent by the appellants to the purchasers in England, and the actual receipt of the goods by the purchasers is in England. In a certain sense there may be a delivery to those who may be the agents of the purchasers in France. We have no information whether the carrying agents in France are selected by the purchaser in England or by the vendor in France; and so I do not go into the question whether the delivery was in France or not. Then we find that the agents, with the authority of the appellants, issued advertisements and circulars in England for the purpose of securing contracts. The appellants' name is exhibited on the inside window of the agents' office in London, and their name is entered in the "London Directory," which must have been done with their authority. Putting all those facts together, and without determining which of them, if any, is essential, I have come to the conclusion that a trade of selling champagne is exercised in the United Kingdom, whether by the appellants or anyone else I do not care to inquire. From that trade so exercised the appellants derive profits, and therefore I think the answer to the question should be in favour of the Crown.

Then it was argued that we could not determine the question solely by the language of schedule D. It is said that the machinery afforded by section 41 shows that the person not resident in the United Kingdom

who derives profits from a business exercised within the United Kingdom, is only to be chargeable in the event of his having a factor, agent, or receiver in the receipt of the profits or gains within the United Kingdom. It is said that the appellants have no such agent, and therefore are not chargeable. I agree with the Master of the Rolls that section 41 does not limit schedule D. I think it gives machinery to be applied where it can be applied. But, further, I think that the appellants have an agent within the United Kingdom in receipt of the profits and gains. The agent is not in receipt of the profits and gains after they have been ascertained by the deduction of the expenses, but he has the receipt of the profits and gains as a part of the gross sum which is paid to him by the purchaser. It is obvious that the profits and gains must be part of the sums received by the agent, and I think that the agent is not less in the receipt of profits and gains because he is in receipt of something else as well.

LOPES, L.J.—The question resolves itself into this, whether the appellants receive profits from a trade exercised in this country. Now this is a question of fact, and I ask where do these profits arise unless they arise from a trade exercised in this country? The contracts are made here, the wines are supplied here to English customers, and the agent is authorized to receive payment here. It seems to me that the profits are earned in England in respect of goods ordered in England, sent to England, and paid for in England by English customers. The profits, therefore, arise from a trade exercised in England, and are assessable. I quite agree with what was said by the Master of the Rolls that there may be profits arising from a trade exercised in England without there being any establishment here. With regard to sections 41 and 44 I need only say that I entirely agree with the interpretation put upon them by Mathew, J., in *Tischler* v. *Apthorpe*.

Appeal dismissed.

Solicitors for the appellants, *Hollams, Son, & Coward.*

Solicitor for the respondent, *Solicitor of Inland Revenue.*

From Prob. Div. & Adm. Div. March 26.

"THE BARON ABERDARE."
"THE GERTRUDE." (a.)

Damages—Interest—Admiralty practice—Action transferred to Admiralty Division—Jurisdiction by consent.

The practice of the Admiralty Division to allow interest upon the damages awarded is a long-established and sound practice, and cannot be overruled.

In an action to recover damages for injury to a ship, tried in the Queen's Bench Division, and transferred by consent to the Admiralty Division for the purpose of having the damages assessed, interest was allowed upon the amount of the damages awarded from the date of the loss until payment.

Held, that the defendant had, by his consent to the transfer, agreed that the admiralty practice should be applied.

In an action in the Admiralty Division, in respect of which, before the Judicature Acts, the Admiralty Court would have had no jurisdiction, interest was allowed upon the amount of the damages awarded from the date of the loss until payment.

Held, that the defendant, by not applying to have the action transferred to the Queen's Bench Division, had agreed to the damages being assessed according to the admiralty practice.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

"THE BARON ABERDARE."

March 15, 17.—Appeal by the defendants from an order of the President confirming the registrar's report allowing interest upon the amount awarded as damages.

The action was brought in the Queen's Bench Division by the owners of *The Baron Aberdare* against the London and St. Katharine Docks Co., to recover damages for the negligent mooring of *The Baron Aberdare*, whereby she sustained such injuries that she sank. The jury found a verdict for the plaintiffs upon the question of liability, and, by consent, it was ordered that the action be transferred to the Admiralty Division, in order that the damages might be assessed by the registrar and merchants. The parties subsequently agreed that the damages should be £7,500, and the registrar awarded the plaintiffs this sum, with interest at the rate of four per cent. per annum till payment. The President confirmed the report: *ante*, p. 191, 12 P. D. 204.

Hurst (*J. G. Barnes, Q.C.*, with him), for the defendants, contended that interest ought not to have been given.—This is a Queen's Bench case, sent to the Admiralty Division merely for the purpose of assessing damages which the court must assess according to the common law rule. Interest upon damages is not given in the Queen's Bench though it is in Admiralty: *The Bellerumbria*, 18 W. R. 188, L. R. 3 A. & E. 6; *Smith* v. *Kirby*, 24 W. R. 207, 1 Q. B. D. 131. Secondly, the admiralty practice as to allowing interest is wrong, and ought to be assimilated to the common law practice.

F. W. Hollams, for the plaintiffs.—The principle is that the plaintiff is to be put in the same position as he was in before the injury. The admiralty practice is in accordance with the chancery practice. This action was transferred to the Admiralty Division, and must be governed by the practice there.

Cur. adv. vult.

"THE GERTRUDE."

March 17.—Appeal by the defendants from an order of the President confirming the registrar's report: *ante*, p. 191, 12 P. D. 204.

The action was brought in the Admiralty Division against the owners of *The Gertrude* to recover damages for the loss of a cargo. Before the Judicature Act, 1873, the action would not have been within the jurisdiction of the Court of Admiralty, as the case did not come within 24 Vict. c. 10, s. 6, the shipowners being domiciled in England. The registrar awarded the plaintiffs £9,[illegible] with interest at the rate of four per cent per annum from the date of the loss until payment.

J. G. Barnes, Q.C. (*Hurst* with him), for the defendants, contended that interest ought not to have been given.—The Admiralty Division tried this action as a division of the High Court of Justice: section 16 of the Judicature Act, 1873. The old Admiralty Court had jurisdiction to try this case, and so, by section 24, and section 6, of the Judicature Act, 1873, the Admiralty Division must now give effect to the claim in the same manner as the old common law courts would have given effect to it if the Judicature Act had not been passed. The practice of the High Court ought to be followed by the practice of the Admiralty Division only applying to cases which were within the jurisdiction of the old Court of Admiralty. At first cases like the present used to be transferred to the Queen's Bench Division, but now the Admiralty Division refuse to transfer them: section 24 of the Judicature Act, 1875. Interest as well as damages can only be given in the cases specified in 3 & 4 Will. 4, c. 42, s. 29.

He referred to *Lyell* v. *Kennedy*, 30 W. R. 49[illegible], [illegible] Ch. D. 484; *The St. Cloud*, Br. & L. 4, 11 W. R. [illegible] Adm. Dig. 24; *Kingston* v. *M'Intosh*, 1 Camp. 51[illegible]

Higgins v. *Sargent*, 2 B. & C. 348; *Pellas* v. *Neptune Marine Insurance Co.*, 28 W. R. 405, 5 C. P. D. 34.

Stubbs, for the plaintiffs.—This case having been tried in the Admiralty Division, the admiralty practice is applicable. Further, interest has been allowed at common law in cases of this sort: *British Columbia Co.* v. *Nettleship*, 16 W. R. 1046, L. R. 3 C. P. 499.

J. G. Barnes, Q.C., replied.

Cur. adv. vult.

March 26.—Lord ESHER, M.R.—In the first case the action was brought in the Queen's Bench Division, and the question of liability was tried there, and then, by consent, an order was made to transfer the action to the Admiralty Division for the purpose of having the damages assessed. The damages were assessed according to the rules of the Admiralty Court. One of those rules is that, besides the direct damages, interest is always given from the time of the loss till payment. In the second case the action was brought originally in the Admiralty Division, and the damages were also assessed according to the admiralty rule. In the first case the action might have been brought in the Admiralty Court. The second case was not within the jurisdiction of the Admiralty Court before the Judicature Act, 1873. It was, therefore, a case which, before that Act, could only have been brought in a common law court.

It was first contended that interest ought not to be given. It was admitted that it is the practice of the Admiralty Court to give it, but it was urged that the Court of Appeal ought to overrule that practice. I decline to overrule such a long-established practice. There is nothing unjust in it; indeed, I am inclined to agree with the learned President that it is more just than the common law rule. Lord Selborne, C., in *The Stoomvaart Maatschappy Nederland* v. *Peninsular and Oriental Steam Navigation Co.*, 31 W. R. 249, 7 App. Cas. 795, did not disagree with such a mode of assessing damages. We cannot, therefore, now overrule it.

It was next contended that these were not Admiralty Court cases, but Queen's Bench cases, and that the Admiralty Court should have assessed the damages according to the common law rule, and that, as interest upon damages, at any rate *eo nomine*, are not given in the Queen's Bench Division, it ought not to have been given in these cases. Now in the case of *The Baron Aberdare* it must be taken that the parties consented—and this is the understanding of the President, whom I have consulted—to the registrar and merchants dealing with the damages according to the admiralty rule. The parties wished to take advantage of the technical knowledge of the registrar, and so the action was transferred. In the case of *The Gertrude* it was said that though it was a case which ought properly to have been brought in the Queen's Bench Division, the President had made a rule never to transfer such cases. I have inquired of the President as to that, and he has informed me that he never intended to, and never did, lay down any such rule. On the contrary, if anyone wished such a case to be transferred he would always consider the application. The plaintiff brings such a case in the Admiralty Division because he prefers having a nautical case tried by a judge of the Admiralty Division with nautical assessors. If the defendant objects, no doubt he can have the action transferred. But he also prefers the Admiralty Court, and he assents to the case being tried in that court and according to the admiralty rules. That was what the defendants did in this case. Therefore, in both cases the defendants, by their own acts, submitted to have the damages assessed according to the admiralty practice, thinking, no doubt, that they would be assessed more accurately by the registrar and merchants than by a jury. For these reasons both appeals must be dismissed.

FRY, L.J.—I am of the same opinion. It seems to me that in both cases, but for the consent, the actions ought, under section 24, sub-section 6, of the Judicature Act, 1873, to have been tried in the Admiralty Division with the same result as in the Queen's Bench Division. I think that, but for the consent of the parties, it would have been the duty of the Admiralty Court to assess the damages according to the Queen's Bench practice, and I have great doubts whether a direction to a jury in the Queen's Bench to give interest upon the damages would stand. However, by arrangement the parties assented to the cases being dealt with according to the admiralty practice. The President dealt with the cases upon that footing, and it is impossible that we can overrule his decision. The only point argued in the court below was upon the admiralty rules. The other point was not put forward, and for this very good reason, that the parties had agreed that the cases should be dealt with as admiralty cases.

LOPES, L.J.—I entirely agree.

Appeals dismissed.

Solicitors for the plaintiffs in *The Baron Aberdare*, *Hollams, Son, & Coward.*

Solicitors for the defendants in *The Baron Aberdare*, *Hacon & Turner.*

Solicitors for the plaintiffs in *The Gertrude*, *Stokes, Saunders, & Stokes.*

Solicitors for the defendants in *The Gertrude*, *Botterell & Roche.*

High Court of Justice.

Chan. Div. Chitty, J. } Jan. 31; Feb. 1.

POLLOCK v. LANDS IMPROVEMENT CO. (a.)

Priorities — Charges — Statute—Construction—Implied repeal.

By an Act of Parliament passed in 1849 *the General Land Drainage and Improvement Co. was incorporated for the purpose of executing works for the improvement of lands, and undertaking and assisting the execution of such improvements, and other purposes. By an Act of Parliament passed in* 1853 *the Lands Improvement Co. was incorporated, and, by subsequent Acts of* 1855 *and* 1859, *the Act of* 1853 *was amended; and by the Act of* 1859 *it was enacted that the three Acts should be read together as one Act, and cited together as the Lands Improvement Co.'s Acts. Both the Act of* 1849 *and the Lands Improvement Co.'s Acts contained a section which provided that, upon the final order or certificate of the Inclosure Commissioners and the execution of the improvements, the company should have a first charge upon the inheritance of the improved lands in priority over every other then existing or future charge. The General Land Drainage and Improvement Co. obtained a first charge of the nature above mentioned upon certain lands, and the Lands Improvement Co. subsequently obtained a charge over the same lands.*

Held, that the sections in the respective enactments were not irreconcileable, and that the charge which was first in order of time had priority over the other charge.

This was an action by the trustees of the London Life Association, as assignees of a charge created by the

(a.) Reported by A. D. MACLAREN, Esq., Barrister-at-Law.

Land Drainage Co., against the Lands Improvement Co., and the question arose whether the charge vested in the plaintiffs and created by the General Land Drainage and Improvement Co.'s Act, 1849, was entitled to priority over a charge of subsequent date upon the same property created under the Lands Improvement Co.'s Acts, 1853, 1855, and 1859, in favour of the defendants.

The property was insufficient for the payment of both charges.

By the Act of 1849 the General Land Drainage and Improvement Co. was incorporated for the purpose of executing works for the improvement of lands, and undertaking and assisting the execution of such improvements and other purposes.

The Act contained provisions enabling any person interested as therein mentioned in land and therein referred to as a landowner to enter into a provisional contract with the company for the improvement by the company of the land in which he was interested, and the execution by the company of works for such improvement, and providing for such provisional contract, after the sanction thereof by the Inclosure Commissioners for England and Wales, becoming an absolute contract, and enabling the commissioners, by provisional order under their seal, to declare that it was right and proper, and for the benefit of the parties having any estate or interest in the lands to be improved, that the moneys paid and to be paid for the execution of the improvements, and for costs, charges, and expenses, or part of such moneys, should be charged upon the inheritance of such lands or a sufficient part thereof.

By the 62nd section of the same Act it was enacted:—"That, from and after the time when the inheritance of any land is, in pursuance of this Act, declared to be charged with any money, the company shall be entitled to, and shall have from the date of the absolute order, a lien and charge upon such lands for the money by the absolute order declared to be charged, with such interest as is contracted for, or, if there be not any contract as to the interest, with lawful interest thereon, and such lands shall thenceforth be and continue liable to the payment of such money and interest, and such lien and charge shall have priority over every other then existing and future charge and incumbrance whatsoever upon or affecting such lands, except quit rents or chief rents incident to tenure and tithe commutation rent-charges and any charges created or to be created under any Act authorizing advances of public money for drainage respectively, if any: Provided always that every such charge shall be redeemable on payment of all principal money, interest, and costs: Provided also that in any case in which a part only of the land charged is subject to a mortgage or other incumbrances, the lien and charge shall have such priority over the mortgage or other incumbrances only to the extent of a due proportion (to be by the circumstances ascertained and apportioned as by this Act provided) of such lien and charge."

The defendant company was incorporated by the Lands Improvement Co.'s Act, 1853, which Act was amended by an Act of 1855, and again by an Act of 1859. By the last-mentioned Act it was provided that the Acts of 1853, 1855, and 1859 should be read together as one Act, and might be cited together as the Lands Improvement Co.'s Acts.

The Lands Improvement Co.'s Acts contained (among others) provisions enabling any landowner (which expression was thereby defined to mean such person or persons in the actual possession or the receipt of the rents and profits of lands as therein mentioned) to enter into a provisional contract with the company for the execution by the company or by such landowner, by means of money to be advanced by the company, of improvements on any land in which he was interested, and, with the assent of the Inclosure Commissioners for England and Wales, for charging the money or contract sum for which the company should agree to execute such improvements or the money to be advanced by the company as an improvement loan on such lands, and providing for such provisional contract after the sanction thereof by the Inclosure Commissioners, becoming an absolute contract, and when the sanction of the commissioners should be given to any such improvements for the execution by them and delivery to the company of a provisional order.

By section 51 of the Act of 1853 it was provided that "When the inheritance or fee of any land is, in pursuance of this Act, charged with any money, the company shall be entitled to and shall have from the time from which such rent-charge shall commence and take effect a charge upon such lands for the money so contained and approved by the commissioners as aforesaid, with such interest as contracted for, not exceeding £5 per cent. per annum, or, if there be not any contract as to the interest thereon, at the rate of £5 per cent. per annum, and such lands shall thenceforth be and continue liable to the payment of such charge, and such charge shall have priority over every then existing and future charge and incumbrance whatsoever upon or affecting such lands, except quit rents, chief rents, feu duties, ground annuals, and charges incident to tenure, and tithe commutation rent-charges created or to be created under any Act authorizing advances of public money for drainage respectively, if any."

By an absolute order under the seal of the Inclosure Commissioners, dated the 29th of March, 1864, the commissioners, in pursuance of the General Land Drainage and Improvement Co.'s Act, 1849, declared and absolutely ordered that the inheritance of the lands mentioned in the schedule to the order, being the East Allington glebe lands, was absolutely charged with the sum of £1,362 2s. 8d. paid for certain improvements mentioned in the schedule, and that such charge was a rent-charge of £84 19s. 9d. to be paid by equal half-yearly payments as therein mentioned for the period of thirty-one years from the date of the order.

By an absolute order under the hands and seal of the said commissioners, dated the 15th of April, 1876, the commissioners, in pursuance of the Lands Improvement Co.'s Acts, charged the inheritance or fee of the glebe lands with the payment to the defendant company, their successors and assigns, of the yearly sum of £48 18s. 10d., payable half-yearly as therein mentioned for the term of twenty-five years from the 25th of March, 1875.

The statement of claim stated that the above-mentioned rent-charges were both in arrear, that the defendant Drake was the rector of East Allington, and entitled to the rents and profits of the glebe lands, subject to the said rent-charges; that in the year 1885 divers judgments were recovered against the defendant Drake, writs of sequestration issued to levy the amounts covered by such judgments, and that the defendant Swan, as sequestrator, was in receipt of the rents and profits of the glebe lands and had in his hands a considerable sum representing such rents and profits.

The plaintiffs claimed to have the respective priorities, rights, and interests of the plaintiffs and the defendant company in respect of the two rent-charges of £84 19s. 9d. and £48 18s. 10d. respectively determined, and a declaration that the rent-charge of £84 19s. 9d. had priority over the rent-charge of £48 18s. 10d.

Romer, Q.C., and *Christopher James*, for the plaintiffs.—The defendants must show that section 62 of the Act of 1849 was repealed by section 51 of the Act of 1853: *Ex parte Chick, In re Meredith*, 11 Ch. D. 27 W. R. Dig. 191; *Hawkins* v. *Gathercole*, 3 W. R.

6 De G. M. & G. 1; *Trustees of Birkenhead Docks* v. *Laird*, 2 W. R. 7, 4 De G. M. & G. 732; Maxwell on Interpretation of Statutes, 2nd ed., p. 222.

Maclean, Q.C., and *Howell*, for the defendant company, cited *Green* v. *Reg.*, 1 App. Cas. 513, 25 W. R. Dig. 92; *Wales* v. *Mayor of Sheffield*, 12 Q. B. D. 142, 32 W. R. Dig. 123; *Baroness Wenlock* v. *River Dee Co.*, 36 Ch. D. 674.

Byrne, for other defendants

Romer, Q.C., replied.

Chitty, J.—The point which I have to decide is presented in such a form as to amount to what I may call a solemn legal conundrum. It is said that each company has a clause in its Act of Parliament enacting that any charge obtained under its own Act of Parliament shall have priority over every other charge, whether existing at the time or made afterwards. On looking at the two statutes that does appear to me to be the case.

The statute under which the plaintiffs claim is the first, and the object of that Act may be shortly stated as being to incorporate a company for the purpose of improving lands, making advances, entering into contracts, and the like, with a view, no doubt, to encourage the improvement of land. It was thought right to give a special privilege to the first company—that is, the privilege which is enacted in section 62—the charge is to have priority (following the language of the section) over every other then existing and future charge or incumbrance whatsoever with certain exceptions. With scarcely a verbal difference a similar section is contained in the defendants' Act of Parliament, which is also an Act of Parliament for the same purpose—that is to say, an Act of Parliament for incorporating another company to do the same thing for the same purpose as the first company was incorporated to do. The Legislature evidently thought that this was a matter in which they might well incorporate these two companies for the same purpose—there may be more, for aught I know—and probably thought that they should not give a monopoly to one company over the other.

It is said that the two enactments are irreconcileable, and that, therefore, the second must repeal the first. I propose to examine that proposition a little. Are the two enactments irreconcileable? I think not. It is not like the case of the Legislature enacting in one private Act that Blackacre (to take the old form of illustration) shall be subject to a charge in favour of A. in priority to every charge now existing on the land and to any future charge, and then enacting, without notice of the statute in favour of A., that B. shall, as regards Blackacre, have a charge in respect of a certain sum of money lent by him on the land in priority to every existing charge and every future charge. It is not that case because that is a case of such particularity that I do not think it would be possible by any reasonable ingenuity to say that the two clauses could stand. I say this is not that case, because, in the present case, the two statutes contain general powers enabling each company to make the advances or to execute the powers which, no doubt, the company will execute although they are not bound to execute, and powers, moreover, which do not relate to any specific land. They are general powers travelling over the whole range of the land which is included in the scope of the Act.

Then I agree that they are not two particular and special enactments; but that they are in the nature of two general enactments. All that the Legislature says is, that if you do that which you are not bound to do—if you execute these powers, you shall then have, as the result, a priority.

But then I come to try the question a little more narrowly on the facts to see whether it is not right and reasonable, on grounds of common sense, to allow these two enactments to stand side by side as not being inconsistent. The first company executed the first work, and when they had done that what was their position? They had, according to their statute, a charge which was prior to every existing charge and every future charge. I leave out the exceptions as only incumbering the case. Is there anything in the second statute sufficient to take away that which had been conferred by the effect of the first, not given, of course, until the first company had executed the power which was given to them? The second Act, no doubt, was in operation at that time, and that is really all that can be said against the statutable priority which is given to the first company. When the second company, who may leave these things alone, come to execute their power, why should I construe their Act of Parliament so as to disturb the priority which already exists under the first, and which has been gained by it? It is a matter of construction. I think the right way is to read them both standing side by side, so that each company may execute its own power and get the priority. But the one which has once got a priority where the two enactments are to be read together maintains that priority, and it is not to be disturbed by the other company under a similar power doing a similar thing. There is another point which is worth considering, and one which may occur as showing that the construction I have put upon the section is a reasonable one. One of these companies first executes certain improvements, and then certain other improvements, and obtains in succession two distinct orders from the Inclosure Commissioners. It is impossible that those two can rank each as prior to the other. One must have some priority. As long, of course, as they are in the hands of the company itself it is an immaterial matter. But these Acts of Parliament provide in special terms for the assignment of charges, and supposing that the company that had got two such orders and two such charges assigned one, and assigned it in such manner as that it could not be said that it had given to its assignee priority, what would be the result? According to one view there would be a deadlock, and each would have priority over the other. That is absurd. I think, in dealing with such a case as that, the right thing would be to say—whether the company had assigned the first or the second, there being nothing, as I say, in the assignment to show priority by contract on the part of the assigning company—that this is a case not within the Act. It is a case in which priority is given over other charges, but as between those two charges it is not given. The only right way is to treat the charges in the order of date as settling the order of priority. That is a similar case to the one with which I have to deal, and I think the proper effect may be given to both these enactments in the way I have indicated. It is not necessary to go through the cases cited, because the point is whether I can reconcile these two enactments. I have reconciled them to my satisfaction and have come to the conclusion which I think the justice of the case requires, and I have answered this supposed difficulty to the best of my ability.

The form of order which I make is this: First, a declaration, in accordance with my judgment, of the priority of the plaintiffs' rent-charge over the defendants' rent-charge; then there must be a reference to chambers for the appointment of a receiver and an order upon the defendant Swan to pay over the balance in his hands to the receiver; and then an account of what is due to the plaintiffs for arrears of their rent-charge.

With regard to the costs, this being a question of priority, the usual rule in a case of this sort, where it is a mere question of priority, is for each party to add his costs to his security.

The plaintiffs will therefore add their costs to their security. Then there will be liberty to apply as to

raising the amount found due to the plaintiffs by sale or mortgage of the lands.

Solicitors, *Druces & Attlee; West & Co.; Paterson, Snow, Blowam, & Kinder.*

Chan. Div. North, J. } Dec. 17, 20; Feb. 6.

ASKEW *v.* ASKEW. (*a.*)

Will — Construction — Survivor — Cross-remainders — Estates tail.

A testatrix, who died in 1831, *by her will, executed in* 1827, *devised her real estate after the death of her daughter, as to one-fourth part thereof to the use of Thomas (a son of the daughter), with remainder to the use of his children as tenants in common in tail; and if there should be a failure of issue of any such child or children, then, as to the share of such child or children whose issue should so fail, to the use of the remaining or other of the said children as tenants in common in tail; and, in case there should be a failure of all such children but one, or if there should be but one such child, to the use of such remaining or only child in tail; and, in default of such issue, to the use of the right heirs of the testatrix.*

The testatrix devised the other three-fourths of her real estate upon similar limitations in favour of three other children of the daughter and their issue. By a codicil she directed that, in case any or either of her grandchildren named in her will should die without leaving any child or children, then the share or shares of them, him, or her so dying in the hereditaments devised by her will should go to and devolve on the "survivor or survivors" of her grandchildren and the heirs of his, her, or their respective bodies. Two of the grandchildren died leaving children. Another died without having married. Thomas was the survivor, and he died without having had a child.

Held, that Thomas's share, on his death without having had a child, devolved upon the two grandchildren who left children, equally between them, as tenants in common in tail.

Petition.

Ann Cornish, by her will, dated the 20th of March, 1827, devised all and singular her real estate unto and to the use of her daughter, Harriett Askew, for her life, and after her death as to one-fourth part thereof to the use of her grandson, John Adam Askew, the son of the said Harriett Askew, for life, with remainder to trustees to preserve contingent remainders, with remainder to the use of his children, equally as tenants in common in tail general with cross-remainders between them in tail general, and if there should be a failure of issue of any such child or children, then, as to the share of such child or children whose issue should so fail, to the use of the remaining or other of the children equally as tenants in common in tail, and in case there should be a failure of issue of all such children but one, or if there should be but one such child, to the use of such remaining or only children in tail, and in default of such issue to the use of the testatrix's own right heirs for ever. And as to the other three-fourth parts to uses in favour of her three grandchildren, William Pochin Askew, Harriett Francis Askew, and Thomas Henry Pochin Askew, the other children of the said Harriett Askew, and their respective children corresponding to the uses thereinbefore declared of the one-fourth part in favour of the said John Adam Askew and his children, with an ultimate limitation in each case to the testatrix's own right heirs. By a codicil executed on the same day as that on which the will was executed, the testatrix directed that "in case any or either of my grandchildren named in my will shall die without leaving any child or children, then the share or shares of them, him, or her so dying of and in the hereditaments devised by my will shall go to and devolve on the survivor or survivors of my said granchildren, and the heirs of his, her, or their body or respective bodies, it being my will that the same hereditaments shall not devolve on my own right heirs but in the event of all my said grandchildren dying without leaving any child or children." The testatrix died on the 20th of March, 1831. Her daughter Harriett survived her, and died on the 8th November, 1832, leaving all the four grandchildren named in the will surviving. Harriett Francis Askew died spinster, on the 31st of January, 1838, without having disentailed her share in the testatrix's real estate. William Pochin Askew died on the 21st of April, 18[illegible] and John Adam Askew on the 9th of May, 1866. They both left children, and they both disentailed their respective shares in the testatrix's real estate. Thomas Henry Pochin Askew died on the 14th of June, 18[illegible] without ever having had any issue, and having, by will dated the 20th of December, 1886, left all his property to his wife, whom he appointed sole executrix.

This suit was instituted for the administration of the testatrix's estate. All the real estate had, after the death of Harriett Francis Askew, been sold by an order made in the suit, and the proceeds paid into court. The funds in court representing the shares of John Adam Askew and William Pochin Askew had been paid out to them respectively.

The funds in court representing the shares of Thomas Henry Pochin Askew at the date of his death consisted of £581 2s. 6d. India Three and a Half per Cent. Stock. He had, by a deed dated the 12th of July, 1878, disentailed his share.

A petition was now presented by the representatives of John Adam Askew and William Pochin Askew asking that the rights of all parties in the sum of £581 2s. 6d. India Three and a Half per Cent. Stock might be declared.

The respondents were the widow of T. H. P. Askew, and the devisee in trust of the will of John Adam Askew, who was the heir-at-law of the testatrix, Ann Cornish.

The chief question now argued was as to how the share of T. H. P. Askew devolved upon his death.

Cozens-Hardy, Q.C., and *Tyssen Amherst*, for the petitioners.—The word "survivor" must be read "other," and, therefore, the two brothers John Adam Askew and William Pochin Askew, who left issue, took the share of Thomas as tenants in common in tail.

Everitt, Q.C., and *Grosvenor Woods*, for the widow Thomas Henry Pochin Askew.—The word "survivor" cannot be read "other." The only cases where this has been done are where the gift on the death of one of a class without issue has been either to the children of survivors, or, by reference to previous limitations, to survivors and their children, and the court, finding that the ultimate gift over was not intended to take effect unless there were no children of any members of the class, carried the property back to the children of the members who died first leaving children: *Lucena*, 26 W. R. 254, 7 Ch. D. 255.

They also referred to *Davidson* v. *Kimpton*, 29 W. R. 912, 18 Ch. D. 213; *Maden* v. *Taylor*, 45 L. J. Ch. 6[illegible] 24 W. R. Dig. 325; and Jarman on Wills, vol. 2, [illegible] ed., p. 700.

Hammond Chambers, for the devisee of John Adam Askew.—The word "survivor" must be read in its natural sense, and as there was no survivor on the death

(*a.*) Reported by G. E. JEFFERY, Esq., Barrister-at-Law.

of Thomas Henry Pochin Askew his share is undisposed of, and, therefore, goes to the heir-at-law of the testatrix: *In re Mortimer, Griffiths* v. *Mortimer*, 33 W. R. 441, 54 L. J. Ch. 414, where Kay, J., referred to and followed *Nevill* v. *Boddam*, 8 W. R. 490, 28 Beav. 554, and *In re Corbett's Trusts*, 8 W. R. 257, Johnson, 591.

Cozens-Hardy, Q.C., in reply, referred to *Doe* v. *Wainwright*, 5 T. R. 427; *Cooper* v. *Macdonald*, 21 W. R. 833, 16 L. R. Eq. 258; and *Smith* v. *Osborne*, 6 W. R. 21, 6 H. L. Cas. 375.

North, J, (after stating the provisions of the will and codicil, continued:—).—The will having been executed before the Wills Act, the heir of the testatrix would take by descent in preference to the limitation to the right heirs in the will. The provision in the codicil—that, "in case any or either of the four grandchildren shall die without leaving any child or children," then his or her share or shares is to devolve on the survivor or survivors of the grandchildren — applies, in my opinion, to the death of any one of the four without leaving any child or children; it applies to the case of one, or two, or three of the grandchildren dying without leaving any child. But I think it does not apply to the case of all the four grandchildren dying without leaving a child, because it is providing for what is to happen if there should not be a failure of children of all the four. On the other hand, no distinction is made between the case of a grandchild dying in the lifetime of the others, or some of them, or after the death of all the others, and, therefore, I think the provision applies to the death of the last survivor of the three grandchildren who die without leaving a child. The words are, die "without leaving any child or children"; but, as the children take vested interests on their births, the words must, I think, be construed as meaning without having had any child or children," notwithstanding that that construction gives no effect to the word children. I have not referred to the cases which establish that rule of construction, as I have recently had occasion to do so in *In re Ball, ante*, p. 265, 36 Ch. D. 588. In case any of the grandchildren named in the will shall die without having had any child, the share of him or her so dying is to devolve (that must mean on the death of the grandchild) on the survivor or survivors of the grandchildren and the heirs of his, her, or their body or respective bodies. [His lordship stated the dates of the deaths of the grandchildren, and continued:—] Neither of the grandchildren William and John died "without having had a child." The grandson Thomas Henry Pochin died last of the four without ever having had any issue. The question is, What then became of the share of which he had been tenant for life? In my opinion, that share did not vest in him as the survivor or longest liver of the four grandchildren. Several cases were cited in support of the proposition that the share did vest in him. The case mainly relied upon was *Maden* v. *Taylor*. In that case a testator by his will specifically devised certain freehold and copyhold estates to trustees upon trust for the benefit of four nieces named in his will for their lives, to be divided between them as tenants in common, and after the death of any of them in trust, as to her share, for her child or children. And the testator directed that if any of the nieces should die without issue "the share or shares of her or them so dying shall go to the survivor or survivors of them and their heirs." By a codicil the testator specifically devised a freehold estate to a trustee in fee in trust for all the nieces during their lives, equally as tenants in common; and after the death of all or any of the nieces, then, as to the share of her or them so dying, in trust for the child or children of them respectively and the heirs of their bodies, and in case any of the nieces should die without leaving issue living at her or their decease, "then in trust for the survivor or survivors of them my said nieces and the heirs of her or their body or bodies; and in case all of them my said nieces except one shall die without leaving issue, then in trust for such only or surviving niece and the heirs of her body; and in case of a total failure of issue of them my said nieces, then in trust for my own right heirs." The devise contained in the codicil there is extremely like that which is contained in the codicil in the present case, with this notable exception—that there the limitation over to the survivor or survivors is in the event of a niece dying without leaving issue living at her death. Of the four nieces the two who died first and second both left issue. The third niece died a spinster, and the plaintiff in the suit, the fourth niece, was over sixty years old, and had never been married.

Sir G. Jessel, M.R., held, with regard to the property devised by the codicil, that the fourth niece, as the survivor, took the share of which the third niece had been tenant for life, and also that she would take her own share absolutely after her tenancy for life. And the Master of the Rolls came to the same conclusion with regard to the property given by the will. I should feel some difficulty in following that decision, for it attributes two different meanings to the word "survivor" in the same instrument. No doubt the decision has received a certain amount of confirmation from the decision of Fry, J., in *Davidson* v. *Kimpton*. But, in my opinion, those cases are at a variance with the decision of Lord Selborne in *Cooper* v. *Macdonald* and with that of Kay, J., in *In re Mortimer*, and the cases upon which he relied. I think that the decision in *Maden* v. *Taylor* and *Davidson* v. *Kimpton* are also inconsistent with what was said by Baggallay, L.J. (which was assented to by James, L.J.), in *Wake* v. *Varah*. Baggallay, L.J., said: "If the words, 'survivor or survivors,' receive their literal interpretation, the death, without issue, of the longest liver is clearly unprovided for, inasmuch as on the death of the longest liver there can be no survivor." In the present case, however, I am relieved from the difficulty of explaining *Maden* v. *Taylor*, because the Master of the Rolls decided that case upon the construction of the particular will, and there was then, in fact, a "survivor." But in the present case it appears to me that the language of the codicil is totally inconsistent with the notion that Thomas Henry Pochin Askew could take his own share as the survivor of the four grandchildren. It would be absurd that, in case he should die without having had a child, his share should go over to himself or the heirs of his body. It is clear that it could not go over to him in that way, except as tenant in tail; but, still, it appears to me that it would be absurd to give property to a man in tail in the event of his death without ever having had a child. Thomas Henry Pochin Askew cannot, therefore, in my opinion, take the share of which he was tenant for life absolutely as having survived the other three grandchildren.

The next question is, What meaning is to be attached to the words "survivor" or "survivors"? and for this purpose the words of the ultimate gift over are very important. The codicil is, in substance, an explanation or modification of the gift over to the right heirs of the testatrix contained in the will. It says that the gift over is not to take effect except in the event of all the four grandchildren being dead without ever having had any children. What is meant by the gift to the "survivor or survivors" of the grandchildren? If Thomas Henry Pochin Askew had died third in order of the grandchildren, I might have felt a difficulty in departing from the decision in *Maden* v. *Taylor*. I might have felt myself bound to follow that case. But in the present case the words are very strong that the property is not to go over to the right heirs of the testatrix until all the four grandchildren are dead without having had any children. It seems to me that cross-

remainders between the grandchildren ought to be implied, and I think that this follows from *Maden* v. *Taylor* itself. In that case Sir G. Jessel, M.R., during the course of the argument, said:—"The difficulty I feel in implying cross-remainders here is, that the gift over is on failure of issue at a particular period. In the ordinary case, where the gift over is on an indefinite failure of issue, the implication makes an exhaustive disposition; nothing can descend to the heir. But where the failure of issue is restricted to the death of the tenant for life, the heir may come in after all, notwithstanding the implication, for the tenant in tail may survive the tenant for life or the particular period, and then die without issue. Still, I am in favour of extending the rule, if it is an extension." And afterwards, in giving judgment, he said:—"For myself, I have no doubt that I ought to imply cross-remainders. I think the true rule laid down in the old case of *Doe* v. *Webb*, 1 Taunt. 234, that, in order to ascertain whether you should imply cross-remainders, you have to ascertain whether the testator intended that the whole estate should go over together. If you once get to that point, that he intends the whole estate to go over together, you are not to let a fraction of it descend to the heir-at-law in the meantime. You are to assume that what is to go over together, being the entire estate, is to remain subject to the prior limitations until the period when it is to go over arrives." These observations appear to me to apply exactly to the present case. And there is another consideration which appears to me equally strong. It is a well-known rule of construction that a devise of land to A. after the death of B. does not create an implied gift of the land to B. for his life unless A. be the heir-at-law of the testator. In that case a gift of the land to B. for his life is implied, because it cannot be supposed that the testator, when he expressly gives the land to his heir after the death of B., could have intended that the heir should also take the lands as undisposed of during the life of B. In the present case the ultimate gift over is to the right heirs of the testatrix, and the codicil makes it clear that she did not intend anything to go over to her heir-at-law until all the four grandchildren were dead without having had any children. The previous gift ought, therefore, to be construed in such a way as to fill up the blank until the gift over to the right heirs takes effect. It seems to me, therefore, that on both those grounds I am driven to say that cross-remainders between the grandchildren ought to be implied, thus providing for every event except that in which the estate is to go over to the heir of the testatrix—that is, upon the death of all the grandchildren without having had a child.

What, then, are the cross-remainders which ought to be implied? The words "survivor or survivors" may be read "other or others," and that was the construction put upon the word "survivors" by the House of Lords in *Smith* v. *Osborne*. In that case Thomas Carr, by his will, devised lands to the use of his daughters, Elizabeth and Francis, as tenants in common in tail, and if either daughter should die without issue, then to the use of the surviving daughter in tail, with remainder to the use of his right heirs. Lord Cranworth said:—"I think the word 'surviving' in the will of Thomas Carr must be construed 'other.' I entirely approve of the rule now generally acted on of giving to the word 'surviving' its ordinary and natural meaning, and not construing it to mean 'other.' Courts have no right to alter the language of a testator merely to effect what they conjecture him to have intended to say, when that is at variance with what he has in fact said. But the words of a will, after all, are but the means of expressing the testator's intention, and where the intention is plain from the words themselves, it is then the duty of the court to execute the intention, however inartificially expressed. And here the language shows that by the word 'surviving' the testator must have meant 'other.' Th[illegible] not a gift to a class, and on the death of one or more [illegible] survivor or survivors; but a gift to two desig[illegible] devisees—that is, the testator's two daughters [illegible] tenants in common in tail, and, if either should [illegible] without issue, then to the surviving daughter and [illegible] heirs of her body. Unless the word 'surviving' [illegible] be taken here to mean 'other,' the intention cannot [illegible] carried into effect, for he means his gift over to [illegible] into operation if either of his daughters dies wi[illegible] issue—that is, on the death of the daughter who [illegible] first or the daughter who dies last, and the latter [illegible] cannot be accomplished unless the word 'survi[illegible] shall be so read as to be rendered capable of [illegible] applied to the predeceasing daughter." And [illegible] Wensleydale expressed his opinion to the same [illegible] That case, as it seems to me, is an authority for [illegible] struing the words "survivor or survivors" in the p[illegible] case "other or others." Another construction [illegible] lead to the same result. Cross-remainders mig[illegible] implied without altering the natural meaning of [illegible] words "survivor" or "survivors," and if the surv[illegible] the four grandchildren should die without havin[illegible] a child his share would go over to the other or [illegible] of the grandchildren in tail. Another question [illegible] have been raised, but I do not intend to decide it, [illegible] is unnecessary to do so. I mean whether the sh[illegible] Harriett Askew devolved upon her death, without h[illegible] had a child, upon the other three grandchildren in [illegible] or upon John and William Askew, the two who [illegible] children. I prefer not to deal with that questio[illegible] in either view the result will be the same, for, if [illegible] third of this fourth devolved on Thomas Henry [illegible] Askew, it would, on his death, without having [illegible] child, devolve upon John and William in tail.

I, therefore, make a declaration that, if the ev[illegible] which have happened, the one-fourth share which [illegible] devised to Thomas Henry Pochin Ask[illegible] for his [illegible] vested, subject to his life estate, in John and Wi[illegible] Askew as tenants in common in tail.

Solicitor for the petitioners, *J. M. Yeits.*

Solicitor for the respondents, *H. Sowton.*

Q. B. Div. (Pollock, B., and Hawkins, J.) Dec[illegible]

Hesketh, *Appellant.*

Bray (Surveyor of Taxes), *Respondent.*

Inland revenue—Income Tax Act, 1842 (5 & 6 [illegible] 35), *s.* 60, *schedule A., No.* 5—*Income Tax Act* (16 & 17 *Vict.* c. 34), *s.* 37, *and schedule A.—[illegible]tion for amount expended by landlord on embankment against tidal river—Income from land—Preservation or protection of land.*

The owner of land which was flooded by a tidal [illegible] was assessed to income tax in respect of the pasture, [illegible] 1880 *he expended a large sum in making an embankment whereby he excluded the tidal river altogether, and [illegible] land became valuable property, yielding a large [illegible]*

Held, that the making of the embankment was [illegible] necessary for the preservation or protection of the [illegible] against the encroachment or overflowing of the [illegible] river within the exception of section 37 of the [illegible] 1853, *and that no allowance or deduction [illegible] allowed for the amount expended by the landlord [illegible] making the embankment, for the embankment was [illegible] to increase the capital value of the land by altering [illegible] condition, and not to protect it.*

Case stated under 43 & 44 Vict. c. 19.

(*a.*) Reported by Sir Sherston Baker, Barrister-at-[illegible]

This was an appeal from the decision of the Commissioners of Income Tax for the district of Leyland, in the county of Lancaster. The appellant claimed to be entitled to a deduction from income tax under section 37 of the Income Tax Act, 1853 (16 & 17 Vict. c. 34), on an average for twenty-one years of a sum of £16,541 expended by him in protecting his assessed lands from the overflowing of a tidal river (the Ribble). The commissioners refused to allow the deduction claimed.

The facts were as follows:—

Hesketh-with-Becconsall is a township situate on the south side of, and adjoining, the estuary of the tidal River Ribble.

In 1858 the appellant's father and predecessor in title bought from the Ribble Navigation Co., in whom the navigation of the River Ribble was vested under a special Act passed in 1853, about 2,000 acres of uninclosed land marked as "tidal water" in the Ordnance Survey map of 1848.

Prior to 1880 this land, by reason of the execution of the powers of the Ribble Navigation Co.'s Act, and by the consequent changes in the course of the channel of the River, and by consequent gradual accretion, as well before as after the purchase by the appellant's father, had been so far gained or reclaimed that, though still open to the River Ribble and liable to be more or less flooded at every tide, the greater portion (including 1,044 acres which were the subject of this appeal) had become covered with short herbage, and formed the salt marsh called Hesketh Marsh.

The land in that condition was worth, as pasturage, from 5s. to 10s. per acre per annum, and was assessed to the poor rate and income tax at from £300 to £350 per annum.

In 1880 the appellant began to execute works in order to exclude the tidal water from a portion, being the land in question, of the 2,000 acres. These works, consisting of an embankment over three miles in length and about twelve feet in height, with the necessary provision for drainage and access by roads, were successfully completed in 1885, and in that year about 526 acres had been brought under cultivation. The total cost incurred by the appellant in executing such works was £16,541.

The land with the tidal water excluded lets at a yearly rental of from £3 to £3 10s. per acre. By 5 & 6 Vict. c. 35, s. 60, No. 5: "Particular deductions and allowances in respect of the duties under schedule (A). 5. For the amount charged on lands, tenements, hereditaments, or heritages by a public rate or assessment in respect of draining, fencing, or embanking the same."

By 16 & 17 Vict. c. 34, s. 37: "In charging the duty under schedule (A) of this Act in respect of lands, an allowance and deduction shall be made for the amount expended by the landlord or owner thereof on an average of the twenty-one preceding years in the making or repairing of sea walls or other embankments necessary for the preservation or protection of such lands against the encroachment or overflowing of the sea or any tidal river, although the sums expended may not have been rated on such lands by any public rate or assessment."

C. A. Cripps, for the appellant.—The appellant is entitled to the deduction he claims. Neither section 37 of 16 & 17 Vict. c. 34, nor Schedule A. No. 5 of section 60 of the 5 & 6 Vict. c. 35 create any distinction between reclamation of land and protection of land. The general intention of the Legislature is to encourage works of drainage. The map kept by the authority of the Ribble Navigation Co.'s Act shows that the lands in question were marked in 1858 as "reclaimed." The embankment was made by the appellant in 1880, and the lands were assessed to income tax before that date. The embankment was therefore, within section 37 of the Act of 1853, necessary for the preservation or protection of lands against the overflowing of a tidal river.

Sir E. Clarke, S.G. (*A. V. Dicey* with him), for the respondent.—The intention of the Legislature was to enable a landowner who has not the benefit of a public rate for the preserving of his property to deduct from his income tax such expenses as he has necessarily incurred in protecting landed property assessed under the Income Tax Acts, and not to encourage him to expend money in improving the capital value of the land for his private profit.

C. A. Cripps replied.

Pollock, B.—In this case the appellant is the owner of a large tract of landed property, and it is admitted that he is properly assessed to the income tax in respect of the same. He claims a deduction from this assessment in respect of money which he has sunk in building an embankment for the purpose of reclaiming from the tidal river 1,044 acres, a portion of his property. He says that he is entitled to this deduction under section 37 of the Income Tax Act, 1853.

Now this Act is an Income Tax Act, and the assessment is assessed on income arising from land. It may be argued that it would be desirable that the Legislature should offer some bounty to a landlord to induce him to expend money in reclaiming or improving land, but I fail to find any such intention in the Income Tax Acts. The Act of 1842, by section 60, schedule A, r. 5, gave a deduction in respect of the amount charged on land by public rate or assessment in respect of draining, fencing, or embanking the same—that is to say, this Act allows a deduction from the gross annual value, but does not in any way allow a deduction in respect of the improvement of land or the enhancement of its permanent value by the expenditure of capital. That principle is maintained in section 37 of the Act of 1853. Had it been otherwise intended it would have been very easy to have used some such words as "reclamation" or "improvement," so as to show that a man should be rewarded for the improvement of his land, and that a deduction from the income tax should be made in respect of any capital so expended. In my opinion the object of this Act was only to allow a deduction which was essential, the words being "necessary for the preservation or protection"—that is, essential for the protection of the particular land in question looking at the *status* it then was in. The preservation or protection intended was the making of either an embankment or sea wall. In this country it is known as a matter of history that such embankments have from time to time been absolutely necessary to prevent the encroachment or overflowing of tidal rivers or of the sea, but the flowing of the tide daily or twice in a day is not an encroachment or an overflowing of a tidal river or of the sea; it is merely a natural event which may either improve or reduce the value of land. In the present case the owner has only endeavoured to enhance the capital value of his land, and therefore he must pay upon the income arising from it, whether small or large. When we look at the particular application of section 37 it is obvious that it could not apply to such a case as this. Or, take the case of a lord of a manor who held from the Crown the foreshore between high and low water mark, and who found it worth his while to convert land, covered at high tide with water, into land which should not be so covered. Such conversion might or might not improve his property, but it is clear to me that he could not be said to have done it for the preservation or protection of his property. He has done it, not for preservation, but to change the character of his land. It has been argued by the appellant that his land had before paid income tax, and that the building of the embankment was,

therefore, the building of a wall for the preservation or protection of land already subject to assessment against the encroachment or overflowing of the tidal river. But I think that it is not to be treated as a grant of ancient land which has been protected before because income tax has been paid in respect of it. The tax was paid in respect of the net annual income arising from it, from whatever source such income might be derived—whether from mussel or oyster fisheries, from lobster pots, from seaweed, or from salt meads for cattle—and the land would not become land for the preservation or protection of which against the encroachment or overflowing of the sea this embankment was necessary. Therefore the deduction claimed cannot be allowed, and the appeal must be dismissed.

HAWKINS, J.—I concur in the remarks of my learned brother, but I wish to add that in the course of time a further expenditure may be incurred by the landlord for the purpose of preserving and protecting the land in its new condition. Should an exemption or deduction be claimed on that further expenditure it would in all probability be allowed.

Appeal dismissed, with costs.

Solicitors for the appellant, *Torr, Janeway, & Co.*

Solicitor for the respondent, *The Solicitor of Inland Revenue.*

Q. B. Div. (Cave and Grantham, JJ.) Jan. 30, 31.

In re STEPHENSON.

Ex parte THE OFFICIAL RECEIVER. (*a.*)

Bankruptcy — Composition deed for the benefit of creditors—Right of party to deed to prove in bankruptcy—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* (a); *s.* 43.

A composition deed executed by a debtor for the benefit of his creditors provided that, "in consideration of the premises," the creditors parties to the deed would "release the debtor from all claims and demands against him." The debtor was adjudicated bankrupt on the petition of a creditor who had not been a party to the deed.

Held, that a creditor who was a party to the deed was entitled to prove in the bankruptcy, as the deed was only a release conditional upon its remaining valid.

This was an appeal by the official receiver from an order of the county court judge at Nottingham ordering him to admit the proof of a creditor.

The creditor was trustee under a deed of assignment made by the debtor in 1887 for the benefit of his creditors generally. The majority of creditors assented to the deed, but one who refused to assent took proceedings in bankruptcy against the debtor and got him adjudicated upon the ground that this deed was an act of bankruptcy under section 4, sub-section (*a*), of the Bankruptcy Act, 1883. The creditor's proof was refused by the official receiver on the ground that his debt was extinguished by the deed, he having released the debtor from all claims in consideration of the debtor's executing the deed, which had been done. The county court judge ordered the proof to be admitted.

Sir R. E. Webster, A.G. (*Sir E. Clarke, S.G.*, and *Muir Mackenzie* with him), for the appellant.—The proof was rightly rejected, because the deed was under seal and its terms were unconditional. The debt was wholly extinguished by it. No doubt the execution of the deed was an act of bankruptcy, and its effect has been to defeat the intended *cessio bonorum* and vest the property in the trustee in bankruptcy as from the date of the execution. That does not affect the validity of the release. In *French* v. *French*, 4 W. R. 139, 6 De G. M. G. 95, and *Ex parte Bell, In re Webb*, 1 G. & J. 9, settlements of property which were void as against creditors were held to be otherwise valid. [CAVE, J.—The execution was not an act of bankruptcy.] A creditor who is party to a deed of assignment containing a release is estopped from treating the debt as subsisting. *Small* v. *Marwood*, 9 B. & C. 300; *Ex parte Stray, In re Stray*, 15 W. R. 600, L. R. 2 Ch. 374. It would seem to follow that a party to such a deed cannot be a creditor in bankruptcy at all. A creditor of this kind has no rights under section 48, sub-section 1, which is limited to a creditor who has accounted for money which he has received in fraudulent preference to others.

Moulton, Q.C. (*Stanger* with him), for the respondent.—No authority can be found to support the appellant's contention, which affords a strong presumption in favour of the respondent. A party to a deed of composition may be estopped from petitioning before the deed has been declared void, but as soon as the deed has been made void his original rights revived. The release was clearly a conditional one, dependent on the validity of the deed.

He cited *Doe d. Pitcher* v. *Anderson*, 5 M. & S. 16, and *Tappenden* v. *Burgess*, 4 East, 230.

Sir R. E. Webster, A.G., in reply.

CAVE, J.—I am of opinion that this appeal should be dismissed. The question depends upon the intention of the parties. The court has to discover their intention, and has to give effect to the deed in accordance with their intention.

The object of the deed is to convey the estate of the debtor to a trustee for realization and division rateably among the creditors of the debtor. One of the covenants is to this effect:—"In consideration of the premises the creditors parties hereto release the debtor from all claims and demands." The contention of the appellant is that, though the conveyance and every other covenant in the deed is void owing to the debtor having been adjudicated bankrupt, this one covenant is valid, the debt due to the creditor is released, and he cannot prove in the bankruptcy. But there is not a single provision in the deed which in any way relates to bankruptcy. The object of the deed is to distribute the estate without bankruptcy proceedings, and to do so in just proportion among all the creditors of the debtor. It is not the case of a minority of creditors who are endeavouring to divide the whole estate among themselves to the exclusion of the majority, on the chance of their being able to effect this before a petition has been filed. The minority might, perhaps, actually intend to give up their right of proof should the plan be discovered and the debtor be made a bankrupt. Here it is inconceivable that the appellant and the other creditors entertained such intention. The arrangement which they were endeavouring to carry through was an arrangement which in no way contemplated the bankruptcy of the debtor, and they must have known that if the result was that no one who executed the deed could prove if the arrangement miscarried and the debtor were made bankrupt, there would be a great temptation to dissentients to defer executing the deed till most of the other creditors had done so, and then to make the debtor a bankrupt and have the estate administered for their own private benefit. It is therefore clear that the release was not intended to be operative in case of bankruptcy.

In the case of fraudulent preference the creditor seldom intend that the acceptance of a payment by way of fraudulent preference shall be a valid re-

(*a.*) Reported by CECIL CHAPMAN, Esq., Barrister-at-Law.

to the debtor, such as, if the payment is set aside, to disentitle the creditor to prove in bankruptcy. This case is similar. The intention of the parties was that the release was to stand or fall with the rest of the deed, and the whole consideration for it having failed, the appellant is entitled to prove. The decision of the learned judge was therefore correct.

GRANTHAM, J.—I am of the same opinion. No authority either for or against the contention of the appellant has been cited by counsel. The reason is, that though composition deeds in this form have been common for many years, and have always been liable to be set aside in case of bankruptcy, it has never till now been suggested that when bankruptcy has taken place, and the consideration for which the creditor gave his assent to the composition has, therefore, totally failed, the debt due is nevertheless extinguished. There could be no authority for so singular a proposition.

Solicitor for the appellant, *Solicitor to the Board of Trade.*

Solicitors for the respondent, *Ockerby & Everington*, for *J. & A. Bright*, Nottingham.

Court of Appeal.

From Chan. Div. March 22, 24, 26, 27; May. 1.

WILLIAMS *v.* COLONIAL BANK.

WILLIAMS *v.* LONDON CHARTERED BANK OF AUSTRALIA. (*a.*)

Shares—Pledge of certificates—Blank indorsement—Brokers—American law—Mercantile usage—Estoppel.

The executors of a holder of shares in an American railway company signed blank transfers indorsed on the share certificates, and handed them to their brokers, in order that the shares might be registered in the names of the executors. The brokers fraudulently deposited the certificates with their bankers as security for advances, and afterwards became bankrupt. According to American law the holder of certificates with transfers properly indorsed has a good legal title to the shares; and, according to mercantile usage in London, such certificates were treated as securities to bearer. In this case the indorsement was not attested in the manner required by the railway company for registration.

Held (*reversing* Kekewich, J.), *that the plaintiffs were entitled to a declaration that the shares in question formed part of the testator's estate, and to delivery of the certificates by the bankers accordingly.*

Appeal from Kekewich, J. (reported 36 Ch. D. 659).

The first action was brought by E. M. Williams, J. Cady, and J. C. Williams, the executors of the will of J. M. Williams, to recover 710 shares in the New York Central and Hudson River Railroad Co., part of the testator's estate.

The testator at the time of his death was entitled to 1,210 shares in the above-mentioned company, represented by 121 certificates of ten shares each, and registered in the name of the testator in the books of the company. The certificates were in the following form:—

"E 4648 10
"Number. shares.

"The New York Central and Hudson River Railroad Company.

"John Michael Williams, of Burncoose, Perran Worthal, Cornwall, England, is entitled to ten shares of one hundred dollars each of the capital stock of the New York Central and Hudson River Railroad Company, transferable in person or by attorney in the books of the company only on the surrender and cancellation of this certificate by an indorsement thereof hereon and in the form and manner which may at the time be required by the transfer regulations of the company. This certificate is, however, to be of no effect or validity until countersigned by the transfer agent, and also by the registrar of transfers of the said company in the city of New York."

The certificates were signed and duly countersigned as required.

The testator died in February, 1880, and his will was proved by two of the plaintiffs, Elizabeth Maria Williams and John Cady, on March 25, 1880. Power was reserved to two other executors to come in and prove, and J. C. Williams, the other plaintiff, did so on October 19, 1882.

In August, 1880, the two first-named plaintiffs wished to be registered as owners in respect of the shares, and their agent, Mr. Pryor, sent the certificates and the probate of the will to their stockbrokers, Messrs. P. W. Thomas & Co. The latter subsequently informed Mr. Pryor that the extract of the probate had been forwarded to New York with the share certificates, but that certain formalities would have to be gone through, after which the share certificates would have to be signed by the executors and new ones would then be issued. The further formalities consisted in signing a blank transfer indorsed on the back of the share certificates, which were then forwarded again to Messrs. Thomas on the 29th of January, 1881. The indorsement was in the following terms:—

"For value received do hereby sell, assign, and transfer to shares of the capital stock of the New York Central and Hudson River Railroad Company of one hundred dollars each standing in name on the books of the company, and represented by the within certificate. "And do hereby irrevocably constitute and appoint attorney to execute a surrender and cancellation of the within certificate, and also to do all things requisite to transfer the said stock on the books of the said company in such form and manner as may be necessary or be required by the regulations of the said company in that behalf, with full power of substitution in the premises.

"Dated Jan. 24th, 1881. "E. M. WILLIAMS.
"J. CADY."

In December, 1882, the plaintiffs made inquiries of Messrs. Thomas & Co. as to the certificates, and they replied stating that the certificates were in New York pending instructions from the plaintiffs for a sale, and to avoid the risk of a double transmission of the certificates. The letter concluded "We need hardly say that there is no risk in leaving the certificates in New York, as they are not indorsed." The certificates in fact had never been sent to New York, but had been deposited in February and April, 1881, with the Colonial Bank, by Messrs. P. W. Thomas & Co. as security for advances. Five hundred of the shares were redeemed and the certificates representing them redeposited with the Chartered Bank of Australia.

Messrs. P. W. Thomas & Co. became bankrupt on the 5th of February, 1884.

This was an action claiming a declaration that the share certificates were deposited in fraud of the plaintiffs, that the bank had no legal title in them, for delivery of the certificates, and an injunction restraining the bank from applying for any alteration in the register of the railway company, and from dealing with the shares.

The Colonial Bank counter-claimed for a declaration that they were entitled to a valid charge on the shares for the amount of their advances on them, and that the executors should concur in all acts necessary for vesting

(*a.*) Reported by C. HERBERT BROWN, Esq., Barrister-at-Law.

the shares in the defendants or their nominees, and enable them to become the registered proprietors thereof.

Evidence was adduced, taken on commission in America, to the effect that the legal title to shares vested in the person who for the time being was entitled by indorsement or otherwise to have them registered in his name. Evidence was also given that certificates, indorsed as these were, were equivalent to securities to bearer and passed as such from hand to hand.

The action against the London Chartered Bank of Australia related to the certificates of 500 shares similarly endorsed, and deposited at a later date with that bank. They however did not counter-claim.

Kekewich, J., held that the banks were entitled to hold the certificates as a security for the debts due from Thomas & Co. He was of opinion that the certificates must be construed according to American law; that the banks were not put on inquiry in dealing with Thomas & Co.; that the executors must be taken to have known the nature of the securities, and to have given their brokers all the authority which by the law merchant went with them; and that, having given this power to Thomas & Co., they were estopped from denying their authority to deal with the shares as they thought proper.

The plaintiffs appealed.

Sir Horace Davey, Q.C., Warmington, Q.C., and *Sturges*, for the appellants, argued that the legal estate in the shares was still in the executors, as they were not in themselves negotiable, and not made so by the indorsement, the case being governed by English and not by American law; that the plaintiffs were not estopped from denying that they authorized the dealing by Thomas & Co. with the shares; that the certificates were confided to Thomas & Co. for a specific purpose—namely, to have the registered name altered; and that the banks were put on inquiry and ought to have inquired of the executors before taking the certificates.

Rigby, Q.C., Reid, Q.C., and *Christopher James*, for the Colonial Bank, contended that the certificates indorsed were equivalent to securities to bearer, and that there was ample evidence that in the money market they were so treated; that by the law of New York these securities, which are American instruments and must be governed by American law, when indorsed, pass from hand to hand, and that the holder is entitled to have his name put on the register as owner of them, if he so desires; that the executors were estopped by their delay, amounting to negligence, in inquiring for the documents, from denying that, having authorized their brokers to sell or pledge the shares, they gave them authority to fill up the blanks; and that the absence of formalities required by the Stock Exchange did not put the banks on inquiry; and submitted that there was no equity against the banks, which, having the legal estate, were entitled, unless redeemed by the plaintiffs, to foreclose the shares.

Latham, Q.C., and *T. H. Wright*, for the London Chartered Bank of Australia, adopted the same argument.

Sir Horace Davey, Q.C., replied.

The following cases were cited:—*Picker* v. *London and County Banking Co.*, 35 W. R. 469, 18 Q. B. D. 515; *London and County Banking Co.* v. *London and River Plate Bank*, 20 Q. B. D. 232; *Dixon* v. *Bovill*, 4 W. R. 813, 3 Macq. 1; *Goodwin* v. *Robarts*, 23 W. R. 915, 24 *Ib.* 987, L. R. 10 Eq. 76, 337, 1 App. Cas. 476; *Rumball* v. *Metropolitan Bank*, 25 W. R. 366, 2 Q. B. D. 194; *Colonial Bank* v. *Hepworth*, *ante*, p. 259, 36 Ch. D. 36; *Easton* v. *London Joint-Stock Bank*, 35 W. R. 220, 34 Ch. D. 95 (since reversed in D. P.); *Colonial Bank* v. *Whinney*, 34 W. R. 705, 11 App. Cas. 426; *Société Générale de Paris* v. *Walker*, 34 W. R. 662, 11 App. Cas. 20; *Willmott* v. *Barber*, 28 W. R. 911, 15 Ch. D. 96; *Carr* v. *London and North-Western Railway Co.*, 23 W. R. 747, L. R. 7 C. P. 307.

Cur. adv. vult.

May 1.—COTTON, L.J.—I am of opinion that this appeal must be allowed. According to English law the title of the bank as transferees of the certificates would not be a legal title, but a mere inchoate title, which would enable them, as transferees from Thomas & Co., to hold the shares as against the plaintiffs. According to American law, however, they would have not only a legal, but also the equitable title. The case, however, must be decided by the law of England, and not by that of America, as the question whether Thomas & Co. had a good title to transfer these certificates to the bank is one which arose in this country, and therefore depends upon English law. It is well settled that no one can transfer any better title to an instrument which is not negotiable than that which he himself has. The transfer by Thomas & Co. to the bank was made in fraud of the plaintiffs. Thomas & Co. never received any authority from the plaintiffs to deal with the certificates.

Though the general law is as I have stated, it may be, however, that the real owner has estopped himself by conduct from asserting his title. The question, therefore, is whether there has been anything in the conduct of the plaintiffs to estop them from asserting their title to the shares as against the bank.

The certificates were not, on the face of them, certificates to bearer, but expressly represented that the shares in respect of which the certificates were issued could only be transferred with certain formalities in the books of the company. And when, on the face of the documents, there was something irregular in the alleged transfer to them, the defendants could not rely upon estoppel as against the plaintiffs. The absence of a certificate of transfer in compliance with the requirements stated on the face of the certificates was sufficient to have put the defendants upon inquiry when the certificates were handed to them by Thomas & Co., and, not having done so, they took at their own risk, and if the persons from whom they took had not a good title the defendants did not acquire any better title. I do not agree with the contention that the conduct of the plaintiffs was such as to give the bank a good title, or that there has been negligence on the part of the plaintiffs in leaving the certificates with the brokers. In my opinion the two sets of defendants stand on the same footing, and the plaintiffs are entitled to claim against them both a declaration that the shares in question form part of the testator's estate, and that the certificates should be delivered up. The judgment of Kekewich, J., must accordingly be reversed.

LINDLEY, L.J.—I am of the same opinion. The constitution of the company, and the proper mode of becoming a shareholder, and the consequences of having acquired a title to the certificates are questions which may depend on American law, but American law does not regulate or apply to dealings in this country with a document by way of gift, sale, or pledge. And although the documents in question may be negotiable instruments in America, that is not sufficient to render them negotiable in this country, so as to give a bona fide holder for value a good title against the true owners from whom they have been stolen. Apart from the question of estoppel, the bank did not acquire any title to the certificates. Thomas & Co. were not owners of the certificates, and were not, in fact, empowered to part with them so as to bring the case within the Factors Acts.

The general rule of law, therefore, applies—that

brokers, who had no authority to part with the certificates, could not, by transferring them to the bank, give the bank a title to hold them as against the plaintiffs, who were the true owners.

Has any title been acquired by estoppel? What representation was made by the executors which they are precluded from denying, or what was done by them calculated to lead to the inference that Thomas & Co. had authority to pledge the certificates? On the face of the certificates the testator was stated to be owner of the shares. The indorsement represented quite truly that the person who was entitled to these certificates might fill up the blanks; but this was the utmost apparent authority given. The certificates with the transfers in blank when deposited by Thomas & Co. with the bank being imperfect, and not negotiable instruments, conferred no legal title; and the document not being in proper form, and there being enough on the face of them to put the bank on inquiry, the defence of estoppel is not available.

BOWEN, L.J.—I am of the same opinion, and for the same reasons. The American law does not, as I think, apply to this case, the key to which is as to the right of the respondents to hold these pieces of paper—these certificates. How, then, have the plaintiffs lost their right to these pieces of paper? It is admitted that they are not negotiable according to English law. The only possible way in which they can have lost their title would be by the operation of the law of estoppel. There is no question of sale in market overt, which is an exception to the general rule. The executors never intended to part with their title, and the law of estoppel cannot apply—estoppel resting on an express or implied representation, or conduct amounting to representation, which is the same thing. The documents nowhere suggest that the bearer is entitled, and, not being in order, there was that on the face of them which should have put the banks on inquiry. There is, in my opinion, no ground for saying that there was any negligence on the part of the plaintiffs.

Appeal allowed.

Solicitors for the appellants, *Young, Jones, & Co.*

Solicitors for the Colonial Bank, *Druces & Attlee.*

Solicitors for the London Chartered Bank of Australia, *Freshfields & Williams.*

From Chan. Div. Jan. 26.

LUCAS v. MARTIN. (a.)

Bankruptcy—Agreement for purchase of bankrupt's estate—Scheme of arrangement—Approval of court—New term—Specific performance—Bankruptcy Act, 1883, *s.* 23, *sub-section* 2.

The trustee in a bankruptcy entered into a written agreement with the defendants whereby it was agreed that the defendants should purchase from the trustee the estate of the bankrupt for such a sum as would pay the costs and expenses of the proceedings and the preferential debts, and a certain composition to the unsecured creditors, and that, upon the approval of the scheme by the court, the bankruptcy should be annulled.

At a first meeting of the creditors a resolution was passed, which was subsequently confirmed at the second meeting by the statutory majority, to accept the offer of the defendants to purchase the estate on the terms of the agreement, provided that the defendants gave a bond to the trustee to secure the payment of the purchase-money.

The court afterwards made an order approving of the purchase upon the terms contained in the agreement between the trustee and the defendants, and annulled the bankruptcy. In an action by the trustee for specific performance of the agreement,

Held, that the agreement could not be specifically enforced against the defendants, they never having consented to the provision relating to the bond, and the agreement which they had entered into with the trustee never having been accepted by the creditors.

Decision of North, J., *affirmed.*

Appeal from a decision of North, J.

F. Curtois was adjudicated bankrupt on his own petition on the 28th of March, 1885, and the plaintiff, C. Lucas, was appointed the trustee in his bankruptcy.

On the 2nd of April, 1885, an agreement in writing was signed by the plaintiff and the defendants, J. Martin and G. Martin, whereby it was agreed that the defendants should purchase the estate of the bankrupt, vested in the plaintiff as such trustee, for such a sum as would be sufficient to pay all the costs and expenses of the proceedings, to pay all the preferential debts in full, and to pay all the unsecured creditors a composition of 15s. in the pound at the times therein mentioned, and that upon the approval of the scheme by the court the bankruptcy should be annulled.

At a first meeting of the creditors of the bankrupt held on the 25th of April, 1885, it was resolved to accept the offer of the defendants to purchase the estate of the bankrupt on the terms of the agreement, provided that the defendants gave a bond to the plaintiff to secure the payment of the purchase-money.

At a second meeting of the creditors, held on the 14th of May, 1885, the resolution was confirmed by the requisite statutory majority.

On the 11th of June, 1885, the judge of the county court of Lincolnshire, on the report of the official receiver, made an order approving of the purchase upon the terms contained in the agreement between the plaintiff and the defendants, and annulled the bankruptcy, but the order did not mention, or in any way refer to, the provision relating to the bond which was contained in the resolution of the creditors.

The defendants subsequently refused to carry out their agreement, and the plaintiff, by the direction of the Court of Bankruptcy, brought the present action against them for specific performance of the agreement of the 2nd of May.

On the 20th of July, 1887, North, J., dismissed the action.

The plaintiff appealed.

Napier Higgins, Q.C., and *Rashleigh*, for the appellant.—We submit we are entitled to the relief we ask. The defendants cannot go behind the order of the 11th of June, 1885. To allow such a proceeding would be productive of grave inconveniences. The provision as to the bond contained in the resolution of the creditors formed no part of the agreement with the defendants, nor do we now seek to enforce it. Assuming that it did form part of the scheme, the court had power to dispense with it: Bankruptcy Act, 1883, s. 23, sub-section 2.

Cozens-Hardy, Q.C., and *R. J. Parker*, for the respondents, were not called upon.

Lord HALSBURY, C.—I think that the judgment of North, J., must be affirmed. The agreement which it is sought to enforce against those two gentlemen was an agreement which I think in every part of it was subject to the approval of the court. The approval of the court becomes essential for the making of the agreement *talis qualis*. It is idle to tell us that some parts of the agreement might have been made, or that a different agreement might have been made without the approval of the

(a.) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

court. There are essential parts of it, running through the whole of the agreement, which require the confirmation of the court. The defendants make their proposition subject to the agreement of the court; and unless there is the approval of the court they have not made any offer which can be enforced; because, as I say, they have imported into their offer the approval of the court as an essential part of it.

Then did the court approve it? Apart from the question of estoppel by the judgment, with which I will deal presently, the fact appears now to be beyond dispute that what the creditors did in fact agree to was a bargain that, besides and in addition to that which these two gentlemen had agreed to do as the consideration which they were to give, they were also to enter into a bond. That was the composition, or agreement, or arrangement which the creditors agreed to, and they have never agreed to anything else. The court has approved, and could only approve, by virtue of the statute, that which the creditors had agreed to. The provision in sub-section 2 of section 23 appears to me to have reference to a totally different matter. That assumes a good agreement agreed to by the creditors, and the court is then invested with the jurisdiction to impose terms and conditions as to the circumstances under which and even the persons to whom, in pursuance of that agreement, the assets of the former bankrupt shall be conveyed. And it appears to me, under these circumstances, that if we have liberty to enter into the question of what the real facts are, there is no agreement by these gentlemen to do the thing which the creditors approved of, and which the court has approved of. Therefore, it is impossible to enforce specific performance of an agreement into which, according to my view, the defendants have never entered, because they have never entered into this particular bargain, except under circumstances which show that their obligation to perform that agreement does not arise. It is said that we cannot arrive at what the real facts are—that we must be estopped by the order of the court. It appears to me that that is a very strange contention. The order of the court purports to confirm that which the creditors in fact did. The recital in the order inaccurately states that that which the creditors agreed to was the agreement *simpliciter*, and not the agreement *plus* the additional term. I entirely dissent from the view that we are not entitled to see what the facts are, and I am not certain that I am altogether able to understand the principle upon which it is alleged that, as against a stranger not a party to the bankruptcy, this order of the court is conclusive and binding upon him, so that we cannot ascertain what the real facts are. Here this may be a judgment *in rem*. It may well be that that binds all the world as an adjudication, and that you cannot go behind the adjudication, but to suggest that a recital of a certain fact leading up to the adjudication is binding upon all the world, so that you cannot prove that the allegation of that recital is different from the truth, is, to my mind, a novelty, to which I, for one, will give no countenance. Under these circumstances, I think the judgment of the learned judge of the court below was right, and that this appeal should be dismissed.

COTTON, L.J.—I am of the same opinion. The first question which has been raised is this, that the agreement was not conditional on the approval of the court. The agreement is not a very good piece of conveyancing language, but I think it appears from it that although it is not in express terms stated that the agreement shall be conditional, when you look at it it must be so; because it was an agreement which could not be carried out without the approval of the court, the approval of the court being necessary in order to obtain that which was the object of the proposed purchasers—namely, the annulment of the bankruptcy. The time for payment of the money has reference to the approval of the court, and the whole agreement, though not said in terms to be conditional on the approval of the court, is in substance, when one reads the agreement and sees what the object was, necessarily subject to the approval of the court.

Then was the approval of the court given to this agreement—that is to say, to the terms contained in it? There, again, the order is not artificial in its terms, but it commences in this way:—"And the court, being satisfied that the creditors in the above matter have duly accepted and approved the composition or scheme of arrangement in the following terms," &c. Then it mentions some of the terms of that agreement and refers to the agreement as an exhibit. What was the meaning of that? In fact we know that the agreement in its terms as signed by the purchasers from the plaintiff, was not assented to by the creditors, because, although it is not expressed in the form of the resolution, it was in reality one term of the agreement assented to by the creditors that there should not be simply a payment of money to the defendants but that before the money was paid the proposed purchasers should give a bond for the performance of the obligation which they had undertaken by their agreement.

That was never assented to so as to become any part of an agreement entered into by the purchasers.

But it is said that although there is that reference to what had been approved of by the meeting of creditors, yet, having regard to the report of the official receiver, the court did not consider that there had been an introduction of that term as to the bond, because it is not mentioned in the report, but, as I understand, the report contains annexed to it the resolution of the creditors, from which it does appear that this term was introduced by the creditors in their approval, and although, as I say, it is not very clear and artificial, yet we must look and see what was in fact approved by the creditors in order that we may know what was approved by the court. The power of the court is limited to approving of that which is agreed to by two meetings of the creditors, and therefore, in my opinion, the proper construction has been put upon this order by the learned judge in the court below, that, although it contains this reference to what was signed by the parties, it really only approves of that which had in fact become binding by the assent and approval of the creditors in general meeting.

It was said, however, that we ought not to read the order in that way for this reason, that there is a power given to the court to annul the bankruptcy and to vest the property in the purchasers on such terms as it thinks fit, and here the bankruptcy was annulled without reference to this term. It is said that, therefore, we ought to consider that the court, when it approved of the arrangement or scheme or composition in these terms, intended to dispense with that clause which had been introduced by the creditors. Now, in my opinion, the court has no such power, because although it might give directions where a scheme does not make any provision for the terms upon which the property is to be vested in the purchasers, yet where there is an express agreement by the creditors by their resolution that a certain term shall be imposed, in my opinion the court has no jurisdiction to depart from that, and to say, although we approve that which has been done by the creditors, we strike out that which we must consider as important, as, in fact, it was imposed by their resolution. As a mere matter of construction, in my opinion it would be wrong so to construe this order unless there were an express provision in it that that portion of the agreement should be dispensed with. I think the court had no power to make any such order, but the fact that it does not in terms purport so to do in my opinion is strong against such a construction. In my opinion the appeal fails.

Bowen, L.J.—I am of the same opinion. I have nothing to add.

Appeal dismissed.

Solicitors, *Greenfield & Cracknall*, for *V. Stapleton*, Stamford; *Taylor, Hoare, Taylor, & Box*, for *Thimbleby & Sons*, Spilsby.

From Q. B. Div. May 9.

Reg. v. Licensing Justices for Crewkerne. (a.)

Licensing—Alehouse—Six-days' licence—Renewal—35 & 36 Vict. c. 94, s. 49.

Although the condition under 35 & 36 Vict. c. 94, s. 49, requiring licensed premises to be closed during the whole of Sunday can only be inserted in a licence if the applicant himself applies for its insertion, yet, when it is once inserted, the licence becomes a six-days' licence, and can only be renewed as such.

Appeal from the decision of a divisional court (Mathew and A. L. Smith, JJ.).

At the annual licensing meeting held at Crewkerne in 1881 an alehouse licence was granted to G. Rugg in respect of an alehouse known as "The Queen," at Misterton. Rugg then requested that the condition limiting the licence to a six-days' licence under 35 & 36 Vict. c. 94, s. 49, should be inserted, which was accordingly done.

The licence was annually renewed as a six-days' licence, and in 1883 the house passed into the possession of Walter Miller, the present appellant, who continued to renew the licence as a six-days' licence down to the 20th of August, 1887, when, at the annual licensing sessions, he applied through his solicitor for a renewal of the licence as a seven-days' licence—that is to say, without the insertion of the condition. There was no opposition to the renewal.

The justices refused to grant the application, and renewed the licence as a six-days' licence.

The appellant then applied to the Divisional Court for a *mandamus* to compel the justices to grant the application, contending that they had no power to insert the condition against the will of the applicant.

The Divisional Court refused the application, and the appellant appealed.

Paterson, for the appellant.—There is really no such thing as a six-days' licence. The Act only speaks of a six-days' licence for convenience of terminology. The condition limiting an ordinary licence to six days can only be inserted at the request of the applicant, and the magistrates cannot refuse to insert it when it is asked for (35 & 36 Vict. c. 94, s. 49): *Reg.* v. *Justices of Kirkdale*, 18 Q. B. D. 248, 35 W. R. Dig. 118. A renewal is really a new grant, and therefore the condition cannot be inserted on a renewal against the will of the applicant. No objection can be taken to the renewal unless written notice of opposition has been served on the applicant in accordance with section 42 of 35 & 36 Vict. c. 94: *Reg.* v. *Justices of Merthyr Tydvil*, 14 Q. B. D. 584, 33 W. R. Dig. 122. The justices were therefore bound to grant this application for renewal.

William Wills (*W. Blake Odgers* with him), for the respondents, was not called upon to argue.

Lindley, L.J.—In my opinion the view taken by the court below was the correct one. This house was given a six-days' licence in the first instance. I think that Mr. Paterson was perfectly right in saying that the condition which makes a licence a six-days' licence can be only inserted at the will of the applicant, and that it is entirely for him whether he will have the condition in or not. But the justices have an absolute discretion to grant or refuse a licence, and this discretion is extended to a renewal just as much as to the granting of a new licence.

The licence in question was a six-days' licence, and was renewed annually as a six-days' licence down to the year 1887. The licensee then applies again for the renewal of the licence. That means that he applies for the renewal of the six-days' licence. What is renewed is that which is in existence and is about to expire—that is, the six days' licence. The licensee had never had a seven-days' licence, and could not therefore apply for the renewal of such a licence. Most probably when the justices orginally granted the licence they never contemplated granting a seven-days' licence. They were willing to grant and to renew a six-days' licence, but the application for a seven-days' licence was substantially an application for a new licence, which they would probably refuse altogether, as they had an undoubted right to do.

Bowen, L.J.—I am of the same opinion. It is, no doubt, for the applicant in the first instance to ask for the insertion of the condition in his licence, limiting it to six days. It cannot be inserted against his will. But, as soon as he has elected to have it inserted, and has called upon the magistrates to insert it, the licence becomes, in my opinion, a six-days' licence, an entirely different thing from a seven-days' licence. It is spoken of by the section as a six-days' licence, and the holder of such a licence has certain privileges and exemptions given him by the Act which do not apply to the holders of seven-days' licences. I think that when a licence is renewed that must be renewed which has already been held, and it is not a renewal to introduce something which the applicant has not held before. A six-days' licence, therefore, can only be renewed as a six-days licence, and an application for a seven-days' licence is a fresh application.

I am confirmed in this view by the fact that a renewal may be made by indorsing the old licence or by issuing a copy of it. This shows that the intention was that that which had been in existence—namely, in this case a six-days' licence—should be renewed, and not that it should become a different licence, a seven-days' licence, at the option of the applicant.

I agree, therefore, in thinking that we cannot grant this application, and that this appeal must be dismissed.

Solicitors for the appellant, *Geare, Sons, & Pease*.

Solicitors for the respondents, *A. B. Trevenen*, for *J. & W. B. Sparks & Blake*, Crewkerne.

From Q. B. Div. April 16.

Hance and Another v. Harding. (a.)

Bankruptcy — Post-nuptial settlement — Purchaser for valuable consideration — Trader — Bankruptcy Act 1869 (32 & 33 Vict. c. 71), ss. 91, 94, sub-section 3.

By a post-nuptial settlement the settlor, in consideration of the assignment by his father of certain leasehold property to the trustees thereof, and in consideration of a release of a debt due from him to his father, assigned to the trustees two policies of insurance upon his life, upon trust out of the income arising fom the leasehold property to pay the premiums on the policies and the residue to the settlor for life, and after his death upon trust, as to all the property, for the settlor's children. Within two years after the date of the settlement the

(a.) Reported by A. P. Percival Keep, Esq., Barrister-at-Law.

(a.) Reported by W. F. Barry, Esq., Barrister-at-Law.

settlor was adjudicated bankrupt under the Bankruptcy Act, 1869. *Upon the death of the settlor his trustee in bankruptcy claimed the proceeds of the policies, upon the ground that the settlement was void under section* 91 *of that Act.*

Held, that the settlor's father was a "purchaser in good faith and for valuable consideration" within the exception in section 91, *and that the settlement was valid.*

Held, also, that the settlement was protected by section 94, *sub-section* 3, *as a "dealing with the bankrupt in good faith and for valuable consideration."*

By schedule 1 *of the Bankruptcy Act,* 1869, *the word "trader" includes an apothecary.*

Held, that a general medical practitioner who supplies the medicines which he prescribes for his patients, but who makes no charge for medicines, charging only for attendance, is not a "trader" within the meaning of the Act.

Appeal from the judgment of Huddleston, B., in favour of the plaintiffs at the trial without a jury of an interpleader issue.

In 1880 Dr. Peskett, who practised as a general practitioner, and who was a married man with children, formed an illicit connection with a married woman, and fell into intemperate habits, and was made co-respondent in certain proceedings taken in the Divorce Court. Thereupon Dr. Peskett's father, for the sake of his son's children, proposed that Dr. Peskett should settle two policies of insurance upon his life, each for £1,500, for the benefit of his children, and upon condition of Dr. Peskett doing so the father agreed to bring into the settlement a leasehold property, producing at that time £70 a year, and which subsequently realized £700, and to release his son from a debt of £107 due to him. A settlement was accordingly executed upon the 25th of November, 1882, under which Dr. Peskett was released from the debt due to his father, and the two policies upon Dr. Peskett's life and the leasehold property were assigned to the plaintiffs as trustees upon trust out of the income arising from the leasehold property to pay the premiums upon the policies, and to pay the balance to Dr. Peskett for his life, and after his death upon trust as to all the property for his children. At the date of the settlement Dr. Peskett was solvent, though being pressed by certain creditors.

Upon the 6th of July, 1883, Dr. Peskett was adjudicated bankrupt, and the defendant was appointed trustee. Upon the 26th of September, 1886, Dr. Peskett died, and the proceeds of the policies were claimed by the plaintiffs as trustees of the settlement and also by the defendant as trustee in bankruptcy of Dr. Peskett. The insurance company interpleaded, and this issue was directed to be tried. It was contended on behalf of the defendant that the settlement was void under section 91 of the Bankruptcy Act, 1869, which provides that "any settlement of property made by a trader, not being a settlement made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of such settlement, be void as against the trustee of the bankrupt appointed under this Act," &c.

Upon the question whether Dr. Peskett was a "trader" within that section (trader by schedule 1 including an apothecary), it appeared from the evidence that Dr. Peskett described himself in the bankruptcy proceedings as a "surgeon and apothecary," that he was a member of the Royal College of Surgeons, England, and a licentiate of the Society of Apothecaries, and that he supplied the medicines which he prescribed for his patients, but that he made no charge for the medicines, charging only for medical attendance, except upon three occasions in 1873, 1874, and 1877, when he charged in his account a lump sum for "attendance and medicine." Huddleston, B., held that Dr. Peskett was not a "trader"; that the father was "a purchaser in good faith and for valuable consideration" within the exception in section 91; and that the settlement was also protected by section 94, sub-section 3, as a dealing with the bankrupt made in good faith and for valuable consideration. He accordingly upheld the settlement and gave judgment for the plaintiffs. The defendant appealed.

Lockwood, Q.C., and *C. K. Francis*, for the defendant.—Dr. Peskett was a "trader" within section 91 of the Bankruptcy Act, 1869. By the schedule to the Act apothecaries are traders. In the bankruptcy proceedings Dr. Peskett described himself as a "surgeon and apothecary." He had a dispensary. The case of *In re Palmer*, 4 W. R. 501, 8 De G. M. & G. 277, is directly in point. Next, the father was not a "purchaser" within section 91. The word "purchaser" in that section is used in its ordinary commercial sense: *Ex parte Hillman*, 27 W. R. 567, 10 Ch. D. 622.

R. T. Reid, Q.C., and *H. Reed*, for the plaintiffs. *Ex parte Daubeny*, 2 Deac. 72, shows that a doctor practising as Dr. Peskett did is not a "trader." Secondly, the father was a "purchaser." A purchaser does not necessarily mean a purchaser for one's self. The father would, in ordinary language, be called a purchaser of his son's life policies, having given valuable consideration for them, and having purchased them for the benefit of his son's family. Further, the transaction is protected by section 94, sub-section 3.

Lockwood, Q.C., replied.

Lord ESHER, M.R. (having stated that the motives of both Dr. Peskett and his father were *bonâ fide*, and were not affected by the probability or otherwise of Dr. Peskett becoming bankrupt, and that the settlement was not void under 13 Eliz. c. 5, continued:—).—The first question we have to determine is whether this case comes within the exemption in section 91. I am inclined to think that section 91 deals more particularly with the mind and acts of the bankrupt. We must, in the first place, see whether the father is a purchaser from the son for valuable consideration and in good faith. I have already stated that both the father and son acted in good faith, and it only remains to inquire whether the father is a purchaser for valuable consideration. The father gave up certain leasehold property in order to induce his son to give up certain other property. He gave it up on condition of his son giving up something also. In my opinion that constitutes the father a "purchaser." It is urged that the decision in *Ex parte Hillman* has narrowed the meaning of the word "purchaser" in that section to a purchaser in a mercantile sense. But when one looks at the facts of that case, the persons who were alleged to be "purchasers" gave no consideration at all. They were, therefore, not purchasers. That case only goes to this, that the trustees in that case were not purchasers within the meaning of the section. They might be called purchasers in a conveyancing sense, but not within the meaning of the section. The next question relates to section 94, sub-section 3. That section seems to me to regard the mind of the person dealing with the bankrupt. The motive of the father was to assure some provision to the son's family, and for that reason he entered into this dealing with the bankrupt and gave valuable consideration for that which he induced his son to do, he himself acting in a perfectly *bonâ fide* manner. This dealing of the father with the son is therefore, in my opinion, within the protection of section 94, sub-section 3. Accordingly the case comes within the exception in section 91, even supposing the son to have been a trader, and in any

event, whether the son was a trader or not, the case comes within section 94, sub-section 3.

Upon the further question, whether the son was a trader within section 91, it appears from the evidence that the son was in practice as a general practitioner—that is to say, he practised as a physician and surgeon and dispensed his own medicine. He did not charge for the medicine, he prescribed for and supplied to his patients, but he charged for the visits he paid them. He did not sell medicines like a chemist. He did not trade in medicines at all, and therefore, in my opinion, he was not a trader. For these reasons I agree with the learned judge in every particular.

Sir James Hannen.—I am of the same opinion. I agree entirely with the judgment of the learned judge. The transaction having been entered into in good faith and without reference to the son's creditors, cannot be set aside unless it is brought within the language of section 91. In *Ex parte Hillman* the late Master of the Rolls was dealing with a case in which the transfer was purely voluntary without any consideration moving to or from either of the parties; and his language must be read with reference to that fact. In effect he says that the word "purchaser" must not be understood as meaning a purchaser in a conveyancing sense. To constitute a person a purchaser within the section there must be a *quid pro quo*. In the present case there was a *quid pro quo* by reason of the father giving up certain property upon condition of the son doing the same. The exception in section 91 therefore applies. As to whether the son was a "trader," the question must be whether he acted as an apothecary. *Did he buy* and sell drugs for profit? I do not think it can be said that he did. He charged his patients a certain sum for each visit, and those charges included the medicines which he prescribed. The case of *Ex parte Daubeny* shows that a dealing in drugs in that manner does not constitute a man a "trader." The appeal must therefore be dismissed.

Lord Esher, M.R.—I also agree that *Ex parte Daubeny* is an authority to show that this man was not a trader.

Appeal dismissed.

Solicitor for the plaintiffs, *G. Castle.*

Solicitors for the defendant, *Harries, Wilkinson, & Raikes.*

High Court of Justice.

Chan. Div. Kay, J. — May 12.

Smith v. Buchan. (a.)

Practice—Specific performance—Default of pleading by defendant—Motion for judgment—Proof of plaintiff's case—Insufficient description—Evidence—"Craves leave to refer"—R. S. C., 1883, ord. 27, r. 11.

In the statement of claim in an action for specific performance the plaintiff craved leave to refer to the agreement, and spoke of the property agreed to be sold as "described in the schedule to the said agreement." The defendant delivered no statement of defence.

On motion for judgment in default of pleadings,

Held, that the description of the property was insufficient; that the court could not look at any evidence beyond the pleadings; and that the statement of claim must be amended and served again.

Short cause.

This was an action for specific performance, and the statement of claim alleged that, "by an agreement in writing dated the 10th of August, 1887, and made between the plaintiff of the one part and the defendant of the other part (to which agreement the plaintiff craves leave to refer) the defendant agreed to purchase from the plaintiff certain hereditaments situate in the parish of St. Peter the Great, otherwise Subdeanry in the city of Chichester, and described in the schedule to the said agreement."

The defendant entered an appearance, but delivered no statement of defence, and the plaintiff now moved in default of pleadings for judgment for specific performance within a limited time, or, in default, for rescission of the contract.

Hewitt, for the plaintiff.

Kay, J.—The plaintiff has not stated the contract or described the property clearly enough in his statement of claim to enable me to make such an order in default of defence. The judges have considered the subject and agreed that no evidence beyond the pleadings themselves can be accepted in cases of this kind. Therefore I cannot look at the contract or any evidence to prove the contents of the contract or the identity of the property. The plaintiff must begin *de novo*, or at least amend his statement of claim by setting out the contract and describing the property fully, and must serve the amended statement of claim on the defendant.

Solicitors, *Robinson, Preston, & Stow*, for *Raper & Freeland*, Chichester.

Chan. Div. Chitty, J. — April 24.

In re Fryman.

Fryman v. Fryman. (a.)

Administration—Insolvent estate—Landlord's right to distrain—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 42, 125.

Part of a testator's estate consisted of leaseholds, and after his death his estate was found to be insolvent, and an action was commenced in the Chancery Division for the administration of the testator's estate by his lessor, who claimed as landlord to distrain upon the demised premises for six years' arrears of rent.

Held, that the landlord was entitled to distrain for six years' arrears of rent, and that section 42 of the Bankruptcy Act, 1883, did not apply so as to limit the landlord's right to one year's rent only.

This action was commenced by S. G. Fryman for the administration of his son, Egbert Fryman's estate. The plaintiff, who had been his son's landlord, claimed against his son's estate six years' arrears of rent, and as the estate was insolvent, and being administered by the court, a question arose whether the 42nd section* of the

(a.) Reported by H. C. Roper, Esq., Barrister-at-Law.

* "(1) The landlord or other person to whom any rent is due from the bankrupt may at any time, either before or after the commencement of the bankruptcy, distrain upon the goods or effects of the bankrupt—for the rent due to him from the bankrupt, with this limitation, that if such distress for rent be levied after the commencement of the bankruptcy it shall be available only for one year's rent accrued due prior to the date of the order of adjudication, but the landlord or other person to whom the rent may be due from the bankrupt may prove under the bankruptcy for the surplus due for which the distress may not have been available.

"(2) For the purposes of this section the term 'order

(a.) Reported by A. D. Maclaren, Esq., Barrister-at-Law.

Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), applied so as to prevent the plaintiff from claiming more than one year's arrears of rent.

The facts were shortly these: By an indenture dated the 1st of January, 1875, certain hereditaments at Rye were demised by the plaintiff to Egbert Fryman, his executors, administrators, and assigns for the term of fourteen years from the 25th of December, 1874, at the yearly rent of £100 during the first ten years, and at the yearly rent of £50 during the last four years of the term.

Egbert Fryman paid no rent to the plaintiff, and on the death of Egbert Fryman in March, 1886, the sum of £1,043 2s. 6d. was then due in respect of such rent to the plaintiff.

Egbert Fryman made a will, and thereby appointed his wife and a Mr. Paine executrix and executor thereof. Mr. Paine renounced probate, and shortly after the proof of the testator's will by his widow, the plaintiff, on the 12th of July, 1886, commenced this action, and on the 16th of November, 1886, the usual administration order at the suit of a creditor was made.

The plaintiff took out a summons in the action to distrain for six years' arrears of rent, and on the 13th of December, 1886, the judge gave leave to distrain without prejudice to any question, including the question whether leave ought to have been given, and, in lieu of a distress, part of a fund in court to the credit of the action was directed to be carried over to an account entitled, "Proceeds of Plaintiff's Distress," the plaintiff submitting to be bound by any order the court might make in respect of it.

The question as to the plaintiff's right to distrain was adjourned into court, and the summons was directed to be served on such creditors of the testator as were opposed to the plaintiff's claim.

Romer, Q.C., and *Alexander*, for the summons, referred to sections 42 and 125 of the Bankruptcy Act, 1883.

Whitehorne, Q.C., *Edward Bray*, and *Haldenstein*, for opposing creditors, referred to *In re York, Atkinson* v. *Powell*, 35 W. R. 609, 36 Ch. D. 233; *In re Coal Consumers' Association*, 25 W. R. 300, 4 Ch. D. 625; *Thomas* v. *Patent Lionite Co.*, 29 W. R. 596, 17 Ch. D. 251.

CHITTY, J. (after disposing of a matter not referred to in this report, continued:—).—Then there is a point which Mr. Whitehorne has raised on the Bankruptcy Act of 1883. Mr. Whitehorne says that now it is pretty clear that the estate of the deceased son is insufficient for payment of his debts in full; in other words, therefore, that it is an insolvent estate, and that, therefore, the 42nd section of the Bankruptcy Act of 1883 applies to this case and limits the right of the father to distrain to one year. His difficulty at first is to say one year prior to what time. The language of the section is that the right to distress is to be available for one year's rent accrued prior to the date of the order of adjudication. Of course there has in this case been no order of adjudication. Then the 2nd sub-section of this section runs thus:—"For the purposes of this section the term 'order of adjudication' shall be deemed to include an order for the administration of the estate of a debtor whose debts do not exceed fifty pounds, or of a deceased person who dies insolvent." Mr. Whitehorne's argument is that "order for the administration of the estate of a deceased person who dies insolvent" includes orders not simply made by the Court of Bankruptcy under the jurisdiction conferred by this Act, but orders made by the High Court.

Now it appears to me that this argument cannot be maintained. First, this sub-section is merely explaining the meaning of the term "order for adjudication." Order for adjudication means obviously, and there is no question about this, an order made by, what I may term for shortness, the Bankruptcy Court, that is the court which, according to the 168th section, is defined to be the court having jurisdiction in bankruptcy under this Act. When the Legislature, in that 2nd sub-section, in explaining the term "order for adjudication," it would be a remarkable, but still a possible, thing that they should have used the term "order for administration" to denote the order of a court of a different jurisdiction. *Primâ facie* the order for administration must mean the order for administration in the same court. But that is made plainer when the rest of the section is considered, and the answer to Mr. Whitehorne's argument does not depend on this observation only. The first thing that the order for adjudication is to include is an order for the administration of the estate of a debtor whose debts do not exceed £50, that is an order for the administration of the estate of a living debtor, and what is referred to there is plainly an order under the 125th section of this Act. Then the words, order for the administration of the estate of a deceased person who dies insolvent, by parity of reasoning, would also, I think, include an order, and only extend to an order made under this Act. But I find the term, order for the administration of the estate of a deceased person who dies insolvent, or order for administration of such an estate, used in several places in the 125th section in such a way that it leaves no doubt as to the meaning of the Legislature on this point.

Now the 125th section is this, in so far as I need state it:—"Any creditor of a deceased debtor whose debt would have been sufficient to support a bankruptcy petition against such debtor had he been alive may present to the court a petition in the prescribed form praying for an order for the administration of the estate," and here there occur the words "according to the law of bankruptcy." Upon the prescribed notice having been given the court may, on proof of the petitioner's debt, unless the court is satisfied there is a reasonable probability that the estate will be sufficient for the payment of the debts owing by the deceased, make an order for the administration in bankruptcy of the deceased debtor's estate or dismiss the petition. But under the third sub-section such an order cannot be made "until the expiration of two months from the date of the grant of probate or letters of administration unless with the concurrence of the legal personal representative of the deceased debtor, or unless the petitioner proves to the satisfaction of the court that the debtor committed an act of bankruptcy within three months prior to his decease." The 4th sub-section also enacts that the petition for administration shall not be presented to the court, which means the court having the jurisdiction in bankruptcy, after proceedings have been commenced in any court of justice for the administration of the deceased debtor's estate, and then makes a provision for transfer.

Now I come to what appears to me to be a very important sub-section bearing on this matter. The 5th sub-section is this:—"Upon an order being made for the administration of a deceased debtor's estate the property of the debtor shall vest in the official receiver of the court as trustee," and the term "order for administration" occurs again in the 6th sub-section, and the 9th sub-section runs thus:—"Notice to the legal personal representative of a deceased debtor of the presentation by a creditor of a petition under this section shall, in the event of an order for administration being made thereon, be deemed to be equivalent to notice of an act of bankruptcy." Then at the end of that section the term "order for administration" again is found.

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of adjudication' shall be deemed to include an order for the administration of the estate of a debtor whose debts do not exceed fifty pounds, or of a deceased person who dies insolvent."

It appears to me therefore, putting these various enactments together, to be reasonably clear that the Legislature intended that the term "order for administration" in the 42nd section, should not extend to an order made by the Chancery Division of the High Court. The limit of time for the distress is the date of the order for adjudication, and there is nothing equivalent in the order made for the administration of a dead man's estate in this division which enables the court at once to see that the estate has been adjudged to be insolvent and insufficient for payment of debts. If Mr. Whitehorne's argument prevailed the result would be to introduce a great revolution in the matter, because what time, according to this argument, is the court to adopt as equivalent to the order for adjudication. It may be that administration has been going on for several years in this court, and suddenly there appears a creditor with a large bond debt, a bond altogether unknown and that would turn the scale (such cases have happened), and the estate would be shown to be insolvent. There is no adjudication when that debt is brought in which will show the estate to be insolvent, there is nothing that enables the court to fix a point of time which will be equivalent to the adjudication of bankruptcy. The result would be that the 42nd section plainly would not be applied during the earlier years of the administration or the earlier time of the administration, and would be brought into operation without there being anything in the shape of a fixed order adjudicating in form or in substance on the question whether the estate is solvent or insolvent. Where the order is made under the 125th section by the court in bankruptcy, to use the short term, there the parties called before the court, and before the order is made, can be heard on the question of solvency or insolvency, and the order, as is obvious from what I have already read from the 2nd sub-section of the 125th section, cannot be made unless the court is satisfied there is a reasonable probability that the estate will be insufficient. I think the result is that at the present time there is nothing equivalent to an order for adjudication, and there is nothing to which the term "order for administration" in the 42nd section applies; and it would be a strange anomaly if the Legislature had introduced this one bankruptcy rule by the 42nd section into administration in the Chancery Division and not introduced various other rules which other people may think are better than the rules applied in this division—for instance, the priority of payment accorded in respect of wages and other matters of that kind. I ask—and I think there is only one obvious answer to the question—what is the effect, if Mr. Whitehorne should be right, of that 5th sub-section, which divests the property out of the legal personal representative and vests it in the official trustee? Of course, upon that part of the case there can be no question but that means an order for administration in bankruptcy. The result is, I think, that the respondents fail upon that point also.

Solicitors, *Blake & Heseltine; Harper & Battcock.*

Chan. Div. North, J. April 25.

HUGILL *v.* WILKINSON. (*a.*)

Statute of Limitations—Mortgage of reversionary interest—Foreclosure action—Time from which statute runs—37 & 38 Vict. c. 57, ss. 1, 2.

A mortgagee of a reversionary interest in land may bring an action for foreclosure at any time within twelve years from the date at which the reversion falls into possession.

(*a.*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

Adjourned summons.

Joseph Hugill, of Whitby, in the county of York, by his will, dated the 24th of August, 1838, devised certain dwelling-houses and real estate, situate at Whitby, to his wife for life, and after her decease upon trust to pay and divide equally the rents (after deducting expenses) unto his children and certain grandchildren therein named, and after the decease of the survivor of his children then upon trust as to the same hereditaments for all his grandchildren who should then be living, in equal shares as tenants in common.

The testator died on the 21st of February, 1845, his wife died on the 8th of August, 1848, and the survivor of his children died on the 10th of August, 1886, leaving several grandchildren, among whom was Joseph Wilkinson and John Wilkinson.

In 1870 Joseph Wilkinson borrowed of his brother the sum of £150, for which he signed the following receipt:—

"September 22nd, 1870.

"Received the sum of one hundred and fifty pounds from my brother John Wilkinson on the twenty-second day of September, one thousand eight hundred and seventy, and I hereby give him as security the whole of my interest I am entitled to out of the property left by my grandfather, Joseph Hugill."

The document was signed by Joseph Wilkinson, and stamped with a penny stamp.

Joseph Wilkinson became a bankrupt in 1871. He was never discharged, but his trustee in bankruptcy was afterwards released, and his estate became vested in the official receiver.

On the 10th of March, 1887, an action was brought by some of the grandchildren of the testator for partition or sale of his estate, and on the 23rd of April, 1887, an order was made directing accounts and inquiries as to the persons entitled, the nature of their interests, and the incumbrances affecting their shares, and a sale of the property instead of a partition.

John Wilkinson thereupon claimed to be an equitable mortgagee of the share of Joseph Wilkinson in the property for the sum of £150; no payment of interest or acknowledgment of the debt having been made since the date of the receipt. In an affidavit in support of his claim he stated that at the date of the loan it was agreed that it should bear interest at the rate of five per cent. per annum, but his claim for interest was abandoned. The official receiver, in whom the estate of Joseph Wilkinson was vested, opposed the claim on the ground that it was barred by the Statute of Limitations. The present summons was thereupon taken out by John Wilkinson for the determination of the question.

Birrell, for John Wilkinson.—A mortgagee of a reversionary interest can bring an action for foreclosure at any time within twelve years from the date at which the reversion falls into possession. Therefore the right of John Wilkinson is not barred, and his claim must be allowed: *James* v. *James*, 21 W. R. 522, L. R. 16 Eq. 153; *Harlock* v. *Ashberry*, 30 W. R. 327, 19 Ch. D. 539; *Beynon* v. *Cook*, 23 W. R. 531, L. R. 10 Ch. 389. The case of *Humble* v. *Humble*, 24 Beav. 535, 6 W. R. Ch. Dig. 44, differs from the present, as there the interest was not really reversionary. Here it is contingent as well as reversionary.

Ingle Joyce, for the official receiver.—The transaction merely amounts to an agreement for a mortgage, and comes within section 8 of statute 37 & 38 Vict. c. 57. *Fearnside* v. *Flint*, 31 W. R. 318, 22 Ch. D. 579, shows that an action on a collateral bond is barred in twelve years. The mortgagee might have taken proceedings while the interest was in reversion, and need not have waited until it fell into possession. He ought to have done so within twelve years, and his

claim is now barred: *Sinclair* v. *Jackson*, 1 W. R. 400, 17 Beav. 410; *Heath* v. *Pugh*, 29 W. R. 904, 6 Q. B. D. 345. The case of *Harlock* v. *Ashberry* does not refer to reversionary interest. *Humble* v. *Humble* is in my favour.

North, J.—Joseph Wilkinson, by a security dated the 22nd of September, 1870, charged all his interest in property left by his grandfather, which included certain real estate devised by his grandfather to his wife for life, and after her death to trustees until the death of the longest liver of certain persons, which took place on the 10th of August, 1886, and then for other persons, of whom Joseph Wilkinson was one. The charge given by Joseph Wilkinson was a charge upon reversionary real estate to which he could not come into possession until the death of a certain person, which took place on the 10th of August, 1886. The mortgagee might have taken steps to have enforced the charge at once instead of waiting until the estate fell into possession. It does not appear that any acknowledgment of the debt was made since the date of the security. It is said that the claim of John Wilkinson is therefore barred by the Statute of Limitations. I do not think so. Now, to put it in a simple way, suppose the charge to John Wilkinson had included all the land, he would have been entitled to proceed against Joseph Wilkinson and joined the trustees of the will as defendants to the action. The right of Joseph Wilkinson to bring an action against the trustees is clear. I see no reason why the mortgagee's right should not be equal to the mortgagor's. Joseph Wilkinson, however, became bankrupt, and his rights passed to the trustee in bankruptcy. It is clear that Joseph Wilkinson or the trustee has a right to bring an action to have a share of the proceeds of sale of the property paid over to him. No defence to such an action is suggested except the statute, which does not bar Joseph's remedy. Now the right of John Wilkinson is a right to enforce a charge which may be enforced by a foreclosure action. That has been held to come within section 2 of the statute 3 & 4 Will. 4, c. 27, and it follows that it is equally within section 1 of the statute 37 & 38 Vict. c. 57. That section enacts:—[his lordship read the section, and continued:—] Now it is clear that the right to bring an action within that Act is to be deemed to have first accrued at the period defined by the 2nd section—that is, as to an estate in reversion, at the time at which the same shall have become an estate in possession by the determination of any estate in respect of which the land shall have been held. That section does not touch the case of a mortgagee of a reversionary interest bringing an action against the mortgagor while the interest is reversionary. But with respect to the right of a mortgagee to bring an action for foreclosure when the mortgaged estate is in possession, the Act does provide that the action is barred in twelve years from the time at which the estate becomes an estate in possession. The right extends to twelve years from the time at which the estate becomes an estate in possession. I think that the right of John Wilkinson to bring an action for foreclosure is saved by the second section of the statute 37 & 38 Vict. c. 57. That being so the chief clerk's decision is right. The costs of the mortgagee may be added to his security.

Solicitors, *Radford & Frankland; Solicitor to the Board of Trade.*

Q. B. Div. (Field and Wills, JJ.) April 19, 20.

Sharp v. Wakefield and Others. (a.)

Licensing—Application for renewal—Discretion of justices to refuse—9 Geo. 4, c. 61—35 & 36 Vict. c. 94—37 & 38 Vict. c. 49.

The justices at the annual general licensing sessions have the same absolute judicial discretion to grant or refuse applications for the renewal of licences as they have in respect of granting or refusing applications for new licences for the purposes specified in the Licensing Acts of 1828, *of* 1872, *and of* 1874. *The provisions of section* 42 *of the Act of* 1872, *and in section* 26 *of the Act of* 1874, *only modify the procedure in cases of applications for renewal, and do not limit in any way the judicial discretion intrusted to the justices by section 1 of the Act of* 1828.

Appeal from justices of Westmoreland, sitting at quarter sessions, by case stated under 20 & 21 Vict. c. 43, as follows:—

On the 10th of September, 1887, William Bland duly applied to the licensing justices for the Kendal division of Westmoreland for a grant by way of renewal for the sale by him of all intoxicating liquors at the Low Bridge Inn at Kentmere, in the county of Westmoreland, and was refused such renewal.

Susannah Sharp, the owner of the said inn, and a person aggrieved by such refusal, appealed in due form of law to quarter sessions of the peace for the county of Westmoreland, holden at Kendal, and such appeal was heard by the Court of Quarter Sessions on the 21st of October, 1887.

On the part of the appellant it was contended that on the hearing of an application for the renewal of a licence under the Intoxicating Liquor Licensing Acts, 1828, 1872, and 1874, the court was not by law entitled to inquire into the character and wants of the neighbourhood or to refuse a grant by way of renewal upon such grounds.

The Court of Quarter Sessions overruled the said contention, and, after hearing evidence, refused to renew the said licence, on the ground of the remoteness from police supervision and the character and necessities of the locality and neighbourhood in which the said inn is situate.

The question of law for this honourable court is whether the Court of Quarter Sessions was entitled to refuse the said renewal upon the grounds stated.

If it were not so entitled the order of sessions is to be quashed, but if the court should be of the contrary opinion the said order is to be affirmed.

Candy, Q.C., and *L. Sanderson*, for the appellant. The justices are not entitled to refuse to renew a licence without any complaint being made as to the fitness of the holder of the licence or the character of the licensed premises. Their discretion is limited in applications for renewal to personal objections. That discretion is founded on the Licensing Acts of 1828 (9 Geo. 4, c. 61), of 1872 (35 & 36 Vict. c. 94), s. 42, and of 1874 (37 & 38 Vict. c. 49), s. 26; *Reg.* v. *Lancashire Justices*, 1 W. R. 204, L. R. 6 Q. B. 97; *Reg.* v. *Liverpool Justices*, 32 W. R. 20, 11 Q. B. D. 638; *Reg.* v. *Farquhar*, L. R. 8 Q. B. 258, 22 W. R. Dig. 38; *Ex parte Martin*, 42 J. P. 133; *Ex parte Bendall*, 42 J. P. 88; *Reg.* v. *Bradford and Over Darwen Justices*, 31 W. R. 273, 10 Q. B. D. 213; *Simpkin* v. *Birmingham Justices*, 20 W. R. 1, L. R. 7 Q. B. 482; *Reg.* v. *Market Bosworth Justices*, 35 W. R. 734, 56 L. J. M. C. 96, 57 L. T. 56. In this last case Lord Coleridge, C.J., based his judgment on that in *Reg.* v. *Liverpool Justices*. [The

(a.) Reported by Spencer L. Holland, Esq., Barrister-at-Law.

J.—The case as reported in the *Law Journal* is unintelligible. In the *Law Times* it is stated that there was no previous notice of opposition. That would make the judgment clear.] Objections to renewals are the object of special enactment, showing that they must be personal objections, and that otherwise, and if without notice, the applicant is entitled to the renewal: *Reg.* v. *Silvester*, 31 L. J. M. C. 93, 10 W. R. C. L. Dig. 2; *Reg.* v. *Schneider*, 11 Q. B. D. 66, 31 W. R. Dig. 109. The licence is not granted to individuals, but to premises, and becomes a right of property in those premises; hence special enactments protecting the owners of such premises and for their transfer: 9 Geo. 4, c. 61, s. 14, and Amendment Act, 1842 (5 & 6 Vict. c. 44).

Addison, Q.C., and *Poland*, for the respondents, the justices.—There is no limitation laid down by the Licensing Act of 1828 as to the discretion of justices to refuse the renewal of licences. A "licence granted by way of renewal" is defined under the general head of "Licences" by section 74 of the Licensing Act of 1872, and stands on a par with new licences as defined in section 32 of the Licensing Act of 1874: *Marwick* v. *Codlin*, L. R. 9 Q. B. 509. The word "renewal" occurs first in the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27, s. 7). The analogy of beerhouse licences is misleading—these were excise licences under 1 Will. 4, c. 64, s. 2. Subsequently personal conditions were required from the holders of such licences under 4 & 5 Will. 4, c. 85, s. 2, and 3 & 4 Vict. c. 61, ss. 1 and 2. Up to 1869 such beerhouse licensees had a right to renewal, subject only to personal conditions. By the Wine and Beerhouse Act, 1869, the same discretion is given to the justices as they possessed over the other licences, except that existing holders of beerhouse licences retained their right to renewal subject only to four qualifications. The limit of one year for licences is not for purposes of excise, but for restraint of drunkenness: *Reg.* v. *Sykes*, 24 W. R. 141, 1 Q. B. D. 52, and it applies to all "keeping or about to keep houses for the sale of intoxicating liquors": section 1 of the Licensing Act of 1828. This control has been subject to the discretion of justices since the days of Edward VI. Further control is given by 26 Geo. 2, c. 31, and the sale of liquor is subsequently limited to the classes specified in the Act of 1828—viz., innkeepers, &c. *Reg.* v. *Hann and Price*, 3 Burr. 1716, sums up the old law. No case can be cited showing any limit to the discretion of justices in granting or refusing to renew. Section 42 of the Act of 1872, excusing attendance in the case of applicants for renewals, merely modifies section 12 of the Act of 1828, enforcing such attendance; and section 26 of the Act of 1874 is to the same effect. Section 14 of the Act of 1828 merely protects the rights of owners of licensed premises in the case of death or change of occupancy.

Candy, Q.C., in reply.—The words "licensed premises" are specifically mentioned in sections 44, 45, and 46 of the Act of 1872 to show that the licence is attached to the premises, and not to the individual. The beerhouse legislation only deals with a particular class of persons, and no inference can be drawn from it to the law as to intoxicating liquor licences in general. The words "to such persons as the justices deem fit and proper," in section 1 of the Act of 1828, clearly intend to limit their discretion to the fitness of the person.

Our. adv. vult.

April 30.—Field, J.—This case was one reserved for us by the justices from the Quarter Sessions of Westmoreland, on an appeal from the petty justices by the applicant for the renewal of a licence for Low Bridge Inn. The justices have withheld the renewal of this licence for the sale of intoxicating liquors on the ground that the locality was too remote from police supervision, and that the needs of the neighbourhood did not require such premises to be so licensed. The justices at quarter sessions came to the same conclusion on the appeal, but reserved the question for us, at the instance of the applicant, as to whether they have a discretion, on such grounds, to refuse to renew a licence. The question turns entirely, as I think, upon the true construction of the Licensing Act of 1828, and not, as was alleged, upon any subsequent legislation. That is my opinion, after having gone through carefully all the legislation and the cases brought to our notice. I cannot find any real authority for the contention of Mr. Candy, that there has been any legislation subsequent to 1828, either by statute or judicial construction, which affects the discretion of justices as laid down by the Act of 1828. Mr. Candy contended that the justices were not competent to entertain an objection founded upon the wants of the neighbourhood at all, even in the case of applicants for new licenses, much less in the case of applications for the renewal of licences. As to new licences, such a contention was startling. Ever since I have considered this question I thought it was clearly understood that in that case, at any rate, the discretion of the justices was what is termed "absolute"—that is to say, that they had a very wide and unfettered discretion in the exercise of this jurisdiction. I contended so in *Simpkin* v. *Birmingham Justices*, and my contention was upheld on appeal; but Mr. Candy says that even if I was in the right, then subsequent legislation has altered the correctness of that contention; and Mr. Candy boldly maintains that, provided the justices are satisfied of the respectability of the applicant and the fitness of the premises, their discretion is limited to granting licences to such fit and proper persons and premises. I do not think that his contention can by any means be borne out.

The general law as to their discretion was declared explicitly and clearly in 1758, and there has been no alteration up till now legislatively or judicially in the principle as there laid down on what grounds the court shall alone interfere with that discretion. That discretion must be interpreted, it is true, by the construction of the Licensing Act of 1828, but Mr. Addison has pointed out how the earlier legislation renders that Act intelligible. Restraint has been exercised upon the sale of intoxicating liquors since the time of Edward VI., and even, to some extent, since the time of Henry VI., by requiring licences held by the retailers to be granted by justices individually, sitting in their private houses. An important modification of this restraint was instituted last century by 26 Geo. 2, c. 31, by which licences were only to be granted by the justices at a general meeting of the quarter sessions. That control was left to the joint discretion of the justices at those sessions, and since the decision in *Rex* v. *Young and Pitt*, 1 Burr. 556, decided by Lord Mansfield in 1758, I have never heard of that discretion being questioned on other grounds than are there laid down. That was a case of an application for the renewal of a licence, and Lord Mansfield there says: "That notwithstanding this was a matter left in a great measure to the discretion of the justices, yet if it appeared to the court that their conduct was influenced by partial, oppressive, corrupt, or arbitrary views, instead of exercising a fair and candid discretion, the court might call upon them to show the reasons whereby they guided their discretion." And again, on the later argument, "that the justices must not be permitted to exercise an arbitary and uncontrolled power," but that the court "had no power to review the reasons of the justices unless it clearly appears they have been partially, maliciously, or corruptly influenced." It was therefore held that the justices had properly exercised their discretion, unless it was impeached on those particular grounds, and the court refused to interfere. Up to a late period

there has been no legislative distinction between new licences and renewed licences, but in the Licensing Acts of 1872 and 1874, and in the Beerhouse Act of 1869, the Legislature did *practically* distinguish the two classes. A "new licence" is defined by section 74 of the Act of 1872 as amended by section 32 of the Act of 1874 to mean "a licence for the sale of any intoxicating liquor granted at a general annual licensing meeting in respect of premises in respect of which a similar licence has not theretofore been granted," and "the renewal of a licence means a licence granted at a general annual licensing meeting by way of renewal." Previously, I believe, no such definitions had been expressed. Each application for a renewal is for a new licence, the preceding licence having expired. There is a new grant for a new period altogether, although the licence may affect the same premises. What was, then, the effect of the Act of 1828? Referring to the useful book of Mr. Paterson's on the "Intoxicating Liquor Licensing Acts" (5th ed.) I find that section 1 of that Act enacts that a special session of the justices shall be held "for the purpose of granting licences to persons keeping, or about to keep, inns, alehouses, and victualling houses, to sell exciseable liquors by retail, to be drunk or consumed on the premises specified." Mr. Candy says that the distinction between new and renewed licences is intended in the words "keeping or about to keep." Well of course there is some distinction between "keeping" and "being about to keep" certain premises, but there seems no ground for basing any legislative distinction on those words. The section further enacts by the last sentence that it shall be lawful for the justices specified "to grant licences for the purposes aforesaid to such persons as they shall, in the execution of the powers therein contained, and in the exercise of their discretion, deem fit and proper." It is alleged that they are limited by those words to deal only with objections to the personal fitness of the applicants and the convenience of the premises. But section 9 of the Act clearly puts another construction on those words of section 1, even if such a construction as is alleged was the true one, which I do not believe. Section 9 says that "any question touching the granting, withholding, or transferring any licence, or the fitness of the person applying for such licence, or of the house, &c.," shall be determined by the said justices. "The fitness of the person" is only one of the questions to be dealt with. Moreover, if the power of granting is enacted it is clear that the power of withholding is implied, as is specifically mentioned in section 9. This principle has, moreover, been clearly decided by the case of *Reg.* v. *Lancashire Justices*, where Lush, J., relies largely on those two sections, 1 and 9.

It is remarkable, too, that the very ground of objection on which the justices refused the renewal of a licence was similar to the one taken here—namely, that "the accommodation of the neighbourhood did not require it." The result of the decisions and enactments, then, so far, is that applications for new licences and for renewal of licences are precisely on the same footing, and that in both cases, so long as the justices, in the exercise of their jurisdiction, do not act "corruptly, arbitrarily, or unfairly," their discretionary power to grant or withhold licences is absolute, and these courts have no power to interfere. There are two or three cases which, it was alleged, qualified this power, *Reg.* v. *Sylvester* and *Reg.* v. *Schneider*, but in these cases the court, so far from denying this discretion, affirmed it most strongly. They laid down that the justices, having to exercise this discretion, must not act upon any general rules so laid down as to limit this discretion, but must exercise their discretion in every individual case. The courts interfered, not because the justices had exercised discretion, but to enforce the law that they should judicially exercise a discretionary jurisdiction and not limit themselves by conditions not within the statutes. Up to 1830 there is no change in the law as I hold it. Has there been any change since whereby licensees holding such licences have been held to have a right, provided they are proper persons with fitting premises, to a renewal of their licence? There have been a series of statutes enlarging the persons and places by whom and on which licences could be held for the sale by retail of intoxicating liquors. The Beer Act 1830 (1 Will. 4, c. 64), gives greater facilities for the obtaining of beer licences, and, these being granted by the Excise for the purpose of obtaining revenue, it was thought advantageous to encourage a greater freedom in the sale of beer on the premises and to grant licences to any applicants for such sale, subject afterwards to certain conditions as to the character of the person and premises. No distinction was made by the Excise between the grant of new licences or their renewal. This lasted till 1869, when, by the Wine and Beerhouse Act 1869 (certain places having been licensed to sell wine by legislation subsequent to 1830), the same control was enacted to be exercised over beershops and wineshops as had been imposed on inns and alehouses since the days of George II. Fitness of character and suitability of the premises was required to be proved, and such licences were to be granted except upon production of the certificate required by the Act, and section 3 of the Act incorporates the same discretion, with one distinction, as we shall see in a moment, of the justices as was declared in the Licensing Act of 1828 in regard to inns and alehouses. On this legislation Mr. Candy founded an argument that the discretion of the justices was limited because a distinction is made between the notices required in case of applications for new licences, while these are dispensed with in cases of applications for renewals under section 7, and, again, by section 4, applications for "off" licences to sell beer are only to be refused on four specified grounds. But, except for the particular grounds specified, section 3 maintains in the broadest possible way that "all the provisions of the Act of 1828 as to the manner in which grants of licences are to be made are to apply." These qualifications are specifically mentioned as to be applicable only to applications for the sale of beer not to be consumed on the premises, clearly implying that were it not for such qualifications the discretion of the justices would be as absolute as under the Act of 1828, whose provisions are declared to be incorporated. Then section 19 of the Beerhouse Act of 1869, in order to protect the vested interests which had grown up in beerhouses owing to the legislation previous to 1869, enacts that applications for renewal in these houses shall not be refused except on particular grounds. So far from qualifying the discretion allowed under the Act of 1828 it practically affirms it. With the exception of a particular class, that discretion is implied to exist. Thus far legislation had not, I hold, affected licence holders under the Act of 1828. But in 1872 the licensing of the sale of intoxicating liquors is incorporated under the one Licensing Act of that year. Licences are defined under section 3. Mr. Candy relied on sections 36 and 40 as showing a distinction between the treatment of new licences and renewed licences. It was intended by the Legislature to protect the owner of licensed premises as well as the holder of the licence, who undoubtedly has considerable material interests in the continuance of the licence. Provisions are made for the transfer of licences under section 40. Certain notices are to be given to the owner before objections be heard on the renewal of the licence. But there is no suggestion to be founded on these sections as to any limitation of the discretion of the justices. Section 42 is also relied on. It is there enacted that in cases of applications for renewal "the applicant need not attend in person."

Under the old laws, both before and since 1828 up to 1872, the justices had been in the habit of requiring publicans to attend, whether as applicants for new or renewal of licences. That was found to be a great inconvenience to all parties. As to applications for new licences no alteration was made. As to applicants for renewal of licences, their attendance in person was, under the Act of 1872, not to be invariably required. There was, also, to be this important distinction that persons were not to be entitled to maintain certain objections to the renewal of licences without notice being served on the holder that such objections were to be raised (section 42): "The justices shall not entertain any objection to the renewal of such licence, or take evidence with respect to its renewal, unless written notice of an intention to oppose the renewal be served," and, further, the attendance of the applicant may be required on an adjournment if no such notice has been given. Then comes a most important proviso. "Subject as aforesaid, licences shall be renewed, and the powers and discretion of justices relative to such renewal shall be exercised as heretofore." That in no way limits the magisterial discretion. It merely gives a statutory safeguard to a man who already holds a licence, and very justly, because a man who has already produced the requisite certificate of character and passed the ordeal of examination is *primâ facie* entitled to continue to hold such licence in default of any objection to his continuing so to do; and it would be unjust to bring him before the justices under such circumstances. But all the powers of the justices in their discretionary jurisdiction are reserved, and remain unaffected by these provisions. If it be argued that that discretion is to be limited to entertaining personal objections, it seems to me, even if that argument was a valid one, which I deny, that it is difficult to say what are the limits of personal objections. Permitting gambling is clearly a personal objection, but whether the wants of the neighbourhood may not be in some sense a personal objection to an applicant it is difficult to say. At any rate, however, the inference that the discretion of the justices is limited to such objections cannot legitimately be drawn from these provisions. Merely to show the tendency of legislation, I may refer to the Act of 1882 (45 & 46 Vict. c. 34), commonly called Mr. Ritchie's Act, which gives "a free and unqualified discretion" to the justices in respect of refusing licences for the sale of beer off the premises, notwithstanding section 8 of the Act of 1869; as was held by myself and Stephen, J., in *Reg.* v. *Kay*, both in respect of applications for renewals of such licences as well as for such new licences.

I have now been through all the legislation on the subject. I will only make some observations on some specific points raised. (1) It was said that the requirement of the attendance of the applicant for a renewal only in case of personal objection showed that the discretion of the justices was limited to entertaining only such objections. I can find no rule for such a construction. Under the Act of 1828 an applicant might be excused from attendance through illness, and section 26 of the Act of 1874 merely extends such relief from attendance, except in cases where personal objections to the applicant are brought forward, when, for his own safeguard, the justices are to require his attendance. (2) It was further urged that the clauses of the Act of 1872 dealing with the case of convictions of the licence-holder (sections 30 and 31) imply an intention to protect the owner against any disability from obtaining a renewal, provided a suitable tenant can be found, and the premises are not to be disqualified without notice to the owner.

It is certainly provided that after one, two, or more convictions a disability is imposed on the house as well as on the man. Under such circumstances the owner is to be given the opportunity of knowing of the existence of such disabilities, and of re-entering so as to let in another tenant who can apply for the renewal as being within the qualifications required by the Act. There is no indication that I can see in such provisions of any intention by the Legislature to limit in any way whatever the general discretion of the justices in granting or withholding licences. The general result, therefore, is that it was intended by the Legislature in 1828, and subsequently, to create a new class of persons and of premises by whom and on which intoxicating liquors were to be sold by retail; that as to one class—*i.e.*, beershops—the discretion of the justices in refusing an off-licence was for a time limited to four grounds, but as to all other classes the original unfettered jurisdiction of the justices is retained under which they may exercise their absolute discretion in all applications for licences. Mr. Candy urged that some authorities were contrary to this view. I am unable to see that they are really anything of the kind. In the one case which he chiefly relied on, *Reg.* v. *Market Bosworth Justices*, the report in the *Law Journal* is not very intelligible, but the report in the *Law Times* makes it clear that Lord Coleridge, C.J., and A. L. Smith, J., had no idea of altering the discretion of the justices by their decision, since the case of *Reg.* v. *Liverpool Justices*, on which they rely, had nothing to do with the question of discretion. It merely overruled some decisions of the divisional courts to the effect that in order to procure the advantages derived under section 14 of the Act of 1828 applications for renewal must be made, pending the currency of the existing licence, and that if the existing licence was allowed to drop a renewal could not be obtained by any of the various classes of persons whose rights were to be safeguarded by section 14. *Reg.* v. *Liverpool Justices* merely decided that persons properly coming within that section need not necessarily apply for the renewal before the expiration of the existing licence, and Lord Coleridge in the later case clearly only decided that in that particular case the application was really one for a licence by way of renewal, and, therefore, on the ground of the absence of proper notice of objection as required in the case of renewals, the justices were not entitled, except at their discretion, to refuse to entertain the application. Upon all the grounds mentioned I see no reason, either upon the old statutes or the new statutes, either upon the old cases or the new cases, to throw the smallest doubt upon the proposition that in granting a licence, whether a new one or by way of renewal, the justices have absolute discretion so long as their power is not exercised "corruptly, arbitrarily, or unfairly." So long as they act in the exercise of their jurisdiction their discretionary power of granting or refusing either application is what is termed "absolute"—that is to say, it is an unfettered judicial discretion with which no court can interfere. The justices in this case were, therefore, competent to refuse the application for a renewal of the licence on the grounds which they have stated, and this appeal must be dismissed, with costs.

Wills, J.—I desire to express my entire concurrence in the result of my brother Field's judgment, and after the very elaborate review which he has given of the statutes and the cases I feel that it would be a waste of time for me to go minutely over the same ground, but I wish shortly to state in my own way the ground of my opinion.

I think it cannot be doubted that before the Act of 1872 every application for what is now called the renewal of a licence was exactly the same thing in all its legal incidents as that which is now called a new licence. There was but one enactment under which such an application could be dealt with—viz., 9 Geo. 4, c. 61, s. 1. The licence, if granted, lasted for a year, and no longer

(section 13), when the year expired it was gone—and if the applicant did not get a fresh licence there was an end of his right to sell exciseable liquors to be consumed on the premises. The word "renewal" does not occur in the Act. The expression "to renew a licence" appears in the marginal note to section 27 and nowhere else, and the use of the phrase there comes to no more than if it were used in a text-book. The phrase "new licence" is equally absent from the Act of George IV. The phrase "renew," as applied to a licence, first appears, so far as I know, in 23 Vict. c. 27, s. 11, the Act of 1860 relating to wine licences, which, so far as I am aware, is incorporated expressly or impliedly by the subsequent Acts, and which I only notice for the purpose of tracing the use of the phrase in legislation of a kindred nature. In the Act of 1872 both phrases are defined. The definition of a "new licence" is modified by the Act of 1874, s. 32, but only to correct a mistake which arose from using in the definition the term "licensed premises" which, inasmuch as "premises" had to be interpreted by another part of the interpretation clause defining "licensed premises," contained words likely to create confusion if applied to some of the circumstances under which the statutory interpretation of "licensed premises" as it stood in the Act of 1872 might have to be resorted to. I may therefore take the definition given by the Act of 1874, which is "a licence granted at a general licensing meeting in respect of premises in respect of which a similar licence has not theretofore been granted before." A "renewal of a licence" is defined as a "licence granted at a general annual licensing meeting by way of renewal."

As the licence, though only to be exercised in respect of specified premises, is in all cases a personal one, and the phrase "licensed premises" is only introduced in company with a definition clause, which shows that it is, taken by itself, an inaccurate and misleading phrase (and one which I cannot help thinking is answerable for a good deal of misapprehension), I think it follows that a licence granted by way of renewal is a phrase applicable only to the case in which both the person applying and the premises are the same as those appearing in the previous licence. A document can hardly be said to be by way of renewal of another when so important a factor as the person who alone can apply is changed. The phraseology of section 42 of the Act of 1872 seems to me completely to bear out this view. It treats the applicant for renewal as necessarily the person already licensed. So far it is, I think, impossible to contend that there was, by the Act of 1828 (9 Geo. 4, c. 61), any limitation upon the absolute discretion of the justices, when applied to for a new licence, to grant or refuse it upon any grounds which seemed to them fit to be acted upon, provided that there is a real judgment exercised in respect of the individual case; to exclude, for instance, a case in which the ground of refusal had absolutely nothing to do with the question in hand, such as a refusal because applicant had not taken out a spirit licence (*Reg.* v. *Sylvester*), or where they had laid down a general rule that they would grant no more licences in the locality (*Reg.* v. *Justices of Wakefield*). In such cases there is really no exercise of judicial discretion at all, and it is very much as if they had refused because the applicant wore a blue coat or a white hat. But where it cannot be shown that no real discretion has been exercised the applicant has, in case of refusal, no other resort than to submit to his fate. I do not pause to cite cases. It is abundantly clear upon the words of the Act, and there is equally abundant authority, and as by that Act there was absolutely no distinction between applications for licences made at the annual general licensing sessions by a person who did not and those by a person who did already hold a licence, it follows that there was no limit to the discretion of the justices in the case of renewal any more than in the case of a grant for the first time. I proceed to inquire what the Acts of 1872 and 1874 have done for a person already holding a licence. By section 42 of the Act of 1872 the applicant for the renewal of a licence is undoubtedly put in a better position than he would have been had he held a licence. He is thereby relieved from attending personally to obtain the licence, whereas it is clear from section 12 of 9 Geo. 4, c. 61, that the applicant for a new licence must do so unless prevented by certain specified causes. If objection be taken to the renewal of his licence he is entitled to notice and to a hearing, but the omission by an objector to give notice at the proper time was not necessarily fatal to the objection, the magistrates might, in their discretion, adjourn the case and require the applicant to attend upon a further day to have the case heard, and the evidence at the hearing must be taken upon oath. Subject to these conditions, however, licences were to be renewed at the discretion of the justices as exercised heretofore. The alteration was simply one of procedure, made imperative upon the justice in order to give an applicant the opportunity of being heard. There is nothing in it to limit their discretion as to the class of objection which they may entertain and act upon. Then comes the Act of 1874, containing further provisions in favour of the applicant for the renewal of a licence. Such applicants are relieved from personal attendance, if they do not wish to give it, unless the nature of the objection is some special cause personal to such licensed person. They are entitled to have the notice of the grounds of such objections to their applications for renewal. It is further provided that it shall not be necessary to serve copies of notices of any adjournment of a general annual licensing session on holders of licences or applicants for licences who are not required to attend at such adjournment annual general licensing meeting.

I find it very difficult to say what this provision means, and I doubt very much if its meaning was understood with reference to the then existing legislation by anyone when it was passed, but it is one in case, not of the persons applying for licences, but of others; I cannot say of whom, for I do not see who was likely to serve notice of adjournment in the case of such applicants for new licences as were not required to attend personally. I am quite sure, however, that an obscure general provision of this kind, relating solely to procedure, was not meant to interfere with the discretion of the justices. The argument is that, because where objection is taken to an application for renewal for the first time at a licensing session there must be an adjournment, and because only in case of a personal objection personal attendance is required, and because in case of adjournment it shall not be necessary to serve notice of adjournment on the holder of the licence (or the holder of a licence not required to attend at such adjourned meeting, for the section may be read both ways), therefore the application of a holder cannot be objected on any ground but one personal to himself. I am not sure what the paragraph does mean, except that it does not mean this, as I am very sure that the repeal of most important discretion absolutely necessary for good government and administration has not been effected in this roundabout and bungling fashion. There are abundant cases in which it is just as necessary to refuse to renew a licence as to grant a new one where the personal character of the applicant may have nothing to do with the objection; for instance, where a street respectable becomes full of brothels or thieves' lodging houses. The action of the magistrates may be quite necessary to prevent the renewal of a licence for a public-house in such a locality as to refuse it in the first instance, and cases of a like kind must often occur.

I have considered the Acts apart from authority, but it seems to me that there is direct authority in favour of my view as to the effect of legislation.

Reg. v. *Smith*, 48 L. J. M. C. 38, Cockburn, C.J., and Mellor, J., held that under 9 Geo. 4, c. 61, and the Licensing Act of 1872 the discretion of justices in cases of applications for renewal was as unqualified as in applications for new licences. That was decided after the Act of 1874. I find no case since throwing any doubt upon this view. It was argued that *Reg.* v. *Market Bosworth Justices* was to the contrary effect. I do not think so. The justices there had decided against the applicant on the ground that there were public-houses enough in the neighbourhood, and had treated the application as one for a new licence without an adjournment and without giving the applicant an opportunity of being heard. This they could not do if it was entitled to be considered as applying for a renewal under section 42. The court, thereupon, held that under the circumstances the case was within the decision of the Appeal Court in *Reg.* v. *Liverpool Justices*, and was a case of a renewal. They, therefore, granted a *mandamus* to the justices to hear and determine the application as one for a renewal.

This is certainly no authority contrary to the present decision. The only shred of authority I can find for the contention that under 9 Geo. 4, c. 61, s. 1, there can be any limit to the justices' discretion is an expression of Lord Romilly in *Day* v. *Luhke*, 16 W. R. 717, L. R. 5 Eq. 336, in reference to a case of transfer. He says:—"The transfer of the licence under section 11 of the Act of George IV. is a matter of course, and no discretion is exercised by the justices unless they have information that the transferee is an objectionable person" (p. 344). He cannot mean, however, that the justices have no discretion, only that in practice they do not exercise it under such circumstances. The very exception he specifies shows that he thought they had a discretion. The words conferring jurisdiction are the same in section 11 as in section 1, and nothing is said as to whether the transferee is an objectionable person or not. That they had discretion in such a case is held in *Reg.* v. *Rowell*, L. R. 7 Q. B. 490, 20 W. R. Dig. 3. *Day* v. *Luhke* has been followed in *Claydon* v. *Green*, 18 W. R. 1126, L. R. 3 C. P. 511, and in *Cowles* v. *Cook*, 20 W. R. 70, L. R. 7 Ch. App. 12, and it seems to be perfectly right; but in neither of these cases is anything said to give countenance to the notion that under section 11 the justices have not the discretion in question. It was merely held that the procedure under section 11 was in those cases necessary to enable a contract for the sale of a going concern in a public-house to be carried out, and that the vendor was not in a position to apply under that section. I only noticed these cases because they are quoted by Fitzgerald, J., in *Reg.* v. *Recorder of Dublin*, 11 Ir. R. C. L. 412 and 413, as authorities for the proposition that licences have been recognized by the English courts as matters of property annexed to a house; but they do not seem to afford really any support to that proposition. The Irish case itself was concerned with a transfer under Irish Acts, and is no authority in reference to the present case, or, indeed, to English licensing Acts, and, as the learned judge there says, "Afford no real guide in the case of those questions arising in the other island."

I do not think it necessary to discuss the enactments affecting licences for the sale of beer and the other licences to which the Wine and Beerhouse Act of 1869 applies, as its provisions are so very different from those regulating this case that they and the decisions upon them have no direct bearing upon the present question. They do, however, suggest that where the Legislature meant to limit the discretion of the justices in dealing with applications for licences it has done so in very clear and unmistakeable terms, the entire absence of which in the present instance forms a striking contrast with the provisions in this respect of the Act of 1869.

In my opinion, therefore, the Court of Quarter Sessions had jurisdiction to decide the appeal to them upon the grounds upon which they acted, and this appeal must be dismissed, with costs.

Appeal dismissed.

Solicitors for the appellant, *Sykes*, for *Watson*, Kendal.

Solicitors for the respondents, *Nicol, Son, & Jones* for *Bolton*, Kendal.

IN BANKRUPTCY.

Q. B. Div. (Cave, J.) April 26; May 9.

Ex parte Kennedy.
In re Willis. (*a*.)

Mortgage deed—Attornment clause—Bankruptcy petition—Distress—Adjudication—Right to proceeds—Validity—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 6.

An indenture of mortgage contained a clause whereby the mortgagor attorned and became tenant from quarter to quarter to the mortgagee in respect of the premises at a yearly rent by equal quarterly payments, the first payment to be made on the first day of the month next after any interest thereby secured should have become in arrear, but all money received by the mortgagee for rent due under the attornment to be accepted in the first place in or towards satisfaction of the interest then in arrear. A bankruptcy petition was subsequently presented against the mortgagor, upon which he was adjudicated bankrupt, but between the presentation of such petition and the adjudication the mortgagee distrained under the tenancy created by the attornment, and realised the sum of £1,715.

Held, that the clause in question fell within section 6 of the Bills of Sale Act, 1878, *and, the distress being unlawful, the trustee in the bankruptcy was entitled to the money realized.*

Application by the trustee in the bankruptcy for an order on Lady Willoughby d'Eresby for the repayment of the value of certain goods sold under a distress made by her on the property of the bankrupt.

On January 28th, 1884, the bankrupt, who was then the lessee of Willis's Rooms for a term of years, in consideration of the loan of £20,000, mortgaged those premises to Lady Willoughby d'Eresby, by way of sub-demise, to secure the repayment of the said loan. By the indenture of mortgage it was agreed that Lady Willoughby d'Eresby, or the persons claiming title under her, might at any time, without any further consent on the part of Willis, or any other person, demise or enter into any agreement to demise the said premises, or any part thereof, on any terms she or they might think fit, provided that such power should not be exercised until such time as she or they were by law empowered to sell. The indenture further witnessed that for the same consideration Willis thereby attorned and became tenant from quarter to quarter to Lady Willoughby d'Eresby, in respect of the premises, at a yearly rent of £2,000, by equal quarterly payments, the first payment to be made on the first day of the month next after any interest thereby secured should have become in arrear, but all money received by Lady Willoughby d'Eresby for rent due under the attornment should be accepted in the first place in or towards

(*a*.) Reported by C. F. Morrell, Esq., Barrister-at-Law.

satisfaction of the interest then in arrear: provided that the attornment should not make it compulsory on Lady Willoughby d'Eresby to collect the rent payable thereunder, and that she should not be accountable to a second mortgagee, or any subsequent incumbrancer, for any rent that might have been recovered under such attornment, and provided that Lady Willoughby d'Eresby might, at any time after she was by law empowered to sell, without any notice, enter upon and take possession of the premises and determine the last-mentioned tenancy.

On September 24th, 1885, a bankruptcy petition was presented against Willis, the act of bankruptcy alleged being a failure to comply with the requirements of a bankruptcy notice served on the debtor on September 4th, and on January 26th, 1886, he was adjudicated bankrupt.

In the meantime—viz., on November 7th, 1885—Lady Willoughby d'Eresby had distrained under the tenancy created by the attornment, and had realized the sum of £1,715.

The trustee in the bankruptcy now applied for the repayment of this sum to him, on the ground that the distress was unlawful by reason of section 6 of the Bills of Sale Act, 1878. It was admitted that if the case fell within the said section, and not within the proviso thereto, the distress became, by virtue of the Bills of Sale Acts, 1878 and 1882, unlawful, and the trustee was entitled to the money realized.

E. Cooper Willis, Q.C., and *Houghton*, for the trustee.—This is a bill of sale within section 6. There is no special reservation of the right of distress in the attornment clause. This case is distinguishable from *Hall* v. *Comfort*, 35 W. R. 48, 18 Q. B. D. 11.

French, Q.C., and *Lane*, for Lady Willoughby d'Eresby.—This case does not come within section 6 at all: *Hall* v. *Comfort*; even if the case does come within section 6, it also comes within the proviso at the end of that section: *In re Stockton Iron Co.*, 27 W. R. 433, 10 Ch. D. 335; *Ex parte Punnett, In re Kitchin*, 29 W. R. 129, 16 Ch. D. 226.

Cur. adv. vult.

May 9.—CAVE, J.—In this case the first contention on behalf of the respondent was that the case did not come within the section at all, and in support of that proposition the case of *Hall* v. *Comfort* was strongly pressed upon me. In that case a mortgage deed contained a clause by which, for the purpose of securing the punctual payment of the interest, the mortgagor attorned tenant to the mortgagee, and the mortgagee had a power of re-entry for default in payment. Default was made, and the mortgagee commenced an action for the recovery of the premises, and applied for judgment under order 14. Upon the hearing of the summons the defendant objected that the attornment clause was void under the Bills of Sale Acts, so that no tenancy had, in fact, been created. The court, however, held that the clause was not rendered void by those Acts. The actual decision has no bearing on this case; but it was contended that the reasoning by which it was arrived at is conclusive in favour of the respondent. In order to test that it is necessary to see what points were actually argued and decided in that case. For the defendant it was contended that, as the attornment clause purported to create a tenancy to which a power of distress is incident, and so gave power to seize personal chattels, it was, in fact, a bill of sale, and so came within section 3 of the Act of 1878. It was also contended that it amounted to a licence to take possession of personal chattels as security for a debt, and so came within section 4. According to the report, it was also contended that it came within section 6, but I cannot understand how that could be, for no personal chattels had been seized or taken under the distress, and there is nothing in that section to make the attorn[illegible] itself void. Lord Coleridge, C.J., held that the att[illegible]ment clause was not within the Act, that it was [illegible] bill of sale within section 3, nor a licence to take [illegible]session of personal chattels as security for a debt w[illegible] section 4, because it had not the character or incid[illegible] of a bill of sale properly so called, and because, [illegible] were within those sections, every lease would be w[illegible] the Acts. That reasoning, if I may respectfully s[illegible] is perfectly good, but it applies obviously to sectio[illegible] and 4 only, for, in the first place, it is expressly [illegible]vided that an attornment, &c., shall be deemed to [illegible] bill of sale which implies that, but for the sectio[illegible] would not have been one at all, and makes it one fo[illegible] purposes of that section only; and, in the second p[illegible] there is nothing in section 6 to bring an ordinary [illegible] within the section, and, indeed, there is an ex[illegible] exception of a mining lease, which, as an anom[illegible] document amounting, not to a demise, but to a s[illegible] the minerals, might otherwise have been thought to [illegible] been within the Act. It is more difficult to explai[illegible] language of Manisty, J., as he seems to have th[illegible] that if an attornment in a mortgage deed were w[illegible] section 6 an ordinary lease would also be wit[illegible] which is clearly not the case, so that it seems pro[illegible] he was referring to sections 3 and 4, to which [illegible] observation as to leases would apply rather tha[illegible] section 6, to which it would not apply. The word[illegible] the section, omitting what is immaterial for the pr[illegible] purpose, are:—"Every attornment whereby a power [illegible] distress is given by way of security for any pr[illegible] advance, and whereby any rent is reserved as a mod[illegible] providing for the payment of interest on such adva[illegible] shall be deemed," &c. Why do not these words [illegible] describe such an attornment clause as that in the pr[illegible] deed? It is said by Manisty, J., in the case cited th[illegible] to be within section 6 the power to distrain must b[illegible] expressly given, and must be a special power, not th[illegible] usual power of distress incident to a demise, and that [illegible] must be a power given over some particular goods. B[illegible] such a power would, as it seems to me, be an auth[illegible] or licence to take possession of personal chattels [illegible] security for a debt within section 4 of the Act. C[illegible]sider the consequences which would follow from h[illegible] that such an attornment clause was not within se[illegible] A money lender's security is often taken upon go[illegible] premises occupied by the borrower. In such a ca[illegible] money lender need only resort to the device of a [illegible] demise and an attornment clause, and his power to [illegible] so far as the rent reserved goes, provided it is a [illegible] rent, will be free from all the restrictions of the Bi[illegible] Sale Acts. It is also said that if this construc[illegible] adopted, an attornment clause, so far as it con[illegible] power of distress, will no longer be of any valu[illegible] think that is so, but I also think that that is ex[illegible] what the Legislature intended when section 6 [illegible] enacted, as enabling the mortgagor to retain the [illegible]ward semblance of wealth whilst secretly giving [illegible] mortgagee power to take possession of the mortga[illegible] goods and chattels to the exclusion of the [illegible] creditors. Moreover, it does not appear that in *Ha[illegible] Comfort* the attention of the court was drawn to [illegible] *parte Jackson, In re Bowes*, 29 W. R. 253, 14 Ch. [illegible] 725, 733, in which Baggallay, L.J., expressed a [illegible] opinion that such an attornment clause as was use[illegible] the present case would come within section 6 of the [illegible] of 1878. For these reasons I have come to the [illegible]clusion that the clause in question does fall within [illegible] section.

The next contention was that if the case came [illegible] section 6 it also came within the proviso at the [illegible] "that nothing in that section shall extend to any m[illegible]gage of any estate or interest in any land, tenement [illegible] hereditament which the mortgagee being in posse[illegible] shall have demised to the mortgagor as his tenant [illegible]

fair and reasonable rent." In support of this contention the cases of *In re Stockton Iron Co.* and *Ex parte Pennett, In re Kitchin*, were cited. In the first of these cases James, L.J., held that when, by the mortgage deed, an actual lease is created with a reservation of rent, the mortgagees are as much mortgagees in possession for all purposes of taking the account of what is due on the mortgage as if they had granted the lease to some new lessee, and had given notice to that lessee to pay the rent to them. In the second case a mortgagor had created two mortgages, and had attorned tenant to the first mortgagee in the first mortgage deed, and also to the second mortgagee in the second mortgagee deed. The court held that the right of the second mortgagee to distrain under his attornment clause was not affected by the prior attornment to the prior mortgagee. Mr. French sought to make use of these cases in this way. He contended that the first established that a mortgagee with an attornment clause was a mortgagee in possession within the meaning of the proviso, and that the second mortgagee would be within the section and outside the proviso, thus seeking to meet a difficulty which had been pressed upon him, that his construction of the proviso would leave nothing for the body of the section to operate upon. But, as it seems to me, a second mortgagee with an attornment clause must occupy, as regards a third incumbrancer, the position which the first occupies with regard to the second, and that if the first must, for all the purposes of taking the account of what is due on his mortgage, be treated, as between himself and the second mortgagee, as being a mortgagee in possession, so must the second mortgagee be treated as regards a third, and so also must the third if he has an attornment clause as against the fourth, if there is one. In that case every mortgagee with an attornment clause would come within the proviso, and nothing would be left for the section to operate on. The words in the proviso are "which the mortgagee being in possession shall have demised," and I think these words can only apply to a case where the mortgagee has taken actual possession under his mortgage deed, and has subsequently demised to the mortgagor, and not to a case where there has been no actual taking of possession, and the demise has been created by the mortgage deed itself. This contention seems to me not only more consonant with the language of the proviso, but also more calculated to secure the objects of the section. If Mr. French's construction is correct the creditors might see all the chattels on the mortgagor's premises swept away by the mortgagee, although nothing had taken place which could lead them to suspect that he had given anyone the power of seizing them to the exclusion of the other creditors, while in the other case the chattels could only be swept away where the mortgagee had actually taken possession, a fact which it is difficult, if not impossible, to keep secret.

For these reasons I am of opinion that the trustee is entitled to the order he asks for, with costs.

Application allowed, with costs.

Solicitors for the trustee, *Blewitt & Tyler.*

Solicitors for the respondent, *Travers, Smith, & Braithwaite.*

House of Lords.

From C. A. (England). May 17; June 28; July 5.

Cavendish-Bentinck v. Fenn. (a.)

Company—Director—Misfeasance—Agent for purchase—Sale of agent's own property to company—Non-disclosure—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 165.

The directors of a company were empowered to purchase, and did purchase, certain properties. One of the directors had, previously to his becoming a director, acquired an interest in these properties. The company went into liquidation, and a shareholder, whose shares were fully paid up, took out a summons under section 165 *of the Companies Act*, 1862, *as a contributory, asking for a declaration that the director had been guilty of misfeasance or breach of trust in not disclosing his interest, and that the properties had been purchased at a price above their proper value, and asking also that he might be ordered to refund the loss which had accrued.*

Held, that the evidence was not sufficient to prove either that the director had not disclosed his interest or that the price was excessive.

Decision of the Court of Appeal (*reported* 33 *W. R.* 788, 29 *Ch. D.* 795) *affirmed on the ground of insufficient evidence only.*

Semble, *that a person who is merely a contributory in respect of shares fully paid up has no* locus standi *to apply under section* 165 *unless he can show that he might derive some benefit thereby.*

This was an appeal from a decision of the Court of Appeal (Cotton and Fry, L.JJ., Bowen, L.J., dissenting), affirming a decision of Pearson, J., reported 32 W. R. 853, 26 Ch. D. 221.

The appellant, who was a holder of fully paid-up shares in the Cape Breton Co., took out a summons under section 165 of the Companies Act, 1862, in the winding up of the company. The summons asked for a declaration that the respondent had been guilty of a misfeasance or breach of trust in relation to the company, and that he might be ordered to pay to the liquidator the amount of the loss occasioned to the company by the misfeasance or breach of trust.

The facts fully appear in the judgments delivered by Lords Herschell and Macnaghten.

May 17, June 28, July 5.—*Montague Cookson, Q.C.* (*J. G. Butcher* with him), for the appellant.—The respondent was bound to disclose his interest, and the *onus* of proof is on him to show that he did so. Again, the evidence shows that the price paid was excessive—or, at least, is sufficient to require an answer. Restitution is no doubt impossible, but section 165 provides for the payment of compensation.

The following cases were cited:—*In re British Seamless Paper Box Co.*, 29 W. R. 690, 17 Ch. D. 467; *Rothschild* v. *Brookman*, 2 Dow. & Cl. 189; *Gillett* v. *Peppercorne*, 3 Beav. 78; *Robinson* v. *Mollett*, L. R. 7 H. L. 802, 24 W. R. Dig. 222; *MacPherson* v. *Watt*, 3 App. Cas. 254, 26 W. R. Dig. 228; *Houldsworth* v. *City of Glasgow Bank*, 28 W. R. 677, 5 App. Cas. 317; *Massey* v. *Davies*, 2 Ves. jun. 317; *In re Ambrose Lake Tin and Copper Mining Co.*, 28 W. R. 783, 14 Ch. D. 390; *Erlanger* v. *New Sombrero Phosphate Co.*, 27 W. R. 65, 3 App. Cas. 1218; *Lord Hardwicke* v. *Vernon*, 4 Ves. 411; *Burton* v. *Wookey*, 6 Madd. 367; *Hichens* v. *Congreve*, 1 Russ. & My. 150; *Bentley* v. *Craven*, 18

(a.) Reported by C. G. Napier Trollope, Esq., Barrister-at-Law.

Beav. 75; *Benson* v. *Heathorne*, 1 Y. & C. 326. [Lord MACNAGHTEN referred to *Waddell* v. *Blockey*, 27 W. R. 931, 4 Q. B. D. 678.]

A point was raised on the Statute of Limitations, and the following cases were cited:—*Lindsay Petroleum Co.* v. *Hurd*, 22 W. R. 492, L. R. 5 P. C. 221; *Flitcroft's case*, 31 W. R. 174, 21 Ch. D. 519; *In re Alexandra Palace Co.*, 30 W. R. 771, 21 Ch. D. 149.

Sir H. Davey, Q.C., and *Farwell*, for the respondent.—There is no evidence that the respondent did not disclose his interest, or that the price was excessive. Secondly, the respondent was not in a fiduciary position when he purchased the properties, and therefore equity will give no relief except rescission, which has now become impossible. Thirdly, the appellant has no right to take out a summons under section 165, as his shares are fully paid up, and he can get no pecuniary advantage from succeeding under it.

They cited *Coventry's case*, 28 W. R. 775, 14 Ch. D. 660.

Butcher, in reply, referred to *Marzetti* v. *Williams*, 1 B. & Ad. 415; *Barker* v. *Green*, 2 Bing. 317; and *In re National Funds Assurance Co.*, 27 W. R. 302, 10 Ch. D. 118.

July 5.—Lord HERSCHELL.—This case arises upon an application made in the winding up of the Cape Breton Coal Co. under the 165th section of the Companies Act, 1862, the appellant claiming, under that section, that the respondent, who was a director of that company, should be held liable for misfeasance or breach of trust, he having been an agent of the company.

The evidence before your lordships is very meagre; and in the arguments of the learned counsel which have been addressed to your lordships a great many suggestions have been made which receive but little support from the evidence which has been adduced.

It appears that in the year 1871 certain persons associated themselves together under the name of "The Coal Area Association," and acquired three areas of coal known as the Haven, Lake, and Balmoral areas. There has been some controversy as to the price at which they acquired those areas in the year 1871, but I think we may take it that the price was £5,500. Amongst the persons thus associated under that title was the present respondent, Mr. Fenn. There were also his partner, Mr. Crosthwaite, an engineer named Baker, and a Mr. Gisborne.

At the commencement of the year 1872 the persons who were thus associated as the Coal Area Association formed a limited company bearing the same name, with the addition of the word "Limited"; and Mr. Gisborne, who resided in Nova Scotia, and by whom apparently these areas had been originally owned, or, at all events, in whose name they stood, assigned his interest in the coal areas to the Coal Area Association (Limited), giving them the right to use his name for all purposes for which that was necessary in order to give them the full benefit of that assignment.

In the following year—1873—negotiations were entered into for the amalgamation of certain other coal companies, three in number—the Lorway Coal Co., the Glasgow and Cape Breton Coal Co., and the Schooner Pond Coal Co.—and an agreement was entered into for the purpose of the amalgamation of those three companies and the transfer of their properties to a new company which was afterwards to be incorporated. The new company was to undertake all the liabilities, debenture and otherwise, of those three companies, and was to acquire all their property. This amalgamation arrangement was made the subject of an agreement of the 24th of October, 1873. The agreement was made between the three companies that I have named and a Mr. Blunt on behalf of the intended new company, and by that agreement, not only were these properties of the three existing companies to be acquired by the new company, but it was made a condition of the entire arrangement that the new company should also acquire by agreement of sale and purchase the three coal areas, the Haven, the Lake, and the Balmoral, which were the property of the Coal Area Association (Limited), to which I have already called attention, at a price not exceeding £42,000, and on the terms that the vendors should take not less than two-thirds of the money in paid-up shares of the new company. The arrangement contemplated by that agreement was afterwards carried into effect; the new company was formed and incorporated in November of the same year—namely, The Cape Breton Coal Co. (Limited), and of that new company Mr. Fenn, the present respondent, and Mr. Baker became directors.

In the following month—the month of December—the purchase of these three coal areas which was contemplated by the agreement of October, 1873, was carried into effect. The price given was the maximum price permitted by the agreement—namely, £42,000—but instead of a third of it being in cash and the remainder in shares, £12,000 only was paid in cash, and the difference, the remaining £30,000, was paid by shares of the new company.

At the time when that agreement was come to by the directors of the new company and the owners of those three areas Mr. Fenn and Mr. Baker were present; they were parties to the agreement and parties to putting the seal of the company to the agreement. It is in respect of that transaction that the present claim is advanced under the 165th section of the Companies Act of 1862. The question which your lordships have to consider is whether there was a misfeasance in relation to that transaction within the meaning of the 165th section of the Companies Act.

Now there can be no doubt that inasmuch as Mr. Fenn was interested with his partner, Mr. Crosthwaite, to the extent of three-tenths of the value of these three coal areas, holding three-tenths of the shares in the Coal Area Association (Limited), he was bound to disclose that interest to the other directors of the new company who were entering into a contract for the purchase of them, and his failure to make that disclosure would entitle the company, upon discovering his interest, to rescind the sale. I think about that there can be no manner of doubt. But at the present time rescission has become impossible. Of course, that is not the remedy sought under the 165th section, but it is said on the part of the appellant, "Although rescission has become impossible, and that remedy is no longer available, I am nevertheless entitled to claim against the respondent that he shall make good to the company the loss they have sustained owing to his misfeasance in failing to make that disclosure."

The case has been put on behalf of the appellant in various ways. First, it is said to be a case of a secret profit made by an agent, which profit he is therefore bound to hand over to his principal. Of course it cannot be doubted that Mr. Fenn, as a director of the company, was in the position of an agent, and, undoubtedly, if he filled any fiduciary position towards them at the time when he purchased this property he would be bound to pay to the company the difference between the price at which he purchased it and the price at which it was sold to the company. But here it is beyond question that at the time when the purchase was made Mr. Fenn and his co-adventurers were none of them in any sort of fiduciary relation to the company, the existence of which was, at that time, not even contemplated. Again, there probably is little doubt that if an agent of a company is employed by that company to make a purchase for them in the market of goods of any description, and if, instead of making that purchase in the market at

the market price, he sells to his company goods of the required description which he happens to own, at a price in excess of the market price, he can be made to pay to the company that excess, so as to leave their purchase, as it ought to have been, at the market price, according to the obligations which he is under to them. But in the present case the purchase that was made was a purchase of a specific property; it was that specific property alone which the agent, the director, was authorized to purchase; it was not left to him to purchase, at the best price at which they could be obtained, goods or land of a particular description, but his agency, so far as it existed at all, was an agency to purchase this specific property in which it is proved he had an interest.

Now I am by no means prepared to say that the argument of the appellant is well founded, that such a case as this is a parallel case to the class of cases to which I have alluded, where an agent employed to go into the market and buy at the market price sells his own goods to the company at something above the market price. But I do not think it necessary to come to any absolute determination upon that point, because it is of the very essence of such a case as this to show that the price at which the property was sold to the company was in excess of what has been called the real price or the true value. Now what evidence is there here, upon which your lordships would be entitled to act, that the property in question when purchased by the company was sold to them at a price in excess of the real value, or the market value, or the true value, in whichever way you put it? I admit that there may be considerable ground for suspicion that the price was in excess of it. But obviously for such a case as the appellant seeks to make out here much more than that is necessary. It is of the very essence of the case, which rests upon his proving what he claims, namely, a secret profit improperly made, that he should prove that there has been that excess which he alleges.

Now what are the only facts before us? The appellant relies upon the fact that this property, purchased in 1871 at £5,500, was sold in the autumn of 1873 at the price of £12,000 in cash, with an addition of £30,000 in shares in this new company. No doubt that is a fact of importance pointing in this particular direction at any rate. But that is not the only fact, and it is impossible for us to shut our eyes to information which is matter of common knowledge that in 1871 and subsequently to 1871 coal properties did rise very considerably in value—whether to this extent or not to this extent it matters not—that fact at all events prevents our coming to the conclusion that the price given in the early part of 1871 is any real guide to the value of the same property in 1873.

But that is not all, because in October of 1873 an agreement was entered into between the representatives of three companies as well as a person acting on behalf of the intended new company. The representatives of three companies, the Glasgow, the Schooner Pond, and the Lorway, considered it worth their while to give up to £42,000, £14,000 of that sum to be in cash, for the purchase of this very property. These three companies were entirely independent, as far as appears, of the persons who owned the coal areas in question. All that is said with regard to it is that these three companies had originally been promoted by the same persons. But it is impossible to shut one's eyes to the fact that such an agreement was come to as affording evidence that this was considered in October, 1873, as the value of the property.

It is not necessary to inquire what the real value of the property exactly was, or for your lordships to come to any determination upon it. As I have said, you may have reason to suspect that the price given was excessive, but how is it possible, in the face of the evidence to which I have called attention, for your lordships to come to the conclusion that any such case is established as is alleged on behalf of the appellant—namely, that a sum in excess of the real value was, in December, 1873, agreed to be given by the directors of the Cape Breton Coal Co. for these three coal areas? I think it is impossible to arrive at any such conclusion and, therefore, to say that there has been misfeasance on the part of Mr. Fenn, the present respondent, which would warrant your lordships coming to the conclusion that he could be compelled to return a part of the money received in respect of this purchase on the ground that he was making improperly a considerable profit.

But I own that I entertain very great doubt in the present case whether there is any evidence establishing that which it is essential to establish for the purpose of making out the appellant's case. I mean that there was a misfeasance on the part of the respondent in concealing his interest in the property. No doubt, where rescission is claimed, if it is shown that a person taking part in the transaction of purchase was himself one of the vendors, the *onus* would be on him of showing that he made full disclosure. But when an applicant seeks under the 165th section, to establish a case of misfeasance, I think it is necessary for him to give evidence of all the elements that go to make up that misfeasance. There is no misfeasance in a person who has an interest in the property, by being a shareholder in the company which is selling it, nevertheless acting as a director in the purchase of that property for another company. The misfeasance, if it exists at all, must be in this, that he enters into such a transaction without communicating to his co-directors the fact that he has such an interest. It seems to me that it must rest with those who allege the misfeasance to prove that element, which is an essential element to make out misfeasance at all.

Now what is the evidence here? I cannot see the slightest evidence, upon the affidavit of Mr. Harper or otherwise, to show that disclosure was not made in the present case or that the other directors were not perfectly well aware of Mr. Fenn's position. One may speculate about it, one may imagine that they were not; but, as I have said, those who undertake to make out a case of misfeasance must establish that case before they can claim the relief to which it is suggested they are entitled.

Then it is said that the case may be put in another way, that there was here at all events a breach of duty, and that in respect of that breach of duty a claim may be made under the 165th section, the breach of duty being the omission to make full disclosure. There again I have only to repeat that I fail to see the evidence that there was any such breach of duty committed. And I think that in order to establish a claim to relief it would be necessary, not only to show a breach of duty, but to show a breach of duty which resulted in pecuniary loss to the company. It may be perfectly true that where there is a duty, whether arising out of a contract or otherwise, by one person to another an action will lie in respect of a breach of that duty although no substantial damage has been suffered. In an action nominal damages may be recovered wherever a breach of duty is shown. But I certainly do not think that any such doctrine can be applied to the 165th section. The right which the 165th section gives is not given really to the company or the representative of the company with whom there is a contract, or as towards whom there is a duty or against whom there is a breach of duty; but the right under the 165th section is given to "any liquidator, or any creditor, or contributory of the company." Now a creditor or contributory has no duty owing to him; there is no duty or breach of duty in respect of which he can maintain an action, but he has a right to this extent, that if, owing to a misfeasance

or breach of duty, the funds of the company in which he is interested have been diminished, those funds shall again be made good, and the assets of the company shall be recouped the loss which they have sustained. And, therefore, I think that, assuming that a breach of duty such as is suggested would be a misfeasance giving rise to an application under the 165th section, such an application could only succeed where it could be shown that the breach of duty had resulted in loss to the funds and assets of the company.

The only other way in which the case has been put is that there has been deceit or fraud which would give rise to this application.

With reference to the last two claims to which I have alluded—namely, the claim for breach of duty and the claim in respect of deceit or fraud—I think that it would be a very grave question whether it would be proper to give the relief applied for upon a summons such as we find in the present case. I think that where it is intended to allege such a breach of duty, and where it is intended to allege fraud or deceit, those allegations should be clearly, satisfactorily, unequivocally made in the summons, so that those against whom they are made should have their attention directed to them, and should have an opportunity of meeting them. In the present case I entertain certainly a strong impression that it never was intended at the time when the summons was issued to make any such allegations. In my opinion there was an idea that the defendant, Mr. Fenn, could be made responsible for the difference between what he gave for the property and the price at which he sold it, and the claim was in respect of his putting the seal to these two agreements, and it was supposed that that resulted in an obligation to pay that difference; because I do not find anywhere an allegation either that there was misfeasance in respect of a breach of duty to disclose, or that there was misfeasance in respect of fraud or deceit in making a false representation to the company or to his co-directors.

I own that I see no ground whatsoever for alleging fraud. The allegation is based solely upon this—it is said that the respondent represented to the directors that the property belonged to Mr. Gisborne, and did not belong to him, and that allegation rests entirely upon the statement in the affidavit of Mr. Harper that "Frederick Newton Gisborne was in each case put forward as the sole vendor of the property." Now Mr. Harper only purports to found his affidavit upon the information which he has obtained from a perusal of the documents in the case, and the sense in which he says that "Frederick Newton Gisborne was put forward as the sole vendor" must be gathered from the documents upon which he founds that statement. Those documents no doubt show that contracts were entered into in the name of Gisborne. Gisborne at that time was the legal owner of the property, and in those contracts Gisborne, who was the legal owner of the property, comes under an obligation to obtain a lease and certain rights in the name of the new company. That perhaps accounts for the fact that the agreements were entered into in the form in which they were with Gisborne; but whether that is so or not, to say that the mere fact that the agreements were entered into in that form with the trustee, who was the legal owner, without any mention of the beneficiaries, is sufficient to prove a fraudulent misrepresentation that he, and he alone, was the owner, seems to me, I own, a somewhat extravagant proposition. At all events, I feel quite sure that your lordships would not be justified in holding so serious a charge as that of fraud to be established upon evidence of such a very flimsy description as that.

I think I have now dealt with the whole of the case put forward on behalf of the appellant, and I have come to the conclusion that he has not established, on any of the grounds suggested, that there has been misfeasance on the part of the respondent resulting in loss to the company in respect of which compensation can be claimed.

There are only two other points to which I need call attention. One of them is the question how far it would be open to the present appellant to bring forward the case upon which he now insists, having regard to the scheme of arrangement which was before the creditors and shareholders of the new company and the action which was taken by the liquidator in selling the property of the company. I am not myself disposed to attribute, in the present case, perhaps so much force as was attributed by the learned judges in the court below to the transaction in question as excluding the appellant from the right upon which he now insists. If the appellant could have established that, although rescission was not open to him, he had a substituted cause of action in respect of deceit or fraud or breach of duty for which an action could have been maintained consistently with the property remaining in the company, I should not myself be prepared to say that that right would be got rid of, or could not be insisted upon, in the winding up under section 165, by reason of the transaction to which I have alluded in respect of the property; but, of course, in the view which I take it is not necessary to pronounce any further opinion upon that point.

One other point remains — namely, the question whether the present appellant has a right, though having no interest, to invoke the assistance of the court under section 165. Of course, in the view which I take, it is not necessary to pronounce an opinion upon that point, but, the point having been raised and argued before your lordships, it may be expedient that it should not be passed over without some expression of opinion upon it. I confess myself that I cannot help entertaining the gravest doubt whether the appellant has really any *locus standi*. I think it clear that he is not a creditor. His only claim, therefore, to the assistance of the court must be on the ground that he is a contributory. He is a contributory whose shares are fully paid up. He would be interested, therefore, as a contributory if any funds could be brought into the coffers of the company out of which it would be possible that any return could be made to him. But I cannot think that it was the intention of this section, or that it was contemplated by the Legislature, that a contributory who could have no possible interest in the result of the application, and could obtain no benefit whatsoever as a contributory, even if to the fullest extent to which the claim was advanced, it proved good, should have a right to apply under this section. True, "contributory" is mentioned without any sort of limitation, but so it is in section 82 of the Act, which allows a contributory to petition for winding up, where it has been held that a shareholder with fully paid-up shares of the company, although a contributory within the words of the section, is nevertheless, or may be nevertheless, not entitled to invoke the assistance of the court if he be a person having no real interest in the company.

For these reasons I have come to the conclusion that the appeal ought to be dismissed with costs, and the judgment of the Court of Appeal affirmed, and I so move your lordships.

Lord Watson.—I am of the same opinion. I do not desire to rest my judgment in this case upon the reasons which were assigned for the decision of the learned judges in the Court of Appeal. It is not, to my mind, at all clear that because rescission has become impossible through the impossibility of giving *restitutio in integrum* to the seller, a claim under either of the two heads embraced in section 165 of the Companies Act of 1862 is thereby excluded. I think it is very material, in considering this case, to attend to the specific nature of the

claims which are sanctioned by that section. They are of a twofold character; they sanction the recovery, at the instance of a liquidator, a creditor, or a contributory of the company in liquidation, first, of moneys for which the defendant has become accountable to the company, the company's moneys; and the second head of claim is for pecuniary loss sustained by the company and its funds through the misfeasance or breach of duty of the defendant. It does not refer to, it does not include, any claim against a seller to the company such as would be comprised in the remedy of offering back the property and seeking restitution of the price.

In the present case I think the appellant, if he had a title under the section (a matter to which I shall shortly allude hereafter), was entitled to have an action against the respondent Mr. Fenn under the 165th section upon two grounds. In the first place he might show, as he has endeavoured to show, that Mr. Fenn, by the transaction in question, and his concealment of his true position in reference to it, has made a secret profit when acting as agent for the company. The second ground is that, having originally concealed his true position, he has, by deliberate acts of his own, prevented the knowledge of that position reaching the company. The latter, I need hardly say, is a case of deliberate and intentional deceit, in other words it is fraud. But the very basis upon which each of these claims rests is, that the company have, through his conduct, whether in making a profit or in fraudulently acting, suffered pecuniary loss.

In a case where rescission is asked, and it is not denied that at the time when the sale was made the seller failed, through breach of duty, to disclose his interest, the *onus* rests upon him to show, if he desires to maintain the transaction, that that interest became known to the purchaser, the person with whom he dealt at a subsequent period, and that the purchaser by his acts, either expressly or by plain implication, elected to uphold the transaction. But the case is very different when you come to charge a defendant with making undue profits in the dark at the expense of the purchaser, or to charge him with fraudulent concealment of facts which has led to loss on the part of the purchaser.

The *onus probandi* there is upon the plaintiff—the usual rule of law must apply. I know of no case where, by implication of law, the duty of clearing himself from a fraud imputed rests wholly on the defendant without any obligation on the plaintiff to instruct fraud.

I do not intend to enter into the facts of this case, which have been fully and, to my mind, satisfactorily criticised by Lord Herschell. I can only say that the proof in this case seems to me to fail at the very outset. There is really no trustworthy evidence, upon which a court can act, of pecuniary loss to the company, whatever may have been the conduct or the character of the acting of this respondent, Mr. Fenn. But I am bound to go further and to say this, that for the imputation of fraud, which is not necessarily expressly made upon the first of these suggested grounds of action, but which certainly is involved in the second, I can see, in these proceedings, no foundation whatever.

I have only to add that, whilst concurring in all that Lord Herschell has said, I do very strongly concur in his concluding observations. It appears to me that it was not the intention of the Legislature to give a right of suit under the 165th section of the Companies Act to any person who had not a pecuniary interest in the result. I think the inference of law is that the Legislature always expects that there shall be an interest, and intends to confine the leave and licence which it gives to those who are possessed of it. In this case, although it rather appears to be otherwise upon the face of these papers, it has been explained at the bar that the appellant is not a creditor of this company, but a creditor of another company, which has a claim of indemnity against the Cape Breton Co. He is a contributory, not in the sense of being liable if called upon to pay money into the coffers of the company at the instance of the liquidator, but he simply stands in the position of a possible recipient of a share in the balance of the assets after payment of the debts. There is no suggestion that any such fund will ever exist or that it would be called into existence by his success in that action.

It is not necessary to rest the judgment upon that ground, because, on the merits of the case, I am of opinion that he has entirely failed. But even if he had made out a case which would involve a right, I should have thought it my duty, as a member of this House, to support a judgment to the effect that he could not recover, not having an interest which would entitle him to sue.

Lord Fitzgerald.—Concurring as I do in the judgment proposed by Lord Herschell, and in the reasons of Lord Watson, it will be sufficient for me to say that it appears clearly to me that the appellant here has not a particle of interest in the litigation which he has instituted, and could never possibly derive any benefit from it. That being his position in that respect, I entirely concur with Lord Watson. The Court of Appeal, as well as Pearson, J., in the court below, dismissed the claim of the appellant upon the ground that the company had put itself in a position in which this contract could not be rescinded. There is no doubt that Mr. Fenn, who had become a director of the Cape Breton Co., was guilty of a breach of duty if he did not disclose the fact that he himself had a large pecuniary interest in the purchase by the Cape Breton Co., at the stipulated price, of these three coal areas to those with whom he was dealing. But I am not by any means satisfied that that serious proposition has been made out. Moreover, there is not to my mind a shred of proof as to what, at the time when the purchase was made, was the real value of these three coal areas. It is true that they had been purchased some years before at a much less sum; but have we any element of proof before us upon which we can come to the conclusion at the present moment that the true value, if means had been taken to ascertain the true value, of the coal areas was not equal to the price that was then put upon them? There is no such evidence, and the inference is the other way, for you have three independent companies converted into one by the amalgamation, and agreeing by the amalgamation agreement to purchase these three coal areas at a sum not exceeding £12,000 in cash, and £30,000 in shares; and you have that same company afterwards, when formed into a new company, ratifying and adopting that agreement. The inference to my mind would be that the price was not an unreasonable one; but without drawing such an inference it is only necessary to say that we have no proof that the sum stipulated for exceeded a fair and reasonable price for the coal areas at that time.

For these reasons I concur in the judgment which has been announced.

Lord Macnaghten.—I agree. When the case was first opened I was under the impression that the appellant had an interest in the result of the application apart from any question of costs, and I was also inclined to think that, although the evidence was meagre in the extreme and the case was presented in a very fragmentary and unsatisfactory manner, yet there was something which the respondent ought to be called upon to answer. But I am bound to say that after the discussion which the case has received, and after the very able argument of Sir Horace Davey, I am convinced that there is no ground for disturbing the order of the court below.

The application which has given rise to this appeal is

made under the 165th section of the Act of 1862. Mr. Cavendish-Bentinck, describing himself as a creditor and contributory of the company, charges Mr. Fenn with a misfeasance or breach of trust. The act complained of is the affixing the seal of the company, or causing the seal of the company to be affixed, to two agreements, by which certain coal areas in which Mr. Fenn was interested were conveyed to the company, they paying a stipulated price for those coal areas. The remedy which was asked for by the summons was payment to the official liquidator of the whole of the purchase-money, or at any rate of that portion of the purchase-money which went into Mr. Fenn's pocket. At your lordship's bar and, as I understand it, in the court below the remedy was put on somewhat different grounds, and it was suggested that at any rate Mr. Fenn was liable for the difference, whatever it might be, between the sum of money which was given for the property and that which the appellant called the real value of the property.

The 165th section of the Companies Act of 1862 has often come under discussion, and it has been settled, and I think rightly settled, that that section creates no new offence, that it gives no new rights, that it only provides a summary and efficient remedy for rights which, apart from that section, might have been vindicated either at law or in equity.

It has also been settled that the misfeasance spoken of in that section is not a misfeasance in the abstract, but a misfeasance in the nature of a breach of trust resulting in a loss to the company. Apparently it has not been hitherto judicially determined that the applicant is bound to show that he is interested in the result of the application, but I certainly think that it must be so. I cannot think that Parliament intended that a person coming under the description of a creditor or a contributory should take upon himself the novel position and the important functions of a public prosecutor in a matter in which he had really no concern. It was, therefore, in my opinion, necessary for the appellant to show first that Mr. Fenn had committed a breach of trust, or a misfeasance in the nature of a breach of trust, as a director of the Cape Breton Co.; secondly, it was necessary for him to show that by reason of that misfeasance the company had sustained loss; and it was also necessary for him to show that he had an interest in the result of the application.

I am of opinion that the appellant has failed to establish any one of these propositions. The facts of the case lie in the narrowest possible compass. It appears that there were three English companies established for the purpose of carrying on business in Nova Scotia. Each of these companies was formed for the purpose of acquiring and working coal property in Nova Scotia. One of those companies added to that business the business of making and working a railway.

So far as appears these three companies were independent bodies, and they had a position of respectability, which may be inferred from the possession of a large paid-up capital, or a capital assumed to be paid up, and the existence of a large debenture debt. It appears that in the year 1873 these companies determined to amalgamate, and they considered that it was for their mutual benefit that the three coal areas mentioned in the summons, which belonged to a syndicate or association in which Mr. Fenn was the managing director, should be purchased, provided they could be acquired at a price not exceeding £42,000, of which one-third might be paid in cash—that would leave the cash payment at £14,000.

It seems to me that there is nothing inconsistent with what appears upon the face of this amalgamation agreement in assuming that the managers of these three companies knew perfectly what interest Mr. Fenn had in the property and that the subject of price had been negotiated. Shortly afterwards the Cape Breton Co. was formed to carry out this amalgamation scheme. There were to be five directors, of whom Mr. Fenn and Mr. Baker, who were interested in the three coal areas, were to be two. There were to be three other directors, who apparently had no interest in these three coal areas. It would appear that the price had been the subject of some negotiation in the interval between the date of the amalgamation agreement and the formation of the company, because the price, or rather the mode of payment of the price, was somewhat altered; instead of £14,000 being paid in cash £12,000 was to be paid in cash, and the articles provide that the directors shall issue £30,000 in shares.

On the 5th of December an agreement was made to purchase these three coal areas at what was the maximum price in the articles of amalgamation, and on the 17th of December the seal of the company was affixed to that agreement. Mr. Fenn and Mr. Baker were both present on the latter occasion, but we are not told whether they took any part in making this agreement, nor are we told whether there was any negotiation whatever with regard to the price. For all that appears Mr. Fenn may have disclosed his interest to his co-directors, he may have stood aside and allowed them to complete the agreement.

I think it was the duty of the appellant to establish his case, and I point out to your lordships that certainly there was sufficient time spent before this case was brought into court. Apparently all the documents in the possession of the company were produced and carefully criticized and examined, and the applicant had the opportunity at any rate of examining both Mr. Fenn and the other three directors, who, it is suggested, were kept in ignorance of the real truth of the transaction.

If I were asked to speculate or to guess whether Mr. Fenn disclosed his interest or not, I should certainly be inclined to say that he did so disclose it; I cannot see what was to be gained at that date by concealment. We start with the amalgamation agreement, and at the date when the purchase agreement between the new company and Mr. Gisborne was made the owners of the property were the masters of the situation. The Cape Breton Co. had declared the price which they were prepared to accept, and if the owners of the coal areas did not sell the property to them, the whole amalgamation scheme would have fallen through and everything that had been done up to that time would have come to the ground. It appears to me, therefore, that there was no reason whatever for concealing from the other three directors the fact that Mr. Fenn was interested in the property. Nor was the price, in my opinion, so very excessive. I think it must be taken that £5,500 was paid for the property. The price which the new company gave for it was £12,000 in cash. I think we may leave out of consideration the portion of the purchase-money which was to be paid in shares, which represented the profit that was to be gained, either from working the coal field or from the credulity of the public. However that may be, it clearly appears to me that the appellant has not proved that there was any misfeasance, nor has he proved that there was any loss.

With regard to this part of the case I merely desire to make one observation. I think it was the duty of Mr. Fenn to disclose his interest to his co-directors, and I think that if he omitted that duty the omission was no light matter. I think that if a person in the position of Mr. Fenn abstained from disclosing his interest, and if it could be proved that the other directors purchased the property without knowing what interest he had in it and gave a larger sum than the property was really worth, it would be very difficult for a person in that position to escape from the charge of fraud. I think it would have been a fraud to have concealed his interest

and to have represented in fact that he was not interested in the property and that it belonged to other persons who were not connected with the scheme.

I think I have now gone through the case, and I will only add that it appears to me that the applicant has really no interest in the subject-matter of the application. I do not think that he is a creditor, and as a contributory it appears to me that it is utterly impossible, upon the facts as stated by himself, that he could ever derive any benefit from this litigation. I therefore entirely concur in the motion which has been proposed.

Order appealed from affirmed; and appeal dismissed, with costs.

Solicitors for the appellant, *Harper & Battcock.*

Solicitors for the respondent, *Dollman & Pritchard.*

Privy Council.

June 23, 24, 28, 30; July 21, 1887.

NORTH-WEST TRANSPORTATION CO. (LIMITED) AND J. H. BEATTY *v.* H. BEATTY (*for Himself and Others.*) (*a.*)

Company—Director—Sale by director to company—Right of director to vote as shareholder.

Where a director, holding a majority of shares in a company, enters into a voidable contract with the company, himself being vendor,

Held, that the fact of his being a director does not incapacitate him from voting as a shareholder in a general meeting to ratify the contract.

This was an appeal from a decree of the Supreme Court of Canada, dated the 9th of April, 1886, reversing a decree of the Ontario Court of Appeal (17th of April, 1885), and affirming a decree of the Chancery Division of that province (6th of May, 1884), reported in 6 Ont. R. 300, which set aside a sale by the appellant James Hugh Beatty to the company.

The appellant Beatty held a preponderance of shares in the company and was a director, and voted as a shareholder for the ratification of a contract in which he was the vendor. The question was whether, being thus personally interested, he was entitled so to vote. The facts of the case appear in detail in their lordships' judgment.

The effect of the judgment of the Chancery Division was as follows:—"All suspicions of unfair dealings may be discarded, and the question resolves itself into one of purely equitable law, that is whether, the purchase from the director having been submitted to the body of the shareholders and adopted by a majority of votes, it is open for the dissentient plaintiff to undo the sale by the intervention of the court. One important element to be considered is that the majority was secured by reason of the votes held by the vendor, without which the result would have been adverse to the purchase. . . . My judgment proceeds on the ground that the vendor's fiduciary position incapacitates him from coercing the minority by means of a majority secured by his own vote in his own favour, without regard to the fairness or unfairness of the transaction. There has been no valid ratification by the company."

The Court of Appeal (Hagarty, C.J., and Burton and Osler, JJ.) unanimously reversed this decree, holding that there was no principle of equity to prevent the defendant J. H. Beatty exercising his rights as a shareholder, and voting as a shareholder in favour of the purchase, although he had a personal interest therein.

The Supreme Court of Canada (Ritchie, C.J., and Fournier, Henry, Taschereau, and Gwynne, JJ.) unanimously reversed the decree of the Court of Appeal. The present appeal was then brought.

Sir R. E. Webster, A.G., and *Jeune*, for the appellants, arguing for the reversal of the judgment of the Court of Appeal, contended that the fiduciary position of J. H. Beatty, as director, was not the question.—His rights as a shareholder, in the absence of fraud, entitled him to vote in general meeting for the ratification of a contract which at the most was voidable. It was no question of agency, for shareholders are principals.

They cited *Pender* v. *Lushington*, 6 Ch. D. 73, 25 W. R. Ch. Dig. 64; *McDougall* v. *Gardiner*, 24 W. R. 118, 1 Ch. D. 13; *East Panet Du United Lead Mining Co.* v. *Merryweather*, 13 W. R. 216, 2 H. & M. 254; *Mason* v. *Harris*, 27 W. R. 699, 11 Ch. D. 97.

Sir H. Davey, Q.C., and *Bremner*, contended that the Supreme Court was right, and that the minority of shareholders had been placed in an unfair position owing to a technical breach of trust.—Beatty made the sale as director and ratified it as shareholder, and the transaction could not be upheld in equity.

They commented on the cases already cited, and referred to *Aberdeen Railway Co.* v. *Blakie*, 1 Macq. 461; *Exparte Lacey*, 6 Ves. 625; *Menier* v. *Hooper's Telegraph Works*, 22 W. R. 396, L. R. 9 Ch. 350; *Attwool* v. *Merryweather*, L. R. 5 Eq. 464n.

Jeune, in reply.

Cur adv. vult.

July 21.—The judgment of their lordships (Lord HOBHOUSE, Sir BARNES PEACOCK, Sir RICHARD BAGGALLAY, and Sir RICHARD COUCH) was delivered by

Sir RICHARD BAGGALLAY.—The action in which this appeal has been brought was commenced on May 31, 1883, in the Chancery Division of the High Court of Justice of Ontario. The plaintiff Henry Beatty is a shareholder in the North-West Transportation Co. (Limited), and he sues on behalf of himself and all other shareholders in the company, except those who are defendants. The defendants are the company and five shareholders, who, at the commencement of the action, were the directors of the company. The claim in the action is to set aside a sale made to the company by James Hughes Beatty, one of the directors, of a steamer called *The United Empire*, of which, previously to such sale, he was sole owner.

The general principles applicable to cases of this kind are well established. Unless some provision to the contrary is to be found in the charter or other instrument by which the company is incorporated, the resolution of a majority of the shareholders, duly convened, upon any question with which the company is legally competent to deal, is binding upon the minority, and consequently upon the company, and every shareholder has a perfect right to vote upon any such question, although he may have a personal interest in the subject-matter opposed to or different from the general or particular interests of the company.

On the other hand, a director of a company is precluded from dealing, on behalf of the company, with himself, and from entering into engagements in which he has a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound by fiduciary duty to protect; and this rule is as applicable to the case of one of several directors as to a managing or sole director. Any such dealing or engagement may, however, be affirmed or adopted by the company, provided such affirmance or adoption is not brought about by unfair or improper means, and is not

(*a.*) Reported by J. M. COLLYER, Esq., Barrister-at-Law.

illegal or fraudulent or oppressive towards those shareholders who oppose it.

The material facts of the case are not now in dispute.

The company was incorporated under the provisions of the Canada Joint Stock Companies Letters Patent Act of 1869. By its charter, dated the 5th of March, 1877, it was authorized to carry on business in the province of Ontario, and to construct, acquire, and maintain steam, sailing, and other vessels for the conveyance of passengers and goods over the navigable waters within or bordering upon the Dominion of Canada, to and from any foreign ports, with power, amongst other things, to sell, charter, or dispose of any such vessels, and to make contracts with any person or corporation whatever.

By sections 16, 18, and 22 of the Act of 1869 it was provided that the affairs of every company incorporated under its provisions should be managed by a board of directors, the major part of whom should at all times be resident in Canada, and subjects of her Majesty, and that the directors should have power to make for the company any description of contract into which the company might by law enter, and from time to time to make byelaws not contrary to law, but every byelaw so made, unless in the meantime confirmed at a general meeting duly called for that purpose, should only have force until the next annual meeting of the company, and, in default of confirmation thereat, should, at and from that time only, cease to have force; and the powers conferred upon the directors by section 22 were made subject to a proviso that one-fourth part in value of the shareholders of the company should at all times have the right to call a special meeting for the transaction of any business specified in such written requisition and notice as they might issue to that effect.

By byelaws made in March, 1877, and duly confirmed, it was provided that the affairs of the company should be managed by a board of five directors; that the qualification for a director should be the holding of five shares in the company; that every shareholder should have as many votes as he had shares in the company; that the annual meetings should be held on the first Wednesday in February in each year; and that at such meetings the directors should be annually elected, retiring directors being eligible for re-election.

The company commenced business shortly after its incorporation, and acquired for its purposes a fleet of several steamers. In the autumn of 1882 one of its steamers, *The Asia*, was lost, and another, *The Sovereign*, was deemed unsuitable for the company's business. At this time the steamer *United Empire* was in process of building for the defendant James Hughes Beatty, and was approaching completion; the contract for her construction had been entered into in December, 1880, and she was in fact completed on the 20th of May, 1883, a few days before the commencement of the action. The acquisition of *The United Empire* by the company had been suggested to the directors, and had been the subject of consideration by them and others interested in the company as early as the close of the year 1881; the loss of *The Asia* led to the matter being further considered, and the sale to the company was brought about in the following manner.

The annual meeting for the year 1883 was held on the 7th of February, and at such meeting the defendants were elected directors for the ensuing year; at the same meeting a discussion took place as to the suggested purchase of *The United Empire*, and it was resolved that a special meeting of the shareholders should be held on the 16th for the purpose of having submitted to them a bye-law for the purchase of the steamer *United Empire*, and also to consider the advisability of selling the steamer *Sovereign*.

At a meeting of the directors held on the 10th of February, 1883, and at which all the directors except the defendant William Beatty were present, it was resolved that a bye-law, which was read to the meeting, for the purchase of *The United Empire* should pass. It is unnecessary to refer in detail to the terms in which this bye-law was expressed; it is sufficient to state that, after reciting an agreement between the company and the defendant James Hughes Beatty, that the company should buy and the defendant should sell the steamer *United Empire* for the sum of 125,000 dols., to be in part paid in cash and in part secured, as therein mentioned, it was enacted that the company should purchase the steamer from the defendant upon those terms, with various directions for giving effect to the terms of the contract.

The agreement, recited in the bye-law, was executed at the same meeting.

At a meeting of shareholders, held, as arranged, on the 16th of February, 1883, the bye-law, which had been enacted by the directors, was read by the secretary, and, after being modified in its terms with respect to the price, was adopted by a majority of votes.

The United Empire, on her completion, was delivered to the company, and has ever since been employed in the ordinary business of the company.

It is proved by uncontradicted evidence, and is, indeed, now substantially admitted, that at the date of the purchase the acquisition of another steamer to supply the place of *The Asia* was essential to the efficient conduct of the company's business; that *The United Empire* was well adapted for that purpose; that it was not within the power of the company to acquire any other steamer equally well adapted for its business; and that the price agreed to be paid for the steamer was not excessive or unreasonable.

Had there been no material facts in the case other than those above stated, there would have been, in the opinion of their lordships, no reason for setting aside the sale of the steamer; it would have been immaterial to consider whether the contract for the purchase of *The United Empire* should be regarded as one entered into by the directors and confirmed by the shareholders, or as one entirely emanating from the shareholders; in either view of the case, the transaction was one which, if carried out in a regular way, was within the powers of the company. In the former view, any defect arising from the fiduciary relationship of the defendant James Hughes Beatty to the company would be remedied by the resolution of the shareholders on the 16th of February, and, in the latter, the fact of the defendant being a director would not deprive him of his right to vote, as a shareholder, in support of any resolution which he might deem favourable to his own interests.

There is, however, a further element for consideration, arising out of the following facts, which have been relied upon, in the arguments on behalf of the plaintiff, as evidencing that the resolution of the 16th of February was brought about by unfair and improper means.

It appears that, at the commencement of the year 1883, 595 of the 600 shares into which the capital of the company was divided were held by seven living shareholders, and five belonged to the estate of a deceased shareholder; that of the seven living shareholders—

The defendant J. H. Beatty	held 200	shares.
The plaintiff	120	,,
S. Neelon (then a director) .	101	,,
F. S. Hankey	71	,,
The defendant J. D. Beatty .	59	,,
J. C. Graham	39	,,
The defendant W. Beatty .	5	,,

It further appears that the defendant J. H. Beatty purchased the 101 shares of S. Neelon, and that they were transferred to him on the last day of January, 1883, the number of shares held by the defendant being

thus raised to 301, an actual majority of all the shares in the company; that on the morning of the 7th of February, before the annual meeting of that day, the defendant J. H. Beatty transferred five of his shares to the defendant Rose and the like number to the defendant Laird, whereby they respectively became qualified to be elected directors; and that on the same day they were elected directors.

The defendants Rose and Laird deny, and their denial is unimpeached, that there was any agreement or understanding between them or either of them and the defendant J. H. Beatty that they would support his views in respect of the sale of his steamer to the company; they both, however, admit that, previously to the transfers of the shares to them, they considered that the purchase of the steamer would be beneficial to the company, that they accepted the transfers with the view of becoming directors, and that the defendant was well aware of the opinions and views entertained by them. Indeed, the defendant Rose states that he would not have joined the company but for the intention to purchase the steamer.

By the transfers to the defendants Rose and Laird the number of shares held by the defendant J. H. Beatty was reduced to 291, but the united voting power of the three last-named defendants was such that they could command a majority at any meeting of the shareholders.

Though there was a discussion, at the annual meeting on the 7th of February, as to the expediency of purchasing the steamer, the resolution, directing a bye-law to be prepared, appears to have been passed without any division.

At the meeting of directors of the 10th the same three defendants were in a position to carry any resolution or to pass any bye-law upon which they were agreed.

At the shareholders' meeting of the 16th the voting was as follows:—

For the confirmation of the bye-law—

	Votes.
The defendant J. H. Beatty	291
The defendant J. E. Rose	5
The defendant R. Laird	5
The defendant William Beatty	5
Total	306

Against the confirmation—

	Votes.
John C. Graham	39
F. L. Hankey	71
The plaintiff	120
The defendant John D. Beatty	59
Total	289

It follows that the majority of votes in favour of the confirmation of the bye-law was due to the votes of the defendant J. H. Beatty.

These last-mentioned facts were stated by the plaintiff in his claim in the action, and he not only insisted that the defendant J. H. Beatty was in such a fiduciary relation to the company that it was not competent for him, under any circumstances, to enter into the contract for the sale of his steamer to the company, but he made various charges of fraud and collusion against the defendant directors, other than the defendant J. D. Beatty, who was also the secretary of the company.

These charges of fraud and collusion were abandoned at the trial of the action, but the facts before referred to were pressed upon the judges, before whom, in succession, the action came, and afforded to those judges, who were of opinion that the sale should be set aside, the substantial grounds for their decisions.

The action first came on to be heard before the Chancellor of Ontario, who, on the 6th of May, 1884, ordered the sale to be set aside, with the usual consequential directions. All charges of fraud and collusion being discarded, the Chancellor treated the question as one of "purely equitable law," and held that the threefold character of director, shareholder, and vendor, sustained by the defendant J. H. Beatty, involved a conflict between duty and interest, and that, being so circumstanced, he could not be permitted, in the conduct of the company's affairs, to exercise the balance of power which he possessed, to the possible prejudice of the other shareholders.

The defendants appealed against the order of the Chancellor, and on the 17th of April, 1885, the Court of Appeal of Ontario allowed the appeal, and ordered that the plaintiff's bill should be dismissed with costs. In the opinion of the members of that court the resolution to purchase the steamer was a pure question of internal management, and the shareholders had a perfect right either to ratify the act of the directors or to treat the matter as an original offer to themselves, and to assent to and complete the purchase.

From the order of the Court of Appeal the plaintiff appealed to the Supreme Court of Canada, and on the 9th of April, 1886, the Supreme Court reversed the order of the Court of Appeal and affirmed that of the Chancellor. It appears to have been the opinion of the judges of the Supreme Court that the case turned entirely on the fiduciary character of the defendant J. H. Beatty as a director; that if the acts or transactions of an interested director were to be confirmed by the shareholders it should be by an exercise of the impartial, independent, and intelligent judgment of disinterested shareholders and not by the votes of the interested director, who ought never to have departed from his duty; that the course pursued by the defendant J. H. Beatty was an oppressive proceeding on his part; and that, consequently, the vote of the shareholders at the meeting of the 16th of February, 1883, was ineffectual to confirm the bye-law which had been enacted by the directors. The nature of the transaction itself does not appear to have been taken into consideration by the judges in their decision of the case.

From this decision of the Supreme Court of Canada the appeal has been brought with which their lordships have now to deal. The question involved is doubtless novel in its circumstances, and the decision important in its consequences; it would be very undesirable even to appear to relax the rules relating to dealings between trustees and their beneficiaries; on the other hand, great confusion would be introduced into the affairs of joint stock companies if the circumstances of shareholders, voting in that character at general meetings, were to be examined, and their votes practically nullified, if they also stood in some fiduciary relation to the company.

It is clear upon the authorities that the contract entered into by the directors on the 10th of February could not have been enforced against the company at the instance of the defendant J. H. Beatty, but it is equally clear that it was within the competency of the shareholders at the meeting of the 16th to adopt or reject it. In form and in terms they adopted it by a majority of votes, and the vote of the majority must prevail, unless the adoption was brought about by unfair or improper means.

The only unfairness or impropriety, which, consistently with the admitted and established facts, could be suggested, arises out of the fact that the defendant J. H. Beatty possessed a voting power as a shareholder, which enabled him, and those who thought with him, to adopt the bye-law, and thereby either to ratify and adopt a voidable contract, into which he, as a director, and his co-directors had entered, or to make a similar contract, which latter seems to have been what was intended to be done by the resolution passed on the 7th of February.

It may be quite right that, in such a case, the

opposing minority should be able, in a suit like this, to challenge the transaction, and to show that it is an improper one, and to be freed from the objection that a suit with such an object can only be maintained by the company itself.

But the constitution of the company enabled the defendant J. H. Beatty to acquire this voting power; there was no limit upon the number of shares which a shareholder might hold, and for every share so held he was entitled to a vote; the charter itself recognized the defendant as a holder of 200 shares, one-third of the aggregate number; he had a perfect right to acquire further shares, and to exercise his voting power in such a manner as to secure the election of directors whose views upon policy agreed with his own, and to support those views at any shareholders' meeting; the acquisition of *The United Empire* was a pure question of policy, as to which it might be expected that there would be differences of opinion, and upon which the voice of the majority ought to prevail; to reject the votes of the defendant upon the question of the adoption of the bye-law would be to give effect to the views of the minority, and to disregard those of the majority.

The judges of the Supreme Court appear to have regarded the exercise by the defendant J. H. Beatty of his voting power as of so oppressive a character as to invalidate the adoption of the bye-law; their lordships are unable to adopt this view; in their opinion the defendant was acting within his rights in voting as he did, though they agree with the Chief Justice in the views, expressed by him in the Court of Appeal, that the matter might have been conducted in a manner less likely to give rise to objection.

Their lordships will humbly advise her Majesty to allow the appeal; to discharge the order of the Supreme Court of Canada; and to dismiss the appeal to that court, with costs; the respondent must bear the costs of the present appeal.

Solicitors for the appellants, *Robinson, Poole, & Robinson.*

Solicitors for the respondent, *Ashurst, Morris, Crisp, & Co.*

Court of Appeal.

From Chan. Div. Dec. 14, 17, 19, 20.

MIDLAND RAILWAY CO. *v.* ROBINSON. (*a.*)

Railway company—"Mines or minerals lying under railway"—Notice of intention to work—Open quarrying—Railways Clauses Act, 1845 (8 & 9 *Vict. c.* 20), *ss.* 77, 78, 79.

An owner of mines or minerals lying under a railway who is desirous of working them, not as his own speculation, but through the medium of lessees, is a person entitled, under section 78 *of the Railways Clauses Act,* 1845, *to give notice of intention to work the same.*

To justify an owner giving such a notice, there must be not merely an expression of desire, but an honest actual existence of the desire to work, either by himself or his lessees, the mines or minerals.

The words "mines" and "minerals," as used in section 77 *and the following sections of the Railways Clauses Act,* 1845, *extend to open quarries and to minerals got by open quarrying.*

Midland Railway Co. *v.* Haunchwood Brick and Tile Co., 30 *W. R.* 640, 20 *Ch. D.* 552, *approved.*

Appeal from Chitty, J.

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

The action was for an injunction to restrain the defendant, Sir F. Robinson, from working minerals under or adjoining a line of railway worked by the plaintiff company so as to injure the railway of the plaintiff company.

The defendant was the owner of land through which about a mile and a half of the railway passed. The land, both under and adjoining the railway, contained ironstone, limestone, and brick clay.

The defendant was the owner in possession of the minerals under the railway and of the minerals under a portion of the land adjoining the railway. The minerals under the remaining portion of the lands adjoining the railway line had been leased by the defendant to a colliery company, but with right of access to the defendant across or through the lands so demised, to the minerals under the railway.

On January 25, 1886, the defendant served a written notice on the railway company that he was desirous of working the mines and minerals under the railway and adjoining thereto as set out in the plan annexed thereto, and that it was his intention to work them after the expiration of thirty days. Negotiations with the railway company ensued, but fell through; and the railway company then instituted this action, and on October 28, 1887, moved for an injunction till the hearing. Chitty, J., refused the application.

The plaintiff company appealed.

Rigby, Q.C., Sir A. Watson, Q.C., and *Phipson Beale,* for the appellant company.—The defendant, at the time of giving the notice, was not in a position to give the notice, for at that time there had been no investigation as to whether the minerals were or were not available; it was not till some time after the 25th of January that the defendant began to sink bore-holes. The mere expression of a desire at some day or other to work minerals somewhere or other is not sufficient. The notice here given is too general; it ought to have been confined to certain definite parts of the land intended to be worked, and not to extend over an area of two miles: *Smith* v. *Directors of Great Western Railway Co.,* 26 W. R. 130, 3 App. Cas. 165. The word "mines" in section 78 does not include "quarries": *Dixon* v. *Caledonian Railway Co.,* 29 W. R. 249, 5 App. Cas. 820. The decision of Kay, J., in *Midland Railway Co.* v. *Haunchwood Brick and Tile Co.,* 30 W. R. 640, 20 Ch. D. 552, has not been sanctioned in any case by the Court of Appeal, and the point is now before the House of Lords.

Sir Horace Davey, Q.C., Romer, Q.C., and *Percy Gye,* for the respondent.—The landowner is not bound to limit his notice to a particular part of the land intended to be worked; that would entail the giving of separate notices for each part as he went to work. A notice that the owner is prepared to work the whole seam or bed of minerals underlying the railway is sufficient and proper. The railway company are not embarrassed, in fact. They are entitled, without having to pay compensation, to whatever minerals they dig, carry away, and use in the construction of the line, and they are also entitled to support from subjacent minerals until the owner gives notice of his intention to work them and to claim compensation: *Great Western Railway Co.* v. *Bennett,* 15 W. R. 647, L. R. 2 H. L. 27; *Locomotive* v. *Tiverton and North Devon Railway Co.,* 31 W. R. 130, 22 Ch. D. 25; *Smith* v. *Directors of Great Western Railway Co.* The defendant was the proper person to give the notice, as he was the owner of the minerals under the railway; the colliery company, to whom part of the adjacent lands were demised, were neither owners, lessees, or occupiers of the minerals under the railway.

Rigby, Q.C., replied.

Cotton, L.J.—This is an appeal by the Midland Railway Co., the plaintiffs, against a decision of Chitty, J., who refused to grant them an injunction to restrain the defendant from working minerals under their line. I say "minerals," and I will deal with the question of what is meant by that word afterwards.

Under the 77th and following sections of the Railways Clauses Act it has been established that a railway company, when they give notice to buy land, do not buy any right of support from minerals under the surface. If they want to get them they may get them, but if the owner is desirous of working the minerals he is not to have them taken away, and the right of working them taken away, without compensation being given under section 6 of the Act and under the provisions of sections 78 and 79. It has been decided that the railway company is not bound to give their notice under section 78 of their desire or intention to purchase within thirty days. They may give that at any time. They may postpone their intention of purchasing on the owner giving notice of his intention to work until the support which would be taken away by working becomes to them a practical question. That is very important, because, if they were bound within thirty days, once for all, to make up their minds as to whether they would buy or not, questions would arise which, in my opinion, do not arise here. Also, as far as I can see, the railway company, if they think it advisable, may give notice to the landowner to buy one plot at one time and another plot at another time—that is to say, to buy the minerals in that portion which there is an immediate danger of his working, and they might afterwards, when he is coming near to work another portion, give another notice of their intention to buy that.

The question raised here is, Was there any intention or desire on the part of the defendant to work the mines within the meaning of this section, and had he the right to express such a desire? It is said that no one but an owner, lessee, or occupier who is intending to work personally—*i.e.*, by his servants and those who are merely acting for him—could give such a notice, and that an owner of minerals who is not desirous of working as his own speculation, but desirous of having the mine worked by a lessee, cannot give such a notice. A great part of the argument in this case turns upon that, but in my opinion the contention of the railway company is wrong. What are the words here? "If the owner, lessee, or occupier of any mines or minerals lying under the railway . . . or within forty yards therefrom, be desirous of working the same, such owner, lessee, or occupier shall give to the company notice in writing of his intention so to do." There is nothing there in my opinion to restrict an owner giving notice unless he intends by his own servants and his own agents to work it. If he intends to do it in the way which is usually adopted by owners, by letting it to the lessees, who will work, rendering him a royalty or rent, in my opinion he is a person who, being deprived of that right and deprived of that mode of employing his land, would be entitled to compensation under section 6, and comes within the terms of this clause as an owner who is desirous of working. To hold the contrary would be to prejudice owners of mines under or near a railway, because a man cannot make arrangements for letting a mine unless he is able to assure those who are offering to take that they can work it if they take a lease; but if he does not know whether the railway company will exercise their right or whether they will allow it to be worked by him or his lessees it is impossible for him to enter into any arrangement with persons who are willing to work and to lay out, as is often necessary, large sums of money in order to enable them to work profitably the minerals of which they are lessees.

In my opinion the defendant had a right to give the notice of his desire to work by his lessees, and on the evidence it is clearly established that he was desirous of so working, and that there was a strong probability of his being able to let it even at the time when he gave this notice. I quite agree that there must be not merely an expression of desire, but an honest actual existence of the desire to work, either by himself or his lessees, to justify an owner in giving such a notice. If he gave the notice when it was obvious either that there were no minerals or that he could not possibly intend either to let them or work them himself, that would be vexatious, and the court would not allow that to be acted upon. If it was acted upon it is very true the railway company might be put to some expense in arbitrations unless they made an offer of rather more than nothing, which is probably what the arbitrator would give if there were no minerals or no possibility of working them. If it appeared the notice was a mere vexatious one, that would not be a notice of a desire to work within the meaning of this section.

Then it is said that this does not apply to limestone or ironstone, which, according to the ordinary course of working, would be properly worked by quarrying. That is to say, that these sections do not except or apply to anything which can be properly worked according to the practice of the country by open quarrying. I cannot accede to that. Let us look at the words of section 77: "The company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them." Slate, as a rule, is worked by open quarrying, and when one looks at that and considers how very often the word "mines" is not used strictly as indicating a working by means of underground cutting only, I think the meaning here is that the notice is to apply to all seams or veins of what is there referred to —coal, ironstone, slate, or other minerals—which are in strata under the surface occupied by the railway. It may come up to the surface, and then it may be said that that portion which is actually on the surface is used for the purpose of the railway, and that would be comprised within their purchase. In my opinion those words—although the word "mines" is not used in a very strict and proper sense as regards working—are used here not to designate the mode of working, but that which is in seams or strata so as to be worked, whether by mines properly so called or by quarrying. Section 80 deals with there being strata under the line of railway when no mine is being worked under the railway. There it gives to the landowner power, if he is working his minerals, in carrying on his mining operations to make mines and openings under the line of railway; but that points, to my mind, to this, that the word "mines" is an inaccurate expression for minerals in strata, and does not define or restrict the mode of working to that mode of working which is properly called "mining" as distinct from quarrying. Therefore, in my opinion, that contention will not prevail.

Then it is said that the area covered by this notice is a great deal too large. In this case the extent seems to be about a mile and a half. I give no opinion as to what the result would be if the owner of twenty miles of land through which a railway went gave a general notice of this sort. It may be that the court would come to the conclusion that there was not an honest actual intention of working those minerals. But in an ordinary case all difficulty is got rid of in this way, that where the railway company know the owner is intending to work any particular portion of that which is included in his notice, they can at once, although the thirty days may have elapsed, give him a counter-notice and say that they are going to purchase the minerals in that portion. But in the present case, where they know well from the bore-holes where there are minerals and where there are not, it would be the most unwise thing in the world for the company to divide the land comprised in the notice, and say "We give you a counter-

notice as between A. and B., but we leave the rest, though you may afterwards find out something there which you intend to work." It would be much better for them to deal with the matter, and to have the expense of one arbitration with the possibility that they may have made an offer that will quite satisfy the arbitrator that they have offered more than enough. In my opinion that objection cannot prevail. If the landowner proceeded to open a mine under the railway in a place where it was obvious there could be no minerals—no ironstone or limestone—which could be worked, in my opinion a court of equity would very properly hold that what was done was done, not in pursuance of an honest desire to work, but merely maliciously in order to embarrass the railway company. If the court came to that conclusion it would be right in granting an injunction to restrain interference with the railway, not for the purpose of working, but for the mere purpose of embarrassing the railway company. In my opinion this appeal fails.

LINDLEY, L.J.—The questions raised are undoubtedly important. What are the facts of the case? [The Lord Justice referred to the facts as above stated, and continued:—] The presence of minerals not being open to doubt, the question is, What is the effect of the notice served by Sir Frederick Robinson on the 25th of January, 1886? I will allude first of all to the argument of Sir Arthur Watson, that the ironstone in this part of the country is usually got by quarrying as distinguished from mining, and that Sir F. Robinson is not entitled to give notice, inasmuch as section 77 and the subsequent sections do not apply to quarries or to minerals usually got by quarrying. This point has arisen and been discussed before, and there is admittedly one decision—*Midland Railway Co.* v. *Haunchwood Brick and Tile Co.*—in which it was held that the construction contended for by Sir Arthur Watson was inaccurate. It is said that that point is now before the House of Lords. If so I am sorry we have not got the decision of the House of Lords to guide us, but in the absence of that guide we must do the best we can upon the language of the Act and the authorities as they stand.

There are indications which show that that argument is untenable, and in particular I refer to and rely upon the express mention of slate in section 77. It is common knowledge that slate, at all events, is got as often by quarrying as by mining; and when we find the word slate in connection with the other words it seems to me that the correct view of the section is, that it extends to minerals which may be got by open quarrying as well as subterranean mining, and therefore that Sir Arthur Watson's contention is untenable.

The next point is whether Sir F. Robinson's notice is bad on the ground that he had no intention to work the mines. His position is this—he has not let the minerals in question and he has not granted to any occupier or other person a licence to get them; he is, in fact, the owner of them, and he is personally in the position of having a present right to work them if he chooses. It is said that he had no intention to work them himself. I cannot find any words in section 78 which required that the owner should work them himself. The contention is, that he is to work them by his servants and agents as distinguished from lessees or licensees. I see no reason for so holding. There being no lease and no licence to get the minerals he is the only person at present interested in them, and one way in which a person desirous of working mines can do so is by letting them, if he can, or by granting licences as distinguished from a lease of the mines. Any mode by which he can make the minerals productive to himself appears to me to be warranted by the clause in question. The construction that the owner cannot give notice unless he intends working the mines himself as contradistinguished from working by lessees or licensees appears to me to be too narrow and not warranted by the language of the section.

Then it is said that if we uphold this notice we expose railways to dangers never contemplated by the Act, and that we should be enabling landowners to give general notices which would be excessively embarrassing. I was struck with this contention, but when examined it will be found to be incorrect. Suppose a landowner, when a railway company gives him notice to take his land, or soon afterwards, gives a general roving notice to the railway company of his intention to work the minerals, what is the position of the railway company? They may disregard the notice. If they think it frivolous they need not do anything. They have power of inspecting; they have power of ascertaining what it is desirable to do for the protection of their own interests.

If they come to the conclusion that the notice is seriously meant, and that the landowner really does intend to work the minerals, they can give him a counter-notice, and if you look at the words "any part thereof" in sections 78 and 79 it seems tolerably plain that they can limit the counter-notice to a portion only of the minerals referred to. Of course the consequence of so limiting their counter-notice would be that the landowner who had served a mere general notice can force them to give another notice if he is in a position really to work the minerals, but the railway company can judge of their own interests about that.

Then it is said that if we put this construction on these sections it will be competent for the landowner to give a general notice and do nothing, let the thirty days go by, and then at any time suddenly come down and work the mines. There is an obvious answer to that. If any landowner did act in that way, which is highly unreasonable, he would be exposed to the risk of being told that he never had had any *bonâ fide* intention of working, and that his notice was bad ab initio; or that, whether his notice was good or not in the first instance, he had abandoned it.

Looking at the evidence in this case it seems to me on the question of fact that Chitty, J., has taken a view which we cannot possibly depart from. He came to the conclusion on the evidence and after hearing the cross-examination of the witnesses that Sir F. Robinson, when he gave the notice, intended *bonâ fide* to work; and I think he did. Of course Sir F. Robinson foresaw that if he was in a position to work, the railway company would be forced to give a counter-notice and compensate him; but it appears to me that if the railway company were to stand on their strict rights and decline to compensate him he was in a position to work these minerals, which were there to be worked. The only remedy in this particular case for the railway company is to give the counter-notice and proceed under the Act to give him compensation.

LOPES, L.J.—This case raises very important questions under the Railways Clauses Act, 1845, s. 77 and the following sections, with regard to working mines. It is to be observed that section 6 must be read with these sections. It is said that these sections do not apply to ironstone and limestone or any minerals obtained by open quarrying. In my opinion that contention cannot be maintained. I think the word "minerals," as used in these sections, applies to minerals whether they are won by open quarrying or by underground working. If that were not so many minerals won by open quarrying would pass by the conveyance to the company, and, therefore, would have to be taken into consideration in assessing the compensation in the first instance, a thing which we know never happens. In my opinion the true construction of section 77 and the following sections is this.

I think that the provision that the minerals are not to pass by the conveyance to the company is a provision in favour of the company—that the company is not to be compelled in the first instance to enter into a long and difficult question as to the existence or value of minerals which may not exist at all, or, if they exist, are not capable of being commercially worked—and shows an intention that the company shall be entitled to the adjacent and subjacent support afforded by the minerals until the owner shall give a notice of his desire to work the minerals. Section 78 provides that the owner may, if desirous of working the minerals, give a thirty days' notice of his desire to work them. That I take it means a *bonâ fide* desire, not merely a capricious one, without any reasonable grounds for believing that minerals exist. The company, on receiving this notice, if they apprehend danger to their railway, may give a counter-notice of their willingness to compensate; and then the company has it in its own power at any moment to secure the support afforded by these minerals to its railway. Upon this counter-notice being given the parties may go to arbitration or go before a jury, and I do not see that the company are prejudiced by this; because, if there are no minerals, or the minerals are not commercially workable, then the owner will obtain no compensation. Moreover, if the company make a reasonable offer in respect of the minerals, and the offer is not exceeded, then the owner will have to pay all the costs incurred by him in going before an arbitrator or a jury.

It is said that the expression "Owner who is desirous of working the minerals" must refer to an owner who intends to work them by his own enterprise, and not to an owner who intends to work them by means of granting a licence, a set, or a lease, which are the usual modes by which owners realize their minerals. I cannot adopt that contention. It appears to me that the owner is entitled to work them, if he thinks fit, as a private enterprise of his own, or he is entitled to let them to others and to obtain from those others a royalty, and thereby to realise the value of his minerals.

With respect to the *bonâ fide* intention of Sir F. Robinson to work these minerals the evidence is strong. Beyond all question valuable minerals exist on this property, and that fact raises a strong presumption that there is a *bonâ fide* intention and desire on the part of the owner to work them. It was also suggested that the notice was too large, that the land in question extended for nearly two miles, and that the notice, therefore, was an embarrassing notice to the company. I do not see that difficulty, because, in the first place, I think that it is open to the company, when they give their counter-notice, to confine it to any such portions of the land in the extent of the two miles as they think fit. Then they may go to arbitration or to a jury to assess the value of the minerals within that particular area. No doubt the company would then be exposed to this, that the owner, if he thought fit, might commence operations in other parts of the line. It is suggested that workmen might come down surreptitiously and suddenly let down the line. In the first place people cannot come down upon the line in the way suggested without being observed, and in the next place I think that if anything of that kind were done the persons who did it, if any persons were killed, would expose themselves to an indictment for manslaughter; and over and above that I think the company might at once come to the court, and that the court would interfere and prevent such proceedings. For these reasons I think Chitty, J., was right, and that his decision should be affirmed.

Solicitors for the plaintiffs, *Beale & Co.*

Solicitors for the defendant, *Capel-Cure & Ball.*

Bankruptcy. April 27.

Ex parte Lewis.

In re Clagett. (*a.*)

Judgment debt—Interest—Insolvent debtor—Surplus in hands of assignee after payment of principal of all debts—1 & 2 Vict. c. 110, ss. 17, 92.

The effect of section 17 of 1 & 2 Vict. c. 110 is that interest at the rate of four per cent. is a debt necessarily attached to every judgment debt, and recoverable at law as a debt; and the judgment creditor is not confined to the remedy by way of execution mentioned in the section.

Therefore, where, in the case of a deceased insolvent debtor who became insolvent before 1869, a sum of money subsequently came to the hands of the assignee, out of which the principal of all the debts entered in the debtor's schedule was paid, it was held that the judgment debts were not satisfied within the meaning of section 92 (since repealed) of that Act until interest was paid, and the assignee was ordered to pay interest before handing over any surplus to the representatives of the insolvent.

Appeal from the refusal of Mr. Registrar Giffard to make an order for the payment of interest on a judgment debt.

On the 23rd of February, 1844, Charles Lewis obtained a judgment against Horatio Clagett for £365. In January, 1845, Clagett, being in prison for debt, took the benefit of the Insolvency Acts, and applied by petition for his discharge. He obtained his discharge under the provisions of 1 & 2 Vict. c. 110, and an order was made vesting all his property in a provisional assignee. He also executed a warrant of attorney, authorizing judgment to be entered up against him for the amount of the debts stated in the schedule. Lewis's judgment debt was entered in the schedule, the amount of principal then due being £329. Clagett died in 1880, and shortly afterwards a reversionary interest in certain property having fallen in, the assignee recovered on behalf of the estate, by an action in the Chancery Division, the sum of £26,000. The executors of Lewis, who had died in 1864, were paid the principal of the judgment debt, and it was admitted that there was sufficient in the hands of the assignee to pay the principal of all the debts and leave a surplus. The executors claimed interest at four per cent. on the judgment debt from the date of the judgment. The registrar refused to make an order for payment of interest. The executors appealed.

Section 17 of 1 & 2 Vict. c. 110 enacts that "Every judgment debt shall carry interest at the rate of four pounds per centum per annum from the time of entering up judgment until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment."

Section 92 (repealed by 32 & 33 Vict. c. 83) enacted that if it should appear to the Court for the Relief of Insolvent Debtors that, after the debts of an insolvent debtor had been discharged and satisfied, there remained any suplus in the possession of the assignee, it should be lawful for the said court to order that such surplus should be vested in the insolvent debtor.

The question was whether the executors were entitled to have interest on the judgment debt paid to them before the surplus was handed over to the personal representatives of the insolvent.

Muir Mackenzie, for the appellants.

Herbert Reed, for the assignee.

Sidney Woolf and *Ringwood*, for the personal representatives of the insolvent.

Lord Esher, M.R.—In this case there is an estate in insolvency, which in the result has produced a surplus in

(*a.*) Reported by F. G. Rucker, Esq., Barrister-at-Law.

the hands of the assignee. There is a judgment debt which was entered in the debtor's schedule; the debt itself has, in a sense, been satisfied, but interest on that debt has not been satisfied. We are asked to say that the judgment creditor is to be paid that interest before anything is handed back to the insolvent debtor. The Act says that interest shall be paid. But it is said that section 92 is so worded that the surplus must be handed back without interest being paid. Section 92 only applies where there is a surplus; it says that if, "after the debts of the insolvent have been discharged and satisfied," there shall be a surplus, the court may make an order vesting the surplus in the insolvent. What are the debts there referred to? It is not necessary to decide whether the section applies to debts not named in the schedule, but it certainly does apply to debts which are. That raises the question, Is this interest a debt named in the schedule? This depends on the true meaning of section 17. Now that section does not say in terms that interest shall be part of a judgment debt, but it says that every judgment debt shall carry interest at four per cent. until the same shall be satisfied. What does that impose on the debtor? It seems to me to impose a statutory obligation to pay interest for every day after judgment. But a statutory duty to pay money reduces that money to a debt. You can always sue on a statutory obligation to pay money. Therefore this interest is a debt. It is not necessary to say that it is part of the judgment debt; it is enough to say that it is a debt necessarily and inevitably attached to the judgment debt if not paid immediately. Therefore, whether part of the judgment debt or not, we may say that it is a debt mentioned in the schedule. And it is obvious that it has not been satisfied. Consequently I am of opinion that the surplus in the hands of the assignee ought not to be handed back till the interest is paid, and that this appeal must be allowed.

Lindley, L.J.—I am of the same opinion. The word "satisfied" occurs in both section 17 and section 92. The effect of section 17 is that in order to satisfy a judgment debt you must pay principal and interest up to the time of payment. The original debt is merged in the judgment, and the judgment debt carries interest till satisfied. Then section 92 says that the surplus may be handed back when all the debts are discharged and satisfied. Has this debt been satisfied? No; it is not satisfied till interest is paid. Therefore I think this appeal must be allowed.

Bowen, L.J.—I am of the same opinion. It has been argued that the effect of section 17 is limited by the last words—"and such interest may be levied under a writ of execution on such judgment"; that unless it is recovered by execution it can never be recovered at all. But the section itself prevents our adopting that view. The judgment debt is to carry interest. The meaning seems to be this—that the judgment debt is to bear interest, as it were like a tree bears fruit, the interest to be a legal liability accruing *de die in diem* from the time when judgment is entered up till payment. The section, in addition, gives the judgment creditor a remedy by execution; but I think it is open to him to recover the interest in any way known to the law for recovering debts like this. It may be recovered by a substantive action of debt. It is an obligation in the nature of debt, annexed and tied to the judgment debt by statute, and the judgment debt is not satisfied until it is satisfied in such a way as to put an end to the obligation to pay interest as well as principal.

Appeal allowed.

Solicitors for the appellants, *Tyrrell, Lewis, & Co.*

Solicitor for the assignee, *W. W. Aldridge.*

Solicitors for the personal representatives, *Leslie & Hardy.*

From Q. B. Div. May 7.

Leek Improvement Commissioners v. Justices for the County of Stafford. (a.)

Highway—Maintenance of main road—Liability of county authority — Macadamized road subsequently paved—Highways and Locomotives Act, 1878 (41 & 42 *Vict. c.* 77), *s.* 13.

The plaintiffs, having paved with stone setts a road in their highway district which was formerly a macadamized road, sought to recover from the county authority under section 13 *of the Highways and Locomotives Act,* 1878, *one-half of the expenses of such paving.*

Held, that a different kind of road had been made, and that therefore the plaintiffs had not "maintained" the road, and could not recover against the county authority.

Appeal from the decision of Huddleston, B.

The plaintiffs claim was for £102 18s. under section 13 of the Highways and Locomotives Act, 1878, being one-half of the expenses incurred by them in paving a certain main road between the Leek railway station and the town of Leek, in the Leek Highway District in the county of Stafford. The plaintiffs were the highway authority for the Leek Highway District and the defendants were the county authority for the county of Stafford.

By section 13 of the Highways and Locomotives Act, 1878 (41 & 42 Vict. c. 77), any road which has between the 31st of December, 1870, and the date of the passing of this Act ceased to be a turnpike road, and any road which, being at the time of the passing of this Act a turnpike road, may afterwards cease to be such, shall be deemed to be a main road, and one-half of the expenses incurred from and after the 29th of September, 1878, by the highway authority in the maintenance of such road shall, as to every part thereof which is within the limits of any highway area, be paid to the highway authority of such area by the county authority of the county in which such road is situate, out of the county rate, on the certificate of the surveyor of the county authority, or of such other person or persons as the county authority may appoint, to the effect that such main road has been maintained to his or their satisfaction.

The defendants contended that the expense of paving the road in question was not an expense reasonably or necessarily incurred in the maintenance of the road within the meaning of the section. Huddleston, B., gave judgment for the defendants, and the plaintiffs appealed.

Bosanquet, Q.C., and *John Rose*, for the plaintiffs.—The traffic over the road in question is very heavy. It was therefore both reasonable and economical to pave it. A road is maintained when it is made suitable to the traffic which passes over it. Maintenance does not exclude reasonable improvement in the structure of the road.

They referred to *Reg.* v. *Inhabitants of Claxby*, 5 W. R. 451, 24 L. J. Q. B. 223; *Reg.* v. *High Holden*, 1 F. & F. 678; *Sevenoaks Railway Co.* v. *London, Chatham, and Dover Railway Co.*, 27 W. R. 672, 11 Ch. D. 625.

Jelf, Q.C., Reddam, and *R. B. D. Acland*, for the defendants, were not called upon to argue.

Lord Esher, M.R.—I think that in this case we must construe the Act in the manner in which we usually construe Acts of Parliament, by giving the ordinary plain English signification to the words used, having regard to the subject-matter of the Act. The Act speaks of roads, but not in the sense of their being rights of

(a.) Reported by A. P. Percival Kerr, Esq., Barrister-at-Law.

way. It does not refer to the way in which the road is to be used, but it refers to the structure of the road and to the way in which it is made. The Legislature speaks of the maintenance of the road. That means the maintenance of the structure of the road.

The road in question was a macadamized road, and, in my opinion, as long as it remained so it must be maintained at the joint expense of the highway district and of the county, as provided by this Act. Of course, as the traffic over the road increased, the road would become more worn, and would need to be repaired more frequently. If the road had originally been made with soft stone, and was repaired with a harder kind of stone, as long as it remained a macadamized road I think that it would be "maintained" within the meaning of this section. Its structure would not be altered, and it would still be a macadamized road.

But there is a vast difference between a macadamized road and a paved road. They are two entirely distinct classes of roads. Therefore I think that, if where there has formerly been a macadamized road a paved road is substituted, the macadamized road can no longer be said to be maintained, since a new road has, in fact, been constructed. The character of the road has been altered, and the old macadamized road has been taken away. That cannot be a maintenance of the road which is really a substitution of a new road for it. Therefore I think that the Improvement Commissioners cannot call upon the county to pay half the expense of the paving under this Act. I agree with the decision of Huddleston, B., and I think that this appeal must be dismissed.

Bowen, L.J.—I am entirely of the same opinion. The only question for us is whether the county authorities are bound to pay one-half of the costs of paving this road. We have to say whether the paving of the road was a maintenance of the road as to enable the plaintiffs to recover under the Act one-half of the expenses from the county.

That the plaintiffs have maintained the road in one sense must be admitted to be true, but they have done more than that. Section 13 of the Act, by which the plaintiffs seek to recover their expenses, after saying that one-half of the expenses incurred by the highway authority in the maintenance of such a road shall be paid by the county authority, goes on:—"The term expenses in this section shall mean the cost of repairs defrayed out of current rates."

Now, although the cost of paving this road was paid out of the current rates, yet in paving the road instead of repairing it a good deal more was done than was contemplated by the section, and I therefore think that the plaintiffs cannot be said to have maintained the road within the meaning of the section, and cannot succeed as against the county authorities.

Bowen, L.J.—I am of the same opinion. I think that the word "maintenance" as used in this section is in effect the same as "repair." The section deals with disturnpiked roads and the expenses of their maintenance. I take that to mean the maintenance or repair of such roads as they then existed. Repair means doing that which is reasonably proper and necessary to the character of the road and for the traffic passing over such a road. But to say that when a paved road is substituted for a macadamized road the macadamized road is maintained and repaired is as repugnant to the ordinary meaning of the language as to say that Augustus repaired Rome when he found it brick and left it marble, or to say that a man when he buys a new coat is repairing his old one. I agree, therefore, that this appeal must fail.

Appeal dismissed.

Solicitors for the appellants, *Ullithorne, Currey, & Villiers*, for *Hacker & Allen*, Leek.

Solicitors for the respondents, *White & Sons*, for *Hand & Co.*, Stafford.

From Q. B. Div. May 5.

Ex parte Woodhall. (*a.*)

Practice—Extradition crime—Habeas corpus—*Appeal*—"*Criminal cause or matter*"—*Jurisdiction*—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 47.

No appeal lies from the judgment of the Queen's Bench Division upon an application for a writ of habeas corpus *in the case of a fugitive criminal committed to prison under the Extradition Act*, 1870, *with a view to his surrender to a foreign country, as the judgment of the Queen's Bench Division is a "judgment in a criminal cause or matter" within section* 47 *of the Judicature Act*, 1873.

Appeal from the refusal of the Queen's Bench Division to grant a rule *nisi* for a writ of *habeas corpus*.

The applicant, Alice Woodhall, was arrested in England under the Extradition Act, 1870, as a fugitive criminal, charged with having committed forgery in New York. She was brought before the chief magistrate at Bow-street Police-court, who committed her to prison under section 10 of the Extradition Act, 1870, with a view to her surrender to the United States of America. A motion was made on her behalf in the Queen's Bench Division for a rule *nisi* for a writ of *habeas corpus* upon the ground that the magistrate had refused to hear evidence on her behalf. The Queen's Bench Division refused to grant a rule.

Finlay, Q.C. (*David* with him), moved by way of appeal for a rule *nisi* for a writ of *habeas corpus*.—The first question is whether this court has jurisdiction to entertain this appeal. Section 47 of the Judicature Act, 1873, provides that "no appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save for some error of law apparent upon the record," &c. That means a judgment in the course of a criminal cause or matter. An application for a writ of *habeas corpus* is not made in the course of a criminal cause or matter: it is entirely collateral to the criminal proceeding. A writ of *habeas corpus*, as in *Ex parte Bell Cox*, *ante*, p. 209, 20 Q. B. D. 1, may be granted in all sorts of cases, and it would be most inconvenient to apply one rule as to appeal to one case and a different rule to another case. It is further submitted that the words "criminal cause or matter" in section 47 only apply to cases triable in England. Hence section 47 does not apply, and an appeal lies under section 19 of the Judicature Act, 1873.

He referred to *Reg.* v. *Steel*, 25 W. R. 34, 2 Q. B. D. 37; *Reg.* v. *Fletcher*, 25 W. R. 149, 2 Q. B. D. 43; *Reg.* v. *Foote*, 31 W. R. 490, 10 Q. B. D. 378; and *Reg.* v. *Justices of the Central Criminal Court*, 35 W. R. 243, 18 Q. B. D. 314.

Lord Esher, M.R.—An application was made to the Divisional Court for a rule *nisi* for a writ of *habeas corpus* with respect to a person in custody, who had been arrested and brought before a magistrate and committed by him to prison under the Extradition Act, 1870, for the purpose of being sent to the United States. The Divisional Court came to a certain decision upon that application, and an appeal has been brought to this court. The question, therefore, arises whether we have jurisdiction to hear the appeal. It is urged that the decision was not a judgment in a criminal cause or matter within the latter clause of section 47 of the Judicature Act, 1873. Those words have been before the Court of Appeal on several previous occasions, and in *Reg.* v. *Weil*, 31 W. R. 60, 9 Q. B. D. 701, the court declined to give an opinion upon the very point now before us, holding that, even if there was jurisdic-

(*a.*) Reported by W. F. Barry, Esq., Barrister-at-Law.

tion, the appeal must be dismissed. In the present case, however, we think that we ought not to flinch from deciding the question of jurisdiction.

Upon looking at all the cases, they seem to me to point to this, that the words "criminal cause or matter" are to receive as wide an interpretation as can reasonably be given to them. This court is a court of appeal in civil matters only, and was not intended to be a court of appeal in matters of a criminal nature. Those words have been considered in several cases, but I desire to refer especially to the case of *Reg.* v. *Fletcher*. There the Queen's Bench Division discharged a rule for a *certiorari* to bring up a summary conviction of justices for the purpose of quashing it on the ground of want of jurisdiction, and this court held that that was a judgment of the High Court in a criminal matter, and that no appeal lay. Mellish, L.J., said:—"In *Reg.* v. *Steel* we held that clause was not confined, as was contended, to the High Court when sitting as the court to hear points reserved in criminal cases, but extended to all criminal cases in the High Court, and therefore to criminal cases in the Queen's Bench Division. The question here is somewhat wider, whether the exemption from appeal extends to a proceeding in the Queen's Bench Division, which might be said to be not strictly a criminal proceeding in that court, but was a proceeding taken in that court for the purpose of quashing a conviction before justices, which was clearly a criminal proceeding. Was that proceeding in the Queen's Bench Division a proceeding in a criminal matter?" He goes on to answer that question in the affirmative. I myself, in giving judgment in that case, said:—"In the present case it is said that judgment must be confined to a judgment in a criminal cause or matter in the High Court itself, and does not extend to a proceeding in a case which has not its inception in the High Court. I cannot agree to that. I should read the clause as meaning no appeal shall lie from any decision of the High Court by way of judgment in any criminal cause or matter. Is not this a decision by way of judgment?" I must now try whether, for the purposes of this case, I cannot express my meaning in different language. In my opinion the last clause of section 47 applies to any decision by way of judicial determination of any question raised in or with regard to proceedings the subject-matter of which is criminal, at whatever stage of the proceedings the question arises. The decision of the High Court in this case was a decision by way of judicial determination of a question raised with regard to proceedings the subject-matter of which was criminal, as the proceedings before the magistrate were taken for the purpose of having the accused surrendered for trial in the United States. The subject-matter of the proceedings before the magistrate was, therefore, criminal, and the case comes within the last clause of section 47, and the judgment of the Divisional Court was a "judgment in a criminal cause or matter." It does not follow from our decision that this court has not jurisdiction to hear an appeal in any case of *habeas corpus*. If the subject-matter is criminal there is no appeal; if not criminal, there is an appeal. Our decision is that we have no jurisdiction to hear this appeal.

LINDLEY, L.J.—I am entirely of the same opinion. It seems to me, whether we regard the language of section 47 or the series of decisions upon that language, that the case is perfectly clear. In *Reg.* v. *Steel* the construction of the last clause of section 47 came in question, and the doubt which was put an end to in that case is thus stated by Mellish, L.J.:—"By section 19 of the Act of 1873 the Court of Appeal has jurisdiction to hear and determine appeals from any judgment or order of the High Court of Justice. These are the general words on which the appellants rely as giving them the right of appeal in the present case. But it is save as hereinafter mentioned, and the respondents rely on section 47 as excepting all criminal matters, whereas the appellants say section 47 only applies to the Court for Crown Cases Reserved. I am of opinion that the section has the effect the respondents contend for, and that it does more than take away an appeal from the judgment of the High Court when sitting as a court for Crown cases reserved." He then referred to the last clause of section 47 and said:—"Are you to confine this to the Court for Crown Cases Reserved, or is it general, extending the exception or exemption from appeal to all criminal causes or matters? I am clearly of opinion that it is general; and then the saving clause was necessary to retain the former right of appeal for error on the record. If this were not so there would be an appeal from the Court of Queen's Bench, not only on every judgment, but on any order in a criminal case. The intention of the latter part of section 47 was to prevent this; and there appears no reason, but the contrary, why the words, no appeal shall lie from any judgment of the said High Court in any criminal cause or matter, should be confined, as the appellants contend, to the High Court when sitting as a court for Crown cases reserved." That decision in 1876 has been observed ever since. We have to consider whether the present application to the Queen's Bench Division is not an application in a criminal cause or matter. The object of the application was to enable the accused to be relieved from prosecution upon a criminal charge, and from being sent to America to take her trial. I confess it seems to me plain that that is an application in a criminal cause or matter, and that we have no jurisdiction to entertain this appeal from the judgment of the Queen's Bench Division upon that application. It does not follow that we have not jurisdiction to entertain an appeal in other cases of *habeas corpus*.

BOWEN, L.J.—I think that in this case we ought to decide the question of jurisdiction in the interests of the administration of justice, and not upon the merits. Whether or not there is jurisdiction to hear this appeal depends upon whether the judgment of the court below was a judgment in a criminal cause or matter within section 47 of the Judicature Act, 1873. The judgment was pronounced upon an application to discharge a person from custody to which she had been committed by the magistrate under section 10 of the Extradition Act, 1870. Section 10 commences with words which direct that the proceedings were taken "in the case of a fugitive criminal accused of an extradition crime"—that is to say, a crime which, if committed in England, would be one of the crimes described in the first schedule to the Act. There was a foreign warrant authorising the arrest of the accused. The magistrates' duty, upon the accused being brought before him, was to decide whether there was sufficient evidence which would, according to the law of England, justify the committal for trial of the prisoner if the crime had been committed in England. That seems to me to be clearly a criminal matter. That being so, the application for a *habeas corpus* to discharge the accused from custody was made, and the judgment of the Queen's Bench Division thereon was pronounced, in a criminal matter, though the criminal matter did not have its inception in the High Court. In my opinion, therefore, the question is quite free from doubt, and we have no jurisdiction to entertain this appeal.

Appeal dismissed.

Solicitors for the appellant, *Rooks & Co.*, for *Banks, Weekes, & Howlett*, Birmingham.

From Q. B. Div. March 22; April 28.

COLQUHOUN v. BROOKS. (a.)

Income tax—Business in Australia—Partner resident in England—Liability for profits accruing abroad and not transmitted to England—16 & 17 Vict. c. 34, s. 2, schedule D.

A partner in a firm carrying on business solely at Melbourne resided wholly in England. A portion of his share in the profits of the Melbourne business was transmitted to him in England and duly returned by him for assessment to income tax. The remainder of his share was left in Australia, and stood to his credit on the books of the firm. Having been assessed to income tax on the whole amount of his share of the profits,

Held, by Lord Esher, M.R., *and* Lopes, L.J. (Fry, L.J., *dissenting*), *reversing the decision of the* Queen's Bench Division (ante, *p.* 332), *that he was only liable to be assessed to income tax in respect of that portion of his share of the profits of the Melbourne business transmitted to and received by him in this country.*

Appeal from the decision of a divisional court (Stephen and Wills, JJ.), reported *ante*, p. 332, 19 Q. B. D. 400.

Mr. Henry Brooks, who resided solely in England, and carried on business here, was also a partner in the firm of Brooks, Robinson, & Co., of Melbourne, Australia, which was entirely distinct from his English business.

A certain portion of the profits made in the Australian business were annually transmitted to Mr. Brooks, and on that portion so received by him in England he had paid income tax. The remainder of the annual profits was placed to his credit in the books of the Australian firm, and was not transmitted to him in England. Mr. Brooks having been assessed on the whole amount of his share in the profits of the Melbourne firm, contended that he ought only to have been charged on so much of it as was actually received by him in England, and a case was stated by the Income Tax Commissioners under 43 & 44 Vict. c. 19, s. 59, for the opinion of the court.

The court were divided in opinion, Stephen, J., holding that Mr. Brooks was liable in respect of the whole share of the profits, and Wills, J., being of opinion that he was only liable in respect of that portion of the profits actually received by him in this country. Wills, J., as the junior judge, having withdrawn his judgment, Mr. Brooks appealed.

Sir Henry James, Q.C., T. E. Scrutton, and *A. C. Nicol*, for the appellant.

Sir R. E. Webster, A.G., Sir E. Clarke, S.G., and *A. V. Dicey*, for the Crown.

The arguments used were the same as in the court below.

The following additional cases were cited:—*Attorney-General* v. *Alexander*, 23 W. R. 255, L. R. 10 Ex. 20; *Werle* v. *Colquhoun*, *ante*, p. 613.

April 28.—Lord ESHER, M.R.—This case appears to me to be one of the highest importance. The appellant is a subject of the Queen, solely resident in England. He has a business which he carries on in England, and in respect of which he pays income tax He is also a partner in a business which is carried on in one of the colonies. That business is managed solely in the colony by his partners there, the appellant taking no part in the management, and the whole of that business is carried on outside the United Kingdom. Part of the proceeds of that business have from time to time been remitted to him in this country, and in respect of that part of the proceeds which he has actually received he has paid income tax. But it has been said that he is bound to pay income tax not only upon that part of the profits of the colonial business which he has received in this country, but also on the whole of the rest of his share of the profits of that business.

The question really depends upon the construction to be put upon schedule D. of section 2 of the Income Tax Act, 1853 (16 & 17 Vict. c. 34).

It is impossible to have words larger than those there used. The only condition appears to be that the person taxed must be a person residing in the United Kingdom. There is no limitation as to the time for which he must reside or as to the class of person so residing.

The words, if taken in their largest sense, apply to a foreigner just as much as to a servant of the Queen. It is this which, in my opinion, makes the case of such great importance. For, if the words are to be read in their fullest sense, any foreigner residing in this country for a time sufficient to make his stay a residence, would have to pay income tax for any kind of property whatever, whether situate in the United Kingdom or elsewhere. That is to say, although not a farthing of the income derived from that property is received in this country, and although that property is managed and carried on wholly outside this country, nevertheless, the mere fact of the owner of the property residing here will make that property liable to income tax. Let us take an instance—one which, as we know, is happening every day. Suppose an American who is carrying on an enormous business in the United States comes over here to reside for a year, as is not uncommon. He brings his family and takes a house in London or elsewhere—which is obviously sufficient to satisfy the term "residing"—for three months or for a longer period. Then if the words of this enactment are to be given their fullest meaning he is to be subject to income tax in respect of the whole of his American trade, no part of which may be with or from this country, and although he may be taking no part whatever in the management of that trade while he is resident here. He will have to subject the circumstances of that business to persons in England, who will have the right to require from him affidavits as to the profits of that business, and, for aught I know, will have the right to require him to produce the trade books and accounts for their inspection.

If such were the case I think this Government would receive a remonstrance from the Government of the United States—a remonstrance which they would find it hard to answer.

Such an inquiry and such a method of taxation would be absolutely contrary to the comity of nations.

Or, again, let us take some great Hungarian nobleman with enormous estates in Hungary. He comes to this country on a visit with his wife and family, and he takes a residence of his own for a time, such, for instance, as a moor in Scotland, and there he resides for awhile. His vast estate in Hungary is in the meantime managed by his stewards and people there. Can it be suggested that he must pay income tax while he resides here on the whole of that property, although no part of the proceeds of it are received in this country? Surely if such were the case we should have unanswerable remonstrances from every foreign Government. I think they would be unanswerable because this would be a most tyrannical and abnormal enactment with regard to matters with which this country has nothing to do. Now what is the rule of interpretation to be applied to an Act of Parliament which, by reason of its general words, produces such consequences as these? I take the rule to be this—that it cannot be supposed that the English Parliament, by reason of its having used general words, are attempting to do that which would be an outrage on the law and comity of nations, and which would lead to inevitable and unanswerable remonstrance.

(a.) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

It is true that if we should be perfectly certain that Parliament had intended to commit that which I deliberately stigmatize as an outrage, we, as mere administrators of the law, should be bound to carry it out, leaving it to the Government of the country to meet the consequences of such an enactment. But unless that is made perfectly clear, unless it appears from the direct words that the Legislature expressly intended to do this, I think we ought not so to construe the enactment. I think that we ought so to limit mere general words as to make them reasonable and proper. That is the ground on which I intend to decide this case.

Reliance was placed, both by Stephen, J., and in argument here, upon sections of the Act which specifically deal with the difference between things belonging to other countries and things belonging to this country, and upon the maxim *expressio unius exclusio alterius*, but I agree with Wills, J., in thinking that that is not a binding doctrine, but is only one which must be used where it is reasonable to use it.

I could, if I thought it advisable, show from the early part of schedule D. that the words "from any kind of property whatever" must be limited. The method of arriving at the annual value of landed property, for instance, by taking the rack rent value, would be inapplicable to foreign lands where, for aught we know, there are no such things as rack rents. So, too, as to foreign funds which must be included if the largest signification is given to these words, yet they are expressly dealt with by the Act which is incorporated with this. Nor do I think the words in "the United Kingdom or elsewhere" were intended to apply to colonies which have a separate parliament of their own or to foreign countries. I think they probably were intended to include only those outlying parts of the Queen's dominions over which Parliament has a right to exercise such powers. But, as I say, I deliberately abstain from entertaining such questions as these, because I desire to rest my judgment on the broad ground which I have stated before.

I agree, therefore, with Wills, J. I adopt all the reasons which he has given in his judgment, and I think the judgment which has been entered must be reversed.

FRY, L.J.—In this case I have the misfortune to differ from the Master of the Rolls, and to think that the decision of the Divisional Court expressed by Stephen, J., is the correct decision.

The question which we have to determine is this. Can a resident in the United Kingdom be charged with income tax in respect of the profits of a business in the colonies or a foreign country which profits belong to the resident, but have not been transmitted to him or received by him in this country? With regard to such portion of the profits as he had actually received in this country, he has, as I understand, been charged without question. The point arises with regard to profits accrued to him, but not received by him. To answer that question we must turn to the schedule D. of 16 & 17 Vict. c. 34, and we find there the intention to create a charge on the person for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom "from any kind of property, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere," to be charged at a certain rate. Then the same schedule goes on to provide or to create a charge "in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of her Majesty or not, although not resident in the United Kingdom, from any property whatever within the United Kingdom or any profession, trade, employment, or vocation exercised in the United Kingdom." Now I pause to make upon that schedule two or three observations.

In the first place it is upon "profits or gains arising or accruing." I cannot read those words to mean "received by." If they were limited to profits and gains "received," the limitations would apply equally to all her Majesty's subjects, and to all foreigners residing in the country. The result would be that no income tax would be payable upon profits which accrued, but which are not actually received, although such profits might both be earned and have accrued in the United Kingdom.

Now, in the next place, I wish to observe that the language of the statute is express. It is "from any profession, trade," and so forth, "whether the same shall be respectively carried on in the United Kingdom or elsewhere." What is the meaning of inserting that clause, except to indicate the mind of the Legislature that for the purpose of taxation it is immaterial whether the trade be carried on in the United Kingdom or in any part of the world outside the United Kingdom. "The United Kingdom or elsewhere," by its alternative description, includes the whole world, and those words can be introduced, it seems to me, for no purpose except to express the intention of the Legislature to charge persons resident in this country with profits derived from any trade carried on in any part of the world.

It will be observed that the whole scope of schedule D. is this: If the person be within the United Kingdom, then he is to be charged in respect of profits accruing or arising in any part of the world, and, if the profits arise from a business or property within the United Kingdom, then it is to be deducted from any person, though he may reside in any part of the world.

The two branches of the schedule are aimed, the one at the person residing or to whom the accrual of profit arises, the other at the thing from which the profits accrue, and I cannot help coming to the conclusion that not merely are profits arising in a foreign country within the words, but they are within the emphatically-expressed meaning of this section.

It may not be, perhaps, immaterial to observe that the language of this section is ancient in this sense, that with the single exception of persons residing abroad, who were not charged by Pitt's Act (39 Geo. III.), schedule D. has been in the same form, I believe, in all the Income Tax Acts which have ever been passed, with the exception I refer to, it is the same in Pitt's Act, the same in Addington's Act, and it has remained the same throughout. Now I turn from schedule D. itself to the rules that are still in force with regard to it, and which will be found with the 100th section of the earlier Act. The statute of 1842 provides "that the duties hereby granted under schedule D. shall be assessed and charged under the following rules." The first of those rules is important, since it distinctly shows that the charge is not a charge upon the profits, but a charge upon the person. It says that the last-mentioned duties "shall be charged annually on, and paid by, the persons, bodies politic, and so forth receiving or entitled unto the same," and then it goes on to provide certain "rules for ascertaining the said last-mentioned duties in the particular cases herein mentioned." I desire to dwell upon these words, because they seem to me to show this, that the intention of the rules is not to diminish the generality of the preceding enactment, but only to furnish a mode or guide where the particular rules apply. Where they do not apply, effect must be given to the general enactment independently of them. Now those rules proceed in this way. They state six distinct cases which are subordinate divisions of the charge created by schedule D., and the first of those is the case in question:—"Duties to be charged in respect

of any trade, manufacture, adventure, or concern in the nature of trade not contained in any other schedule of this Act." Now I merely refer to these rules to point out that the second rule, which follows that first case, is as emphatic as the language of schedule D. itself, showing the intention to charge the persons with the profits on any concern carried on by them in the United Kingdom or elsewhere.

Pausing there, I confess that the conclusion, to my mind, is this, that the obvious and express language of the Legislature does create a charge upon persons resident in this country in respect of any profits wherever they may have been earned.

Against that conclusion various propositions have been presented to us. The first is that which has been expressed with so much force in the judgment of the Master of the Rolls. It is said that it is an outrage on the law of nations to suppose that the Legislature of this country could have created a charge upon foreigners resident within this country in respect of the profits on their trades carried on in other countries. Now it appears to me that that is an argument not for the judge but for the lawgiver; and that the forcible observations of the Master of the Rolls might well be addressed to the House of Lords in his character as a legislator, but are not adapted to the tribunal which has merely to determine what was in the mind of the Legislature as expressed in those enactments. It must be borne in mind that the Legislature of every country asserts the right to impose certain taxes upon every person who enters their territory or becomes a resident in it. It cannot, I suppose, be argued for one moment that colonists and foreigners are not liable to customs duties, or to the excise, or to the licence duties, or to local rates when they take up their residence within this country.

Whether, therefore, the mind of the Legislature is to charge the persons who are foreigners and require them to pay income tax according to a particular standard, seems to me to be a mere question of enactment. I do not understand that it is argued that a foreigner is not to be charged with income tax in respect of profits which he receives in this country from trade carried on abroad, but if it be lawful and competent to the Legislature of this country to charge him with the profits so received by him here in respect of trade abroad, why is it not within their competence to charge him with profits accrued to him while resident in this country? The principle upon which we ought to proceed in considering an Act of this description is, I think, to be learned from the language of Lord Cairns. In addressing the House of Lords in the case of *Partington* v. *The Attorney-General*, L. R. 4 H. L. 100, at p. 122, he said:—"The principle of all fiscal legislation is this. If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax cannot bring the subject within the letter of the law the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute where you can only adhere to the words of the statute."

Now the next argument which is addressed to us is this: It is said, in the language of Lord Westbury, that the English Act of Parliament cannot be applied to foreign property whilst it remains foreign property. I quote his observations in the case of *The Attorney-General* v. *Campbell*, 21 W. R. 34n, L. R. 5 H. L. 34, which was dwelt upon by Wills, J., in his able judgment in the court below. That proposition of Lord Westbury's I have no desire—if I had the power—to dissent from, but in my judgment it does not apply or govern the present case.

The income tax is not like the succession duty or the legacy duty, a charge upon a thing. The income tax, as I have already shown from the language used in the statute in schedule D., is a charge upon a person in respect of a thing, and I know of no principle of law which prohibits the Legislature from using foreign property or anything in the world they like as the standard by which the person resident within this country is to be charged. That is all that is sought in the present case.

The third argument which I desire to consider is this: It is said that there are, in the statute itself, indications that the charge is to be made only in respect of the foreign moneys received in this country. For that our attention was drawn to cases 4, 5, and 6. I have already observed that the cases are only subordinate divisions. The rules with regard to each case only apply to the particular case. Now the fourth case is this: It is for the computation of duties on securities in the Colonies, and undoubtedly there the rule is this.

The duty to be charged in respect of it "shall be computed on a sum not less than a full amount of the sums (so far as the same can be computed) which have been or will be received in the United Kingdom in the current year, without any deduction or abatement," and in the same way case 5, which deals with the computation of duties in respect of foreign possessions or possessions in the Colonies, must be on the sums actually received in the United Kingdom, and the computation of duty on undescribed profits is undoubtedly on the profits and gains received annually.

In those cases, undoubtedly, the Legislature has been minded, probably from reasons of convenience, to confine its rule to moneys received. That appears to be the true construction to be put upon the rules relating to those cases. But I am unable to find anything which authorizes me to extend the particular language in those cases to a portion of the tax which comes, not within those cases, but within other cases. I have no right to extend the limitation imposed upon those particular portions of the duty to the other portions of the duty. The rules, as I have already pointed out, are only to be used in the particular cases to which they apply.

They do not, therefore, in my judgment, furnish any general guide for the interpretation of the statute. On the contrary, they seem to me to show this, that the "reception," "the receipt," is not the same as "accruer," and that when the Legislature were minded to deal with actual receipts they used unequivocal language. Therefore I feel myself all the more bound to give the natural and full significance to the words "arising" and "accruing" as applied to the profits with which we have to deal. For these reasons I feel myself compelled to hold that the decision of the Divisional Court was correct.

Lopes, L.J.—I agree with the judgment of the Master of the Rolls and of Wills, J., and I cannot agree with the judgment of my brother Fry, L.J., and of Stephen, J.

The question raised in this case is most important. It is whether a resident in the United Kingdom is to be charged with income tax in respect of the profits of a business in the Colonies or in foreign parts, which profits belong to that resident, but are not transmitted to or received by him in this country.

This depends upon what is the true construction of schedule D of 16 & 17 Vict. c. 34.

It is said that the intention of the Legislature was if the person was within the United Kingdom, to charge him for profits wherever arising, or if the business was within the United Kingdom, to charge the person wherever residing.

I think that this is a correct construction of schedule D., but subject always to this, that the profit or gain must

be received by, or come to, the person to be charged, in the United Kingdom. I understand the words "arising or accruing to any person residing in the United Kingdom" to mean "coming to his hands or received by him in the United Kingdom." The second part of schedule D. refers to profits or gains actually made in the United Kingdom, which would be chargeable wherever the recipient resided. It is difficult to believe that the Legislature intended to make a resident in this country, maybe for a temporary purpose only, chargeable with income tax in respect of profits made in another country and which are never transmitted to or received in this country, and which are expended in the colony or foreign country.

The provision with regard to temporary residence in the United Kingdom for less than six months favours the construction I put upon schedule D. Such temporary residents are not to be charged with income tax as persons residing in the United Kingdom in respect of profits or gains received from or out of any possessions in any of her Majesty's dominions or any foreign possessions, or from securities in any of her Majesty's dominions or foreign securities, but are to be chargeable after six months' residence. The chargeability here depends, it must be observed, upon the profits or gains being received in this country. Again, there is another indication in the statute that the charge is to be made only in respect of foreign moneys received in this country (see case 4 and the rule applicable to that case). Can it be successfully contended that, while the computation of profits on securities and possessions out of the United Kingdom are to be made on the amount only received in this country, profits made abroad in a trade or business which are never transmitted to or received in this country are to be chargeable, and that, too, although the person to be charged is residing here for a temporary purpose—for instance, less than six months and in circumstances where he is not chargeable even in respect of profits or securities or possessions received in this country? I am at a loss to understand on what principle such a distinction can be maintained. It seems to me obvious that the general words in schedule D. (having regard to the provisions to which I have just alluded) must receive some limitation. I think that the limitation to be inferred from these sections is that the duty is chargeable only on the amounts received in this country from the business carried on abroad by the persons sought to be charged.

The maxim *expressio unius exclusio alterius* has been pressed upon us. I agree with what was said in the court below by Wills, J., about this maxim. It is often a valuable servant but a dangerous master to follow in the construction of statutes or documents. The *exclusio* is often the result of inadvertence or accident, and the maxim ought not to be applied when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice. I think that a rigid observance of the maxim in this case would make other provisions of the statute inconsistent and absurd, and would result in injustice. I cannot, therefore, permit it to govern my decision.

The judgment, therefore, in the court below, in my opinion, was wrong, and must be reversed.

Appeal allowed.

Solicitor for the appellant, *Shepheards.*

Solicitors for the respondent, *Solicitor of Inland Revenue.*

High Court of Justice.

Chan. Div. } Chitty, J. } Jan. 11, 12, 30.

In re HOLLINGSHEAD.

HOLLINGSHEAD *v.* WEBSTER. (*a.*)

Simple contract debt—Tenant for life—Payment of interest by—Acknowledgment—Statute of Limitations (21 *Jac.* 1, *c.* 16)—3 *&* 4 *Will.* 4, *c.* 104—*Part payment—Executor*—9 *Geo.* 4, *c.* 14—19 *&* 20 *Vict. c.* 97, *s.* 14.

The law in regard to the effect of payment of interest on a simple contract debt of a testator by the tenant for life of the real estate stands on the same footing as that in respect of payment of interest on a specialty debt.

The principle in Roddam *v.* Morley, 5 *W. R.* 510, 1 *De G. J. & S.* 1, *discussed.*

Payments made by a tenant for life under a will of real estate held to be sufficient admission of the liability of the real estate, and sufficient evidence to keep alive a simple contract debt of the testator.

Thomas Hollingshead, the testator, was at the date of his will possessed of certain freehold estate subject to mortgages thereon for £700, and also indebted to his brother, James Hollingshead, in a sum of £400, secured by promissory note, with interest at four and a half per cent.

By his will, dated September, 1870, the testator bequeathed to his wife, Mary Ann Hollingshead, absolutely, all his personal estate, subject to the payment of his debts, funeral and testamentary expenses, and devised all his real estate to his said wife for her life, subject to any mortgages or charges thereon which might be subsisting at his death, with divers remainders over in favour of his children, and appointed his wife and Joseph Webster executrix and executor of his will.

The testator died in April, 1871, and his will was duly proved by both the widow and Joseph Webster, the personal estate being sworn under £600.

The widow entered into possession of the testator's real and personal estate, and continued in such possession till her death. From the testator's death to her own, she regularly paid to James Hollingshead, and afterwards to his executors, the interest on the £400, but there was no evidence, from the form of the receipts or otherwise, to show whether these payments were made by her in her character of executrix or as tenant for life. Joseph Webster never received any portion of the assets, and beyond proving the will never took any part in the administration of the testator's estate. The widow died in February, 1884, having appointed Joseph Webster her executor, but as her estate was insolvent he had never proved her will.

In May, 1885, the mortgagees sold the freeholds under their power of sale, and, after having satisfied their own mortgage debt and costs, paid the surplus, amounting to £397, into court under the Trustee Relief Act.

In April, 1886, the executors of James Hollingshead commenced the present action against Joseph Webster and the devisees under the testator's will, claiming as creditors for £400, to have the real and personal estate of the testator administered. There was also pending a summons on behalf of the devisees for payment out to them of the fund in court, and also another by the executors of James Hollingshead for payment out to them. It was admitted that the plaintiffs in the administration action were the only creditors

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

of the testator. It was also admitted that there was no personal estate of the testator outstanding. There was no direct evidence that the widow received any part of the testator's personal estate, but the judge came to the conclusion that the just inference was that she did receive some portion of it, though there was no evidence to show how much she received or how she applied what she did receive. There was no evidence as to the testator's funeral expenses, or as to his debts other than the £400 debt.

All the summonses now came on for hearing together, but all accounts and inquiries as to these matters, and generally as to the administration of the testator's estate, were waived at the bar; and upon these facts, as admitted, the only questions argued were as to the effect of the payment of interest by the widow during her life on the simple contract debt of £400, and who was entitled to the fund in court representing the testator's real estate.

Maclean, Q.C., and *Tyssen*, for the plaintiffs, the executors of James Hollingshead, cited *Roddam* v. *Morley*, 5 W. R. 510, 1 De G. J. & S. 1; *Fordham* v. *Wallis*, 1 W. R. 118, 10 Hare, 217; *Boatwright* v. *Boatwright*, 22 W. R. 147, L. R. 17 Eq. 71.

Farwell, for Webster, in support of the contention that the payments were made by the widow in her character of executrix only, cited *Scholey* v. *Walton*, 12 M. & W. 510; *Tulloch* v. *Dunn*, 1 Ry. & M. 416; *Atkyns* v. *Tredgold*, 2 R. & C. 23; *Brocklehurst* v. *Jessop*, 7 Sim. 438; *Winter* v. *Innes*, 4 Myl. & Cr. 111; *Wainman* v. *Kynman*, 1 Ex. Rep. 118; *Tippetts* v. *Heane*, 1 Cr. M. & R. 282; 9 Geo. 4, c. 14; *In re Gale*, 31 W. R. 538, 22 Ch. D. 820; *Putnam* v. *Bates*, 3 Russ. 188.

Swinfen Eady, for the devisees.

Webb, for legatees.

Maclean, Q.C., replied.

Cur. adv. vult.

Jan. 30.—CHITTY, J., after stating the facts and admissions as set out above, continued:—The first question which arises is, in what character the widow paid the interest. The receipts taken are silent on the subject. It was argued for the defendants that she paid in her own right, but this is untenable; she was under no personal liability. She made the first payment in April, 1871, about a fortnight after the testator's death. It was then argued for the defendants that she made the payments in her character of executrix only. But I think the just inference is that she made the payments in her character of tenant for life of the real estate as well as in her character of executrix. She paid the interest because she was in possession of assets of the testator; there is no sufficient reason for attributing the payments to her character of executrix only; on the contrary, the case, on the facts, is, if anything, stronger for saying that she paid in her character of tenant for life of the real estate of which she was in possession, and which has proved more than sufficient for payment of the mortgage debt; whereas it is not shown that she was in possession of personal estate applicable to the payment of the interest. In *Fordham* v. *Wallis* Sir George Turner, upon facts similar to the present, considered that the payments ought to be attributed to both characters.

The last payment of interest was made by the widow in September, 1883, and the present proceedings by the executors of the creditor were commenced within six years after the last payment. The defendants, the persons entitled to the testator's real estate in remainder after the widow's death, set up the Statute of Limitations (21 Jac. 1, c. 16) as a bar to the claim, and contend that the proceedings ought to have been commenced within six years after the testator's death, and that they are not affected by the payments of interest made by the tenant for life. The question which then arises is as to the effect against the remainderman of payment by a tenant for life of interest on a simple contract debt carrying interest.

Strange to say, the point does not appear to have been decided. *Roddam* v. *Morley* was the case of a debt on a specialty by which the testator's heirs were bound. There it was decided by Lord Cranworth, with the assistance of two common law judges, that the effect of payment of interest on the specialty by the tenant for life was to keep the debt alive and set the action free as against the remainderman. This decision is not a conclusive authority in favour of the plaintiffs, because the exact point there decided turned upon different statutes from those which apply to the present case. But the general observations of the Lord Chancellor, and the course of reasoning pursued in his judgment, have an important bearing on the question before me.

The statutes which apply to the present case are the statute 3 & 4 Will. 4, c. 104, and the Statute of Limitations of James; the arguments at the bar extended also to Lord Tenterden's Act (9 Geo. 4, c. 14) and the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97).

The statute 3 & 4 Will. 4, c. 104, enacts that where (as in the present case) there is no charge of debts, the real estate of a deceased debtor "shall be assets to be administered in courts of equity for the payment of the past debts of such person, as well debts due on simple contract as on specialty," and that "the devisees of such debtor shall be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as" the heirs or devisees of any person dying seised of freehold estates were, before the passing of the Act, liable to in respect of such freehold estates at the suit of creditors by specialty in which the heirs were bound. The Act contains a proviso giving a priority to specialty creditors, which has since been abolished by statute. The general effect of the Act is plainly to place the simple contract creditors and specialty creditors on the same footing in regard to the real estate of the debtor, save that the specialty creditors have a priority.

It was suggested, rather than argued, for the plaintiffs that the effect of this statute of Will. 4 was, with the exception only of the priority in the proviso, to place simple contract creditors on the same footing, in regard to real estate, as specialty creditors, so as to confer on simple contract creditors the benefit of the same Statutes of Limitations as those which relate to specialties. It is enough to say that the suggestion cannot be maintained.

The Statute of Limitations, then, which applies to the present case is that of James. As is well known, that statute required the action for the recovery of a simple contract debt to be brought within six years "next after the cause of action." It contained no provision as to acknowledgments, or part payment of principal, or payment of interest. But there has been grafted on this statute a series of judicial decisions as to the effect of acknowledgments and payments to take the case out of this statute. Under these decisions part payment of principal and payment of interest stand upon the same footing. Payment of interest is regarded as an acknowledgment of the debt, and from the acknowledgment a promise to pay the debt may, and ought, to be implied (see the judgment of Lord Tenterden in *Tanner* v. *Smart*, 5 L. J. K. B. 218, and of Sir George Turner in *Fordham* v. *Wallis*). That was one way of stating the result of the decisions on acknowledgments or part payments. Another was that the acknowledgment was sufficient evidence of a new or continuing contract (see Lord Tenterden's Act, s. 1). Lord Tenterden's Act required that a simple acknowledgment should be in writing; it dealt only with simple acknowledgment by words as distinguished from the acknowledgment of the

debt by part payment of principal or payment of interest, and it expressly excepted such payments from its operation. The Mercantile Law Amendment Act, 1856, dealt with part payment of principal and part payment of interest, but only with regard to co-contractors and executors or administrators. The short effect of the enactment as to executors is that no executor shall "lose the benefit of the" statute of James "so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money by any other" executor (see section 14). The Mercantile Law Amendment Act and Lord Tenterden's Act are both silent on the subject of any such payment made by a tenant for life of the real estate of a deceased testator, and these Acts, therefore, have no direct bearing on the question to be decided.

An elaborate argument was delivered at the bar as to the effect of payment of interest on a simple contract debt by one only of two executors in regard to the other executor and the testator's personal estate. But as no relief is asked against Webster, the surviving executor, and as all administration accounts or inquiries of any kind in reference to the testator's personal estate are waived at the bar, it is not necessary to decide any question as to the effect of the payments by the widow as executrix, either in regard to Webster or the testator's personal estate. The only ground for entertaining the general arguments on these points is the bearing they may have in ascertaining the effect of the widow's payments in her character of tenant for life. I will briefly state the nature of these arguments. It was said that the payment of interest by one executor affected him only, and did not in any way affect his co-executor, and the argument was pushed to the extreme length of saying that the payment involved the executor who made it in a personal liability to pay the debt. Therefore it was urged that, where one of two executors, having assets in his hand, applies those assets, so far as they extend, in payment of interest on a simple contract debt, the result is that, after the lapse of six years from the testator's death, not only is the co-executor absolved, but the testator's personal estate, whether in the hands of the co-executor or outstanding, is exempted from all liability to pay the debt, and that the creditor's sole remedy is against the executor personally who made the payment. This argument was founded on the language of the 14th section of the Mercantile Law Amendment Act. But it appears to me that proper effect may be given to every word in that enactment without producing so extraordinary a result. Some reasonable interpretation may be put on the words "so as to be chargeable" which would stop short of such a conclusion; as, for instance, by holding that the co-executor who has not paid is not to be personally chargeable as for a devastavit in paying over to beneficiaries assets which have come to his hands. But I dissent altogether from the proposition that the executor by whom the payment is made is thereby involved in any personal liability. The promise to pay the debt arising from the payment of interest, whether such promise is an inference of fact or an implication of law, is a promise to pay as executor—that is, out of the personal assets of the testator. The inference or implication must be consistent with the facts from which it is drawn or raised, and it would be wholly inconsistent with the facts to hold that in such a case as that supposed the executor has incurred any personal liability. But it is unnecessary to pursue these matters any further.

In the case before me the plaintiffs are suing on a legal demand or debt for a remedy which can be granted only by a court of equity, and for a remedy against property of the deceased debtor which can be reached only by a court of equity. The statute of 3 & 4 Will. 4, c. 104, already cited, does not confer on the simple contract creditor any right at law against the real estate of the deceased debtor, but makes such real estate assets to be administered in courts of equity, and confers a remedy by suit in equity only. In regard to demands to which the statute of 21 Jac. 1, c. 16, applies, courts of equity undoubtedly follow the law. But there have not been, and indeed there cannot be, any decision in a court of law as to the effect of payment of interest on a simple contract debt by a tenant for life of real estate. In determining this question a court of equity ought to follow the analogy of the decisions at law, so far as they are applicable in relation to acknowledgments and part payment of principal or payment of interest, but there are equitable considerations also which must be carefully attended to. Now what is the duty and what are the powers of a tenant for life in possession of real assets of a deceased testator? His duty, as was pointed out by Lord Cranworth in *Roddam* v. *Morley*, is to keep down the interest on the debt, and nothing more. He has no power to sell the real estate in order to pay the debt. By discharging his duties to pay the interest he relieves the remainderman from the burden of interest. It would be absurdly unjust to hold that, from the performance of this duty, a personal promise on his part to pay the debt ought to be inferred. I reject this argument on the part of the defendants. The right principle to adopt is, that so far as the real estate is concerned, there is no one else but the tenant for life to pay the interest; that in making such payment he represents the whole estate; that the payment is an admission of the liability to the debt affecting the real estate of which he is in possession; it is sufficient evidence for a continuance of the testator's contract to pay the debt, or (if it be necessary to have recourse to the somewhat subtle doctrine of a promise to pay), it is a promise to pay out of such real estate which he, as the person in possession of such real asset, is competent to give on behalf of the real asset generally and so as to bind those who take the remainder. This places the law, in regard to payment of interest on a simple contract by a tenant for life, on the same footing as payment of interest on a specialty debt. The decision in *Roddam* v. *Morley* turned principally on the 5th section of the 3 & 4 Will. 4, c. 42. That section says nothing about the effect of payment of interest by a tenant for life, but in dealing with the enactment and in arriving at the conclusion that the effect was to keep the debt alive as against the remainderman Lord Cranworth founded his judgment to a considerable extent on a consideration of the position and duty of a tenant for life. In *Coope* v. *Cresswell*, 15 W. R. 242, L. R. 2 Ch. App. 112, Lord Chelmsford stated he was unable to concur in the reasoning which led to the ultimate decisions in *Roddam* v. *Morley*. I apprehend it was not competent for him to overrule the decision in *Roddam* v. *Morley*, nor, indeed, does he purport so to do. But, while not concurring with the reasoning in *Roddam* v. *Morley*, he adds that it is unnecessary for him to consider whether the position of tenant for life and remainderman—are not so unlike in interest that payment by the one might not be regarded as an acknowledgment of the debt by the other; but he adds that it would undoubtedly have been the case if the bond debt had been a charge upon the land. By this I may observe that neither in *Roddam* v. *Morley* nor in the case before me was or is the debt a charge upon the land; a debt or specialty on which the lands are bound does not create, either at law or in equity, a charge; the land is merely assets in the hands of the heir or devisee for payment of the specialty debt, just as the land is, since the passing of the 3 & 4 Will. 4, c. 104, assets for payment of the simple contract debt. In this respect the case before me stands on the same footing as *Roddam* v. *Morley*. In my opinion the observations of Lord Chelmsford have not weakened the effect of the course of reasoning adopted by Lord

Cranworth so far as it bears upon the question which I have to decide.

The only other authority which requires any distinct notice on this point is *Fordham* v. *Wallis*, already mentioned, which was decided before *Roddam* v. *Morley*. The defendants, on an examination of the terms of the decree, claimed this case as an authority in their favour. But whatever may have crept into the decree, it is clear that Sir George Turner did not intend to decide the question whether payment of interest by a tenant for life would keep alive the debt against the fee; he states expressly in his judgment that he abstained from giving any judgment on that point.

The result is, that the plaintiffs are entitled to have the £397 applied in payment of this debt.

Solicitors for the plaintiffs, *Scott & Co.*, for *Rogers & Jessop*, Sleaford.

Solicitors for the plaintiffs, *Pattison, Snow, Blossam, & Kinder; Page & Scorer; Swann & Co.*

Chan. Div.
North, J.

Feb. 9.

In re Fleck.
Colston *v.* Roberts. (*a.*)

Will—Construction—Mortgage debt—Locke King's Act (17 & 18 *Vict. c.* 113)—*Amendment Act* (30 & 31 *Vict. c.* 69).

A testator by his will directed his executors to appropriate the moneys to arise from certain policies on his life, in payment of his private debts, not being trade debts, and funeral and testamentary expenses, and bequeathed his residuary personalty, subject to the payment of his trade debts, which he declared should be a charge on his personal estate, to his son, and devised his real estate to his daughter.

At the date of his death he owed a debt admitted to be a trade debt to his bankers, to secure which he had deposited the title deeds of his real estate.

Held, that the provision in the will as to the payment of trade debts amounted to a declaration of intention contrary to the rule established by Locke King's Act, and that the trade debt was payable out of the testator's personal estate, and not out of the real estate, the title deeds of which were deposited with the bankers to secure the debt.

Adjourned summons.

J. T. Fleck, a twine manufacturer, by his will, after giving certain legacies and annuities, and after mentioning two sums of £999 19s. and £1,000 respectively, to arise from two policies on his life, with bonuses, proceeded as follows:—"I direct my executors to receive the said moneys and appropriate the same in or towards payment in due course of all my private debts, including my promissory notes or other engagements whatsoever which I may have entered into previous to my death, not being trade debts, and all my funeral and testamentary expenses, and the legacies hereby bequeathed, and the surplus (if any) of such moneys, after making such payments thereout as aforesaid, shall be placed to the credit of my current account with Messrs. William Williams, Brown, & Co., of Leeds." He devised his real and residuary personal estate to trustees upon trust as to his real estate for the benefit of his daughter and her children, and then proceeded:—"And as to all the residue of my personal estate, after and subject to the bequests and provisions in regard thereto hereinbefore contained, and to the payment of my trade debts (which I hereby declare shall be a charge upon my personal estate), I will and direct that the same, including the whole of the twine machinery in my said mill, but not the main shafting (which, together with engine, boilers, and other fixtures, shall, as I have hereinbefore directed, form part of, and be deemed to belong to, my real estate), and the stock-in-trade of yarns, twines, and other trade effects, together with all books, debts, and other matters and things connected with my said trade (over and beyond what is needful for payment of all my trade debts) shall be held in trust for my said son Henry Arthur Fleck."

The testator afterwards overdrew his account at his bankers, Messrs. William Williams, Brown, & Co., and at their request deposited with them the title deeds of his real estate as security for the overdraft.

The testator died in 1887. At that time the overdraft amounted to £4,900 1s., as appeared from the books kept by the testator at his mill; and the title deeds remained in the possession of Messrs. William Williams, Brown, & Co.

This present summons was taken out by the trustees for the determination of the question whether the debt due to Messrs. William Williams, Brown, & Co., which was admitted to be a trade debt, was payable out of the testator's real estate, the title deeds of which were deposited with them, in accordance with Locke King's Act, or whether the provision in the will of the testator, with respect to his trade debts, amounted to a contrary intention that the Act should not apply, so that the debt was payable out of the testator's personal estate, notwithstanding the provisions of the statute 30 & 31 Vict. c. 69.

The statute 30 & 31 Vict. c. 69 enacts, by section 1, that "a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the said Act, unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate."

Vernon Smith, for the trustees, stated the facts.

Cookson-Crackanthorpe, Q.C., and *Archibald Brown*, for the testator's daughter.—The provision in the will of the testator as to the payment of his trade debts out of his personal estate shows an intention that the debt should be paid out of his personal estate, and not out of the real estate, the title deeds of which were deposited as a security for it: *Eno* v. *Tatham*, 11 W. R. 475, 3 De G. J. & S. 443; *Mellish* v. *Vallins*, 2 J. & H. 194.

T. R. Warrington, for the testator's son.—The provision of the testator with respect to the payment of his trade debts only amounts to a direction that the debts shall be paid out of his personal estate, and comes within section 1 of statute 30 & 31 Vict. c. 69. The fact that two classes of debts are directed to be paid out of two different parts of his personal estate makes no difference. There is no reference to the payment of any mortgage debt out of the personal estate. The debt to the bankers must be paid out of the real estate, the title deeds of which were deposited with them: *Nelson* v. *Page*, 17 W. R. 27, L. R. 7 Eq. 25; *In re Rossiter*, 28 W. R. 238, 13 Ch. D. 355.

North, J. [after reading the 1st section of 30 & 31 Vict. c. 69, proceeded:—] It is not necessary under that statute that the debt should be referred to as a mortgage debt, but it must be sufficiently described to identify it as the particular debt which happens to be secured by mortgage. If a debt is described as the debt which the testator owes his banker, and that debt is, in fact, secured by mortgage, there would not, by

(*a.*) Reported by J. Trustram, Esq., Barrister-at-Law.

reason of that fact, be the less an expression of a contrary intention. The words of the Act only require that the debt shall be specifically described and identified in some way, not that it shall be described as a mortgage debt; but anything that will identify it will be sufficient. A general direction that all debts shall be paid out of the personal estate is not sufficient. There is not here such a general direction. In the present case the testator provides very carefully for the payment of different debts out of different parts of his estate. His private debts are to be paid out of the proceeds of certain policies; and he disposes of his residue "after and subject to the bequests and provisions in regard thereto hereinbefore contained, and to the payment of my trade debts (which I hereby declare shall be a charge on my personal estate)." That is a clear direction that the trade debts are to be paid out of a particular fund, and that it is only the surplus which is to go for the benefit of the son. The debts, therefore, are divided into two classes, which is an exhaustive division. It has been suggested that it is not exhaustive, but there is no debt which is neither a trade debt nor a private debt, but which is a mortgage debt. The fact that the testator had received large sums of money for his trade, and that he gives security to his bankers by way of deposit, does not make that which is a trade debt other than a trade debt. Before the deposit the debt was a trade debt, and can it be said that the testator's intention is changed by his making the deposit? In my opinion, the last thing he intended was to take the secured debt out of the class of trade debts. It seems to me that, in this case, one set of the debts was charged on a particular part of the personal estate, and the other portion of the debts was charged on another part of the personal estate, and there was some personal estate on which neither set of debts was charged. Of course, the incidence of debts by operation of law in case the funds provided should not be sufficient would not be affected. The testator has not made any general direction that his debts are to be paid out of his personal estate, but he has made a particular specific provision which takes the case out of the Act, and has, by necessary implication, shown an intention that the Act shall not apply.

Solicitors, *Bell, Bredrick, & Gray; Pitman & Sons*, for *Booth & Booth*, Leeds; *Torr, Janeways, & Co.*, for *Evan M. Jones*, Leeds.

Chan. Div.
Stirling, J. } March 1, 6, 21.

Brooking *v.* Maudslay, Son, & Field. (*a.*)

Marine insurance—Unseaworthiness of ship—Innocent shippers—Action by underwriters to restrain proceedings on policy.

In an action by underwriters for an injunction to restrain policyholders from taking any proceedings with reference to a policy of insurance, on the ground that the underwriters had an admittedly good defence to any action that might be brought on such policy,

Held, that an injunction ought not to be granted.

Action.

This was an action by Marmaduke Hart Brooking, on behalf of himself and all other the underwriters on a policy of insurance, dated in February, 1884, on machinery carried by the steamship *Elephant*, on a voyage from London to Portsmouth, against the insurers, Messrs. Maudslay, Son, & Field; and by the re-amended statement of claim the plaintiff asked a declaration that the said policy was void, and that it might be delivered up to be cancelled; or, alternatively, a declaration that the policy was not binding on the plaintiff and the others on whose behalf he sued, and that they and he were discharged from all liability for loss on the voyage; and an injunction restraining the defendants from taking any proceedings on the policy.

The circumstances out of which the action arose were these:—

The defendants were engineers carrying on business at Lambeth.

In January, 1884, they were desirous of procuring certain machinery, which they had made for one of her Majesty's ships, to be conveyed from London to Portsmouth; and for this purpose they entered into a charter-party, dated the 8th of January, 1884, with one Scott, the owner of the steamship *Elephant*, whereby it was agreed that the machinery in question, which weighed about 867 tons, should be carried by that vessel from Millwall Dock to Portsmouth Dockyard in consideration of a lump sum of £600 as freight. The machinery was to be loaded, stowed, and discharged by the defendants, and was to be carried in two voyages, if the vessel could take all, the owner having an option of making a third voyage or supplying another vessel to take the balance, if any.

The vessel, loaded with 422 tons of the machinery, left Millwall Dock on the 28th of January, 1884, and reached Portsmouth in safety on the 3rd of February.

On the 14th of the same month she again set sail from Millwall Dock carrying the rest of the machinery, but on this occasion was lost with all hands on board.

On the 25th of January the defendants, through their insurance broker, procured an insurance to be effected on the machinery which constituted the cargo on the second voyage, to the amount of £30,000, and on the 13th of February the amount was increased to £40,000; and a slip was initialled by the underwriters on those days.

The policy in question was dated the 15th of February, and included the whole £40,000, and was made out in accordance with the slip. The risk included "risk of barges, lighters, &c., from assured premises and while waiting shipment on land or water."

Upon the occurrence of the loss some of the underwriters paid, but a large majority disputed their liability.

An inquiry into the circumstances attending the loss of the vessel took place in the Wreck Commissioner's Court, and the judgment on that inquiry was given on the 14th of May. The Commissioner found that the *Elephant* had been sent to sea in an unseaworthy condition, and that Scott, the owner, and he alone, was responsible for the manner in which the ship went to sea.

The defendants, upon this, applied to the underwriters to pay, and a few did so, but a large majority still refused to do so; and on the 23rd of May the present action was brought.

The original statement of claim was delivered on the 24th of May, and alleged that, by reason of the weight of the machinery, the mode of stowage, the weight intended to be carried on the deck, and the fact that part of the machinery would be carried in the hatches, rendering it impossible to put on the hatches, the cargo was of a special and dangerous character, as the defendants and their agents well knew, or ought to have known, that they failed to communicate these facts to the plaintiffs; and (paragraph 4) that the vessel, with the machinery on board, set sail "in a grossly unseaworthy state"; and they claimed a declaration that the policy was void, and that it might be delivered up to be cancelled.

The defendants, in the first instance, met this by an application to strike out paragraph 4, relating to unsea-

(*a.*) Reported by W. Ivimey Cook, Esq., Barrister-at-Law.

worthiness, and upon this application an order was made giving the plaintiffs liberty to amend.

The plaintiffs accordingly, on the 6th of August, amended by alleging that the policy was void, "or the underwriters discharged from liability thereunder," retaining their former allegation that "the defendants nevertheless claim and intend to make use of the same and treat it as a valid and existing contract on the part of the plaintiff, and those on whose behalf he sues, and adding a claim for the alternative declaration mentioned above."

To this amended statement of claim the defendants put in a defence in which (as also amended) they admitted that the ship was unseaworthy, but stated that the unseaworthiness was owing to her being overladen, and was not known to them until after the ship had been lost, and they wholly denied the allegations of concealment and non-communication of facts. And they further alleged that the overloading did not take place until after the slip for the policy of insurance was initialled, so that the question of overloading did not arise until after the contract was entered into; and they asserted that the policy was valid, and had not been avoided; and, further, that although the vessel was unseaworthy, yet, according to the universal practice that had hitherto prevailed with all leading underwriters at Lloyd's, the plaintiff and the other underwriters of the policy were bound in honour, though not in law, to pay, but the defendants denied that they had claimed or intended to deal with or make use of the policy as a valid existing policy, or that they even threatened legal proceedings.

The plaintiffs then put in a reply in which they joined issue generally, but stated that they "did not proceed further in this action with the charges in the statement of claim as to concealment and non-communication by the defendants of material facts."

On an application of the defendants to strike out the reply, an order was, on the 15th of July, 1886, made, that so much of the statement of claim as contained charges of concealment and non-communication by the defendants of material facts be struck out, and that the plaintiff should pay the defendants the costs of the motion and also their costs occasioned by the introduction of such charges.

The pleadings were accordingly amended and the action now came on for hearing.

Sir Henry James, Q.C., Graham Hastings, Q.C., Gorell Barnes, Q.C., and *Hurst*, for the plaintiff.

Sir R. E. Webster, A.G., Byrne, Q.C., and *R. M. Bury*, for the defendants.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

March 21.—Stirling, J., after stating the facts and reading the pleadings, continued:—On these pleadings the action has been brought to trial. At the trial it was admitted by counsel for the plaintiffs that the policy was not void, and that judgment for cancellation cannot be given; but they contended that they were entitled to relief in accordance with the alternative prayer in the statement of claim. The defendants, on the other hand, admit that the unseaworthiness of *The Elephant* constitutes a good defence to the action at law on the policy; but they deny the right of the plaintiffs to the relief claimed by them or any other relief. This question formed the main subject of argument before me. A correspondence between the legal advisers of the plaintiffs and defendants was, however, put in evidence, from which it appears that the real issue between the underwriters and the defendants is one which is not and cannot be raised in this action. It is of this nature. It is the practice of underwriters, who may have a good defence to an action on a policy founded on the unseaworthiness of a vessel, to pay insurers who are "innocent shippers." Whatever may have been the case at first, it is not now asserted by the underwriters that the members of the defendants' firm are personally to blame for the condition in which the vessel left for sea; but it appears to be alleged that through their servants or agents they are in some way implicated in the unseaworthiness, and the real question between them is whether Messrs. Maudslay are innocent shippers and entitled to the benefit of the practice to which I have referred. This issue cannot be tried in this action, nor, indeed, so far as I can see, by any legal tribunal whatever. It must be decided, if at all, by some court of honour to be selected by the parties interested.

Most certainly it cannot be affected one way or the other by the judgment I am about to pronounce. My decision depends upon the dry and technical (though not unimportant) question whether (regard being had to the rules which govern the procedure of the court) the plaintiffs are entitled to the relief for which they ask at the bar. The case stands thus. The defendants are entitled to the benefit of a policy of insurance on which they may sue at law. The plaintiffs allege and the defendants admit by the pleadings that the plaintiffs have a valid defence to any action which may be brought at law on the policy. The defendants say that they have not threatened legal proceedings, but they have declined to give an undertaking not to take any, and they abstain from stating whether it is their intention to take proceedings or not. Under these circumstances, can the underwriters bring the defendants before a court of equity and obtain a declaration and injunction according to the second alternative of the statement of claim? If the policy were liable to be completely avoided—as, for example, if it had been obtained by misrepresentation—a court of equity would have jurisdiction to direct the delivery up and cancellation of the instrument. This is clearly shown by the case of *Duncan* v. *Worrall*, 10 Price, 31. On the other hand, where the policy cannot be avoided, but there is a good legal defence to an action upon it (as, for example, unseaworthiness or deviation), a court of equity cannot make a decree for cancellation: *Thornton* v. *Knight*, 16 Sim. 509, where the Vice-Chancellor in a few words draws the distinction between the two classes of cases. He says:—"If the policy, though good on the face of it, had been proved to be void on the ground that the representation made by the insurers when they effected it, as to the seaworthiness of the ship, was false, I could have interfered, for then a case of fraud would have been made out against the insurers. But I cannot interfere on the mere ground of deviation, unless this court has a concurrent jurisdiction with a court of law, in all cases in which relief is sought against instruments like the one in question. That, however, is not so; and therefore I shall dismiss the bill with costs." In that case, however, an action at law had been brought, and the decision does not cover the question before me—viz., whether the court can make a declaration that the underwriters are not liable on the policy, and grant an injunction against future proceedings at law.

Prior to the Judicature Acts a plaintiff coming into equity to restrain proceedings at law was bound to show some equitable ground for relief. He had not, as a rule, a right to come into a court of equity to restrain proceedings in a court of law if he had a good defence at law. If authority for this is wanted I may refer to the cases of *Hardinge* v. *Webster*, 8 W. R. 71, 1 Drew. & Sm. 101, and *Kemp* v. *Tucker*, 21 W. R. 470, L. R. 8 Ch. 369. The present plaintiffs come before the court without alleging any case which would give a court of equity jurisdiction, either exclusive or concurrent, with the courts of law. The sole ground on which they claim the relief is that, although there is a good legal

defence to any claim by the defendants against them, that defence depends on extrinsic facts the evidence of which may not be forthcoming at all times and under all circumstances. The existence of such evidence is not alleged in the statement of claim nor proved at the trial; if it had been it would seem to me the appropriate remedy would be found in an action for the perpetuation of testimony rather than in proceedings such as the present. Upon this I may refer to two authorities. In the case of *Angell* v. *Angell*, 1 S. & St. 83, Sir John Leach lays down the law as to the cases in which the jurisdiction of courts of equity to perpetuate testimony is exercised. He says, page 89:—"If it be possible that the matter in question can, by the party who files the bill, be made the subject of immediate judicial investigation, no such suit is entertained. But if the party who files the bill can, by no means, bring the matter into present judicial investigation . . . there courts of equity will entertain such a suit, for, otherwise, the only testimony which could support the plaintiff's title might be lost by the deaths of his witnesses. Where he is himself in possession the adverse party might purposely delay his claim with a view to that event." Obviously it did not occur to Sir John Leach that a person in possession of real estate and threatened with an action of ejectment to which he had a good legal defence might file a bill in Chancery to establish that defence and obtain an injunction to restrain proceedings at law. The other case is *Earl Spencer* v. *Peek*, 15 W. R. 478, L. R. 3 Eq. 415, where Lord Romilly decided that the pendency of an action in which the issue could be tried was an answer to a bill to perpetuate testimony.

It could not, therefore, have been his opinion that a person threatened with proceedings at law to which he had a good legal defence could bring a suit in equity to restrain them on the ground that his evidence in support of his case might be lost. On principle it is difficult to see why the defendants, having a claim which they may assert in a court of law at any time within the period fixed by the Statute of Limitations, should be compelled to try the issue on which the validity of that claim depends in a court of equity, and at another time than that which they may select as the most convenient for themselves. The authorities mainly relied on by the plaintiffs were the judgment of Lord Eldon in *Bromley* v. *Holland*, 7 Ves. 3, and certain paragraphs in the judgments of Lord Cottenham in *Simpson* v. *Lord Howden*, 3 My. & Cr. 97, see p. 102, and of Lord Selborne in *Hoare* v. *Bremridge*, L. R. 8 Ch. 22, see p. 26, 21 W. R. Dig. 113. These authorities are no doubt of great weight, but they relate to the cancellation of void instruments (as is shown by the case of *Thornton* v. *Knight*, already cited), and do not necessarily apply to cases where, as here, the instrument is not void or voidable, and relief by way of cancellation cannot be given. In *Cooper* v. *Joel*, 27 Beav. 313, the defendants claimed the benefit of a guarantee which was held by Lord Romilly, M.R., to be invalid, although the invalidity did not appear on the face of it, and his lordship thus dealt with it. He said (at pp. 319, 320): "In that state of circumstances I think that the defendants could not succeed at law, and that this would have been a good defence to the action. But as the case which is made out by the defendants, upon the affidavits, confessedly or professedly is, that the proceedings at law are only suspended, as they say, 'for the present,' their argument being that they may sue again upon a fresh instalment under the guarantee becoming due, I am of opinion (referring again to the principle laid down by Lord Cottenham in the case I have referred to) that as lapse of time might deprive the plaintiffs chargeable upon this document of the means of defence, and as the defendants may hold it, and profess to hold it, for the purpose of suing at a future time, this court ought to interfere and direct it to be delivered up."

This appears to be an authority in favour of the plaintiffs. The case, however, was brought on appeal (1 De G. F. & J. 240, 8 W. R. Ch. Dig. 22) before the Lord Chancellor, Lord Campbell. [His lordship read the judgment at pp. 244—246, and continued:—] The judgment of the Lord Chancellor appears to me to amount to a reversal of the decision of the Master of the Rolls, so far as it is based upon any principle applicable to the present case, and that, too, although cancellation, and not an injunction, was the remedy sought. If, in the present case, the argument on behalf of the plaintiff is well founded, it appears to me that any person liable to have a claim made against him at law and having a good defence to it may bring the matter before a court of equity in the same way as the present plaintiff does; and, indeed, the case was put as high as this by the learned counsel of the plaintiff in the course of his reply. Such a right appears to be negatived by the words of the Lord Chancellor, Lord Campbell, in *Cooper* v. *Joel*. He said (p. 245): "If that was the rule, hardly any dispute could arise upon a contract"—or, indeed, as to any other legal right—"which might not be drawn into court of equity." In my opinion no such rule exists. In my judgment, therefore, the claims of the plaintiffs are not warranted by principle or supported by authority. I think that this action is in the nature of an experiment, and as the experiment fails I see no reason why the costs should not follow the event.

Action dismissed.

Solicitors for the plaintiff, *Walton, Bubb, & Johnson.*

Solicitors for the defendants, *Hopgood, Foster, & Dawson.*

Chan. Div. Kekewich, J. } May 8.

Webb v. Jonas. (a.)

Trustee and cestui que trust—*Lending money on contributory mortgage—Liability of trustee.*

The trustees of a marriage settlement had power to invest the funds "in their or his name or names" on (amongst other investments) real securities. The trustees, being two in number, joined with the two trustees of a will, one of them being a trustee both of the settlement and the will, in advancing £2,000 on a contributory mortgage, the trustees of the settlement advancing £1,500, those of the will £500.

The security subsequently depreciated in value, and an action was brought by the cestui que trust *under the settlement claiming a declaration that the trustees of the will had committed a breach of trust.*

Held, that, by advancing money on a contributory mortgage, the trustees had not complete control over the mortgaged property, and were liable to make good the deficiency in value, as such an investment was not authorized.

Trial of action.

By a post-nuptial settlement of the 5th of October, 1852, and made between George Webb and Frances his wife of the one part, and S. Webb and William Bennett Freeland, as trustees, of the other part, it was declared that the trustees should stand possessed of the moneys to arise from the sale of certain hereditaments upon trust to invest the same in their or his names or name on Government, Parliamentary, or real securities

(a.) Reported by C. H. F. Christie, Esq., Barrister-at-Law.

England or Wales, or on the security of the bonds or debentures of any railway company, or the security of settled personalty, with power to vary such investments in such manner as they should think fit, and to pay the income to the said Frances Webb and her children as therein mentioned.

The plaintiffs were two of the children of Frances Webb, the first plaintiff being her administratrix.

W. Bennett Freeland was also trustee, with B. G. Giblin, of the will of one Henry Giblin, who died in 1874.

In 1875 Henry J. C. Giblin, a son of Henry Giblin, borrowed on mortgage of a freehold estate a sum of £2,000 from the trustees of his father's will and the trustees of the settlement already referred to. The money was advanced, as to £1,500 by the trustees of the settlement, being the exact amount in their hands as such trustees, and as to £500 by the trustees of the will, and was secured by a mortgage deed dated the 2nd of June, 1875, and made between H. J. C. Giblin of the first part, S. Webb and W. B. Freeland of the second part, and B. G. Giblin and the said W. B. Freeland of the third part, whereby the lands were conveyed to the mortgagees and their heirs to such uses as the said S. Webb and W. B. Freeland, as mortgagees to the extent of £1,500, and the said B. G. Giblin and W. B. Freeland, as mortgagees to the extent of £500, should jointly or separately as such several mortgagees, and to the extent of their several debts, and either by way of realizing their mortgage security and obtaining repayment of their principal and interest moneys respectively, or by way of release and re-assurance of the mortgaged hereditaments, by any deed or deeds to be executed, &c., direct or appoint, and, in default of such appointment, to the use of the mortgagees, their heirs and assigns, for ever. The proviso for redemption provided that, on repayment of the respective principal sums of money and interest, or either of them, the hereditaments should be re-assured by the persons or person who should have received such principal and interest moneys.

By a deed of appointment, to which the mortgagor was not a party, indorsed on the mortgage, dated the 25th of October, 1884, and expressed to be made between W. B. Freeland and B. G. Giblin of the first part, J. G. Bellingham of the second part, the said W. B. Freeland of the third part, and the said W. B. Freeland and B. G. Giblin of the fourth part, the legal estate in the mortgaged premises was vested in W. B. Freeland as to three-fourth parts, and in W. B. Freeland and B. G. Giblin as to the remaining fourth part. The value of the mortgage security having fallen, the plaintiffs brought this action for a declaration that the investment above mentioned was a breach of trust, and claiming repayment of the £1,500.

The defendants were the executors of S. Webb and W. B. Freeland.

Barber, Q.C., and *Bardswell*, for the plaintiffs.—There is no direct authority that, in the absence of an express power in the instrument, trustees are justified in lending on a contributory mortgage. In this case they have committed a breach of trust: Lewin on Trusts, 8th ed., p. 331; Davidson's Conveyancing, vol. 3, p. 40, 3rd ed. By lending on this kind of security they lose their proper and absolute control over the trust-moneys.

Palmer v. *Earl of Carlisle*, 1 S. & S. 423; *Tolson* v. *Sheard*, 25 W. R. 667, 5 Ch. D. 19, were also cited.

Warmington, Q.C., and *F. H. Coll*, for the defendants.—The court will not make trustees liable for a technical breach of trust if they have acted honestly. It will not decide for the first time a new question against trustees: *Speight* v. *Gaunt*, 30 W. R. 785, 31 W. R. 401, 32 W. R. 435, 22 Ch. D. 727, 9 App. Cas. 1. [KEKEWICH, J.—Is this an investment on a security authorized by the trust? *Whiteley* v. *Learoyd*, 34 W. R. 450, 33 Ch. D. 347.] There was power in the settlement to lend on real security—which this was. Trustees, in the absence of prohibition may lend money on an undivided share of realty. The difference between that security and this is very shadowy. The two funds are clearly divided all through the deed. The mortgage money can be recovered by each set of trustees, apart from the other set. *Tolson* v. *Sheard* is in our favour. *Palmer* v. *Earl of Carlisle* is distinguishable. One trustee can bring his action for foreclosure and make the other trustees defendants: *Luke* v. *South Kensington Hotel Co.*, 27 W. R. 514, 11 Ch. D. 121. This case is different from those which appear to be authorities the other way; *Lupton* v. *White*, 15 Ves. 432; *Robinson* v. *Robinson*, 1 De G. M. & G. 247.

Barber, in reply, cited *Fry* v. *Tapson*, 33 W. R. 113, 28 Ch. D. 268.

KEKEWICH, J.—I am sorry to be obliged to decide against trustees, especially when, as in this case, they have behaved perfectly honestly. But here the question is, have these trustees, as agents, acted up to their authority or gone beyond it? If they have gone beyond it it is no answer to say they acted in good faith. Their authority was to invest in certain securities. [His lordship stated the power of investment.] The question turns on the meaning of the words "in their or his names or name"—that is the essence of the investment clause. There is no difference between an investment in the names of three persons, two of whom are trustees of one deed, and a third, who, with one of the first two, is trustee of another deed, and an investment in the names of two trustees and two entire strangers.

Here the whole estate is conveyed to four persons (in reality three, as one is trustee in both cases) so they must keep the control of the securities, that is, the money, and they do not even get the legal estate. True they have a power of appointment, which they exercised. I accept the reason suggested for its being given—namely, to enable them to accept one part of the security and not the other. It was urged that the power of sale is so expressed that either set of mortgagees may sell, and so may grant leases. But one set cannot enter without the concurrence of the other, and whatever is done is for the benefit of all. It is said that is the essential form of a contributory mortgage; if so, it forms the strongest possible reason for trustees not to invest in it. They lose control over the fund, if they have to foreclose they must bring other parties before the court as in *Luke* v. *South Kensington Hotel Co.*, this involves trouble and expense, and it is not a difficulty that trustees ought to embrace of themselves when it is not forced upon them. The plaintiffs are entitled to the relief asked in their statement of claim.

Solicitors for the plaintiffs, *Lette Brothers*.

Solicitors for the defendants, *Aldridge, Thorn, & Morris*, for *Eaden & Knowles*, Cambridge, and for *Freeland & Bellingham*, Saffron Walden.

Chan. Div. Kekewich, J. } April 19.

In re DERBON.

DERBON *v.* COLLIS. (*a.*)

Practice—Joinder of causes of action without leave—Time for taking objection—Rules of Supreme Court, 1883, *ord.* 18, *r.* 2; *ord.* 70, *r.* 2.

A claim for recovery of the possession of land was,

(*a.*) Reported by C. H. F. CHRISTIE, Esq., Barrister-at-Law.

subsequently to the institution of an action for administration, added by amending the statement of claim, and without the leave of the court being obtained under ord. 18, r. 2. The defendant pleaded to the amended statement of claim, and raised the objection to this joinder of causes of action without leave, but took no step to insist on the objection until the trial of the action.

Held, that the objection to the joinder of such claims could not be insisted on at the trial, as it would be too late under ord. 70, r. 2.

Trial of action.

The plaintiffs, two tenants for life under a will, brought an action against one of the trustees and the executors of another for administration of the will and the appointment of a receiver. They afterwards, without leave of the court, added by way of amendment of the claim, a demand for possession of an inn, part of the trust property, of which one of the defendants was tenant, and that the said defendant should pay an occupation rent.

The defendants pleaded to the amended statement of claim that this joining another action with one for the recovery of land was irregular without leave of the court, but took no further steps to insist on the objection until the trial of the action.

Ord. 70, r. 2, is in these terms: "No application to set aside any proceeding for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity."

Barber, Q.C., and *Fawcus* (*Williamson* with them), for the defendant.—The action, according to the writ, only asks for administration of a receiver. [KEKEWICH, J.—Are you not too late to object now?] We did all we could; we had no idea that we were taken to have waived our objection to the irregularity.

Vernon R. Smith, for the defendant Collis.

Warmington, Q.C., and *Nalder*, for the plaintiffs, cited *Mulckern* v. *Doerks*, 28 SOLICITORS' JOURNAL, 688, 53 L. J. Q. B. 526.

KEKEWICH, J.—In this case after the defendant appeared the plaintiff amended, not his writ, but his claim, and added, without leave, a claim for the recovery of land. The defendant noticed this, and called attention to it, but did not insist on his objection. Many more steps were taken in the action, and at last the defendant definitely took the point that this pleading is bad under ord. 18, r. 2. I am of opinion that the objection is now too late: *Mulckern* v. *Doerks*. On any irregularity a party should come at once to have it cured: ord. 70, r. 2; he ought not to go on to trial before taking his objection. The reason for the latter rule is that the defendant may not be harassed, and it is for his benefit; but he must make a fair use of it. In this case he is too late.

Solicitors for the plaintiff, *Collyer-Bristowe & Co.*, for *Edwin Laverack*, Kingston-upon-Hull.

Solicitors for the defendants, *Williamson, Hill, & Co.*, for *A. J. Reed*, Great Grimsby; *Pritchard & Sons*, for *T. W. Hearfield & Lambert*, Kingston-upon-Hull.

Q. B. Div. (Field and Wills, JJ.) May 5.

REG. v. COUNTY COURT JUDGE OF GREENWICH AND MOXON. (a.)

County courts—Jurisdiction—New trials.

On an application to a county court judge for a new trial, he refused the application on the two grounds then urged, but intimated that the applicant might apply on a fresh ground if affidavits could be produced in support of such fresh ground. On the second application, upon fresh grounds, the judge granted the new trial.

Held, that the judge had not "finally determined" the application for a new trial, and that no writ of prohibition could issue to prevent the new trial, as the judge had not exercised his full discretion on the first application, but had only disposed of the two specific grounds on which that application had been based.

Great Northern Railway Co. v. Mossop, 4 *W. R.* 116, 17 *C. B.* 130, *distinguished.*

Per Wills, J.—*The High Court has only power to look into the grounds of such applications for new trials to see whether they are such that a judge could have reasonably exercised his discretion upon them, and they cannot interfere with his discretion beyond that limit.*

Application upon a rule *nisi* for a writ of prohibition against his honour Judge Pitt-Taylor at the Greenwich County Court.

This was an action by a Mrs. Moxon for personal injury, against a tramway company, which had been remitted to the county court at Greenwich on the ground that the plaintiff had no visible means. The jury found a verdict for the defendants. The judge pronounced the verdict an unsatisfactory one, and the plaintiff's counsel at once applied for a new trial, on the ground that the verdict was against the weight of evidence, and of surprise. The judge refused the application on these grounds, but intimated to the plaintiff that she might apply again on the ground of the misconduct of the jury if affidavits could be produced to that effect. Application was made on another day on this ground, whereupon the judge granted the new trial. The defendants obtained a rule for a writ of prohibition against the rehearing of the action, on the ground that the judge had refused the application for a new trial once, and could not afterwards re-open the question.

Lush-Wilson, for the plaintiff Moxon, showed cause against the rule.—"*Res judicata*" is only a ground for prohibition when the same application is renewed after having been once disposed of: *Irving* v. *Aikin*, [illegible] W. R. 467, L. R. 5 Q. B. 208.

M'Clymont, for the defendants.—The county court judge has only statutable authority to grant a new trial under section 89 of 9 & 10 Vict. c. 95. He has exercised that authority once by refusing to grant a new trial, and cannot re-open the case: *Great Northern Railway Co.* v. *Mossop*, 4 W. R. 116, 17 C. B. 130; *Jones* v. *Currey*, 20 L. J. Q. B. 438. This court may review the grounds on which a judge grants a new trial to see whether they are unreasonable or not.

FIELD, J.—This was an action in the High Court which was remitted, by the beneficial enactment of section 10 of 30 & 31 Vict. c. 147, to the county court on account of the poverty of the plaintiff. It was remitted for all purposes, and was, so far, out of the jurisdiction of this court. The cause was heard, and the result a verdict was given for the defendants, the tramway company. The plaintiff at once applied for a new trial, on the ground of the verdict being against

(a.) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

weight of evidence, and of surprise. A new trial was refused by the county court judge on those grounds. Had nothing more occurred, had a new trial been definitely refused, judgment been given, and certificate been signed, it would undoubtedly have not been competent for the county court judge again to entertain a further application for a rehearing of the cause. That principle is clearly stated, in *Mossop* v. *Great Northern Railway Co.*, by Jervis, L.C.J., with his usual clearness of language and great knowledge of law. "The case proceeds to judgment, and there is a decision in favour of the defendants. An application is then made by the plaintiff for a new trial. That application is refused, and the costs are paid. The suit is then at an end; it is practically out of court. The claim has been adjudicated upon; there is an end of the judge's jurisdiction. Having exhausted his power over the suit, what right has he to revive it?" It is true that Williams, J., throws out a doubt of the principle applying in certain cases; but Willes, J., on the other hand, enforces the law of the Chief Justice. "Immediately that the judge has exercised his discretion to grant or refuse a new trial, the exception to the general rule is exhausted, and the general rule must prevail. The decision once pronounced, there ought to be an end of the matter—specially when it has been acted upon and the fruits reaped."

That is the only authority cited to us by Mr. M'Clymont, but it is not applicable here, where, by the defendants' own affidavit, it is shown that the judge distinctly confined his refusal to the two grounds first urged, but that, upon the plaintiff's counsel applying for leave to make a further application on the ground of misconduct of the jury, the judge went on to say that the plaintiff might apply if affidavits could be produced showing such misconduct. There was, upon these facts, no definite end put to the cause. It was not finally determined. The judge did not dispose of all his discretion in the matter; he only disposed of it on the two grounds first mentioned, but reserved to himself the doubtful discretion to deal with an application made on another ground. Substantially the application for a new trial was adjourned, with liberty to the plaintiff to make further application on another ground. Had the plaintiff made the application on the two grounds, the above case would have applied, and the judge could not have properly reheard what he had already disposed of. But that was not the case. The second application for a new trial was made on fresh grounds, partly on the judge's suggestion. He had not finally determined the cause, but he merely exercised that discretion which he had very properly reserved for dealing with a fresh application; and, looking at the facts as stated in the plaintiff's affidavit produced before him on the second application, I am not prepared at the way in which the judge did exercise his discretion.

The present application for a prohibition must be granted, with costs.

Willes, J.—I am of the same opinion. It is quite clear that the judge had not fully exercised his discretion upon the application for a new trial, and not finally disposed of the cause. It is said that a judge cannot revise his own judgment in the same cause when once he has determined it. That is so; but here he reserved his power of determining the application, and only exercised that power in regard to two grounds. I am not sure that the case of *Mossop* v. *Great Northern Railway Co.* goes quite so far as the defendants' counsel contended. It only shows that in the case under discussion there the judge had finally disposed of it on the grounds upon which he had sought to re-open it. In any rate, it is not a decision affecting this case, where the judge left it open to the plaintiff to apply on a fresh ground. It would be unreasonable and unjust to lay down that, under certain circumstances, where it was shown that some definite gross injustice had occurred, a judge might not re-open a case which he had at the time intended to dispose of. However, there is, at any rate, a distinction between such occurrences where a matter of practice only is involved, and not a matter of jurisdiction; and here it is a matter of practice only which is involved. The judge really dealt with two grounds for the application and adjourned the consideration of other grounds for such application, as he clearly had the right to do.

It has been urged that we have a right to review the grounds on which the application was based. I admit that we have a right to see whether these were so ridiculous or absurd as not to constitute any grounds at all on which a court should act, because in such a case the judge could be held not to have exercised his judgment at all, and we might prohibit a judge from granting a new trial without having practically exercised his judicial function at all. But beyond that limit I think we have no jurisdiction to review the discretion of the judge, and I see no reason in the affidavits here to consider that that limit had been reached. It was a matter for his discretion, and he has properly exercised his jurisdiction upon such an application.

Application refused, and rule discharged.

Solicitor for the plaintiff, *W. Bristow.*

Solicitor for the defendants, *J. O. Jacobs.*

Q. B. Div. (Mathew and A. L. Smith, JJ.) Feb. 2.

Crew v. Cummings.

Wood, *Claimant.* (*a.*)

Bill of sale—Affidavit by attesting witness—Omission of residence and occupation—Power to order rectification—Bills of Sale Act, 1878 (41 & 42 *Vict.* c. 31), *s.* 10, *sub-sections* 2, 12, 14.

The power of a judge to rectify any accidental omission or misstatement in the register under section 14 *of the Bills of Sale Act,* 1878, *does not enable him to rectify such omission or misstatement in an affidavit filed in the course of registration.*

This was an appeal from Field, J., at chambers, who, upon the trial of an interpleader issue before him, ordered the rectification of an affidavit made by an attesting witness and filed in the course of registering the bill of sale, as he was satisfied that the omission contained in it was made through inadvertence.

Kisch, for the execution creditor.—This order is wrong. The judge has no power to make it. The only power of ordering rectifications of this kind is conferred by section 14 of the Bills of Sale Act, 1878, and that is confined to causing insertions to be made in the register. The register is defined by section 12 of the Act, and consists of a book kept by the registrar. The form in Schedule B referred to in section 12 does not contain a space for the address and occupation of attesting witnesses, and that is what the judge has ordered to be inserted. The affidavit is part of the process of registration, and the judge has no power to interfere with it.

Bassett Hopkins, for the claimant.—The order is in accordance with the intention of the Act of 1878. The Legislature meant to prevent injustice being done by accidental omissions, and conferred a general power upon a judge to rectify them. The words "insertion in

(*a.*) Reported by Cecil Chapman, Esq., Barrister-at-Law.

the register" should be construed as "the process of registration" mentioned in section 10, sub-section 2.

MATHEW, J.—I decide with reluctance that this appeal should be allowed. The objection to the order is technical; but I am not satisfied that the court can decide in the respondent's favour without doing violence to the meaning of the statute. The Act provides that for the purpose of registering a bill of sale it shall be necessary to file an affidavit stating the address and occupation of each of the attesting witnesses. In this case the address and occupation of one of the attesting witnesses were accidentally omitted in the affidavit filed when the bill of sale was given.

The Act, no doubt, intends that such an omission may be rectified, but, unfortunately, in section 14 it expressly provides that the rectification shall be effected by means of a judge's order for the "insertion in the register" of the "true residence and occupation" of the witness. The "register" is defined in the 12th section. It is a book which the registrar is to keep, and in which he is to make an entry of certain particulars relating to each bill of sale in a prescribed form. The form in the schedule to the Act does not contain a space for the addresses and occupations of the attesting witnesses. The language of section 14 is, however, clear, and the order, not being an order for the "insertion in the register" of the omitted particulars, is not in conformity with the Act.

A. L. SMITH, J.—I am of the same opinion. There is a flaw in the statute. The order is one which I can well suppose that I should myself have made at chambers, though, perhaps, I might have made it without prejudice to the rights of the execution creditor. But section 14 does not give the judge power to make this order. It is impossible, in the face of the definition of "register" given in section 12, to construe section 14, as investing the judge with any general discretion as to the correction of errors accidentally made in the process of registration.

In my opinion, and I regret that it should be so, the Act does not permit the correction of a mistake in the affidavit which is filed under the Bills of Sale Act, 1878, as a part of the process of registration.

Appeal allowed.

Solicitor for the execution creditor, *J. S. Rubenstein.*

Solicitor for the claimant, *Buckler.*

Q. B. Div. (Cave and A. L. Smith, JJ.) April 24.

PREVIDI v. GATTI & CO. (*a.*)

Master and servant—Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 7—*Notice of action—Service of notice.*

A notice of action under the Employers' Liability Act, 1880, *omitted the address of the person injured, and also the cause of injury, and gave the date of the accident incorrectly. But the county court judge who tried the action was of opinion that the defendants were not prejudiced by any defect or inaccuracy in the notice, and that there had been no intention to mislead.*

Held, that the notice was valid.

It was proved that the notice was posted, though not in a registered letter, to the defendants on the day before the day on which the six weeks from the accident elapsed, and a reply was received from the defendants' solicitors a few days afterwards.

Held, that this was evidence on which the county court judge might find that the notice was received within the six weeks.

Appeal from a judgment of the judge of the Clerkenwell County Court.

This was an action under the Employers' Liability Act, 1880, to recover compensation for injuries sustained by the plaintiff, who was in the employment of the defendants, by reason of a defect in the condition of the plant connected with or used in the business of the defendants.

On the 9th of August, 1887, the plaintiff, in the ordinary course of his employment, was descending an ice well belonging to the defendants, who were ice merchants. The method of letting down the blocks of ice into this well and bringing them up again was by means of an iron "dog," which was lowered and raised by a winch and chain. There being no steps or ladder leading down into the well, the defendants' workmen had for years been in the habit of using the "dog" for ascending and descending, standing on the "dog" and holding on to the chain. The plaintiff was descending in this manner, when suddenly he lost his foothold, and fell to the bottom of the well, receiving serious injuries. The alleged defect was a projection on the side of the well, which, as the plaintiff said, came in contact with the "dog," and caused its two limbs to come apart.

At the trial, in order to prove notice of action as required by the Employers' Liability Act, the following letter from the plaintiff's then solicitor to the defendants, dated the 19th of September, 1887, was put in:—"I have been consulted by Mr. Previdi with reference to serious injury sustained by him at your place on the 8th August last. As his injuries are sure to be permanent, I am instructed to apply for substantial compensation, and shall be pleased to hear what you intend to do in the matter before proceeding further." It was proved that this letter was posted, though not registered, on the morning of the 19th of September, the six weeks from the accident elapsing on the 20th; and that a reply came from the defendants' solicitors dated the 23rd of September. Objection was taken to this notice on the grounds, first, that it did not give the address of the person injured; secondly, it did not state the cause of the injury; thirdly, it gave the date of the accident wrongly, the 8th of August instead of the 9th. It was further objected that, the notice not having been served by posting a registered letter under section 7 of the Employers' Liability Act, the plaintiff had not given proper proof of service within six weeks. The county court judge, who tried the case without a jury, was of opinion that the defendants had not been prejudiced by any defect or inaccuracy in the notice, and that there had been no intention to mislead, and therefore he held that the notice was rendered valid by the last clause of section 7. As to service, he thought that the letter of the 23rd of September showed that the notice had reached the party to whom it was addressed, and that the presumption was that it reached him in due course. On the merits the county court judge found in favour of the plaintiff, and gave him judgment for £200.

Bucknill, Q.C. (*Percy Gye* with him), for the defendants.—This notice was a nullity. In *Stone* v. *Hyde*, W. R. 816, 9 Q. B. D. 76, there was only one defect; here there are three. The plaintiff ought at least to have given the defendants notice of what he alleged to be the cause of injury, what defect or negligence he relied on. This is a statutory remedy, and the statute must be complied with: *Keen* v. *Millwall Dock Co.*, W. R. 503, 8 Q. B. D. 482. Secondly, the plaintiff failed to give any proof of service of notice within six weeks. He did not comply with section 7, which says that notice "may be served by post by a registered letter addressed to the person on whom it is to be served at

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

his last known place of residence or place of business; and, if served by post, shall be deemed to have been served at the time when a letter containing the same would be delivered in the ordinary course of post; and, in proving the service of such notice, it shall be sufficient to prove that the notice was properly addressed and registered." Proof of the postage of an unregistered letter is not sufficient.

Wilbey-Wright (*McCullagh* with him), for the plaintiff.

Cave, J.—I am of opinion that the points which have been taken cannot succeed. The first point is that no proper notice, as required by the Act, was given to the defendants. The question whether the notice which was given contains all that the Act requires depends, of course, upon the terms of the Act. Section 4 says that an action under this Act shall not be maintainable "unless notice that injury has been sustained is given within six weeks." The notice is required to be a notice that injury has been sustained; it must contain that. Then section 7 requires that it shall contain certain further facts. It says that the notice "shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained." It is clear that, if section 7 stopped there, the notice must have contained all the matters there mentioned. But at the end of the section we have this clause—"A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading." A defect must mean the omission of some particular, and an inaccuracy a wrong statement of some particular. The intention of the Act is that there must be a notice containing particulars to enable the defendant to understand the case and to make necessary inquiries, but if any of these particulars, which are only to assist the defendant, are omitted or incorrectly stated, that is not to make the notice invalid, unless the defendant is thereby prejudiced. In *Stone v. Hyde* the omission of one particular was held to be a curable defect. Why is not the omission of two particulars or three to be also curable? In the *Millwall Dock case* the county court judge was not asked to say whether the defendants were prejudiced by the defects in the notice.

The second point taken by the defendants is that the plaintiff gave no proof of service of the notice within six weeks. There was proof that the letter was posted on the 19th, and that an answer came from the defendants' solicitor on the 23rd. I think that was evidence to go to a jury, and, therefore, evidence on which the county court judge might himself find that the notice was received in due time. And I can have no doubt as to what conclusion a jury would come to on such evidence.

A. L. Smith, J.—Section 4 says that the plaintiff must give a notice that injury has been sustained. If the matter depended on section 4 alone this present notice would be sufficient. Then section 7 gives an answer to the question, What shall be the form of the notice? It says it must contain four things: the name of the person injured, his address, the cause of injury, and the date; provided that it is not to be rendered invalid by a defect or inaccuracy, unless the defendant is thereby prejudiced.

Now, looking at this notice—the name it has right, the address it has not, the cause of injury it has not, the date it has wrong. The omission of the address is a defect, so is omitting the cause of injury. The giving a wrong date is an inaccuracy. Then the proviso comes in and says that the notice is not to be invalidated by any defect or inaccuracy if the judge is of opinion that the defendant is not thereby prejudiced, and that there has been no intention to mislead. And here the county court judge has so found. I quite agree with *Stone v. Hyde*, which is an authority in favour of this notice being a good one. But then we are met with the *Millwall case*. There, however, the plaintiff did not get the county court judge to say that the defendants were not prejudiced. I think that case does not carry the matter so far as has been contended.

As to service, I think that proof of postage on the 19th was *primâ facie* evidence of receipt by the defendants on the 20th, on which the judge was entitled to act. The meaning of the statute seems to me to be that if notice is sent as a registered letter, that is to be conclusive that the defendant received it in due course of post.

Appeal dismissed.

Solicitor for the plaintiff, *W. J. Titley.*

Solicitors for the defendants, *Fladgate & Fladgate.*

Q. B. Div. (Cave and Grantham, JJ.) Jan. 27, 29, 31.

The Queen v. Commissioners for Special Purposes of Income Tax. (*a.*)

Revenue—Income tax—Claim for repayment—Discovery and proof of diminution of profits—"Within or at the end of the year"—5 & 6 Vict. c. 35, s. 133—23 Vict. c. 14, s. 10.

Section 133 of 5 & 6 Vict. c. 35 provides that income tax assessed under schedule D. in respect of profits shall be repaid if, "within or at the end of the year," in respect of which such assessment is made, the person claiming repayment "shall find and shall prove . . . that his profits and gains during such year for which the computation was made fell short of the sum so computed in respect of the same source of profit on which the calculation was made."

Held (Grantham, J., *dissenting*), *that the words "at the end of the year" do not mean "at any time after the end of the year," but that reasonable diligence must be used to "discover and prove" diminution of profits, and the claim must be made within a reasonable time after the end of the year in respect of which the assessment is made.*

Rule *nisi* to show cause why a *mandamus* should not issue against the Commissioners for Special Purposes of the Income Tax, commanding them to order repayment to the Cape Copper Mining Co. (Limited) of certain overpaid income tax, pursuant to 5 & 6 Vict. c. 35, s. 133.

The Income Tax Commissioners for the City of London having granted certificates to the above-mentioned company entitling them to repayment of alleged overpaid income tax for the years ending respectively April 5, 1884; April 5, 1885; and April 5, 1886, their claim in respect of the years 1884 and 1885 was subsequently disallowed by the respondents, on the ground that the claim was not made until March, 1887, whereas it was their custom to refuse all claims for repayment of income tax in respect of profits unless made within a year from the end of the year of assessment to which they related.

The affidavit of the secretary of the company stated that in computing the profits for each of the years in question, he had in the first instance taken the average of the three preceding years, but, "upon subsequent examination and comparison," discovered mistakes which

(*a.*) Reported by G. K. Paley, Esq., Barrister-at-Law.

gave rise to the diminution in the profits in respect of which the claim for repayment was made.

Sir R. E. Webster, A.G., Sir E. Clarke, S.G., and *A. V. Dicey*, showed cause.—The claim for the years 1884 and 1885 was not made until March, 1887. There was not discovery and proof as required by the statute "at the end of the year" for which the profits were assessed. We must attach some definite meaning to the words "at the end of the year." They cannot mean "at any time after the end of the year." Section 10 of 23 Vict. c. 18 limits the time within which a person who is entitled to repayment can enforce his claim, to "three years next after the year of assessment to which the claim shall relate." This does not, however, extend the time for discovery and proof under section 133 of 5 & 6 Vict. c. 35.

Meadows White, Q.C., and *Pollard*, in support of the rule.—The company are entitled to claim repayment any time within three years from the end of the year of assessment. This is the only statutory restriction as regards time. If any other restriction had been intended the Act would have expressly stated it, and, consequently, "at the end of the year" must be taken to mean "at any time after the end of the year."

Grantham, J.—I am of opinion that this rule should be made absolute. The question turns chiefly on the construction of section 133 of 5 & 6 Vict. c. 35.

The section enacts that an assessed person can demand a return of income tax overpaid on profits "if within or at the end of the year current at the time of making the assessment he shall find, and shall prove to the satisfaction of the commissioners, that his profits and gains during such year fell short" of the sum at which he estimated them. Now in 1842, when this Act passed, the computation of the profits of a mercantile firm trading with distant parts of the world was a matter of greater difficulty than it is in these days of easier communication. It was, therefore, essential that time should be allowed for the computation of profits if it was to be made honestly. The effect of allowing too short a time must have been to tempt mercantile firms to under-estimate their profits in order to avoid the new tax. I can scarcely believe that this danger was not present to the mind of the Legislature in 1842, and I think that this danger would almost certainly result if the narrow construction which has been suggested were put upon the words "shall find and shall prove at the end of the year." When the Act passed it must have been practically impossible for a great firm to calculate their profits so as to be in a position to support a claim for repayment during, or immediately after, the year of assessment.

For this reason I do not think that this is the meaning of the words.

What, then, is the meaning? In my opinion, in construing them it is necessary to separate "find" from "prove," and to confine the words of limitation to the process of discovery. The section, it appears to me, contemplates the discovery of a mistake in the profits when all the transactions for the year of assessment are over, and, so far as it is concerned, allows such a mistake to be proved at any time. This liberty is, however, in my opinion, cut down by section 10 of 23 Vict. c. 14, an Act passed after the operation of the tax had become well understood. The result is that an applicant is confined to three years from the end of the year of assessment.

If this view is correct, the company are in time, as their claim relates to April, 1884, and April, 1885, and was made in March, 1887.

They are, therefore, entitled to repayment. As, however, my brother Cave does not agree with this conclusion, and the court is thus equally divided, I withdraw my judgment.

Cave, J.—I have the misfortune to differ from my learned brother. The question is as to the meaning of the words "at the end of the year" of assessment in section 133 of 5 & 6 Vict. c. 35. It is said on the one side that they mean "at any time after the end of the year" of assessment, on the other that they mean in some real sense "at the end of the year" of assessment.

Now, in this Act and the subsequent Act 16 & 17 Vict. c. 35 taken together, the time for claims is dealt with in five other cases. In three cases—sections 61 and 105 of this, and section 54 of the later Act—the time is limited. Either the statute is silent, or it says "at any time" after some event which it names. On the other hand, in two cases—section 134 of this, and section 18 of the later Act—a definite limit, in the one case of three months, in the other of six months, is fixed. This difference shows, as it appears to me, that the Legislature was careful in this matter of limitation and intentionally fixed, or did not fix, a definite time. I, therefore, conclude that "at the end of the year" of assessment means in some real sense "at the end of the year" of assessment.

The context is "shall find and shall prove." What is the meaning of "shall find and shall prove at the end of the year" of assessment? My opinion is that the words are designedly rather indefinite.

It was not thought desirable to fix a precise time for discovery and proof. The mistake in the profits might be obvious, or might be impossible to discover and prove without a great deal of examination and calculation. What the Legislature intends is that the mistake is to be found and proved "at the end of the year" by the exercise of reasonable diligence on the part of the applicant.

He is to act, not to sleep, upon his right under the statute.

Upon this interpretation of the words, have the applicants shown reasonable diligence as regards discovery and proof? I am of opinion that they have not shown reasonable diligence. They found it impossible to prepare their case as regards the year ending April, 1887, as early as March, 1887; but as regards the years ending April, 1884, they claim nearly three years, as regards the year ending April, 1885, they claim nearly two years after its expiration. What explanation do they offer? The affidavit of their secretary merely states in the most general terms, that he discovered the mistake "upon a subsequent examination of the accounts."

This is, as it appears to me, no explanation at all. I think, therefore, that due diligence has not been shown, and that for this reason the applicants are not entitled to repayment under the statute.

I should add that, in my opinion, section 10 of 23 Vict. c. 14 does not apply. That section refers to both the unlimited and the limited periods, and what it shortens the former does not lengthen the latter.

I think, therefore, that the rule should be discharged, and as my learned brother withdraws his judgment this will be the effect of our decision.

Rule discharged.

Solicitors, *J. Sheppard; Solicitor to the Inland Revenue.*

Court of Appeal.

From Chan. Div. May 30, 31.

In re London Celluloid Co.
Bayley and Hanbury's Cases. (*a*.)

Company—Shares issued as fully paid up—No registered contract—Transferees with notice—Estoppel—Companies Act, 1867 (30 & 31 *Vict.* c. 131), *s.* 25.

A company incorporated as a company limited by shares contracted with a French association to issue and allot to the French association, or its nominee, shares in the company, such shares to be credited as fully paid up, in consideration of services to be rendered by the French association to the company; and the contract contained a clause that the company should procure registration of this contract before issuing the shares. Two hundred shares were, in pursuance of this contract, issued and allotted to S., the nominee of the French association, as fully paid-up shares, but no money was in fact paid for them by S., nor was any sum of money at the time due by the company to S. and set off against the amount of the shares. S. transferred these 200 shares to H., a director of the company, and H. transferred 100 of them to B., another director. Certificates were issued stating these shares to be fully paid up. The contract with the French association was in fact never registered. The company went into liquidation, and the liquidator put H. and B. on the list of contributories as liable for the full amount of these 100 shares respectively held by them. H. and B. applied to have the certificate of contributories varied by having their names expunged therefrom. The evidence showed that S. and H. and B., when they respectively took the shares in question, were aware of the fact that nothing had been paid on them, but that both H. and B. believed that the contract with the French association had been registered. There was no evidence to show that either H. or B. had given any value for the respective transfers of the shares to them.

Held, on the facts of the case as appearing from the evidence, that neither the company nor its liquidator were estopped from saying either that no payment had been made in respect of the shares, or that the contract had not been registered, and that H. and B. were liable for the full amount of the shares.

Burkinshaw *v.* Nicolls, 26 *W. R.* 819, 3 *App. Cas.* 1004, and Waterhouse *v.* Jamieson, *L. R.* 2 *Sc. App.* 29, 18 *W. R. H. L. Dig.* 8, *explained and distinguished.*

The meaning of the maxim, "*No man can take advantage of his own wrong,*" *explained.*

Decision of Kay, J., *affirmed.*

Appeal from Kay, J.

The London Celluloid Co. was incorporated under the Companies Acts as a company limited by shares in February, 1881. The memorandum of association fixed the capital to be £30,000 divided into 3,000 shares of £10 each. The objects of the company were therein stated to be (*inter alia*) the manufacture, application, and sale of celluloid and the acquisition of any invention capable of being used for any such purpose which might be deemed useful to the company. The articles of association, so far as material to the present appeal, provided (art. 79) that E. H. Bayley and R. W. Hanbury, with certain other persons, be appointed directors of the company; that the shares should be under the control of the directors, who might (subject to the provisions of the Companies Act, 1867) issue any shares as the consideration or part of the consideration for any property acquired by, or work done for, the company, and might issue shares to such persons and on such terms and conditions as they might think fit (art. 7); and that they might, in their discretion, pay for any rights acquired by, or services rendered to, the company, either wholly or partially in cash, or in shares of the company, and any such shares might be issued either as fully paid up or with such amount credited as paid up thereon as might be agreed on (art. 100 (3)).

On July 18, 1882, a contract in writing was entered into between La Compagnie des Matières Plastiques, therein referred to as the French company, and the London Celluloid Co., therein referred to as the English company, whereby the French company agreed to send a competent person to England to give instructions to the English company as to the best mode of manufacturing celluloid and as to the processes and details of such manufacture, and, in consideration of the services to be so rendered by the French company, the English company agreed to cause to be transferred to the French company, or their nominees, 1,000 shares of £10 each in the English company, numbered respectively 1,901 to 2,900 (both inclusive), such shares to be credited as fully paid up, and to be issued and allotted as fully paid up to the French company, and to be deposited at the bankers of the English company in the joint names of the two companies, and if and when the French company performed what they undertook the said shares should be transferred to the French company or their nominees or nominee; and clause 8 of this agreement provided as follows:—"Before the above-mentioned 1,000 shares are issued and allotted in trust as aforesaid the English company shall procure this agreement to be filed with the Registrar of Joint-Stock Companies in England." At a meeting of directors of the company, held on July 23, 1883, Hanbury and Bayley being both present as directors, it was resolved that 1,000 shares, numbered respectively 1,501 to 2,500 (both inclusive), be issued and allotted forthwith to the French company and deposited at the English company's bankers in the joint names of the two companies. The French company nominated Albert Sauvée as a person to whom 200 of the said 1,000 shares should be allotted; and on July 30, 1883, at a meeting of directors, Hanbury and Bayley being again present, it was resolved that the shares be allotted to the French company and M. Sauvée, as requested, and certificates were issued and handed to the secretary to be deposited at the bank.

On August 9, 1883, at a meeting of shareholders of the company, it was resolved that the shares issued to the French company under the agreement of the 18th of July, 1882, be handed over to M. Sauvée, acting on behalf of the French company, on the understanding that the said company would give full information and instructions in the manufacture of celluloid on the terms as heretofore.

This contract with the French company was never registered in fact. On December 20, 1884, an order for the compulsory winding up of the English company was made.

E. H. Bayley and R. W. Hanbury were respectively placed on the list of contributories in respect (*inter alia*) of 100 shares with a liability for the full amount, £10, on each such share.

It appeared from the evidence of the official liquidator, which was not denied by Bayley or Hanbury, that these 200 shares had been allotted originally to A. Sauvée as fully paid up, but that it was not intended by the directors that Sauvée should pay any money for them, and that no sum of money was at any time due by the company to Sauvée, and set off against the amount due under the said shares, but that the shares were given to Sauvée in return for some services alleged to have been rendered or to be rendered by him to the company; that on November 19, 1883, A. Sauvée transferred these 200 shares to R. W. Hanbury, and that on November 24, 1883, Hanbury transferred 100

(*a*.) Reported by M. J. Blake, Esq., Barrister-at-Law.

of the said shares to E. H. Bayley, but that no payments were made on any of the said 200 shares by any person whomsoever. Both Bayley and Hanbury, in their affidavits, stated that until November, 1886, they believed that the contract with the French company had been registered, and they also stated that certificates had been issued stating that the said 200 shares were fully paid up, but they did not, in their affidavits, state that they believed that anything had, in fact, been paid on the said shares or that they had given any value for the shares on the respective transfers to them.

Messrs. Bayley and Hanbury applied by way of summons to vary the certificate of contributories by having their names expunged therefrom. Kay, J., before whom the summons was adjourned on the 25th of January, 1888, made an order varying the certificate of contributories in other respects, but refused to vary it by expunging the names of Bayley and Hanbury from the list of contributories in respect of these 100 shares respectively held by them. Bayley and Hanbury appealed from this refusal.

Marten, Q.C., Millar, Q.C., and *Ribton*, for the appellants.—The evidence shows that these shares were allotted, and certificates of them issued, as fully paid up, under the contract to that effect with the French company, and it was part of that contract that the English company should procure registration of the contract before issuing the shares. The shares were issued as fully paid up to Sauvée in the ordinary course of business at the request of the French company, who had given consideration for them, and Sauvée took the shares as a *bonâ fide* holder for value without notice that the contract had not been registered. As against Sauvée, therefore, the company is estopped from saying either that the shares were not fully paid up or that the contract was not registered, and the liquidator of the company is also estopped: *Burkinshaw* v. *Nicolls*, 26 W. R. 819, 3 App. Cas. 1004. The present appellants are transferees from Sauvée, and if Sauvée had not notice it is immaterial whether they had notice or not: *Barrow's case*, 14 Ch. D. 432. [COTTON, L.J.—I doubt the correctness of the opinion expressed in that case, that the equitable rule which protects a purchaser with notice taking from a purchaser without notice applies to a legal liability which can only be got rid of by estoppel.] Even if not estopped under the principles laid down in *Burkinshaw* v. *Nicolls*, the company, having broken its contract to procure registration, cannot take advantage of its own wrong. [COTTON, L.J.—Would that be a good plea in bar, or merely give a right to a cross action?] It would be a plea in bar: *Molton* v. *Camroux*, 2 Ex. 487, affirmed on appeal, 4 Ex. 17. [FRY, L.J.—To hold the contract to register binding so as to make it a plea in bar would be to render section 25 a nullity.] There is nothing in the Companies Acts to render a contract by the company, to register an agreement, illegal. Again, the undertaking of the English company to register the contract was a condition precedent to the taking of shares at all by the French company, and if that condition is unfulfilled the mere fact that the appellants' names are on the register in respect of the shares will not entitle either the English company or its liquidator to bring an action for calls on the shares: *Pellatt's case*, 15 W. R. 726, L. R. 2 Ch. App. 527; *Reese River Silver Co.* v. *Smith*, L. R. 4 H. L. 64. [COTTON, L.J.—But the appellants are on the register by virtue of an agreement to take a transfer of the shares, which transfer has been assented to by the company.]

The following cases were also referred to:—*Arnot's case*, 36 Ch. D. 702; *In re Dronfield Silkstone Coal Co.*, 29 W. R. 768, 17 Ch. D. 76. [BOWEN, L.J., referred to *Hooper* v. *Lane*, 6 W. R. 146, 6 H. L. 443.]

Renshaw, Q.C., and *Bramwell Davis*, for the respondent, the official liquidator of the company, were not called on to argue the point as to estoppel.—As to the contention that the company—or the liquidator on its behalf—cannot take advantage of its own wrong, assuming that there had been a completed contract by the company to issue the shares as fully paid up and to register that contract, the wrong arises by breach of that contract, and the present appellants cannot raise that point, because the contract, if any, was not made with them but with the French company. Again, the liability of the appellants arises from the fact of their being on the register as shareholders, and it is they, and not the company, who set up the contract in question. But, assuming that the appellants are entitled to the benefit of the contract, if any, made with the French company, it is too late for them, after a winding up has occurred, and no question of estoppel arising, to seek to be relieved from liability in respect of the shares they hold on such a ground, for *Houldsworth* v. *City of Glasgow Bank*, 28 W. R. 677, 5 App. Cas. 317, and *In re Addlestone Linoleum Co.*, *ante*, p. 37 Ch. D. 191, show that after winding up a new set of rights intervenes and the liquidator seeks to enforce the statutory rights of creditors. Again, it was the duty of the appellants themselves, being directors of the company, to have that the contract was registered: *In re New upon-Tyne Co., Ex parte Brown*, 3 W. R. 5, 19 Beav. 97. But in fact there never was any completed contract made by the company with the French company. The seal of the English company was not affixed to the contract, which was merely a draft agreement. The registrar would not have registered such a document.

Marten, Q.C., in reply.—Section 37 of the Act of 1867 shows that it is not necessary that the contract should be under seal of the company, and this contract was in fact signed by Bayley acting under authority in that behalf for the company. The company during its continuance would not have been allowed to take advantage of its own wrong by suing either Sauvée or Sauvée's transferees for calls on these shares, and the fact that a winding up has occurred can make no difference, as the liquidator acquires thereby no new right of action. [FRY, L.J.—The liquidator may acquire a new right of action, but the fact of a winding up having occurred may make some difference: [illegible] v. *Turquand*, L. R. 2 H. L. 345, 16 W. R. H. L. Dig. 15.] The Court of Appeal in *Blyth* [illegible], 17 W. R. 194, L. R. 4 Ch. App. 140, thought that the liquidator suing for calls was in a better position than the company, but *Burkinshaw* v. *Nicolls* [illegible] *Waterhouse* v. *Jamieson*, L. R. 2 Sc. App. 29, [illegible] W. R. H. L. Dig. 8, show that that view is not correct. [COTTON, L.J.—In *Waterhouse* v. *Jamieson* the company had made an admission that it had received the money in respect of which the liquidator was suing, and it was held that that admission being acted on by the holder of the shares bound the liquidator; that I think is the effect of that case and also of *Burkinshaw* v. *Nicolls*.] *Houldsworth* v. *City of Glasgow Bank* and *In re Addlestone Linoleum Co.* were cases, not of claims by the company or its liquidator against the holders of shares, but claims by the holder against the company for misrepresentation and breach of contract in respect of the issue of the shares. [COTTON, L.J.—Neither of those cases decide that, if what are called outside creditors were all paid, there would be anything to prevent the shareholders making claims of that kind.] The mere fact that the appellants were directors of the company does not impute to them knowledge of everything done or omitted to be done by the company: [illegible] *Hallmark's case*, 26 W. R. 824, 9 Ch. D. 329; [illegible] *Denham & Co.*, 32 W. R. 487, 25 Ch. D. 752.

COTTON, L.J.—This is an appeal from a decision of Kay, J., refusing to relieve the appellants from liability

in respect of these shares. The shares in question were issued as shares fully paid up in pursuance of a contract to that effect made by the company, and which the company undertook to register before the issue of the shares, but in fact the contract was not registered as required by section 25 of the Act of 1867. Certificates for these shares were issued stating that the shares were fully paid up. The appellants claim to be relieved from any liability in respect of these shares, on the authority of the case of *Burkinshaw* v. *Nicolls*, and they say that these shares were transferred to them in the ordinary course of business as fully paid-up shares, and therefore that they, as holders of the shares, are entitled to treat them as shares fully paid up. Now, M. Sauvée must be taken to have known that these shares were issued as fully paid up under a contract which was to have been registered, but that nothing was in fact paid on them, and I am of opinion that the decision in *Burkinshaw* v. *Nicolls* is not applicable to the circumstances of this case. In that case it was found, as a matter of evidence, that the holder of the shares took and held the shares on the faith of a statement made in the certificates that the shares were fully paid up, and the House of Lords held that the matter of evidence which was binding on the company bound the liquidator of the company also. Lord Cairns, at p. 1016, 3 App. Cas., says this: "In the course of business Goulton," who was the original allottee, "transfers for valuable consideration to a transferee a share as to which there is a statement in the certificate made by the company that the money has been paid up. Now I desire to know in what way this section affects a transaction of that kind. It appears to me that it leaves altogether untouched the question of the payment of the money upon the share, which payment it declares shall, no doubt, be an attribute or consideration of every share in the company. But how that is to be or what is to be the evidence of that payment it leaves altogether untouched. If the money is paid and if the receipt is given for it, of course no question could be made but that the transferee would have a right to hold it as a paid-up share; but if a receipt is given for the money by the company, and the share passes into the hands of a person who has given valuable consideration for it and knows nothing about the fact that the payment has not really taken place, there is nothing whatever in this section which would in any way invalidate his title. He comes before the court not in any way affecting to break in upon the enactment which I have read. He says, 'I bow to the words of the enactment. I have not in any way attempted to interfere with it, but I have taken in the course of business a share, in regard to which I have the representation of the company that that section has been complied with.'" Those last words, I think, mean a representation that the section had been complied with in the sense that the company had received the money and that the liquidator was bound thereby. Lord Blackburn says the same thing in effect in somewhat different terms at p. 1026, "In the present case there is no . . . registered contract, and consequently the shares are payable in cash, but then the section does not say that that is to be conclusive against everyone, nor, as it was argued, that anyone who has become a shareholder under any circumstances shall be compelled to pay them up in cash. That is not the statute. These shares were bought, and the liquidator may require payment of the calls unless either it be proved that they were paid in cash or circumstances have arisen which render it unnecessary to prove that. The present case is of the latter description. Now sometimes there is a degree of odium thrown upon the doctrine of estoppel because the same word is used occasionally in a very technical sense, and the doctrine of estoppel *in pais* has even been thought to deserve some of the odium of the more technical classes of homologation. But the moment the doctrine is looked at in its true light it will be found a most equitable one, and one without which, in fact, the law of the country could not be satisfactorily administered. When a person makes to another the representation, 'I take upon myself to say such and such things do exist, and you may act upon the basis that they do exist,' and the other man does really act upon that basis, it seems to me it is of the very essence of justice that between those two parties their rights should be regulated, not by the real state of facts, but by that conventional state of facts which the two parties agree to make the basis of their action; and that is what I apprehend is meant by estoppel *in pais* or homologation."

But in the present case there was no representation made that the contract had been registered, and therefore we need not enter into the question as to what might be the result if such a representation had been made. In my opinion a representation that the money had been paid on the shares could only be effectual in favour of those who did not know that the money had not in fact been paid. If a person buys shares on the faith of a representation made by the company that the money on the shares had been paid up, such a representation is binding against the company; and any admission made by the company and acted on by the person who takes shares is binding on the company. I except, however, from the last observation such a singular admission as this if made by the company—viz., that the person taking the shares should be under no liability to pay for them, as the Act of Parliament prevents the shareholder from relying on such an admission.

Then, assuming for the purposes of the argument that there was here a contract in writing made by the company, it was argued that it would have been impossible for the company, while a going concern, to have sued the present appellants for calls in respect of these shares on the ground that no one can take advantage of his own wrong, and the case of *Molton* v. *Camroux* was relied on as an authority for that contention. In that case a contract had been made granting an annuity to a man during his life, and the annuity was so paid. No memorial of the grant was, however, registered as required by statute, and after the death of the grantee his legal personal representative brought an action against the grantor to recover the money paid by the grantee as consideration for the grant of the annuity. That case followed the decision in the case of *Davis* v. *Bryan*, 6 B. & C. 651, which laid down the rule that it was the duty of the grantee to register, and Bayley, J., said: "Here a bargain was made and the testator paid a consideration of £300, and the defendant agreed for that to pay a certain annuity. The testator received the whole of that which he bargained for, and now his representative says the contract was void from the beginning." In both those cases the personal representatives of a grantee of an annuity, who had received the whole of what he bargained for during his life, sought after his death to set aside the contract on the ground of non-registration; but the non-registration arose from the neglect of their principal to do what was required by the Act of Parliament, and it was held they could not succeed in setting the contract aside. Those cases are obviously distinguishable from the present case. Here the company—or the liquidator of the company—is not suing in respect of any right arising under the contract which the company neglected to register, but is suing in respect of a liability imposed by the Act of Parliament on anyone who holds shares. [The Lord Justice then read section 25 of the Act of 1867, and continued:—] If the company had made a representation that the holder of the shares was under no liability in respect of them, it might—though not necessarily—be that the shareholder would have a right to have his name removed from the register, but that cannot be done after a winding up has occurred, for in that respect the liqui-

dator does not stand in the same position as the company; and so, again, a shareholder cannot, after winding up, compete with outside creditors of the company by bringing an action for damages against the company for misrepresentation or breach of contract. In my opinion, even if the company had entered into a contract not to enforce the liability in respect of the shares, it could not be prevented from bringing an action to enforce that liability, as the contract would have been *ultrâ vires* and one not allowed by the Act of Parliament.

As to the case of *Waterhouse* v. *Jamieson*, that case only went on the same footing as *Burkinshaw* v. *Nicolls*—viz., that there had been a statement that the shares had been paid for in cash, which, under the circumstances of the case, was binding on the company, and bound the liquidator also. The appeal must be dismissed.

BOWEN, L.J.—I am of the same opinion. And the result, it seems to me, follows as the logical conclusion of the language contained in section 25 of the Act of 1867. [The Lord Justice read the section, and continued:—] Nothing can be clearer than the words of the section stating the obligation imposed on the original holder of the shares, and attaching to the holder on a transfer—viz., that the whole amount of each share must be paid in cash—and the holder can only escape from making payment in one way—viz., by following the mode of escape, and the only mode of escape indicated in the section itself. Can there be any other way of escape on equitable principles? That can only be if the company so acted as to preclude itself from denying that the Act has been complied with, or, in other words, if the company be estopped from saying that the Act has not been complied with—which amounts to this, that there is conclusive evidence as against the company that the Act has been complied with.

Now, as to the mode of working out such estoppel, if the company make a representation to a person other than the original holder that there has been payment in cash, and the shares are taken by that person on the faith of that representation, then neither the company nor the liquidator can say that there has not been payment in cash, and they cannot say that the statute has not been complied with. The case of *Burkinshaw* v. *Nicolls* shows such a case of estoppel may arise, but that case also goes further, and contains a ruling as to a point of evidence; but that was only a ruling on the facts and circumstances of that particular case, and a ruling on a point of evidence on the facts of a particular case is not to be crystallized into a general proposition of law. The ruling was that as the evidence showed that the shares were taken in the ordinary course of business as fully paid up, the *onus* would rest on the company to show that the person who so took them had notice that they were not actually paid up. But how can you apply the doctrine of estoppel laid down in that case in favour of Sauvée or the present appellants? The evidence here is quite inconsistent with Sauvée's being ignorant of the fact that the shares were not paid up in cash; it is clear that he must have known that the shares were not paid up in cash. There is no suggestion on the evidence that could lead us to suppose that the present appellants were ignorant of the fact that the shares were not paid up in cash. The inference I draw from the evidence is that everyone knew that these shares were not paid up in cash, and, therefore, no case of estoppel arises against the company. But estoppel might arise under circumstances not existing here—viz., if there had been a representation made by the company that the contract had been registered. If a company did make such a representation, I do not say but that there might be some estoppel to prevent the company saying that the contract had not been registered, but that would operate, not to enable the company to evade compliance with the Act, but to prevent the company saying that the Act had not been complied with.

Mr. Marten tried to escape on the ground that the company—though not estopped from denying either registration of the contract or payment in full of the shares—would, if allowed now to enforce this demand, be taking advantage of its own wrong. The maxim that a man cannot take advantage of his own wrong is as old as the hills, and is somewhat obscure. In my opinion it means that a man cannot enforce against another, whom he has wronged by a breach of contract or breach of duty, a right that he has acquired against that other by means of such breach of contract or breach of duty. The observations of Bramwell, B., as to the meaning of the maxim, in his opinion submitted to the Lords in the case of *Hooper* v. *Lane*, 6 H. L. 443, at pp. 460—1, bear out this construction, and will be found very instructive. What is the wrong here of which the company is said to be taking advantage? It is the breach of contract to register. Can the company, having regard to section 25, preclude itself from demanding payment in cash by such a contract? In my opinion, if that were to be allowed the whole effect of the section would be vain. If the company could lawfully contract not to sue a holder in respect of his shares, even though no contract be filed under section 25—which I think must be admitted to be the law—how can the company hamper itself by a contract which falls short of that? On the ground alone, then, that this contract cannot be pleaded in bar as between the company and Sauvée, Mr. Marten's argument fails. But, again, the right to payment in cash in respect of which the company is suing is not a right acquired through the breach of contract to register. The cases of *Mellor* v. *Camroux* and *Davis* v. *Bryan* are wholly distinct from this case. [The Lord Justice here referred to the facts of those cases, and continued:—] Then, again, the maxim is only applicable when the right arises against the person to whom the wrong was done or persons clothed with the full rights of that person, and not as against strangers. For these reasons it seems to me that the appeal must be dismissed, with costs.

FRY, L.J.—It seems to me that section 25 is fatal to the case of the appellant. That section was for the benefit of creditors of the company, and therefore it is not possible for the company to contract itself out of that section. The result of the section is this, that the whole amount of every share must be paid for. I do not like to follow the words of the section and say "paid in cash"—having regard to what was said by the Court of Appeal in *Spargo's case*, 21 W. R. 306, L. R. 8 Ch. App. 407—but must be paid for, unless otherwise determined by a contract in writing registered before the issue of the shares. No shareholder can escape the liability to make payment by any other method whatever than by this. No release by the company, no covenant not to sue, no accord and satisfaction, no breach of contract to register, will suffice to discharge the shareholder of that liability. It follows distinctly, therefore, that the argument set up, viz., that the company is precluded from suing because it contracted to register the agreement—fails to the ground. To hold otherwise would, in effect, be relieving the shareholder from the obligation to pay. The object of the provision in section 25 as to registration of the agreement, was to have the agreement filed, so that persons afterwards dealing with the company could inspect it.

As to *Waterhouse* v. *Jamieson* and *Burkinshaw* v. *Nicolls*, they have nothing to say to the point to be decided here. They only decide that, on the circumstances in those cases, there was a good estoppel against

the company and the liquidator, on the question of payment in cash; but they do not show that the shareholder might be relieved from the obligations of section 25. In the present case there are no facts whatever which could lead a jury or a judge sitting as a jury to conclude that either of the present appellants believed that these shares had been paid in cash. I may add that I share the doubt expressed by Cotton, L.J., that there was any valid agreement.

Appeal dismissed, with costs.

Solicitor for the appellants, *Edward Lee.*

Solicitors for the respondent, *Lindo & Co*

From Chan. Div. Nov. 29; Dec. 2.

NANNEY *v.* MORGAN. (*a.*)

Railway stock — Transfer — Passing of legal estate — Non-delivery to or acceptance by secretary of company — Companies Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 16), *ss.* 14—16.

In 1868 *certain stock of the London and North-Western Railway Co. was standing in the names of A. and B., who were trustees of it for C. In that year a transfer of the stock by A. and B. to C. was executed and sent to the company for registration; but, in consequence of its being improperly stamped, and the stock certificate not being sent with it, it was returned by the company unregistered. The proper stamp was then affixed, but no further step was taken until* 1872. *In* 1869 *C. purported, by a voluntary deed, to settle the stock. The Act by which the stock was created incorporated the Companies Clauses Act,* 1845.

Held, that, at the date of the settlement, the stock was not legally vested in C., for that it was essential to the validity of the transfer that it should be delivered to the secretary of the company, to be kept by him in accordance with section 15 *of that Act; and that the transfer in question, being improperly stamped, was rightly returned by the company.*

Held, therefore, that the representative of C. must transfer the stock to the trustees of the voluntary settlement.

Decision of Stirling, J. (35 *W. R.* 713, 35 *Ch. D.* 598), *affirmed.*

Appeal from a decision of Stirling, J., reported 35 W. R. 713, 35 Ch. D. 598.

The facts fully appear in the report in the court below, and may be shortly stated as follows:—In 1868 a sum of £6,500 Consolidated Ordinary Stock of the London and North-Western Railway Co. was standing in the names of Richard Meredith Richards, since deceased, and the defendant, William Griffith, as trustees of the marriage settlement of Howel Morgan and his wife. Under a power in that settlement Mrs. Morgan had made an appointment of the stock to her husband, and he desired to make a voluntary settlement of it. The trustees executed a transfer of the stock to him, and the transfer was duly delivered to the secretary of the railway company for registration, but the company declined to register it, because it was not properly stamped and the date was incomplete, because the year was omitted. The stock accordingly remained in the names of the trustees, notwithstanding the execution of the transfer by them. In November, 1869, Howel Morgan executed a voluntary settlement of the stock. In 1872 the deed of transfer, duly stamped and dated, was delivered to the secretary of the company, and Howel Morgan was registered in the books of the company as the holder of the stock. He died in October, 1884, and the question was whether the stock passed to his personal representative as part of his estate, or whether the persons claiming under the voluntary settlement were entitled to it.

Stirling, J., held that the stock was not, at the date of the voluntary settlement, legally vested in Howel Morgan, and that his legal personal representative must transfer it to the trustees of the voluntary settlement.

From this decision the legal personal representative of Howel Morgan appealed.

Sir Horace Davey, Q.C., and *Upjohn,* for the appellant, contended that the stock passed to Howel Morgan as soon as the transfer to him by the trustees was executed, and that it, therefore, was legally vested in him at the date of the voluntary deed.

Graham Hastings, Q.C., and *Eyre,* for the appointee, submitted that, by reason of the irregularity in the transfer, the stock did not become legally vested in Howel Morgan.

The Companies Clauses Consolidation Act, 1845, ss. 14, 15, 16, and the following cases were referred to:—*Dodds* v. *Hills,* 2 H. & M. 424, 13 W. R. Ch. Dig. 57; *Reg.* v. *Wing,* 17 Q. B. 645; *London and Brighton Railway Co.* v. *Fairclough,* 2 Man. & G. 674, 705; *Donaldson* v. *Donaldson,* 2 W. R. 691, Kay, 711; *Copeland* v. *North-Eastern Railway Co.,* 6 E. & B. 277, 4 W. R. Dig. 209; *Société Générale de Paris* v. *Walker,* 34 W. R. 662, 11 App. Cas. 20; *Colonial Bank* v. *Whinney,* 34 W. R. 705, 11 App. Cas. 426; *Milroy* v. *Lord,* 4 De G. F. & J. 264, 11 W. R. Ch. Dig. 120; *Reg.* v. *General Cemetery Co.,* 6 E. & B. 415, 4 W. R. C. L. Dig. 150; *Ellison* v. *Ellison,* 6 Ves. 656, 662; *Kekewich* v. *Manning,* 1 De G. M. & G. 176, 190; *Wolverhampton New Waterworks Co.* v. *Hawksford,* 8 W. R. 446, 7 C. B. N. S. 795; *Portal* v. *Emmens,* 24 W. R. 641, 25 W. R. 235, 1 C. P. D. 201, 664.

COTTON, L.J.—This is an appeal from a decision of Stirling, J., and there is no authority which much helps us to arrive at a conclusion. Howel Morgan executed a voluntary settlement which purported to comprise certain stocks and shares, including £6,505 stock in the London and North-Western Railway. That stock was in the names of the trustees of his marriage settlement, and under his marriage settlement his wife had a power of appointment under which she appointed to him absolutely all the settled funds. That gave him an equitable right to this stock. Previous to the execution of the voluntary settlement he had got from the trustees of the marriage settlement the execution of a voluntary transfer. That, unless it was effectual to pass the legal estate, would not give him any interest at all, because there was no contract for value, but he had an equitable title to the stock under the appointment, which gave him a right to say to the trustees of the marriage settlement, you are trustees of the stock for me. The question is whether, as regards that stock, the voluntary settlement was effectual. The law as regards a voluntary settlement is this. If the settlor transfers all the interest that he is in a position to transfer at that time, then it is effectual. If he does not, then the court will not assist volunteers as against the settlor, and the settlement is ineffectual as regards that which he might have effectually transferred, and which he did not transfer as effectually as he could.

When this case came on at the original hearing a reference was directed to ascertain what stocks and shares were legally vested in Howel Morgan, and it was declared that such as were legally vested in him did not pass by the assignment in the voluntary settlement, but that such as were not legally vested in him, though belonging to him in equity, did pass. I do not think

(*a.*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

that language very appropriate, for the terms "legal estate" and "legal interest" are terms properly applicable to land. Now what is a share in a company? It is a right to call upon the company for a share of the profits, and to attend and vote at the general meetings. Those are rights which are valuable, and, therefore, the share is saleable in the market. Then the Companies Clauses Consolidation Act, 1845, gives a power of transferring it, and the question is what, under the circumstances of this case, was the effect of the deed of transfer which was executed by the trustees previous to the voluntary settlement? It was taken to the company before the date of the voluntary settlement, but as it was not duly stamped and was not properly dated the company would not receive it, and it remained in the possession of the transferor. Some years afterwards, in 1872, it was taken to the company, and then the formalities were complied with. It was duly stamped and duly dated, and was received by the secretary of the company, and the stock was registered in the name of Howel Morgan. The question turns upon sections 14, 15, and 16 of the Companies Clauses Consolidation Act, 1845.

I may say that I do not consider that there is any distinction, as was pressed upon us by Mr. Eyre, between stocks and shares. Section 14, which was very much relied on by Mr. Upjohn, is in these terms:—"Subject to the regulations herein or in the special Act contained, every shareholder may sell or transfer all or any of his shares in the undertaking, or all or part of his interest in the capital stock of the company, in case such shares shall, under the provisions hereinafter contained, be consolidated into capital stock; and every such transfer shall be by deed duly stamped, in which the consideration shall be truly stated; and such deed may be according to the form in the schedule B. to this Act annexed, or to the like effect." Then there is a particular provision in section 16 that no shareholder shall transfer as long as the calls are in arrear, and Mr. Upjohn says that is the only thing referred to by the words of section 14, subject to the regulations herein or in the special Act contained, the "special Act" here being out of the question, as it contains nothing about the transfer of shares. But is that right? If the effect of a transfer of shares is to give to the transferee the rights against the company which the transferor had, the deed alone clearly does not transfer them effectually, for section 15 says:—"The said deed of transfer (when duly executed) shall be delivered to the secretary, and be kept by him; and the secretary shall enter a memorial thereof in a book to be called 'the Registers of Transfers,' and shall indorse such entry on the deed of transfer, and shall, on demand, deliver a new certificate to the purchaser." So something more than the execution of the deed is required, and then at the end of the section we find these words: "And until such transfer has been so delivered to the secretary as aforesaid, the vendor of the share shall continue liable to the company for any calls that may be made upon the share, and the purchaser of the share shall not be entitled to receive any share of the profits of the undertaking, or to vote in respect of such share." That, as regards the company, provides that the deed shall not have any effect so as to put the transferee into the position of the transferor until it has been left with the secretary, and it must be not only left, but accepted by him as properly left, because if the secretary finds it does not comply with the provisions of the Act it is his duty to refuse to receive it. In my opinion here the deed of transfer had no effect until it was duly stamped and was received by the secretary so as to make the transfer effectual as between the company and the transferee. Therefore, as between the company and everyone else, it is clear that, under the Act, what may be called the legal right to this stock at the time of the execution of the voluntary settlement still remained in the transferors as trustees of the marriage settlement. We must then remember the 20th section, which says that the company shall not be bound in any way to have regard to trusts, but shall only have regard to the legal title shown by their register and by the transfer which they have received. I do not place any reliance on the transferee being entered on the register, because when a deed duly executed is left with the secretary it becomes the duty of the company to register the transferee as entitled to the shares, and the mere neglect of the company to do that will not, in my opinion, affect the right of the transferee to be treated as the legal owner of the shares.

Then it was said, where at the time of the voluntary settlement was the legal estate? If "the legal estate" means the right to call upon the company to recognize the title of some person as holder of the shares, it clearly remained in the transferors, in the trustees of the marriage settlement. There is, indeed, a difficulty which I put to Mr. Graham Hastings during the argument. Could these trustees who are on the register have created a subsequent transfer to another person? If their original deed of transfer was for value, they would not be at liberty to transfer to anyone else, and the original transferee could interfere to restrain them from doing so. But if he did not interfere, the transferors, in my opinion, could substitute another person instead of the person they had originally proposed to substitute as the shareholder to be recognized by the company as intended to have, and as having, all the rights against the company which the latter part of the 15th section says shall not be transferred from those on the register to anyone else until certain things are done. In my opinion, therefore, the answer of Stirling, J., to this inquiry was right, and we must say that these shares were not legally vested in the voluntary settlor at the time when he executed the voluntary settlement.

Then comes another question, which does not seem to have been argued at all in the court below. Was the learned judge right in ordering the personal representatives of the voluntary settlor to transfer these shares to the trustees of the voluntary settlement? That, I think, depends upon the questions which I have already been discussing. If the legal title was acquired by Howel Morgan subsequently to the execution of the voluntary settlement, which settlement was effectual if he had only an equitable title when he executed it, the order was right, because it is perfectly clear then that he could not keep to himself the legal interest in shares the equitable interest in which had been effectually settled, and so defeat the voluntary settlement. On the facts which we have here, I come to the conclusion that he by a subsequent act, not his own, acquired the legal estate or legal interest in these shares. The deed of transfer was never delivered to him, and subsequently to the execution of the voluntary settlement one of the trustees to the marriage settlement took the transfer deed to the secretary of the company and presented it duly executed, duly dated, and duly stamped, and in consequence of that act the deed of transfer, which had been imperfect and ineffectual to pass the legal interest, became effectual and passed the legal interest to Howel Morgan, the voluntary settlor, and then he, so acquiring it, could not retain it as against those claiming under the trust which had been effectually declared. It therefore was right to order his personal representative, who stands in exactly the same position as himself, to transfer that legal interest which he took subject to a trust, to the duly constituted trustees of the voluntary settlement. In my opinion, therefore, the appeal fails.

Sir JAMES HANNEN.—I have nothing to add.

LOPES, L.J.—I am entirely of the same opinion, and I should not add anything were it not that certain important questions arise with regard to clauses 14, 15, and 16 of the Companies Clauses Consolidation Act,

1845. In this case a deed of transfer of the stock in question to Howel Morgan was executed, but Howel Morgan never had that deed of transfer nor the stock certificates in his possession. At the time of the execution of the voluntary settlement the deed of transfer had not been duly delivered to the secretary of the company, but remained in the possession of the transferors, and had not been registered. In expressing what I desire to say I think I need state no more facts than those which I have just mentioned.

Now, in those circumstances, what was the position of Howel Morgan? I think that, in the circumstances, nothing passed to him by the deed of transfer. The words at the end of section 15 are these: "And until such transfer has been so delivered to the secretary as aforesaid, the vendor of the share shall continue liable to the company for any calls that may be made upon such share, and the purchaser of the share shall not be entitled to receive any share of the profits of the undertaking or to vote in respect of such share." Therefore the transferor, until the delivery of the deed of transfer to the secretary, is subject to all the liabilities and entitled to all the rights which belong to a shareholder or stockholder, and, in my opinion, until the requisite formalities are complied with, he continues the legal proprietor of the stock or shares, subject to that proprietorship being divested, which it may be at any moment by a compliance with the requisite formalities. One of those formalities, as I have pointed out, is a delivery of the deed of transfer to the secretary of the company. Whether the registration of the transfer as well as delivery to the secretary is a necessary formality it is not necessary in the present case to express an opinion. The necessary formality of the delivery of the transfer to the secretary in this case was not complied with, and I think at the time of the voluntary settlement nothing had passed to Howel Morgan by the deed of transfer, and he, therefore, was not the legal proprietor of this stock. I may add that the construction which the court is putting upon these sections of the Lands Clauses Consolidation Act is consistent with that put upon them by Lord Campbell in the case of *Copeland v. North-Eastern Railway Co.*, where he says: "We are satisfied that the Legislature intended that every transfer should be by deed to be left with the company, which the new taker was to execute, to testify unequivocally his acceptance of the shares and his taking upon himself the liabilities of a shareholder." I think that the decision of the learned judge below was right.

Appeal dismissed.

Solicitors for the appellant, *Morgan, Son, & Upjohn.*

Solicitors for the respondents, *Crouch, Spencer, & Edwards.*

From Q. B. Div. April 28.

HORNBY v. SILVESTER AND OTHERS. (a.)

Commons—Inclosure—Power to stop up roads—"Old inclosures"—Inclosure Act, 1845 (8 & 9 *Vict. c.* 118), *s.* 62.

The meaning of the words "old inclosures" in section 62 of the Inclosure Act, 1845, *is not limited to old inclosures from the waste, but applies to all old inclosed lands whatever their condition was prior to their being inclosed.*

Held, therefore, that the valuer has power to stop up, divert, or alter roads or ways passing through any old inclosed lands in the parish.

Action of trespass for wrongfully breaking and entering the plaintiff's land, and using his roads. At the trial the action was referred to an arbitrator to state a case for the opinion of the court, and accordingly a case was stated, of which the following are the material parts:—

The plaintiff was tenant for life of certain manors called the Hook Manors, situate in the parish of Titchfield. At the time of the inclosure award hereinafter mentioned there were certain roads leading from the village of Hook to the sea-shore. The soil of the roads was part of the demesne lands of one or other of the Hook Manors, and the roads were situate within the parish of Titchfield. These roads were public highways.

On the 11th of May 1866, the valuer appointed under the Inclosure Act, 1845, made his award under that Act, whereby he stopped up the roads above-mentioned leading from the village of Hook to the sea-shore, and set out certain other public roads in lieu thereof. The award was confirmed by the Inclosure Commissioners on the 16th of July, 1866. There was no evidence that the roads so stopped up or any of them were, at the date of the award, roads or ways passing through land to be inclosed by the award or through any old inclosures* in the parish in which the land to be inclosed was situate within the meaning of the Inclosure Act, 1845.

Since the award the new roads ordered to be set out were made, and they had since been repaired by the parish of Titchfield, within which they were situate. None of the roads ordered to be stopped up had since the award been repaired by the parish of Titchfield, the lord of the manor having since that time repaired them. In December, 1884, and February, 1885, the defendants came with horses and carts and passed along the roads ordered to be stopped up, and, breaking open gates which were across the roads, proceeded to the sea-shore, and returned the same way.

The question for the opinion of the court was, what judgment should be entered on the case.

The Divisional Court (Mathew and Cave, JJ.) held that the award was *ultrà vires* so far as related to the stopping up of the roads in question, as the power of the valuer to stop up roads was, by section 62 of the Inclosure Act, 1845, limited to roads passing through land to be inclosed or through any "old inclosures" in the parish, the words "old inclosures" by section 52 meaning old inclosures from the waste. Judgment was therefore entered for the defendants.

The plaintiff appealed.

Rigby, Q.C., and *Stuart Moore* (*T. E. Scrutton* with them), for the plaintiff.—The sole point is whether the valuer acted within his powers in making the award—"old inclosures" in section 62 of the Inclosure Act, 1845, include inclosures of cultivable lands as well as inclosures from the waste. They include all old inclosures—*i.e.*, all the land in the parish except village greens and such like places.

They referred to the Inclosure Act, 1801 (41 Geo. c. 109), ss. 4, 5, 8; the Inclosure Act, 1845 (8 & 9 Vict. c. 118), ss. 11, 12, 50, 52, 61, 62, 66; *Goodtitle v. Milburn*, 2 M. & W. 853; *Manning v. Eastern Counties Railway Co.*, 12 M. & W. 237; *Williams v. Eyton*, 2 H. & N. 771, in Ex. Ch. 7 W. R. 291, 4 H. & N. 357; *Thackrah v. Seymour*, 1 Cr. & M. 19; *Rex v. Marquis of Downshire*, 4 A. & E. 698.

Henn Collins, Q.C., and *Mackey*, for the defendants.—"Old inclosures" mean inclosures from the waste or common. The preamble shows that the scheme of the Act is to deal with commonable lands. Section 61 speaks of land to be inclosed and ancient inclosures and "other lands in the parish," showing that there are other

(a.) Reported by W. E. Baxter, Esq., Barrister-at-Law.

* The meaning of these words was that there was no evidence that the roads passed through any old inclosures from the waste of the manor.

lands in the parish. The Legislature may well have refused to give the valuer a roving power to stop up any road in the parish, and may have limited his power to the land to be inclosed and old inclosures, which were originally of the same nature as the land to be inclosed.

They referred to the Inclosure Act, 1845, ss. 34, 35, 47, 86; Elton on Commons, 48, 120, 150; Blackstone, p. 89, "Manor."

Rigby, Q.C., in reply, referred to *Paston and Utherts' case*, Litt. Rep. 264; Scrutton on Commons, 76, 79.

Cur. adv. vult.

April 28.—Lord ESHER, M.R.—The question for our decision is whether the valuer had jurisdiction to stop up the roads in question. The roads which were stopped up were public roads, not upon lands to be inclosed by the valuer, nor upon lands shown to have been part of the waste of the manor. Therefore the question comes to this—were they roads passing through "old inclosures" within the meaning of section 62 of the Inclosure Act, 1845. If they were the valuer had jurisdiction; but if they were not he had no jurisdiction. It was contended that these words had a technical meaning, signifying old inclosures of land which had once formed part of the waste. The words of section 62, which give the valuer power to stop up roads, are "roads or ways passing through the land to be inclosed or through any old inclosures in the parish." The phrase "land to be inclosed" receives its interpretation from section 11, which shows that it applies to land subject to rights of common or other rights mentioned in that section. Therefore the roads do not pass through "land to be inclosed." Upon looking at section 27 it is clear that, in considering whether common lands shall be inclosed, the commissioners are to regard, not merely the advantage of the lord and tenants of the manor, but also the health, comfort, and convenience of the inhabitants of the towns or villages in or near the parish in which the land proposed to be inclosed shall be situate. The instructions to be given to the valuer under section 34 carry out this view. Accordingly, when the valuer has to determine what new roads are to be set out, he is to consider not merely the persons who will get a portion of the inclosed land as an addition to what they have already got, but also the inhabitants of the whole district. Opportunity is taken of the right to inclose to make it work for the benefit of the whole parish. That being so, there must be power to close roads which are of no benefit to anybody. Section 50 provides that encroachments within twenty years upon the land proposed to be inclosed shall be deemed parcel of the land subject to be inclosed. Section 52 provides that all lands which shall have been inclosed from any land subject to be inclosed under this Act for more than twenty years shall be deemed and taken to be ancient inclosures. It does not say that they are ancient inclosures, but that they shall be deemed to be ancient inclosures. Therefore, upon consideration of all these sections, I can see no reason why we should give to the words "old inclosures" in section 62 any other than their ordinary meaning—viz., inclosures which have existed for a length of time, whether upon common lands or not. The valuer, in laying out new roads, is to take into account the benefit to the whole parish or district, and it naturally follows that he can close old roads which thereby cease to be of any benefit to the parish or district. Accordingly the valuer had jurisdiction to close up these roads, and judgment must be entered for the plaintiff.

FRY, L.J.—I also feel unable to agree with the conclusion arrived at by the Divisional Court. The question turns upon the meaning of the words "old inclosures" in section 62. That section deals with the setting out of new roads and the stopping up, diverting, or altering of old roads. The words are not any old inclosures from the common or waste. If that is the meaning of the words, it is not aptly expressed. What is their natural meaning? But for the judgment of the Divisional Court I should have felt no doubt about it. They seem to me to include all lands which have been anciently inclosed in the parish, whatever their condition was prior to their being inclosed. If they have existed for a length of time as inclosed lands, they are accurately described as old inclosures. Again, looking at the intention of the Legislature, as expressed in the section, I come to the same conclusion. There is no reason why power should be given to stop up roads which have become useless if they were formerly taken from the common; while, at the same time, there should be no such power if the roads were not originally taken from the common. Good reason seems to require that there should exist a power of closing up old roads which have become useless, and good sense and law require us to give the words their wider, and not their narrower, meaning. Further, the words of the statute lead me to the same conclusion. I find phrases indicating the same result. In section 61 "ancient inclosures or other lands in the parish" are spoken of in contrast to "the land to be inclosed." That clearly conveys, to my mind, the intention of the Legislature that the former expression should include ancient inclosures of every kind. A similar argument may be drawn from section 86. Upon the other hand, I find expressions which accurately describe inclosures from the common. For instance, in sections 50 and 52, where the Legislature speaks of encroachments upon and inclosures from land subject to be inclosed under the Act, phrases which accurately describe inclosures from the common, and which show that the Legislature knew how to express itself when it intended to convey that meaning. Moreover, on looking back at 41 Geo. 3, c. 109, we see that, by section 4, the commissioners were required to make a survey of all the lands in the parish, with a view to seeing how they ought to be distributed, and the lands are described as lands and grounds to be divided, allotted, and inclosed (that is, waste land), "and also all the messuages, cottages, cottage gardens, homesteads, ancient inclosed lands and grounds within any such parish or manor." That refers to land which is an ancient inclosure, without regard to whether it was inclosed from the common or not. Similar language is to be found in other sections, to which it is unnecessary to refer.

Lastly, I have referred to Seebohm's treatise on The English Village Community, 2nd ed., p. 14, and I find it there stated that nearly 4,000 private Inclosure Acts were passed between 1760 and 1844, and though I do not profess to have looked at them all, yet I cannot find one Act which uses this language to describe inclosures from the commons.

For these reasons I am of opinion that the appeal must be allowed.

LOPES, L.J.—This case depends upon what is the meaning of the words "old inclosures" contained in section 62 of the Inclosure Act, 8 & 9 Vict. c. 118. The section provides "that, in the first place, the valuer acting in the matter of any inclosure shall and must before he shall proceed to make any of the divisions and allotments of the land to be inclosed, set out and make public roads and ways, and widen public roads and ways, in or over the land to be inclosed, and stop up, divert, or alter any of the roads or ways passing through the land to be inclosed or through any old inclosures in the parish or respective parishes in which the land to be inclosed shall be situate." If "old inclosures" mean old inclosures of twenty years' standing as defined by section 52 of the Act only, the judgment of the court below is right, and the valuer had no power to stop up the roads in question; but if

on the other hand, "old inclosures" mean and include the old inclosures in the parish as well as inclosures of twenty years' standing inclosed from the land subject to be inclosed, then the judgment of the court below is wrong, and the valuer had power to stop up the roads in question.

During the argument I was inclined to adopt Mathew, J.'s construction of the words "old inclosures," and I thought they referred only to inclosures of twenty years' standing mentioned in section 52. After careful consideration I have come to the conclusion that this view cannot be maintained. Section 52 enacts that all lands which shall have been inclosed from any land subject to be inclosed under this Act for more than twenty years next preceding the day of the first meeting shall, for the purposes of this Act, be deemed and taken to be ancient inclosures. I think the Legislature hereby intended to extend the meaning of the words "old inclosures," and not to exhaust or limit them. This section puts inclosures of twenty years' standing from the land subject to be inclosed in the same category with old inclosures—that is, with old inclosures in the parish, not being inclosures of the land to be inclosed of twenty years' standing, but old inclosed lands in the ordinary sense of those words. It does not appear to me that there is any substantial distinction between old inclosures and ancient inclosures. I find the terms ancient inclosures and old inclosures almost invariably used in private Inclosure Acts to denote inclosed lands in the ordinary sense of the words. These private Acts always direct a survey and measurement of the fields, meadows, and commons, yards, gardens, &c., and other ancient inclosures in the parish or manor, where the inclosure is to take place. It is impossible to peruse these private Acts without coming to the conclusion that the words "old or ancient inclosures" have a recognized meaning, and refer to inclosed lands in the ordinary sense, and not to inclosures from the common.

It is said, however, that this construction is inconsistent with section 61 of the Act which gives the valuer power to make watercourses, &c., because the power is there given to him, not only over the land to be inclosed and in ancient inclosures, but also in other lands in the parish or respective parishes in which the land to be inclosed may be situate. It is said where the Legislature intended more than inclosures of twenty years' standing it used words to signify that intention—for instance, "other lands in the parish"—and that if the power contended for was meant to be conferred by section 62, some such expression would have been used. It occurs to me that larger words were used in section 61, because it is not improbable that it might be necessary to enlarge, cleanse, or alter and improve ditches, watercourses, &c., which were neither in the land to be inclosed nor in any ancient inclosures, as, for instance, by the side of roads. This, while it would account for the difference in language of the two sections, would in no way limit the application of the words "any old inclosures in the parish or respective parishes" as used in section 62. Section 50 relates to inclosures within twenty years, and provides that they are to be deemed parcel of the land subject to be inclosed, unless authorized by the custom of the manor or otherwise according to law—for instance, approvement by the lord of the manor.

In my opinion, the valuer had power to stop up the roads in question, and I think the plaintiff is entitled to succeed. The appeal must, therefore, be allowed.

Appeal allowed.

Solicitors for the plaintiff, *Burn & Galloway*, for *Goble & Warner*, Fareham.

Solicitors for the defendants, *A. H. P. Ewer*, for *N. Donnithorne*, Fareham.

High Court of Justice.

Chan. Div. Chitty, J. } June 4.

SMITH v. PEARMAN. (*a*.)

Mortgage—Goodwill of business—Foreclosure—Form of order—Special form

Where the property subject to a mortgage included the goodwill of a business, and a receiver and manager had been appointed after the commencement of a foreclosure action, the court inserted a proviso into the order for foreclosure that any person redeeming, or, in the event of foreclosure, the plaintiff, should be at liberty to apply to the judge in chambers for payment of any money in court or in the hands of the receiver.

Coleman v. Llewellin, 35 *W. R.* 82, 34 *Ch. D.* 143, *followed.*

This was a foreclosure action, and the question was whether, under the circumstances of the case, the court would insert into the foreclosure order a proviso that any person redeeming, or, in the event of foreclosure, the plaintiff, should be at liberty to apply in chambers for payment of any money in court or in the hands of the receiver.

The statement of claim alleged (amongst other things) that the plaintiff was the equitable mortgagee of certain leasehold hereditaments in the Strand and at Putney and of the goodwill of the defendant's businesses carried on there, each business being that of a tobacconist.

By an order made in this action on the 23rd of March, 1888, a receiver and manager of the goodwill of the above-mentioned businesses and the other property comprised in the mortgage was appointed. The plaintiff's claim for relief included a claim for an account to be taken of what was due to him under the mortgage, foreclosure or sale, and a receiver and manager.

The action came on upon motion for judgment in default of defence, and the plaintiff asked for such judgment as he was entitled to upon his claim. Minutes of the order now asked for had been prepared, and contained directions in the usual form for an account, payment, and, in default of payment, foreclosure, a direction that the receiver and manager already appointed should be continued, and the following clause:—"Let any person redeeming the premises under the provisions of this order, or the plaintiff in the event of foreclosure, be at liberty to apply to the judge in chambers for payment and transfer of any money or the annuities in court to the credit of this action or in the hands of the receiver."

Beddall, for the plaintiff, asked for an order according to the minutes, and referred to *Coleman* v. *Llewellin*, 35 W. R. 82, 34 Ch. D. 143; *Jenner-Fust* v. *Needham*, 34 W. R. 709, 32 Ch. D. 582.

The mortgagor did not appear.

CHITTY, J.—A proviso similar to that which Mr. Beddall now asks for was inserted in the foreclosure order in *Coleman* v. *Llewellin*, but it appears to have been inserted for special reasons. The question is, whether I can see any special reason for inserting a proviso of that sort in the present order. There is a receiver and manager of the mortgaged property, and as that property includes the goodwill of a business, I think that the proviso now asked for ought to be inserted in the order.

Solicitor, *F. J. Mann.*

(*a*.) Reported by A. D. MACLAREN, Esq., Barrister-at-Law.

Chan. Div. } Chitty, J. } April 27.

In re REED. (*a*.)

Will—Construction—Gifts to a class described by relationship—Half blood.

The presumption is that a gift in a will to relations includes relations of the half blood, but such presumption may be overruled by the context.

A will contained a gift to the sisters of A., and the question arose whether the sisters of the half blood, as well as the sisters of the whole blood, were entitled to take under the gift.

Whitehorne, Q.C., and *Badcock, Romer, Q.C.*, and *Swinfen Eady, Sir A. Watson, Q.C.*, and *R. F. Newton, Maclean, Q.C.*, and *Gayer, Latham, Q.C.*, and *Warliters Horne*, appeared for the different parties.

CHITTY, J.—That the description of nephews and nieces must be contrued as including children of a half blood brother or sister was decided long ago. *Grieves* v. *Rawley*, 10 Hare, 63, is an authority for that. I have no doubt that a similar construction must be put upon a gift to a class of brothers and sisters. I may observe that in the Statute of Distributions the provisions that no representative shall be admitted to the brothers' and sisters' children does not exclude children of half blood. As to the general rule of construction being that half blood relations are not excluded from participating in gifts to classes of persons described by relationship, I have no doubt whatever. But in the present case the context seems to me to overrule the presumption. Therefore, as I think, the context has such an effect, I in this case decide against the claim of the half-sisters.

Solicitors, *Crowders & Vizard; T. P. Dixon*, for *Mahaffey*, Belfast.

Chan. Div. } Chitty, J. } Feb. 4, 6.

DE RECHBERG *v.* BEETON. (*b*.)

Succession duty—Purchaser and successor.

Testator by his will devised certain lands at F., held under leases for lives, of which R.'s was the last, upon trust for R. for his life, with remainders over. B. purchased from R. his life interest in the lands, and then purchased the reversion in fee of the lands. Part of the lands were taken under statutory powers for public purposes, and a sum of money was paid into court as purchase and compensation money.

B. applied for payment out to him of the fund in court, but it was held that B., having bought from the tenant for life, was only entitled to the income of the fund in court during R.'s life, and was a trustee of the corpus for the persons entitled under the testator's will, subject to a lien for the price paid for the reversion.

R. died, and S. became entitled, under the testator's will, to the fund in court.

Held, that, although B. would not have been liable to pay succession duty, S. was liable to pay succession duty on R.'s death, inasmuch as the equity of S. to be substituted for B. was by virtue of the testator's will, and that the effect was the same as if there had been a trust in the testator's will for the purchase out of his estate of the reversion in fee of the lands.

(*a*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

(*b*) Reported by A. D. MACLAREN, Esq., Barrister-at-Law.

Petition.

This was a petition for transfer to the Countess de Rechberg of a sum of £1,652 1s. 3d. Consols in court, representing the purchase and compensation money for lands at Fulham taken by the London School Board in 1878; and for carrying into effect the compromise of an action brought by the countess against the petitioners, R. J. S. Beeton and Elizabeth Crowle (the legal personal representative of Thomas Crowle).

The countess raised the question whether she was liable to pay succession duty inasmuch as she claimed the fund as the *cestui que trust* of persons who had acquired the land (which was represented by the fund in court) for valuable consideration.

At the date of his will (August, 1814), and at the time of his death, July, 1820, Thomas, the sixth Viscount Ranelagh, the testator, was entitled to certain leaseholds, held of the Ecclesiastical Commissioners for lives, and by his will he devised them to trustees on trust for his son Thomas Heron, the seventh Viscount Ranelagh, for life, with remainders in favour of testator's daughters and their issue, and an ultimate remainder in favour of testator's right heirs in fee. The testator, who died in July, 1820, left one son, the seventh Viscount Ranelagh, and three daughters, of whom the Countess de Rechberg was the survivor. In October, 1876, the seventh Viscount Ranelagh contracted to sell, and by deed of the 16th of March, 1879, conveyed his life interest and all other his estate and interest in the Fulham leaseholds to R. J. S. Beeton and Thomas Crowle. On the 7th of August, 1879, the Ecclesiastical Commissioners (in whom, subject to any legally subsisting lease thereof, the property had become vested for the purposes of their Acts), in consideration of £2,300, conveyed the reversion in fee of the Fulham leaseholds to R. J. S. Beeton and Thomas Crowle as tenants in common, but subject to such trusts, equities, and interests as then affected the leasehold interest under a lease of May, 1825. In 1884 R. J. S. Beeton and Thomas Crowle presented a petition for a transfer and payment of the £1,650 in court and accrued interest representing the purchase-money and compensation for the portions of the Fulham leaseholds which had been taken by the London School Board.

The petition was heard before the late Pearson, J., on the 29th and 31st of March, 1884, and his lordship held that it was impossible for R. J. S. Beeton and Thomas Crowle to purchase the reversion otherwise than as trustees for the persons interested in the will under the trusts of the will, and that, subject to their right to be recouped the purchase-money, they were only entitled to an order for payment of so much of the fund in court as represented income or accumulations of income, and during the life of the tenant for life (the seventh Viscount Ranelagh), or, until further order, to the interest upon the residue of the fund (*vide In re Lord Ranelagh's Will*, 26 Ch. D. 590). Thomas Heron, the seventh Viscount Ranelagh, the last surviving life named in the lease of 1825, died on the 13th of November, 1886. The Countess de Rechberg was the surviving daughter of the sixth Viscount Ranelagh, and by an order of the 25th of June, 1887, made by Mr. Justice Chitty on petition in an old administration suit of *Ranelagh* v. *Ranelagh*, it was declared that, upon the true construction of the will of the sixth Viscount Ranelagh and in the events that had happened, the Countess de Rechberg became, on the death of the seventh Viscount Ranelagh, solely entitled as equitable *quasi*-tenant in tail to the hereditaments at Fulham, held on leases for lives and devised by, and remaining subject to, the trusts of the said will and, subject to a certain agreement (as to the proceeds of sale of certain hereditaments sold to the Metropolitan District Co.), to the moneys representing the sale of such of them as had been sold. She had since executed a disentailing deed.

In December, 1886, the Countess de Rechberg had

commenced an action against R. J. S. Beeton and Elizabeth Crowle claiming a declaration that they were trustees for her of the land taken by the London School Board subject to a lien thereof in their favour for the purchase-money of £2,300, with interest from the 13th of November, 1885, and that, subject to such lien, the plaintiff was absolutely entitled to the sum of £1,632 1s. 3d. in court, and that the defendants, on payment by the countess to them of the £2,300, with interest, might be ordered to convey the land to the countess and concur in all necessary acts for procuring the transfer and payment to her of the £1,632 1s. 3d. in court. A compromise of this action had been agreed to upon the terms—(1) that the £1,632 1s. 3d. in court should be transferred to the countess; (2) that upon payment by R. J. S. Beeton to the countess of £200 (for costs) the countess should execute to him a conveyance and release of her equitable interest.

The present petition was presented for the purpose of carrying this compromise into effect, and for payment of the costs of the petition under section 80 of the Lands Clauses Consolidation Act by the London School Board, except so far as they had been increased by this litigation between the countess and the petitioners, and for payment to the countess of the fund in court.

John Cutler, in support of the petition.

P. V. Smith, for the London School Board.

A. E. Dryden, for other parties.

J. G. Wood, for the Countess de Rechberg.—Succession duty is not payable in respect of the fund in court, which represents the value of the reversion which was purchased for value by Beeton and Crowle from the Ecclesiastical Commissioners, and never in any way formed part of, nor was it derived from, the estate of the sixth viscount, and the case therefore falls within *Fryer* v. *Morland*, 25 W. R. 21, 3 Ch. D. 675.

Vaughan Hawkins, for the Crown.

CHITTY, J.—Mr. Beeton and Mrs. Crowle bought the reversion of property which was held under leases for lives, which leases for lives were subject to the trusts of the sixth viscount's will. If Mr. Beeton and Mrs. Crowle had bought on their own account and had been entitled to hold on their own behalf there is no question that succession duty would not have attached. But it cannot be contested, and, in fact, it is admitted, that if there had been a trust in the will of the sixth viscount out of his estate to purchase this reversion, then the person who came in on the death of the seventh viscount succeeded to the estate by virtue of the trusts of the sixth viscount's will, and would have had to pay duty upon that succession. That being so, it appears to me that the circumstances of this case bring it exactly within the second, and not within the first, class of cases I have described. Mr. Beeton and Mrs. Crowle could not hold for their own benefit. Why? Because they were affected by the trusts of the sixth viscount's will. It is said that they paid the money themselves; and so they did, because they attempted to set up an independent title for themselves; but it was decided by Mr. Justice Pearson that they could not hold the reversion for their own benefit. The reversion was acquired for the benefit of those interested under the sixth viscount's will; but Mr. Beeton and Mrs. Crowle, having paid the purchase-money, were entitled to be repaid, and unquestionably they had a lien for the amount upon the reversion, which was held by Mr. Justice Pearson upon the facts to be part of the testator's estate. The result, therefore, is that, although there has been some compromise, the details of which are immaterial, Mr. Beeton and Mrs. Crowle were entitled to be paid, and have been paid, through the medium of that compromise, the £2,300 which was paid as purchase-money. It comes exactly to the same thing as if there had been a trust in the sixth viscount's will for the purchase of the reversion, and so the duty attaches.

Solicitors, *Ward, Aplin, & Taunton; Helder & Roberts; Gedge, Kirby, & Millett; Solicitor to the Treasury.*

Chan. Div. Chitty, J. } Feb. 1, 2.

In re TAYLOR.

WHITBY *v.* HIGHTON. (*a.*)

Will—Codicil—Confirmation of will—Married woman—Power of appointment—Intestacy—After-acquired property.

A married woman who had a power of appointment over certain property under her marriage settlement, by her will, dated in 1883, in exercise of the power, and "all other powers enabling her in this behalf," appointed, gave, and bequeathed all the property comprised in the settlement, and over which she had any power of appointment, to certain persons. She subsequently, on the death of her husband, became entitled to certain real estate and personal estate, and made a codicil to her will, devising certain real estate, described as having come from her late husband, but without confirming her will.

Held, that the will was confined to the settlement property, and there was an intestacy as to the subsequently-acquired personal estate.

Mrs. J. C. Taylor had, under her marriage settlement, dated in 1867, a power of appointment over £15,000 worth of securities, and was entitled to jewels and furniture for her separate use.

On the 20th of October, 1883, Mrs. J. C. Taylor made a will, in which, after briefly reciting that she had a power of appointment under her settlement, she proceeded as follows:—"Now I do by this my will, in exercise and execution of the power or authority given or reserved to me by my said marriage settlement, and of all other powers, if any, enabling me in this behalf, appoint, give, and bequeath all the property of whatever nature comprised in the said settlement and over which I have any power of appointment or disposition by will," to trustees "upon trust to pay" an annuity of £2 a week to her brother, and, subject thereto, "upon trust to pay to my husband the income of the whole of the said trust property (except of that portion the income of which he shall be entitled to under the provisions of the said settlement) during his life, and to permit him to retain possession of any portion of the trust property not yielding income during his life"; and at his death the testatrix made various dispositions amongst her relations, dividing the trust fund into moieties, to one of which moieties certain charities ultimately became entitled.

In August, 1885, Robert Taylor, the husband of the said J. C. Taylor, died, and by his death Mrs. J. C. Taylor became entitled to certain real estate and to personal estate of the value of £7,500.

On the 14th of December, 1885, Mrs. J. C. Taylor made a codicil, which, so far as is material, was as follows:—"Codicil to my will.—Certain property having become mine by the will of my late husband, to wit" [the testatrix here specified certain real estate only] "I do give the whole of the aforesaid houses and lands to my brother for his sole use and benefit."

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at Law.

On the 27th of January, 1886, the testatrix died.

On the 17th of May, 1887, an originating summons under order 55 was taken out by one of the beneficiaries and next of kin for the opinion and determination by the court of several questions arising in the administration of the testatrix's estate, but the only question argued and calling for a report was whether the effect of the will and codicil was to pass the after-acquired property, both real and personal, or whether only the property included in the settlement and the specifically-mentioned realty passed, in which case there would be an intestacy as to the £7,500 acquired from the husband.

Sir A. Watson, Q.C., and *Nalder*, for the summons, cited *Du Hommelieu* v. *Sheldon*, 2 W. R. 639, 19 Beav. 389; *Sidney* v. *Sidney*, 22 W. R. 101, L. R. 17 Eq. 65; *Hopwood* v. *Hopwood*, 7 H. L. Cas. 728, 8 W. R. H. L. Dig. 7.

Whitehorne, Q.C., and *MacSwinney*, for the charities, cited *In re Earl's Trust*, 4 K. & J. 673, 6 W. R. Dig. 57.

Romer, Q.C., and *Blakesley*, *Maclean, Q.C.*, and *Maidlow*, for next of kin.

Sir A. Watson replied.

Chitty, J.—If a married woman, having power to dispose by will of certain property, duly makes a will as a married woman, and then, at the death of her husband, afterwards by codicil confirms that will, the will is, after all, though confirmed, only a will disposing of the particular articles mentioned and contained in the will. If, however, a married woman makes a will in a form which I will state as being the simplest form that I can think of to give rise to the question—namely, "I hereby appoint and give all property of whatever nature that at the time of my death I shall be capable of disposing of by will," and afterwards becomes discovert, and then makes a codicil confirming that will, it appears to me to be pretty plain (though it is not necessary to decide it) that that would be a will which would operate on all the property which at her death she was capable of disposing of—in other words, it would operate as a will of an unmarried woman.

The question that I have to decide is, in my opinion, simply a question of construction. The point is whether the will which this lady made when she was covert applies to any other property than the property which is comprised in her marriage settlement. [His lordship stated the settlement shortly, and continued:—] Now, she made her will during the coverture in these terms. She recites very shortly the settlement, and she says that by it certain bank, gas, and other shares comprised in the schedule, along with certain moneys, furniture, and other property therein specified, were effectually vested in certain trustees upon certain trusts "in favour of me and my said husband and our children, if any, and, subject thereto, in trust for such person or persons, and for such purposes as I, notwithstanding coverture, shall by my will, or any codicil thereto, appoint, and in default of such appointment upon the other trusts in the same settlement expressed." That being the short recital in the will of the settlement, though not perfectly accurate, but sufficient for the purpose, she goes on to make this disposition. [His lordship then stated the will, and continued:—] Now the question is whether the words "all the property of whatever nature comprised in the said settlement, and over which I have any power," &c., are confined to the property comprised in the settlement, or ought to be extended, upon the true construction of the words used, to all the property as to which at the time of her death she should have any power of disposal. The words are not "or over which," but "and over which."

Now the court has no right to alter a testator's language, and to substitute "or" for "and," unless it has such a context as justifies the court in coming to the conclusion that "and" was written for "or," and there must be a sufficiently strong context to enable the court to alter any word found in a will, or it may be in some cases two constructions are open, and it may be that, having regard to the rest of the will and the nature of the disposition and other matters proper to be considered, the court can find sufficient reason for changing the word. The late Master of the Rolls used to put it in this way. He said, "Alter words only where you find one word written in mistake for another"; and a favourite example of his was this: If a man having a black horse, which he was in the habit of riding, should say, "I give the black cow which I am in the habit of riding," it is plain that is a mistake. It is plain that "cow" would be written for "horse," and there would not be the slightest difficulty in changing that word. That was a good illustration of his to show the limit of the rule as to altering words upon which he generally, indeed I believe always, acted. Now take a gift "of all my lands in Middlesex, and the title deeds of which will be found in a certain box," it is quite plain that the essential part of the description in such a gift are the words "lands in Middlesex," and the additional words that are thrown in would not be held to be any part of the description itself, but something which the testator considers to be convenient to state in his will with reference to the property. There are many cases in the books with regard to parcels of real estate which are founded on this principle. The expression "and which" is rather peculiar to conveyancers, and I think in this will the words "and over which" are not intended to be any part of the description of the widow's property. I think it would not be right to interpose any words in this will by which I might get over, on behalf of the respondents, a difficulty which stands in the way. I think it would not be right to read it thus: "All the property of whatsoever nature, first, which is comprised in the will, and, secondly, over which I have a power of appointment." I think that would be inserting in this will unjustifiably words which the testatrix has not used. I think that the essential leading part of the description is, "All the property of whatsoever nature comprised in the said settlement," and that these words "and over which" are mere words of innocent addition, not enlarging the property which it is intended to dispose of by will. They are words, according to the construction which I adopt, unquestionably of surplusage, but that appears to me not to be an objection to the construction which I put upon them. I think it really reads thus: "The property comprised in the settlement, and I have over that property a power of appointment or disposition by will."

Then it was said, if I adopt this construction I should not give effect to the words "give and bequeath"; but after what I have stated with regard to the contents of the settlement, it is obvious, with regard to the jewels, "give and bequeath" was not an inappropriate term, and there is nothing in the use of those words in the will which enables me to say judicially that they show an intention that she should comprise in her will property which was not included in the settlement.

Some observations were made with reference to a description of the property which occurs in another part of the will. The term used is "said trust property." Very little light is thrown on the construction of the will by the use of that term, because she appointed whatever she has appointed by the earlier part of the will to certain persons as trustees, and begins by saying "Upon trust to pay £2 a month out of the income." Therefore "the said trust property" in the rest of the will may be ascribed to all the property which is included in the will of which she is declaring the trusts

But I have looked at these words and the disposition that is made by the will under the trusts of the will, and examined them with some care, and the result is this, that they afford no argument favourable to those who say that the intention was to embrace all the property which she could at the time of her death dispose of, whether covert or discovert, and they add, if anything, some slight additional force to, and somewhat strengthens, the conclusion I have arrived at upon reading the operative words themselves, because the trusts will be found appropriate to the property comprised in the settlement.

After this first trust to pay the annuity to her brother, she goes on:—"And, subject thereto, upon trust to pay to my husband the income of the whole of the said trust property excepting that portion the income of which he shall be entitled to under the provisions of the settlement"—words which aptly refer to the life interest which he had in the moiety of the main fund comprised in the settlement during his life. She goes on:—"and permit him to retain possession of any portion of the said trust property not yielding income during his life." Those words, again, are apt words to refer to the jewels and the furniture, in which he had, as is apparent from what I have already said, no life interest whatever.

This examination of the trusts declared strengthens, but I think in a very slight degree, the conclusion that I have come to upon the operative part of the will itself.

Then I come to the codicil, and I will assume in favour of the respondents for whom Mr. Whitehorne appears that the words "codicil to my will" were sufficient to confirm the will, and I think that would be the right construction. The codicil, except by those words "codicil to my will," does not confirm the will in any way. The bequest in the codicil runs thus:—"Certain property having become mine by the will of my late husband, the Rev. Robert Taylor, to wit." And she describes particularly a house and buildings and so forth, and she makes by this codicil a disposition of that property and that property only.

The result, therefore, is this, to my mind, that the codicil has confirmed the will as it stood and does not in any way alter the construction of the will, and that, so far as relates to any property that was within the ambit of the will, this codicil operates as a confirmation—it does not enlarge the scope of the will so as to make the will include any other property than that which, according to its true construction, is comprised in it. The confirmation, I think, is sufficient to get over any difficulty that might have arisen with regard, say, to the furniture. There is an intention shown that the furniture should pass by the will, but the power of disposition which she had by the will was, as I have shown, a contingent power, and that power failed by reason of her having survived her husband, and in that way under the trusts of the settlement the furniture became hers, but I think to this extent the codicil has set up the gift of the will, it has set up the disposition of the furniture and made that which, if she had not confirmed her will, would only have been an execution of a power, now a gift, and in that way I give effect to the words "give and bequeath." And, so far as is necessary, I make a similar observation with regard to the jewels, which do not, as I have already said, stand exactly in the same position as the furniture. There was no contest raised before me in regard to the jewels and furniture, but I have mentioned these points because they were made use of for the purpose of argument in regard to the true construction and the true effect of the lady's dispositions. I therefore declare that the lady died intestate as to so much of the personal estate as is not comprised in the settlement.

Solicitors, *Collyer, Bristow, Withers, Russell, & Hill; Currie, Williams, & Williams; S. Hamilton; Stretton, Hilliard, Dale, & Newman.*

Chan. Div. North, J. — April 12.

In re Worswick. Robson *v.* Worswick. (*a.*)

Discovery — Privileged document — Shorthand writer's notes taken in former action.

A coal mine was leased by the trustees of a charity to W., with a provision that a belt of coal should be left by the lessee, at the boundaries of the mine, of sufficient thickness to keep out the water. An adjoining mine was also leased by the trustees, with a similar provision, to a company which worked another adjoining mine belonging to an adjoining owner. The mines in the occupation of the company were damaged by flooding alleged to have resulted from the improper working by W. of the mine leased to him, which caused the water to flow into that part of the company's mines not leased to them by the trustees, and thence into the mine which was leased to them by the trustees.

W. died, and an action was brought by the company against his executors for damages for injury to the company as lessees, by the flooding of the mines in their occupation, but the action was compromised on payment of compensation. On behalf of the executors shorthand writer's notes of the proceedings were taken. An action was afterwards brought for the administration of W.'s estate, the executors being defendants; and the trustees of the charity put in a claim for damages for injury to them as owners of the mine leased to the company by the flooding of the mine.

Held, that the trustees were entitled to the production of the shorthand writer's notes taken on behalf of the executors in the former action.

Adjourned summons.

The chaplain and poor of Wyggeston's Hospital being possessed of the minerals underlying the Manor of Swannington, in the county of Leicester, by an indenture dated the 31st of December, 1852, demised a mine under that manor to William Worswick, since deceased, for a term of thirty-five years from the 29th of September, 1852; and it was provided in the lease that a belt of coal should be left by the lessee at the boundaries of the mine of sufficient extent and thickness to keep out the water.

The chaplain and poor of the Wyggeston's Hospital also, by leases, dated respectively the 9th of January, 1871, and the 22nd of June, 1875, demised another mine under that manor, and adjoining the mine leased to William Worswick, to the Snibston Colliery Co. for the term of forty years from the 25th of March, 1869. The Snibston Colliery Co. also worked an adjoining mine leased from the owners of property adjoining that of the chaplain and poor of the Wyggeston's Hospital.

The Snibston Colliery Co.'s mines became damaged by flooding, alleged to have resulted from the improper working by William Worswick of the mine leased to him, which caused the water to flow into that part of the Snibston Colliery Co.'s mines which was not leased to them by the chaplain and poor of the Wyggeston's Hospital, whence it found its way into that part of the mines which was leased to them by the chaplain and poor of the Wyggeston's Hospital.

The action was brought in 1882 for the administration of the estate of William Worswick, who died in 1871, his executors being the defendants.

In 1884 the Snibston Colliery Co. brought an action against the executors of William Worswick to recover damages for injury caused to them, as tenants, by the flooding of the mines in their occupation. The action came on for trial before Pearson, J., on the 15th, 16th,

(*a.*) Reported by J. Trustram, Esq., Barrister-at-Law.

17th, 18th, and 22nd of February, 1886, and shorthand notes of the proceedings were taken by the defendants. The action was subsequently compromised, the defendants agreeing to pay to the plaintiffs £2,000 at once, and also an annual sum of £200 for twenty-five years from the 25th of March, 1885.

The chaplain and poor of the Wyggeston's Hospital carried in a claim in the administration action for damages for injury caused to them as landlords by the flooding of their mine leased to the Snibston Colliery Co., through the alleged improper working by William Worswick of the mines in his occupation, and in support of their claim, after an affidavit as to documents had been made by the defendants, administered interrogatories, asking, among other things in reference to the action by the Snibston Colliery Co., "Did not the defendants or some or one and which of them cause to be taken shorthand writer's notes of the evidence in the said action?"

The defendants replied that they had already made an affidavit of documents and submitted that they ought not to be required to answer the interrogatory as to the shorthand writer's notes.

The present summons was taken out by the chaplain and poor of the Wyggeston's Hospital, and the question was raised whether or not the shorthand writer's notes were privileged from production.

Higgins, Q.C., and *Nalder*, for the summons.—The shorthand writer's notes taken on behalf of the defendants are liable to production.

They referred to *Nicholl* v. *Jones*, 13 W. R. 451, 2 H. & M. 588; *Rawstone* v. *Preston Corporation*, 33 W. R. 795, 30 Ch. D. 116.

Everitt, Q.C., and *Butcher*, for the defendants.—The shorthand writer's notes taken on behalf of the defendants in the action against them by the Snibston Colliery Co. are privileged: *Pearce* v. *Foster*, 33 W. R. 919, 15 Q. B. D. 114.

North, J.—Then the question is whether the shorthand writer's notes are privileged from production. I think they are liable to production. It seems to me that there is nothing privileged or confidential in any such notes. In the case of *Nicholl* v. *Jones* Wood, V.C., ordered them to be produced. Then, again, in *Rawstone* v. *Preston Corporation*, which is the latest case on the subject, Kay, J., held that they were not privileged and must be produced. In another case, *Nordon* v. *Defries*, 30 W. R. 612, 8 Q. B. D. 508; I, myself, in chambers, made an order for the inspection of certain shorthand notes, but on appeal to a divisional court the judges took a different view and held that the shorthand notes were protected from inspection on new grounds. In giving judgment Mathew, J., says:—"We are therefore disposed to give credit to the suggestion that the notes were intended to form materials for the guidance of the plaintiff and his counsel in the prosecution of the present action, and we think that the affidavit of the plaintiff is sufficient to enable us to act upon this view. In accordance, therefore, with the principles laid down in *Southwark Water Co.* v. *Quick*, 26 W. R. 328, 3 Q. B. D. 315; *Anderson* v. *Bank of Columbia*, 24 W. R. 624, 2 Ch. D. 644; and *McCorquodale* v. *Bell*, 24 W. R. 399, 1 C. P. D. 471, we are of opinion that the shorthand notes are protected from inspection and that the appeal must be allowed." In that case *Nicholl* v. *Jones* was cited. The question here is whether shorthand notes are privileged at all. That is not the point upon which the judges decided in that case. I shall follow the case of *Rawstone* v. *Preston Corporation*. If the solicitor had taken shorthand notes like a shorthand writer, or if counsel had taken such notes they would not be privileged. Under the circumstances I make an order that the defendants produce the shorthand notes. There may be a further question whether the documents referred to in the shorthand notes are liable to production.

Solicitors, *Collyer-Bristow & Co.*; *C. J. Munder*.

Chan. Div.
Stirling, J.

March 23; April 24; May 15.

Warne v. Sherohm. (a.)

Copyright — Infringement — Dramatization of novel — Multiplying copies — Copyright Act, 1842 (5 & 6 Vict. c. 45), *ss.* 2, 3.

Although the mere dramatization of a novel and the representation of the play upon the stage are not infringements of the copyright of the novel, yet the making copies (although not in print) of a play in which numerous passages from the novel have been inserted is "multiplying copies" of the novel within section 2 of the Copyright Act, and is consequently an infringement of the copyright.

This was an action brought by the proprietors of the copyright in a novel called "Little Lord Fauntleroy" for an injunction to restrain the defendant from infringing their copyright.

The defendant had dramatized the novel, and caused his play to be performed on the stage. The play was also called "Little Lord Fauntleroy."

The plaintiffs did not complain of the dramatization of the novel and the representation of the play upon the stage.

The alleged infringement was that for the purpose of producing the play the defendant had made four copies of the play either in manuscript or by the aid of a type-writer. One of these copies had been deposited with the Lord Chamberlain; the other three remained in the possession of the defendant or the persons employed by him in representing the piece.

Very considerable passages in the play had been abstracted almost *verbatim* from the novel. Thus in the first act about one-fourth of the lines had been taken from the novel, and some of the passages so extracted were prominent and striking parts of the dialogue.

It was stated at the bar that the defendant claimed the right to make such further copies of the play as might be necessary to enable him to give further representations of his piece in London and elsewhere.

Hastings, Q.C., and *E. F. Studd*, for the plaintiffs, after pointing out the passages which had been extracted *verbatim* from the novel, contended that the burden was on the defendant to show that there was an infringement within sections 2 and 3 of the Copyright Act, 1842. They argued that, although the defendant might be entitled to dramatize, yet he was not entitled to make copies.

They cited *Coleman* v. *Wathen*, 5 T. R. 245; *Murray* v. *Elliston*, 5 B. & A. 657; *Reade* v. *Conquest* (No. 1), 9 W. R. 435, 9 C. B. N. S. 755; *Reade* v. *Lacy*, 7 W. R. 531, 1 J. & H. 524; *Reade* v. *Conquest* (No. 2), 10 W. R. 271, 11 C. B. N. S. 479; *Tinsley* v. *Lacy*, 11 W. R. 876, 1 H. & M. 749; *Novello* v. *Sudlow*, 12 C. B. 177; *Ager* v. *Peninsular and Oriental Steam Navigation Co.*, 26 Ch. D. 637, 32 W. R. Dig. 49.

Buckley, Q.C., and *Lewis Coward*, for the defendant, argued that dramatization did not mean merely representing on the stage.—It meant, in the first place, producing a play in writing; and as sending a copy to the Lord Chamberlain was a condition precedent to acting, one copy, at least, must be produced. The question was, had the production of the copies interfered with

(a.) Reported by L. S. Benrown, Esq., Barrister-at-Law.

the sale of the novel: *Scott* v. *Stanford*, 15 W. R. 757, L. R. 3 Eq. 718.

They also cited *Bell* v. *Whitehead*, 3 Jur. 68; *Whittingham* v. *Wooler*, 2 Swan. 428.

Hastings, Q.C., in reply, cited *Chatterton* v. *Cave*, 26 W. R. 498, 3 App. Cas. 483; *Hole* v. *Bradbury*, 28 W. R. 39, 12 Ch. D. 886.

Stirling, J., after stating the facts, proceeded:—I have now to decide whether the plaintiffs are entitled to complain of what the defendant has done and intends to do; and, if so, to what relief they are entitled. It was not disputed that the plaintiffs' title depends on statute. There have been three principal Acts of Parliament on the subject of copyright. By the earliest (8 Anne, c. 19) there was conferred on authors the sole right and liberty of printing and reprinting. In the second (54 Geo. 3, c. 156) copyright is styled "the sole liberty of printing." The Act now in force (5 & 6 Vict. c. 45) defines (section 2) copyright to be "the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied." And by section 3 it is enacted that "the copyright in every book which shall after the passing of this Act be published in the lifetime of its author shall . . . be the property of such author and his assigns." By section 2 the word "book" is to be construed to mean and include "every volume, part, or division of a volume." Notwithstanding the language of the Act, not every *verbatim* reprint of part of a book is an infringement of copyright. In the words of Lord Hatherley in *Chatterton* v. *Cave*, "Books are published with an expectation, if not a desire, that they will be criticized in reviews, and, if deemed valuable, that parts of them will be used as affording illustrations by way of quotation or the like, and if the quantity taken be neither substantial nor material, if, as it has been expressed by some judges, 'a fair use' only be made of the publication, no wrong is done and no action can be brought." In *Tinsley* v. *Lacy* the question arose whether it was a fair use of a novel to print and publish a drama founded on it. In that case it was proved that a portion of the drama, including the most striking incidents and much of the actual language, had been taken bodily from the novel. And it was in evidence that the profit on the publication of the play had been almost inappreciable. Nevertheless, a perpetual injunction was granted against the printing and publishing of the play without any preliminary inquiry as to damages. In giving judgment Lord Hatherley (then Vice-Chancellor) says: "Although it is open to any actor or declaimer to recite a poem or other work written by another as publicly as he pleases, it could scarcely be said that he would be at liberty on the occasion of his recitations or performance to distribute copies of the work for sale among the audience, nor could it be any excuse to say that the copies were intended merely to assist the audience, who desired, while listening to the recitation, to have a copy of the words in their hands." In *Novello* v. *Sudlow* it was decided that the printing or multiplying copies of a piece of music, not for sale, but for gratuitous distribution among the members of a musical society, was a violation of the right of property vested in the owner of the copyright in the piece. It must therefore follow that the gratuitous distribution among the audience of copies of a poem or other work which an actor or declaimer thought fit to recite in public would be an infringement of the copyright therein. This being so, I am unable to see that the multiplication of an indefinite number of copies of a play (which, if printed and published, would be an infringement of copyright) for the purpose of enabling that play to be publicly represented can be otherwise than an infringement. It is said, however, that anyone has a right to dramatize a novel—that is, not merely to conceive, but to write, dramas, and to do everything necessary for that purpose, including the making of a copy for the Lord Chamberlain. In my opinion this is a fallacious mode of stating the right. The statute confers on the author of a book and his assigns "the sole and exclusive liberty of printing or otherwise multiplying copies" of the book. By implication every person other than the author and his assigns is prohibited from printing or otherwise multiplying copies of the book. But this is the only restriction imposed on the public, and, subject to it, every person is free to make such use of the book as he pleases. So long, therefore, as he does not print or otherwise multiply copies of the novel, any person may dramatize it, and may cause his drama to be publicly represented. But if, for the purpose of dramatization, he prints or otherwise multiplies copies of the book he violates the rights of the author no less than if the copies were made for gratuitous distribution. The authorities appear to me to be consistent with this view. In the early cases, *Coleman* v. *Wathen*, and *Murray* v. *Elliston*, the point raised in the present action could hardly have arisen, for they were decided at a time when the statutes in force conferred only an exclusive right of printing. It is unlikely that any copies (other than manuscripts) were used for the purpose of the representation of the plays which were the subject of these actions; and such manuscript copies would not have been infringements of the author's rights. The case most relied upon for the defendant was *Reade* v. *Conquest* (No. 1). It was decided on a demurrer to a count of the declaration which alleged that the defendant without the consent of the plaintiff dramatized the plaintiff's book, and publicly represented and performed or caused to be represented and performed as a drama the said book. The declaration does not allege that the defendant printed or otherwise multiplied copies of the book. In the course of the argument the defendant's counsel says (see p. 764):—"It is not suggested that the defendant multiplied copies of the plaintiff's book. The complaint is that the defendant has dramatized the story and caused it to be represented at the theatre." In giving judgment Williams, J., says, "The right claimed by the plaintiff was two-fold. First, he contended that his statutable right was infringed by the act of the defendant. It was held, however, in the case of *Coleman* v. *Wathen*, that representing a public dramatic piece of the plaintiff's upon the stage was not a publication within the meaning of the 8 Anne, c. 19, so as to subject the defendant to the penalty imposed by the statute, and the 2nd section of the 5 & 6 Vict. c. 45, defining 'copyright' to mean 'the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied' seems to furnish a complete answer to the plaintiff's claim under the statute." That case, therefore, seems to me to have been decided on the ground that the plaintiff's statutory right of multiplying copies of his book was not infringed. In the present case I am of opinion that if the defendant had caused his play to be printed and published there would have been as substantial an infringement of the plaintiffs' rights as occurred in *Tinsley* v. *Lacy*. For the reasons already given I think that what has been done, and is intended to be done, by the defendant constitutes an infringement of the plaintiffs' legal rights no less than if the defendant had printed and published his play; and, notwithstanding the smallness of the damage, I consider myself bound by the authority of *Tinsley* v. *Lacy* to grant a perpetual injunction to restrain the defendant from printing or otherwise multiplying copies of his play, containing any passages copied, taken, or colourably altered from the plaintiffs' book, so as to infringe the plaintiffs' copyright in the novel or tale entitled "Little Lord Fauntleroy." The plaintiffs further insist on an order directing the delivery up for cancellation of the existing copies of the play; and they rely on

the decision in *Hole* v. *Bradbury*. In that case, however, as I understand the facts, the whole of the work complained of was an infringement of the plaintiffs' rights. In the present case, however, upon an examination of the play, I have come to the conclusion that it may not be impossible for the defendant to sever the passages which he has extracted from the novel, from the rest of his work; and if he desires it I will give him an opportunity of doing so. He must, however, first, state upon oath what copies of the work exist; secondly, extract from those copies which are in his possession or power, and deliver up to the plaintiffs for cancellation, all passages copied, taken, or colourably imitated from the plaintiffs' book; thirdly, produce to the plaintiffs, if required by them, for examination the copies after the pirated passages have been extracted, and there must be liberty for the plaintiffs to apply for a further order if they are dissatisfied with the result. I introduce these last words purposely because, as was pointed out in the course of the arguments, there is a possible mode by which, without infringing the plaintiffs' copyright, the defendant may be able to make copies of the play. The costs of the action must be paid by the defendant.

Solicitors, *Kaye & Guedalla; Williams & James.*

Chan. Div. } June 1.
Kekewich, J. }

In re CARR.
CARR *v.* CARR. (*a.*)

Practice—Investment—Payment of income.

It is not desirable as a general rule to order income to be paid to trustees, "or either of them," according to the form in Seton on Decrees, p. 88, Section 4, No. 2.

In re Clinton, 8 *W. R.* 492, *not followed.*

Petition.

This was a petition in an administration action in which no decree had been made.

The testator, John William Carr, died on the 14th of January, 1880, and under his will his daughter, Elizabeth Jane Tonge, one of the petitioners, was now entitled to one-fourth share of the income of his residuary personal estate. Upon her marriage in April, 1881, Mrs. Tonge had assigned her share under the will to the trustees of her marriage settlement upon the trusts thereby declared. All the income of the residuary personal estate, including Mrs. Tonge's share, had (under an order of the court) been, and from time to time was to be, paid into court by a receiver appointed in the action.

The petition asked (*inter alia*) that the daughter's share of the income so paid in should from time to time be paid out to the two trustees of her marriage settlement, "or either of them," upon the trusts thereof—following the form in Seton on Decrees (4th ed.), p. 88, Section 4, No. 2. One of the cases cited by Seton in support of that form is *In re Clinton*, 8 W. R. 492.

Younger, for the petitioners, referred to the form in Seton on Decrees, at p. 88, and the cases there cited.

MacCoakey, for the respondents.

KEKEWICH, J., held that, though in certain cases orders had been made in that form, it was not desirable to follow it generally, and ordered that the dividends should be paid out to the two trustees on their joint receipt in the usual form.

Solicitors for the petitioners, *Wynne, Holme, & Wynne*, for *Forshaw & Hawkins*, Liverpool.

Solicitors for the respondents, *Bartlett & Berry*, Liverpool.

(*a.*) Reported by R. H. DRANE, Esq., Barrister-at-Law.

Chan. Div. } May 15, 16.
Kekewich, J. }

TOD-HEATLY *v.* BENHAM. (*a.*)

Lease — Lessor and lessee — Restrictive covenant — "Business"—Hospital—Injunction.

A lease contained a covenant by the lessee with the lessor not to carry on upon the demised premises, besides certain trades specifically mentioned, "any other noisome, obnoxious, or offensive trade or business, nor suffer any act or thing which shall or may be or grow to the annoyance, nuisance, grievance, or damage of the lessor or the inhabitants of the neighbouring or adjacent houses." An under-lessee used the premises as a hospital for the treatment of disease of the nose, ear, skin, and eye, fistula, and other diseases.

Held, that the user of the premises as a hospital was an infringement of the covenant.

Bramwell *v.* Lacy, 27 *W. R.* 463, 10 *Ch. D.* 691, *followed.*

Trial of action.

In this action the plaintiffs, Messrs. Elliott & Fry, claimed an injunction to restrain the defendant from using certain premises, No. 6, Gloucester-terrace, Hyde Brompton, London, as a hospital and surgical appliance department for the treatment of diseases of the throat, nose, ear, skin, and eye, fistula, and other deformities and diseases of the human frame.

By an indenture dated the 16th of April, 1868, made by the predecessor in title of the plaintiff, Tod-Heatly, the premises were demised to one James Drake from Midsummer, 1826, for a term of ninety-nine years. The lease contained a covenant by the lessee for himself, his heirs, executors, administrators, and assigns, with the lessor, her heirs, and assigns, that he, his executors, administrators, or assigns, or any or either of them, should not at any time during the term "use, exercise, or carry on, or permit, or suffer any other person or persons whomsoever to inhabit, dwell in, use, or occupy the" premises, or any part thereof, who shall use or exercise therein or thereupon the trades or business of a tallow-chandler, or melter of tallow, soap-boiler, slaughterman, distiller, brewer, lampblack maker, or ammoniac manufacturer, or any other noisome, obnoxious, or offensive trade or business without the express consent of the said lessor, her heirs, or assigns in writing, nor do, or wittingly or willingly suffer to be done, any act, matter, or thing in, upon, or about the said demised premises, or any part thereof, which shall or may be or grow to the annoyance, nuisance, grievance, or damage of the lessor, her heirs, or assigns, or the inhabitants of the neighbouring or adjacent houses.

The plaintiffs were lessees and occupiers of the adjacent houses, Nos. 7 and 8, Gloucester-terrace.

The defendant was in occupation of No. 6, Gloucester-terrace, by virtue of an underlease, dated shortly before the commencement of the action, and commenced to use the house as a hospital under the name of "The Queen's Jubilee Hospital," for the treatment of the diseases above mentioned.

The plaintiffs thereupon brought an action to restrain the defendant from (*inter alia*) using the said premises for the purposes above stated, in contravention of the covenant in the lease. The construction of the covenant is the only point in the case calling for a report.

Warmington, Q.C., and *Alexander Young*, for the plaintiffs.—A hospital of this kind is a "noisome, obnoxious, or offensive trade or business": Bramwell v.

(*a.*) Reported by C. H. F. CHRISTIE, Esq., Barrister-at-Law.

Lacy, 27 W. R. 463, 10 Ch. D. 691; *Rolls* v. *Miller*, 32 W. R. 806, 25 Ch. D. 206, 27 Ch. D. 71.

Barber, Q.C., Cock, Q.C., and *Farwell*, for the defendant.—This is not a "legal nuisance." If the business is not one of those specially excepted, it cannot come within the covenant. The effect of holding that a hospital is prohibited would be to strike out all words prohibiting the special businesses and make the covenant a general one in restraint of trade. The plaintiffs might as well say, "We object to a tailor's shop." A tailor's business is no more excepted than ours, and yet no one imagines that tailoring would be restrained under this covenant. There is no material inconvenience: *Walter* v. *Selfe*, 4 De G. & Sm. 315, 322.

They also cited *Harrison* v. *Good*, 19 W. R. 346, L. R. 11 Eq. 338; *Bamford* v. *Turnley*, 10 W. R. 803, 3 B. & S. 66; *Ball* v. *Ray*, 21 W. R. 282, L. R. 8 Ch. App. 467; *Hammersmith, &c., Railway Co.* v. *Brand*, 18 W. R. 12, L. R. 4 H. L. 171; and *Sayers* v. *Collyer*, 33 W. R. 91, 28 Ch. D. 103.

KEKEWICH, J.—This case depends upon the construction of a covenant in a lease, and is covered by authority. The first part of the covenant prohibits the exercise of certain specified trades, and that means that it only extends to the actual ones mentioned. But the clause in the lease goes on:—[His lordship read the rest of the covenant above set out.] This shows that reference is intended to be made to trades other than those prohibited by name; as if the first part were written "other noisome, obnoxious, or offensive trade or *other* business." "Nuisance" means "legal nuisance," *Harrison* v. *Good*, and not merely what we mean in common parlance by "annoyance." As to the meaning of this latter word see *Walter* v. *Selfe*. In my opinion this is a nuisance, and therefore a legal nuisance. In *Bramwell* v. *Lacy* the words of the covenant were very like these, and were as follows:—"That he, the said William Reynolds, his executors, administrators, or assigns, shall not exercise or carry on, or suffer to be exercised or carried on, upon any part of the said premises, any trade, business, or dealing whatsoever, or anything of the nature thereof, without the consent in writing of the said Richard Roy, his executors, administrators, or assigns, or be party to or suffer any act or thing which may be or grow to the annoyance, damage, injury, prejudice, or inconvenience of the neighbouring premises"; and it was held that carrying on a hospital was a "business" and therefore a breach of the covenant.

This case is not distinguishable from *Bramwell* v. *Lacy*, so that the plaintiffs are entitled to the injunction they ask, but it is not to come into operation for six months.

Injunction granted.

Solicitors for the plaintiffs, *Last & Sons.*

Solicitors for the defendant, *Prior, Church, & Adams.*

Chan. Div. } March 13, 14, 15; April 11, 12, 16.
Kekewich, J. }

CAPEL & CO. v. SIM'S COMPOSITION CO. (a.)

Company—Fraudulent prospectus—Misrepresentation—Omission to state parol contract—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 38.

Before the issue of the prospectus of the S. Co., the defendant S. verbally agreed with one E. that, out of £21,000 represented in the prospectus to be the cash portion of the purchase-money, E. should receive £6,000 as promoter. This agreement did not appear on the prospectus. The plaintiff T. stated that, if he had known of the agreement, he would not have recommended the shares in the company to the plaintiffs C. & Co.

Held, first, that this was such a misrepresentation as to entitle the plaintiffs to relief; and, secondly, that the agreement, though not in writing, was within section 38 *of the Companies Act*, 1867, *and that its non-disclosure in the prospectus rendered such prospectus fraudulent.*

Held, therefore, on both grounds, that the plaintiffs were entitled to judgment.

The law as to misrepresentation by companies and their officers discussed.

This was an action by James Capel & Co. and the Foreign, American, and General Investments Trust Co. for a declaration that the plaintiffs were induced to apply for and accept an allotment of 1,000 shares in the defendant company by the fraud and misrepresentation of the defendants (viz., the company and Appleton, Burnside, and Sim, who were directors thereof). The plaintiffs also claimed rescission of their contract to take shares and rectification of the register of members by striking out their names, and repayment of the amount paid on the shares with interest and damages. A few months prior to March, 1886, the company was registered under the Companies Acts, the object of its formation being to take over, as a going concern, the business carried on for the manufacture and supply of Sim's Protective and Anti-Fouling Compositions for coating ships' bottoms. The defendant, Sim, was the inventor and proprietor of these compositions. In March, 1886, a prospectus was issued inviting applications for shares. This circular contained certain statements which the plaintiffs alleged to be untrue. Of these, the principal paragraphs relied on by the plaintiffs were as follow:—"Average net profits for the last five years equal to a dividend of more than fourteen per cent. upon the capital proposed to be called up." "These compositions have for the last twelve years undergone long and exhaustive trials on ships of the Royal Navy, and are now extensively used in her Majesty's service. A list of ships in the Navy to which they have been applied accompanies this prospectus." "Many of the leading private shipbuilders and others are using the compositions, and it is intended to largely develop this branch of the business." "The profits for the past five years, as certified . . . show an amount which would yield an average dividend of more than fourteen per cent. upon the share capital proposed to be called up."

The case, when part heard, stood over to allow the plaintiffs to amend their statement of claim, which they did by inserting the following paragraph:—

"Before the issue of the said prospectus an agreement had been, to the knowledge of the defendants Appleton and Burnside, made between defendant Sim and Henry Russell Evans, party to the agreements referred to in the prospectus, that said Evans should receive, out of the £21,000 represented in the prospectus to be the cash portion of the purchase-money, £6,000 for his services as promoter. In the said agreement the defendant Sim and the said Henry Russell Evans were described as vendors, and the facts that Evans was the promoter of the company and was to receive that sum for his services were purposely concealed by the defendants, the directors. If defendant (Burnside) did not know the said facts, he made or authorized the statement as to the purchase-money in the prospectus recklessly, without caring to ascertain whether it was true or untrue. If plaintiffs had known the facts so concealed, they would not have taken or applied for the said shares or any of them. They only discovered the said concealed facts on cross-examination of defendants at the trial. They submit that, so far as regards the relief sought against

(a.) Reported by C. H. F. CHRISTIE, Esq., Barrister-at-Law.

the directors, the said concealed agreement was a contract within section 38 of the Companies Act, 1867."

In answer to this the company replied that the whole and real agreement between Sim, Evans, and the company was set forth in the agreements referred to in the prospectus; that the fact that Evans was a promoter was well known to the plaintiffs before the close of the pleadings; that there had been no concealment of facts; that, except as appeared from the agreements, Evans was not, to the company's knowledge, a promoter, and that the facts alleged to have been concealed were immaterial and irrelevant. The defendant Sim's reply to the amendment was that the agreements mentioned in the prospectus disclosed the fact that Evans was to receive £6,000 out of the £21,000, which was the only material fact with regard to the company or to any person intending to become a shareholder therein that existed in any arrangement made between Evans and Sim; that such agreements constituted the final agreement between Evans and Sim as to the payments to be received by the former, and were the only agreements or contracts required to be set out in the prospectus; that the fact that Evans was a promoter and that the £6,000 was to be paid to him for his services as promoter was not purposely or at all concealed by the directors or any of them; that it was known to the plaintiffs before they applied for shares that Evans was a promoter; that the plaintiffs did not first discover the alleged concealed facts on the cross-examination, but were aware of them when they applied for shares; that the plaintiffs were not induced to apply or influenced in applying for shares by the non-disclosure of the alleged concealed facts; that the alleged concealed agreement was not a contract within section 38 of the Companies Act, 1867; and that, if it were such a contract, it was sufficiently specified in the prospectus.

Bigby, Q.C., and *Grosvenor Woods*, for the plaintiffs.

Warmington, Q.C., and *Sturges*, for the defendant company.

Channell, Q.C., and *C. E. Allen*, for Appleton.

Pochin, for Burnside.

Finlay, Q.C., and *Little*, for Sim.

The following cases were referred to in addition to those noticed in the judgment: *Peek* v. *Gurney*, 20 W. R. 71, 22 W. R. 29, 13 Eq. 79, L. R. 6 H. L. 377; *Redgrave* v. *Hurd*, 30 W. R. 251, 20 Ch. D. 1; and *Edgington* v. *Fitzmaurice*, 32 W. R. 848, 33 W. R. 911, 29 Ch. D. 459.

April 16.—Kekewich, J.—The representations with regard to which this action is brought were really made to Mr. Trotter, who was Capel & Co., and he was the agent of the Foreign, American, and General Trust Co., of which he was the broker and a director. They must succeed through him or not at all. The plaintiffs complain, irrespective of statutory fraud, of representations by the prospectus and representations by Appleton. A plaintiff in an action of this kind is entitled to succeed if he can put his hand on a positive and material untruth, in reasonably plain language, of such a character that, in the absence of evidence to the contrary, it must have influenced the contract in the sense of having induced the plaintiff to do that in belief of what was false which, if he had known the truth, he would have refrained from doing. If he cannot do this he may succeed by showing that he was misled by statements proved to be inconsistent with the truth, couched in language capable of more than one interpretation; but, as regards any such statements, he is not entitled to say, "This must have been the meaning, and this is false." He must prove that he so understood it and relied on it as having that meaning. And his oath is not sufficient; it must be a reasonable understanding. And in considering what is reasonable regard must be had to the particular person, his knowledge and means of knowledge of the matter in hand, and also his general experience and other circumstances. This statement of the law is based on *Smith* v. *Chadwick*, 32 W. R. 687, 9 App. Cas. 187. Here is a plaintiff who stands alone in this fertile field of litigation. He is an eminent stockbroker, living with and by companies; and I must read the prospectus with his experienced eye, remembering that he regarded this particular company as of a transitory character. The statement (above set out) as to average net profits must be read in connection with another statement in the prospectus:—"The profits for the past five years, as certified by Messrs. Good, Daniels, & Co., chartered accountants, and by Mr. Stephen Darley, show an amount which would yield an average dividend of more than fourteen per cent. upon the share capital proposed to be called up." The certificate was produced, and agreed with the statement, and no doubt the profits were made. The untruth must be in the words "capital proposed to be called up." That was not stated. It is difficult to infer what was meant by that expression. But manifestly the capital was more than £36,000, because that was the purchase-money. How much more? That includes the plant, stock, and everything of that kind, but not preliminary expenses so far as the statement of the prospectus goes. Why am I to add more? The plaintiff added £4,000; it was little more than a guess, the result of his experience, and not far wrong. That was what was contemplated to be paid up in the first instance. The profits were nearly enough for that, and would have been enough to pay fourteen per cent. on a slightly smaller sum. He asked no question, and relied on his own experience. How could he allege deceit? He omitted intentionally to take into consideration for this purpose the difference between £40,000 and £15,000 because he did not consider that ought to be taken into consideration with reference to the intended dividend, an important matter for consideration at the moment. I therefore hold that this alleged misrepresentation is not made out. [His lordship, after dealing with the charge of misrepresentation by the statement as to the trials and use of the composition by the Navy, and by private shipbuilders and engineers, and deciding in the defendants' favour on that and certain other points, continued:—] The main statement complained of is this, "The consideration to be paid for the entire property and business plant, stock, &c., is £21,000 in cash and £15,000 in shares." Examine it first alone—that is, not without reference to documents, but without reference to the rest of the prospectus. It means, and means plainly, that there was a purchase of the property and business plant, stock, &c., and the purchase-money was £36,000, payable £21,000 in cash and £15,000 in shares. The necessary conclusion—that is, a conclusion which must, of course, be drawn by a man of ordinary intelligence—is, that these sums were to be paid to the person from whom the purchase was made; in other words, to the vendors of the thing purchased. And looking, as of course a man of ordinary intelligence would and must, at the statements in the prospectus of the contracts entered into by the company, there he finds that the person to whom the money is to be paid—that is, the vendors—are Sim and Evans, grouped as parties of the one part in each of the contracts there mentioned. Again, the conclusion is inevitable that the £36,000 was to be paid to them as vendors. That is a positive statement, and it is positively untrue. It is, in plain English, false. The purchase-money was, in truth, £30,000, payable £15,000 in cash and £15,000 in shares. Sim was the only vendor, and the extra £6,000 was promoter's money—that is, money to be paid to Evans, who had an interest in the property, for floating the company. It

whatever way and by whatever means he thought best. The plaintiff has sworn that he trusted this plain statement as true, and that if he had known how untrue it was—had known the real facts—nothing could have induced him to recommend the investment to the trust company. The difference between purchase-money payable to a vendor and promotion-money paid to a promoter, in no sense a vendor, is too obvious to require explanation, as is also the influence which the distinction, if disclosed, would make on the mind of a man of business. But it is said that something is generally thrown into a bargain for the purchase of a business on behalf of a company to cover the expenses incident to formation, and Mr. Trotter, a man of large experience in such matters, admitted that this is frequently done. I am not prepared to say that where the vendor undertakes to bear the preliminary expenses there may not fairly be added to the purchase-money for that purpose a moderate sum beyond what would otherwise be paid to him as the cost price of what he sells, but I am equally unprepared to say what would be a moderate sum, or to say more than that it must be fixed in each case according to the special circumstances, and honesty must be the guide as well as the best policy. There is no question about a moderate sum here. The proportion borne by the promotion-money to the purchase-money is far too large, and, moreover, there is not a little of evidence to displace the inference that £6,000 was far more than could have been required for legitimate purposes connected with the formation of the company. The conclusions at which I have arrived on this part of the case are in harmony with the judgment of Bacon, V.C., in *Bagnall* v. *Carlton*, 26 W. R. 243, 6 Ch. D. 371, supported by the Court of Appeal, and of that of Sir G. Jessel, M.R., in *Emma Silver Mining Co.* v. *Grant*, 11 Ch. D. 918, 27 W. R. 48. But it is said that there are passages in the prospectus indicating the real truth, and which at least put the plaintiff on inquiry respecting the terms of the purchase agreements, especially remembering that he was a man of business. This is so, and if the passages in question are critically examined, without reference to those on which I have already commented, they might support the desired conclusion. Sim is referred to as having established the business, and as being the vendor, whose age and failing health are the only reasons for the sale to a company. I think that if the plaintiff had noticed those phrases, as he apparently did not, he might well have said, "Sim is, no doubt, the principal vendor, and the composition is called by his name, and if there is some inaccuracy in referring to him alone, it is yet consistent with the other gentleman spoken of as vendor, having some interest." Consider, however, what would have happened if he had exercised extreme caution and had followed up the inquiry suggested by the passages in question. The doctrine of equity is that a man put on inquiry has notice of what the inquiry, if prosecuted with reasonable diligence, would have disclosed, and not that he would have ascertained anything which would not have been thus disclosed. The plaintiff might, of course, have made inquiries of Sim or others, but the natural and proper course was to look at the agreements to which reference was made; and if he had done this he would have found that Sim and Evans are not merely called vendors, but are throughout the agreements treated as vendors, and that there is not the slightest indication that they are not both in the same manner, though in different proportions, interested in the property contracted to be sold to the company. This compels me to hold that there has been stated, in the face of the prospectus and in the documents referred to, a positive and material untruth, and that the defendant company, Sim, Appleton, & Burnside, are all responsible for it. I give no reasons for attaching that responsibility, for it was not attempted to be denied. There is a point made by the plaintiffs by amendment in connection with this part of the case which it is convenient to dispose of here. They say that the evidence disclosed a contract within the operation of section 38 of the Companies Act, 1867, which ought, therefore, to have been specified, but is not specified, in the prospectus, and that such prospectus must consequently be deemed fraudulent on the part of the defendants, who issued the same. The first objection taken to this claim is that there is no contract in writing, and that without writing it is impossible to specify the dates and names of parties. On this I need say no more than that if authority to the contrary is not found in *Arkwright* v. *Newbold*, 28 W. R. 828, 29 W. R. 455, 17 Ch. D. 301, which is cited for it, I entertain no doubt that a parol contract is covered by the statute. I see no reason for so restricting its operation as to invite wholesale evasion. The question there is whether the actual contract is within the meaning of the statute. I do not propose to define what contracts are and what are not within it. The language presents considerable difficulty, as is evidenced by the litigation which it has occasioned and the varied, though, I think, substantially consistent constructions which have been placed on it by judicial decisions. To my mind there is no serious difficulty in applying the language to this case. What is the contract which it is said ought to have been specified in the prospectus? This, that out of the money nominally payable as purchase-money for the business, £6,000 should be paid to Evans, not as purchase-money, but for his services as promoter, or that the purchase-money should be £30,000 and that in addition £6,000 should be payable to Evans as promoter. Take it as you will, it is a contract made between two promoters, Sim and Evans, relating to the affairs of the company, and, as I have already held, one of which any person proposing to subscribe for shares ought to have been informed, in order that he might exercise a reasonable judgment touching the position and prospects of the company. *Gover's case*, 23 W. R. 608, 24 *Ib.* 125, L. R. 20 Eq. 114, 1 Ch. D. 182, and *Twycross* v. *Grant*, 25 W. R. 586, 701, 2 C. P. D. 469, are authorities, if authorities be needed, that such a contract at least is within the operation of the statute. The effect of this conclusion I will consider later on. I pass to the consideration of an entirely different question—namely, whether the defendant Appleton made the representations charged against him in paragraph 5 of the statement of claim. This is a question affecting the defendant Appleton only of the directors. [His lordship then compared the evidence of the plaintiff and Appleton, and decided in favour of that of the plaintiff whenever it conflicted with Appleton's, and continued:—] It is objected that Trotter made no inquiries of the company or of Sim. Trotter might, however, have made inquiries of the company or of Sim (not that he would have ascertained anything as far as I can see if he had), but was he under any obligation to make them? Clearly not. According to English law a man is entitled to accept and act on statements of fact of a person presumably competent to make them, and to make that person responsible for their truth. He is under no obligation to doubt their accuracy or to test it by inquiry elsewhere. Law, in this instance as in many others, is consistent with honest dealing between man and man. I hold, therefore, that the defendant Appleton made false representations to the plaintiff, William Trotter, as agent for the plaintiff company, which induced the latter to enter into the contract to take shares in the defendant company, and to pay, therefore, the sum actually paid by them—viz., £1,000, less the allowed rebate. I have already said in making these representations he was

not authorized either by Sim or by Burnside. I further hold that he had no authority from the defendant company. There is no proof of any such authority, and I cannot presume it: see *Barnett, Hoares, & Co.* v. *South London Tramways Co.*, 35 W. R. 640, 18 Q. B. D. 815. I hold that the prospectus contained false statements of a material character, which induced the plaintiff company to take shares and pay money. It was the prospectus of the company, and the company must be liable in its corporate character for that document, issued in its name, soliciting applications for shares. The defendants Sim, Appleton, and Burnside are likewise responsible for it as having been issued with their authority. I hold that there was a concealment of a contract which ought to have been specified in the prospectus, and that such concealment is, according to the statute, fraudulent as against the defendants, Sim, Appleton, and Burnside. The statute does not make it fraudulent as against the company, and I think that the other defendants were not the agents of the company for this purpose in the sense of having been authorized to omit to specify the contract in question. The company being clearly liable for the prospectus, it is practically immaterial to consider whether they are liable for the false representations of Appleton, but the point having been argued, and being one of some importance, the plaintiffs are entitled to my opinion on it. I entertain no doubt on the point. The company have received, retained, and employed the plaintiffs' money which would not have been paid had the truth been told or had the real contract been specified. They cannot be heard in a court of equity to say that they are not liable to restore money thus obtained. Relief against them might, perhaps, be supported on other grounds also, but it is enough, and to my mind more satisfactory, to rest it on this general principle of equity, for the application of which to such a case the *Western Bank of Scotland* v. *Addie*, L. R. 1 Sc. & D. App. 145 (see p. 158), 15 W. R. H. L. Dig. 14, is ample authority. The liability of the other defendants depends on this—that they have personally, or through the prospectus, made false representations which induced the plaintiffs to enter into a contract to take shares and pay money for what really was and has proved to be worthless. The plaintiffs must, of course, give up the shares as taken, and, indeed, that is part of the relief which they ask in seeking rescission, but there is no question to my mind about the value of the shares, or about the measure of damages. The defendants are bound to make good their representations in the only way now possible—that is, to put the plaintiff in the position which he would have occupied if the representations had not been made. Observe, however, that the same result would follow the application of the principle for measuring damages laid down to the jury in *Twycross* v. *Grant* by Lord Coleridge, whose direction was upheld by the Court of Common Pleas and the Court of Appeal. It is objected that a claim as against the company for rescission and a claim against the other defendants for damages are not properly included in one action; that the plaintiffs ought first to elect to affirm or disaffirm the contract, and having pursued the remedy which such election gives them as regards the company, then, if need be, to attack the directors. I think the objection fails to notice that the form of action is an election to rescind the contract, but apart from that and apart from the observation that if such an objection were allowed to prevail it would contradict the modern practice, which prevents as far as possible circuity of action, I find abundant authority in support of the plaintiffs' claim as framed. Sir George Jessel stated, in *Emma Silver Mining Co.* v. *Grant*, that such an objection is untenable, and Fry, J., obviously thought the same, though the circumstances of the case made it unnecessary for him to decide the point, in *Cargill* v. *Bower*, 26 W. R. 716, 10 Ch. D. 502. In *Henderson* v. *Lacon*, 16 W. R. 328, L. R. 5 Eq. 249, the point was fully discussed and relief was not only asked, but granted, against the company and directors concurrently under circumstances substantially similar to those which I am now considering.

I propose to declare that the plaintiff company were induced to take the shares held by them by means of false representations in the prospectus, as also by false representations made to the plaintiff Trotter by the defendant Appleton, and by means of the omission to specify in the prospectus the real contract with Evans, which according to the statute ought to have been specified therein. I propose also to declare that the plaintiff company are entitled as against the defendant company to have their name removed from the register of shareholders, and that must be ordered accordingly. There will further be a declaration that the defendants are severally liable to repay to the plaintiff company the actual amount paid by them, with interest calculated from the day of payment to the defendant company, and there must be an order on them to do so within, say, a month from the date of this judgment. At what rate ought interest to be paid? I have long thought that this question deserves general reconsideration with special reference to the fact that all the courts are now part of one High Court of Justice, and that there is an anomaly in a different rate of interest prevailing as a general rule in the two divisions. The reduction of the rate of interest obtainable on what are styled trust securities is another reason for reconsideration, operating, perhaps, in a different direction. It is not for me, now at least, to consider the question thus generally. Having regard to the circumstances of this case, I see no reason why interest should not be payable at what I may term a mercantile rate usually allowed by juries, and fix it at five per cent. There remains the question of costs. The plaintiffs have succeeded and are entitled to their costs of action. But they have not succeeded on all points raised, and their success is in great measure due to the new points first raised by amendment after the commencement of the trial. On the other hand, it is to be borne in mind that the omission to raise these new points at an earlier date was in great the fault of the plaintiffs; and, further, though I have held some statements in the prospectus not to be fraudulent so as to entitle the plaintiffs to relief, yet there is one passage about which I have been compelled to speak strongly, and which of itself, in my judgment, warrants the entire result. I think that, except as I am about to mention, the defendants must severally be ordered to pay the costs of the action. The trial was postponed at the last moment, when court, counsel, and parties were all ready, by reason of the illness of the plaintiff Trotter, who was an indispensable witness. The delay was inevitable, and it was due merely to misfortune; but I cannot properly make the costs thus occasioned costs in the action; nay, more, I think that the costs of the day must be paid by the plaintiffs.

Solicitors for the plaintiffs, *Norton, Rose, Norton, & Co.*

Solicitors for Sim's Composition Co., *Harris, Wilkinson, & Raikes.*

Solicitors for the defendant Sim, *Mason, Phillips, & Cotton.*

Solicitors for the defendant Appleton, *Sollit & Son.*

Solicitors for the defendant Burnside, *Seaborne & Co.*

Q. B. Div. (Huddleston, B., and Charles, J.) May 30.

HOLMES v. BRIERLEY. (a.)

Ratification—Breach of promise to marry—Evidence of new promise—Infants' Relief Act, 1874 (37 & 38 *Vict. c.* 62), *s.* 2.

The defendant, as a minor, promised to marry the plaintiff. After the defendant came of age the plaintiff offered to release the defendant from his engagement to her. The defendant said that "he was very much hurt at such a proposal, and that he was ready to marry her then, if she thought they were old enough." The plaintiff said "she thought they had better wait till they were older."

Held, that there was no evidence in such a conversation of any new promise by the defendant after he came of age, but only of a ratification of his original promise made when he was under age; and that, in view of section 2 of the Infants' Relief Act, 1874, *the evidence to go to a jury of a "new promise" after the majority of the defendant must be something more than language which is not inconsistent with a mere ratification of the original promise to marry made by him as an infant.*

Ditcham *v.* Worral, 29 *W. R.* 59, 5 *C. P. D.* 410, *distinguished.*

Motion for judgment to be entered for the defendant, or for a new trial on the ground of misdirection.

The action was one for a breach of promise to marry. The defendant, when a minor, promised to marry the plaintiff. Subsequently to his attaining his majority the plaintiff offered to release him from his former engagement, but the defendant reiterated his willingness to marry her at once. The action was based on the terms of the conversation upon this occasion as set out in the judgment. The trial was heard before Grantham, J., and a jury, when a verdict was found for the plaintiff, damages £100. The defendant now moved for a new trial on the ground that the judge had not directed the jury to find whether there was a new promise to marry or only a ratification of the promise made by the defendant as a minor, or for judgment on the ground that there was no evidence to go to the jury of any new promise.

J. Walton (*Gully, Q.C.*, with him), for the defendant.—An action will not lie upon a mere ratification of a promise by a minor under section 2 of the Infants' Relief Act, 1874. The judge assumed that the plaintiff had released the defendant, and that the defendant had accepted the release and made a fresh offer. He ought to have left it to the jury to say whether there was reasonable evidence of a new promise or only a ratification of the original one. There is no new consideration which goes to show evidence of a new promise as in *Northcote* v. *Doughty*, 4 C. P. D. 385, 28 W. R. 106; *Ditcham* v. *Worral*, 29 W. R. 59, 5 C. P. D. 410; *Pillison* v. *Hayter*, 19 W. R. 130, L. R. 6 C. P. 38.

Addison, Q.C., for the plaintiff.—Evidence of a renewal of a promise to marry was evidence to go to a jury of a new promise: *Northcote* v. *Doughty*, at p. 390.

Walton replied.

HUDDLESTON, B.—This is a motion, firstly, for a new trial, and, secondly, in the alternative, for judgment to be entered. The application for a new trial is on the ground that there was misdirection, or rather non-direction, by the judge on the question as to whether there was only a ratification by the defendant of his promise to marry the plaintiff, made when he was a minor, or whether there was a new promise made by him after he attained his majority. The judge assumed that the plaintiff had released the defendant. He used words in his summing up to that effect. If so, there was no difficulty in assuming that anything which took place subsequently was evidence of a new promise. We have to consider whether there was reasonable evidence of a new promise to go to a jury. In our opinion the judgment of the learned judge was not directed to the question whether there was a new promise or only a ratification of the original one, upon which by the Act of Parliament (37 & 38 Vict. c. 62) no action would lie. The wholesome words of Lindley, L.J., in *Ditcham* v. *Worral* afford the proper guidance for summing up on such a point. "In every case which arises under the Act care must be taken not to deprive persons of the protection intended to be afforded them by it. Where the intention of the parties is obscure, where the so-called new promise is made soon after twenty-one, where it is, in consequence of an influence against which it is necessary to guard, in all such cases a jury ought to be warned not lightly to infer a new promise as distinguished from a ratification." We have no doubt that the defendant is properly entitled to a new trial upon this point. But we are further asked to enter judgment for him on the ground that there was no evidence of anything but ratification, and consequently nothing upon which an action could be founded. Since the decision in *Coxhead* v. *Mullis*, 27 W. R. 136, 3 C. P. D. 439, the Infants' Relief Act of 1874 has been held to apply to actions of breach of promise to marry. It may be questionable whether such a promise comes under the head of section 1, but it clearly comes within the words of section 2: "No action shall be brought whereby to charge any person upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

I am not at all inclined to disagree with the decision in *Coxhead* v. *Mullis*, even if we did not hold ourselves bound by it, as we do. Was there, then, any reasonable evidence at all to leave to a jury in this case of a promise to marry by the defendant after he came of age? What are the facts? for this is, after all, rather more a question of fact than of law. There was clearly an engagement between the parties when the defendant was a minor in April, 1886. In September he attained his majority. In October the plaintiff's father had to compound with his creditors. That altered the position of the parties in regard to marriage. The plaintiff says that she told the defendant what had occurred, and that "if he wished to break it (*i.e.*, the engagement) off, he could." He was much hurt, and said that he "was ready to marry her then if she thought they were old enough." She replied that she "thought they were too young, and had better wait." That, practically, is the whole of the conversation which is admitted between the parties. Taken together, what does it substantially come to? If the conversation had been a statement by her to this effect—"I find there is a difference now in our positions, and I release you," and the defendant had replied, "I accept the release, but I now make you a new promise to marry under these new circumstances," it would have been a different matter. But here the defendant did not accept her offer to release him. He proposed to carry out the engagement still in existence. There was no evidence of any new promise at all—at most it was but a ratification of his original intention. Even if it did amount to a new promise, it was one to marry her at that moment. This the plaintiff declined. Taken at the highest, it was a mere suggestion, accepted only conditionally on the parties growing older. But substantially it can only be considered a readiness to carry out the original engagement. That is a ratification,

(a.) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

and a ratification of a promise made by the defendant as a minor, and so not one upon which an action could be founded.

The cases cited are certainly distinguishable. In *Northcote* v. *Doughty* the defendant had promised to marry the plaintiff conditionally on his obtaining his parents' consent. On coming of age he renewed his promise, but this time unconditionally. Lopes, J., left it to the jury to say whether that amounted to a new and absolute promise, or a ratification only of the former conditional promise. There was evidence of a new promise free from the conditions of the former one. *Ditcham* v. *Worral*, again, is clearly distinguishable. I may say that as to that case, personally I should agree with the view of the Chief Justice, but he was overruled by the majority of the court, consisting of my brothers Lindley and Denman; but we should, in any case, be bound by the majority in that case. It is, however, clearly distinguishable, as Mr. Walton pointed out, There a new element had been introduced. There was a new promise to marry on a particular day. There is no new element introduced here. The defendant would be properly entitled to a new trial upon the question whether this was a new promise or a ratification only of the original promise; but in my judgment, as there was really no evidence of any new promise which could reasonably be left to a jury, he is entitled to our judgment now. There must be a verdict and judgment entered for the defendant.

Charles, J.—I agree. As to the second point, since the decision in *Coxhead* v. *Mullis* a contract to marry must be held to come within the provisions of the Infants' Relief Act, 1874. There is no question that the present contract, the original promise made while the defendant was a minor, comes within section 2 of that Act. Was there, then, any evidence proper to be submitted to a jury of a fresh promise to marry by the defendant after he came of age? or was the evidence so equally consistent with a mere ratification as with a new promise that the case ought to have been withdrawn from a jury? The evidence must be read altogether as the plaintiff's account of the material interview. That evidence was clearly inconsistent with any other construction than that there was an expression of willingness by the defendant to carry out the engagement already made by him as a minor. That engagement was, in fact, one insufficient in law upon which to bring an action. There was no evidence of a fresh promise to submit to a jury.

In *Northcote* v. *Doughty* there was evidence of a fresh promise, different in character from the promise made during infancy. The second promise was absolute; the first was conditional on the defendant's parents' consent.

In *Ditcham* v. *Worral* I should have been much disposed to agree with the view expressed by the Chief Justice, but there the case stands decided by a majority of the court otherwise. But it is distinguishable from this case. There was a new term agreed upon in that case between the parties—namely, a particular day for the marriage. There is no new element introduced here. Upon the general question, if the Infants' Relief Act, 1874, is to be worth anything, and is to be given any effect in this class of contract, we must act upon the principle that to make out a fresh promise there must be evidence of something more than ratification—evidence amounting directly or indirectly to an intention to agree to making a new promise, and it is not enough to give evidence of language which is not inconsistent with a mere ratification of the original promise.

There must be judgment for the defendant.

Verdict and judgment entered for defendant.

Solicitor for the plaintiff, *Willan*, Manchester.

Solicitors for the defendants, *Barn & Berridge*, for *Ramsden, Sykes, & Ramsden*, Huddersfield.

Q. B. Div. (Lord Coleridge, C.J., and Mathew, J.) May 14.

Downe v. Fletcher and Wife. (a.)

Husband and wife—Wife's separate estate—Judgment under R. S. C., 1883, ord. 14—Evidence of separate estate—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 14, 15, 19.

In an application to sign final judgment under order 14 against a married woman for debts contracted before marriage, it is not necessary to prove, as a condition of obtaining judgment, that she is at the time possessed of separate estate.

Such judgment, however, should be signed in the form settled by the Court of Appeal in Scott v. Morley, ante, p. 67, 20 *Q. B. D.* 120.*

Application for judgment under order 14.

Action by a dressmaker against a husband and wife to recover £168 4s. 6d. for dresses supplied to the latter in 1879, two years before her marriage, which took place in 1881. The husband had leave to defend unconditionally, and the wife, by affidavit, denied her indebtedness in the sum claimed, and stated that the charge made was extravagant and excessive.

There was no evidence that she possessed any separate estate.

The master refused to allow the plaintiff to sign final judgment under order 14 against the wife, and on application being then made to the judge at chambers, the matter was referred by him to the court.

Morten, for the plaintiff.—There is no real defence to the claim against the wife, and the plaintiff is entitled to judgment against her in the form given in *Burrell* v. *Tanner*, 32 W. R. 827, 13 Q. B. D. 691. The lady was a *feme sole* when the debt was contracted. It is unnecessary as a condition of judgment to give evidence of separate estate. The only effect of her marriage is that the judgment cannot be enforced against her personally without showing that she has separate estate. There is no authority to show that a woman must have separate estate at the time that judgment is obtained, but only that execution cannot be issued except against such separate estate.

M'Call, for the defendant.—The remarks of Cotton, L.J., in *Ex parte Jones, In re Grissell*, 12 Ch. D., at page 490, 27 W. R. Dig. 16, show that such an application as this could not succeed. Judgment can only be obtained against separate estate, and it is not alleged that the defendant has any. The plaintiff is bound to prove that she has separate estate capable of being reached at the time of the judgment: *Pike* v. *Fitzgibbon*, 29 W. R. 551, 17 Ch. D. 454. The form of judgment settled by the court in *Scott* v. *Morley*, 20 W. R. 67, 20 Q. B. D. 120, shows that the separate estate intended to be attached must be referred to in the judgment. The marriage took place before the passing of the Married Women's Property Act, 1882. If the Act is retrospective, which is not admitted, section

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* The form of the judgment as settled in *Scott* v. *Morley* is as follows:—"It is adjudged that the plaintiff do recover £—— and costs (to be taxed) against the defendant (the married woman), and the costs to be payable out of her separate property hereinafter mentioned, and not otherwise. And it is ordered that execution hereon be limited to the separate property of the defendant (the married woman), subject to any restriction against anticipation, which by reason of section 19 of the Married Women's Property Act, 1882, the property shall be liable to attachment notwithstanding such restriction."

(a.) Reported by G. K. Paley, Esq., Barrister-at-Law.

and 15 virtually re-enact the provisions of the Acts of 1870 and 1874. [Mathew, J.—If the wife acquires separate property after the judgment, may not judgment be recovered against her?] No; for there can be no judgment except as against her separate estate.

Morten in reply.—*Scott* v. *Morley* decides quite a different point; but in that case an order was made in the form in which the plaintiff now asks for judgment.

Lord Coleridge, C.J.—It appears to me that the plaintiff is entitled to an order for judgment in the form in which it is pointed out in *Scott* v. *Morley* such a judgment ought to be; that is, judgment only against the wife and against such separate estate as she now has or may hereafter have. The plaintiff will thus be restrained from executing judgment, except as against such separate estate.

Mathew, J.—I am of the same opinion. The only question referred to us by the judge in chambers is whether final judgment can be signed against the wife when there is no evidence that she has separate estate. The Act of 1882 protects the husband, but does not affect the position of a married woman. It limits the liability to her separate estate. There is, however, no ground for saying that it is necessary for the plaintiff to show that actually, at the time of judgment, she is possessed of separate estate.

Appeal allowed.

Solicitors for the plaintiff, *Clement, Cheese, & Green.*

Solicitor for the defendant, *F. J. Rushton.*

Q. B. Div. (Field and Wills, JJ.) May 4.

Reg. v. Registrar of Joint-Stock Companies. (*a.*)

Mandamus—*Alternative remedy—Registrar of Joint-Stock Companies—Filing of contract—Insufficiency of stamp—Servant of Crown—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Stamp Act*, 1870 (33 & 34 *Vict. c.* 97), *ss.* 18, 19.

The Registrar of Joint-Stock Companies having refused to file a contract under section 25 *of the Companies Act*, 1867, *on the ground that the Stamp Act*, 1870, *had not been complied with,*

Held, that, whether or not the Registrar of Joint-Stock Companies was an officer to whom a writ of mandamus *might be sent, the appropriate remedy for the party aggrieved by such refusal was the procedure provided by sections* 18 *and* 19 *of the Stamp Act*, 1870, *and therefore a writ of* mandamus *ought not to be granted.*

Rule *nisi* for a *mandamus* to the Registrar of Joint-Stock Companies, commanding him to register a contract under section 25 of the Companies Act, 1867.

On the 31st of December, 1887, a limited company was duly constituted under the Companies Acts for the purpose of buying the business of Messrs. Sampson Low, Marston, & Co., a firm of publishers, and on the 2nd of January, 1888, a contract for the transfer of the business was executed by the vendors and the company. The company, being desirous of having the contract filed in pursuance of section 25 of the Companies Act, 1867, presented it for that purpose to the Registrar of Joint-Stock Companies. The registrar refused to file the contract, on the ground that it was insufficiently stamped. The company then required the Commissioners of Inland Revenue, under section 18 of the Stamp Act, 1870, to express their opinion on the question with what amount of stamp duty the contract was chargeable. The commissioners were of opinion that it was insufficiently stamped, and that it required an *ad valorem* stamp.

A fresh contract was then executed, dated the 27th of January, by which it was agreed that the company should allot to the vendors a certain number of shares, and that the vendors should accept such shares in part satisfaction of the price. To this contract a schedule was annexed containing the terms of the first contract. The new contract was stamped with a ten shilling stamp and presented to the registrar to be filed. The registrar refused to file this contract until he had seen the first contract properly stamped.

The company applied for and obtained a rule *nisi* for a *mandamus* to compel the Registrar of Joint-Stock Companies to file the contract of the 27th of January.

Sir R. E. Webster, A.G., and *R. S. Wright*, for the Registrar of Joint-Stock Companies, showed cause.—First, the registrar is a servant of the Crown, and the court will not issue a *mandamus* to a servant of the Crown to compel him to exercise his discretion: *Reg.* v. *Lords Commissioners of the Treasury*, 20 W. R. 336, L. R. 7 Q. B. 387. Secondly, the remedy by *mandamus* is ousted by reason of the existence of another remedy—viz., by appealing from the decision of the commissioners under section 19 of the Stamp Act. That is an efficient remedy; and therefore *mandamus* ought not to go: *Reg.* v. *Lords Commissioners of the Treasury, Queen Dowager's Annuity*, 16 Q. B. 357, see *per* Lord Campbell, p. 361.

Sir H. James, Q.C., and *Macaskie*, for the company.—*Mandamus* will lie to a servant of the Crown where there is a statutory duty and a subject is deprived of his legal right: *Reg.* v. *Lords Commissioners of the Treasury, Queen Dowager's Annuity; Rex* v. *Lords Commissioners of the Treasury*, 4 A. & E. 286. Secondly, sections 18 and 19 of the Stamp Act were not framed for the benefit or convenience of the Crown, but for the convenience of the subject. Here the remedy afforded by those sections is not so convenient to us as the remedy by *mandamus*; and *mandamus* is only ousted "where there is a remedy equally convenient, beneficial, and effectual": *In re Barlow*, 30 L. J. Q. B. 271, 10 W. R. C. L. Dig. 17.

Field, J.—I am of opinion that this rule must be discharged. I do not say whether the registrar is an officer to whom a *mandamus* may go. I base my judgment on the second ground of objection—viz., that in this case a *mandamus* ought not to go. When the Commissioners of Inland Revenue decided that the deed required an *ad valorem* stamp, it was competent to the applicants to appeal from that decision to this court under section 19 of the Stamp Act, 1870; and I cannot conceive a more convenient or effectual remedy than that given by that section, especially as the court can in that case assess the stamp duty. But they did not appeal; they executed a fresh deed; and on the registrar refusing to file it without seeing the first deed properly stamped, they come here for a *mandamus*. The question is whether we ought to grant this prerogative writ of *mandamus*. It is a matter which is in our discretion; and limits have been laid down as to how far we ought to exercise our discretion. Lord Campbell thought that the writ ought to be refused if there was another efficient remedy. Other judges say "where there is a remedy equally convenient, beneficial, and effectual." To my mind the writ of *mandamus* is a most inconvenient remedy; while under sections 18 and 19 of the Stamp Act the matter might be decided promptly and conveniently; and I think this latter remedy is also equally beneficial with the remedy by *mandamus*, and more efficient, for the whole question is whether the deed is properly stamped or not. Therefore I think the case

(*a*) Reported by F. G. Rucker, Esq., Barrister-at-Law.

comes within the rule which ousts the remedy by *mandamus*.

Wills, J.—I am of the same opinion, though I am inclined to think there would be no objection to our sending a *mandamus* to the Registrar of Joint-Stock Companies in a proper case, and therefore my judgment must be on the other ground. I think it would not be right to infringe the rule that a *mandamus* is not to be granted where there is an efficient alternative remedy.

Rule discharged.

Solicitors for the company, *Taylor, Hoare, & Box.*

Solicitor for the registrar, *Solicitor to the Board of Trade.*

Q. B. Div. (Field and Wills, JJ.) April 28; May 7.

Reg. v. Commissioners of Inland Revenue. (a.)

Intoxicating liquors—Place of public entertainment—Right to excise licence—Mandamus—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *ss.* 3, 72, 74—5 & 6 *Will.* 4, *c.* 39, *s.* 7.

The proprietor of a place of public entertainment is not entitled to an excise licence unless he has previously obtained a justices' licence for the sale of intoxicating liquors. The statute 5 & 6 *Will.* 4, *c.* 39, *s.* 7, *has been impliedly repealed as to places of public entertainment by the Licensing Act*, 1872.

Rule *nisi* for a *mandamus* to the Commissioners of Inland Revenue to grant an excise licence to the applicant, the proprietor of the Empire Theatre.

The building in question was not a theatre established by letters patent, nor licensed as a theatre by the Lord Chamberlain or justices, the proprietor, however, held a music and dancing licence.

The Commissioners of the Inland Revenue had refused to grant an excise licence until the proprietor had obtained a justices' licence.

Sir C. Russell, Q.C., and *Forrest Fulton*, in support of the rule.—The statute 5 & 6 Will. 4, c. 39, s. 7, which authorizes the grant by the commissioners, of a liquor licence to the proprietor of a place of public entertainment, has not been repealed expressly or otherwise. The Statute Law Revision Act of 1874 repeals a number of sections, but leaves untouched section 7 of the above Act. The statute of 1872, in section 72, protects the rights of proprietors of theatres under the older Act, and with theatres clearly must be read places of public entertainment such as this. Secondly, a *mandamus* will lie to the commissioners (*Reg.* v. *Salford*, 21 L. J. M. C. 223), for this is merely a ministerial Act.

Sir Edward Clarke, S.G. (*R. S. Wright* with him), for the commissioners, waived the question, for the purposes of the present case only, as to whether a *mandamus* could be issued against them as being servants of the Crown. [Wills, J., referred to *Reg.* v. *Commissioners of Stamps*, 9 Q. B. 637, and *Reg.* v. *Postmaster-General*, 26 W. R. 322, 3 Q. B. D. 429.] There is a great distinction between theatres and places of public entertainment. The justices could not license this building as a theatre. The Act of 1872 was intended to consolidate the law as to licensing, and the preamble is quite definite on the point. [He was stopped.]

Field, J.—This motion must be refused and the order discharged. The applicant is in occupation of an edifice called the Empire Theatre, which is not a theatre established under letters patent, nor licensed by the Lord Chamberlain nor by the justices of the peace, but is a place of public entertainment licensed by the justices under 25 Geo. 2, c. 36, for music and dancing. It was conceded by the Commissioners for the Inland Revenue that, for the purpose of obtaining an authoritative decision, the question whether there is jurisdiction in this court to issue a *mandamus* to them as the servants of the Crown should be waived for this occasion only.

It was admitted that under the Acts passed up to 1835 such an application for a licence ought to have been granted, but the commissioners contend that an alteration was made by the Act of 1872 (35 & 36 Vict. c. 94), which justifies their present action. It is necessary to consider the legislation up to the time of that Act. The Act of 1828 (9 Geo. 4, c. 61) enacted that no licence for the sale of exciseable liquors on premises should be granted except upon the production of a justices' licence. The statute further defines what exciseable liquors are, and imposes certain penalties. In 1830 the Legislature selected three kinds of exciseable liquors, beer, ale, and porter, and authorized the sale of them on premises the subject of the particular licence, and made the right to such a licence general. In 1834 the sale of such an unrestricted right of sale became obvious, and by the statute 4 & 5 Will. 4, c. 85, a condition was introduced that no such excise licence should be granted without the production of a certificate of good character to be obtained in a certain manner. In the next year the statute 5 & 6 Will. 4, c. 39, authorized the commissioners to grant licences for the sale of beer, spirits, and wines in a licensed theatre or place of public entertainment without the certificate required in the case of an ale or beerhouse.

Then came the Act of 1872, which was intended to codify the law to a large extent. The preamble runs "Whereas it is expedient to amend the law for the sale by retail of intoxicating liquors and the regulation of public-houses and other places in which intoxicating liquors are sold," &c. That shows that the Act was intended to strike at all places, without exception, where intoxicating liquors were sold. By section 74 "intoxicating liquors" mean all exciseable liquors, and the word "licence" is also defined. By section 72 a saving clause is introduced protecting the rights of proprietors of theatres. But this present application is not made by the proprietor of a theatre, but by the occupier of a place of public entertainment licensed by justices. Therefore the applicant is not within the saving clause.

It has been said that we should understand the words of the statute in the popular sense, but there is a distinction clearly drawn between the expression "theatre" and "place of public entertainment" in the statute of William IV. It has been said, also, that the Act of 1872 declares the intention to give to the proprietors of places of public entertainment the right to obtain licences to sell beer, &c., in them, and that this enactment has not been expressly repealed by the Act of 1872. But if the Acts are inconsistent there is an implied repeal. If there had been no new provisions as to the control and management of licensed places and as to the obtaining of licences in the later Act they might, perhaps, have stood together. But it is evident that there are such new provisions, and the later Act is expressly declared to be aimed at all places where intoxicating liquors are sold. The rule must be discharged.

Wills, J.—I am of the same opinion. The statute 5 & 6 Will. 4 enabled the proprietor of a theatre or place of public entertainment to get an excise licence without the formalities imposed by the statute of the previous year. The Act of 1872 says that no person

(a.) Reported by A. H. Todd, Esq., Barrister-at-Law.

shall sell intoxicating liquors without getting a licence so to do from the justices. The saving clause is as specific as the rest of the Act, and the applicant is not within it.

Solicitors for the applicant, *Tyrrell, Lewis, & Co.*

Solicitor for the respondents, *Solicitor to Inland Revenue.*

Q. B. Div. (Huddleston, B., and Manisty, J.) Feb. 7.

Wennhak v. Morgan and Wife. (a.)

Libel—Communication of libel by husband to wife—Publication—Servant's character—Testimonial.

The disclosure of a libel by a husband to his wife is not a publication of the same. A servant has the property in a testimonial given to him by a former employer, as distinguished from a letter testifying to his character sent by a former employer to a new would-be employer. If the former testimonial be damaged by the new employer, the servant may recover substantial and not merely nominal damages.

This was a motion for a new trial on the ground of misdirection.

The plaintiff, a manservant, having a good character in writing, from a lady who had gone abroad, entered the service of the defendant, who took him on the faith of the above testimonial. Afterwards the plaintiff gave notice that he should quit the service. Shortly after this the defendant dismissed him summarily on a charge of misconduct—*i.e.*, of having stayed out of the house all night without leave. The plaintiff asked for a return of his testimonial, which was delivered to him by the wife of the defendant. The reason of his discharge was found written on the testimonial.

The plaintiff brought an action against the defendant and his wife for libel—*i.e.*, the words written on the testimonial—and for malicious damage to the property of the plaintiff—*i.e.*, the testimonial.

Mathew, J., who tried the case, held that there was no publication of the libel, and as to the damage to the testimonial, that a shilling was enough for damages.

Hopkins, for the plaintiff.—The defendant published the libel by showing it to his wife. Although in law a husband and wife are one, save for purposes of the Married Women's Property Act, an action will lie for defaming a man to his wife, and *vice versâ*. In *Wenman* v. *Ash*, 1 W. R. 452, 13 C. B. 836, Maule, J., said:—"In the eye of the law, no doubt, man and wife are for many purposes one, but that is a strong figurative expression, and cannot be so dealt with as that all the consequences must follow which would result from its being literally true. For many purposes they are essentially distinct and different persons, amongst others for the purpose of having the honour and feelings of the husband assailed and injured by acts done or communications made to the wife." With regard to the damage to the testimonial, it was the property of the plaintiff, and being indorsed with disparaging remarks it became valueless, and he is entitled thereon to more than nominal damages.

R. V. Williams, for the defendants.—There is no case in which it has ever been held that an action would lie for a defamatory statement made by a man to his wife: *Toogood* v. *Spyring*, 1 Cr. M. & R. 181; *Taylor* v. *Hawkins*, 16 Q. B. 308, are in point. The learned judge assumed that the testimonial belonged to the plaintiff, and probably directed the one shilling for damages on the ground that the tort was technical, but not actual.

Huddleston, B.—In this case there are two questions for our consideration—first, whether the uttering of a libel by a husband to a wife is a publication; and, secondly, whether the learned judge should have taken upon himself the issue as to the amount of damages due to the plaintiff. With regard to the first point I believe that this is the first occasion on which it has been alleged that the uttering or passing of a libel by a libeller to his wife is a publication. According to the common law principle husband and wife are one. Further, the uttering of a libel to the party libelled is, for the purposes of an action, no libel. Lastly, if a libel be uttered on a privileged occasion to a husband in the presence of his wife the privilege is not lost by her presence. In the American case *Trumbull* v. *Gibbons*, 3 City Hall Recorder, 97, the facts were as follows:—Gibbons wrote defamatory matter of Trumbull, and had fifty copies printed in pamphlet form in Massachusetts. Forty-five copies he retained and five copies he sent to his wife in New Jersey, indorsing four of them with the names of certain persons acquaintances of the wife, but without any instructions to his wife as to how she should dispose of the copies so sent to her. The wife delivered two of the copies in New Jersey to the persons whose names were indorsed, and the others she delivered in New Jersey to Trumbull, who exhibited them to various persons. On Trumbull suing Gibbons in New York for libel it was contended for the defendant (1) that there was no publication by defendant (2) or no publication within the State. The second point was overruled, and as to the first it was held that the delivery of the manuscript to be printed was a publication. Although a delivery to a wife in confidence would not be a publication, yet in the case then before the court the wife acted as the agent of her husband, and her delivery of the pamphlets amounted to a publication by the defendants. Now according to a well recognised principle husband and wife are in the same position, and therefore in cases apart from the Married Women's Property Act I hold that the uttering of a libel by a husband to his wife is no publication. The decision of the learned judge was right on this point. The next question is more difficult—viz., how far the judge at the trial was right in assuming the duties of a jury with respect to damages. It is contended on the one hand that the document which was defaced was not the property of the plaintiff, and that the act done to it was neither malicious nor mischievous, but was done *bonâ fide*.

At the trial the learned judge held that the testimonial handed over by the plaintiff to the defendant, was and remained the property of the plaintiff. That is, I think, a very debateable question. It may be argued that it was a question for the jury, looking at all the circumstances, whether the plaintiff, when he handed over the testimonial to the defendant, did not do so with the intention of passing the property in it. There is a difference between a letter written to a would-be employer in answer to an inquiry about a servant's character, and a general testimonial of good character. The latter, I should think, would be intended to be used as a voucher on future occasions, and there might well have been a question for the jury whether the handing over of the testimonial was a mere deposit of it or a parting with it. But as it happened the learned judge decided that point in favour of the plaintiff. The learned judge also took upon himself to decide the amount of damages. Now this was a matter for the jury and not for him. He seems to have thought that the only measure of damage was the expense that the plaintiff would be put to in obtaining a renewal of the testimonial. Yet even so would not that expense be more than a shilling? There would be the expense in

(a.) Reported by Sir Sherston Baker, Barrister-at-Law.

finding out where the lady was. But it was open to the jury to find that the indorsement was malicious, and in such event they might have given heavy damages. We are of opinion that, there being no publication, the verdict must be entered for the defendant on the first point, the claim for libel. The other issues must be sent down and be re-tried by a jury.

Manisty, J., concurred.

Judgment accordingly.

Solicitor for the plaintiff, *C. A. Swaine.*

Solicitor for the defendant, *Frederick Romer.*

IN BANKRUPTCY.

Q. B. Div. (Cave, J.) April 25.

Ex parte Otway.
In re Otway. (*a.*)

Judgment summons—Orders for alimony—Receiving order in lieu of committal—Payment by instalments—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 5—*Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 103, *sub-section* (5).

On January 30, 1888, *an order for alimony* pendente lite, *and on February* 1, 1888, *an order for permanent alimony, was made in the Probate and Divorce Division. The sum of £130 being due under these orders, a judgment summons in respect thereof was issued by the wife.*

Held, that a receiving order in lieu of a committal could not be made by the court against the husband under section 103, *sub-section* (5), *of the Bankruptcy Act,* 1883, *but that the wife was entitled to come to the court under section* 5 *of the Debtors Act,* 1869, *and that an order directing payment by monthly instalments of £10 should be made.*

This case came before the court in the form of a judgment summons issued by Mrs. Otway against her husband in respect of £130 arrears of alimony.

On November 30, 1887, a decree for a judicial separation was granted in the Probate and Divorce Division. On January 30, 1888, an order for alimony *pendente lite*, at the rate of 25s. a week from the date of the service of the citation to the date of the decree, was obtained, and on February 1, 1888, an order for permanent alimony was made, at the rate of £2 2s. per week from the date of the final decree.

The sum of £130 being due from the husband in respect of these orders, a judgment summons was issued by Mrs. Otway, and on March 24, 1888, a receiving order in lieu of a committal under section 103, sub-section (5), of the Bankruptcy Act, 1883, was made by Cave, J., against the debtor, but an application on his behalf for leave to have the case reheard and argued on the question whether, under the circumstances, a receiving order could be made, was subsequently allowed.

Sidney Woolf, for the debtor.—No doubt, after the decision in *Ex parte Linton, In re Linton*, 33 W. R. 714, 15 Q. B. D. 239, these are orders (or the order for permanent alimony is an order) enforceable under section 5 of the Debtors Act, 1869, the sums being debts due in pursuance of orders of a competent court. But to enable the court to make a receiving order under section 103, sub-section (5), of the Bankruptcy Act, 1883, the application under section 5 of the Debtors Act, 1869, must be by a "judgment creditor" against a judgment debtor. These orders are not judgments, and cannot be enforced like judgments.

He also referred to *Ex parte Fryer, In re Fryer*, 34 W. R. 766, 17 Q. B. D. 718; *Bailey* v. *Bailey*, 32 W. R. 856, 13 Q. B. D. 855.

B. Abrahams (solicitor), appeared for Mrs. Otway.

Cave, J.—In the case of *Ex parte Fryer* it was held that the words "judgment creditor" in section 103, sub-section (5), of the Bankruptcy Act, 1883, must be construed strictly, and, therefore, that a receiving order in lieu of a committal cannot be made under that section on the application of every person who is entitled to apply to the court under section 5 of the Debtors Act, 1869. In *Bailey* v. *Bailey* it was held that an order to sign final judgment under ord. 14, r. 1, will not be made where the action is for arrears of alimony *pendente lite* payable under an order of the Probate and Divorce Division. That case shows that a wife in such case cannot be said to be a judgment creditor in the strict sense, and the same reasoning is applicable in the case of permanent alimony. It follows, therefore, that Mrs. Otway is not a judgment creditor, and cannot have a receiving order. But she is entitled to come to this court under section 5 of the Debtors Act, 1869. The receiving order must be reversed, and, instead of it, I will make an order upon the debtor for payment of the amount due by monthly instalments of £10.

Order accordingly.

Solicitors for the debtor, *Michael Abrahams & Co.*

Solicitor for the wife, *B. Abrahams.*

Q. B. Div. (Cave, J.) April 24, 25.

Ex parte Board of Trade.
In re Martin. (*a.*)

Bankruptcy — Appointment of trustee — Objection of Board of Trade—Difficulty of acting with impartiality—Notification to court—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 21.

On October 1, 1887, *a deed of assignment was executed by the debtor for the benefit of his creditors, under which a trustee was appointed, who dealt with the estate. On December* 10, 1887, *a bankruptcy petition was presented against the debtor, the act of bankruptcy alleged being execution of the said deed, and the debtor was adjudicated bankrupt. On February* 11, 1888, *the trustee under the deed was appointed by the creditors the trustee in the bankruptcy, but the appointment was objected to by the Board of Trade, on the ground that his connection with the bankrupt's estate made it "difficult for him to act with impartiality in the interest of the creditors generally."*

Held, that the objection was right, and must be sustained.

Notification to the court by the Board of Trade of their objection to the appointment of a trustee, under section 21 of the Bankruptcy Act, 1883.

On the 10th of December, 1887, a petition was presented against the debtor Martin in the Cardiff County Court on which a receiving order was made, the act of bankruptcy alleged being the execution by the said debtor on the 1st of October, 1887, of a deed of assignment for the benefit of his creditors, under which one John Jenkins was appointed trustee.

Shortly after the making of the receiving order the

(*a.*) Reported by C. F. Morrell, Esq., Barrister-at-Law.

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was written by the official receiver to Jenkins, the trustee under the said deed, requiring him to render an account showing his dealings with the debtor's estate, and to remit any balance he might have in hand. To this letter a reply was received enclosing an account purporting to show the amounts received and paid by him under the said assignment, and a cheque for £48, the amount of the balance admittedly due from him to the estate.

On the 21st of January, 1888, the debtor was adjudged bankrupt, and on the 11th of February, 1888, the first meeting of the creditors was held at which the said John Jenkins was by a special resolution appointed trustee in the bankruptcy, the appointment being duly reported to the Board of Trade.

On the 16th of February, 1888, the official receiver wrote to Jenkins a letter applying for the repayment by him of a sum of £10 1s. 8d. debited against the estate in the account of the receipts and disbursements under the deed of assignment, incurred in opposing the bankruptcy petition, and certain other correspondence subsequently passed between the parties in which the official receiver applied in effect for further accounts of the dealings with the estate, and was answered by Jenkins that he had furnished accounts of all his transactions with the estate which he was advised he was legally liable to render.

Under these circumstances the Board of Trade objected to the appointment of Jenkins as trustee in the bankruptcy, on the ground that his connection with the bankrupt's estate rendered it "difficult for him to act with impartiality in the interest of the creditors generally," it being alleged (1) that he had dealt with the estate of the bankrupt with notice of the act of bankruptcy on which adjudication was made; (2) that he was accountable to the trustee in the bankruptcy in respect of such dealings; (3) that he had in his hands moneys forming part of the property of the bankrupt which he had failed to pay over, and that the question in respect thereof could only be ascertained by an investigation instituted by some other independent trustee.

At the request of the creditors the objection was now notified to the High Court under section 21, sub-section (3), of the Bankruptcy Act, 1883, in order that the court might decide on its validity.

Sir Edward Clarke, S.G., and *Muir Mackenzie*, for the Board of Trade.—A very troublesome duty is imposed on the Board of Trade in any case where they are compelled to interfere with the choice of the creditors, but the court will not reverse the objection unless it is quite clear there is no ground for the suggestions made. Where in a case of this kind there are circumstances from which it might be inferred that the trustee cannot act with impartiality, the Board of Trade have a discretion, and this court will not go fully into the particular facts which have led the board to come to the conclusion to which they have. Here it is clearly difficult for the person appointed to act with impartiality. There is a dispute as to moneys received, and the questions in dispute would have to be decided as between the trustee in the bankruptcy and the assignee under the deed In this case they are the same person.

Herbert Reed, for the trustee.—The objection of the Board of Trade really amounts to this, that any person who may be a trustee under a creditors' deed, and who may be supposed to be an accounting party, cannot possibly be appointed trustee in the bankruptcy. There is not the slightest imputation on Mr. Jenkins as being a person improper to be trustee, and there is not the slightest suggestion that, if it is shown that he ought to pay over the sums in dispute, he will not do so. The utmost in dispute appears to be £10 1s. 8d., and in any case there is plenty of machinery to enforce payment, even if it were refused.

Cave, J.—This is a question which arises under section 21 of the Act which enables the Board of Trade to make objection to the appointment of trustees, and which enacts that, if requested by a majority in value of the creditors, they are to notify the objection to the High Court, and that thereupon the High Court may decide upon its validity. Now, in the first instance, I take it that that requires the High Court to enter into an investigation, not only of the objection itself, but of the grounds on which the objection rests, and that, if the objection is not one which is authorized to be taken by the Act, the High Court must disallow the objection. Also that, if the objection is one which is authorized to be taken by the Act, but is one which is not founded upon any valid ground or upon any facts that can reasonably be held to support it, there also the High Court must hold the objection invalid, and give judgment accordingly. That being the jurisdiction, in my judgment, vested in the High Court, the question is, how it ought to exercise it in this case. Sub-section (2) of section 21 requires that the Board of Trade shall certify that the appointment of the trustee "has been duly made, unless they object to the appointment on the ground that it has not been made in good faith by a majority in value of the creditors voting, or that the person appointed is not fit to act as trustee, or that his connection with, or relation to, the bankrupt or his estate, or any particular creditor, makes it difficult for him to act with impartiality in the interest of the creditors generally."

Now the objection which is taken here is the third of these objections—namely, that the connection of this trustee with, or his relation to, the bankrupt or his estate makes it difficult for him to act with impartiality in the interests of the creditors generally. The connection of the trustee with the bankrupt or his estate which is objected to in this case is that Mr. Jenkins was appointed, on the 1st of October, 1887, the assignee of the estate of the debtor under a deed by which the estate was to be divided amongst the creditors. Undoubtedly that was an act of bankruptcy and might be treated as such by any dissentient creditor, and therefore it has been laid down that it was the duty of every person to treat it as an act of bankruptcy and not to act upon it in any way or shape until at least the statutory period had arrived after which it could not be impugned as being such an act of bankruptcy. Unfortunately in this case the trustee did not adopt that course, but in several instances he acted as if no act of bankruptcy had been committed, and consequently, by so acting, he has raised divers questions between himself and the estate which will have to be decided. The question I have to decide is, whether by so doing he has made it difficult for himself to act with impartiality in the matter.

It is always difficult, as it seems to me, for a man to decide between his duty and his interests — that is acknowledged upon all hands. Take one instance. With regard to courts of justice, no judge, however high or however low, however important or however unimportant the case he may be called upon to decide, is permitted to act in deciding the matter if he has any pecuniary interest, however small, in the result of his judgment. What is the case with reference to Mr. Jenkins? Has he made it difficult to act with impartiality? To my mind he has clearly done so, because he has put himself in the position in which he will have to decide between his own interests and the claims of the creditors. It is no answer to say that machinery exists by which, if he goes wrong, he may be forced back into the right road. The object of the statute is to avoid any such mischief in the outset, and to enable the Board of Trade to object to the appointment where the circumstances make it difficult for him to act with impartiality. Now here we have a very strong proof, as it seems to me, of this difficulty, because certainly in more

than one instance, as far as I am able to judge at present, the contests between the interests and the duty of the trustee have prevented him from acting with impartiality.

I have not to decide whether the sums of money which he claims to retain against the estate are rightly retained by him or not, but certainly upon such an application as this, where he has retained sums of money and has decided these questions in his own favour and against the estate, one would have expected that the most ample explanation would have been forthcoming, in order to show that if it was difficult for him to act with impartiality he had at all events surmounted that difficulty in cases which had already come before him. I cannot, however, find that he has done so. There is a sum of £10 which he says, at the request of the debtor, he paid to his solicitors as the costs of opposing the petition. Now that sum appears to have been paid after the act of bankruptcy had been committed, and in order to enable the debtor to oppose the petitioning creditor, the petition being founded upon the execution of that very deed. Undoubtedly it was his duty, being aware of the act of bankruptcy, to refuse to deal with any money in his hands belonging to the bankrupt until it appeared whether or not the money still continued to remain the money of the bankrupt, because when that deed was executed there was an act of bankruptcy, and the money might turn out to be the money of the trustee and not the money of the bankrupt. Whether he acted rightly or not in this particular instance, as I have said, it is not for me to decide on this particular application. All I can say is that, having to decide between himself and the estate, he has not satisfied me on this occasion that he acted with impartiality. So also I come to the same conclusion in respect of the two sums amounting to £11 5s. which Mr. Jenkins appears to have applied in payment of the costs of an investigation which had been made by his firm. Moreover, although it was his duty, as I have said, to wait until the expiration of the statutory period before dealing with an estate, his title to which might turn out to be invalid, he nevertheless proceeded to deal with that estate, and he incurred costs of putting up a portion of the property for sale. Those questions will have to be dealt with at some time or other. His interest will lead him to decide in favour of paying those expenses to himself. His duty to the creditors ought to draw him in the other direction. Consequently there again there will be a conflict between his interests and his duty, the very thing which it is contemplated by this section ought not to happen, and the possibility of the happening of which is a thoroughly good ground for the interference of the Board of Trade.

I say nothing about another question which may possibly also arise in time, and that is the temptation he will be under from time to time of showing by the result that it would have been better for the creditors if the deed of October 1 had been allowed to stand, and that a larger dividend would have been realized under that deed than under the bankruptcy. Upon the grounds which I have stated I think the objection made by the Board of Trade has been fully borne out in this inquiry, and, consequently, that it must be sustained.

Objection sustained.

Solicitor for the Board of Trade, *The Solicitor to the Board of Trade.*

Solicitor for the trustee, *O. B. Wooler.*

Q. B. Div. (Cave, J.) April 26, 27.

Ex parte OFFICIAL RECEIVER. *In re* BOND. (a.)

Bankruptcy—Husband and wife not trading jointly or in partnership—Joint petition—Separate receiving orders—Practice—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 8.

On February 11, 1888, *a receiving order was made against a husband and wife upon their joint petition, but the official receiver having discovered that they had not traded jointly or in partnership, the petition was subsequently amended to that effect, and a separate receiving order was made against each of the debtors. Objection was taken by the Board of Trade to the two receiving orders being made upon a joint petition, it being shown that the husband had no assets, and had acted only as manager in the wife's business.*

Held, that the official receiver had locus standi *to apply to the court to rescind the receiving order against the husband, and that, under the circumstances, it was the duty of the court to rescind the order.*

Special case stated by his Honour Judge Chalmers from the county court at Birmingham pursuant to section 97 of the Bankruptcy Act, 1883.

On February 11, 1888, a receiving order was made against John Bond and Claire, his wife, upon a joint petition presented by the two, and on February 14 the receiving order was duly advertised. On February 22 it was discovered by the official receiver that the petitioners were a man and his wife, but that they had not traded jointly or in partnership, and thereupon, on February 23, the petition was amended to that effect, and the joint receiving order was set aside, and a separate receiving order was made against each of the debtors and also separate adjudications.

The Board of Trade, however, objected to the two receiving orders being made upon a joint petition where there was no joint trading and no partnership, and on March 15 an application was made by the official receiver to the county court that the receiving order and adjudication against John Bond should be rescinded.

A special case was stated for the opinion of the High Court, the questions submitted being (1) whether the official receiver, either as official receiver or as trustee, had any *locus standi* to apply to have an adjudication or a receiving order rescinded under the above circumstances; (2) whether the court had any power to rescind a receiving order and adjudication, and dismiss the petition against an admittedly insolvent debtor, and, if so, whether in the present case the receiving order and adjudication ought to be rescinded and the petition dismissed, or what other order ought to be made.

Muir Mackenzie, for the official receiver, stated the case, and showed that there were no joint assets and no joint liabilities, and that the husband, John Bond, had no assets at all, but had acted as manager of certain brickworks carried on by the wife.

CAVE, J.—I am of opinion that the application of the official receiver to rescind the receiving order and adjudication against John Bond should be granted.

The questions which presented themselves to the learned judge as questions of importance were two. First, whether the official receiver, either as official receiver or as trustee, had any *locus standi* to apply to have the adjudication or receiving order rescinded under the circumstances. Now I am of opinion that the official receiver, whether as official receiver or as trustee, in either capacity had a *locus standi* to apply to

(a.) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

court. As an official receiver, and an officer, therefore, of the Board of Trade, representing the Board of Trade and having a duty to make known to the court all matters that come to his knowledge relating to the bankruptcy, I think that it was his duty to bring before the court the fact that separate receiving orders had been obtained wrongly on a joint petition, and that in that way as the learned registrar yesterday pointed out to me, the revenue had been deprived of a fee of £5, which would have had to have been paid if, as ought to have been done, there had been separate petitions instead of a joint petition. I am also of opinion that the official receiver had a *locus standi* as trustee as well, because, as trustee, he represents the interest of the creditors in the estate of the wife, and, as representing their interests, it is his duty to see that the assets of that estate were not applied wrongly in paying the expenses of the bankruptcy of the husband John. Inasmuch as there was a joint petition there was a danger that the assets might be applied in payment of the expenses of the husband's bankruptcy, and under those circumstances, in my judgment, the trustee was not bound to wait until any order of the kind had actually been made, but it was his duty to apply at once to the court in order that proper steps might be taken at the outset to prevent those expenses being incurred at all.

Now the second point upon which the learned judge desires my opinion is whether there is power to rescind a receiving order having regard to the language of section 8 of the Act. Section 8 of the Act is in these terms:—"A debtor's petition shall allege that the debtor is unable to pay his debts, and the presentation thereof shall be deemed an act of bankruptcy without the previous filing by the debtor of any declaration of inability to pay his debts, and the court shall thereupon make a receiving order." Now, with regard to that, undoubtedly it is the imperative duty of the court to make a receiving order where the petition is a proper petition, but where the petition is, as it is in this case, an abuse of the process of the court by joining two debtors who ought not to be joined, it thereby tends to deprive the revenue of a fee which ought to be paid, and it has for its object the payment of the expenses of a debtor with no assets out of the assets of a debtor who has assets. Under those circumstances I am clearly of opinion that the court had power to refuse to make the receiving order, and when the receiving order was wrongfully made to rescind it. In point of fact the registrar here did rescind the joint receiving order and made a separate receiving order against each of the debtors. I think that he ought to have done was this. He should have rescinded the joint receiving order and made a separate receiving order against the wife, and a separate adjudication against the wife, and with regard to John Bond he ought to have directed the petition to be amended by striking out John Bond's name and all reference to him as an insolvent debtor, and to have turned the petition into what it really was, a petition on behalf of the wife alone, out of whose pocket the whole of the costs of the petition up to that time had been paid. By that means there would have been a perfectly good receiving order and adjudication against the wife, and Bond would have been left to take such steps as he might have been advised to take—to file his own separate petition if he thought fit to do so, but to do it out of his own assets and not out of the assets of his wife's estate.

I therefore answer the questions put to the court—that the official receiver had a *locus standi*; and that the court had power to rescind the receiving order and adjudication against John Bond; and that it was the duty of the court to do so and amend the petition in the way I have pointed out.

Solicitor for the official receiver, *The Solicitor to the Board of Trade.*

C. C. R. Dec. 10.

Reg. v. Buckmaster. (a.)

Larceny by a trick—"Welshing."

The prosecutor deposited money with the prisoner, who appeared to be a "bookmaker," at a race meeting, to abide the event of a race. While the race was being run the prisoner left.

Held, that there was evidence to go to the jury of larceny at common law.

At the general quarter sessions for the county of Berks Walter Buckmaster had been tried upon an indictment which charged that he did, on the 9th of June, 1887, feloniously steal, take, and carry away certain money of the moneys of John Rymer.

It was proved that the prisoner and another man during the Ascot race meeting were the only persons standing upon a platform or stand made to represent "Safes," or iron safe chests. The words "Griffiths, the safe man," were printed upon it. The stand was outside the course on a spot on Ascot Heath, where carriages were placed and was not within any betting inclosure or ring.

The prisoner, with a book in his hand, was calling out "two to one against the field." Just before a race was about to be run, Rymer went up to him and asked, "What price Bird of Freedom?" to which he replied, "Seven to one to win." Rymer then deposited five shillings with Buckmaster, who told him that if the horse won he (Rymer) would win thirty-five shillings and get his own five shillings back. He also deposited another five shillings with Buckmaster, who told him that he would have fifteen shillings back including his own five shillings if the horse was first or second. The man who was with Buckmaster, and was acting with him, received the money, and the latter, with whom all the conversation took place, appeared to take down the bet in his book and gave Rymer a card with the words "Griffiths Safe Man" upon it.

While the race was being run the prisoner and the other man were seen by one of the witnesses to walk quietly away. They were followed for about twenty yards, and on the witness at once returning, the stand had gone.

The horse "Bird of Freedom" won the race, and thereupon Rymer went back to the place where the stand had been, and found that the prisoner and the other man had gone. He waited there for half an hour and then left. Much later in the afternoon Rymer saw the prisoner on another part of Ascot Heath and said, "I want £2 15s. from you." The prisoner said he knew nothing about it. Upon being told by Rymer that he would be detained, he admitted the bet, and said he had not the money, but that he was only the clerk and could take the prosecutor to the man who had it. He was then taken into custody, and upon him were found card tickets with the words "Griffiths the safe man" upon them.

It was elicited from Rymer in cross-examination that he would have been satisfied if he did not receive back the same particular coins he had deposited.

At the trial it was submitted that Rymer having parted voluntarily with the money there was no evidence of larceny, nor of any taking by prisoner, but the chairman declined to withdraw the case from the jury. No evidence at all was called on the part of the prisoner.

A verdict of guilty was returned, and the question for the opinion of this court was whether there was any evidence to be left to the jury.

Keith Frith, for the prisoner.—There was no evidence

(a.) Reported by R. E. Melsheimer, Esq., Barrister-at-Law.

of larceny to go to the jury. Larceny as bailee is out of the question; so also larceny at common law, inasmuch as the prosecutor intended to part with the property in the specific coins deposited. The offence is, therefore, not larceny by a trick, but if anything it is obtaining money by false pretences: *Powell* v. *Hoyland*, 6 Ex. 67, *per* Parke, B. Had the horse won the prisoner would have been entitled to retain the money, and it is impossible that his guilt or innocence should depend upon the result of the race.

No counsel appeared for the prosecution.

Lord Coleridge, C.J.—I am of opinion that this conviction should be affirmed.

The only question left for us by the case is whether there was any evidence of larceny. I think there was abundant evidence to go to the jury.

It was argued that the prosecutor intended to part with the property as well as the possession of the money, and that the offence, therefore, if any, was false pretences or nothing.

To this contention there are two answers—first, that there was no evidence of anything in the nature of a contract or consent which would be essential to pass the property from the prosecutor to the prisoner; this can only be effected by the assent of the two minds (*per* Wood, B., in *Oliver's case*, cited in *R.* v. *Walsh*, 2 Leach C. C. 1072), and, therefore, even if the prosecutor had any intention to part with the property, I do not think that it did in fact pass, because the intention of the prisoner was not to contract but to steal. But, secondly, I think that the true view is that the property in the money was not intended by the prosecutor to pass to the prisoner. The case of *R.* v. *Robson*, R. & R. 413, is very similar to the present one. The prosecutor in that case was induced to deposit money on the event of a bet, and the question left to the jury was whether, at the time the money was received by the prisoners, there was not a plan between them to keep it under the false colour of winning a bet. The jury so found, and it was held in this court that the conviction was right because the prosecutor had parted with the possession only. The taking was felonious because the property was obtained by fraud, and in the present case I think the same principles are applicable.

Pollock, B., Manisty, Hawkins, and Smith, JJ., concurred.

Conviction affirmed.

Solicitor for the prisoner, *Bassett*.

Prob. Div. & Adm. Div. } Dec. 6; Jan. 24.
Divorce.

Turner (otherwise Thompson) *v.* Thompson. (*a.*)

Divorce — Impotency — Nullity — English marriage — Husband foreigner—Jurisdiction of foreign court.

A woman—a British subject domiciled in England—was here married to an American citizen, and the parties soon after went to the United States with the intention of making their permanent home there. The wife obtained a decree in one of the United States courts dissolving the marriage on the ground of her husband's impotency. After the dissolution she came to live in England, and, in consequence of doubts as to whether that decree was binding here, she filed a petition in this court to have the marriage declared null and void.

Held, that the American court had jurisdiction; that, by its decree, the marriage was absolutely and totally dissolved; and that, therefore, no marriage existed upon which this court could pronounce any decision.

Hearing of a petition for a declaration of nullity of marriage.

The petitioner, Georgina Turner, was a British subject domiciled in England, and on November 7, 1882, she went through the form of marriage with the respondent, Charles Peter Thompson, a citizen of the United States, and domiciled there. In 1873 they went to the United States, where they remained. The respondent, who was an officer in the Marine service of that country, was from time to time absent from his wife on professional duties, but they met and cohabited together from time to time during the intervals of his service. In February of 1879 the petitioner presented a petition to the Supreme Court of Columbia praying for a dissolution of the marriage on the ground of her husband's impotency; the form of decree in the United States being a dissolution of marriage, and not, as in this country, a declaration that it is null and void. In April, 1879, the court pronounced a decree dissolving the marriage. The petitioner then returned to this country, where she has ever since resided. Being desirous of marrying again, she was advised that there were doubts as to the validity in this country of the decree of the American court, and she accordingly in September, 1886, presented a petition to this court praying for a declaration that her marriage was null and void.

The case was undefended, and came before Butt, J., who raised the question whether there was anything on which the court could proceed, and whether the court had jurisdiction in the sense that if the marriage was absolutely dissolved by the decree of the United States court, then there would exist no marriage upon which this court could be called to pronounce an opinion, and the learned judge directed that the papers should be forwarded to the Queen's Proctor, in accordance with the provisions to that effect contained in 23 & 24 Vict. c. 144, ss. 5, 7, and 36 Vict. c. 31, in order that the question might be argued.

The case came on before Hannen, P., and after a discussion as to whether the statutes cited entitled the Queen's Proctor to intervene, it was arranged that the case should be argued on a demurrer to the petition to be filed by the Attorney-General.

This demurrer having been filed,

Dec. 6.—*Sir R. E. Webster*, *A.G.*, and *Middleton* in support of the demurrer.—Incapacity does not make a marriage void *ab initio* without any complaint being made by one of the parties: *A.* v. *B.*, 17 W. R. 14, L. R. 1 P. & D. 559; impotence only renders the marriage void. If the parties had originally chosen to come into this court, *i.e.*, the court of the country, where the contract was made, they could have undoubtedly done so, but they were equally entitled to go into the court of the country of domicile, and, having done so, the decree of that court is binding, and there is no marriage upon which this court can pronounce a decision.

Bargrave Deane, for the petitioner.—The wife does not assume her husband's domicile until marriage; here the facts disclose that there was no valid marriage, and, therefore, the American court could have jurisdiction: *Niboyet* v. *Niboyet*, 27 W. R. 262, 4 P. D. 1.

Sir R. E. Webster replied.

The following cases were also cited:—*Sinclair* v. *Sinclair*, 1 Hagg. Cons. 294; *Dalrymple* v. *Dalrymple*, 2 Hagg. Cons. 54; *Herbert* v. *Herbert*, 2 Hagg. Cons. 263; *Scrimshire* v. *Scrimshire*, 2 Hagg. Cons. 395; *Yelverton* v. *Yelverton*, 8 W. R. 134, 1 Sw. & Tr. 574;

(*a.*) Reported by J. Gerard Laing, Esq., Barrister-at-Law.

Deck v. *Deck*, 8 W. R. 666, 2 Sw. & Tr. 91; *Simonin* v. *Mallac*, 2 Sw. & Tr. 67, 8 W. R. Div. Dig. 16; *Sottomayor* v. *De Barros*, 26 W. R. 455, 3 P. D. 1, 27 W. R. 217, 5 P. D. 101; *Firebrace* v. *Firebrace*, 26 W. R. 617, 4 P. D. 63; *Harvey* v. *Farnie*, 28 W. R. 723, 5 P. D. 153, 29 W. R. 409, 6 P. D. 35, 31 W. R. 433, 8 App. Cas. 43; *Briggs* v. *Briggs*, 28 W. R. 702, 5 P. D. 163; *Scott* v. *Attorney-General*, 11 P. D. 128, 35 W. R. Dig. 108; and The Legitimacy Declaration Act, 21 & 22 Vict. c. 93.

Cur. adv. vult.

Jan. 24.—Hannen, P., after stating the facts, said:—I am of opinion that this case is one in which this court has no jurisdiction in this sense, that the marriage has been totally and absolutely dissolved by the decree of the court of the United States, and therefore there is now no marriage between the parties which can be dissolved or declared null and void by this court. Though the marriage took place in England, it must undoubtedly, according to the decision in *Harvey* v. *Farnie*, which went up to the House of Lords, be taken to be *primâ facie* an American marriage, because the husband was domiciled in the United States, and *primâ facie* the courts of the place of domicile have jurisdiction in the matter. If the parties had remained in England then *Niboyet* v. *Niboyet* is an authority for saying that, under some circumstances, the courts of this country would have had jurisdiction. But, as a matter of fact, these parties, after the solemnization of the marriage went to the United States and there took up their permanent abode, and I am of opinion that the petitioner acquired a complete domicile in the United States. I know it is argued on her behalf that this is not so. It is said that she was originally a British subject; that as by the law of England the matter in dispute between herself and her husband would have been disposed of by a declaration that the marriage was null, she was therefore entitled to treat it as null and void from the beginning; and that consequently she never lost her English domicile, but by the law of England has remained a British subject. The fallacy which underlies that argument appears to me to be evident from this:—A woman when she marries a man, not only by construction of law but as a matter of fact, acquires the domicile of her husband if she lives with him in the country of his domicile. Here the petitioner not only married an American citizen, but after the marriage went with him to the United States with the intention of taking up her permanent abode with him in the country of his domicile. It is to be remembered that the marriage before it was annulled was, by the law of England, not absolutely void, but only voidable at the instance of the injured party. The petitioner might, had she thought fit, have enjoyed all the advantages of a wife, save that of marital intercourse. The marriage having been entered into in 1872, it was not until 1879 she instituted proceedings to have it set aside.

I am of opinion that at the time of the institution of that suit—which is the turning point of the case—the domicile of the petitioner was, in fact and law, in the United States, and that therefore the court of the United States had jurisdiction to annul the marriage. On this ground I dismiss the petition.

Petition dismissed.

Solicitor for the petitioner, *S. H. Turner*, Queen's Proctor.

Prob. Div. & Adm. Div. Admiralty. } March 20.

"The Orwell." (*a.*)

Practice—Action under Lord Campbell's Act (9 & 10 *Vict. c.* 93)—*Writ of inquiry before sheriff.*

In an action to recover for loss of life under Lord Campbell's Act, retained in the Admiralty Division under section 11 *of the Judicature Act*, 1875, *the court—there having been default in pleading—pronounced interlocutory judgment, and ordered the damages proceeded for to be assessed on a writ of inquiry directed to the sheriff of Middlesex.*

This was an action instituted on behalf of Mary Ann Hughes and four of her children against the owners of the vessel *Orwell* to recover compensation under Lord Campbell's Act in respect of the death of her husband in consequence of a collision between *The Orwell* and the schooner *Margaret Lewis*.

The owners of *The Orwell* appeared in the action, but *The Orwell* having on the 7th of December been found solely to blame for the collision in an action of damage *in rem* instituted against her in this court, no application was made to transfer the present action to the Queen's Bench Division, and no defence was delivered therein.

The plaintiffs afterwards, on the 14th of March last, took out a summons returnable before the registrar calling upon the defendants to show cause why the plaintiffs should not be at liberty to enter up interlocutory judgment for damages to be assessed, and why such damages should not be assessed on a writ of inquiry directed to the sheriff of Middlesex.

March 16.—The summons was now referred to the judge, and by him adjourned into court.

Barnes, Q.C., for the plaintiffs.—The provisions of Lord Campbell's Act (9 & 10 Vict. c. 93) require that the damages in actions under that Act should be assessed by a jury, but, even if the court has a discretion, it ought to exercise it in sending this case to the sheriff for assessment of the damages: *The Bernina*, 35 W. R. 314, 12 P. D. 58; Rules of the Supreme Court, ord. 27, r. 4.

Raikes, for the defendants, *contrâ*, referred to *The Gertrude*, *ante*, pp. 191, 616, 12 P. D. 204, and the Merchant Shipping Act, 1854, s. 514, as showing that the court, in its discretion, ought to refer the question of damages to the registrar and merchants in the ordinary way.

The President.—I am of opinion that this application should be granted. It was established by *The Bernina*, that actions under Lord Campbell's Act were not within the jurisdiction of the Admiralty Court, but they have been brought within the jurisdiction of this division, because now any action may be begun in any division of the High Court, though if it is not part of the business assigned to that division it may be transferred to a more appropriate division. Here an action under Lord Campbell's Act has been begun in this division and the defendants have not asked that it should be transferred to the Queen's Bench Division. Therefore, on the above principle, I am entitled to entertain this application. How, then, am I to deal with this application? My decision in *The Gertrude* has been pressed upon me. There I held that if the parties agreed to come into this division it must be assumed that they agreed to have the action tried according to the law and practice administered in this division. If I found that in practice this assumption was wrong, I should certainly refuse to

(*a.*) Reported by C. F. Jemmett, Esq., Barrister-at-Law.

allow the transfer of actions to this division, or should transfer them if brought here. But in *The Gertrude* there was solely a question of damages to be decided, and the registrar was not fettered by any Act of Parliament. Here, however, I am not left free; I am exercising the jurisdiction arising under Lord Campbell's Act. In that Act it is said that the damages are to be assessed by a jury, which is also to apportion them. Neither is there in this case any assent on the part of all parties to the case being decided according to the special practice of this division; and I am therefore bound to send the case to a jury unless there is such consent. Reference has also been made to section 514 of the Merchant Shipping Act, 1854, but it is sufficient to say that what has been done in regard to cases under that section has been done under the special provisions of that Act. I therefore give interlocutory judgment as prayed, and I direct that the damages shall be assessed by a jury.

Solicitors for the plaintiffs, *Pritchard & Sons.*

Solicitors for the defendants, *Gellatley & Warton.*

Prob. Div. & Adm. Div. Admiralty. } Dec. 6.

"THE PARISIAN." (*a.*)

Practice—Registrar and merchants—Receipt of evidence—Cross-examination of deponents—Ord. 37, *r.* 2.

*Affidavits brought into the Admiralty Registry in support of claims filed there are, by the practice of the court, receivable in evidence, notwithstanding that orders made for the cross-examination of the deponents have not been complied with. At the same time the weight in evidence to be attached to affidavits uncross-examined to is for the registrar, who, in his discretion, may require the deponents to be examined either in the registry or under a commission abroad, and if no examination of the deponents takes place, refuse to find in favour of the claim, on the ground that the evidence in support of it does not satisfy him that it is valid.**

This was an action of damage instituted on behalf of the owner of the French vessel *La Marie* against the steamship *Parisian.*

The owners of *The Parisian* admitted their liability for fifty per cent. of the damage proceeded for, and an order was made referring the assessment of damages to the Liverpool district registrar, assisted by merchants. Thereupon the plaintiff filed their claim in the district registry at Liverpool, and himself made an affidavit in support thereof. On this affidavit being filed the defendants gave notice to the plaintiff to attend in the district registry for cross-examination, and obtained an order from the district registrar directing the plaintiff to attend for cross-examination at the reference. The plaintiff did not attend at the commencement of the reference, and it was then stated on his behalf that he resided in France, and that if his cross-examination was still desired it would be more convenient to him for a commission to issue to take his evidence abroad. The district registrar was of opinion that it would be more satisfactory that the plaintiff should attend for cross-examination in this country, but referred the matter to the judge, stating the above facts, and desiring directions—first, as to whether the affidavit of the plaintiff ought to be used at the reference as he had failed to appear; secondly, if he were to be cross-examined, whether he should attend before the district registrar for the purpose, or be allowed to give his evidence abroad under a commission.

* See *La Trinidad* v. *Browne*, *ante*, p. 138.

(*a.*) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

Charles Hall Q.C., and *Stubbs*, on behalf of the plaintiff, referred to ord. 37, r. 2, allowing the evidence in references in admiralty actions to be given by affidavit, and contended that although the district registrar was entitled to say what evidence he required, the proper and most convenient course, if further evidence was required, was for a commission to issue under which the plaintiff could be examined in France.

J. Walton, for the defendants, referred to ord. 38, r. 28, and *Concha* v. *Concha*, 35 W. R. 477, 11 App. Cas. 541, as showing the general intention of the Rules of the Supreme Court, that evidence given on affidavit should be subject to cross-examination.

BUTT, J.—I think the proper course in this case is for the district registrar to receive the affidavit of the plaintiff; but I also think he is perfectly within his rights if he refuses to give the statements in it any weight unless and until the plaintiff has been cross-examined either here or abroad. It may be doubtful whether the Supreme Court Rules give the registrar power to order the cross-examination of a deponent who resides abroad; but it is quite open to him under the practice now in force to say "I am not satisfied with the affidavit, and desire to have the oral evidence of the party making the affidavit." The course the district registrar may adopt on this point is, in my opinion, entirely in his discretion.

The next question is this, supposing the district registrar in his discretion requires that the deponent should be orally examined, before the district registrar can attach any weight to the affidavit, and the party on whose behalf the affidavit has been made wishes to further support his case by the deponent being so orally examined, how is the examination of the deponent to take place? Is the examination to be under a commission abroad or on the production of the deponent in this country? This is, again, a question very much for the discretion of the district registrar. In my opinion there is a material difference between a case where the person whose examination is in question is a party to the action, and a case where he is not a party to the action. If a deponent who is not a party to the suit is resident abroad it would, probably, be impossible to enforce his attendance here. It is quite a different thing where the deponent is a party to the action, who has it entirely within his power to come or to stay away. There is another question which I think should be taken into consideration by the district registrar—namely, the question of convenience and expense; for, whilst it may be unreasonable to require the attendance of a man resident in Brazil, it may be right to compel the attendance of a party resident in France. Here the plaintiff is the person who has made the affidavit. He resides at Granville in France, and there is no evidence that he is really ill. In the absence of such evidence I think the district registrar might in his discretion say, "I shall hold my hand and give no decision in favour of the plaintiff's claim until he comes and submits himself to cross-examination." If he is really too ill to come to this country within a reasonable time there is no reason why a commission should not issue for the purpose of his being cross-examined abroad; but if he is not too ill it is more convenient that he should come over here. The discretion is in the district registrar.

I may add that my decision does not, I think, conflict with the opinion of the Court of Appeal in *Concha* v. *Concha*, more especially as the House of Lords regarded the matter as one of discretion.

Solicitors for the plaintiff, *Stokes, Saunders, & Stokes.*

Solicitors for the defendants, *Hill, Dickinson, & Co.*

Court of Appeal.

From Chan. Div. May 29, 30; June 12.

ANDREWS v. BARNES. (a.)

Practice—Solicitor and client costs—Jurisdiction to order in equitable matters—Judicature Act, 1873, *s.* 23—*R. S. C.*, 1883, *ord.* 65, *r.* 1.

The Court of Chancery formerly had, and the High Court in matters of equitable jurisdiction now has, a general discretionary power to award costs as between solicitor and client.

Quære, *whether such power exists in matters of common law jurisdiction.*

Mordue v. Palmer, 19 *W. R.* 86, *L. R.* 6 *Ch. App.* 22, *approved.*

Cockburn v. Edwards, 38 *W. R.* 446, 18 *Ch. D.* 449, *disapproved.*

Decision of Kay, J., *affirmed.*

Appeal from Kay, J.

The action was one relating to the custody and possession of a small trust fund of £162 2s. 3d., collected at the parish church of St. Luke's, New Kentish Town, by means of offertory and alms collections for the purpose of building a parish-room to be used as a Sunday-school.

The plaintiffs were the vicar and churchwardens of the parish, and the defendants were the treasurers of a building committee that had been appointed to carry out this object. The fund in question was in the custody of the defendants, and the plaintiffs claimed to have the fund transferred to them, alleging that the fund had been handed to the defendants by the plaintiffs upon certain conditions only, which had not been, and could not be now, fulfilled, and that the plaintiffs were now the proper persons entitled to the custody of the fund. The defendants denied that the fund had been transferred to them in the manner alleged by the plaintiffs, and claimed to be the proper persons entitled to its custody.

Kay, J., dismissed the action, and being of opinion that the litigation was most unjustifiable, and that the fund should be protected to the utmost, he ordered that the plaintiffs should pay the costs of the defendants as between solicitor and client.

The plaintiffs appealed from that part of the order which directed them to pay the defendants' costs as between solicitor and client.

Swinfen Eady (*Renshaw, Q.C.*, with him), for the appellants.—The judge had no jurisdiction to order the plaintiffs to pay the defendants' costs taxed as between solicitor and client. Though the defendants are trustees of this money, the plaintiffs are not their *cestui que trusts*. The old Court of Chancery had only jurisdiction to order costs to be paid as between solicitor and client (1) where charges of fraud or scandal were made and not proved; (2) where a public officer was made defendant in respect of his official capacity: *Edenborough* v. *Archbishop of Canterbury*, 2 Russ. 93; (3) where a trustee is defendant in a suit unsuccessfully instituted against him by *cestui que trusts*. The present case does not come under any of these heads. The Judicature Act has not enlarged the jurisdiction of the Chancery Division as to costs: ord. 65, r. 1; *In re Mills' Estate*, 35 W. R. 65, 34 Ch. D. 24; Annual Practice, 1887-8, p. 751. Costs as between solicitor and client cannot be given by way of damages: *Cockburn* v. *Edwards*, 30 W. R. 446, 18 Ch. D. 449.

He also referred to *Turner* v. *Collins*, 20 W. R. 385, L. R. 12 Eq. 438, L. R. 7 Ch. App. 329, 19 W. R. Ch. Dig. 83; *Poole* v. *Pass*, 1 Beav. 600; *Attorney-General* v. *Compton*, 1 Y. & C. C. 417; *Attorney-General* v. *Cumming*, 2 Y. & C. C. 139; *Saunders* v. *Saunders*, 5 W. R. 479, 3 Drewry, 387; *Forester* v. *Read*, 19 W. R. 114, L. R. 6 Ch. App. 40; *Mordue* v. *Palmer*, 19 W. R. 86, L. R. 6 Ch. App. 22. [COTTON, L.J., referred to *Dungey* v. *Angove*, 2 Ves. jun. 304, 313.]

Marten, Q.C., and *S. W. Worthington*, for the respondents, the defendants.—The plaintiffs claimed as *cestui que trusts* of this money on the footing of a resulting trust. [COTTON, L.J.—But Kay, J., has decided that they are not *cestui que trusts*, and that is not appealed from.] If they claim to be *cestui que trusts* that is sufficient to give jurisdiction as to costs. [COTTON, L.J.—The early cases as to scandal may throw some light on the matter as to jurisdiction: *Ex parte Thorpe*, 1 Ves. jun. 394.] *Mordue* v. *Palmer* fully recognizes the general jurisdiction of the Court of Chancery to order costs to be paid as between solicitor and client, and *Edenborough* v. *Archbishop of Canterbury* is distinctly in our favour, as is also *Neaves* v. *Spooner*, *ante*, p. 257.

Swinfen Eady replied.

On the conclusion of the argument the junior counsel on each side undertook to look into the early cases on the subject and submit them to the court.

The following additional cases were accordingly subsequently cited: *Jones* v. *Coxeter*, 2 Atk. 400; *Burford* (*Bailiffs of*) v. *Lenthall*, 2 Atk. 551; *Cartwright* v. *Hateley*, 1 Ves. jun. 292; *Ex parte Simpson*, 15 Ves. 476; *Currie* v. *Pye*, 17 Ves. 462; *Dunlop* v. *Hubbard*, 19 Ves. 205; *Attorney-General* v. *Haberdashers' Co.*, 4 Bro. C. C. 178; *Fenner* v. *Taylor*, 5 Madd. 470; *Palmer* v. *Walesby*, 16 W. R. 924, L. R. 3 Ch. App. 372.

Cur. adv. vult.

June 12.—The judgment of the court (COTTON, FRY, and LOPES, L.JJ.) was delivered by

FRY, L.J.—In this case the plaintiffs sought to recover from the defendants a small sum of money held on trust for certain parochial purposes. The plaintiffs failed, and Kay, J., dismissed the action, with costs to be paid by the plaintiffs as between solicitor and client, on the ground that the fund ought to be preserved intact and unimpaired by the plaintiffs' wrongful claim, and that this would not be the case if the defendants were to receive the difference between costs on the two scales out of the fund, which, as trustees, they would be entitled to if not paid by the plaintiffs. The only question raised is whether Kay, J., had any jurisdiction to make this order. The suit, relating to the custody and possession of a trust fund, is clearly one which would have been proper and peculiar to the Court of Chancery when that court existed, and the question therefore is whether that court had jurisdiction to make such an order in such a case. The jurisdiction of the Lord Chancellor in costs was essentially different to that at common law. "The giving of costs in equity," said Lord Hardwicke in *Jones* v. *Coxeter*, "is entirely discretionary, and is not at all conformable to the rule of law." "Courts of equity," said the same great judge in another case, "have in all cases done it"—*i.e.*, dealt with costs—"not from any authority"—*i.e.*, as we understand, from any statutory or delegated authority—"but from conscience and *arbitrio boni viri*, as to the satisfaction on one side or other on account of vexation": *Bailiffs and Corporation of Burford* v. *Lenthall*. An examination of the older general orders of the court made, not under any statutory authority, but from the general and inherent authority of the Lord Chancellor, will show that the court exercised a most wise discretion, not only as to the circumstances under which costs were to be awarded, but apparently as to the measure and fulness of the costs. The general

(a) Reported by M. J. BLANN, Esq., Barrister-at-Law.

orders will be found to use very varied language expressing different measures of estimation. We have references not only to costs and ordinary costs (Ord. 17th November, 1635, "Saunders," p. 180), but to full costs (Ord. 22nd August, 1654, *ibid.*, p. 262); full costs and charges in travel, attendance, and otherwise (*ibid.*, p. 265); "good costs" (Ord. 14th January, 1617—8, p. 291, 17th November, 1635, p. 183); "very good costs" (Ord. 17th November, 1631, p. 66, 25th November, 1658, p. 280); "utmost costs to be assessed by the court" (Ord. 29th January, 1618—9, p. 116); "uttermost cost and charge to be assessed by the court" (Ord. April, 1596, p. 69); "double costs" (Ord. 17th November, 1635, p. 182); "treble costs and quadruple costs" (Ord. 29th January, 1618—9, p. 117). It would be useless to attempt to ascertain the precise value of the expressions used, but they are inconsistent with any notion that the court was confined to one measure of costs. The same control over the amount of costs is shown by the language frequent in such orders, which asserts the full discretion of the court in this matter. "Such costs as the court shall think reasonable" (Ord. 29th October, 1683, p. 359) and "such costs as their lordships shall think fit to inflict" (Ord. 29th October, 1692, p. 397) are instances of numerous like expressions. Again, the makers of these orders exercised a right to fix arbitrarily the amount of costs to be paid in particular cases; that in 1669 (Ord. 12th February, 1669—70, p. 335) 10s. was fixed as the costs to be paid for every frivolous exception to a master's report, which sum in 1689 (Ord. 17th January, 1689—90, p. 387) was increased to 20s., and many similar instances may be found. Lastly, in the particular case now before us of the failure of the plaintiff, we find the orders of August 22, 1654 (p. 265), providing that the plaintiff should pay the defendant "his full costs upon a bill of costs to be allowed by the six clerks, or any two of them; and in case the court upon the hearing shall find the suit to have been vexatious, the court shall give additional costs against a plaintiff, to be pronounced by the court at the hearing, besides the said costs to be taxed upon the bill." The jurisdiction of the Court of Chancery in the matter of costs has been supposed by an eminent writer on the subject—Mr. Beames—to be derived from the recently-repealed statute, 17 Rich. 2, c. 6, which enacts that "forasmuch as people be compelled to come before the King's Council or in Chancery by writs grounded upon untrue suggestions, that the Chancellor for the time being, presently after such suggestions be duly found and proved untrue, shall have power to ordain and award damages, according to his discretion, to him which is so troubled unduly as afore is said." It may be that costs are included under the word damages. But it will be observed, as has, indeed, been long ago pointed out by Coke (4 Inst. 83) that the jurisdiction thus given only arose after proof of the untruth of the allegations, and, therefore, could be exercised only on or after the hearing of the cause. It cannot, therefore, be the foundation of the jurisdiction to award costs in all stages of the suit, and for the insufficiency as well as the untruth of the matters alleged. The records of the Court of Chancery during the last century show that in numerous cases it has exercised the right of giving costs between attorney and client, or, to use the more recent language of the cases, between solicitor and client. Such costs were awarded in the cases of *Attorney-General* v. *Haberdashers' Co.* and *Currie* v. *Pye* to an heir at law made a party to a suit relative to a charity; in *Ex parte Thorp* to creditors of a bankrupt who, as petitioner, applied in bankruptcy to set aside a commission fraudulently sued out to clear the bankrupt from his debts; in *Dungey* v. *Angove* to a landlord made defendant by a tenant to a bill of interpleader, which had been brought by the tenant in collusion with a stranger; in *Ex parte Simpson* and numerous other cases on the ground of scandal; in *Edenborough* v. *Archbishop of Canterbury* to the Attorney-General, and also to the Archbishop of Canterbury and the Bishop of London, where the plaintiff sought to restrain the induction of a particular person; in *Palmer* v. *Walesby* against the next friend to a person in whose name a bill had been filed by this next friend falsely alleging him to be of unsound mind.

In none of the cases which we have consulted has the court stated any limitation of its jurisdiction to award costs as between solicitor and client, though various circumstances have been stated as influencing the discretion of the court—in some cases to vindicate the honour and justice of the court, and in *Palmer* v. *Walesby* on the ground of the right of the applicant to indemnity, the reason alleged by Kay, J., for awarding them in the present case. The general jurisdiction of the Court of Chancery in this respect is stated with great clearness by the Lords Justices in *Mordue* v. *Palmer*. In the course of a chancery suit a reference was made to arbitration, which ordered that the costs should be in the determination of the arbitrator. He awarded them as between solicitor and client, and the Court of Appeal held that as the reference was in chancery the arbitrator had power so to do. "The Common Law Courts," said Mellish, L.J., "have no power to give costs as between solicitor and client, and therefore, when there is a reference, the arbitrator cannot give any other than costs between party and party. But it is otherwise with courts of equity; and I therefore think that when a reference as to costs is made by a court of equity, the court gives the arbitrator jurisdiction to award costs as between solicitor and client if he shall think fit." It was argued that in *Cockburn* v. *Edwards* a different view was taken by the Court of Appeal, but the point then only rose indirectly, and the point does not appear to have been argued. If, therefore, there is any discrepancy between this case and *Mordue* v. *Palmer*, we think that the decision in the latter case must prevail, not only as more express, but as being in accordance with the earlier authorities. From this consideration of the earlier authorities we conclude that there was inherent in the Court of Chancery at the time of its abolition a general and discretionary power to award costs as between solicitor and client to a successful party, and when the justice of the case might so require, and that Kay, J., therefore had jurisdiction to make the order which he pronounced, and consequently that this appeal fails. As the nature of the suit was one of equitable jurisdiction, the question whether the judges of the High Court have any power to award costs as between solicitor and client in matters of common law jurisdiction does not arise, and on it we express no opinion.

Solicitors, *T. Blair*; *G. M. Jameson*.

From Q. B. Div. May 30.

GUARDIANS OF DORCHESTER UNION, *Appellants*.
GUARDIANS OF POPLAR UNION, *Respondents*. (a.)

Poor law—Settlement—Derivative settlement of child from father—Retention of such settlement after widow—Divided Parishes Act, 1876 (39 & 40 *Vict.* c. 61), s. 35.

By section 35 *of the Divided Parishes Act*, 1876, "*no person shall be deemed to have derived a settlement from any other person, . . . except in the case of a child from her husband and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up*

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

to that age, and shall retain the settlement so taken until it shall acquire another."

Held, on an inquiry into the settlement of a pauper over the age of sixteen, that the pauper, not having acquired a settlement of its own, retained the settlement which it derived from its father when under the age of sixteen.

Reg. *v.* St. Mary, Islington, 15 *Q. B. D.* 95, 34 *W. R. Dig.* 135, *overruled.*

Appeal from the judgment of the Queen's Bench Division upon a special case stated under 12 & 13 Vict. c. 45, s. 11, on appeal against an order of removal whereby it was adjudged that the last legal settlement of Eliza George, a pauper, and her children was in the parish of Fordington, in the appellant union.

The pauper, Eliza George, was born on the 9th of February, 1851, in the parish of Fordington, in the appellant union, being the legitimate daughter of Stephen and Susan Balster.

On the 9th of February, 1867, when the pauper attained the age of sixteen years, her father was alive and had acquired a settlement in the parish of Plumstead, in the Plumstead Union, by renting and occupying a tenement, and paying all rates and taxes for the same.

In September, 1878, the pauper was married to James George, a ship's fireman and native of Africa, who never had any legal settlement. There were five children issue of the marriage, the eldest of whom was seven years of age. In January, 1887, the pauper was deserted by her husband, and she and her children became chargeable to the respondent union.

The question for the court was whether the order, adjudging the settlement of the pauper and her children to be in the parish of Fordington in the appellant union, was rightly made.

The Divisional Court (Mathew and A. L. Smith, JJ.) quashed the order. The respondents appealed.

Besanquet, Q.C., and *F. Mead*, for the respondents, the present appellants.—The pauper, being over sixteen, is not within the exception in section 35 of the Divided Parishes Act, 1876, which abolishes derivative settlements except in the case of a wife from her husband, "and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age." That only applies to a child who at the time of removal is under sixteen. That appears from the language of Brett, M.R., and Cotton, L.J., in *Reg.* v. *Bridgnorth*, 31 W. R. 938, 11 Q. B. D. 314. The words, "and shall retain the settlement so taken until it shall acquire another," apply to a child which is removed under the age of sixteen and settled at that time, and being so settled it is to retain that settlement after sixteen until it acquires another. The clause does not apply when the person whose removal is in question is over sixteen. That is the decision in *Reg.* v. *St. Mary, Islington*, 15 Q. B. D. 95, which was affirmed in the Court of Appeal, 15 Q. B. D. 339, 34 W. R. Dig. 135. No doubt the *Highworth Union* v. *Westbury-on-Severn Union, ante*, p. 422, 20 Q. B. D. 597, is inconsistent with this view, but the former decision ought to be followed. The pauper, therefore, is not within the exception, and does not take her father's settlement, her settlement being in the parish in which she was born. The order of the justices was, therefore, right.

They also referred to *Croydon Union* v. *Reigate Union*, 35 W. R. 824, 19 Q. B. D. 385; *Reg.* v. *Marylebone*, 13 Q. B. D. 15, 32 W. R. Dig. 144; *Rex* v. *Bleasby*, 3 B. & Ald. 377.

Bowen Rowlands, Q.C., and *R. Cunningham Glen*, for the appellants, the present respondents, were not called upon.

Lord ESHER, M.R.—There is always a difficulty in expressing oneself so as to prevent any possibility of one's language being used in a subsequent case in a sense that is not intended. The language one uses must be read with reference to the subject-matter under discussion, and so, without retracting anything that I have previously said when regarded in that light, I will now state the conclusion at which I have arrived.

We have to deal with the question of the removal of a woman over the age of sixteen. The fact that she is a mother makes no difference. Indeed the question would in this case be just the same if she were a man. She is a married woman, but her husband has never had a settlement of his own. Therefore, though she is a wife, she is the wife of a man who has never had a settlement. We have to apply to her case the provisions of section 35 of the Divided Parishes Act, 1876. That section abolishes derivative settlements "except in the case of a wife from her husband"—the husband here has no settlement for the pauper to take, and so she is not within that exception—"and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age"—this is not the case of a child under sixteen—"and shall retain the settlement so taken until it shall acquire another." In my opinion the true construction of that section is that no one can derive a settlement except in the two cases mentioned. A wife may derive a settlement from her husband, but not from her husband's father, as was pointed out in *Reg.* v. *Bridgnorth*. A child under sixteen shall take the settlement of its father or of its widowed mother, and that is the only settlement a child under sixteen can take, every other settlement being excluded. That deals with the case of a child under sixteen. The last clause goes on to deal with a child after sixteen, "and shall retain the settlement so taken until it shall acquire another." It is obvious that this deals with the case of a person who is over sixteen when the moment of adjudication arrives. When the child reaches the age of sixteen it has the settlement of its father or of its widowed mother, and it is to retain that settlement until it—that is, the person over sixteen—shall acquire another. The suggestion that a child under sixteen can acquire a settlement for itself is negatived by the former part of the section, which says that such child shall take the settlement of its father or of its widowed mother. In this case the settlement of the pauper's father was in the parish of Plumstead. When the question of the pauper's removal arose she had not acquired another settlement. While under sixteen she took the settlement of her father, and, as she had not acquired another since she was sixteen, she retained that settlement.

In arriving at this decision I do not break from anything I have said before. The only case to the contrary is *Reg.* v. *St. Mary, Islington*. The *Bridgnorth case* is, I protest, not to the contrary. Certain observations in that case have been treated as if they were applicable to the whole section. We were dealing there with the section item by item, and the language used with reference to each item must be confined to that item, and must not be extended in a way that was never intended. No doubt the *Islington case* is contrary to our present decision, and that case was affirmed in the Court of Appeal. But the Court of Appeal affirmed the decision because it was stated and not denied that the case was the same as the *Bridgnorth case*. It was upon that erroneous assumption that the decision was affirmed. But even if it be said that we affirmed the decision of the Queen's Bench Division, still we have the later case of the *Highworth Union* v. *Westbury Union* contrary to it, and we must adopt one and reject the other. If, then, we did come to a wrong decision in the *Islington case*, we must now adopt the *Highworth case*. I am about to

[illegible] the judgment in the *Highworth* [illegible] to, and which Lopes, L.J., [illegible] adheres to*. "Previously [illegible] statute, great expenses were often [illegible] making remote derivative settle- [illegible] family pedigrees; and it [illegible] this mischief that the 35th [illegible] the Act, which at a stroke [illegible] a derivate settlement being [illegible] derivative settlements [illegible] *v. Bridgnorth*. But the pro- [illegible] a most important. It is [illegible] that it is to be [illegible] derivative settlement of the [illegible] settlement acquired by [illegible] sixteen is not to be [illegible] child is to retain the [illegible] when it attained sixteen [illegible] These words govern the [illegible] in conformity with [illegible] the derivative settle- [illegible] sixteen, as she has never [illegible] The order of removal [illegible] of the Divisional [illegible] as to the children, [illegible] the order is wrong as [illegible]

[illegible] not to see that section [illegible] so worded as to [illegible] The difficulty [illegible] words "child" and [illegible] *Bridgnorth* that [illegible] be read with [illegible] deal with the [illegible] settlement of [illegible] age. The [illegible] with the [illegible] The [illegible] sixteen, and [illegible] that [illegible] The whole [illegible] refer to [illegible] but it [illegible] who at [illegible] may have, [illegible] long time [illegible] When the [illegible] settle- [illegible] settle- [illegible] in- [illegible] was [illegible] it was [illegible] assumption [illegible] by [illegible] is [illegible] but [illegible] also [illegible] the [illegible]

[illegible] Bench Division in that case may therefore be considered as overruled.

Appeal dismissed.

Solicitors for the appellants, *Lucas & Ward*, for *A. H. Lock*, Dorchester.

Solicitor for the respondents, *J. W. Marsh*.

From Prob. Div. & Adm. Div. May 31; June 6.

HYDE v. HYDE. (a.)

Practice—Married woman—Separate estate—Restraint on anticipation—Writ of sequestration—Form of—Discovery in aid of execution—Jurisdiction of Divorce Division—Divorce and Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 35, 52—R. S. C., 1883, ord. 42, r. 33; ord. 43, r. 6; ord. 68, r. 1.

It is the proper practice in the Divorce Division now, as it was in the Divorce Court formerly, to issue writs of sequestration in general form against "the estate and effects" of a married woman, without any express limitation in the writ to property of the married woman not subject to a restraint on anticipation; but nevertheless the writ can only operate on property of the married woman not subject to a restraint on anticipation.

In re Glanville, Ellis v. Johnson, 34 *W. R.* 309, 31 *Ch. D.* 532, *followed.*

Miller v. Miller, 18 *W. R.* 585, *L. R.* 2 *P. & D.* 55, *explained.*

Scott v. Morley, ante, *p.* 67, 20 *Q. B. D.* 120, *distinguished.*

In a suit in the Divorce Division for dissolution of marriage, an order was made on the wife to deliver up the children to the custody of the husband, and not to withdraw them from the jurisdiction of the court. The wife, who at the date of the order had been residing with her sister and brother-in-law, evaded service of the order and did not comply with it.

Butt, J., *on the application of the husband, made an order directing the wife's sister and the brother-in-law to attend before the court for the purpose of being examined as to their knowledge of the whereabouts of the wife and children.*

Held, that a judge of the Divorce Division had no jurisdiction to make such an order.

Appeal from Butt, J.

A decree *nisi* for dissolution of the marriage between Mr. and Mrs. Hyde had been made on the petition of the husband, and on December 21, 1887, an order was made that the wife should, within one week, deliver up the children of the marriage to the husband.

On May 29, 1888, the wife having failed to comply with the order of December 21, on the application of the husband an order was made for committal of the wife for contempt, and that a writ of sequestration should issue against all the estate and effects of the wife, and, further, that the mother, the sister (Mrs. Felgate), and brother-in-law of the wife should attend before the court to be examined as to their knowledge of the whereabouts of the wife and children.

It appeared from the uncontradicted evidence of the person who was employed to serve the order of December 21 on the wife, that on going to the last known address of the wife, he was informed by the wife's sister that the wife was not at home, but was expected to return, and that he left a copy of the order with the sister, and on going there again shortly afterwards he was informed that the wife had gone to America. Being unable to effect service on the wife, that

(a.) Reported b[illegible] Barrister-at-Law

he sent the order in a registered letter to the residence of the wife's sister; and that the letter was received and never returned.

The marriage between Mr. and Mrs. Hyde took place in October, 1881, and under the marriage settlement Mrs. Hyde was tenant for life of certain real and personal estate for her separate use without power of anticipation.

The wife appealed from the order of May 29.

Cozens-Hardy, Q.C., and *Lewis Coward* (*Philpotts* with them), for the appellant.—First, no attachment ought to have been issued without personal service of the order of December 21, and there is no sufficient evidence to show that the wife evaded personal service. *Allen* v. *Allen*, 33 W. R. 826, 10 P. D. 187, is, therefore, distinguishable. Secondly, the writ of sequestration ought to have been expressly limited to separate property of the wife not subject to the restraint on anticipation, following the form of judgment in *Scott* v. *Morley*, *ante*, p. 67, 20 Q. B. D. 120; *Miller* v. *Miller*, 18 W. R. 585, L. R. 2 P. & D., at p. 55. The court has no jurisdiction, either directly or indirectly, to make an order affecting property of a married woman subject to a restraint on anticipation: *In re Glanville*, *Ellis* v. *Johnson*, 34 W. R. 309, 31 Ch. D. 532; *Claydon* v. *Finch*, L. R. 15 Eq. 266, 21 W. R. Dig. 146. Thirdly, there was no jurisdiction to order the wife's relatives to attend for examination: *In re Spence*, 2 Ph. 247, at p. 253.

English Harrison, for the trustees of the wife's marriage settlement.

Inderwick, Q.C., and *R. H. Pritchard*, for the husband, the respondent, were only called on as to the second and third points.—In *Miller* v. *Miller* the writ of sequestration was general in form, and also in *Allen* v. *Allen*; and *Symonds* v. *Symonds*, L. R. 2 P. & D. 447, 21 W. R. Dig. 93. On the third point, s. 35* of the Matrimonial Causes Act, 1857, give the Divorce Court power to make orders as to the custody of the children, and section 52† gives that court power to enforce its orders in the same manner as the Court of Chancery could do. The Court of Chancery would have had jurisdiction to make this order for examination of these persons. [FRY, L.J.—Even if the infants were not wards of court?] Yes: *Rosenberg* v. *Lindo*, 48 L. T. N. S. 478, 31 W. R. Dig. 92.

They also referred to the Chancery Procedure Act, 1852 (15 & 16 Vict. c. 86), s. 39.

Cozens-Hardy, Q.C., in reply.—Except in the case of wards of court, the Court of Chancery could not have made this order for examination. *Rosenberg* v. *Lindo* was a case of wards of court. As to limiting the writ of sequestration to property not restrained from anticipation, he referred to *Birch* v. *Birch*, 8 P. D. 163, 31 W. R. Dig. 153; *Willcock* v. *Terrell*, 3 Ex. D. 323, 27 W. R. Dig. 168; *Lucas* v. *Harris*, 35 W. R. 112, 18 Q. B. D. 127, cases relating to the pensions of officers.

Cur. adv. vult.

June 6.—COTTON, L.J.—This is an appeal from a decision of Butt, J., ordering a sequestration to issue against the present appellant. The first point taken by the appellant is that, as the original order was not personally served, it would be wrong therefore to issue sequestration. In my opinion that objection cannot prevail. No doubt the general rule is that sequestration will not be ordered when there has not been personal service of the order in respect of the non-compliance with which sequestration is sought, but there are exceptions to that rule, and if the court is shown that the party knows of the order—as, for instance, if the party was in court when the order was made, or otherwise knew of the order—that is an exception to the general rule. What is the evidence here? [The Lord Justice went through the evidence, and continued:—] In my opinion the proper conclusion to be drawn from the evidence is, that Mrs. Felgate was in communication with Mrs. Hyde, and that Mrs. Hyde kept out of the way in order to evade service, and therefore that the order appealed from was in this respect right, and followed the principle laid down in *Allen* v. *Allen*.

The second objection was that the writ of sequestration was too general in its form. It was said that in the case of *Miller* v. *Miller* the order directing the issue of the writ of sequestration was confined to the separate estate of the married woman. Now the registrar has obtained the order and writ of sequestration in that case, and they are both found to be general in form, as in the present case, and the registrar also informs us that the practice in the Divorce Division is to issue the writ of sequestration in that general form. The question, of course, as to what property of the married woman the writ will operate upon, though not now necessary to be decided, would arise hereafter, and as the point has been argued, and is important, I think it well to express my opinion upon it. In my opinion, with regard to what could be sequestered as against a married woman—and I give no opinion as to what would be the case if there were evidence before the court that the married woman had no property except what she was restrained from anticipating, as here we have evidence that there are some arrears of income which has already become due—it would be wrong, as to future income restrained from anticipation, to direct the sequestrator to take possession, or to hold that he could be put in possession, of such: the doctrine of equity being that a married woman can neither anticipate such income herself, nor act so as to enable any other person to receive it by way of anticipation, that doctrine having even been applied in the case of a fraud committed by the married woman. I am of opinion, therefore, that the court has no right or power to order the sequestrator to take possession of income which the married woman is restrained from anticipating.

The third point taken as to the order appealed from is an important one also—viz., as to that part of the order requiring the attendance of these persons—the appellant's mother, sister, and brother-in-law—to be examined. The ground on which that part of the order seems to have been made is ord. 42, r. 33, of the Rules of the Supreme Court, 1883. But these rules do not apply to the Divorce Division. It was said on behalf of the present respondent that under section 52 of the Divorce Act, 1857, orders made by the old Divorce Court were to be enforced and put in execution in the same or the like manner as orders of the old Court of Chancery were enforced and put in execution. In my opinion the effect of that section is to provide that the

* Section 35 of the Divorce and Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), so far as material, enacts:—"In any suit, &c. . . . for obtaining a judicial separation . . . the court may . . . . make such provision as it may deem just and proper with respect to the custody, maintenance, and education of the children, the marriage of whose parents is the subject of such suit, . . . and may, if it shall think fit, direct proper proceedings to be taken for placing such children under the protection of the Court of Chancery."

† Section 52:—"All decrees and orders made by the court in any suit, &c., . . . instituted under this act shall be enforced and put in execution in the same or like manner as the judgments, orders, and decrees of the High Court of Chancery may now be enforced and put in execution."

mode adopted by the old Court of Chancery as to the enforcement and execution of its orders was to be followed when that differed from that pursued in the old common law courts. Now, no doubt the old Court of Chancery in the case of its own wards, and with reference to matters affecting them, had power to make such orders and to enforce them in this particular way. But the Court of Chancery had no such power as this in cases not affecting wards of court. Section 35 of the Act of 1857 does not enable the Divorce Court to make the infants wards of court, and therefore the Divorce Court cannot be said to be following the practice of the Court of Chancery in enforcing its orders in this particular way, as that practice referred only to wards of court.

It was said that the order was only enforcing the order made on a matter in issue before the court—viz., the custody of the children. But that contention will not hold. There was no issue before the court with reference to which these persons could be summoned as witnesses. The issue as to the custody of the children has been already determined. I think, therefore, that this part of the order cannot stand.

BOWEN, L.J.—I am of the same opinion. On the first point, as to want of personal service, the inference I draw from the evidence as a conclusion of fact is, that the appellant knows perfectly well what the order was, and has been evading service of the order. Then as to the general form of sequestration. The fact that a general form has always been the one adopted since 1857 in the Court of Probate and Divorce formerly, and now in the Probate Division—and such is the knowledge of the registrar—inclines one to the opinion that the general form is the right one. I need not enumerate categorically the cases referred to, but will only mention *Miller* v. *Miller*, decided in 1870. There there had been, no doubt, an application for a writ of sequestration against the separate estate of the respondent, a married woman, and Lord Penzance directed a writ of sequestration to issue, but said, "It may be necessary hereafter to decide what property will be subject to the writ." We have seen the actual writ of sequestration issued in *Miller* v. *Miller*, and it is a writ general in form, and, therefore, it seems to me that the Judge Ordinary there determined that the writ should issue in the first instance in general form.

Then as to the property it is to affect. I agree that it is not right that future income subject to a restraint on anticipation should be subjected to the effect of the writ. I think the case of *In re Glanville* shows that, and that to hold the contrary would have the effect of doing indirectly what the court cannot do directly—viz., to allow a married woman to prejudice her right to the income by doing an act which will have the effect of anticipating it.

On the other point I think Mr. Cozens-Hardy's contention must prevail. Ord. 68, r. 1, shows that the orders and rules made under the Judicature Acts do not apply to divorce and other matrimonial causes. Is there any jurisdiction under the Act of 1857 to make this order? [The Lord Justice read section 52 of the Act of 1857, and continued:—] Was the examining persons not parties to the cause any possible mode in 1857 of putting in execution a judgment of the Court of Chancery? It seems not, except under two possible contingencies, the first of which was the case of wards of court, and the second was for the purpose of obtaining evidence with reference to matters in issue in a pending litigation. Neither of these contingencies are applicable here; and the Court of Chancery had no power to exercise a general right of discovery in aid of execution.

FRY, L.J.—Three points have been put forward against this order. First, that it was bad because there had been no personal service, and that there was no evidence that the present appellant evaded service. I cannot agree in that view, as I think there is evidence that the appellant evaded service.

Then it was said that the form of the writ to issue execution was too wide, and that it ought to have been confined, as in *Scott* v. *Morley*, to the separate property of the married woman not subject to any restraint against anticipation. That was a judgment for damages obtained against a married woman under the provisions of section 2, sub-section (1), of the Married Women's Property Act, 1882. But in regard to sequestration that statute says nothing at all, and decides nothing at all, and therefore we are not bound by what was said in that case as to that statute. Then I do not think it was the course of the old Court of Chancery or of the Divorce Court to limit the writ of sequestration in anticipation of questions that might arise. The writ ran in general terms, and the case of *Fenton* v. *Lowther*, 1 Cox, at p. 315, shows that, though the writ was in that wide form, the salary of an equerry to one of the Royal Family did not come within the grasp and operation of the writ. The only point on which I differ from the order made by the judge below is as to that part of the order directing these persons to attend for examination. I cannot find any jurisdiction authorizing that. Section 35 of the Act of 1857 was relied on, giving the Divorce Court power to make orders with respect to the custody, &c., of the children, but that was only as between the parties to the litigation. Then it was said to be authorized by section 52, but I know of no case to show that the Court of Chancery had power to summon persons to make discovery in aid of execution. Even if the Court of Chancery had such power, this part of the order is not for the purpose of enabling the court to enforce any order made, but to enable the court to consider whether it should make some other order.

Appeal dismissed.

Solicitors, *Mear & Fowler; Mann & Taylor; L. Desborough.*

High Court of Justice.

Chan. Div. Kay, J. } June 7.

In re HANCOCK.
HANCOCK *v.* BERREY. (*a.*)

Mortgage—Release by parol—Handing over mortgage deed—Absence of consideration.

Two brothers were, subject to their mother's life interest, entitled to a fund in equal moieties. One of them mortgaged his share to his father, who died, having appointed the other brother his executor and residuary legatee. He, on the death of his mother, wrote to his brother, the mortgagor, that, in accordance with her wish that he should hand over to him the mortgage deed, he gave himself the satisfaction of fulfilling her desire, and he inclosed the deed accordingly. Afterwards he insisted on his rights under the mortgage.

Held, that the gift, being by parol and without consideration, was imperfect, although accompanied by delivery of the deed, and could not be enforced by the mortgagor.

In re Richardson, Shillito *v.* Hobson, 34 *W. R.* 594, 30 *Ch. D.* 396, *followed.*

Adjourned summons.

By an indenture of the 25th of March, 1858, George

(*a.*) Reported by H. F. AMEDROZ, Esq., Barrister-at-Law

Berrey assigned to his father, G. J. Berrey, all the share or interest to which he was then entitled in possession, reversion, remainder, or expectancy of or in the estate of the testator, C. Hancock, by way of mortgage for securing repayment to H. J. Berrey of £2,575 10s.

G. J. Berrey died in 1872, having by his will appointed his son, Charles Berrey, his executor and residuary legatee. The interest of George Berrey in the estate of C. Hancock remained reversionary until the 20th of October, 1887, when, on the death of his mother, it fell into possession. It was represented by a sum of £2,873 10s. 8d. Consols, to which George Berrey and his brother Charles Berrey were entitled in equal shares.

On the 30th of November, 1887, Charles Berrey wrote to his brother, George Berrey, as follows:—

"Dear George,—I have found a letter addressed by our good mother to me, in which she expresses a wish that I should hand over to you the deed of assignment by which you finally relinquished (in part consideration for large sums advanced) your share in the moneys bequeathed ultimately to ourselves equally by her father. I now give myself the satisfaction of fulfilling her desire, and herewith inclose deed accordingly. I may mention that, although, of course, I had no thought (till I read my mother's letter) of making you a present of what belonged to myself, particularly as you are so much better provided for than I am, it was contrary to my intention that the matter of the assignment was revived so soon. I may add that I had not seen the above-mentioned letter up to Thursday last, and that I procured the deed only yesterday, otherwise I should probably have acquainted you earlier with the last proof of your mother's love.—Yours,

"Charles E. Berrey."

George Berrey acknowledged the receipt of the deed and letter, and he retained possession of the deed.

Subsequently Charles Berrey refused to release his rights under the mortgage of the 25th of March, 1858, whereupon the trustee of the estate of C. Hancock took out this summons to have it determined who was entitled to the £1,436 15s. 4d., the share of George Berrey in the estate.

It appeared that George Berrey had never paid any interest on the £2,575 10s., nor given any acknowledgment in respect thereof, and he set up the Statute of Limitations as a bar to the claim under the mortgage. But the court held that, as the interest of George Berrey was reversionary, the right to enforce the mortgage arose only when it fell into possession: *Hugill* v. *Wilkinson*, *ante*, p. 633.

There remained the question as to the effect of the above letter of Charles Berrey, coupled with the return of the mortgage deed.

Hope, for the summons.

E. Ostler, Q.C., and *S. Peel*, for Charles Berrey, contended that as there was no consideration for his letter to George Berrey, it did not, either in law or equity, constitute a release of the mortgage debt.

They cited *Antrobus* v. *Smith*, 12 Ves. 39; *Cross* v. *Sprigg*, 6 Ha. 552, and *In re Richardson*, *Shillito* v. *Hobson*, 34 W. R. 286, 30 Ch. D. 396.

Marten, Q.C., and *Horsley*, for George Berrey.—The letter of Charles Berrey and his forwarding the mortgage deed amounts to a release of his rights as mortgagee, and to a direction to the trustee to hold the share in trust for George Berrey.

They cited *Richards* v. *Syme*, Barnard. Ch. Rep. 90, 2 Eq. Cas. Abr. 617; *Flower* v. *Marten*, 2 My. & Cr. 459; *Taylor* v. *Manners*, 14 W. R. 154, L. R. 1 Ch. 48; *Freemans* v. *Williams*, L. R. 1 Eq. 184, 14 W. R. Ch. 108; *Strong* v. *Bird*, 22 W. R. 788, L. R. 18 Eq. 5; and *Harding* v. *Harding*, 34 W. R. 775, 17 Ch. D. 442.

Hope referred to *Byrn* v. *Godfrey*, 4 Ves. 6.

Kay, J., after deciding the question of the Statute of Limitations, went on to say: Then a serious question arises as to the effect of Charles Berrey's letter. Now it is true that his desire in writing that letter was to carry out his mother's wish, but he received no consideration for so doing, and the question, therefore, is, whether, when a mortgagee without consideration hands over his mortgage deed to the mortgagor, intending to thereby release the debt due to him on the mortgage, that is a transaction upon which the mortgagor can insist, and whether it is a binding release on the mortgagee. The case would be very different if the release had been made by deed, for the deed would import consideration, but here the release was only by parol, and there is no authority showing that such a release can be enforced. Then does the handing over of the deed make any difference? In the case of *In re Richardson*, *Shillito* v. *Hobson*, where a mortgagee wishing to make a present of his mortgage to a third person did so by parol, and handed over his mortgage deed, but made no actual transfer, it was decided that this was not a completed gift, that the fact that the deed had been handed over made no difference, and that the person who had received the deed was bound to hand it back. How can the handing over the deed in this case have any greater effect than there? It was handed over merely by way of confirmation of the parol release. Is it a binding transaction, so that thereby the estate which was assigned by the mortgage deed, and by which the assignee was made *cestui que trust* of George Berry's share of the property, was transferred to the person to whom the deed was handed? The case would be very different if there were a vestige of consideration, but, as I have already said, there was none. It was an uncompleted gift of the property which belonged to the donor, and which he was minded to hand to the donee, but did so ineffectually by this letter, and by the delivery of the deed. The case, too, would have been altered if there had been any declaration of trust, or any act by Charles Berrey amounting to declaring himself to be trustee of the mortgage debt. Then he could not have recalled it. This distinction is pointed out in the case of *Harding* v. *Harding*, where executors had sent a statement of account to a residuary legatee, which he forwarded to his daughter, with this direction thereon, "I hereby instruct the trustees in power to pay to my daughter the balance shown in the above statement," which amounted to a direction to the trustees to hold that of which they were trustees for him for his daughter. There is nothing like that in this case. The letter is no direction to the trustees, nor does the donor declare himself to be trustee of the debt for his brother. There is merely an incomplete voluntary gift of his interest in the property, which I must hold to be ineffectual. The gift, therefore, cannot be supported. In *In re Richardson* it was urged that the deed could not be recovered back, but it was decided that it could, and I must hold the same in this case. The share of George Berrey must be paid to Charles Berrey, but I will not give him any costs.

Solicitors, *Currie, Williams, & Williams; Gasquet & Metcalfe; Arthur Pearce.*

Chan. Div. Kay, J. June 7, 14.

In re JUPP.

JUPP *v.* BUCKWELL. (*a.*)

Husband and wife—Unity of person—Gift to husband and wife and third person—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *ss.* 1, 5.

The rule that, under a gift by will to a husband and wife and a third person, the husband and wife take only one moiety between them, the third person taking the other moiety, is not affected by the Married Women's Property Act, 1882, *and is still applicable to a gift under a will made since that Act came into operation. The effect of the Act is that the husband and wife each take one-fourth, the wife's share being her separate property.*

The reasoning of Chitty, J., *in* In re March, Mander *v.* Harris, 31 *W. R.* 885, 24 *Ch. D.* 222, *disapproved.*

Adjourned summons.

The testator by his will dated the 17th of November, 1887, directed that the residue of his estate (which consisted of the proceeds of sale of realty and personalty) should be divided into five equal shares, "one share between my sister, Mary Buckwell, Daniel Buckwell, her husband, and Harriet Buckwell, her step-daughter, in equal parts." He died on the 25th of November, 1887, and the summons was taken out by the executor of his will to have it determined in what proportions the above share should be divided between the three legatees.

The marriage of Mr. and Mrs. Buckwell took place before the date when the Married Women's Property Act, 1882, came into operation.

Haycraft, for the executor.—The share is divisible into equal thirds and not moieties, and Mr. and Mrs. Buckwell are each entitled to a third. I rely on the judgment of Chitty, J., in *In re March, Mander* v. *Harris*, 31 W. R. 885, 24 Ch. D. 222, 32 W. R. 941, 27 Ch. D. 166, in reversing which the Court of Appeal went solely on the ground that the will there was made before the Married Women's Property Act, 1882, came into operation, leaving untouched the question on a will after that date. The old rule of construction was based on the artificial rule of law that husband and wife were one person: see *Paine* v. *Wagner*, 12 Sim. 184, and *Dias* v. *De Livera*, 5 App. Cas. 123, 28 W. R. Dig. 34. The effect of the Married Women's Property Act, *ss.* 1 (1) and 5, is to abolish this rule of law, consequently the reason for the rule of construction ceases.

He also referred to *Warrington* v. *Warrington*, 2 Ha. 54, and *Marchant* v. *Cragg*, 31 Beav. 398. [KAY, J., referred to *Butler* v. *Butler*, 14 Q. B. D. 83, 33 W. R. Dig. 96, and *Reid* v. *Reid*, 34 W. R. 332, 31 Ch. D. 402.]

Haldinstein, for Harriet Buckwell.—The Married Women's Property Act is intended to affect only the mode of holding property by husband and wife, not its acquisition. The *status* of the wife is not thereby altered, and she has not become a *feme sole* for all purposes, as decided by Chitty, J., in *In re Duke of Somerset*, 35 W. R. 273, 34 Ch. D. 465, and *Wennhak* v. *Morgan*, *ante*, p. 697, 20 Q. B. D. 635. The effect of the bequest clearly is to make the share divisible in moieties. The case of *Paine* v. *Wagner* is of no authority: *Gordon* v. *Whieldon*, 11 Beav. 170, and *Atcheson* v. *Atcheson*, *Ib.* 485.

Haycraft replied.

Cur. adv. vult.

June 14.—KAY, J.—By the will of Stephen Jupp, dated the 17th of November, 1887, he bequeathed a fifth share of the proceeds of real and personal property "between my sister Mary Buckwell, Daniel Buckwell, her husband, and Harriet Buckwell, her step-daughter, in equal parts."

Unless this gift is affected by the Married Women's Property Act, 1882, Mr. and Mrs. Buckwell would take one half, and Harriet, the step-daughter, the other half: *Bricker* v. *Whatley*, 1 Vern. 233; *In re Wylde*, 1 W. R. 9, 2 De G. M. & G. 724. In the last-mentioned case, *Paine* v. *Wagner*, which was relied on before me, was considered as not a binding authority.

Mr. and Mrs. Buckwell were married before the passing of the Act. Upon the operation of the statute, an interest of a husband and wife, held by entirety, was determined by the Court of Appeal in *In re March* to be, that the husband would be entitled to one-half of the joint share in his own right, and the wife to the other half for her separate use.

But it is argued here that as the will was made after the passing of the Married Woman's Property Act, 1882, the rule of construction under which husband and wife take as one person one share between them has been altered, and that they now take, under this will, not one-half between them—Harriet Buckwell, the step-daughter, taking the other half—but that each of the three, the husband, wife, and her step-daughter, takes one-third.

Apart from authority that would be an extraordinary effect of an Act of Parliament, the main purpose and effect of which is to give a married woman certain gifts as between her and her husband, because the effect of so holding would be that both husband and wife, instead of getting one-fourth each, would get one-third each of this gift, and Harriet Buckwell, the step-daughter, instead of getting one-half, would only get one-third; that is, the husband would have an increased share, not only as between him and his wife, but against third persons. If it had been the intention of the framers of the Act to alter this rule of construction, I should expect to find that intention expressed. But the Act does not refer to it in any way, and, so far as appears on the face of it, this would be a consequential and undesigned effect of its provisions.

The argument is that this consequence results from section 1, which provides that "a married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee." And, by section 5, "every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which . . . shall accrue after the commencement of this Act." These provisions seem to be intended to give her at law a right to any property acquired after the commencement of the Act (which was the 1st of January, 1883) equivalent to the separate use, which was a creature of equity. For the creation of that separate use a trust was required, and as a trust never fails for want of a trustee, where no other trustee was appointed it was held that the husband should be considered as trustee for the wife. This new interest is to be without any trust—a legal interest.

The reason why, if the joint estate was made to a husband and wife and to a third person, the husband and wife only took half, is thus expressed by Littleton, section 291; "The cause is for that the husband and wife are but one person in law, and are in like case as if an estate be made to two joint tenants, where the one hath by force of the jointure the one moiety in law, and the other the other moiety." Coke, commenting upon this (187b), quotes from Bracton, "Vir et uxor sunt quasi unica persona quia caro una et sanguis unus." Does the Act mean to alter this? Section 12 shows

(*a.*) Reported by H. F. AMEDROS, Esq., Barrister-at-Law.

that it does not for all purposes, because it expressly preserves the inability of the wife to sue the husband in tort in certain cases. I cite, with entire approval, the language of Wills, J., in *Butler* v. *Butler*, "I take the Act to mean exactly what it says—no more and no less. It is said that it destroys the doctrine of the common law, by which there was what has been called a unity of person between husband and wife. Again I answer, I do not see why. It confers in certain specified cases new powers upon the wife, and in others new powers upon the husband, and gives them in certain specified cases new remedies against one another. But I see no reason for supposing that the Act does anything more than it professes to do, or either abrogates or infringes upon any existing principles or rules of law in cases to which its provisions do not apply." That expresses perfectly my opinion as to the mode in which an Act of this kind should be construed. The capacity of a married woman to take property is not altered as between her and the grantor. That was always complete. Whatever property, real or personal, was devised, bequeathed, conveyed, or assigned to a married woman, as between her and the grantor, passed absolutely. The Act only enlarges her capacity to take such property "as her separate property." That is, as I read it as between her and the grantor, she takes the same as before, but as between her and her husband, what she takes is "her separate property." That is my construction of the statute, independently of authority.

In the case of *In re March* Chitty, J., expressed an opinion that the Act has altered the *status* of a married woman for this purpose. After reading section 1, sub-section 1, he says, "It appears to me that this section enlarges the capacity of a married woman. Her capacity formerly was that she could not take property which went to her husband. There were, no doubt, exceptions made in equity with regard to her right to a settlement; but here her *status* is changed and she is made capable of acquiring personal property in the same manner as if she were a *feme sole*." And, after referring to other sections of the Act, his lordship says: "It appears to me that the Act makes such alterations in the relation of husband and wife that it severs that unity of person, and divides that compound person which the law formerly recognized, to such an extent as to render it wrong for the court to apply the old principle, which was founded on unity of person."

I cite this passage for the purpose of explaining the grounds on which I respectfully differ from this judgment. In my opinion, as I have said, the capacity of a married woman to take property is only altered as between herself and her husband. The true view seems to me to be that the wife had an unlimited capacity before the Act to acquire property, but that, upon its acquisition, the marital right of the husband gave him certain interests in it which the Act has interfered with. This seems to me to be the extent to which her *status*, if that be the right word, is intended to be altered. But for collateral purposes—that is, for any purpose in respect of property—except altering her right to property as between herself and her husband, I do not find in the Act any intimation of an intention to change her legal position. If that had been the intention, I should have expected to find in the Act an express provision to the effect, for example, that in all questions relating to property, the husband and wife should be considered, not only as between themselves, but also as between themselves and third persons, two separate individuals, and that the old law of unity of person should be abolished. The decision in *In re March* was overruled by the Court of Appeal, not on this ground, but because the will in that case was made before the passing of the Married Women's Property Act, 1882. The learned judges expressly declined to give any opinion what would be the effect, in this respect, of a will made after the Act. But Cotton, L.J., said this, in which I concur. "In my opinion the Act was not intended to alter any rights, except those of the husband and wife *inter se*."

In this state of authority I think I am bound to decide this case according to my own opinion. I therefore hold that Mary Buckwell and her husband each take one-fourth, and Harriet Buckwell one-half, Mary Buckwell's share being her separate property according to the Act.

Solicitors, *Henry Sowton*, for *J. C. Buckwell*, Brighton.

Chan. Div. } April 27; May 4.
Chitty, J. }

STEWART v. FLETCHER. (*a*.)

Practice—Married woman—Restraint on anticipation—Payment of dividends on fund into court—Power of attorney—Conveyancing Act, 1881, *s.* 40—*Form of order.*

A married woman restrained from anticipation may appoint an attorney to receive the growing payments, but only on her behalf and for her use.

Form of order directing payment of dividends to a married woman entitled for her separate use.

A sum of Consols was ordered to be transferred into court, and the dividends paid to a married lady who was entitled for life for her separate use and restrained from anticipation, with liberty to apply on her death. There was no gift over or attempted alienation. The proposed order as drawn by the registrar contained the following direction: "Pay upon production of evidence that she has not anticipated the dividends as they accrue during the life of M. Stewart on annuities carried over until further order." In the column under heading Payees, "M. Stewart, wife of J. S. Stewart, for her separate use." The lady was going to reside in India, and it was proposed that she should appoint an attorney to receive the dividends on her behalf.

H. Fellows now mentioned the matter to the court on the minutes, and took the objection that the order should be simply for payment of the dividends as they accrued due to the married woman for her separate use.

CHITTY, J.—The question is as to the form of order which should be used in directing payment of dividends to a married women, when the trust is for payment to her separate use without power of anticipation, and there is no gift over. It is quite plain that it should appear on the face of the order that she is restrained from anticipation, because such orders often come into the hands of third persons, and it might be, that if the order did not disclose the restraint, such persons might treat the married woman as having a full power of disposition. It is equally clear that in questions of this class the married woman herself has no power whatever to anticipate, and that any acts of hers are wholly without operation, for the case is not that of forfeiture or attempted alienation. It appears that the registrar's practice is to draw the order in such a form as to show all this. It is also necessary to produce evidence to the Paymaster-General before he will make payment. Some of the registrars draw the order in such a form that this evidence may be produced by persons other than the married woman herself. Here the lady is about to go abroad to India, and it appears that it is not the practice of the Paymaster-General to draw cheques for India, and the result therefore is, as she cannot receive the dividends herself, that if she is not able to give a power of attorney appointing somebody to

(*a*.) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

receive the dividends for her, she will have from time to time to appoint some attorney after the dividends have fallen due—that is to say, when the restraint has ceased. If she has to do this on every occasion much expense and delay must necessarily arise. I may say here that in my opinion, since the passing of the Conveyancing Act, 1881, s. 40, there is no reason why any married woman may not execute a power of attorney although her separate property may be subject to a restraint on anticipation, but of course she could not, by executing any such power, get rid of the restraint on anticipation. The order I shall in future make in such cases as the present (when there is a simple restraint on anticipation, and no gift over) will be as follows:—The said A. B. being restrained from anticipating such dividends, they are not to be paid to any attorney except upon an affidavit or statutory declaration of such attorney that he receives them on behalf of and for the use of the said A. B., and not of any other person to whom she has assigned or puported to assign them. There must therefore be an affidavit, but it need not be made by the lady herself, but by her attorney. Inasmuch as an affidavit must be always required on each occasion of payment certifying to the fact that the lady is alive, little or no additional expense can be occasioned by requiring the additional evidence, which of course may be embodied in one and the same affidavit.

Solicitors, *Lattey & Hart.*

Chan. Div. Kekewich, J. } Feb. 23, 24, 27, 28.

Attorney-General *v.* Anderson. (*a.*)

Trust—Dissenters' chapel trust deed—"Protestant Dissenters of the Presbyterian or Independent denomination"—Presbyterian Church of England—Dissenters' Chapels Act, 1845 (7 & 8 *Vict.* c. 45), *s.* 2.

A chapel was conveyed in 1766 *to trustees upon trust to permit the premises to be used as "a meeting-house for Protestant Dissenters of the Presbyterian or Independent denomination to worship in."*

A series of ministers had been appointed and officiated in the chapel since that date, some of them being Presbyterians, others Independents; but since the year 1800, *Independent ministers alone had been pastors of the congregation, the defendant A., who was appointed in* 1864, *being an Independent. In* 1879 *and* 1880, *at meetings of the chapel congregation, a majority of the members decided to apply for the admission of the congregation to fellowship with the Presbyterian Church of England, a body formed in* 1876 *by the union of certain religious bodies in England holding Presbyterian tenets, and the congregation was eventually so admitted. By the constitution of this body, any congregation admitted to its fellowship lost the power of absolute control over its own affairs in certain particulars. The plaintiff was a member of the congregation at the time of the application to the English Presbyterian Church, and objected to joining that Church, and brought this action, claiming that, the chapel having been used for more than twenty-five years for worship in accordance with Independent principles and usage, it could not now, under* 7 & 8 *Vict.* c. 45, *be used for worship in accordance with the usages of the Presbyterian Church.*

Held, that the Dissenters' Chapels Act was available only as a defence against attempted alteration after a period of twenty-five years, and not as a means to compel the continuance of any particular religious usages.

But held, also, that the constitution of the Presbyterian Church of England was such that it would be contrary to the trusts of the deed of the chapel for it to be transferred to that Church, the deed contemplating the control of the chapel affairs by no other body than the congregation meeting there, and that on that ground, therefore, the plaintiff's claim must succeed.

Trial of action.

Emma Miles, by an indenture dated the 15th of February, 1766, granted a messuage situate at Tooting Graveney to trustees "upon trust that they, the said Emma Miles, S. Bayes, J. Fullager, J. Bond, and T. Pewtress, and the survivors and survivor of them, and the heirs and assigns of such survivor, shall and do at all times hereafter permit and suffer the same premises to be used and enjoyed as and for a meeting-house or place for Protestant Dissenters of the Presbyterian or Independent denomination to worship in as the same are now used, without receiving any rent or recompense for the same so long as the present or any future laws of Great Britain do and shall tolerate Protestant Dissenters from the present Established Church of England to worship God in the same meeting-house, or so long as there shall be any persons who shall frequent or use the said place for the purpose aforesaid. But in case, according to the laws of England or of Great Britain, it shall at any time cease to be lawful for Protestant Dissenters to meet in the said meeting-house to worship God, and the same shall for that or any other reason be shut up or not preached in for the space of twelve months, then upon trust" for the sole use and benefit of the said Emma Miles, her heirs and assigns for ever.

Various endowments were from time to time conferred on the chapel by deeds, in which the congregation in question was referred to as a "congregation of Presbyterian or Independent Dissenters," "Protestant Dissenters," and other similar terms, none materially differing from the first one mentioned. The ministers appointed to officiate at the chapel by the congregation, no other persons at all interfering in the election, had been, some of them Independents, others Presbyterian, but for about eighty years previous to the matters complained of in this action had been Independents.

In 1864 the defendant William Anderson became pastor of the chapel, and at that time, and subsequently, professed himself an Independent. At a meeting of the members of the congregation, held on the 10th of December, 1879, a majority of those present decided to apply to the Synod of the Presbyterian Church of England for admission to fellowship. This was at first refused by the Synod of that Church, but a second application, made in consequence of another meeting held on the 11th of January, 1880, was successful, and the congregation was admitted into fellowship with that Church, and became subject to its system of church government.

The nature and origin of this Church appear from the argument and judgment.

The plaintiff, G. P. Haskins, was, at the date of these meetings, a member of the chapel congregation, and objected to the applications for admission to the Presbyterian Church of England, and on the 15th of January, 1880, issued the writ in this action, claiming to have the trusts of the indenture of February 15, 1766, or such of them as could be then ascertained, and were valid and subsisting, carried into effect, under the direction of this court; a declaration that, according to the true construction of the deed, and in the events which had happened, or otherwise, pursuant to the provisions of the Act, 7 & 8 Vict. c. 45, the meeting-house at Tooting Graveney was for the exclusive use of persons, members of the denomination, known as Independent or Congre-

(*a.*) Reported by J. W. Gerig, Esq., Barrister-at-Law.

gationalist, to be used by such persons for the public worship of God according to the principles and usages of the Independent denomination; and an injunction restraining W. Anderson, or any person acting under his authority, or claiming as a minister of the Presbyterian Church of England, from using the meeting-house for public worship and from holding any meetings or celebrating public worship in accordance with the usages of the Presbyterian Church of England in the meeting-house and hereditaments.

It appeared from the Book of Order of the Presbyterian Church of England that the sanction of a presbytery is necessary to the appointment of a minister to any particular congregation, and that the appointment does not depend solely on the choice of the congregation.

By 7 & 8 Vict. c. 45, s. 2 (the Dissenters' Chapels Act), it is enacted "that so far as no particular religious doctrines or opinions, or mode of regulating worship, are on the face of the will, deed, or other instrument declaring the trusts of any meeting-house for the worship of God, dissenting, as aforesaid, either in express terms or by reference to some book or other document as containing such doctrines or opinions or mode of regulating worship, be required to be taught or observed or be forbidden to be taught or observed therein, the usage for twenty-five years immediately preceding any suit relating to such meeting-house of the congregation frequenting the same shall be conclusive evidence that such religious doctrines or opinions or mode of worship as have for such period been taught or observed in such meeting-house may properly be taught or observed in such meeting-house, and that the right of the congregation to hold such meeting-house and property shall not be called in question on account of the doctrines or opinions or mode of worship so taught or observed in such meeting-house."

Cozens-Hardy, Q.C., *Aspland, Q.C.*, and *Lemon*, for the plaintiff.—The real question to be decided is whether the English Presbyterian Church can claim to be the successor or representative of the Presbyterian denomination of the last century, referred to in the deed of trust. It is conceded by the defendants that for the last eighty years this chapel has been an Independent one—that is to say, that the congregation meeting in the chapel had complete control over all its affairs, including the appointment of a pastor. The character of the constitution of the Presbyterian Church of England, which was formed in 1876 by a union between various churches in England connected with the Established Church of Scotland and branches of the United Presbyterians and Free Churches of Scotland, is that each congregation, while retaining a certain amount of individual control over its own affairs, is subject also to presbyteries and synods. Previous to admission to the English Presbyterian Church, this chapel congregation was a self-governing body, it will now be subject to church courts, it will not be able to choose its own minister, as the presbytery practically does it. Even if the majority of the congregation may have decided to go over to the Presbyterian Church of England, they cannot carry over the property of the chapel: *Attorney-General* v. *Pearson*, 3 Mer. 352, see pp. 397 and 401. Again, the Independents have now acquired a statutory right under the Dissenters' Chapel Act (7 & 8 Vict. c. 45, s. 2) to retain the chapel as a place for worship in accordance with Independent usages, such usages having been observed for twenty-five years there. There are "no particular religious doctrines or opinions, or mode of regulating worship" on the face of the deeds relating to this church required to be taught or observed, so as to take the case out of the Act. The name "Presbyterian" not amounting to a description of any particular doctrine: *Attorney-General* v. *Hutton*, 4 Drury 480; *Attorney-General* v. *Bunce*, L. R. 6 Eq. 563, 17 W. R. Ch. Dig. 41. [KEKEWICH, J.—Presbyterianism is not the name of a doctrine, but of a mode of church government.] The decisions show that it does not even indicate a mode of church government. Even putting aside the statute, Scotch Presbyterians were not objects of the trust. Presbyterianism, in the sense understood by the defendants, did not exist at the date of the deed in question, or, in fact, at all during the last century: *Attorney-General* v. *Shore*, 11 Sim. 592. We propose to put in oral evidence of what was the meaning of the word "Presbyterian" as used in the last century. [*Gainsford Bruce, Q.C.*, for the defendants, objected to reception of oral evidence, on the ground that the documents themselves alone could be looked to: *Attorney-General* v. *Shore*, 9 Cl. & Fin. 555, see p. 568. KEKEWICH, J., upheld this objection.] Presbyterians and Independents are really two sections of one body, which repudiated any confession of faith and control of individual congregations by any body external to the congregation. In 1691 a "Happy Union" was effected between the Presbyterians, so called, and the Congregationalists. The whole terms of this document are inconsistent with Presbyterianism, as understood by the defendants. The plaintiff was a member of this congregation at the time of the institution of this action, and the fact that he may have since that time ceased to be a member is irrelevant: *Milligan* v. *Mitchell*, 3 Myl. & Cr. 72, p. 84. [KEKEWICH, J.—A right to a seat would give a member such a right of property as would enable him to sue for administration of the trusts of the deed.]

Gainsford Bruce, Q.C., and *Pownall*, for the defendant Anderson.—The language of the deed shows that two separate denominations are meant; the words are, "For Protestant Dissenters of the Presbyterian or Independent Denomination." History shows that attempts were made, which failed, to bring the three denominations of Independents, Presbyterians, and Baptists into union, and they have continued to exist as separate bodies down to the present time: *Attorney-General* v. *Clapham*, 3 W. R. 158, 4 De G. M. & G. 591; *Shore* v. *Wilson*, 9 Cl. & Fin. 355; *Attorney-General* v. *Wilson*, 16 Simons, 210. The Act 7 & 8 Vict. c. 45 only applies where "doctrine, opinion, or mode of worship" are in question, and hence is not applicable here, and, even if it were, can only be used as a shield to persons in possession, and not as a weapon of attack. User in a certain way for twenty-five years may justify a breach of trust, but the continuance of that user after that period is not made compulsory by the statute. The trust here is an alternative one, and a majority of the congregation could decide which mode of government was to prevail. The reason why there are few (if any) traces of a Presbyterian system in the last century is that the Dissenters, though tolerated, were virtually socially ostracized and persecuted, and, had they attempted to form any distinct system of church government, would have brought down on themselves the anger of the dominant church; hence they confined themselves to consolidating their position as citizens.

Levett, for trustees in whom the legal estate in the chapel was vested, submitted to act as the court should direct.

Sillem, for the representatives of a deceased trustee, took the same course.

Cozens-Hardy, Q.C., in reply.—Even if the transfer to the English Presbyterian Church of the chapel and its endowments could have been validly made it was not properly carried out, as no proper meeting was ever convened. This action is virtually one to restrain a majority from depriving a minority of their share of the common prop-

erty. The congregation have committed what may be termed an act of suicide, having lost their right of absolute control over their own affairs. The chapel has become absorbed in a body which could veto its retransfer for the purpose of congregational worship. Unanimity is necessary for the transfer of trust property of this description.

[Other authorities cited were Dr. Rees' Cyclopædia, 1786, *sub. nom.* "Presbyterian"; Rapin's History; Baxter's Nonconformist Plea for Peace; Calamy's Abridgment of the Life of Baxter, 1713; Hallam's Constitutional History, vol. 2, p. 115 (Longmans); Toulmin's History of Dissenters.]

KEKEWICH, J.—The first question which arises is as to the construction of the trust of the deed of February 15, 1766. To construe it reference may be made to the circumstances of the time and to other deeds as illustrations. I think it clear that the trust is an alternative one for either of two denominations, and that it is a trust that would exclude Baptists, who, together with the Presbyterians and Independents, formed the mass of Protestant Dissenters. The second question which arises is whether, the chapel having been used for some eighty or one hundred years as an Independent chapel, the Dissenters' Chapels Act applies so as to prevent Presbyterians from exercising their worship there. I do not think the Act does apply in favour of the plaintiffs. The section is in these terms:—[His lordship read the section set out above.]

There is, however, no declaration in this deed, or by reference, as to the doctrine to be taught or preached; and *Attorney-General* v. *Bunce* is in favour of that proposition. The section does not make it necessary to continue the teaching of certain doctrines if they have been preached there, the Act is a shield against attack, not a weapon of attack. But, again, there has been no change in the doctrine taught or in the mode of public worship. The point whether the word "Presbyterian" connotes any particular doctrine is said to have been considered in the case of *Attorney-General* v. *Bunce*, but I think the case throws no light on it, and it is not necessary for me to decide it. There remains then the question whether this church has been properly attached to the Presbyterian Church in England. [After examining the evidence, his lordship arrived at the conclusion that the transfer had not been properly carried out.] If the Attorney-General were not a party to this action I might have avoided the other points, but now I must deal with them. I think it is almost involved in this deed that this church could not be attached to the Presbyterian Church of England. The law is clear that in matters of this kind a mere majority cannot prevail: *Attorney-General* v. *Pearson*, 3 Mer. 352. The conversion of the property of this church cannot be made without the consent of all the members of the congregation.

I do not propose to trace the history of Presbyterianism. That the Presbyterians, as a body, were strong and distinct originally, there is no doubt; but towards the middle of the eighteenth century Presbyterianism, as a separate form of dissent, disappeared; a few congregations lived on, becoming, in course of time, Socinians, Unitarians, some even joining the Established Church. Lately they have reappeared as a separate body, but their rules now are inconsistent with those that bound this congregation, and with those of the Presbyterians of the eighteenth century.

That being so, what was attempted here was contrary to the trust, and cannot be effected, and I shall therefore decide in the plaintiff's favour.

There will be a declaration that it was not competent to the meetings of the congregation held in December and January, 1879 and 1880, by their resolutions to subject the property to the control of the Presbyterian Church of England, and that the same ought to be enjoyed by the Protestant Dissenters of Protestant or Independent congregations worshipping therein, as if no such resolutions had been passed.

Solicitors for the plaintiff, *Shepheard & Sons.*

Solicitors for the defendant, *Lucas & Sons.*

Solicitors for the defendant trustees, *Winter & Co.*; *H. R. T. Alexander.*

Q. B. Div. (Lord Coleridge, C.J., and Mathew, J.) May 14.

GRAY v. HOPPER. (a.)

Practice—County court—Power to remit action—Reduction of claim below £50 by judgment under order 14—County Court Act, 1856 (19 & 20 Vict. c. 108), s. 26.

Where a claim indorsed on a writ originally exceeds £50, and after the issue of the writ is reduced below that sum by payment in obedience to a judgment under order 14 for a portion of the claim, the district registrar has jurisdiction under section 26 of the County Court Act, 1856, to order the action to be remitted to the county court.

Appeal from an order of Denman, J., in chambers, confirming the order of the district registrar of Newcastle-upon-Tyne.

The action was originally brought to recover £66 11s. 3d., money alleged to have been received by the defendant as agent for the plaintiff. After the issue of the writ an application was made under order 14, and judgment given for £28 11s. 3d., the defendant having leave to defend as to the residue, which was thus reduced below £50. Execution was issued, and the £28 11s. 3d. paid. The district registrar thereupon ordered the action to be remitted to the county court at Newcastle-on-Tyne, pursuant to section 26 of the County Courts Act, 1856.

Tindal Atkinson, for the appellant.—The district registrar had no jurisdiction to remit the action to the county court. The payment reducing the amount below £50 must be a payment before action brought: *Osborne* v. *Homburg*, 24 W. R. 161, 1 Ex. D. 48: *Foster* v. *Usherwood*, 26 W. R. 91, 3 Ex. D. 1. These are decisions on section 7 of the County Court Act, 1867,* where precisely similar words are used, and it was held that as the words "payment and set-off" apply to payment and set-off before action brought, the words "or otherwise" must likewise apply to something before action.

Newson, for the respondent, was not called on.

Lord COLERIDGE, C.J.—This is clearly a case which can be remitted to the county court. It is an action of contract brought in the superior court. The claim originally exceeded £50, but since the issue of the writ has been reduced below £50 by a judgment under order 14. Under these circumstances I think the case comes clearly within the words of section 26 of the County Court Act of 1856, which gives jurisdiction "where in any action

* The County Court Act, 1867 (30 & 31 Vict. c. 142), s. 7, gives jurisdiction to remit to the county court, on application of the defendant within eight days from the day on which the writ shall have been served upon him, in any action of contract where "the claim indorsed on the writ does not exceed £50, or where such claim, although it originally exceeded £50, is reduced by payment, an admitted set-off, or otherwise, to a sum not exceeding £50."

(a.) Reported by G. K. PALEY, Esq., Barrister-at-Law.

of contract brought in a superior court the claim indorsed on the writ, . . . though it originally exceeded £50, is reduced by payment into court, payment, an admitted set-off, or otherwise, to a sum not exceeding £50," to remit the same to the county court. It is contended that similar words are used in section 7 of the County Court Act, 1867, and the decisions in *Osborne* v. *Homburg* and *Foster* v. *Usherwood* on the wording of that, section are relied on. There, however, the words "payment into court" are omitted, and the main object of the section was to limit to eight days from the issue of the writ the time in which the defendant might avail himself of his right to apply to have the action remitted. Thus the decisions are on a later Act, on different words, and for a different object, and it is noticeable that in *Foster* v. *Usherwood* all the Lords Justices drew attention to the distinction between the words of the two sections. It appears to me that the words "into court" in section 26 of the former Act contemplate the case of reduction of the claim subsequent to the commencement of the action.

This appeal, therefore, must be dismissed.

MATHEW, J.—I am of the same opinion. The words "or otherwise" mean in a similar manner; that is, in a similar manner, amongst other things, to payment into court, and this clearly includes a reduction of the claim after action brought by judgment for a portion thereof under order 14.

Appeal dismissed.

Solicitors for the plaintiff, *R. Greening*, for *D. E. Stanford*, Newcastle.

Solicitor for the defendant, *R. S. Hopper*, Newcastle.

Q. B. Div. (Field and Wills, JJ.) May 3.

HEWITSON *v.* FABRE. (*a*.)

Practice—Service of writ—Foreigner residing out of jurisdiction—Rules of Supreme Court, 1883, *ord.* 11, *r.* 6; *ord.* 70, *rr.* 1, 2.

Service of a copy of a writ was made by leave, under a mistaken belief as to the state of facts, upon F., a foreigner residing out of British jurisdiction. F. took no steps to have the service set aside or to enter an appearance, and judgment was signed against him four months after the service of the writ.

Held, that a notice of the writ, and not any service of the writ, was compulsory upon a non-British subject not in British dominions, under ord. 11, *r.* 6; *and that such a wrongful service was not an irregularity which could be dealt with under ord.* 70, *r.* 1, *nor was the defendant estopped, under ord.* 70, *r.* 2, *from taking steps to set aside the proceedings.*

Appeal from the refusal of the master to set aside a judgment referred to the Divisional Court by Denman, J., sitting at chambers.

The defendant, a Frenchman recently stopping in England, but subsequently resident at Bordeaux, had been served at Bordeaux with a copy of a writ in a chancery action, under an order of Kekewich, J., giving leave for service out of the jurisdiction. He entered no appearance to the action, and judgment was signed. At that time the plaintiffs were not aware that defendant was not a British subject, but they now admitted this to be a fact. The defendant applied to the master to set aside the judgment on the ground that notice of the writ should have been given him under ord. 11, r. 6, and he now appealed against the refusal of the master to set aside the judgment.

Lynch, for the defendant.—There is no power to serve a writ on a foreigner resident out of British jurisdiction: *Padley* v. *Camphausen*, 27 W. R. 217, 10 Ch. D. 550; *Field* v. *Bennett*, 56 L. J. Q. B. 89, 35 W. R. Dig. 160.

H. D. Green, Q.C., for the plaintiffs.—The defendant took no steps to prevent judgment being signed against him between the 4th of December, 1887, when he was served with the copy of the writ, and the 14th of April, 1888, when judgment was signed. He ought to have applied under ord. 12, r. 30, to set aside the service. The service in lieu of notice has been a mere irregularity curable under ord. 70, r. 1, and the defendant has, under ord. 70, r. 2, lost his right to complain by his delay.

FIELD, J.—This is an appeal by the defendant to set aside a judgment signed against him. That judgment is said to have been warranted by a preceding service of a copy of the writ on the defendant when residing at Bordeaux, in France. The defendant denies that he is a British subject, and alleges that, he being a subject of the French Republic, such a service was not warranted by the law of England; that a notice only of the writ was warranted, but not a service of the writ. It is a matter of some importance. The object of the rule (ord. 11, r. 6) was to qualify the procedure under the old rule. The order was to provide primarily for the service of writs upon persons residing in Scotland or Ireland. It was found to be so intolerable to have writs running in those countries under different, and what may be termed foreign, jurisdictions. Greater sensitiveness is aroused in the case of any sort of interference in other foreign countries, such as was evidenced in the case of a member of the bar attempting to take a commission in the German Empire. That was considered a trespass on a foreign jurisdiction. It was for such reasons that an alteration was made. A special distinction was thereby made between serving a copy of a writ and serving a notice; and the notice was pointedly drawn in the present form to mark the distinction. Form No. 5, App. A., Pt. I., specifically points out that "when the defendant to be served is not a British subject, and is not in British dominions, notice of the writ, and not the writ itself, is to be served upon him." And the form of notice is given under No. 10. It is no doubt competent for a non-British subject to complain of a service on him of a British process when he is resident in his own country, and we ought to set aside the original order against him. Kekewich, J., was misled, however honestly on the part of the plaintiffs, because he thought the defendant was a British subject. It turned out that he was not. If that fact had been discovered before Kekewich, J., he must have held that there could not be a service of a copy of the writ, but only a notice of the writ being issued, which is not service. If the defendant had been a party to the order made in the hearing before the judge, no doubt he would be bound by it. But he comes forward now for the first time. The order was brought about by a misrepresentation of fact, however innocently made. I do not see why, because he did not come forward before, judgment should be issued against him. No letter was written to him or notice given, but an agent in Paris was instructed to take proceedings in the French courts. I do not know how much the defendant knew of all this.

At any rate, the judgment was clearly not warrantable in the chancery action under the new rule, and if the registrar signed such judgment, that was merely a ministerial act, and would make no difference if the judgment was originally unwarranted. Judgment on

(*a*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

such a service must be set aside, and the order must, therefore, also be set aside for such substituted service. It is important that applicants *ex parte* should understand the responsibility entailed upon them. It constantly happens that statements made *ex parte* are subsequently not found to be warranted in fact.

The plaintiffs ought to have inquired specifically what was the exact nationality and position of the defendant, and more care should be taken in drawing up affidavits on *ex parte* applications.

WILLS, J.—I am entirely of the same opinion. The jurisdiction as to the service and substituted service of writ or notice of writ must be exercised strictly according to the rules laid down. Ord. 11, r. 6, is perfectly clear and explicit. A foreigner living in a foreign country cannot be subject to service of a writ running in this country. But he can be dealt with in that foreign country by a notice, without being served by our process. If any step was taken against the defendant which did not put it in his power to set up the real state of facts as to his nationality and residence abroad, all proceedings thereupon would be wrong, *ab initio*. If he had appeared and voluntarily submitted himself to British jurisdiction it may be that he would be estopped from appealing to us now to set aside a judgment obtained after such submission. But nothing has been done here to alter his original position as a non-British subject resident abroad. Under such circumstances he may come to us at any time to set aside a judgment obtained on a wrongful service, on the ground that he ought never to have been brought before our courts at all. The order and judgment must be set aside.

Order and judgment set aside.

Solicitors for the plaintiffs, *Wakefield, May, & Woulfe.*

Solicitors for the defendant, *Daniel Jones & Linnett.*

Q. B. Div. (Lord Coleridge, C.J., Pollock, B., and Hawkins, J.) } Nov. 28; April 25.

REG. *v.* ARCHBISHOP OF YORK. (*a.*)

Ecclesiastical law—Convocation—Authority of archbishop as president—Jurisdiction of the High Court of Justice—Election of proctors.

The President of Convocation having exercised his discretion on questions connected with the internal affairs thereof (as in the case of a disputed election of proctors to represent an archdeaconry at Convocation), the High Court of Justice has no jurisdiction to inquire into or interfere with such decision.

Rule *nisi* calling upon the Archbishop of York, as President of the Convocation of York, to show cause why a *mandamus* should not issue directing him to admit into Convocation the Rev. Canon Tristram as a proctor duly elected to represent the clergy of the Archdeaconry of Durham in the Lower House.

The facts were as follows:—On the 6th of July, 1886, the Archbishop of York, as Metropolitan of the province of York, issued, in accordance with the Queen's writ received by him, a mandate to the Bishop of Durham for the election of proctors for Convocation. Two proctors were to be elected to represent each archdeaconry. The result of a poll held for the purpose of electing two proctors to represent the Archdeaconry of Durham was —Canon Grey, 86; Canon Tristram, 66; the Rev. J. Bailey, 57. A special return having been made by the archdeacon of all three names, the Archbishop determined against Canon Tristram, who was second on the poll, on the ground that, although he was then a canon residentiary of Durham Cathedral, which is situated within the Archdeaconry of Durham, he was not beneficed within the archdeaconry.

The only question argued was whether the court had jurisdiction to interfere with the decision of the Archbishop.

The Archbishop of York in person, showed cause. —It is a well-established rule of law that this court will not interfere with matters ecclesiastical nor with the decisions of an ecclesiastical tribunal: *Appleford's case*, 1 Mod. Rep. 88. Under the jurisdiction conferred upon me as President of Convocation by the Queen's writ I have power to decide questions arising as to whether certain persons are duly elected as "proctors" for Convocation. In order to know whether my decision is right the court must take notice of matters which have never yet been deemed to be within its judicial cognizance. If this court had jurisdiction in such matters I should be liable to repeated *mandamuses*.

Tristram, Q.C., and *Jeune*, in support of the rule.—The elections to Convocation take place under the Queen's writ, which has not, in this case, been properly executed. If the Queen's writ has not been properly executed the court will set it right. The Archbishop may decide disputed elections, but with an appeal to this court. The power of decision must depend upon custom, and the custom must be decided by the court. There is no authority to show that Convocation has jurisdiction to decide disputed elections. The position of the Archbishop is similar to that of an archdeacon in an election to a vestry. Although the archdeacon's return that a particular person was duly elected would be good, the return could be traversed and the question would be triable in this court. The same principle applies to an election to Convocation. The reason why no precedents exist for such an appeal as this is, that for 120 years Convocation was suspended. The right of voting for proctors in Convocation is a legal franchise capable of being established by a court of law: *Randolph* v. *Milman*, 17 W. R. 262, L. R. 4 C.P. 107. [Lord COLERIDGE, C.J.—That case turned on the construction of a statute, and was, by mutual consent, submitted to the court by special case.] If that is so there is no decision upon the point, but it is submitted that, upon principle, a person elected, as in this case, to a public office, is entitled, in the event of such election being disputed, to have the question judicially decided.

Cur. adv. vult.

April 25.—Lord COLERIDGE, C.J., read the following written judgment of the court:—In this case the Archbishop of York was called upon to show cause why a writ of *mandamus* should not issue directed to him commanding him to order that the name of Henry Baker Tristram, clerk in holy orders, and one of the canons of the Cathedral Church of Durham, be called as one of the proctors for the Archdeaconry of Durham and otherwise to admit him to act as such proctor in the Convocation of the province of York. The facts out of which this application has arisen are few, simple, and undisputed, but they give rise to a variety of historical and legal questions, not, perhaps, altogether easy of solution, if it were necessary to solve them. In the Northern Convocation the parochial clergy are, and have been for centuries, represented by two proctors from each archdeaconry within the province of York; in addition to these there are, as in the province of Canterbury, the deans of each cathedral, the archdeacons, and a representative of each cathedral chapter. The Archbishop is, as in the Southern Province, the president of the Convocation. In the month of July, 1886,

(*a.*) Reported by G. K. PALEY, Esq., Barrister-at-Law.

a fresh Convocation was summoned, and in the Archdeaconry of Durham the election of the two proctors to be returned as representatives for the parochial clergy of that archdeaconry was a contested one. The third, fourth, fifth, and sixth paragraphs of the affidavit of Canon Tristram are not contradicted as to these facts by anything in the affidavits filed by the Archbishop, and I read them so far as they narrate the facts out of which this application has arisen. [His lordship here read the paragraphs of the affidavit referred to.] Whether the decision of the Archbishop was correct in point of law is a matter on which we offer no opinion, an expression which must not be taken as suggesting anything in any way unfavourable to it, but simply that, as we have not had the matter argued, we think it better to be silent. Before any argument on his Grace's decision the question must be decided whether we have any jurisdiction to inquire into it; whether this court is a court of appeal from the Archbishop, and can correct any errors of his committed in his conduct of the affairs of his Convocation, supposing that he has in fact committed any errors. This, it must be observed, is not a case in which the Archbishop has declined to act. If it were, different considerations might arise, and our judgment might be, though we do not say it would be, different. It is a case in which he has acted and has decided, and the application, though in form of a *mandamus*, is in truth and substance an application to us to annul his act and reverse his decision. Have we any such jurisdiction as the application assumes? It is conceded that our jurisdiction is invoked for the first time during the many centuries of the existence of the Convocations, and in face of the fact that contested elections must have and have in fact occurred, in which the defeated parties might have had recourse to our jurisdiction to correct the decisions of the Primates, if such jurisdiction had in fact or in law existed. Nor is this surprising, if the history and constitutional position of these bodies is recollected. Our supposed jurisdiction, it must be remembered, rests on no statute; if it exists at all, it exists at common law, and existed, therefore, in days when Convocations were as important as Parliaments, as independent, perhaps as powerful. This writ, if the argument be correct, might have been directed to Chichele or Sudbury, to Scrope or Wolsey, as well as to Archbishops Benson or Thomson.

What was the exact origin of Convocation, at what point of time it was divided into two bodies, whether it be the synod of the nation, whether it be, as the 139th canon decrees, "the true Church of England by representation"—these are questions antiquarian rather than practical, and need not detain us now. Probably in some shape it is older than Parliament; certainly in the time of Edward I. and Edward II. there were attempts made, partially and temporarily successful, to incorporate it into Parliament. The clergy are still summoned in the writs addressed at the beginning of each Parliament to the archbishops and bishops of England—and it was the same in Ireland before the disestablishment—though this has long ceased to be anything more than an obsolete form. The old writ remains as a piece of historical evidence; but the separation of Convocation and Parliament has been complete since the days of Richard II., if not of Edward III. In Convocation the clergy not only passed canons with the king's consent, but taxed themselves, which, like many a right once earnestly contended for as a privilege, became in lapse of years a burden, and was finally relinquished about 1665 in consequence of a verbal and wholly informal agreement between Archbishop Sheldon and Lord Clarendon, who was at the time Lord Chancellor. (See Speaker Onslow's note in the Oxford edition of Burnet's Own Times, vol. 1, p. 302.) Convocation, as appears from the collection of precedents in the Codex of Gibson—which for this purpose is of good authority—was summoned not directly by the king's writ, but by the writ of the archbishop and bishops, the archbishop being set in motion by the king, and, as Dr. Burn tells us, for the most part varying in his summons from the king's writ both as to the time and place of meeting. In this Convocation, he continues, "the archbishop sat as king; his suffragans sat in the Upper House as his peers; the deans, archdeacons, and proctor for the chapter represented the burghers, and the two proctors for the clergy the knights of the shire. And so this body, instead of being one of the estates, as the king (Edward I.) designed, became an ecclesiastical Parliament to make laws and to tax the possessions of the clergy." (Burn, ed. 1842, vol. 2, pp. 22, 23.) To the members of Convocation were accorded, by the 8 Hen. 6, c. 1, "for the security and quiet of the prelates and clergy for ever hereafter, such liberty or defence in coming, tarrying, and returning as the great men and commonalty of the realm called or to be called to the king's Parliament do enjoy and were wont to enjoy, or in time to come ought to enjoy." All this and much more as to the powers and privileges of Convocation may be collected from the precedents in Gibson above mentioned, and is set out shortly and clearly in Godolphin's Abridgment, pp. 586 *et seq.* Its antiquity appears from him whom Godolphin calls "Mr. Bede," and the passage in Lord Coke's Fourth Institute devoted to Convocation shows the respect which he, no favourer of ecclesiastical pretensions, thought due to Convocation while it kept within the limits prescribed to it by the ancient English Constitution. Blackstone, book 1, c. 7, is to the same effect.

The whole history of the junction of Convocation with Parliament and its subsequent separation is to be found in Fuller's Church History, book 5, and in Collier's Ecclesiastical History (4th and 5th volumes of the London edition of 1841). In the case of *Bird* v. *Smith*, Moore, 781, it was held by Lord Ellesmere, who was assisted by the two Lord Chief Justices Popham and Coke and the Lord Chief Baron Fleming, that canons passed by Convocation on ecclesiastical matters, with the assent of the king, bind the whole realm. One of the reasons given in the report from this judgment is that the Convocations originally were and in law continued to be part of the Parliament of England. The point, indeed, as to the binding effect of canons must be considered as overruled by Lord Hardwicke in the famous case of *Middleton* v. *Croft*, 2 Str. 1056, 2 Atk. 659, a case repeatedly acknowledged as law, and especially by the Court of Common Pleas in *Marshall* v. *Bishop of Exeter*, 7 C. B. (N. S.) 653, 9 W. R. C. L. Dig. 73. But the historical reasons remain true as history, and, indeed, cannot be denied. Further, it was seriously debated in the time of Charles I. (1640) whether by a dissolution of Parliament Convocation was also dissolved. In fact, fortified by the opinion of the Lord Keeper Ford and Littleton, Chief Justice of the Common Pleas, that Convocation continued to sit after Parliament was dissolved and passed several canons. It would not be wise to rely on the authority of a precedent created by Charles I. and under the Primacy of Laud; but the very contention is a proof both of the ancient rights and the absolute independence of Convocation, and the notion of the King's Bench of that day interfering by *mandamus* to command the Archbishop to admit a particular proctor to sit and vote in Convocation was one which assuredly no judge of that time would have even for a moment entertained. Indeed, the celebrated judgment of Lord Hardwicke in *Middleton* v. *Croft*—which V. Williams, J., in *Marshall* v. *Bishop of Exeter* described as "a prodigy of industry and learning"—is founded upon the broad distinction which exists between the power of Convocation and its privileges when acting within its own jurisdiction and upon its own subjects and the power of the same body

when it attempts to bind the laity and to impose anything, even ecclesiastical in its nature, on the nation without the authority of Parliament. What we are asked to do is to interfere in the internal affairs of an ancient body as old as Parliament and as independent, to control the action of its president, and to revise or reverse his decision on a matter relating to the constitution of the body itself. For 700 or 800 years, it is contended, no precedent for such an interference can be found. Such an interference would not only be without a shadow of precedent, but would be inconsistent with the character and constitution of the body with which we are asked to interfere. Accordingly we discharge the rule, and with costs.

Rule discharged.

Solicitors for the appellant, *Dangerfield & Blythe.*

Q. B. Div. (Cave and A. L. Smith, JJ.) April 19.

BETTS v. ARMISTEAD. (a.)

Adulteration—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 6—*Defence to prosecution—Want of knowledge.*

Absence of knowledge in the defendant that the article sold was adulterated is no defence to a prosecution under 38 & 39 *Vict. c.* 63, *s.* 6.

This was a case stated for the opinion of the court by the justices of the borough of Nottingham.

The respondent was prosecuted by the inspector of nuisances, under section 6 of the Sale of Food and Drugs Act, 1875, for selling bread which was found to contain a quantity of alum. During the proceedings before the magistrate the respondent did not require the public analyst to be called, but contended that, as he did not know that alum was in the bread, he was entitled to be acquitted. On the authority of *Core* v. *James*, 20 W. R. 201, L. R. 7 Q. B. 135, a case decided under the 6 & 7 Will. 4, c. 37, s. 8, the magistrates refused to convict. The inspector appealed.

Stanger, for the appellant.—The only question in this case is whether the knowledge of the seller is material or not. In the first place the words of section 6 of the Food and Drugs Act, 1875, show that knowledge is not material, for they are not qualified in any way. Secondly, if we look at sections 3 and 4 we see that the offences are stated in the same unqualified way, but section 5 expressly provides that absence of knowledge is to be a defence in those two cases. Therefore on the principle *expressio unius exclusio alterius*, it is clear that the Legislature did not intend that absence of knowledge should be a defence under this section. There are several sub-sections which contain grounds of defence, but no suggestion that want of knowledge is one of them. Section 25 only applies to cases in which a thing is resold in the same condition in which it was originally bought.

No counsel appeared for the respondent.

CAVE, J.—I am of opinion that in this case the justices came to a wrong conclusion. Section 6 of the Food and Drugs Act, 1875, enacts that no person shall sell any article of food which is not of the nature, substance, and quality of the article demanded by the purchaser, under a penalty not exceeding £20. In this case it was proved that the respondent had sold bread containing alum, and consequently came within section 6. The magistrates thought that the word "knowingly" should be read into that section; I am of opinion, however, that we ought not to read that word in, unless that was the intention of the Legislature, and from the other sections it is plain that this word was purposely excluded. This appears from section 5, which provides that no one shall be convicted under sections 3 and 4 if he proves that he was ignorant of the adulteration. So that where the Legislature desired to limit the offence and make ignorance a ground of defence the Legislature has expressed that intention in most distinct terms. Its presence, therefore, in sections 3 and 4, and absence in section 6, shows that the Legislature clearly intended that the word "knowingly" should not be inserted. It is said that the magistrates followed a decision on another statute, but no decision on any other statute can have any effect on the construction of this one.

A. L. SMITH, J.—I am of the same opinion. The offences under sections 3 and 4 are misdemeanours, and, therefore, the statute enacted that want of knowledge was a defence, but this does not apply to section 6, which only inflicts a fine.

Solicitors for the appellant, *Sharpe, Parker, & Co.*

(a.) Reported by CECIL CHAPMAN, Esq., Barrister-at-Law.

Prob. Div. & Adm. Div. Divorce. Dec. 1, 15.

FIELD v. FIELD AND DENTON. (a.)

Divorce — Husband's petition — Separate estate—Costs against wife—Notice of application—Practice.

In an action for dissolution of marriage by a husband, costs may be given against the wife where she has separate estate, but she must have notice of the application.

Hearing before Hannen, P., without a jury, of an undefended action by the husband for dissolution of his marriage on the ground of his wife's adultery with the co-respondent.

The parties were married in 1864, and had had four, of whom nine children were surviving.

The court, on proof of the adultery, pronounced a decree *nisi*, with costs, against the co-respondent.

Searle, for the petitioner, asks also for costs against the respondent, who had not appeared, on the ground that she had separate estate, and the husband gave evidence to the effect that she had a separate income of about £300 per annum.

HANNEN, P., directed that notice of this application should be given to the wife, and adjourned the case.

Notice of the application was accordingly served.

Dec. 15.—*Moyses* appeared for the respondent, and read an affidavit sworn by her in which she disputed the statements made by the petitioner as to the amount of her income.

HANNEN, P., made an order condemning her in costs subject to a reference to the registrar to inquire as to her means if she required it.

Solicitor, *G. Turner.*

(a.) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

House of Lords.

From C. A. (England). July 1, 5, 7; Aug. 1.

LEAROYD v. WHITELEY. (a.)

Trustee—Investment—Real security—Trade premises—Brickfield—Interest.

Trustees, who were authorized to invest upon real securities, proposed to invest the trust funds on the security of a freehold brickfield. Valuers reported that "the land, premises, and freehold fixtures form a good security" for the money to be invested. The trustees, without further inquiry, advanced the money, and the security failed to realize the amount advanced.

Held, that the trustees had not acted with ordinary prudence, and were personally liable to make good the money, with interest at four per cent. from the last payment; and that the tenant for life was not bound to return the excess of interest which had been paid because the security was hazardous.

Decision of the Court of Appeal *affirmed.*

This was an appeal from a decision of the Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.), affirming a decision of Bacon, V.C., reported 34 W. R. 450, 32 Ch. D. 196, and 33 Ch. D. 347.

The appellants, as trustees under the will of Benjamin Whiteley, had power to invest "in or upon real securities in England or Wales."

In January, 1878, they invested £3,000 of the fund upon the security of a five per cent. mortgage of a freehold brickfield containing about ten acres, with the buildings, machinery, &c., affixed to the soil, where business was being carried on. The report of the valuers described the premises, and, after observing that allowance should be made for the working out of the brickfield, concluded, "but, having carefully considered this, we think the land, premises, and freehold fixtures form a good security for £3,500."

Interest was duly paid till August, 1884, when the business ceased. In January, 1884, the property was offered for sale by auction, but was bought in at £3,300.

The respondents brought this action against the appellants to make good the loss sustained, and Bacon, V.C., held the trustees liable to pay the £3,000, with interest at four per cent. This decision was affirmed by the Court of Appeal.

July 1, 5, 7.—*Sir H. Davey, Q.C.*, and *Baker*, for the appellants, referred to *Speight* v. *Gaunt*, 31 W. R. 401, 22 Ch. D. 727, 32 W. R. 435, 9 App. Cas. 1, *Ex parte Belchier*, Amb. 218; *Rowland* v. *Witherden*, 3 Mac. & G. 568; *Bostock* v. *Floyer*, 14 W. R. 120, 35 Beav. 603; *Stickney* v. *Sewell*, 1 My. & Cr. 8; *Stretton* v. *Ashwall*, 3 W. R. 4, 3 Drew. 9; *In re Olive*, 34 Ch. D. 70, 35 W. R. Dig. 213; *Oxley* v. *Searth*, 51 L. T. N. S. 692, 33 W. R. Dig. 224; *Royds* v. *Royds*, 14 Beav. 54; *Budge* v. *Gummow*, 20 W. R. 1022, L. R. 7 Ch. 719.

Marten, Q.C., and *Cumming* (*Seward Brice, Q.C.*, with them), for the respondents, cited *Smethurst* v. *Hastings*, 33 W. R. 496, 30 Ch. D. 490.

Baker replied.

August 1.—Lord HALSBURY, C.—In this case trust funds have been lost by an investment on insufficient security. Some doubt has been expressed as to whether Bacon, V.C., did not intend to decide that the security upon which the money was invested was not a real security at all, and therefore not within the powers of the trustees. In my opinion he did not intend so to decide. What he said was—and I think it is accurate—that although the ten acres of land upon which this money was invested were in a certain sense real security, because it was land, the substantial value upon which the money was advanced was a brick-making concern. The trade has ceased to exist, and the substantial part of the security, which represented £3,500 or £3,000—for I do not think it is material to consider the question of £500—has ceased to exist. No one, either at the bar or in either of the courts in which this matter has been litigated, has doubted that the trustees intended to do what was right, and certainly no imputation can be made against them that they were actuated by any other motive than that of procuring the highest amount of interest that they could for their *cestuis que trust*. But the goodness of their motives cannot justify the propriety of the investment. A trustee must use ordinary care and caution, and although it is impossible to lay down an absolute rule—and indeed it cannot be contended that the ordinary practice of courts of equity has the force of law—yet there are some limits beyond which it is manifest that no trustee is authorized in going. It is, of course, true that it is not because the money has been lost that the trustees are necessarily liable. But as the money has been lost by the insufficiency of the security it is necessary to see what precautions were taken by the trustees in conducting the business of the trust. I think it is quite clear that a trustee is entitled to rely upon skilled persons in matters in which he cannot be expected to be experienced. He may, perhaps, rely upon a lawyer in some matters of law, and in this case I do not deny that he would be entitled to rely upon a valuer upon a pure question of valuation. But unless one examines with reference to what question the skilled person gives advice it is possible to confuse the reliance which may properly be placed upon the skill of a skilled person with the judgment which the trustee himself is bound to form on the subject of the performance of his trust. I do not think it is true to say that one is entitled to consider the special qualities or degree of intelligence of the particular trustees. Persons who accept that office must be supposed to accept it with the responsibility at all events for the possession of ordinary care and prudence. In applying the principle that I have indicated to this particular case it is obvious to remark that the trustees not only relied upon the skilled persons for the possession by those persons of skill in their own business, but appear to have adopted without sufficient care what those skilled persons said. As to the propriety or impropriety of the investment looked at not merely as a question of the due performance of the trust, is it true to say that the trustees have been misled by an erroneous statement as to what was the value of the land? I think not. I should think they might well be able to defend themselves from responsibility on the ground that they had selected a reasonably careful person, and acted upon the skilled advice that they had received upon such a question; but that is what they did not do. Assuming in their favour that they sufficiently understood and analyzed the valuers' report—though I doubt whether that assumption is accurate—they acted on advice not that these ten acres of land were, as land, a sufficient security for the sum they invested, but as to whether they, the trustees, were justified in investing upon the security of a speculative trading adventure. The forming a judgment on such a question was the duty of the trustees themselves, a duty which they could not delegate to others. I only wish to add that I am unable to follow or adopt some observations of the Court of Appeal which seem to point to a different degree of care in regard to the conduct of the business of a trust according to whether there are persons to take in the future, or whether the trust fund is created for one beneficiary ab-

(a.) Reported by C. G. NAPIER TROLLOPE, Esq., Barrister-at-Law.

solutely. The question must be the due care of the capital sum. Whether that capital sum is one in which there is a life estate only or absolutely for the use of the beneficiary seems to me to bear no relation to the question of the due caution which a trustee is bound to exercise in respect of the investment of the trust fund. I agree with Cotton, L.J., that the tenant for life during the time the money was invested received the income she was entitled to receive, and that the trustees were right in paying her the interest, as it was in truth and in fact the interest received from the trust fund whereof she was tenant for life. But it seems quite an untenable proposition to contend that she is therefore bound to bring into account the interest that she has received upon the investment because that investment has turned out to be an insecure one, and the trustees are called upon to make good the deficiency that has arisen. I am of opinion that the judgment of the Court of Appeal was right, and I move your lordships that this appeal be dismissed, with costs.

Lord Watson.—I also am of opinion that the order of the Court of Appeal must be affirmed. As a general rule, the law requires of a trustee no higher degree of intelligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own private affairs. Yet he is not allowed the same discretion, in investing the moneys of the trust, as if he were a person *sui juris* dealing with his own estate. Business men of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character; but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust, and likewise to avoid all investments of that class which are attended with hazard. So long as he acts in the honest observance of these limitations the general rule already stated will apply. The courts of equity in England have indicated and given effect to certain general principles for the guidance of trustees in lending money upon the security of real estate. Thus it has been laid down that, in the case of ordinary agricultural land, the margin ought not to be less than one-third of its value; whereas in cases where the subject of the security derives its value from buildings erected upon the land, or its use for trade purposes, the margin ought not to be less than one-half. I do not think these have been laid down as hard-and-fast limits up to which trustees would be invariably safe, and beyond which they could never be in safety to lend, but as indicating the lowest margins which, in ordinary circumstances, a careful investor of trust funds ought to accept. It is manifest that, in cases where the subjects of the security are exclusively or mainly used for the purposes of trade no prudent investor could be in a position to judge of the amount of margin necessary to make a loan for a term of years reasonably secure until he had ascertained, not only their present market price, but their intrinsic value, apart from those trading considerations which gave them a speculative, and, it might be, a temporary value.

Upon the general law applicable to this case I have only to observe further that, while trustees cannot delegate the execution of the trust, they may, as was held by this House in *Speight* v. *Gaunt*, avail themselves of the services of others, wherever such employment is according to the usual course of business. If they employ a person of competent skill to value a real security, they may, so long as they act in good faith, safely rely upon the correctness of his valuation. But the ordinary course of business does not justify the employment of a valuator for any other purpose than obtaining the *data* necessary in order to enable the trustees to judge of the sufficiency of the security offered. They are not in safety to rely upon his bare assurance that the security was sufficient, in the absence of information which would enable them to form, and without forming, an opinion for themselves. At all events, if they chose to place reliance upon his opinion without the means of testing its soundness they could not, should the security prove defective, escape from personal liability, unless they proved that the security was such as would have been accepted by a trustee of ordinary prudence, fully informed of its character, and having in view the principles to which I have already adverted. By the terms of Benjamin Whiteley's will his trustees were authorized to invest trust moneys upon real securities in England and Wales. It is not disputed that in lending £3,500 upon the security of the brickfield the appellants acted in good faith. Of that sum £3,000 only belonged to Whiteley's trust, a circumstance which does not alter the character of the security, because it has not been shown that the trust money was made a charge in priority to the balance of £500. The course which was followed by the appellants in entering into the transaction of January, 1878, is very compendiously stated by Mr. Learoyd, in whose evidence, so far as it related to matters within his personal knowledge, Mr. Carter generally concurred, and from that it plainly appears that the appellants had no information regarding the subjects mortgaged, except what was contained in the report of their valuators. In my opinion the report was not such a document as a lender of ordinary prudence would have ventured to act upon. It disclosed the fact that there were only ten acres of land, and that a not inconsiderable portion of the subjects consisted of buildings and fixed machinery used for brickmaking. But it did not state either the *cumulo* value of the subjects or the separate values of the land, the buildings, and the machinery. It did, no doubt, contain the statement that the valuators thought the land, premises, and freehold fixtures would afford good security for £3,500; but trustees who chose to act upon such an opinion must take the risk of the security proving insufficient. In these circumstances, I think it has been established that, at the time of taking the security, the appellants altogether failed to exercise that ordinary amount of care which the law required of them. Notwithstanding such failure, they would still have had a good answer to the respondents' claim had they been able to show that, if they had made full inquiries and had obtained all necessary particulars from their valuators, they would have been justified, as men of ordinary prudence, in accepting the security. Unfortunately, the evidence led by the appellants themselves appears to negative any inference of that kind. Their witness and valuator, Mr. Uttley, states that in 1877 he valued the subjects as a going brick work at £7,200, of which £2,000 was for the land, and the remaining £5,200 for buildings and machinery. He did not, in 1877, form any estimate of their value upon a sale by the mortgagees, and not as a going concern. Being asked, on cross-examination, what difference that would have made in his estimate, he said: "I should say 10 per cent. would represent the difference not as a going concern. Everything was in order." The answer is by no means satisfactory. It assumes that the works would be kept in the same good order; and it leaves out of account the possibility of depression in the brickmaking trade, a factor which I do not think a prudent valuer would omit from his calculations. But taking his estimate as he gave it, a deduction of 10 per cent. leaves a margin of £520 below the minimum amount which ought to be allowed in order to cover the possible depreciation of subjects affected, to the extent of five-sevenths of their value, by the fluctuations of trade. Upon the question of interest, I agree with the reasoning of Cotton, L.J. I do not think the tenant for life can now be required to repay or give credit for any part of the sums paid to her before August, 1884, as the actual income of the trust estate.

Lord Fitzgerald.—I concur that the decision of the

Court of Appeal should be affirmed. There was no controversy in the court below or at your lordships' bar as to the rule which, in such a case as the present, governs the duties and liabilities of trustees; and I am satisfied to accept in substance the exposition of Cotton, L.J., though it may be open to some verbal criticism. The rest of the case relates to the proper view of the facts, and I am compelled to take the same view as my noble and learned friends—namely, that the trustees did not exercise ordinary care in investing the money intrusted to them. They invested the trust fund on a very insufficient security, and without due or proper inquiry. It may well be described as a loan on a security the sufficiency of which depended on the prosperity of a hazardous manufacture carried on by the mortgagors on the mortgaged premises. I concur in affirming the decision of the Court of Appeal with that regret which a judge feels in every case where his decision fixes liability on trustees who have acted honestly but erroneously, and to some extent negligently, in not requiring more full and precise information than they received from the valuators they employed. In my opinion the trustees, in selecting and adopting the security in question, did not exercise the care or foresight which a man of ordinary prudence ought to exercise, and would probably exercise, in making such an investment. I am not disposed, however, to say that the fact that the investment was one for the benefit of the tenant for life, and after her decease then for her children, is to be left entirely out of consideration. It was not to be a temporary investment, but one to last for many years if not called in or paid off. Lopes, L.J., thus accurately describes the security which the trustees accepted: "Its value mainly depends on the success of a speculative and fluctuating business, a business for which it is difficult to find customers" (*i.e.*, purchasers), "a business largely dependent on the energy and solvency of those working it, a business of necessity of precarious duration, and one which cannot be carried on without such an excavation and destruction of the soil as must eventually leave what remains nearly useless for agricultural and other purposes"; and, I may add, a security of a peculiarly hazardous character, and one in reference to which it has been properly observed that the value of the buildings and fixed machinery depended entirely on the mortgagees being able to find a purchaser for it as a going concern for the manufacture of bricks. Upon the minor point in the case, I also concur with my noble and learned friends.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Godfrey, Rhodes, & Co.*, for *Godfrey, Rhodes, & Evans*, Halifax.

Solicitors for the respondents, *Jackson & Co.*, for *Jackson & Jackson*, Middlesbrough.

Court of Appeal.

From Stannaries Court. Feb. 3.

In re Wheal Buller Consols (Limited).
Ex parte Jobling. (*a.*)

Company — Winding up — Contributory — Director — Qualification of director.

A person by becoming a director of a company and acting as such does not, ipso facto, agree with the company to take the requisite qualification shares.

A. was duly elected as a director of a company, and for some time acted in that capacity, but he never applied for or agreed to take the qualification shares prescribed by the articles of association of the company.

Held, that A. was not liable to be placed on the list of contributories on the winding up of the company.

This was an appeal from a decision of the Vice-Warden of the Stannaries, placing Mr. Jobling on the list of contributories of the Wheal Buller Consols in respect of 250 shares of £1 each, being the number which constituted the qualification of a director under the articles of association of that company.

The company was incorporated with limited liability under the Companies Acts, 1862 to 1880, on the 6th of February, 1883, for mining purposes, its primary object being to take over the business of the Basset and Buller Consols (Limited).

Mr. Jobling was one of the subscribers of the memorandum of association in respect of ten shares, and he also signed the articles of association.

The articles of association provided that the number of directors should not be less than three or more than seven; that the qualification of a director should be the holding of preference shares or stock of the company of the nominal value of £250 at the least, and that any director might act before acquiring his qualification shares or stock; and that a director should vacate his office if he ceased to hold his qualification shares or did not acquire the same within three months after his election or appointment.

By the articles of association five directors were nominated, of whom Mr. Jobling was not one, and their first meeting was held on the 23rd of February, 1883. At the second meeting, which was held on the 10th of May, 1883, Mr. Jobling was elected a director in the place of one Colonel Johnstone, who had retired. Mr. Jobling subsequently attended several meetings of directors, two of which took place more than three months after his election, and a circular was printed and circulated to a small extent bearing his name as a director; but he never applied for nor had allotted to him more than his original ten shares.

The company did not prosper, and on the 19th of January, 1884, a winding-up petition was presented in the Stannaries Court, upon which an order was made, but it was not drawn up until August, 1885.

An official liquidator having been appointed, he applied to have Mr. Jobling's name placed on the list of contributories in respect of the 250 shares required to be held by a director. Mr. Jobling denied his liability except in respect of the ten shares for which he had signed the memorandum of association, but the Vice-Warden of the Stannaries held him liable in respect of the whole 250 shares.

From this decision Mr. Jobling appealed as far as related to 240 shares.

Grosvenor Woods, for the appellant.—There was no agreement to take shares enforceable against the appel-

(*a.*) Reported by C. Herbert Brown, Esq., Barrister-at-Law.

lant. The mere acceptance of the office of director is no contract to take shares: *Brett's case*, 32 W. R. 234, 25 Ch. D. 283, 295; *Brown's case*, 22 W. R. 171, L. R. 9 Ch. 102; *In re Pandora Theatre Co.*, 28 SOLICITORS' JOURNAL, 238; *Onslow's case*, 31 SOLICITORS' JOURNAL, 46. A contract with the company to take shares must be shown, and the articles only constituting a contract between the shareholders *inter se*, a contract with the company cannot be made out of them: *Browne* v. *La Trinidad, ante*, p. 289, 37 Ch. D. 1. What was the contract, if any, entered into by Mr. Jobling? Not a contract to qualify himself: *Coventry and Dixon's case*, 28 W. R. 775, 14 Ch. D. 660. A person, in order to be a member, must, under the Companies Act, 1862, s. 23, have taken or agreed to take shares—*i.e.*, agreed with the company to take them. But nothing in the articles constitutes an agreement with the company: *Pritchard's case*, 21 W. R. 829, L. R. 8 Ch. 956; *Carling's case*, 24 W. R. 165, 1 Ch. D. 115; *Chapman's case*, L. R. 2 Eq. 567, 15 W. R. Ch. Dig. 36. Even if the articles do constitute an agreement with the company, it is an agreement to conform to the articles, not an agreement to qualify. The articles provide, not that a director shall take shares, but only that he shall vacate his office if he does not. If he does not he may incur liability by acting without authority, but that is all. The observations upon which the Vice-Warden relied in *Karuth's case*, L. R. 20 Eq. 506, 511, 24 W. R. Dig. 55, and *Miller's case*, 3 Ch. D. 661, 665, 25 W. R. Dig. 54, were only *dicta*, which have not been established by any decision.

Buckley, Q.C., and *Chadwyck Healey*, for the respondent.—Where it is provided by the articles that a director shall possess a certain share qualification, and a person accepts the office and acts after the time when the qualification should be acquired, he has contracted to take that number of shares. By section 16 of the Companies Act, 1862, all members are bound by the articles, and Jobling was a member. The articles imposed upon any person becoming a director a duty to take shares; and Jobling, by acting as director, in substance contracted to take the shares from someone. The question whether the shares must be taken from the company does not affect the present case. [COTTON, L.J.—There are cases containing *dicta* by judges suggesting grounds on which a director who has not taken shares may be put on the list for the amount of qualification; but can you refer to any case in which it has been done?] It has been done in four cases under special Acts, and which it is difficult to distinguish from the present case: *Kincaid's case*, 19 W. R. 122, L. R. 11 Eq. 192; *Forbes' case*, 23 W. R. 402, L. R. 19 Eq. 353; *Purcell's case*, 29 W. R. 170; *Portal* v. *Emmens*, 25 W. R. 235, 1 C. P. D. 664. [COTTON, L.J.—It seems to me that *Onslow's case* is decisive of the present case.] In that case the company, while a going concern, had repudiated the contract, and it was impossible for the liquidator to obtain specific performance of it. [They referred also to *Mackley's case*, 24 W. R. 92, 1 Ch. D. 247.] By acting after the expiration of the time, Jobling may be taken to have been re-elected. [LINDLEY, L.J.—If so, it would only be for three months under the articles.]

COTTON, L.J.—This is an appeal by Mr. Jobling from a decision of the Vice-Warden of the Stannaries placing him on the list of contributories in respect of shares which he never agreed with the company to take, unless he is to be held to have done so by signing the memorandum of association and accepting the office of director, and continuing to act as such after the time at which, according to the articles, he vacated his office if he did not hold the specified number of shares.

I am of opinion that the decision of the Vice-Warden is erroneous. To make a person liable to contribute to the assets of the company he must, under section 38 of the Companies Act, 1862, be a member—*i.e.*, according to section 23 he must have agreed to take shares. It is not necessary that he should be actually on the register, his agreement to take shares is enough, but the agreement must be with the company.

If A. agrees with B. to take shares from him, whatever may be the right of B. against A. to be indemnified, the company has nothing to do with A., and he cannot be placed on the list of contributories unless the shares have been actually transferred to him.

Now, is there any agreement between Mr. Jobling and the company to take 250 shares? By the articles it is provided that the qualification of a director shall be the holding of preference shares of the nominal value of £250 at least, that a director may act before acquiring his qualification, and that he shall vacate his office if he does not acquire the qualification within three months after his election. Mr. Jobling was not an original director. He subscribed the memorandum of association for ten shares, and in respect of them he admits that he is a contributory. He was afterward elected a director, but he never applied for any shares besides his original ten shares. It is said that the articles contain a contract by him with the company that he will take the necessary shares for his qualification, but in my opinion they do not. Section 16 of the Act provides that the articles when registered "shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto and there were in such articles contained a covenant on the part of himself, his heirs, executors, and administrators, to conform to all the regulations contained in such articles subject to the provisions of this Act." It is conceded that the regulations are only to bind the company and the members of the company *inter se*. It may be that the appellant has bound himself to his fellow-members to this extent: "If I become a director it is my duty to qualify myself by taking shares." But during three months he is at liberty to act without any qualification, and I think it would be wrong to say that his continuing to act after that period amounts to a contract to take the shares requisite for a qualification. There are cases where a director has been held not liable for the shares requisite to qualify him; there have in some cases been observations to the effect that acceptance of the office and acting as director may make a person liable as if he had taken a qualification, but no judge has ever acted upon that view.

Some cases have been referred to relating to shares in companies formed by special Acts of Parliament. In my opinion they cannot govern the present case. If Parliament thinks fit to say that persons shall be members, it can do so, and members they must be; but they become so by force of the Act of Parliament, not by agreement. Here the question is whether the appellant agreed to take shares; and I think it would be wrong to say that the acceptance of the office of director and acting in it constituted such an agreement. A director may estop himself from disputing his being a shareholder, as where a director without his knowledge was entered on the register for the qualification shares, and was held to be fixed with them because he, being a director, must be presumed to have known of the entry; but, having regard to the nature of the entries in this case, I think that principle cannot be applied here.

LINDLEY, L.J.—This case arises under articles of a peculiar description. I will clear the ground by saying that the evidence falls very far short of what is required to estop the appellant from denying that he is a holder of 250 shares. He, therefore, can only be put on the list in respect of them on the ground that he agreed to take them. Is it made out that he did so agree? In

my opinion it is not. The appellant was authorized by the articles to act as director for three months without qualification. At the end of those three months the sheriff was in possession of the mine under an execution against the former proprietors, and there was no prospect of the company being carried on. I cannot, under these circumstances, draw from the mere fact of his continuing to act as a director the inference that he agreed to take the shares requisite for his qualification. I am one of those who think that the law is not on a satisfactory footing on this subject, and that it would be just for a person who acts as director to be held liable for the shares without which he had no right to act; but that does not enable us to infer an agreement to take them.

BOWEN, L.J.—I agree that there is no estoppel, and that, if the appellant is to be on the list, it must be by virtue of an agreement, within the meaning of section 23, to become a member—that is to say, an agreement to that effect with the company. Where is such an agreement to be found? The appellant signed the memorandum of association, and therefore, by virtue of section 16, he became bound to the same extent as if he had signed and sealed the articles, and they had contained a covenant by him to conform to the regulations contained in them. But has he entered into any contract to take shares because he has bound himself to conform to the regulations contained in the articles, including, of course, those as to the qualification of directors? There is no provision in the articles that the directors shall take the shares required for a qualification or be liable as if they had taken them. There is only a provision that if a director does not acquire the requisite number of shares within three months he shall cease to be a director. That regulation makes it his duty not to act after the three months; but that is quite different from a regulation that if he continues to act he shall be deemed to have contracted to take them. That seems to me to dispose of the case. I do not say that the present case is governed by *Onslow's case*, for that case is not sufficiently reported to be relied on, and I was struck by the observation of Mr. Buckley upon it; but I think we ought to affirm the principle which Mr. Grosvenor Woods cited it to establish.

Appeal allowed.

Solicitors for the appellant, *Street & Poynder*, for *F. H. Cock*, Truro.

Solicitors for the respondent, *Rowcliffes, Rawle, & Co.*, for *Hodge, Hockin, & Marrack*, Truro.

Bankruptcy. April 30.

Ex parte MCDERMOTT.
In re MCHENRY. (*a.*)

Bankruptcy—Petition for liquidation—Composition—Subsequent adjudication of bankruptcy — Relation back of title of trustee—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 126.

Where the creditors of a debtor have resolved to accept composition under section 126 *of the Bankruptcy Act*, 1869, *and the debtor is subsequently adjudicated a bankrupt under the last clause of that section, there is no relation back of the trustee's title to the act of bankruptcy committed by the debtor in filing his petition, so as to validate a payment made by him between the filing of his petition and the adjudication of bankruptcy.*

APPEAL from a decision of Mr. Registrar Hazlitt.

ON the 15th of August, 1879, the debtor presented a petition for liquidation under the Bankruptcy Act, 1869, and, after repeated adjournments, the creditors, upon the 22nd of October, 1883, resolved to accept a composition, under section 126, of 20s. in the pound, payable in four instalments of 5s. each, the first instalment to become due on the 13th of July, 1884. On the 12th of July, 1884, the debtor by deed assigned to McDermott, who had notice of the composition proceedings, the proceeds of four policies of insurance effected by the debtor on his own life, and which were surrendered by him in 1883, upon trust to pay certain persons named in the deed, and to hold the balance towards payment of a debt due to McDermott from the debtor. The proceeds of the policies, which were received by McDermott on the 28th of August, 1884, amounted to £5,765, and the balance, after the payments specified in the deed, amounted to £2,251. This sum of £2,251 was, at the request and under the direction of the debtor, paid by McDermott to certain persons. None of the instalments of the composition were paid, and on the 26th of March, 1886, the debtor was adjudicated bankrupt under the power contained in section 126 of the Bankruptcy Act, 1869.

The trustee in bankruptcy applied for an order directing McDermott to pay over to him this sum of £2,251, on the ground that the title of the trustee related back to the act of bankruptcy committed by the debtor in 1879 in filing a petition for liquidation.

The registrar made the order.

McDermott appealed.

Sir H. Davey, Q.C., and *Cooper Willis, Q.C.* (*F. C. Willis* and *F. A. Broxholme* with them), for the appellant.—After the resolution for a composition the debtor was left with full dominion over his property and full power to dispose of it. When the debtor was adjudged a bankrupt under the last clause of section 126 the adjudication was not made upon any act of bankruptcy, but because the composition could not be carried out. Therefore neither section 6 nor section 11 applies, and there is no relation back. Sections 6 and 11 apply to petitions for adjudication founded on an act of bankruptcy. There is no petition for adjudication under section 126.

Sir H. James, Q.C., and *Winslow, Q.C.* (*Sidney Woolf* with them), for the trustee.—An adjudication cannot take place without an act of bankruptcy. An adjudication under section 126 is founded upon an act of bankruptcy—namely, the filing of the petition for liquidation with a declaration that the petitioner is unable to pay his debts. That act of bankruptcy, which was suspended during the composition arrangement, revived upon the order for adjudication. The limit of time prescribed in section 6 does not apply to an adjudication under section 126.

Cooper Willis, Q.C., replied.

The following cases were referred to:—*Sharp* v. *McHenry*, 57 L. T. N. S. 606; *Ex parte Duignan*, 19 W. R. 1127, L. R. 6 Ch. App. 605; *Ex parte Learoyd*, 27 W. R. 277, 10 Ch. D. 3; *Ex parte Charlton*, 25 W. R. 800, 6 Ch. D. 45; *In re McHenry*, 32 W. R. 47, 24 Ch. D. 353; *King* v. *Leith*, 2 T. R. 141; *Barron* v. *Ehlers*, 1 Cab. & Ell. 432; *Ex parte Snowball*, 20 W. R. 786, L. R. 7 Ch. App. 534; *Ex parte Schulte*, 22 W. R. 462, L. R. 9 Ch. App. 409; *Ex parte Cartwright*, 44 L. T. N. S. 883, 29 W. R. Dig. 15.*

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

* The COURT, after hearing the above arguments, adjourned the case for the purpose of enabling counsel for the trustee to consider whether they would contend that the deed of the 12th of July, 1884, was void as against creditors under 13 Eliz. c. 5, or under section 91 of the Bankruptcy Act, 1869. The court were subsequently informed that counsel declined to argue these points.

April 30.—Lord Esher, M.R.—We have been informed that the trustee in seeking to avoid this deed does not rely upon the statute 13 Eliz. c. 5, nor upon section 91 of the Bankruptcy Act, 1869. We have, therefore, to determine the point of law argued before us.

It appeared that on the 15th of August, 1879, the debtor filed a liquidation petition, and on the 22nd of October, 1883, the creditors resolved to accept a composition under section 126 of the Bankruptcy Act, 1869, payable by instalments, the first of which became due on the 13th of July, 1884. On the 12th of July, 1884, the debtor, by deed, transferred certain moneys to McDermott, and certain payments were made under that deed, and the balance was dealt with under the direction of the debtor. On the 26th of March, 1886, the debtor was adjudicated bankrupt, and a trustee was appointed.

The trustee now contends that his title relates back to the act of bankruptcy committed by the debtor in 1879 in filing his petition for liquidation. If this were an ordinary bankruptcy it cannot be doubted that there would be no such relation back, as the act of bankruptcy committed in 1879 would be too old. Under section 6 the act of bankruptcy upon which the adjudication is founded must have occurred within six months before the presentation of the petition for adjudication; and under section 11 the bankruptcy relates back to the act of bankruptcy upon which the adjudication was made, or to the first act of bankruptcy committed by the bankrupt within twelve months preceding the order of adjudication. In my opinion the true view is that an adjudication in bankruptcy under section 126 is not made upon an act of bankruptcy at all. That section commences by enacting that the creditors of a debtor may, without any proceedings in bankruptcy, resolve that a composition shall be accepted in satisfaction of the debts due to them from the debtor. The creditors therefore agree to accept a composition in satisfaction of their debts. It leaves the debtor free to deal with his property just as if there had been no composition. The creditors were dealing with a debtor who, to their knowledge, had committed an act of bankruptcy by filing his petition, and, according to the decision in *Kearley and Clayton's Contract*, 26 W. R. 324, 7 Ch. D. 615, the object and effect of the resolution for a composition is to leave the debtor with complete dominion over his property and full power to dispose of it. Therefore, until steps are taken under the last clause of section 126 to adjudge the debtor a bankrupt, anyone has a right to deal with the debtor in perfect safety, otherwise the debtor might be prevented from paying the composition which the creditors had agreed to accept. When the court is asked to adjudge the debtor a bankrupt under the last clause of section 126 its duty is not to inquire whether there has been an act of bankruptcy. The filing of the petition is the foundation of all the subsequent proceedings; the debtor may have committed fifty acts of bankruptcy to the knowledge of the creditors, and yet they have refused to make him a bankrupt and have accepted a composition. The act of bankruptcy is swept away by the resolution for a composition, and the court has not to inquire whether an act of bankruptcy has been committed or not. The court has to inquire whether "the composition cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor," and, if so, it may adjudge the debtor a bankrupt. Therefore, the adjudication is to be made, not in consequence of an act of bankruptcy, but in consequence of something else. The petition for liquidation gives the court jurisdiction; it is a *causa sine quâ non*. But the court makes the adjudication without consideration of any act of bankruptcy, the adjudication differing therein from an ordinary bankruptcy. Therefore, this transaction cannot be impeached upon the ground contended for, that the trustee's title related back, as it was a transaction between the debtor and another person in respect to property with which the debtor had a perfect right to deal. The appeal must therefore be allowed.

Lindley, L.J.—I am of the same opinion. The registrar ordered McDermott to pay to the trustee £2,251 which the debtor, in August, 1884, handed over to McDermott. We are now asked to hold as a matter of law that the adjudication of bankruptcy in March, 1886, relates back to the filing of the petition in 1879. That, to my mind, is a very startling proposition, for the Act of 1869, by section 11, limits the relation back to a period of twelve months preceding the order of adjudication.

The question for our consideration is whether there was here any act of bankruptcy upon which the adjudication was founded. To say that the debtor was adjudicated bankrupt in 1886 upon the act of bankruptcy committed by him in filing his petition in 1879 is contrary to the fact. That act of bankruptcy *might have* been made the ground for adjudicating him bankrupt at the time under section 6. But it was not. The ground of the adjudication in 1886 was the difficulty in carrying out the composition. The adjudication was not in truth founded upon any act of bankruptcy at all. There was therefore no section which caused the bankruptcy to relate back. A little reflection will show that the other view must be wrong. The theory of a composition is that the debtor remains master of all his property so that he may be enabled to pay the composition. The composition scheme would be unworkable if there was any relation back in the event of bankruptcy superseding the composition. That being so, the protection clauses, sections 94 and 95, are not wanted and have no application in a bankruptcy of this sort. The above view has been adopted by the courts for some time past: *Ex parte Charlton; In re Kearley and Clayton's Contract*; and *Sharp* v. *McHenry*. In liquidation proceedings under section 125 there are words which introduce the doctrine of relation back, and properly so for this reason, that the property of the debtor is taken away from him and vested in a trustee. The order of the registrar must, therefore, be discharged.

Bowen, L.J., concurred.

Appeal allowed; leave to appeal to the House of Lords refused.

Solicitors for the appellant, *John Holmes & Son.*

Solicitors for the trustee, *Munns & Longden.*

From Q. B. Div. June 12.

Butler v. Manchester, Sheffield, and Lincolnshire Railway Co. (a.)

Railway company—Passenger—Production of ticket—Right to eject from carriage.

Where a passenger over the line of a railway company who has taken and paid for his ticket, but has lost it, declines to pay the fare over again, the company have no power to eject him from the railway carriage, but can only take his name and address and sue him for the fare.

Appeal from the decision of Manisty, J.

The plaintiff, on the 27th of November, 1887, took an excursion return third-class ticket from Sheffield to Manchester on the defendants' line, for which he paid the special reduced fare of 2s. 6d. He gave up

(a.) Reported by A. P. Percival Keep, Esq., Barrister-at-Law.

the outward half of the ticket at Manchester, but when, on the return journey, his ticket was demanded at Wadsley Bridge Station, where the tickets for Sheffield are collected, it was discovered that he had lost it. He gave his name and address to the ticket collector and offered to pay the whole excursion fare of 2s. 6d., but the collector demanded 3s. 5d., the ordinary third-class single fare from Manchester to Sheffield. The plaintiff declined to pay this, and was thereupon ejected from the carriage by the defendants' servants, and was detained at the station until he paid the 3s. 5d. This action was then brought for assault and false imprisonment. The defence raised was that the plaintiff was unlawfully upon the premises of the defendants, and that they were therefore entitled to eject him from them. The jury found that if the plaintiff had been rightly ejected no more force than was necessary had been used, but if the defendants had no right to eject him they assessed the damages at £25. Manisty, J., gave judgment for the defendants, holding that they had acted within their rights. The plaintiff appealed.

Waddy, Q.C., and *Lawson Walton*, for the appellant. —There is no bye-law of the company authorizing them to eject a passenger for not producing his ticket. Their remedy was by action for the fare.

Lockwood, Q.C., and *Cyril Dodd*, for the respondents. —The ticket is either the only evidence of the contract between the railway company and the passenger, and must be produced when demanded, or it is a licence to travel over the company's premises which is revocable: *Wood* v. *Leadbitter*, 13 M. & W. 838. At any rate, it is part of the plaintiff's contract that he should show and deliver the ticket when requested to do so, and in not doing so he committed a breach which made him a trespasser: *Shelton* v. *Lake Shore Railway Co.*, 29 Ohio State Reports, 216.

They also referred to *Saunders* v. *South-Eastern Railway Co.*, 5 Q. B. D. 456, 28 W. R. Dig. 186; Railway Clauses Consolidation Act, 1845 (8 Vict. c. 20), ss. 103, 104, 109.

Waddy, Q.C., was not called upon to reply.

Lord ESHER, M.R.—In this case a passenger on the line of a railway company had paid for his ticket and had lost it. At a certain stage of his journey he is asked for it, and cannot produce it. He is told that he must pay a certain fare—it signifies not what. He refuses to do so, and the company thereupon assume the power to put him out of the carriage. This action is then brought for the assault. The company set up for their defence that he was unlawfully upon their premises and in their carriage, and that they, using no more force than was necessary, exercised their right to put him out. Now is this true? The jury have found that if the passenger was rightfully ejected no more force than was necessary was used; but had the company the right to eject him? What were the relations which existed between the plaintiff and the defendants? In my opinion they were purely contractual.

It was urged that the contract was, in fact, one by which the passenger had a right, in the nature of an easement, to go over the land of the company; that it was, in fact, a licence which they had a right to revoke. I think that contention is absurd. To say that every passenger has an easement over the line of the company is ridiculous, more especially as some companies contract to carry passengers over the lines of other companies over which they could not create easements. The case of *Wood* v. *Leadbitter* was cited in support of that view. I think that case has nothing to do with this point. It was a case which no one would be willing in these days to see carried any further.

There was a contract between the plaintiff and the defendants that, in consideration of a fare paid beforehand, the company would carry the plaintiff, taking all reasonable care of him, to his destination. The contract may, no doubt, by reason of the notice upon the ticket, be subject to certain conditions and regulations. Those are the conditions and regulations which the company is authorized to impose by section 109 of the Railways Clauses Act, 1845, and they are set out in the time table. The only regulation bearing upon this point runs thus:—"Every passenger shall show and deliver up his ticket (whether a contract or season ticket or otherwise) to any duly authorized servant of the company whenever required to do so for any purpose. Any passenger travelling without a ticket or failing or refusing to show or deliver up his ticket as aforesaid shall be required to pay the fare from the station whence the train originally started to the end of his journey." I shall not say now whether that regulation is, in my opinion, reasonable or not. The case of *Saunders* v. *South-Eastern Railway Co.* seems almost to decide that it is unreasonable, but I think it unnecessary to say anything about that now. By this regulation the only consequence of a passenger not producing his ticket is that he will have to pay the fare. If he breaks this contract he must be sued; but there is nothing about any power to eject a passenger who does not show his ticket. There is no law that enables the company to do so, unless there is any agreement between the passenger and the company to such an effect. I think, therefore, that the company have no defence to this action. I cannot agree with the decision of Manisty, J. I can see no implied contract that the plaintiff would allow the defendants to eject him if he did not produce his ticket. Therefore I think that the company were wrong, and that the plaintiff must succeed.

LINDLEY, L.J.—I am of the same opinion. The case is one of great importance both to railway companies and to passengers. I do not express any opinion as to whether a bye-law could be framed which would not be *ultra vires* and would yet cover the action of the company. There is no bye-law or regulation in existence which authorizes them to turn out of a carriage a passenger who does not produce his ticket. The plaintiff had taken his ticket and paid his fare for both journeys. The effect is that the railway company contracted with him to carry him to his destination and back. There is no authority to support the contention that a contract of carriage is an interest in land within the meaning of the Statute of Frauds. That is a very different thing, and I think it is absurd to say that it was really a revocable licence. It was a contract of carriage, and neither more nor less. Even supposing that the contract involved the production of the ticket when demanded, and that the regulation was part of the contract, then, when the plaintiff broke that part, had the company any right to eject him? I think not. Their proper remedy was by action for his fare. To say that he was no longer lawfully upon their premises does not at all follow from breach of the contract. I agree in thinking that the case of *Wood* v. *Leadbitter* has no application here. No one would extend the doctrine there laid down to contracts of carriage. If the plaintiff had broken the contract the only remedy of the defendants was to sue him, and they had no right to act as they did. I agree, therefore, that this appeal must be allowed.

LOPES, L.J.—I think it is an extraordinary thing that there are no authorities on a point of such importance. The case is, to my mind, a very clear one. There is no bye-law and no regulation which can be relied upon by the company in justification of their conduct. For my own part I doubt very much whether any could be framed which would not be *ultra vires*, but that is unnecessary to decide now. The plaintiff had properly taken his ticket and paid his fare, and had accidentally lost the

ticket. The effect of that state of facts is that he was lawfully upon the premises and in the carriage of the defendants. In itself that is sufficient to show that the defendants were not justified in what they did. I cannot understand what is the implied contract which the plaintiff is said to have broken. Did he impliedly contract to allow the defendants to lay hands on him if he did not show his ticket? There is no evidence of any such contract. If his conduct only amounted to a mere breach of the contract of carriage the remedy of the company was by action and not by ejecting him. They might take his name and address and sue him if they thought fit to do so. It is worthy of observation that if they had done this the defendant would have had a good answer to the action, since he could have shown that he had paid his fare and taken the ticket. *Wood* v. *Leadbitter* and the principles there laid down have, in my opinion, nothing to do with this case, and the questions as to revocable licences do not arise. I think Manisty, J., was wrong, and that judgment must be entered for the plaintiff for £25.

Judgment accordingly.

Solicitors for the plaintiff, *Rickin & Fox*, for *Clegg*, Sheffield.

Solicitors for the defendants, *Cunliffes & Davenport.*

From Q. B. Div. June 6, 11.

DAVYS *v.* RICHARDSON. (*a.*)

Practice — Payment of money into court — Tender — Denial of liability—Order on solicitor for repayment —Rules of Supreme Court, 1883, *ord.* 22, *rr.* 5 (c), 6 (c).

In an action for wrongful dismissal, claiming a year's salary in lieu of notice, the defendant denied liability for more than a month's salary, or, alternatively, for more than three months' salary, which amount he tendered before action and paid into court, "with defence setting up tender."

Immediately after the delivery of this defence and before trial, the whole amount so paid in, was paid out to the plaintiff's solicitor under ord. 22, *r.* 5 (c). *At the trial the plaintiff obtained a verdict for one month's salary. On an application by the defendant for an order for the repayment of the difference, the Divisional Court ordered the solicitor to the plaintiff to repay the amount to the defendant. The plaintiff being dead, the solicitor filed an affidavit stating that he had paid the whole amount over to his client after deducting costs.*

Held, that the order of the Divisional Court (ante, *p.* 552, 575n, 20 *Q. B. D.* 722) *was wrong, and that, whatever might be the remedy of the defendant against the personal representatives of the plaintiff, there could be no order against the solicitor, who had been guilty of no misconduct.*

A plea of tender cannot be set up in an action for unliquidated damages.

Appeal from the decision of a divisional court (Lord Coleridge, C.J., and Mathew, J.), reported *ante*, p. 552, 575n, 20 Q. B. D. 772.

The action was brought for wrongful dismissal, and claimed a year's salary.

The defence set up (*inter alia*) that "by the agreement the plaintiff was only entitled to one month's notice at the time when he received the same." "Alternatively the plaintiff was not entitled to more than three months' notice or salary in lieu thereof." "Further, as to the whole statement of claim, the defendant made tender before action of £163 which the plaintiff refused, and the defendant has paid the said amount of £163 into court, and says it is enough to satisfy the plaintiff's claim." The sum of £163 included, as appeared from the particulars, the sum of £62 10s., "three months' salary in lieu of notice."

The request for lodgment in court contained a statement that the money was "paid in with defence setting up tender," and the sum paid in was receipted on the pleadings by the Bank of England, Law Courts Branch, as being "paid in with defence setting up tender." At the trial Day, J., held that the plaintiff was only entitled to one month's notice or salary in lieu thereof, and gave judgment accordingly.

On applying for payment out of court of the difference between one month's salary and the sum paid into court in respect of three months' salary, the defendant ascertained that before the trial the whole amount had been paid out of court to the plaintiff's solicitor upon the plaintiff's written authority. A summons was taken out for the repayment of the money, but a master and Pollock, B., at chambers refused to make any order. The Divisional Court, however, made an order upon the plaintiff's solicitor for the repayment of the money. The plaintiff had in the meantime died, and the solicitor now appealed, and filed an affidavit in which he stated that he had paid the money over to the plaintiff immediately that he received it, and that he had only retained his costs.

Lumley Smith, Q.C., and *Horace Browne*, for the solicitor.—The money was paid in under ord. 22, r. 5 (c), with defence setting up tender, and it could, therefore, be paid out at the request of the plaintiff. At any rate the solicitor who has been misled by the defendant's pleading ought not to be obliged to make good money he has already paid over.

Henn Collins, Q.C., and *Morton Smith*, for the respondent.—The defence must all be read together, and it will then be seen that it denies liability. The payment into court, therefore, falls under ord. 22, r. 6 (c), and the money ought not to have been paid out without an order. The question was one of discretion for the Divisional Court, and this court will not interfere.

Lumley Smith, Q.C., replied.

Cur. adv. vult.

LINDLEY, L.J. [after stating the facts].—In this case the Divisional Court have ordered the solicitor to the plaintiff to refund the money to the defendant. The plaintiff himself is dead, and nothing has been said as to any order upon his representatives. The court took the view that in strictness and propriety this could not be a defence setting up a plea of tender, since the action was brought for unliquidated damages, to which no tender could be pleaded. No doubt, strictly speaking, the law is the same as it was before the passing of the Judicature Acts, and no plea of tender can be set up in an action for unliquidated damages such as an action for wrongful dismissal. A plea of tender can only be set up where the action is for liquidated damages. But the Divisional Court, having come to the conclusion that the money was improperly taken out of court, have made an order upon the plaintiff's solicitor to refund it. It appears to me that, looking at the matter with a view to see whether the solicitor had acted rightly or wrongly, the Divisional Court have come to an erroneous conclusion. It appears from the affidavit of the solicitor, which certainly was not before the Divisional Court, that when he had got the money out of court he immediately paid it over to his client, merely retaining his own costs. The statement of defence is, to say the least of it, ambiguous, and it is calculated (though it was probably not intended) to mislead a person acting, as this solicitor undoubtedly did, in perfect honour and

(*a.*) Reported by A. P. PERCIVAL KEEP, Esq., Barrister-at-Law.

good faith. It would have misled, I think, ninety-nine persons out of every hundred placed in a similar position. That being so, is the defendant entitled to say that his opponent has done wrong if he has done that which the statement of defence appears to invite him to do? The defendant has really done all that he could to induce the plaintiff to take this money out of court. It does not, of course, follow that the person who has got the money is entitled to retain it. But the Divisional Court, in the view they have taken, appear to have confused two very different things. The right of the plaintiff's representatives to retain the money is one question, the right to make the solicitor pay over the money which he no longer has is another and a very different one. It is conceded that the solicitor has acted perfectly right, and in my opinion whatever claim there may be should be against the principal, and not against the agent. It has been urged upon us that the question was one of discretion for the Divisional Court, and that we ought not to interfere. I do not think that discretion has anything to do with it. In my opinion the Divisional Court has made an order against a person who was not liable in any legal sense whatever, and therefore their judgment must be set aside, and this appeal must be allowed.

LOPES, L.J.—In my opinion this statement of defence is informal and is calculated to mislead. Any solicitor might feel a doubt as to its exact effect. I agree, however, with the Divisional Court that the true reading of it is that the payment into court was made under rule 6 (c) with a denial of liability, and not with a plea of tender under rule 5 (c), of order 22. I therefore so far agree with the Divisional Court as to the effect of this pleading. But the Divisional Court made an order upon the plaintiff's solicitor to repay to the defendant money which he had taken out of court and paid over to his client. No misconduct on the part of the solicitor has even been suggested, and it is clear that what he did was done under a *bonâ fide* and excusable mistake.

Under these circumstances I do not think that the Divisional Court had power to order the solicitor himself to refund the money.

Appeal allowed.

Solicitor for the appellant, *J. G. Clabburn.*

Solicitors for the respondent, *Rose, Douglas, & Norman.*

High Court of Justice.

Chan. Div. Kay, J. } April 21; June 9.

In re ALICE KEMP. (*a.*)

*Infant—Maintenance—Accumulation—Money invested in Consols in name of infant only—Dividends—Guardians—Bank of England—*11 *Geo.* 4 *&* 1 *Will.* 4, *c.* 65, *s.* 32.

A sum of Consols was standing in the sole name of an infant, and it was desired to obtain payment of the dividends to be accumulated for her benefit, as they were not required for her maintenance. The Bank of England refused to act upon a suggested order requiring them to accumulate the dividends.

Order made for payment of the dividends to the trustees of a will under which the property was derived, to be applied for the benefit of the infant.

Petition.

(a) Reported by H. C. ROPER, Esq., Barrister-at-Law.

This was a petition asking that the right to transfer a sum of bank annuities standing in the name of Alice Kemp, an infant, and to receive the dividends already accrued thereon, might be vested in certain trustees, and that they might transfer the fund into their own names to be held on the trusts of the will of S. Hayward, or that they and Fanny Kemp might be appointed guardians of the infant, and the dividends paid to them on their undertaking to apply them for her maintenance.

S. Hayward, by his will, left the residue of his property to J. Kemp and F. C. H. Bellyse upon trust to invest and accumulate till the youngest child of F. Kemp attained twenty-one, and then to divide amongst the testator's grandchildren. Alice Kemp was the only grandchild still an infant, and the whole estate had been divided and the estate wound up except her share, which had been paid to a separate account. In 1885 part of this fund was invested in the purchase of £1,494 7s. 9d. Consolidated Three per Cent. Bank Annuities in the joint names of J. Kemp and Alice Kemp, her name being inserted by mistake for that of F. C. H. Bellyse, the other trustee. J. Kemp and F. C. H. Bellyse were both dead, and F. H. Bellyse and B. Kemp had been appointed new trustees of the will. F. Kemp, the mother of Alice Kemp, was her statutory guardian. It was stated that the dividends were not needed for her maintenance.

The petition was presented by the new trustees, the infant, and her mother, and was intituled in the matter of Alice Kemp, an infant, and in the matter of the will of S. Hayward, and of the Act 11 Geo. 4 and 1 Will. 4, c. 65, and the Trustee Act, 1850, and the Trustee Extension Act, 1852. When it came on for hearing on the 21st of April, Kay, J., directed that a draft order should be sent to the Bank of England to see if they would act on it, to the effect that, the court being of opinion that the dividends on the Consols would not be wanted for the maintenance of the infant petitioner, it was ordered that the Secretary or Deputy-Secretary, or Accountant-General or Deputy-Accountant-General of the Governor and Company of the Bank of England should, during the minority of the said infant, invest the dividends now due or hereafter to accrue due on the Consols standing in the name of J. Kemp, deceased, and Alice Kemp in the books of the Bank of England, or in any stock for which the same may be converted, in 2¾ per cent. Consolidated Stock, and should also invest and accumulate the dividends as they accrued on such stock when purchased in like stock.

The bank replied, through their solicitor, that there was nothing in the Act enabling the court to throw such a duty upon them, and that they must decline to undertake such a responsibility.

D. Sturges, for the petitioners, now asked for an order for payment of the dividends to the new trustees under the Infants and Lunatics Act, 1830, s. 32, which authorizes the court to direct payment of dividends "to any guardian of such infant or to any other person, according to the discretion of such court, for the maintenance and education or otherwise for the benefit of such infant," such guardian or other person being named in the order.

He referred to *Sanders* v. *Homer*, 6 W. R. 476, 25 Beav. 467; *Gardner* v. *Cowles*, 24 W. R. 920, 3 Ch. D. 304; *In re Findlay*, 32 Ch. D. 221, 641, 34 W. R. Dig. 86.

KAY, J., made an order directing payment of the dividends to the trustees to be applied by them for the benefit of the infant.

Solicitor, *Y. H. Bird* for *R. D. Baker*, Audlem, Cheshire.

Chan. Div. Kay, J. April 27; May 29.

In re RAILWAY AND ELECTRIC APPLIANCES CO. (*a*.)

*Contract—Patent—Assignment of patent rights to company—Omission by company to pay fees—Lapse of patent—*Bona fides*—Fraud—Consideration—Implied covenant in a deed—Damages.*

By an indenture which recited an agreement to sell a patent for £250 "and for the other considerations herein appearing," the patentees, "in consideration of the premises and of the sum of £250," assigned their rights to a company, and covenanted that the patent might be held and enjoyed by the company "during all the term subsisting therein." The company covenanted to pay royalties on articles manufactured under the patent "while subsisting." The deed contained no covenant to keep on foot the patent or manufacture or sell any articles under the patent. The company omitted to pay stamp duty, and the patent lapsed. The patentees claimed damages against the company, which was in course of voluntary liquidation.

Held, that the omission to pay duty was a bonâ fide *mistake, and that there was nothing to show that it was a wilful act on the part of the company; and that, for that reason and because the assignment was by deed, and that deed contained no covenant to manufacture or sell, a covenant to keep the patent on foot could not be implied.*

Adjourned summons.

This was a claim by E. Gilbert and D. Sinclair for £2,000 damages against the company, and the question was whether a covenant to keep on foot a patent must be implied as one of the terms of the contract between the parties.

By an indenture of the 1st of March, 1883, made between Edward Gilbert and Daniel Sinclair of the one part, and the Railway and Electric Appliances Co. (Limited) of the other part, after reciting that Gilbert and Sinclair had obtained a patent for a new or improved fastener for securing the coverings for railway and other wagons or vehicles during the term of fourteen years, subject to payment of £50 stamp duty within three years, and £100 within seven years; and that Gilbert and Sinclair had agreed with the company "for the sale to them of the said invention and letters patent, and the rights, privileges, and advantages thereof, at or for the price or sum of £250, and for the other considerations herein appearing," it was witnessed that "in consideration of the premises and of the sum of £250 paid by the company," &c., Gilbert and Sinclair did "grant, bargain, sell, assign, and set over unto the company and their assigns all that and those the said inventions and letters patent thereinbefore mentioned, and the full and exclusive benefit and advantage whatsoever thereof and thereupon, with the like benefit of, and right to apply for, take out, and procure all future and other letters patent, prolongations, or extensions of the said letters patent, or any other letters patent or like privileges, whether within the countries and places aforesaid or elsewhere, for, or in respect of, the said invention, and all rights, powers, authorities, advantages, privileges, profits, emoluments, and benefits of the said invention, letters patent, and premises, or any of them, or in any wise appertaining or belonging thereto," to hold the same for the absolute use and benefit of the company. Gilbert and Sinclair covenanted for title "and that the said letters patent shall and may thenceforth be lawfully held and enjoyed by the company and their assigns during all the term subsisting therein," and to assist the company in working the patent. The company covenanted to pay to Gilbert and Sinclair a royalty of one halfpenny for every fastener or other article manufactured or sold by them under the said letters patent, or any such other letters patent as aforesaid, "while respectively subsisting"; and also in each year in which the profits on articles manufactured under such letters patent, "while respectively subsisting," should be such that thirty-five per cent. thereof should exceed the aggregate of the royalties for that year to pay a further sum to Gilbert and Sinclair. The deed contained no covenant by the company to keep on foot the patent, or to manufacture or sell any articles under the patent.

The assignment was duly registered at the Patent Office by the company. On the 4th of June, 1885, they sold licences to use the invention, during the unexpired residue of the term, to the Caledonian Railway Co. for £250, and to the North British Railway Co. for £200. The company paid several substantial sums to the patentees under their covenants.

By the rules of the Patents, Designs, and Trade-Marks Act, 1883, the fees of £50 and £100 were changed into annual payments of £10, and the first of these was paid by the company on the 11th of October, 1885; but the next one, due on the 11th of October, 1886, was omitted, and at the end of the three months' grace allowed from that date the patent lapsed.

The company in the session of 1887 applied by petition to Parliament for leave to present a Bill enabling them to pay the fee, and that the patent might thereupon be restored. The petition stated that if this were not allowed the company would be liable for damages to the patentees and other persons.

The petition and Bill were rejected, and on the 3rd of November, 1887, the company passed resolutions for a voluntary winding up.

Gilbert and Sinclair sent in a claim in the liquidation for £2,000 damages caused by the lapse of the patent.

The liquidators declined to admit this claim, and took out a summons for directions as to whether they were bound to do so.

Renshaw, Q.C., and *Chadwyck Healey*, for the liquidators.—No covenant to keep up the patent can be inferred from the terms of the deed nor implied. The parties had no such intention, and the court will not imply a covenant to pay money to a third person. There is no covenant to manufacture or sell articles under the patent, as damages would be nominal: *Churchward* v. *The Queen*, L. R. 1 Q. B. 173; *Stirling* v. *Maitland*, 13 W. R. 16, 5 B. & S. 840; *Rhodes* v. *Forwood*, 24 W. R. 1078, 1 App. Cas. 256; *McIntyre* v. *Belcher*, 11 W. R. 889, 14 C. B. N. S. 654; *The Telegraph Despatch Co.* v. *Maclean*, L. R. 8 Ch. 658; *Aspdin* v. *Austin*, 5 Q. B. 671; *Rashleigh* v. *South-Eastern Railway Co.*, 10 C. B. 612; *Ivens* v. *Elwes*, 3 W. R. 119, 3 Dr. 25.

Horton Smith, Q.C., and *Haldane*, for the claimants.—The facts show that the parties intended the patent to be kept up. It is a question of contract, and the court will imply a covenant not to do anything which will prevent the carrying out of the contract. All the cases cited are on that footing: *Erasmus* v. *Elderton*, 2 H. L. Cas. 624.

KAY, J.—I am asked in this case to imply in a deed a covenant which is not there, a deed which, it seems to me, is carefully and not unskilfully drawn; and the very great danger of implying such a covenant in a deed is, of course, manifest.

I have no right to know—I cannot know—anything about the negotiations which led to this deed. I can only look at the attending circumstances at the time it was executed. It may be that the parties thought this matter, and deliberately and with intention omitted to put into the deed such a covenant as I am asked to imply, and, of course, the danger of raising a right by an implication of that right is a very great one which I

(*a*.) Reported by H. C. ROPER, Esq., Barrister-at-Law.

amply illustrated by the consideration I have just mentioned.

The facts are as follows:—Gilbert and Sinclair were possessed of a patent which they had recently taken out, and in respect of which there were certain payments to be made, and the omission to make these payments would make the patent invalid. They assign it to the Railway and Electric Appliances Co., which is now in liquidation by a deed of the 1st of March, 1883, and in that deed I am asked to imply a covenant by the company to make the payments necessary to keep on foot the patent. There is no such covenant in the deed. There are no such words in the deed as can support such a covenant.

There are a good many authorities on this subject, many of which show the extreme danger and difficulty of making an implication of this kind. One of the earliest is *McIntyre* v. *Belcher*, and there by certain articles of agreement for the sale of the goodwill of a medical practice, it was stipulated that the purchaser should have delivered up to him possession of the house, and have sold to him the horse, drugs, bottles, and surgical instruments and furniture employed in the business at the sum of £17 5s., and the vendors agreed with the purchaser to pay the rent and taxes up to a certain day, and that they would not within ten years from the date of the agreement practise at or within ten miles of the place; and the purchaser agreed that he would, in consideration of the premises, pay the vendor for or in respect of each of the succeeding years ending the 31st of December, 1860-1-2-3, if he should be living at the end of each respective year, one quarter part of the earnings and receipts in respect of the said practice without any deduction for expenses, provided the earnings and receipts of each year should amount to £300 a year. Then the matter came on on demurrer to the declaration, and it turned entirely upon a question of pleading, and the judgment, which seems to have been brief, contains, amongst others, this passage: "The substance of that"—that is, the pleading—"is that he has wilfully chosen to destroy the goodwill. Is that a breach of agreement? I think it is necessarily implied from the stipulations in the agreement that the defendant would take common and ordinary care so to carry on the business as to realize receipts. And a wilful omission so to do renders him liable to an action." Another of the learned judges says: "Looking at this agreement, although it is true there is no specific contract on the part of the defendant to carry on the business for four years, I think such a contract may be fairly implied." And another of the learned judges says: "The nature of the stipulated payments is such that it is necessary that the business should continue to be carried on during the four years. By wilfully incapacitating himself from so doing the defendant has clearly broken his contract." And the illustration he gives is this, "As if I grant a man all the apples growing upon a certain tree, and I cut down the tree, I am guilty of a breach." I must say that illustration does not quite satisfy my mind.

It seems to me that that illustration imports perfectly new considerations—I do not use the word considerations in the larger sense—but a perfectly new matter altogether. If a man sells the fruit of a standing tree it is not necessary to say there is an implied contract to keep the tree there, but if, after selling the fruit, having in his pocket the price which has been paid for it, he cuts the tree down, he commits a deliberate fraud upon the person to whom he has sold the fruit of the tree; and I should suppose that that element of fraud enters more or less distinctly into all such cases as *McIntyre* v. *Belcher*. Where a man contracts to make certain payments as part of the price of a thing which he has bought, and then wilfully (because every one of the judges uses that word) incapacitates himself from making those payments by destroying the thing which was to produce the money out of which the payments were to be made, he commits in the eye of a court of equity, and I should presume in the eye of a court of law too, a fraud upon the man in whose interest he was to make the payment. No doubt it was put in that case upon the ground of contract, and also in the case of *Stirling* v. *Maitland*, where the Chief Justice says: "I look on the law to be that, if a party enters into any arrangement which can only take place by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances under which alone the arrangement can be operative."

Just to mention the other case on which reliance has been placed—*In re the Telegraph Despatch Co.* There, again, it was a sale of a business for £2,500 by instalments, the first two payable in any event, but the payment of the other two being contingent on the profits of the business. It was held that, as the purchase-money was to be ascertained with reference to the profits, therefore that there was an implied covenant that the business should be kept on, and that the plaintiff had broken the covenant by assigning the business to other parties against whom he could not recover.

In all these cases there is the element of a wilful act on the part of the person against whom relief is sought which incapacitated him from carrying out his contract to make particular payments. Here the contract is by deed, and I quite agree that it should therefore be construed by a more careful rule than if it were only an agreement, because if it were only a preliminary agreement it might not have been prepared with the same care. The deed seems to me to have been skilfully and carefully framed. It recites that Gilbert and Sinclair had contracted to sell their rights for £250 and for the other considerations therein appearing. I quite agree that those words are important as showing that what occurs afterwards is part of the consideration. Then there is an assignment and a covenant by the patentees that "the said letters patent shall and may thenceforth be lawfully held and enjoyed by the company and their assigns during the term subsisting therein."

These are apt words to describe the duration of a completed period, and various covenants which I need not dwell upon particularly. The company also covenant to pay a royalty of one halfpenny for every article manufactured and sold under the patents "while respectively subsisting therein." Observe that the terms are altered; instead of "during the term subsisting therein" you now have "while respectively subsisting." There is an entire absence of any covenant by the company to make payments to keep the patent on foot, or to keep it on foot, or to make any articles under the patent if they do keep it on foot.

Now the liquidators come in the liquidation and ask whether a claim by Gilbert and Sinclair for damages can be sustained under these circumstances. The first payment of stamp duty on the patent was duly made. The second payment, by what was obviously a *bonâ fide* mistake, was omitted, and the three months' grace expired, and the good faith of the company was shown by this, that they actually went to the expense of applying to Parliament for leave to bring in a private Bill. They did not succeed, and the patent lapsed. To say that there was anything wilful in the sense that would involve an act of bad faith on the part of the company is impossible. But the real question is, If you can imply a covenant in any case of contract, can I imply this covenant here? It would only be while the patent was subsisting. It was known that the patent would only subsist whilst these payments were made, and that if they were not made it would lapse; and seeing that the expressions used as to the duration of the contract are

dropped when you come to the payments which the company had to make, it seems to me that it was intended that it should be left to the company and the interest they would have in keeping the patent on foot. Therefore it seems to me that I should be running the extremest danger of doing that which would be contrary to the intention of both parties if I imported into this deed a covenant to keep the patent on foot. I therefore must decline to do this. It seems to me that the patent lapsed by a mistake which did not involve bad faith, and I cannot hold that the company are liable because they did not make the payments which they might have made if the patent had been kept on foot. Very great weight must be attributed to the other side of the argument. There is no covenant to make any of these articles, so what damages could the claimants have? The company cannot carry on business, and are not bound to make any articles. So I could only give nominal damages. Much the safest rule is, where there any reasonable doubt whether the parties intended to enter into a covenant such as is sought to be implied here, is to look to the circumstances in which the deed was made, and if you find no such covenant in the deed, nor any bad faith by the parties against whom it is sought to imply a covenant, the court ought to be extremely careful how to imply a covenant in a well-considered deed, where there are no words whatever which express that covenant in any way. Here I must say that no claim can be allowed. The patentees brought in the claim, and they cannot have any costs; the liquidator will have his costs out of the estate.

Solicitors, *Burton, Yeates, & Co.; Linklaters & Co.*

Chan. Div. }
Stirling, J. } April 21; May 1.

In re The Palatine Estate Charity. (*a.*)

Charity—Objects—"Reparations, ornaments, and other necessary occasions"—Erection of spire—Salaries.

The objects to which the funds of a charity were applicable were "the reparations, ornaments, and other necessary occasions of the parish church of Stoke Newington." A new parish church having been erected by voluntary contributions and substituted for the old one, under 8 & 9 Vict. c. 70, s. 1, and the funds having been insufficient for the erection of a spire which formed part of the design,

Held, that the erection of the spire fell within the objects of the charity.

Held, also, that the salaries of persons employed in the church, except such as were concerned with the maintenance of the fabric of the church, could not be paid out of the charitable funds.

The origin of this charity was unknown. In an inquisition, however, held in the reign of Charles I. it was found that the churchwardens of Stoke Newington had been seised from time immemorial of 4 acres and 3 roods of pasture land commonly called "the gravel pits" in the parish of St. Mary, Stoke Newington, and had time out of mind employed "all the rents, issues, and profits of the said 4 acres and 3 roods of pasture land for or towards the reparations, ornaments, and other necessary occasions of the parish church of Stoke Newington," subject to a small quit rent payable to the Dean and Chapter of St. Paul's as Lords of the Manor of Stoke Newington.

By the beginning of the present century the property of the charity had come to be known as "The Palatine Estate."

In 1845, the parish church of St. Mary being not large enough for the parish, an ecclesiastical district was formed comprising parts of the parishes of Stoke Newington and Hornsey. This district was called the district of St. Matthias, and a district church called the Church of St. Matthias was erected. This church stood in the parish of Stoke Newington.

In 1855 an information was filed at the instance of the then incumbent of St. Matthias, by which a share of the income of the Palatine Estate was claimed on behalf of that church. The information was heard by Lord Romilly, M.R., in 1857 (*Attorney-General* v. *Love*, 23 Beav. 499) and he decided against the claim on the ground that the parish church of St. Mary only was entitled to the income of the charity until it could be shown that the income was in excess of the requirements of that church. His lordship also decided that a new parish church which had then recently been erected, and under 8 & 9 Vict. c. 70, s. 1, substituted for the old church, was entitled to the income in place of the old church.

By the scheme settled under that information the trustees of the charity were directed, after providing for the expenses of working the scheme, to pay to the churchwardens for the time being of the parish of St. Mary, Stoke Newington, such sums as should be necessary for the reparations, ornaments, and other necessary occasions of the parish church of St. Mary, to be applied by them in such reparations, ornaments, and occasions. And leave was reserved to the Attorney-General, if at any time he should consider it desirable, to apply for a new scheme.

In 1873 the Palatine Estate was enfranchised, and building leases were granted, and the annual income in consequence increased so that it was now £500 above what it had been in 1859.

It being difficult to expend the whole of the income of the estate in ordinary repairs and ornaments of the church, it had for a long time past been the practice to pay the salaries of the sexton, church cleaners, organist, and other officials out of the income of the charity. On the hearing of the above-mentioned information the Master of the Rolls said, with regard to the payment of these salaries, "It is doubtful whether these salaries are within the terms of repair, ornament, and other necessary occasions of the parish church," but he did not further decide the question.

Of late years other ecclesiastical districts—namely, those of All Saints', St. Faith's, and St. Andrew's—had been formed, each comprising part of the parish of Stoke Newington. The incumbents of these districts all claimed part of the income of the charity, on the ground that the income was larger than was requisite for the parish church of St. Mary.

The present parish church of St. Mary was erected in 1858 by voluntary contributions. The design included a tower and spire, but, the contributions being insufficient, the tower and spire were not erected. It having been proposed to borrow upon mortgage the sum requisite for adding the spire, and to employ the surplus income of the Palatine Estate in paying off this mortgage, the Attorney-General, at the instance of the incumbents of the district churches, applied for a new scheme.

An order for a new scheme having been obtained, a draft was prepared and afterwards amended. By the amended draft the Attorney-General proposed to divide one-half of the charity between the old and new parish churches, and the other half in equal shares between the four district churches standing in the parish.

Since the matter had been set down an arrangement had been come to between the incumbents and churchwardens of the district churches and the rector and churchwardens of the parish church (subject to the approval of the court), by which £6,000 was to be raised by mortgage of the Palatine Estate for the com-

(*a.*) Reported by L. S. Bristowe, Esq., Barrister-at-Law.

pletion of the spire, to be repayable out of the charity income by instalments extending over thirty years, and out of the residue of the income £75 was to be paid every year to each of the district churches for thirty years, and at the end of that time a new scheme was to be made. The Attorney-General, however, declined to accede to this arrangement, on the ground that the spire was not within the objects of the charity.

Cecil Russell, for the Attorney-General, cited *Attorney-General* v. *Love*, 23 Beav. 499, 5 W.R. Dig. 13, and *Merchant Taylors' Co.* v. *Attorney-General*, 19 W. R. 641, 6 Ch. App. 512. He contended that the erection of the spire was not within the objects of the trust. It was not an "ornament." [He referred to the definition of "ornament" given by Lord Kingsdown in *Liddell* v. *Westerton*, Moo. Spec. Rep., at p. 156; "Church Furniture," by Edw. Peacock; and two decrees dated 10th year of King John in the Cotton MS. at the British Museum.] Nor was the spire a "reparation," because no spire had previously existed. Nor was it a "necessary occasion," for if it had been the bishop would not have consecrated the church without it, nor could the services have been conducted. With regard to the salaries he cited Burn's Eccles. Law, 9th ed., p. 374, tit. Church, and *Church of St. John's, Margate*, v. *Parishioners of the Same*, 1 Hagg. Cons. 198.

Hastings, Q.C., and *Boome*, for the trustees of the charity, including the rector and churchwardens of St. Mary's, *contrà*, cited *Woodward* v. *Makepeace*, 1 Salk. 164; *Nicholson* v. *Master*, Vin. Abr., tit. Churchwardens; and *Maynard* v. *Brand*, 3 Phil. 501.

Stuart Moore, for the vicar and churchwardens of St. Matthias.

Ingle Joyce, for the vicars and churchwardens of the other district churches.

STIRLING, J., stated the facts and proceeded:—The question is, How the surplus rents of this charity ought to be applied? It is contended on behalf of the Attorney-General that they ought to be applied *cy-près*. On the other hand, it is contended on behalf of the parish church that, the charity having been established for the "reparations, ornaments, and other necessary occasions" of the church, there can be no surplus to be applied *cy-près* until all the objects of the original trust have been exhausted, and it is said that there is a purpose within the scope of the original trust to which the surplus ought to be applied—viz., the erection of a spire, which was contemplated by the architect, but has not yet been erected for want of funds. The question is whether such an application of the funds falls within the objects of the charity. I am asked by the Attorney-General to construe the gift very much as if the charity were founded by a charter. I am not sure that that is a proper mode of construing it, but I propose to deal with it on that footing, and to consider whether the erection of a spire falls within the "reparations, ornaments, and other necessary occasions" of the church. It is not clear that it may not fall within the one or other of the first headings. In regard to "reparations" the law is very wide, and it has been frequently laid down that the term is not to be confined in its application to old buildings, but may be extended to the reparation of a new building. That was sanctioned in *Attorney-General* v. *The Wax Chandlers' Co.*, 19 W. R. 33, 5 Ch. App. 503. Again, as regards "ornaments," it is contended by the Attorney-General that the word has a technical meaning, and, as laid down by the Privy Council in *Liddell* v. *Westerton*, is confined to the internal furniture of the church. I am not sure that that is not putting too narrow a construction upon the word. Sir Robert Phillimore treated ornaments as including decorations. He included a spire, and certainly said that decorations included all architectural decorations; and organs and bells have been held to be ornaments. But it is not necessary to decide whether a spire comes within either of the terms "ornaments" or "reparations." What are "necessary occasions" if they do not include such a work as this? It seems to me that they may fairly include all purposes necessary and proper in order that the building may fulfil the object for which it was erected—viz., that of being the parish church of St. Mary, Stoke Newington. The church, as designed by the architect, is incomplete at the present moment, for it has not got a spire, and the spire is the place in which it is usual to hang the bells, which are necessary ornaments of the church. In *Woodward* v. *Makepeace* it was laid down that bells were not mere ornaments, but were a necessary part of a complete parish church. I think I ought not to limit the meaning of "necessary occasions" to anything less than that. It seems to me, therefore, that the erection of a spire falls within the original trust, and that a part of the funds may be devoted to that purpose. There is another point—viz., whether the salaries of certain persons employed in or about the church are properly payable out of this fund. That point arose in 1857, when the case was before Lord Romilly, and he then said, "I do not know whether anything is brought before me except the question of right. If the question were before me, I should think it extremely doubtful whether the salaries to particular persons could be brought within the terms of the original foundation." Considering that the matter was not put at rest then, I should have been willing to let it remain open now. But, looking at the accounts, I do not find that these salaries were paid before the year 1815, when the increase in the rents of the property took place. In 1685 there was a minute in the Vestry Minute Book to the following effect:—"Whereas the rents annually arising from the Parish Field have heretofore been employed promiscuously with other moneys by the churchwardens, whereas it should have been only appropriated and applied for the repair of the parish church, and the ornaments thereof: It is ordered that the said rent be employed for the uses aforesaid and no other." It seems to me that this usage is too modern and too far apart from the purpose mentioned in the early documents for me to hold that the salaries fairly fall within the scope of the original charity, but, having regard to the length of time during which the rents have been so applied, and to the fact that in 1857 the Attorney-General took no steps to obtain a declaration upon the point, I think that existing arrangements should be disturbed as little as possible, and if binding contracts have been entered into they should not be interfered with. Upon these declarations the scheme will go back to chambers for settlement.

His lordship subsequently stated that the salaries of persons employed in the care and maintenance of the fabric of the church might continue to be paid out of the charitable funds. This included the sexton, organ-tuner, and verger, so far as he was concerned with the care of the fabric, but not such persons as the organist and bell-ringers.

Solicitors, *Clabon; G. & W. Webb; Few & Co.; Cross.*

Q. B. Div. (Manisty and Stephen, JJ.) June 6, 7.

STIMPSON v. WOOD & SONS. (a.)

Negligence—Husband and wife—Wife living apart in adultery—Action on behalf of widow—Lord Campbell's Act, 1846 (9 & 10 *Vict. c.* 93), *s.* 2.

A woman who has left her husband and is living apart in adultery at the time of his death unsupported by him is not entitled to bring an action under Lord Campbell's Act for compensation for the death of her husband.

Quære (per Manisty, J.), *whether evidence of the willingness of the husband to take back the woman as his wife would have entitled her to claim the benefit of the Act.*

Motion to enter judgment for the defendants, or for a new trial.

This action was one brought by a widow to recover damages, under Lord Campbell's Act, for the loss of her husband through the negligence of the defendants. The action was tried before Grantham, J., and a common jury, resulting in a verdict for the plaintiff, with £5 damages. The material facts in evidence were that the plaintiff's husband was killed by the negligence of the defendants, but that for five years the plaintiff and her husband lived apart owing to the plaintiff's adultery, and that during that time she continued to live in adultery with another man, who supported her. It was proved, however, that the deceased had met the plaintiff several times and had given her small sums of money, but not to an amount sufficient to support her.

Murphy, Q.C., and *Pyke*, for the defendants.—There was no evidence of a reasonable expectation of pecuniary benefit by the plaintiff from the deceased. The husband was not bound to support his wife after she had committed adultery: *Sykes* v. *North-Eastern Railway Co.*, 33 W. R. 473; *Govier* v. *Hancock*, 6 Term. Rep. 603.

Kemp, Q.C., and *Cohen*, for the plaintiff.—There was evidence for the jury that the deceased might have taken back the plaintiff as his wife, and, if so, that was sufficient ground for a reasonable expectation of support from him on her part. The adultery of the wife with the connivance or by the tacit permission of the husband did not free him from his legal obligation to support her: *Wilson* v. *Glossop*, *ante* 296, 20 Q. B. D. 355.

MANISTY, J.—This action was brought by Sarah Ann Stimpson, as widow of William Stimpson, who was killed by the negligence of the defendants, as the jury have found. The defendants, however, allege that she has sustained no pecuniary damage, on the ground that she had not lived with her husband for several years before his death, during which period she was supported by another man with whom she lived in adultery. The husband also lived with another woman during that time, and the only suggestion of the condonation of her offence by the husband is the woman's own statement that he intended to take her back. The question is whether, under such circumstances, the plaintiff has, in law, any claim whatever against the defendants. She clearly had no legal claim against her husband. He could not be compelled to support her. But now that he is killed, she claims a right to compensation for the loss of him. It would be strange if she had such a claim in law. What legal relationship did she occupy towards her deceased husband? She had deserted him, and was living in adultery continuously. The point is dealt with in several authorities. Coke lays it down that, "If the wife leave her husband and goeth away and tarrieth with her adulterer she shall lose her dower" (Co. Litt. 32a). In *Govier* v. *Hancock* the action was for the board and lodging of the defendant's wife, whom he had turned out of doors when she had committed adultery, but whom he had refused to take back. The verdict was directed for the defendant, and the court refused a rule to set it aside. In *Rex* v. *Flinten*, 1 B. & Ad. 227, it was held that a husband could take advantage of the desertion of him and adultery by his wife to render himself not liable to her support, although he afterwards himself committed adultery. That case was an appeal by the defendant from his conviction as a vagrant for not supporting his wife. During the argument Littledale, J., said of the wife: "Having rendered herself unworthy of her husband's protection, she returns to the same state as if she were not married."

In the present case the wife returned to the same legal state she was in before marriage by her adultery, and so had no claim on her husband. The person guilty of negligence is, under Lord Campbell's Act, responsible for the pecuniary loss sustained by any of the persons named in section 2 of the Act. Upon the first point we must hold clearly that the plaintiff was not, in law, in a position to make any claim whatever on the deceased. As to the second point, I do not think that there was any evidence of the husband being willing to take his wife back. As at present advised, I very much doubt whether, if there had been strong evidence of the husband being willing to take the plaintiff back, she would have been entitled to maintain the action. There was no evidence, at any rate, fit and proper to submit to a jury of any probability of the husband condoning her offence. I am, therefore, of opinion that the verdict ought to be entered for the defendants, on the two grounds that the plaintiff did not stand in the relationship of a wife having any claim on her husband, and that there was no evidence on which the jury could reasonably come to the conclusion that there was any prospect of the husband taking her back.

STEPHEN, J.—I am of the same opinion. This was an action under Lord Campbell's Act, which enacts that the persons entitled to the benefit of that Act should be the wife or husband, parent or child. It is not necessary to suppose that every one of these persons had a legal right of support from the person killed, as, for instance, in the case of a father and a son over sixteen; yet in every case under the Act the right arises out of the relationship of the parties. It must be some such relationship between the parties as would give a right to a reasonable expectation of support. There is a well-known instance of a man who, having children, makes no will, or does not provide for certain of his children. Although he was not legally bound to provide for them after his death, and although he had not, in fact, done so, yet if the father had been killed by negligence the children would be entitled to claim under the Act as having an unqualified, an undoubted right, founded on a natural expectation of some future provision from the father had he lived. Or take, again, the instance of a father having only a life estate in his property. The child could have no legal right at all to look for provision from it after his death. Yet if there was a reasonable expectation by them of advances to them from the father had his life continued, the jury are entitled to find compensation as due to them under the Act. Now there are two characters here under which the jury might be asked to compensate the plaintiff. First, as the widow of the man killed, they might be entitled to suppose that she had an expectation of support from her husband unless there was some reason to the contrary. That she remained as his wife after her adultery cannot, I think, be doubted. She might have been divorced for that adultery, but she was not. Nevertheless, although she continued to be his wife, the cases show that, by adultery, she lost the right to support from her husband, *i.e.*, she had no legal right to his support. Does she come, then, under the second class of persons who, by reason of their

(a.) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

relationship, but without any legal claim, may be held by a jury to have had a reasonable expectation of support from the deceased, which they have only lost by his untimely death? What reasonable expectation had she in point of fact? There was some evidence to go to the jury, though of a very unsatisfactory nature, that the deceased had occasionally given her some money. Even if so, there was no reasonable inference to be drawn from that of what he might have done. I do not think any estimate of damages could be based on this chance of receiving some slight help from a man who himself had hardly any money. It is said there might have been a possible reconciliation, but there seemed to be no evidence of that to leave to the jury. I base my judgment, therefore, on these two grounds—first, that there was no evidence in this case of any legal right in the widow, so circumstanced, to support from the deceased; secondly, that there was no evidence of any reasonable expectation by her of pecuniary advancement. Lastly, I may say, as to the £5 damages, that I am not sure they might not be found to be excessive on the ground that there was no ground of estimating any such amount.

Judgment for the defendants.

Solicitor for the plaintiff, *J. Fenn.*

Solicitor for the defendants, *W. Easton.*

IN BANKRUPTCY.

Q. B. Div. (Cave and Wills, JJ.) June 18.

Ex parte COMMISSIONERS OF WOODS AND FORESTS. *In re* THOMAS. (*a.*)

Bankruptcy—Disclaimer—Property held of the Crown—Right of trustee to disclaim—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 55, 150.

The provisions of section 55 *of the Bankruptcy Act,* 1883, *are binding upon the Crown, and a trustee in bankruptcy is entitled under that section to disclaim a bankrupt's interest in property held by him from the Crown.*

Appeal from an order of his Honour Judge Brynmor Jones in the county court at Cheltenham refusing an application on behalf of the Commissioners of Woods and Forests to set aside a notice of disclaimer whereby the official receiver, as trustee in the bankruptcy, disclaimed all the estate and interest of the bankrupt in certain tract of coal in the Coleford High Delf Vein the Forest of Dean, known as the "Success Level ale."

The case raised the question whether, under section 55 the Bankruptcy Act, 1883, a trustee in bankruptcy disclaim property held of the Crown.

The facts of the case were not substantially in dispute. By the Dean Forest Amendment Act, 1841, s. 1, grant of a gale shall be deemed to have conferred the grantee, his heirs, and assigns, an interest in the nature of real estate, and by section 4 it is provided that the obligation to pay the rent, royalties, and dues shall be in the person in actual possession or in receipt the rents and profits of the gale, and be a personal obligation, and that he may be proceeded against as if had entered into a covenant with the Crown to pay such rents, royalties, and dues.

The interest of the bankrupt was three-sixteenth two-forty-ninth shares in the "Success Level ale," and on September 25, 1886, the official receiver, trustee, gave notice to disclaim this interest.

Sir R. E. Webster, A.G., and *Gore,* for the Commissioners of Woods and Forests.—The simple question is, How far section 55 of the Bankruptcy Act, 1883, is binding on the Crown? It is a general rule in the construction of Acts of Parliament that the Crown is not reached, except by express enactment or by necessary implication, in any case where it would be ousted of an existing right or prerogative. Therefore the Crown is only bound by the Bankruptcy Act, 1883, to the extent specified in section 150. The bankrupt's interest in the gale in question is vested in the official receiver under section 54, and as the covenants run with the land he thereupon became liable to perform them. But the Crown is not bound by section 55 giving the trustee a right to disclaim, as section 150 clearly does not include the disclaimer provisions.

They referred to *Ex parte Postmaster-General, In re Bonham,* 27 W. R. 325, 10 Ch. D. 595; *In re Henley & Co.,* 26 W. R. 885, 9 Ch. D. 469.

Muir Mackenzie, for the official receiver.—The case is clear on two grounds. Either the provisions of section 55 are provisions "relating to the remedies against the property of a debtor" within section 150, or inasmuch as the Act is not taking away but giving the Crown, as lessor, a right against another person—viz., the trustee, if the property vests in the trustee the Crown cannot say that it assumes the liability of the trustee under section 54 without the corresponding power of the trustee to get rid of it.

CAVE, J.—I am of opinion that the decision of the county court judge dismissing the motion to set aside the disclaimer was correct. It appears to me that the best way to put the case is to say that it comes within the language of section 150 of the Bankruptcy Act, 1883. Section 150 provides that "Save as herein provided the provisions of this Act relating to the remedies against the property of a debtor, the priorities of debts, the effect of a composition or scheme of arrangement, and the effect of a discharge shall bind the Crown." Now the remedies against the property of a debtor are not put under any separate heading in the Act, but where provisions are found relating to the remedies against the property of a debtor they will bind the Crown. The ordinary remedies in this case are remedies by way of covenants, by which the Crown might impose on the debtor certain onerous liabilities. On the making of a receiving order no action could be brought on the covenants, and the effect of discharge is that the bankrupt is absolutely relieved. Then by section 54 the property is transferred to the trustee. Now it seems to me that that is all one mode of dealing with the remedies against the property of a debtor. The remedies against the debtor are taken away, and in the interest of the creditors there is a vesting of the property in the trustee, and as attaching to that there is a right to disclaim and get rid of the property altogether. You must look at the whole of the sections, and the effect is that the creditor can no longer get at the property of the debtor. On the other hand there is substituted the right to prove against the estate, and the property is vested in the trustee in order that he might dispose of it to the best advantage. It would be outrageous to say that the Crown has a right to interfere with the vesting of a Crown lease. The sections which provide for the vesting of a property in the trustee are so connected with the sections which restrain actions against the debtor that we must read them together, and say that they do relate to the remedies against the property of a debtor. If section 54 is a section relating to the remedies against the property of the debtor, so is section 55. It is one whole, showing on what terms the property is to vest in the trustee.

WILLS, J.—I am of the same opinion, and I have

(a) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

very little to add. The extremely narrow construction put forward by the appellants would lead to consequences so extravagant that that in itself must be a strong argument that it is not a proper construction of the Act. The proper view in my opinion is to take the group of sections which deal with taking the property out of the bankrupt and vesting it in the trustee as a whole, and say that they are provisions relating to remedies against the property of a debtor.

Appeal dismissed.

Solicitor for the appellants, *The Solicitor to the Commissioners of Woods and Forests.*

Solicitor for the official receiver, *The Solicitor to the Board of Trade.*

Q. B. Div. (Cave, J.) May 10; June 1.

Ex parte THE TRUSTEE.
In re WHITAKER. (a.)

Bankruptcy—Reference—Application by official receiver as trustee—Fees—Disclaimer—Joinder of respondents—Practice.

Where an application is made to the court by the official receiver as trustee in a bankruptcy, he is not exempt from the payment of the fee of five shillings prescribed by the scale of fees and percentages.

In an application to disclaim property against a landlord, any number of mortgagees or sub-lessees who are interested in parts only of the property sought to be disclaimed may be joined, but different landlords of separate and distinct estates cannot be joined as respondents to one application for leave to disclaim the aggregate property.

Reference by the registrar to the court at the request of the trustee in the bankruptcy.

The questions to be decided were:—(1) Whether, when the trustee making an application to the court happens to be the official receiver, he is exempted from the payment of the prescribed fee of five shillings (see Scale of Fees and Percentages, Table A.) although he does not make the application in his capacity of official receiver, but as trustee?

Up to the present time the court had required him to pay the fee, and the question was one of importance to the revenue, and the decision upon it would govern the practice, not only in the London district, but in all the county districts.

(2) May a trustee, in making an application to disclaim property, include in one application paper and one notice of motion any number of distinct and different properties, and any number of distinct and different respondents, such as landlord, mortgagees, &c., and use one affidavit dealing with all the distinct and different properties?

The question was of importance to the revenue, as, if he might do so, there would only be one five shilling stamp required, there being only one application. The practice hitherto had been to allow the trustee to include in one application any number of different properties, provided the persons to be served as parties interested were the same, but where the parties interested were different, separate applications were required, it having been found to cause great inconvenience to include different parties in one application, as they had to peruse a long affidavit, the very much greater portion of which had nothing whatever to do with them or their interests.

In the present case, and in some others now pending, there are a very large number of different properties to be disclaimed, and in which the parties interested are different.

(a.) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

Sidney Woolf, for the trustees, referred to sections 27, 54, 70, and 121 of the Bankruptcy Act, 1883, and to Rules 332, 333, and 334 of the Bankruptcy Rules, 1886.

Cur. adv. vult.

June 1.—CAVE, J.—The first point I have to decide is whether the official receiver is exempt from the payment of the prescribed fee of five shillings when he makes the application as trustee and not as official receiver.

Table A. of the Scale of Fees and Percentages contains the following:—"Every application to the court, except by the official receiver—5s." In my judgment the exemption only applies when the official receiver makes the application as official receiver, and not when he makes the application as trustee. There are, I think, good grounds for the distinction. Where the official receiver makes an application as trustee he is, as a general rule, in possession of the assets in the bankruptcy, and there seems no sufficient reason why a particular estate should be exempted from the fee when the application is made by the official receiver in his capacity as trustee, and be compelled to pay the fee when a similar application is made by a trustee appointed by the creditors. These fees are applied in paying the salaries of the officials and other expenses of working the Bankruptcy Act, and I can see no reason why a particular estate should be exempted from its share of the burden where an application is made by the official receiver in his capacity of trustee. It may be said that there are cases, especially in the administration of small estates, where there are no available assets for the payment of these fees. Such cases can only occur very seldom, and when they do occur the fees will, in fact, be payable out of the moneys applicable in paying the expenses of the Act, which seems a far more reasonable course than that in all cases, whether there are assets or not, an estate should be exempt from these fees so long as the official receiver was acting as trustee. Moreover, rule 318, which was made at the time when the table of fees was sanctioned, provides that the trustee shall, before the estate is handed over to him by the official receiver, discharge any balance due to the official receiver on account of fees, costs, and charges properly incurred by him and payable under the Act. The words "except by the official receiver" appear to me to have a sufficient meaning given to them if they are confined to applications made by the official receiver to the court as official receiver, such as applications under rule 334, or under rule 339 (4), or the like.

The second question is, in effect, What is an application? Primarily an application connotes a respondent against whom the application is made, and an application does not cease to be one because there are more respondents than one who are affected by the whole of the application. Nor do I think it ceases to be one application because there are respondents who are interested in part of the application only, provided there is also a chief respondent who is interested in the whole. But when there is no longer any chief respondent who is interested in the whole application, but only respondents who are interested in one part and others who are interested in another part, then I think the character of unity is gone, and the application is no longer one. I answer, therefore, that so long as there is a chief respondent who is affected by the whole application, the application is one, and one fee only is payable, although there may be many other respondents, some of whom are concerned as to part only and others as to other parts only, but that as soon as there is no chief respondent who is sought to be affected by the whole of the application, then the application is double and should not be allowed to be made in that form.

Apply this principle to an application to disclaim. I think the landlord is the chief respondent, and that if

an application against one landlord, whether individual, partners, or company, any number of mortgagees or sub-lessees who are interested in parts only of the property sought to be disclaimed may be joined; but that different landlords of separate and distinct estates cannot be joined as respondents to one application for leave to disclaim the aggregate property.

Solicitors for the trustee, *Valpy, Chaplin, & Peckham.*

House of Lords.

From C. A. (England). July 26, 28; Aug. 8.

Attorney-General v. Marquis of Ailesbury. (a.)

Probate duty—Accumulations of personal estate—Conversion—Lunacy.

The accumulations of the personal estate of a lunatic were invested in the purchase of land by his committees under the orders of the Lords Justices. By the conveyances made in pursuance of the orders, the lands were conveyed to the use of the committees, their heirs and assigns, upon trust for the lunatic, his executors, administrators, and assigns, either until the inquisition as regarded his soundness of mind should be superseded, or until his death, whichever should first happen, and until such time the grantees had certain powers of leasing, selling, or exchanging. Each conveyance also declared that the premises thereby granted were, "to all intents and purposes, to be considered as part of the personal estate" of the lunatic, but there was no trust for sale. Upon the death of the lunatic the Crown claimed probate duty on the value of the investment in land.

Held, that the value of the lands was part of the personal estate of the lunatic at his death, and liable to probate duty.

Decision of the Court of Appeal (*reported* 34 *W. R.* 261, 16 *Q. B. D.* 408) *reversed.*

This was an appeal from a decision of the Court of Appeal (Lord Esher, M.R., Cotton and Bowen, L.JJ.), reversing a decision of the Queen's Bench Division (Mathew and A. L. Smith, JJ.), reported 33 W. R. 731, 14 Q. B. D. 895.

The information in this case was to recover duty payable under the Inland Revenue Act, 1881 (44 Vict. c. 12), in respect of certain investments representing portions of the personal estate of Sir Henry Meux, deceased, of whose will the defendants were executors.

The short facts of the case are stated in the judgments delivered by Lords Selborne and Macnaghten.

This appeal was first argued by *Vaughan Hawkins* (*Sir R. E. Webster, A.G.*, and *Sir E. Clarke, S.G.*, with him), for the appellant, and by *Montague Cookson, Q.C.*, and *Sir H. Davey, Q.C.* (*R. V. Williams* and *Leach* with them), for the respondents; and, secondly, by one counsel on each side before a larger number of learned lords.

July 26, 28.—*Vaughan Hawkins*, for the appellant, referred to *In re Badcock*, 4 My. & Cr. 440; *Ex parte Dikes*, 8 Ves. 80; *Attorney-General* v. *Mangles*, 5 M. & W. 120; *Tait* v. *Lathbury*, 14 W. R. 216, L. R. 1 Eq. 174; *Johnson* v. *Arnold*, 1 Ves. sen. 169; *Webb* v. *Sadler*, 31 W. R. 394, L. R. 8 Ch. 419; *Perry's Executors* v. *Reg.*, 17 W. R. 382, L. R. 4 Ex. 27; *Ex parte Grimstone*, Amb. 706; *Oxenden* v. *Lord Compton*, 2 Ves. jun. 69; *Leitrim* v. *Enery*, 6 Ir. Eq. Rep. 357; *Ex parte Annandale*, Amb. 80; *Webb* v. *Lord Shaftesbury*, Madd. & Geld. 100; *Attorney-General* v. *Hubbuck*, 13 Q. B. D. 275, 32 W. R. Dig. 170.

Cookson, Q.C., for the respondents, referred to *Ex parte Dawes*, 34 W. R. 752, 17 Q. B. D. 275; *Wright* v. *Pearson*, 1 Eden. 119; *Evans* v. *Ball*, 30 W. R. 899; *Ex parte Phillips*, 19 Ves. 118; *Matson* v. *Swift*, 8 Beav. 368; *Attorney-General* v. *Brunning*, 8 W. R. 362, 8 H. L. Cas. 243.

Hawkins replied.

Aug. 8.—Lord Halsbury, C.—It is not my intention to dissent from the conclusion at which the majority of your lordships have arrived. If the matter were *res integra* I think that much might have been said as to the effect of the original investment in land on behalf of the lunatic, and the authority under which that investment was made, and to the effect that should properly be given to the trust declared by the Lords Justices. But I yield to authority. I think that the practice of the Court of Chancery for more than 100 years and the authority of judges of very great eminence establish such a course of practice and such a chain of authority that I do not think I am at liberty to assume that either that Court or its very learned judges were in error as to their powers and jurisdiction; and I cannot deny that if the course so sanctioned by usage and authority is authorized by law it governs this case. I do not think that it would be a profitable exercise to point out how, if this case were not governed by such authority and one were more free to argue it on abstract principles, the decision ought to be the other way. I am therefore prepared to concur in the motion which I understand the noble and learned earl is about to make.

Earl Selborne.—In this case money of a lunatic was invested, by order of the Lords Justices having jurisdiction in lunacy, in purchases of lands, which, under their lordships' direction, were conveyed to trustees upon trust for the lunatic, his executors, administrators, and assigns, with a declaration that the lands so conveyed (and all others to be purchased in lieu of them under any exercise of certain powers of sale and reinvestment which were contained in the deed) should, "to all intents and purposes, be considered as part of the personal estate" of the lunatic. After the death of the lunatic, who never recovered, the Crown claimed probate duty upon his interest under this trust, as part of his personal estate and effects at the time of his death, which by virtue of the probate of his will (made before the lunacy) became vested in his executors. A divisional court of the Queen's Bench Division held the Crown entitled to the duty so claimed; but that judgment was reversed by the Court of Appeal. The question is important, and it might have been expected to have been previously the subject of judicial decision. But no authority directly in point was cited at the bar. It is to be observed that in this case the lunatic to whom the money laid out in these purchases belonged never himself did, or assented to, any act by which it was or could be converted into realty; he was incapable of doing any such act, or of giving any such consent. And although I do not think it is open to dispute that the Lords Justices, in the due course of the administration of his estate in lunacy, might have done any act which they judged to be for his benefit, it is to me clear that in this case they did not judge it necessary, or for his benefit, to do any act which would have the effect of converting his personal right to the money thus invested into a real right to land with the incidents belonging to realty; but that, on the contrary, they intended to prevent the investment which they authorized from having any such consequence, and introduced both into their own order and into the conveyance which followed thereon declarations which they considered

(a.) Reported by C. G. Napier Trollope, Esq., Barrister-at-Law.

proper and sufficient to effectuate that intention. Under these circumstances, I think the present case undistinguishable in principle from those in which trustees without authority, or the guardians of an infant or committees of a lunatic without the sanction of any court, have invested personalty belonging to the trust, or to the infant, or the lunatic, in the purchase of lands of inheritance, nothing being afterwards done to supply the original want of authority. The Lord Chancellor and the Lords Justices in Lunacy, high as are their functions, and regulated as they are by statute, act not as proprietors but only as guardians and administrators of the lunatic's property; and, whatever power they may have to convert any part of it from realty into personalty, or from personalty into realty, when judging this to be for his benefit, and deliberately intending to do it, it is in my opinion neither necessary nor right to ascribe that effect to an investment, which they have authorized on the terms, and with the declared intention, that it should not have that consequence. If an investment, *de facto*, in land may leave the original personal right to the money invested unchanged in equity for want of authority in the persons making that investment to change it, so in my judgment may a similar investment, made under the direction of a court, which declares, both in the order and in the conveyance, that it intends the personal right to remain unchanged, and does not mean to exercise any authority which it may possess to change it. In such a case little or nothing appears to me to depend upon the mere technical form of the conveyance to the trustees. In this respect I am unable to perceive any ground for making a difference between an investment of a lunatic's personal estate in land, under the authority of the Lord Chancellor or the Lords Justices in Lunacy, and an investment of an infant's personal estate in land (the terms of the order and of the conveyance in trust being assumed to be in each case similar), under the authority of the Court of Chancery or the High Court of Justice. There may be differences in some other respects, but in this respect I think there is none. Some of the older authorities, applicable to cases in which the investment has been unauthorized, are referred to in the first volume of Sir Edward Williams' book on Executors and Administrators, 7th ed., pp. 666 and 667. Two of these were cases of infants (*Gibson* v. *Scudamore*, 1 Dick. 45, and *Witter* v. *Witter*, 3 P. Wms. 99); and one that of a lunatic (reported under the name of *Lord Plymouth* as committee, in Freeman's Chancery Cases, p. 114, and under the title of *Awdley* v. *Awdley* in 2 Vern. 193). In *Gibson* v. *Scudamore* the court treated the purchase-money as in equity charged on the estate. In *Witter* v. *Witter* the same Lord Chancellor (Lord King) said: "The renewed lease, though for lives, shall follow the nature of the original one, and go to the executors or administrators of the infant, as that should have done. . . . This might and ought to have been declared in trust for the executors and administrators of the infant, if he should die during infancy." Lord Chancellor King there pointed out, as proper to preserve the personal character of the right during infancy, the same form which was afterwards used by the court in the case of *Bridges* v. *Bridges* in 1752 (Seton on Decrees, 2nd ed., 345); and was followed with approval by Lord Eldon in 1801, in *Ashburton* v. *Ashburton*, 6 Ves. 7, expressly to prevent the court from "changing the nature of the property." That form was for a long period of time, and under very great judges, sanctioned by the general course of the Court of Chancery in such cases. I do not see how your lordships could now hold a trust, declared in such terms to be ineffectual for the preservation of the personal right, with its proper incidents (of which the devolution of the equitable title to executors or administrators was certainly not the least important, nor the least distinctly in view), without practically declaring that all those judges were mistaken, and that the course of the Court of Chancery in those cases proceeded upon a misconception of the powers of the court, and of the effect in equity of what is authorized to be done. In the old lunacy case, as reported by Freeman, the Lords Commissioners (in 1690) held "that the administrator should have the benefit of the purchase, and not the heir; for if the money had not been laid out, it had been clear that the administrator should have had it; and, if laying out of the money would alter the estate, then it would have been in the power of the grantee of the custody to prefer the heir or administrator as he pleased"; and they said, "This court may either follow the land purchased, or the estate of Lord Plymouth." The report of the same case in 2 Vern. (Raithby's ed., 194n.) gives an extract from the decree, which declared "that it was not in the power of any committee to alter the nature of the lunatic's estate"; and adds, that the decree, in effect, declared the money laid out in the purchase to be a charge upon the land. It is true that, although it was not in the power of a committee, it is in the power of the Lord Chancellor or the Lords Justices in Lunacy, to change the nature of a lunatic's estate, and also that there is not, when that authority has given its sanction to an investment in land, any personal liability to make good the amount invested as there was in Lord Plymouth's case. But it is contrary to the general principle and course of the administration in lunacy to change the nature of a lunatic's personal estate into realty, unless it is judged, for special reasons, to be for his benefit to do so; and a power to change the nature of the estate, not exercised or intended to be exercised, appears to me to leave the case just as if there had been no such power; and, although there is no personal liability, the alternative remedy remains of "following the land"—that is, of treating the land as in the nature of a security for the money invested, with the chance of loss or increment, to be worked out either by means of a sale, as the proper and necessary means of effectuating the trust declared, or under the powers of a court of equity. The lunatic had, in my opinion, under the orders for these investments, and the trusts declared pursuant thereto, such a personal right transmissible to his executors, which vested in them by virtue of their office. If so, no election by any person beneficially interested after the lunatic's death to take the land *in specie* could displace the right of the Crown to probate duty, or the rights of the creditors or legatees to be paid in a due course of administration. This case, therefore, is governed, in my opinion, by the principle on which the *Attorney-General* v. *Brunning* and the *Attorney-General* v. *Hubbuck* were determined, although it differs *in specie* from those cases. The Court of Appeal seems to have thought that the declarations by which the Lords Justices manifested their intention to prevent the conversion of the lunatic's personal estate into realty might for some purposes be effectual, though not for the purpose of preserving the personal right, so as to vest in his legal personal representatives, and become liable to probate duty. That is not, to my mind, a distinction resting upon satisfactory grounds. If the necessary effect, in equity, of the investment as made, with a declaration of trust in the form which was approved by the court in this, and doubtless in a multitude of other cases, were to make the purchased property real estate of the lunatic, and to extinguish the personal right of his executors or administrators to follow the money invested, and call for its extrication from the land (with or without the assistance of a court of equity); and if the question had been, as was insisted by the learned counsel for the respondents, merely one of conversion of real estate into personal, and not of the preservation, unconverted in equity, of an antc-

cedent personal right, then I could understand that the Lords Justices might have had no jurisdiction to alter the devolution of the lunatic's real estate after his death, and to cause it under any form of trust depending for its equitable effect upon their authority only to pass to executors or administrators instead of heirs (*Fitch* v. *Weber*, 6 Hare, 145). But that is not the view which I take of the present question. I therefore think that the order appealed from ought to be reversed, and the order of the Queen's Bench Division restored, with costs.

Lord Watson concurred.

Lord Fitzgerald.—The committee of the estate of Sir Henry Meux thought that it was advisable that the large accumulations of money standing to the credit of the lunatic's estate should be invested in the purchase of real estate, but could not do so without the sanction of the court, to be obtained on establishing to the satisfaction of the court that it was for the benefit of the lunatic that the investment should be made. The committee entered into a preliminary negotiation with the Earl of Clarendon for the purchase of an estate, and obtained from the court an order of the 27th of April, 1865, authorizing the committee on behalf of the lunatic to employ competent surveyors to ascertain the value of the estate, and to enter into a provisional contract for the purchase subject to the approval of the court. The provisional agreement for purchase was made on the 19th of June, 1865, by which the Earl of Clarendon agreed to sell to Sir Henry Meux, and the said Sir Henry Meux by his committee agreed to purchase, the freehold and inheritance of the estate in question for £225,000. On the ordinary reference the master in lunacy reported that it was fit and proper, and for the benefit of the lunatic, that the provisional contract should be adopted and carried into effect. On that report the ordinary reference was made by the court to settle a proper conveyance to the commitees "in trust for the said Sir Henry Meux, his executors, administrators, and assigns, with a declaration that the said estate is to be considered as part of the personal estate of Sir Henry Meux." In pursuance of that order the conveyance of the 30th of June, 1866, was settled and executed to the committees and their heirs in trust for Sir Henry Meux, his executors, administrators, and assigns, and it was thereby "declared that the manors, advowsons, hereditaments, and premises hereinbefore expressed to be hereby granted, are to all intents and purposes to be considered as part of the personal estate of the said Sir Henry Meux." The purchase was so completed because it was judicially considered that to do so was for the benefit of the lunatic, and it was probably at the time a wise determination having regard to his position, the state of his family, and the provisions of his will made whilst he was of sound mind. We are now dealing with this case for revenue purposes only. As the Inland Revenue Act declares that probate duty is to be paid "on the estate and effects in respect of which probate is to be granted," and as the imposition of a duty of the kind requires clear and unambiguous language which ought not to be extended so as to embrace matters not plainly within the purview and intention of the Legislature, I had led myself to think that the question was, what was the character of this estate at the time of the death of Sir Henry Meux? On that question there could be no real difficulty. It was "land" purchased for his benefit, and remained such to the period of his death, and was not subject to any contract or obligation to treat it otherwise than as land, or to any trust or duty in anyone as against Sir Henry Meux to reconvert that land into money, nor was there any right in anyone to call for its reconversion. It seemed to me therefore that it would be simpler and more in accordance with the sound construction of the statute and with principle to consider this estate for revenue purposes to be what it physically was, "land," and not subject to probate duty as if personal estate, but coming under other Acts for the purposes of duty or taxation as real estate, and liable to taxation or duty in that character. We have had the benefit of two arguments characterized by learning and ability, and I have read the judgment of the noble and learned earl and the judgment of Lord Macnaghten, accompanied by reasons of a weighty and exhaustive character. It seems that for a great length of time a theory has existed in equity, which has been carried into effect in practice, that an investment of the money of a lunatic in the purchase of land under such conditions as are now before us does not change its character or its destination. It remains "money" for all intents and purposes and unchanged in character during the continuance of the lunacy, and up to and at the time of the death of the lunatic if he has had no lucid interval. I think it would be unsafe and unwise to shake a doctrine and a practice so long established and acted on, and on that ground I concur in the conclusion at which the noble and learned earl has arrived.

Lord Macnaghten.—On the death of the late Sir Henry Meux, a lunatic, the Crown claimed probate duty in respect of the value of a freehold estate in Wiltshire, known as the Wootton Bassett Estate, which had been purchased during the lunacy, under the authority of the court, out of the lunatic's personal estate. The Divisional Court allowed the claim. The Court of Appeal decided the other way. From that decision the Crown has appealed. It was admitted by the learned counsel for the respondents that whatever is actually or constructively personal estate—whatever is personal estate either at law or in equity—becomes on the death of the owner subject to probate duty. This admission reduces the case to the simple question, what was the true character of the Wootton Bassett Estate at the death of Sir Henry Meux? To answer that question it is necessary to consider the circumstances under which the estate was purchased, and the terms and conditions on which the purchase was sanctioned by the court. Sir Henry Meux was found a lunatic in 1858. He had been married in 1856. His wife was alive, and there was one child of the marriage, the present baronet, who is a respondent. Sir Henry Meux was a person of considerable wealth, and in receipt of a large income from the well-known brewery business in which he was engaged. He continued to be of unsound mind from the date of the inquisition until his death, which occurred in 1883, and during all that time his estate of course was under the care of the court. The principles on which the court acts in dealing with the property of lunatics under its care are not open to question. The leading principle, the paramount consideration, is the interest of the lunatic. Consistently with that principle it is settled that, in the ordinary course of managing a lunatic's estate, the court pays no regard to the interests or expectations of those who may come after; but it is equally well settled that, in matters outside the ordinary course of management, it is the duty of the court, so far as may be possible, not to alter the character of the lunatic's property, or to interfere with any rights of succession. This is no new doctrine. In substance it is to be found in the statute *De Prerogativâ Regis*, which has been construed as impliedly forbidding the investment of a lunatic's personal estate in the purchase of land: *Awdley* v. *Awdley*, 2 Vern. 192. Lord Hardwicke lays down the rule on more than one occasion. In *Ex parte Annandale* he says: "In cases of lunacy the first care of the court is the maintenance of the lunatic, and after that it is a rule never departed from to vary or change the property of the

lunatic so as to effect any alteration as to the succession to it." In 1772, in a case which was much considered, *Ex parte Grimstone*, Lord Bathurst expresses himself as follows: "It was said to be a general rule that the court will not alter the lunatic's property to the prejudice of his successor. Rightly understood, it is true. The court will not buy or sell land for him; but in the management of the estate the governing principle is the interest of the lunatic." In 1793, in *Oxenden* v. *Lord Compton*, Lord Loughborough makes the following comments on Lord Bathurst's judgment in *Ex parte Grimstone*: "If the Chancellor was continually looking to the right and left and weighing the probable interest of the representatives, the interest of the lunatic would be committed in favour of those who have no immediate interest, and whose contingent interests are left to the ordinary course of events. Therefore the Chancellor is to administer the estate *tanquam bonus pater familias*, making every advantage fairly to increase and improve it without engaging in risks and dangerous adventures, for those are not fit enterprizes. But whatever leads towards ordinary improvement it is strictly the duty of the administrator to do, considering only the immediate interest of the proprietor of the estate. But when I am laying down this so generally I must be understood to do it with this guard, that great care must be taken that nothing extraordinary is to be attempted, as estates to be bought or interests to be disposed of. Alteration of property is, as far as possible, to be avoided consistently with the idea of preserving the interest of the proprietor." In *In re Badcock* Lord Cottenham, while declining to listen to objections on the part of next of kin, in a case of ordinary repairs, observes that, "if the money were laid out in the purchase of land, or what would amount to the same thing, in building a farmhouse, it would be right that the sum so laid out should retain its character of personalty." If the rule which guards against alteration in the character of a lunatic's property should seem to require authority over and above that derived from the statute of Edward II., and the long-continued practice of the court, such authority may, I think, be found in the views of the Legislature as declared in the Lunacy Regulation Act, 1853, and the earlier enactments embodied in that statute. The Act of 1853 provides (section 118) for raising money for certain purposes by sale or mortgage of the lunatic's property. It provides (section 119) that if the money is raised by sale or mortgage of the lunatic's "land" (which comprehends all property other than "stock" as defined by the Act), the lunatic and his heirs, next of kin, devisees, legatees, executors, administrators, and assigns shall have the like interest in any surplus moneys as he or they would have had in the property if no sale or mortgage had been made, and that "the surplus moneys shall be of the same nature and character" as the estate sold or mortgaged. The Act also provides (section 118) for charging the lunatic's land with the expenses of permanent improvements if it appears to be for the lunatic's benefit, and enacts that if the money required is advanced out of the lunatic's general property it is to be secured "to some person as a trustee for him as part of his personal estate." Indeed, the principle is of wider application still. For example, it extends to cases where private property is taken for *quasi*-public purposes under the authority of Parliament. To quote James, L.J.'s observations in *In re Barker*, 29 W. R. 873, 17 Ch. D. 241, "Where property is taken compulsorily from any person who is not *sui juris*, and is not competent to make the subsequent alteration in the disposition or the devolution of that property which would naturally follow such change, the presumption is, if the words in the Act of Parliament really admit of that interpretation, that the Legislature did not intend to interfere with any legal rights or legitimate expectations of any persons whatsoever." That, as the Lord Justice says, is "a broad, general principle." In dealing with the property of lunatics, in late years at any rate, and since the Act of 1853, the court has given effect to the rule in cases which at first sight appear to lie rather on the line, and might possibly have been dealt with differently but for the Act. I will only refer to two instances. In *In re Leeming*, 9 W. R. 403, 3 De G. F. & J. 43, a mortgage created by an ancestor of the lunatic was paid off out of the lunatic's personal estate. The mortgage was kept alive, and on the death of the lunatic, intestate, it was held that the sum expended out of personal estate in paying off the mortgage ought to be raised out of the real estate comprised in the mortgage and dealt with as personal estate. In *In re Ryder*, 30 W. R. 417, 20 Ch. D. 514, the court sanctioned the enfranchisement of a copyhold estate belonging to a lunatic, but, as the descent of copyholds in the manor was different from the descent of freeholds, the court made a declaration for the purpose of carrying the equitable interest in the enfranchised copyholds, in the event of the lunatic dying intestate, to the persons who would have taken the property if it had not been enfranchised. In making the order the late Master of the Rolls, referring, of course, to cases outside the ordinary course of management, observed that it was, "a settled principle in lunacy that the court would not alter the rights of succession to the lunatic's property." I have dwelt at some length on this part of the case, because it seems to me that, if the rule is established, the contention of the Crown must prevail, unless it can be shown that there was some oversight or blunder on the part of the court when it sanctioned the purchase of the Wootton Bassett Estate. Now, let me invite your lordships' attention to what occurred on the occasion of the purchase. It appears that in 1866 the Wootton Bassett Estate was for sale. It was considered a very desirable property. The price was over £200,000, but there were ample funds resulting from the accumulation of income from the brewery business standing to the credit of the lunacy. Under these circumstances the committees of the lunatic's estate presented a petition asking for leave to buy the property on behalf of the lunatic. It was not disputed at your lordships' bar that the court had power to sanction the purchase. Whatever the origin of the power may have been, it is too late to dispute its existence. But unquestionably such a purchase was altogether outside the ordinary course of administration of a lunatic's estate, and, therefore, as it seems to me, if the court thought fit to sanction the purchase, it was bound to take care that the character of the lunatic's property was not altered. Knight Bruce and Turner, L.JJ., sitting in Lunacy, approved the purchase and declared it to be for the benefit of the lunatic, proceeding, I presume, on the footing that the proposed expenditure was an outlay which a person of sound mind in the pecuniary position of Sir Henry Meux might not unnaturally consider desirable in the interests of his family. At the same time they laid down the conditions on which the purchase was sanctioned, and they prescribed the form of the conveyance. The property was to be conveyed to trustees "upon trust for Sir Henry Meux, his executors, administrators, and assigns," with a declaration that the estate was "to be considered as part of the personal estate of Sir Henry Meux." If it had not been for the judgment of the Court of Appeal I should have thought the meaning and effect of the transaction clear. The commissioners had no power of themselves to lay out the lunatic's personal estate in land. "It was not in the power of any committee," as the decree in *Awdley* v. *Awdley* expressly declared, "to alter the nature of a lunatic's estate." The purchase could only be made with the

sanction of the court. In giving its sanction it was surely competent for the court to impose such terms, not inconsistent with law, as it thought right. Terms so imposed are, I think, to be treated as binding and effectual. I read the order as authorizing the proposed purchase on the terms that the money to be laid out in the purchase was to retain its character, and that the property was to be conveyed to trustees upon trust to be held and applied as part of the lunatic's personal estate, which the court then and there declared it to be. The language of the order seems to me to be framed for the purpose of impressing upon the property to be purchased the character of personal estate from the moment of the purchase during the lunatic's lifetime as well as after his death. The conveyance carries out the order of the court in terms. It recites the order. It conveys the property precisely as the court directed it to be conveyed. It repeats the declaration which the court prescribed, and which is none the less the declaration of the court because it is embodied in the conveyance. A trust for sale would have made the conveyance no better and no worse. Practical effect under the circumstances it could have none. I do not see why a sort of magical effect should be attributed to it. The court is guided by the same principles and speaks in the same language, whether it is sitting in chancery or in lunacy. The origin of the Crown having the custody of idiots and lunatics is, as Lord Bathurst said in *Ex parte Grimstone*, "more matter of curiosity than of use." He adds that it certainly existed before the statute *De Prerogativâ Regis*, and that "after custody is granted the Great Seal acts in matters relative to the lunatic not under the sign-manual, but by virtue of its general power as keeper of the King's conscience." The observations of Lord Redesdale in *In re Fitzgerald*, 2 Sch. & Lef. 432, are to the same effect. Now, the order of the Lord Justices was not a novel experiment in lunacy administration, nor was it couched in language unfamiliar to courts of equity. In *Simon Degge's case*, 4 Bro. C. C. 235n, it appears that the lunatic was entitled to a freehold lease held for three lives of which the lunatic was ultimately the survivor. On the dropping of each of the other two lives, the lease was renewed under the order of the court, and the fines and charges were paid out of the lunatic's personal estate. On each occasion it was ordered, in the one case by Lord Hardwicke, in the other by Lord Northington, that the interest in the renewed lease during the life added was to be considered as part of the lunatic's personal estate for the benefit of his next of kin. Those orders were commented on by Sir Edward Sugden in *Leitrim* v. *Enery*, 6 Ir. Eq. Rep. 357, and certainly he appears to treat them as well-founded and effectual for the purpose of preserving the character of the lunatic's estate. In Elmer's Practice in Lunacy (6th ed. 206) a precedent is given for an order sanctioning the purchase of a house for the residence of a lunatic. It orders "that the property to be so purchased be deemed and taken to be part of the personal estate of the lunatic." It directs that the conveyance be made to trustees "upon trust for the lunatic, his executors, administrators, and assigns." The order, it appears, was made on the 7th of December, 1860, by Knight Bruce and Turner, L.JJ. It is obvious from the very nature of the case that there it must have been intended to preserve the character of the lunatic's property as personal estate. And so I think this order has an important bearing on the question before your lordships, whether it was specially framed by the learned judges who pronounced it, or taken, as is more probable, from an earlier precedent. Turning now to the practice in the Court of Chancery, we find in Seton on Decrees (3rd ed., vol. 2, p. 692) a precedent on precisely the same lines, which was in use in the Court of Chancery for some hundred years: "Let the estates mentioned in, &c., be conveyed to trustees to be approved, &c., in trust for the plaintiff (infant), his executors, administrators, and assigns. And let the conveyances be settled by the (judge). And declare that such trustees are to stand seised of the said estates in trust for the plaintiff, his executors, administrators, and assigns, as part of his personal estate. And in case the plaintiff shall live to attain the age of twenty-one years, then let the said trustees convey and assure the said estates to the plaintiff, his heirs and assigns for ever: *Bridges* v. *Bridges*, M. R., 30th of July, 1752, A. 559." It is the form of order employed before the Wills Act, when real estate was purchased with personalty belonging to an infant. The object was to preserve the character of the property, and thus to enable the owner, though an infant, notwithstanding the outward form of the property, to deal with it by will. That precedent had the sanction of Lord Eldon, and seems to have been uniformly adopted by him when the occasion required it: see *Ashburton* v. *Ashburton*; *Ware* v. *Polhill*, 11 Ves. 278. The efficacy of that precedent was never questioned. If such an order was efficacious in the case of an infant, why is it futile, or less efficacious, in the case of a lunatic? The result of the judgment of the Court of Appeal, if I recollect it rightly, seems to be this: The Wootton Bassett Estate, though bought with the lunatic's personalty, was land, and nothing but land; real, not personal estate; the equitable fee vested in Sir Henry Meux, either under the limitations of the conveyance, or through a resulting trust; the declaration that the property was to be considered part of the lunatic's personal estate was not a matter which could take effect during his lifetime; but in the event of his dying intestate, and in the event of his heir and next of kin being different persons, the estate was not to descend according to the ordinary rules of real property; it was to "follow the route taken by the personal estate," and devolve on the next of kin. That I apprehend is an impossible disposition. Real estate must descend according to the ordinary rules of real property. You cannot give real estate in fee, and say that on the death of the owner intestate it shall go to his next of kin. I venture to think that the court has no power to make such a disposition. So far as I am aware it has never attempted to do anything of the kind. Certainly I should hesitate to attribute such an experiment to Knight Bruce and Turner, L.JJ. In *Holmes* v. *Godson*, 4 W. R. 415, 8 De G. M. & G. 152, it happened that they themselves had to consider a very similar disposition. In a most learned and exhaustive judgment, Turner, L.J., sums up the law in the following words:—"The law has said that, if a man dies intestate, the real estate shall go to the heir and the personal estate to the next of kin, and any disposition which tends to contravene that disposition which the law would make is against the policy of law, and therefore void." It may be observed that, if the judgment of the Court of Appeal is right, the Lords Justices, in sanctioning the purchase of the Wootton Bassett Estate, did that which might have led to a practical difficulty. In the opinion of the Court of Appeal, the Lords Justices converted the lunatic's personal estate into real estate; they then had no power to reconvert it; thenceforward the Court in Lunacy had only certain limited powers of sale over the property under the Act of 1853. Now, if that were so, and if any misfortune had happened to the brewery business, and the money invested in the Wootton Bassett Estate had been wanted for the purpose of the business, it would have been found that the court had tied its own hands, and that, while professing to act for the benefit of the lunatic, it had put a fetter upon his property which it would have been difficult, if not impossible, to remove. On the other hand, if the land were impressed with the character of personal estate, actual conversion,

if required, would always be in the power of the court. Stress was laid on the power of sale and exchange contained in the conveyance. I am at a loss to see how that can affect the question. It is a usual power. So long as the property retained the form of real estate it might have been extremely useful. But it does not show that the real character of the property was the same as its outward form. It was said that the Lords Justices had the lunatic's will before them when they sanctioned the purchase, and that the will gave everything to the only child. True. But he might have died in the lunatic's lifetime, or he might have survived the lunatic and died under age. In view of either event, and I may add in view of the testator's directions as to the surplus income of his estate, it seems to me that it was specially incumbent on the court to preserve the character of the lunatic's property. In the course of the argument some faint reliance was placed on the case of *Matson* v. *Swift* (8 Beav. 368). In that case there was equitable conversion during the testator's lifetime; actual conversion after his death. The proceeds were in court. The Crown claimed probate duty. The argument on behalf of the next of kin, and the decision of the court, proceeded on the ground that the right to probate duty depended on the actual form and condition of the property at the death; that the Crown was not entitled to enforce, for fiscal purposes, equities between private parties; and that real estate, though converted out and out, was not within the jurisdiction of the ordinary, nor part of the "estate and effects, for or in respect of which probate" is granted under the Act of George III. That view was perfectly intelligible. But after the decision of this House in *Attorney-General* v. *Brunning*, it was thought to be inconsistent with the grounds on which that case was decided, and it seems to have been finally exploded by the reasoning of James, L.J., then Vice-Chancellor, in *Forbes* v. *Stevens*, 18 W. R. 686, L. R. 10 Eq. 178, which met with general acceptance, and has been followed in *Attorney-General* v. *Lomas*, 22 W. R. 188, L. R. 9 Ex. 29, and *Attorney-General* v. *Hubbuck*, both of which cases relate to probate duty. In connection with this point it is to be observed that, although the Probate Court never recognized the doctrine of equitable conversion, a different view is now taken in the Probate Division. In *In the Goods of Gunn*, 33 W. R. 169, 9 P. D. 242, the President granted probate of a married woman's will or appointment, dealing only with real estate, which had been impressed with the character of personal estate, and he concluded his judgment in these words:—"I am of opinion that, where freehold property has had impressed upon it a changed character by reason of the doctrine of equitable conversion, it is to be treated as personalty, and probate duty is payable, and it therefore follows that probate must be granted. Probate must issue." Under these circumstances, it seems to me that no reliance can be placed upon *Matson* v. *Swift*, or, I may add, upon any of the glosses on that case, which it is difficult, I think, to understand, and still more difficult to reconcile with the facts as they appear in Mr. Beavan's report. It was not easy to apprehend the precise view which the learned counsel for the respondents took of the order of the Lords Justices, and the conveyance of the Wootton Bassett Estate. One thing, however, was clear: they did not accept the view of the Court of Appeal in its integrity. They admitted that the declaration that the property was to be considered part of the lunatic's personal estate for what it was worth applied, or might apply, for the purposes of administration during the lunatic's life. They did not conceal their opinion that, in the event of the lunatic dying intestate, and his real estate and personal estate becoming separated, the heir would have had a better claim to the Wotton Bassett Estate than the next of kin. So that on two points, one of which goes to the root of the decision of the Court of Appeal, the counsel for the respondents were at odds with the judgments they attempted to support. It seemed to me that, if they had not been hampered by those judgments in their favour, they would have preferred to argue, as they appear to have argued before the Court of Appeal, that the declaration of the Lords Justices had no effect at all. And rightly. The truth is, you must either give the order and conveyance their full meaning and effect, or you must hold that the declaration that the property was to be considered personal estate had no force or operation whatever, and that the order of the Lords Justices was a blunder. For the reasons I have given I decline to adopt the latter alternative. I think it was the duty of the Court in Lunacy to preserve the character of the lunatic's property. I think the court plainly intended to do so. I think the order and conveyance were effectual for the purpose. And therefore I am of opinion that the order of the Court of Appeal must be reversed.

Order appealed from reversed; decree of the Queen's Bench Division restored; respondents to pay to appellant the costs both in the House of Lords and below; cause remitted to the Queen's Bench Division.

Solicitor for the appellant, *The Solicitor of Inland Revenue.*

Solicitors for the respondents, *Hunters, Gwathin, & Haynes; Baker, Folder, & Upperton.*

From C. A. (England). Nov. 22, 24.

Stonor v. Fowle. (a.)

Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 5—*Judgment summons—Commitment order—Direction to suspend issue of warrant during payment of instalments.*

Judgment was recovered in a county court against a defendant, who was ordered to pay £20 in a fortnight. Upon default in payment, a judgment summons was taken out and an order made to commit the defendant to prison for ten days. The judge, however, directed that the warrant should not issue if the defendant paid instalments of £4 a month.

Held, that the order was made in respect of the past default in payment of £20, and not in anticipation of a default in payment of £4, and that the judge had jurisdiction to make the order under section 5 of the Debtors Act, 1869.

Decision of the Court of Appeal (*reported* 35 *W. R.* 130, 18 *Q. B. D.* 213) *reversed.*

This was an appeal from a decision of the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.), affirming a decision of the Queen's Bench Division (Lord Coleridge, C.J., and Manisty, J.).

On the 7th of January, in an action of *Bowen* v. *Fowle*, the plaintiff recovered judgment against the defendant for £57 2s. 6d. debt and costs, and the defendant was ordered to pay by two instalments—£20 on the 21st of January, and the balance on the 21st of February. Default was made in the payment of the first instalment, and a judgment summons was served on the defendant. On the 4th of March evidence was given that the defendant had had means to pay the instalment of £20, and the judge indorsed the summons as follows:—"Commitment, ten days. Suspend warrant £4 monthly, first payment in fourteen days." The note made by the registrar for his own use ran thus—"Fourteen days. £4 a month." The order was entered in the Commitment Summons Book by the registrar in

(a.) Reported by C. G. Napier Tholloper, Esq., Barrister-at-Law.

the following terms:—"Commitment ten days; suspended fourteen days. Means."

The two first instalments only were paid.

On the 18th of June, in answer to an application by the defendant's solicitor for a copy of the order of the 4th of March, the registrar replied as follows:—"Order made 4th March, 1886: £4 to be paid 18th March, 1886, and each succeeding calendar month. If not so paid warrant of commitment might be issued. The May payment is overdue, the June payment is due to-day." This reply was stamped with the seal of the county court.

An order of commitment was afterwards drawn up and issued. This order was dated the 4th of November, and was in respect of the non-payment of the balance of £20 and 16s. costs, after deducting the two instalments of £4 each which had been paid.

A rule *nisi* for the issue of a writ of prohibition, directed to the county court judge and the plaintiff, was made absolute by the Divisional Court, and the decision was affirmed by the Court of Appeal.

The county court judge appealed to the House of Lords.

Nov. 22, 24.—*Sir R. E. Webster, A.G.*, and *R. S. Wright* (*Sir E. Clarke, S.G.*, with them), for the appellant.—The order for commitment was in respect of the default in payment of the instalment of £20. The direction as to £4 a month was only to the registrar, and was not part of the order. The Commitment Summons Book shows the true order. The registrar had no authority to write the letter he did.

They referred to *Kemp* v. *Neville*, 10 C. B. N. S. 523, 9 W. R. C. L. Dig. 84; *Sintzenick* v. *Lucas*, 1 Esp. 43; *Green* v. *Alston*, 1 F. & F. 12; *Andrews* v. *Marris*, 1 Q. B. 3; *Ex parte Kinning*, 4 C. B. 507; *Kinning's case*, 10 Q. B. 730; *Ex parte O'Neill*, 10 C. B. 57; *Abley* v. *Dale*, 10 C. B. 62; *Dews* v. *Riley*, 11 C. B. 434; *Davies* v. *Fletcher*, 1 W. R. 367, 2 E. & B. 271; *Ex parte Koster*, 33 W. R. 606, 14 Q. B. D. 597; *In re Debtors Act*, 22 L. T. N. S. 666; *Marris* v. *Ingram*, 28 W. R. 434, 13 Ch. D. 338.

Sir H. James, Q.C., and *Wallace* (*Willis, Q.C.*, with them), for the respondent.—The order was an anticipatory one; it was an order for payment by instalments substituted for the original order to pay £20. It is clearly bad.

Sir R. E. Webster replied.

Nov. 24.—Lord Halsbury, C.—In this case I desire to say at once that if I understood the facts to be as assumed by the Lord Chief Justice and by the Court of Appeal I should entirely agree with the law which they have laid down in their judgments.

The two different propositions which have been suggested as guiding the interpretation of the statute are as distinct as anything can be. The Debtors Act, in that respect giving the jurisdiction to the judges both of the High Court and of the county court, although exercised under different conditions, has prescribed that there shall be in substance an abolition of imprisonment for debt, but has also provided that if a debtor having had the means, or having the means at the time when the matter comes for adjudication before either the judge of the High Court or the county court judge, wilfully refuses to pay or has improperly spent the money which he had after the date of the judgment, and has not applied it as he should have done in honesty for the purpose of satisfying the creditor's claim, there shall then be a jurisdiction, exercised by whichever judge exercises the jurisdiction, of sending him to prison, and that that sending of him to prison shall be a punishment to him for the offence which upon that hypothesis he has already committed, inasmuch as the Act specially provides that that imprisonment shall not be in satisfaction of the debt—it is an imprisonment for the offence which he has already committed.

In this particular case there are two views suggested as being, the one or the other, the true view of the facts. A certain debt was due by this debtor, and on the 4th of March, the debtor having been at a previous court ordered to pay £20, the matter is brought before the judge. It is suggested on the one side that what happened was that the learned judge made an inquiry into the means of the debtor and ascertained on that 4th of March that he either had had, or had at that date (it is immaterial to inquire which), means whereby that debt might have been discharged, and that having adjudicated that he had or had had that £20 he had refused or neglected to pay it, and that thereupon the learned judge directed an order for his committal for ten days for the offence which at that date—namely, the 4th of March—was already consummate, but that he gave a direction to the registrar of the court in consequence of something which passed between the plaintiff and the defendant in the cause that, although that warrant of commitment might then and there have issued because the offence had already been committed, yet it might be suspended and not put into execution if the debtor paid £4 a month in discharge of the debt which he had so owed and had so wilfully refused or neglected to pay.

If that is the view of the facts it does not appear to be doubted that that was within the legal competency of the judge. What happened afterwards, whether the man had means or had not, whether he did comply with the conditions into which he had entered or not, could in logic or good sense have no relation to the offence which on the 4th of March was already consummate. But the extreme rigour of the law might be relaxed in his case if, instead of continuing his refusal or neglect to pay, he had complied with what the plaintiff in the cause was satisfied with—namely, the gradual wiping off of the debt by the payment of £4 a month. And I do not think that any one observation of the learned judges in the courts below, with the single exception, perhaps, of Lopes, L.J., seems to throw any doubt upon such a course being legal. Lopes, L.J., however, rather indicates that it might be a sort of circuitous evasion of the Act of Parliament.

On the other hand, it is suggested that the facts of the case were these: that the £20 being due the parties appeared before the learned judge, and that the learned judge made no order for commitment for the non-payment of the £20, because as the whole thing took place on the 4th of March I suppose it would be too unreasonable and absurd to suppose that he made two contradictory orders at the same time—that what he did was to make a substituted order with regard to the £20 with which the previous order had dealt, and to reduce the amount payable to instalments of £4 a month. The question of fact for your lordships to determine upon those materials resolves itself into this question, What was it that the learned judge did at that date, and was there any substituted order made?

I have no doubt that the learned judge would, under the Debtors Act, have the power and authority to make such an order had he been so minded. But the answer appears to me to be overwhelmingly conclusive. There is not a fragment of evidence of any such order having been made at all. On the contrary, in the form which is relied upon in argument by the respondent, "I hereby certify that the above is a true copy of an entry in the summonses for commitment, interpleader, and minute of orders thereon," I find that every one of the entries included in that certificate is absolutely inconsistent with the existence of any such order as it is suggested to your lordships was made. I find that the amount for which the summons was issued was £20. I find that the order is not an order for £4, with the

additional direction that if not paid the person is to be committed, but I find "Commitment ten days: suspended fourteen days." What does that mean? If the order which is now suggested was made—namely, that the instalment was altered from £20 to £4—and that that was to be paid in future, how could there be any commitment for ten days? There was no default made, and the commitment for ten days would have been totally inappropriate, for the judge could not possibly anticipate that the order would not be obeyed.

When one looks at the order for commitment which was ultimately issued, it appears to be very clear in its terms. Those terms are "Whereas the defendant hath made default in payment of" What? "Of £20 16s.," the odd 16s. being the cost of the hearing I suppose; "And whereas a summons was at the instance of the plaintiff duly issued out of this court by which the defendant was required to appear personally at this court on the 4th day of March, 1886, to be examined on oath touching the means he had then, or had had since the date of the judgment, to satisfy the sum then due and payable in pursuance of the judgment, and to show cause why he should not be committed to prison for such default"; "And whereas at the hearing of the said summons it has now been proved to the satisfaction of the court that the defendant now has [or has had] since the date of the judgment the means to pay the sum then due and payable in pursuance of the judgment, and has refused [or neglected] to pay the same, and the defendant has shown no cause why he should not be committed to prison; now, therefore, it is ordered that for such default as aforesaid," for the non-payment of the £20 which he had the means of paying on the 4th of March, "the defendant shall be committed to prison for ten days."

Every document in the cause appears to me to bear the same meaning. Even the document upon which so much reliance has been placed, the note made by the registrar upon a scrap of paper, seems to be in accordance with the note of the learned judge. What I should understand that to mean was that the order had then been made by the judge for commitment for ten days, but that it was to be suspended for fourteen days, and that the condition upon which the warrant was to lie in the office and not to be given out to the high bailiff for execution was the payment of £4.

If that is the true view of the matter what is the error, what is the mischief, what is the objection on the part of the defendant of which he has a right to complain? He is not being adjudicated, as Sir Henry James put it, in default for his not having the £4 at the end of the fourteen days, but what he is adjudicated as guilty of contempt for, and what he is sent to prison for, is what the judge has found as a fact upon the judicial evidence before him—namely, that on the 4th of March he had the £20 and did not pay it. I cannot help thinking that some confusion has been created by the ambiguous use of the word "order" without describing what order, and of the word "direction" without describing what direction. This was an order of commitment for ten days for the non-payment of the £20 on the 4th of March, and has no relation to the payment or the non-payment of the £4 at any subsequent date.

Under these circumstances it seems to me that the learned judge had full jurisdiction to make the order which in fact I find he did make, and, if so, of course this writ of prohibition cannot be sustained.

I desire to say one word as to the letter of the solicitor on the one side and the reply of the person professing to act under the orders of the court on the other. It seems to me to have been an irregular proceeding from beginning to end. The solicitor had no right to write such a letter, the registrar had no right to make any such reply. The registrar was thereby taking upon himself to give an exposition in contradiction of what the judge's order really was; and I cannot help thinking that that letter bears upon the face of it a sort of invitation to the registrar to fall into the trap which, as it appears to me, he has fallen into. I only desire to say upon that matter that I should regard it as certainly a novelty in our jurisprudence if the regular order of a learned judge could be affected or qualified or altered in the slightest degree by what some subordinate officer of the court thought proper to say in writing about it, even though in so doing he committed this additional irregularity that to that private correspondence he thought proper to affix the seal of the court.

For these reasons I move that the judgment of the court below be reversed, and that this appeal be allowed, with costs.

Lord Watson.—I shall content myself with saying that I entirely concur in the judgment which has been proposed by the Lord Chancellor, and also in the reasons which have been assigned for it by his lordship.

Lord Bramwell.—I am of the same opinion and for the same reasons. I think a county court judge would do wrong if, merely because both parties were willing to give time, as was done here, he should adjudicate that the man had means and had made default. At the same time if the whole conduct of the parties before him was such as to recognize that the man had had means, the county court judge might well adjudicate without any specific proof of it. I think it is important to bear in mind that an adjudication of committal ought only to take place where there has been a wilful default in payment; because in truth this power of committal is not an imprisonment for debt, it is an imprisonment for past dishonesty, together with the prospect of the plaintiff getting his money.

There is one remark which I should like to make about imprisonment under the Debtors Act. It has nothing to do with the particular case, but it might be useful to mention it. A learned county court judge once told me that at first he used to make orders of committal for a short time, and he found that the people went to prison. He then lengthened the period and he found that fewer people went to prison; and he found that the longer the period for which he committed people to prison for not paying, the shorter was the total amount of imprisonment suffered by debtors, because when they were committed for the whole six weeks they moved heaven and earth among their friends to get the funds and pay; whereas if the term was a short one they went to prison and underwent the punishment. That might possibly be useful as a guide. I am not speaking of my own experience, but I only say what I was told.

To come back to the matter in hand, I agree that for the reasons which have been given we ought to decide that there was here a finding by the county court judge that the man had had the means, and had made default in paying the amount, and an adjudication that for that default he should go to prison for ten days, but there was a direction at the same time that the execution of that order should be respited or delayed, and that it should not be executed at all if payment were made according to the instalments which were mentioned.

Lord Herschell.—I quite agree. I am not surprised altogether at the view taken by the learned judges in the court below of the facts, considering the way in which the case was presented to them and the admissions or statements which were made by the learned counsel who appeared on behalf of the county court judge. I think that we have probably an advantage which they had not with regard to arriving at a correct view of the facts of the case.

I should be extremely sorry to be supposed to throw any doubt upon the view which was expressed by the

learned Master of the Rolls in conformity with that which he said had been entertained by Wills, J., and had been acted upon by the judges; but I think that in the present case there was an inquiry as to the means of the debtor; there was the conclusion that he was in default; there was an order for his commitment in respect of that default; and all that was done further was in mercy to the person declared liable to suffer imprisonment, he was allowed an opportunity of escaping from that liability provided he made certain payments. Now I do not think it is material how the amount of those payments was arrived at, whether it was according to what the judge thought he would be able to pay, which was perfectly consistent with his having been in default in respect of past non-payment, or whether it was according to what the plaintiff was willing to take. I do not think that we need enter into those motives at all, because I do not think that it was in respect of the non-payment of that sum that any proceedings were about to be taken to cause the debtor to suffer imprisonment which led to this application for a prohibition. But I desire to say this with regard especially to what was urged by Mr. Wallace, that I think a judge would very much neglect his duty if, in order to save himself the trouble of inquiring whether there was default, and whether the man had possessed the means of making payment of the instalments down to that time ordered, he were to issue a warrant of commitment with a stipulation for suspension if some smaller sums were paid, without having really arrived at the conclusion that there had been default. I think that that would be a most irregular and improper proceeding, and one which might very well be called in question. I think that it would be an abuse. But if there has been really in good faith a determination and adjudication of a past default, then I cannot see that the case is really open to the objections which have been raised.

Lord MACNAGHTEN.—I concur.

Order appealed from reversed; the respondent to pay to the appellant the costs of the appeal to this House.

Solicitor for the appellant, *Solicitor to the Treasury.*

Solicitor for the respondent, *E. A. Fuller.*

Court of Appeal.

From Chan. Div. Feb. 3, 4, 7, 9.

BADELEY *v.* CONSOLIDATED BANK. (*a.*)

Partnership—Loan to person engaged in undertaking—Participation in profits—Mortgage to secure loan—Test of partnership—Intention.

A loan was made to a person engaged in an undertaking at a rate of interest varying with the profits arising out of the undertaking, the amount of the loan and the interest being secured by a mortgage to the lender of the borrower's interest in the undertaking. The borrower became bankrupt.

Held, reversing Stirling, J. (35 *W. R.* 106, 34 *Ch. D.* 536), *that, notwithstanding participation in profits, no partnership was created between the lender and the borrower, but that the transaction was a* bonâ fide *loan.*

In deciding the question of partnership or no partnership in such cases, the court will not base its decisions upon isolated clauses in the agreement, nor upon such circumstances as participation in profits, but will look at the whole agreement. If it appear that, under the agreement as a whole, the business was a joint business, each party being concerned as principal and as agent for the other, the agreement will be treated as constituting a partnership.

Mollwo, March, & Co. *v.* Court of Wards, *L. R.* 4 *P. C.* 435, 21 *W. R. Dig.* 167, *and* Ex parte Tennant, 25 *W. R.* 854, 6 *Ch. D.* 303, *followed.*

This was an appeal from a decision of Stirling, J. (reported 35 W. R. 106, 34 Ch. D. 536).

The principal question in the case, and the only one calling for a report here, was as to whether certain dealings between the plaintiff, John Badeley, and one Joseph Melland Smith, and particularly an indenture of mortgage dated the 4th of July, 1878, constituted a partnership between them. This mortgage and the facts of the case, so far as may be necessary for the present report, are set out in the report in the court below (35 W. R. 106).

Stirling, J., held that a partnership was created between the plaintiff and Smith, and held that the plaintiff was liable on that footing. The plaintiff appealed.

The arguments used and authorities cited sufficiently appear in the judgments.

Rigby, Q.C., Swinfen Eady, and *Eve,* for the appellant.

Cozens-Hardy, Q.C., and *Chadwyck Healey,* for the executors of one Haworth, who, by a counter-claim, had raised the question of a partnership having been established between the plaintiff and Smith.

Sir H. Davey, Q.C., Barber, Q.C., S. Hall, Phipson Beale, and *Tanner,* for the other defendants.

COTTON, L.J.—This case turns upon one important point—namely, as to whether there was or was not a partnership between the plaintiff and Smith. On this point the judgment of Stirling, J., was unfavourable to the plaintiff. With that judgment I do not agree. The principle upon which this case should in my opinion be decided is found in the cases of *Ex parte Tennant,* 25 W. R. 854, 6 Ch. D. 303, and *Mollwo, March, & Co.* v. *Court of Wards,* 4 P. C. at p. 435. What is the law applicable to such cases? It is thus stated in the judgment in *Mollwo, March, & Co.* v. *Court of Wards,* as quoted by Jessel, M.R., in *Pooley* v. *Driver,* 25 W. R. p. 163, 5 Ch. D., p. 474: "If cases should occur where any persons, under the guise of such an arrangement," that is, the guise of an arrangement as creditor and debtor, "are really trading as principals, and putting forward, as ostensible traders, others who are really their agents, they must not hope by such devices to escape liability; for the law in cases of this kind will look at the body and substance of the arrangements, and fasten responsibility on the parties according to their true and real character." And in *Ex parte Tennant,* where the principle applicable was the same as that which governs the present case, I thus expressed myself: "Now as to participation in profits, there is, no doubt, a clause in the agreement which for the purpose of my judgment I will assume to amount to a participation in profits. . . . And I take it the law is this, that participation in profits is not now conclusive evidence of the existence of a partnership, but it is one of the circumstances, and a very strong one, which are to be taken into consideration for the purpose of seeing whether or not a partnership exists, that is to say, whether there was a joint business, or, putting it in another way, whether the parties were carrying on the business as principals and as agents for each other, whether it is a joint business, or the business of one only. Now let us see what is said by Lord Blackburn in *Bullen* v. *Sharp,* 14 W. R. 338, L. R. 1 C. P. 86, 112: 'I think that the *ratio decidendi* of *Cox* v. *Hickman,* 8 H. L. C. 268, is that the proposition laid down in *Waugh*

(*a.*) Reported by C. HERBERT BROWN, Esq., Barrister-at-Law.

v. *Corver*, 2 H. Bl. 235—viz. that the participation in the profits of a business does of itself by operation of law constitute a partnership—is not a correct statement of the law of England' (it has not been overruled, but it is qualified certainly) 'but that the true question is, as stated by Lord Cranworth, whether the trade is carried on on behalf of the person sought to be charged as a partner, the participation in the profits being a most important element in determining that question, but not being in itself decisive; the test being, in the language of Lord Wensleydale, whether it is such a participation of profits as to constitute the relation of principal and agent between the person taking the profits and those actually carrying on the business.' Certainly the Master of the Rolls does not in any way dissent from the proposition of law so laid down, because he quotes with approval the authority of Mr. Justice Lindley, stating the rule in substantially the same way. The Master of the Rolls, in *Pooley* v. *Driver*, 5 Ch. D. 481, says:—'I may cite, further, from p. 45 of the 3rd edition of Mr. Lindley's book, considering that gentleman is now a judge, the conclusion that he comes to as to the effect of the case of *Cox* v. *Hickman*, 8 H. L. Cas. 268, 'that *primâ facie* the relation of principal and agent is constituted by an agreement entitling one person to share the profits made by another to an indefinite extent; but that this inference is displaced if it appears from the whole agreement that no partnership or agency was really intended.' So that the Master of the Rolls, Mr. Justice Lindley, and Lord Blackburn all agree that what you must look at is whether the relation of principal and agent existed, a participation in profits not necessarily constituting a partnership, but being a matter which is to be considered, and which may be, conclusive if there is nothing else to prevent there being a partnership." So while there are *dicta* to the effect that participation in profits may establish or furnish evidence that there was a joint business—*i.e.*, a partnership—yet where such participation depends upon a clause in an agreement, the court must examine the whole agreement to ascertain whether it was an agreement for a loan or a partnership.

The mortgage deed under which the partnership is sought to be established is peculiar. The object of the advance is to enable Smith to carry on his contract with the railway company; and the security to Badeley is whatever Smith should get from the railway company. The contract was to be carried on by Smith; but the loan was not merely a loan to the business, as in *Delhasse's case*, 26 W. R. 338, 7 Ch. D. 511. Smith was to go on with the contract, and power was reserved to Badeley to take it over and make it effectual, in order to duly to keep up the value of his security.

It was said that a share of profits was secured to Badeley, notwithstanding that the loan might be previously paid off. This is not inconsistent with the transaction being really a loan to Smith, but was by way of consideration for the risk involved in the loan. Badeley incurring such risk, the right was reserved to him to get ten per cent. of the profits, after making a suitable allowance for the work and labour of Smith; and there is nothing in this pointing to a device to mask a secret partnership.

Letters between the plaintiff and Smith have been referred to, in which the plaintiff uses the expression "working capital," or says, "we should do so and so," or speaks of a "servant of ours," "our interests," "our work." In some of the letters, capital is distinguished from interest; but nowhere does the plaintiff speak of "our capital" or treat the capital as a common fund of himself and Smith. And such expressions as I have referred to are explained by the fact that both the plaintiff and Smith were interested in the success of the contract; but the distinction remains between the present case and cases where the business is so carried on by each on behalf of and as agent for the other as to constitute a partnership. In my opinion the judgment of Stirling, J., must on this point be reversed, and the counter-claim brought by the executors of Haworth must be dismissed.

[His lordship then proceeded to deal with certain questions of priority between different incumbrancers, which do not call for a report, holding that on these questions the judgment of Stirling, J., must be affirmed.]

LINDLEY, L.J.—I am of the same opinion. As to the question of partnership, Stirling, J., considered, basing his decision upon participation in profits and certain expressions in the agreement and in the correspondence, that there was a partnership between the plaintiff and Smith. But we must look at the real agreement, the whole of it, and not infer a partnership merely from the fact of participation in profits. In my opinion the principle was correctly stated in the Privy Council in the case of *Mollwo, March, & Co.* v. *Court of Wards*, at p. 433: "It was contended at the bar that whatever may have been the intention a participation in the net profits of the business was in contemplation of law such cogent evidence of partnership that a presumption arose sufficient to establish as regards third parties that relation unless rebutted by other circumstances. It appears to their lordships that the rule of construction involved in this contention is too artificial, for it takes one term only of the contract and at once raises a presumption upon it; whereas the whole scope of the agreement and all its terms ought to be looked at before any presumption of intention can properly be made at all."

Stirling, J., has, in my opinion, fallen into error in picking out certain clauses in the agreement, and not looking at the agreement as a whole. I may point out that in this case there is no provision as to participation in loss, as in *Pooley* v. *Driver* and in *Delhasse's case*. The transaction, as it seems to me, was a *bonâ fide* loan; and no partnership was created. On the other points in the case I also agree with Cotton, L.J.

BOWEN, L.J., concurred.

Solicitors, *Nash, Field, & Withers; Shaw & Tremellen; Phelps, Sidgwick, & Biddle; Rowcliffe, Rawle, & Co.; W. P. V. Wallis; Le Brasseur & Oakley; Trinders & Romer; Batten, Proffitt, & Sell; Terrell & Co.*

From Q. B. Div. June 25.

GRAY v. HOPPER. (a.)

County court—Claim indorsed on writ exceeding £50—Reduction below £50 by judgment under order 14—Jurisdiction to order trial in county court—County Courts Act, 1856 (19 & 20 *Vict.* c. 108), s. 26.

By section 26 *of* 19 & 20 *Vict.* c. 108, *where, in an action of contract, the claim indorsed on the writ exceeds* £50, *but "is reduced by payment into court, payment, an admitted set-off, or otherwise, to a sum not exceeding* £50," *a judge may order that the cause be tried in a county court.*

Held, that the words "or otherwise" included the case of the claim being reduced after action brought; and that, therefore, where the claim was reduced to a sum not exceeding £50 *by judgment under order* 14, *for a portion thereof, there was jurisdiction to order that the cause be tried in a county court.*

Judgment of the Queen's Bench Division (ante, p. 716), *affirmed.*

Appeal by the defendant from a decision of the Divisional Court (*ante*, p. 716).

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

The claim indorsed upon the writ was for £66 money due. The plaintiff obtained judgment under order 14 for £28, which was paid, the defendant having liberty to defend as to the residue of the claim. After issue joined the plaintiff applied for an order that the cause should be tried in the county court of Newcastle-upon-Tyne, pursuant to section 26 of the County Courts Act, 1856. The district registrar of Newcastle made the order, and this order was affirmed by the judge at chambers and the Divisional Court.

19 & 20 Vict. c. 108, s. 26.—"Where, in any action of contract brought in a superior court, the claim indorsed on the writ does not exceed fifty pounds, or where such claim, though it originally exceeded fifty pounds, is reduced by payment into court, payment, an admitted set-off, or otherwise, to a sum not exceeding fifty pounds, a judge of a superior court, on the application of either party, after issue joined, may, in his discretion and on such terms as he shall think fit, order that the cause be tried in any county court which he shall name."

Tindal Atkinson, for the defendant.—There was no jurisdiction to remit the cause for trial under section 26 of the County Courts Act, 1856. The words "or otherwise" coming immediately after "payment, an admitted set-off" must be read *ejusdem generis* with them as referring to something before action brought. That was the construction placed upon similar words in section 7 of the County Courts Act, 1867: *Osborne* v. *Homburg*, 24 W. R. 161, 1 Ex. D. 48; *Foster* v. *Usherwood*, 26 W. R. 91, 3 Ex. D. 1. In that section the words "payment into court" are omitted, but those words do not immediately precede "or otherwise," and these latter words must be construed *ejusdem generis* with those that immediately precede them. This mode of reducing the claim under order 14 was unknown at the time of the passing of the Act of 1856.

He also referred to *Lewis* v. *Lewis*, *ante*, p. 63, 20 Q. B. D. 56.

French, *Q.C.*, and *H. Newson*, for the plaintiff.—The words "or otherwise" follow three particular expressions, one of which at any rate refers to something happening after action brought. Therefore the generality of the words cannot be limited by the preceding particular words.

Lord Esher, M.R.—In my opinion this appeal must be dismissed. As was pointed out by Bramwell, L.J., in *Foster* v. *Usherwood*, the wording of the two County Courts Acts are different. We have to apply the well-known rule that, where particular words of limited meaning are followed by general words, the general words must be read *ejusdem generis* with the particular. In *Foster* v. *Usherwood*, decided upon section 7 of the County Courts Act, 1867, this court held that the words "payment" and "set-off" meant payment and set-off before action brought. It followed that the words "or otherwise" also referred to something happening before action. The effect of that rule was to limit the meaning of the general words in that section. Can that rule be applied here? In section 26 of the County Courts Act, 1856, there is obviously one expression, "payment into court," which can only refer to something happening after action brought. Therefore the rule cannot apply so as to limit the meaning of the general words to something happening before action. The general words must have their natural interpretation, and the court had jurisdiction to make this order.

Lindley, L.J.—I am of the same opinion. Reading the words of section 26 of the Act of 1856 in their natural sense, it is clear to me that the construction placed upon them by the court below is correct, and I concur in the reasons given by the Master of the Rolls. There seems to me to be a reason for the difference in the language of that section and of section 7 of the Act of 1867. The words "payment into court" were purposely omitted in the later section. Under the earlier section the judge has an absolute discretion in the matter; under the later section that discretion is gone, the words being "the judge shall, unless there be good cause to the contrary," remit the action to the county court. It is obvious that if the defendant could, by paying money into court, bring himself within the later Act, he could of his own will force the plaintiff into the county court. A reason, therefore, exists for the use of the more limited words, and that reason does not apply to the earlier Act.

Appeal dismissed.

Solicitor for the plaintiff, *R. Greening*, for *D. E. Stanford*, Newcastle-upon-Tyne.

Solicitors for the defendant, *Pyke & Parrott*, for *R. S. Hopper*, Newcastle-upon-Tyne.

From Q. B. Div. June 21.

Coch v. Allcock. (a.)

Practice—Evidence—Commission to examine witnesses—Ord. 37, r. 5.

It is in the discretion of the court or judge, taking all the circumstances of the case into consideration, to grant or withhold a commission to examine witnesses who are out of the jurisdiction, and the commission will not be granted ex debito justitiæ. *The rule will be more strictly applied when a plaintiff asks for a commission to be himself examined.*

Kemp v. Tennant, 2 *Times Law Rep.* 304, *explained.*

Appeal from the decision of a divisional court (Field and Wills, JJ.).

The plaintiff was an ice merchant residing at Brevig in Norway. He agreed to sell and deliver to the defendant at Ramsgate a cargo of ice. The ice was loaded by the plaintiff's servants at Brevig, and shipped in the plaintiff's ship, but on arriving at Ramsgate the defendant refused to receive it, alleging that it was not of the size and condition specified by the contract. The plaintiff brought this action for £24, the price of the ice, and applied for a commission to Norway to examine himself and other material witnesses. The application was granted by a master, but refused by Denman, J., at chambers. The Divisional Court reversed his decision, and the defendant appealed.

Butler Aspinall (*L. E. Pyke* with him), for the appellant.—The court will not grant a commission where the amount is so small, nor will it ever, except under very special circumstances, grant a commission to a plaintiff to be himself examined.

Meek, for the respondent.—The court will grant a commission *ex debito justitiæ* where witnesses are out of the jurisdiction, since the witnesses cannot be compelled to come to this country: *Kemp* v. *Tennant*, 2 Times Law Rep. 304; *Lawson* v. *Vacuum Brake Co.*, 33 W. R. 186, 27 Ch. D. 137. [Lopes, L.J., referred to *Light* v. *Governor and Company of the Island of Anticosti*, 4 Times Law Rep. 430.] The case is within *Armour* v. *Walker*, 32 W. R. 214, 25 Ch. D. 673.

Lord Esher, M.R.—In consequence of the case of *Kemp* v. *Tennant*, I have consulted my brother Mathew, and he tells me he never intended to convey that a commission must be granted *ex debito justitiæ*, or that Wills, J., had ever said so. He entirely agrees with the view which we have always taken, that a

(a.) Reported by A. P. Percival Kerr, Esq., Barrister-at-Law.

commission is a matter of judicial discretion, and that it is not to be granted except on reasonable cause shown. What that reasonable cause may be depends upon all the circumstances of the case. It is the duty of the judge to see that there is no oppression on the party making the application, and also that the other party is not in any way prevented by it from presenting his case fairly. It is, therefore, necessary to take all the circumstances of the case into consideration. With regard to a plaintiff asking for a commission that he should himself be examined as a witness, I think the rule is the same as with regard to a commission to examine any other witness, but it will be more strictly applied. In this case we do not feel inclined to overrule the Divisional Court, but we say that although the commission must issue the costs of the commission shall be in the absolute discretion of the judge who tries the case.

LINDLEY and LOPES, L.JJ., concurred.

Appeal dismissed.

Solicitors for the appellants, *Wilson & Sons.*

Solicitors for the respondents, *Turnbull, Tilly, & Mousir.*

From Prob. Div. & Adm. Div. June 27, 28.

HARRISON *v.* HARRISON. (*a.*)

Divorce—Costs — Permanent maintenance — Solicitor's charging order—Jurisdiction—Divorce Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 32—*Solicitors Act,* 1860 (23 & 24 *Vict. c.* 127), *s.* 28—*Married Women's Property Act,* 1882 (45 & 46 *Vict. c.* 75), *s.* 1 (2), (3).

A sum secured to the wife on a dissolution of marriage under section 32 *of the Divorce Act,* 1857, *is not alimony, and is property in respect of which the court has jurisdiction to grant the wife's solicitor a charging order for costs under section* 28 *of the Solicitors Act,* 1860; *but the court will not grant such an order unless the solicitor make out a* primâ facie *case of inability to obtain payment in any other way.*

A married woman, having either no separate property or only separate property subject to a restraint on anticipation, who institutes divorce proceedings after the passing of the Married Women's Property Act, 1882, *cannot be deemed under that Act to have entered into a contract, with respect to her separate property, for payment of the costs of her solicitor incurred in the divorce proceedings.*

Order of Butt, J., *discharged.*

Appeal from Butt, J.

In May, 1886, Mrs. Harrison, on her petition, obtained a decree absolute for dissolution of her marriage with Mr. Harrison; and in March, 1887, an order was made under section 32* of the Divorce Act, 1857 (20 & 21 Vict. c. 85), that the respondent (Mr. Harrison) should secure to the petitioner (Mrs. Harrison) during her life the annual sum of £130.

On the 17th of May, 1888, Mrs. Harrison changed her solicitors, and on the 5th of June, 1888, Mrs. Harrison's former solicitors obtained from Butt, J., in chambers, a charging order under section 28 of the Solicitors Act, 1860 (23 & 24 Vict. c. 127), for their costs upon this sum of £130 as property recovered or preserved through their instrumentality.

From this order Mrs. Harrison appealed.

E. W. Byrne, Q.C., and *Bargrave Deane* (*Phillpotts* with them), for the appellant.—This sum secured to the wife is in the nature of alimony, and therefore is not property capable of being charged with the payment of costs: *In re Robinson,* 33 W. R. 17, 27 Ch. D. 160. A solicitor has no lien on money received by him as alimony for the wife: *Leete* v. *Leete,* 27 W. R. 921; *Cross* v. *Cross,* 43 L. T. N. S. 533 (which case explains *Bremner* v. *Bremner and Brett,* 15 W. R. 75, L. R. 1 P. & D. 254). The husband is liable for the payment of the sum secured to the wife: *Linton* v. *Linton,* 33 W. R. 714, 15 Q. B. D. 239; and the solicitors of the wife can sue the husband for their full costs: *Ottaway* v. *Hamilton,* 26 W. R. 783, 3 C. P. D. 393.

Gill v. *Gill and Hogg,* 12 W. R. 808, 33 L. J. N. S. P. & M. 43, was also referred to.

Bayford, Q.C., and *W. T. Barnard,* in support of the order of Butt, J.—An allowance such as this, secured to the wife as permanent maintenance by virtue of an order made under section 32 of the Act of 1857, is property capable of being charged under the Solicitors Act, 1860. Such an allowance is only made on a dissolution of marriage, and is not to be confounded with alimony, which is only granted in cases of judicial separation, and while the relationship of husband and wife exists. Alimony, whether payable permanently or *pendente lite,* is given under rule 94 of the Rules of Practice in Divorce and Matrimonial Matters, and is liable to be varied from time to time or withdrawn altogether at the discretion of the judge and on the application of either husband or wife. But a sum secured by way of permanent maintenance under section 32 of the Act of 1857 cannot be subsequently altered or varied, but must always stand according to the terms of the deed executed in pursuance of the order made under section 32. *Bremner* v. *Bremner and Brett, Leete* v. *Leete, Cross* v. *Cross,* and *In re Robinson* were all cases of alimony, and are, therefore, not in point. *Linton* v. *Linton* was not a case of money secured to the wife under section 32 of the Act of 1857, but was either a case of alimony on a judicial separation or a case where an order had been made under 29 & 30 Vict. c. 32, s. 1, for weekly or monthly payments by the husband to the wife. *Ottaway* v. *Hamilton* was decided

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* The Divorce and Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 32, so far as material, enacts that "The court may, if it shall think fit on any such decree" (*i.e.*, for dissolution of marriage) "order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or such annual sum of money for any term, not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it shall deem reasonable, and for that purpose may refer it to any one of the conveyancing counsel . . . to settle . . . a proper deed or instrument to be executed by all necessary parties."

The Divorce and Matrimonial Causes Amendment Act, 1866 (29 & 30 Vict. c. 32), after reciting section 32 of the Act of 1857, and that it sometimes happened that a decree for dissolution of marriage is obtained against a husband who has no property on which the payment of any gross or annual sum can be secured, but who, nevertheless, would be able to make a monthly or weekly payment to the wife during their joint lives, proceeds to enact by section 1, "In every such case it shall be lawful for the court to make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sums for her maintenance and support as the court may think reasonable," with power to the court to discharge or modify the order if the husband afterwards become unable to make the payments.

By rule 94 of the Rules in Divorce and Matrimonial Causes (December, 1865) "alimony pending suit, and also permanent alimony, shall be paid to the wife or to some person or persons to be nominated in writing by her and approved of by the court as trustee or trustees on her behalf."

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

before the Married Women's Property Act, 1882, but since the passing of that Act it cannot be said that the wife contracts as agent for her husband in respect of the costs incurred by her solicitors in her suit for dissolution of marriage, and therefore the husband is now not liable for such costs. The wife is now capable of contracting with her solicitors, and her contract is to be deemed to have been made with respect to, and to bind, her separate property. The fact that the separate property was subject to a restraint on anticipation does not prevent it being charged with the payment of the solicitor's costs. *In re Keane, Lumley* v. *Desborough*, 19 W. R. 1025, L. R. 12 Eq. 115, is an express decision to that effect. [COTTON, L.J.—But there have been recent decisions of the Court of Appeal that property with a restraint on anticipation cannot in any way be charged.*]

Byrne, Q.C., in reply.—Though the sum secured to the wife under section 32 may not be alimony in the strict sense of the term, it is given on the same principle as alimony—viz., to prevent the wife becoming destitute: *Fisher* v. *Fisher*, 10 W. R. 122. But, assuming that this is property which could be charged under the Solicitors Act, this is not a case in which such a charge ought to be given, as the husband is primarily liable for these costs. [COTTON, L.J.—You did not argue that point in the court below, nor in your opening here, but, under the circumstances of the case, we will allow you to deal with it in reply, giving the other side liberty to reply finally.] The power given to the judge to declare the solicitors' costs a charge on property recovered is discretionary.

He referred also to *Greer* v. *Young*, 31 W. R. 930, 24 Ch. D. 545, and *D'Oechsner* v. *Scott*, 24 Beav. 239, 6 W. R. Ch. Dig. 91.

Barnard, in reply on this point.—This question was raised, if not argued, before Butt, J., and he exercised his discretion and gave us this charge. Section 28 of the Solicitors Act gives the judge power to make such order as he may deem just and proper as to how the costs are to be paid.

COTTON, L.J.—This is an appeal from a decision of Butt, J., giving the solicitors who formerly acted for the plaintiff, the petitioner in the divorce suit, a charge for their costs on an annual sum which, under an order of the judge in the divorce suit, had been secured to the wife as a provision for her after a decree for dissolution of marriage had been made.

It was first argued on behalf of the appellant that this annual sum of £130 secured to the wife was not property, and, therefore, that the judge had no power, under section 28 of the Solicitors Act, 1860, to charge it with the solicitors' costs as "property recovered or preserved" through the instrumentality of the solicitors. No doubt it looked at first sight as if the order under which this sum was secured was only an order for alimony, and if that were so this sum so secured could not be charged, as it has often been held that alimony is not property capable of being charged under this section of the Solicitors Act. But it appeared on examination that this sum could not be considered as alimony, as it was not, and could not be, given under that rule of the Rules in Divorce and Matrimonial Matters by which alimony is given, but was given under the power contained in section 32 of the Act of 1857.

No doubt in regulating the amount of the sum to be secured to the wife under this section the court has regard to many of the same circumstances which it regards when granting alimony—viz., what is requisite for the maintenance of the wife, and what the means of the husband are; but the sum secured under this section is secured to the wife as her property, and cannot be subsequently, at the discretion of the judge, increased, or diminished, or withdrawn altogether as alimony can, but is subject only to whatever limitations are expressed in the deed or instrument by which the sum is secured. I therefore agree with the learned judge below in considering that he had jurisdiction to charge under the Solicitors Act this sum "as property."

But then it was urged here, if not in the court below, that under the circumstances of the case the court ought not to have made this charging order. Now, although in my opinion if the solicitors make out a case *primâ facie* that they could not in any other way get payment of their costs, it would be right to give them this charge; yet I think they must make out such a case *primâ facie*, and the case of *Greer* v. *Young* I think shows that.

It was said on behalf of the solicitors that the Married Women's Property Act, 1882, had rendered the wife solely liable for these costs, and had relieved the husband from the liability to pay them. But under that Act a contract entered into by a married woman is to be deemed to have been made with reference to, and to bind, her separate estate only, "unless the contrary be shown." There was some slight evidence to show that here the married woman had some separate estate under her marriage settlement. We have looked at the settlement, and find that there was a provision amounting to a restraint on anticipation on what was her separate property. The fact, therefore, that all her separate property was unalienable prevents the presumption arising that a contract was made with reference to her separate estate. In my opinion, therefore, the solicitors have not made out a *primâ facie* case of inability to get payment in other ways sufficient to justify the charging order made by Butt, J., and that accordingly it must be discharged, and the appeal must be allowed.

BOWEN, L.J.—I am of the same opinion. Assuming the deed by which this sum was secured to the wife to have been executed, I agree with the view expressed by Cotton, L.J. The sum is not alimony, and there is, therefore, a distinction between this case and the cases as to alimony which have been cited. This is a sum given under section 32 of the Act of 1857, and its object is not to provide a maintenance for the wife during the continuance of the matrimonial tie, nor does it depend from time to time on the discretion of the court. It seems to me, on considering this section, that the sum secured to the wife under it, is really property within the meaning of the Solicitors Act, because it is not thereby settled on her so as to be inalienable by her, or so as to defeat the effect of the Solicitors Act, and the fact that the sum secured may be a gross sum as well as an annual sum shows that the sum secured was intended to become the wife's for all intents and purposes, subject only to the limitations of the deed to be executed by order of the court.

But the court is not bound to make a charging order under the Solicitors Act except it thinks the order is a just and proper one to make, and in my opinion that would not be so unless the court is satisfied that all other means to have the costs satisfied have been exhausted. That has not been done here. The husband is primarily liable for the costs. It was said that the wife must be deemed to have entered into a contract to pay the costs out of her separate estate; but it is impossible to suppose that to be the true character of the contract, as the only separate property which the wife had was restrained from anticipation by the terms of her marriage settlement. The cases of *Steedman* v. *Poole*, 6 Ha. 193, and *Spring* v. *Pride*, 12 W. R. 893, 10 Jur. N. S. 647, seem to me to be authorities which show that the words used in the settlement amount to a restraint on anticipation. In my opinion, therefore, the appeal

* See *Hyde* v. *Hyde*, *ante*, p. 708; and *In re Glanvill*, *Ellis* v. *Johnson*, 34 W. R. 309, 31 Ch. D. 532.

succeeds on the ground that the solicitors have not made out a *primâ facie* case sufficient to satisfy the court that the order was a just and proper one.

Fry, L.J.—I am of the same opinion. [The Lord Justice stated the facts of the case, and continued:—] There are four kinds of payment which may be ordered by the Divorce Division to be paid to the wife:—(1) alimony *pendente lite*; (2) permanent alimony on judicial separation; (3) a gross or annual sum which, on a dissolution of marriage, the court may order to be secured to the wife under section 32 of the Act of 1857; (4) monthly or weekly payments under section 1 of the Act of 1866 (29 & 30 Vict. c. 32) which, on a dissolution of marriage, the court may order the husband to pay if he has no property on which a gross or annual sum could be secured. We have to do with the third class of payment, which may be either a gross sum or an annual sum. It seems to me this is essentially different from alimony, and from the other classes of payments, and I cannot regard it as other than property of the wife, and, therefore, that it might be charged under the Solicitors Act.

We have, then, to consider who is liable to pay the solicitors' bill. It is said that the wife is liable, and that is put as the result of the Married Women's Property Act, 1882, s. 1, sub-sections (2) and (3). It is said that the married woman here had some separate property, but it turns out that the separate property she had was inalienable, and that fact repels the inference that there was a contract by her with reference to her separate property, and shows the contrary. We have, therefore, a case where the husband is primarily liable for the costs, and, therefore, the result of the order of Butt, J., is that what is a debt of the husband's is to be paid out of the sum which the husband has been ordered to provide for the wife. I should be unable to come to that conclusion until it were shown that all reasonable resort to other means of payment had been made. But here the solicitors have not sued the husband. *Primâ facie* the debt is a debt due by the husband, and the contrary has not been shown to us by the solicitors, they have not made out to our satisfaction that they had no means other than this of getting paid. The appellant must have the costs here and below.

Appeal allowed.

Solicitors for the appellant, *Meare & Fowler.*

Solicitors for the respondents, *Hughes & Son.*

High Court of Justice.

Chan. Div. Kay, J. — June 18, 19, 27.

In re Roper.

Roper *v.* Doncaster. (*a.*)

Married woman—General power of appointment by will—Power exercised—Liability of property for her debts.

In cases not within the Married Women's Property Act, 1882, *the exercise, by the will of a married woman, of a general power of appointment, whether the power be exercisable by deed or will, or by will only, does not make the property appointed liable to engagements entered into with her on the credit of her separate estate.*

The cases on the subject reviewed, and London Chartered Bank of Australia *v.* Lemprière, 21 *W. R.* 513, *L. R.* 4 *P. C.* 572; Mayd *v.* Field, 24 *W. R.* 660, 3 *Ch. D.* 587; *and* In re Harvey's Estate, 28 *W. R.* 73, 13 *Ch. D.* 216, *considered.*

Adjourned summons.

By an indenture of mortgage of the 28th of March, 1881, in consideration of an advance of £1,000 made by the mortgagees to Sydney Charles Dyne Roper, he covenanted to repay the same with interest thereon until payment, and his wife, Annie Caroline Christina Roper (the testatrix in this cause), with intent to bind her separate estate, covenanted for the payment of the interest to the mortgagees. The mortgaged premises comprised, *inter alia*, a policy of insurance on the life of Mrs. Roper for £1,000, to which she was absolutely entitled for her separate use, according to the Married Women's Property Act, 1870, and which she thereby assigned to the mortgagees as security for the advance, with a declaration that, notwithstanding as between Mr. Roper and Mrs. Roper, the latter might be a surety only for the former, yet, as between the mortgagees and Mrs. Roper, she and the said policy moneys should be deemed a principal debtor and security respectively for the principal, interest, and other moneys intended to be thereby secured.

At this date the only property to which Mrs. Roper was entitled for her separate use, without restraint on anticipation, was some household furniture and effects of the value of £200, and this policy of insurance, but she had a general power of appointment by will over two sums, of £10,000 and £2,400 respectively, under her grandfather's will.

By an indenture of the 10th of May, 1881, this mortgage was transferred to the present mortgagees, and Mrs. Roper "with the intent to bind her separate estate" thereby covenanted with the transferees for the payment of the interest on the mortgage debt.

On the 22nd of September, 1884, Mr. and Mrs. Roper executed a separation deed, by which Mrs. Roper covenanted with her husband that she would pay the interest on (*inter alia*) the £1,000 mortgage debt due from him to the mortgagees, and would pay the premiums necessary for keeping on foot the policy of insurance.

On the 10th of July, 1887, Mrs. Roper died, leaving her husband surviving. By her will, dated the 31st of May, 1873, she exercised her power of appointment in favour of her infant daughter, and bequeathed all her money, property, and effects unto her executors upon trust to pay her debts, &c., and hold the balance upon trust for her daughter.

The sum payable on the death of Mrs. Roper under the policy of insurance was received by the mortgagees, and applied in part satisfaction of the moneys owing to them on the security of their mortgage.

This was an originating summons taken out by the infant daughter of Mrs. Roper, by a next friend, in order to determine whether any and what part of the estate of Mrs. Roper (other than and besides the policy money), or any property which had been appointed by her in exercise of her general power of appointment, was, or might become, liable for the payment of the principal or interest owing on the above indenture of mortgage; and to what extent her estate was entitled to be indemnified for such payments against the mortgaged premises and against her husband personally.

The respondents to the summons were the executors of Mrs. Roper, her husband, and the mortgagees, who consented to be bound by the decision of the court on the application, subject to their costs being provided for.

Freeman, for the summons.

Borthwick, for the executors, admitted that by the separation deed the testatrix had made herself liable, as between herself and her husband, for the interest on

(*a.*) Reported by H. F. Ambrose, Esq., Barrister-at-Law.

the mortgage debt, but, as to the principal, claimed that her estate was entitled to be recouped by him.

Gaselee, for the mortgagees, contended that the exercise of her general power of appointment by Mrs. Roper made the appointed funds liable for her debts as part of her assets, and that those funds were, therefore, liable for the mortgage debt.

L. Field, for Mr. Roper.

Freeman replied.

The cases relied on are all referred to in the judgment.

The Court held that as between Mrs. Roper and her husband her estate was only security for the £1,000, and was entitled, therefore, to be indemnified by her husband to that extent. On the question whether the property appointed by her will was liable to the mortgagees for the amount due on the mortgage,

Cur. adv. vult.

June 27.—Kay, J.—In 1881 Mrs. Roper, being entitled to separate property, joined with her husband in a mortgage to secure £1,000 lent to him, and, "with the intent to bind her separate estate," covenanted to pay the interest, and assigned a policy on her life for £1,000.

I have decided that she joined in this deed merely as surety for her husband.

In the same character she concurred in a deed of transfer of this and previous mortgages by her husband, and entered into a covenant with the transferees for payment of the interest. Afterwards she separated from her husband, and by a deed of the 22nd of September, 1884, she covenanted with him out of her separate estate to pay the interest upon the aforesaid mortgage debts. She died on the 10th of July, 1887, leaving her husband surviving. At the respective dates of the mortgage and transfer her only separate property as to which she was not restrained from anticipation was some furniture worth about £200, and the before-mentioned policy upon her life for £1,000. But she had, under the will of her grandfather, a general power of appointment over a sum of about £10,000, such power being exerciseable only by her will. She had a similar power over another fund of £2,400 in the event of the infant plaintiff dying under twenty-one unmarried. She made her will dated the 31st of May, 1873, by which she exercised her powers, appointing in effect the whole of the funds to the plaintiff upon attaining twenty-one or marrying, subject to an annuity of £250 which she gave to her husband on certain conditions. The question is whether the funds so appointed have become liable to satisfy her obligations under her covenants with the mortgagees.

The Married Women's Property Act, 1882, commenced on the 1st of January, 1883.

On the 25th of March, 1881, it was decided in *Pike* v. *Fitzgibbon*, 29 W. R. 551, 17 Ch. D. 454, that the only separate estate of a married woman which could be made liable for her engagements was such as she had "at the time of contracting the debt or engagement." Section 1, sub-section 4, of the Act of 1882 altered this by providing thus: "Every contract entered into by a married woman with respect to and to bind her separate property shall bind, not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire." Grammatically this plainly refers only to contracts made after the commencement of the Act, otherwise the words would have been "which she was or is possessed of," &c. Moreover, it is part of a section which increases the future capacity of a married woman to make contracts. To hold that it was intended to alter the effect of contracts already made would, in my opinion, be an unreasonable and violent construction which the court ought not to adopt without any express words. I therefore hold that this case does not come within that provision of the Married Women's Property Act, 1882. If it did the question would be whether the fund appointed ever was the separate property of the married woman. It was held in *Ex parte Gilchrist*, 34 W. R. 709, 17 Q. B. D. 521, by all the judges of the Court of Appeal, following many previous authorities, that such a power, although general, and even if exerciseable by deed or will, is not itself property at all.

But it is argued that, although the power itself is not property, yet that the exercise of such a power makes the property assets of the appointor, and accordingly the property thereby appointed became liable for her debts. There is no doubt that in the case of a man who has a general power of appointment and exercises it by will in favour of volunteers, the property so appointed will be considered as assets for the payment of his debts. And this doctrine was applied by Lord Hardwicke in *Lord Townshend* v. *Windham*, 2 Ves. sen. 1, to the exercise of a general power, even when exercised by deed so as take effect on the death of the appointor, his lordship saying, at p. 11, "In respect of his creditors it must be considered as part of his estate at the time of his death, he having executed it so as to gain the interest to himself, and attempted to pass it at the same time to his daughter; the court will not suffer it; saying he has been guilty of a fraud as to them, being indebted at the time." This decision proceeded upon the statute 13 Eliz. c. 5. In *Holmes* v. *Coghill*, 7 Ves. 499, Sir W. Grant treats the doctrine as settled, where the appointment by will has been actually made, and at p. 502 there is a note of the decree in *Bainton* v. *Ward*, before Lord Hardwicke, in a case where such a power was exercised by will, and it was thereby declared that the fund appointed was to be considered part of the testator's personal estate, liable to the satisfaction of his debts.

But does this law apply to the case of a married woman? It would be strange if before the Married Women's Property Act of 1882 the law was that only the separate property which a married woman had at the time should be liable, to the exclusion of separate property acquired afterwards, but that, nevertheless, the exercise by will of a general power of appointment would make the appointed fund, which never was her separate property, liable. Even if it could be said to become her separate property by the appointment, this would only be at her death, long after the engagements were entered into, and, therefore, according to *Pike* v. *Fitzgibbon*, the appointed property could not be made liable. Suppose she had a general power to appoint by deed or will, and exercised it by deed to take effect from her death, would Lord Hardwicke's decision, to which I have referred, apply, and make the appointment void against her creditors, or rather make it an appointment for their benefit under 13 Eliz. c. 5? Or, suppose she survived her husband, and exercised the power by will after his death, would the property then become liable for her engagements during coverture? I think not, and these illustrations make the fallacy apparent. A married woman could not contract debts like a person completely *sui juris*, her engagements only bound her to the extent of her separate property at the time which might be reached by judgment and execution. It follows that when she exercised the general power, whether by deed or will, she had no debts which could be made available against it. In *Vaughan* v. *Vanderstigen*, 2 W. R. 293, 599, 2 Drew. 165, 363, where a married woman exercised a general power of appointment by will, it was held that the property was not liable for her engagements, because (p. 184) "a contract for the payment of money made by a married woman having separate estate, though called a debt, is only a debt *sub modo*." This was followed by Lord Romilly in *Hobday* v. *Peters*, 8 W. R. 512, 28 Beav. 354, where the

power of appointment was by deed or will, but was exercised by will. The same point was decided in *Blatchford* v. *Woolley*, 11 W. R. 478, 2 Dr. & Sm. 204, and *Shattock* v. *Shattock*, 14 W. R. 600, L. R. 2 Eq. 182. The last case was dissented from in the judgment of the Privy Council in *The London Chartered Bank of Australia* v. *Lempriere*, 21 W. R. 513, L. R. 4 P. C. 572, upon the ground that *Norton* v. *Turvill*, 2 P. Wms. 144, *Sockett* v. *Wray*, 4 B. C. C. 483, *Heatley* v. *Thomas*, 15 Ves. 596, and *Johnson* v. *Gallagher*, 9 W. R. 506, 3 De G. F. & J. 513, had established that when a married woman, having a power of appointment by deed, gave a bond, that bond was payable out of the fund which was subject to the power. But it has recently been pointed out in *In re Hastings, Hallett* v. *Hastings*, 35 W. R. 135, 584, 35 Ch. D. 94, that these decisions proceeded upon a misapplication of *Norton* v. *Turvill*, which really decided that the bond was an exercise of the power of appointment—a doctrine which, as Turner, L.J., states in *Johnson* v. *Gallagher*, is now exploded. In *In re Harvey's Estate*, 28 W. R. 73, 13 Ch. D. 216, Hall, V.C., held that when the power was only by will, and was exercised, the property was liable for the appointor's debts. This last case seems to have been followed in *Hodges* v. *Hodges*, 30 W. R. 483, 20 Ch. D. 749.

In *Mayd* v. *Field*, 24 W. R. 660, 3 Ch. D. 587, the power was by deed or will, and, subject thereto, the property was settled to the separate use of the married woman for life, and if she survived her husband, which happened, to her absolutely. During her coverture she exercised her power by will. The property was treated by the late Sir George Jessel, M.R., as though it was altogether the separate property of the married woman—that is to say, that the *corpus* of property, which is settled to the general appointees by deed or will of a married woman, and in default of appointment to her separate use during her life, and if she survive her husband to her absolutely, was treated as her separate property in case she should so survive. Would it be her separate property if she did not survive, in which case the limitation was, I understand, to other persons? The separate use during her life would only enable her to bind her life interest; an engagement, though by bond, would not be an exercise of her power; the reversion, which was contingent on her surviving her husband, was not limited to her separate use. The cases relied on by the Master of the Rolls proceed upon a misapplication of the earlier decisions, which treated the bond of a married woman as an exercise of her power to appoint by deed. With respect to this it was decided by Lord Cottenham in *Owens* v. *Dickenson*, Cr. & Ph. 48, that a contract in writing of a married woman to pay a sum of £210 could not be treated as the execution of a power to appoint "by any deed or other instrument in writing," Lord Cottenham saying, "Now that document alone, within the authority of cases which have been decided, would have been operative upon her separate estate, but not by way of the execution of a power, although that has been an expression sometimes used, and, as I apprehend, very inaccurately used, in cases where the court has enforced the contracts of married women against their separate estate. It cannot be an execution of a power, because it neither refers to the power, nor to the subject-matter of the power, nor, indeed, in many of the cases has there been any power existing at all. Besides, as it was argued in the case of *Murray* v. *Barlee*, 3 My. & K. 209, if a married woman enters into several engagements of this sort, and all the parties come to have satisfaction out of her separate estate, they are paid *pari passu*; whereas, if the instruments took effect as appointments, they would rank according to the priorities of their dates. It is quite clear, therefore, that there is nothing in such a transaction which has any resemblance to the execution of a power." It was with reference to this decision that Turner, L.J., said in *Johnson* v. *Gallagher*, at p. 519, "The doctrine of appointment seems to me, however, to be exploded, and it is scarcely less clear that the transactions do not create any lien or charge on the separate estate," and he decided, as is well known, that the separate estate of a married woman is made liable for her engagements simply by a process of equitable execution—a decision which has settled the law upon the point, and has been acquiesced in ever since.

My opinion is that in cases not within the Married Women's Property Act, 1882, whether the power of appointment be by deed or will, or by will only, an appointment by the will of a married woman does not make the property appointed liable to engagements entered into with her on the credit of her separate estate. What may be the law as to cases falling within that Act I express no opinion save this, that to make property appointed by the will of a married woman liable to her engagements under that Act, it seems necessary to hold that the appointment by her will makes the property appointed her separate property, because it is only "all separate property which she may thereafter acquire" which is by that Act rendered liable.

In this case the powers of appointment were only by will, and, as the provisions of the Married Women's Property Act, 1882, s. 1, sub-section 4, do not apply, in my opinion the property appointed by her will is not subject to her engagements made during her coverture.

Solicitors, *P. Hodgkinson*, for *Pratt & Hodgkinson*, Newark; *Welbury J. Mitton*; *Field & Co.*

Chan. Div. } June 14.
Kay, J. }

In re Currie.

Bjorkman *v.* Kimberley. (*a*.)

Will — Construction—"Clear value"—Appointment—Residue—Gift of residue of specified fund—Legacy duty—Testamentary expenses.

The testatrix, in exercise of a general power of appointment under her marriage settlement, appointed that the trustees of the settlement should stand possessed of so much of the trust funds as should be "of the clear value of £1,000," in trust to pay the same to the trustees of her will, upon trust to pay the same to O. J. Vernon. After several other appointments in similar language, the will contained an appointment of "all the residue of the said trust funds." There was no direction for payment of debts, duty, or expenses, and no other property was disposed of.

Held, that the interposition of other trustees did not affect the question; that the word "clear" showed that the rule by which an appointment of the residue of a fund is held to be a gift of a definite sum, not of residue in the ordinary sense, did not apply; and that all the outgoings on the prior appointments must be discharged out of the part of the fund appointed as residue.

Adjourned summons.

The question was whether probate and legacy duty and testamentary expenses on certain portions of a trust fund appointed by the testatrix were payable out of those portions or out of the residue of the fund.

Under her marriage settlement the Hon. Mrs. E. E. Currie was entitled to a power of appointment over two sums of £10,256 3s. and £10,301 9s. 9d. to such person or persons, for such intents and purposes, in such proportions, and generally in such manner as she should by will or codicil direct.

(*a*.) Reported by H. C. Roper, Esq., Barrister-at-Law.

She made her will on the 12th of April, 1871, and after reciting the power of appointment, in exercise of that power directed and appointed that from and after the death of her husband, or from such other time as her will should become operative or take effect in possession or relation thereto, the trustees of the settlement should stand possessed "of so much and such parts of the said trust funds as shall be of the clear value of £1,000 sterling in trust to pay and transfer the same into the names or name of John, Earl of Kimberley, and P. W. Currie" upon trust to pay or transfer the same to C. J. Vernon, but if he should die in her lifetime, then to his children. The testatrix then proceeded to appoint further specified sums forming part of the said trust funds in similar language, and directed and appointed that the trustees of the settlement should "stand and be possessed of all the residue of the said trust funds in trust to pay or transfer the same into the names or name of my trustees or trustee" upon trust for the plaintiff for life, and then for her children; and she appointed Lord Kimberley and P. W. Currie executors.

By a codicil of the 4th of January, 1872, the testatrix revoked one of the appointments made by her will, and directed and appointed that the trustees of the settlement should stand possessed of "so much of the trust funds as shall be of the clear value of £400 sterling in trust, to pay or transfer the same into the names or name of my trustees or trustee" upon trust to pay the same to the Archbishop of Westminster for the time being; and of so much as "shall be of the clear value of £50 sterling" in trust for other persons. There was no direction in the will or codicil for payment of debts, funeral, and testamentary expenses, or duty, nor any disposition of other property.

The testatrix died in 1873, and her husband in 1887. The whole of the trust funds subject to the settlement had been transferred to the trustees of the will, and they paid the above-mentioned pecuniary legacies, amounting to £5,050, and they also paid out of the funds appointed as residue, brokerage £20, legacy duty £298 14s. 7d., probate duty £663, law charges £132 5s. 2d., and £1,584 9s. 8d. as legacy duty on the residue.

The summons was taken out by the plaintiff to decide whether the trustees of the will were entitled to deduct these sums from the residue which had been appointed to her.

Ince, Q.C., and *A. Young*, for Mrs. Bjorkman, the residuary appointee.—This is not a gift of residue in the ordinary sense, and each of these legacies must bear its own proportion of the expenses. The trustees of the will are interposed, and the trustees of the settlement have only got to pay them a clear sum of £1,000 and the deductions must be made afterwards: Theobald on Wills, 2nd ed., pp. 112, 143; *Page* v. *Leapingwell*, 18 Ves. 463; *Platt* v. *Routh*, 6 M. & W. 756; 23 Vict. c. 15, ss. 4, 5; Hanson on the Probate Duty Acts, 3rd ed., p. 48; Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 6; *In re Higgins, Day* v. *Turnell*, 34 W. R. 81, 31 Ch. D. 142; *Davies* v. *Fowler*, L. R. 16 Eq. 308, 22 W. R. Dig. 270; *Baily* v. *Boult*, 14 Beav. 595; *Sanders* v. *Kiddell*, 7 Sim. 536.

Marten, Q.C., and *Nalder*, for the appointee.—The word "clear" shows that duty must be paid out of the sum appointed as residue: *Haynes* v. *Haynes*, 1 W. R. 204, 3 De G. M. & G. 590; *In re Cole's Will*, L. R. 8 Eq. 171, 18 W. R. Ch. Dig. 155; *Gude* v. *Mumford*, 2 Y. & C. Ex. 448; *Ford* v. *Ruxton*, 1 Coll. 403; *In re Robins*, 32 Solicitors' Journal, 273, W. N., 1888, p. 41; Sugden on Powers, 8th ed., pp. 443, 461, 463; Wills Act, s. 27; *Wilks* v. *Groom*, 4 W. R. 97. [Kay, J., referred to *Easum* v. *Appleford*, 5 M. & W. 56, and *Harries' Trusts*, John. 199, 7 W. R. Dig. 95.]

Blakesley, for another appointee, referred to *In re Meredith*, 25 W. R. 107, 3 Ch. D. 757, and *In re Hunt's Trusts*, 34 W. R. 247, 31 Ch. D. 308.

Ince, Q.C., replied.

Kay, J.—Mrs. Currie, a married woman, had under a settlement a general power of appointment over trust funds comprised in the settlement. She made her will, dated the 12th of April, 1871, whilst still a married woman, and after reciting the settlement she exercised her power of appointment and made no other disposition of any property at all. She exercised her power in this way. [His lordship referred to the will, and continued:—] There is no direction for payment of debts, funeral and testamentary expenses, or legacy or probate duty, and if it were not for what I am going to point out it would seem *primâ facie* to be a case within the decision in *Page* v. *Leapingwell*—namely, a case in which certain definite portions of a definite fund are given to certain persons and then the residue of that fund is given to somebody else, and the doctrine of that case is that the sum thus described as residue is as much a definite sum as any other part of the fund, and that it is not residue in the ordinary sense. But in this case we have in each gift before the gift of residue the words "clear value," and the question is, What is the meaning of those words? The words of the gift are:—[His lordship read them, and continued:—] I think the interposition of her own trustees has nothing to do with the matter at all. It is just the same as if she had directed the trustees of the settlement to stand possessed of these funds upon these trusts. It is said that the word "clear" only means clear of expenses which the trustees of the settlement would have had the right to deduct. But is that so? The fund will not be clear if it is to be subject to probate and legacy duty and the testamentary expenses of the testatrix, but it will fall far short of £1,000. Could she possibly mean to clear it of one deduction and not of another? I am reading her will, and I must take it to mean that C. J. Vernon is to take a sum of the clear value of £1,000. That was her intention, and I have no right to say she meant to clear it of one thing more than another. I must take her to have been aware that there would be other things which might come out of this legacy under the appointment, and because she made this appointment, and in this way disposed of it. But for this direction that it should be clear it would not come to the hands of the appointee of the clear value of £1,000. I read the word clear as expressing an intention that each of these sums should come to the respective appointees clear of any outgoings, not merely under the settlement, but those to which it would otherwise be subject under the provisions of her will. That includes probate and legacy duty and testamentary expenses. Out of what are these outgoings to come? She does not speak of the residue as a clear fund, but she gives it simply as residue. Therefore, where the appointor of a fund gives £1,000 to one person and the residue of the fund to another, and directs that the £1,000 shall be clear, it can only be done by reducing the residue. Whether the word "residue" in this will is to be construed as meaning residue for all purposes I do not now decide. It may be that the word clear may throw upon this which is called residue the payment of debts and testamentary expenses, but yet that it does not include a lapsed share of the fund. There might be a very good argument on that point, but it does not arise here. I see on the face of the will that it was her intention that each sum should be clear of these payments, and that the residue should be reduced accordingly.

Now let me see what the authorities are. The early case of *Haynes* v. *Haynes* is an instance that the word clear is sufficient to exonerate a legacy from the payment of duty and so on.

It is said that *Day* v. *Turnell* is an authority for holding that the word "clear" must be confined to clearing the share of expenses under the settlement, and that, when the fund came into the hands of the trustees of the will, it then for the first time became liable to probate and legacy duty and testamentary expenses, and that the word "clear" does not mean clear from those duties. But that case seems to me to have nothing to do with the matter. Higgins covenanted to pay to the trustees of a settlement, during his life or within twelve months after his death, £10,000 free from all deductions whatever. He died without payment, and his executors paid it. The Crown claimed succession duty, and the question was whether the trustees of the settlement could recover that, not from the covenantor, but from the executors, and it was held that they could not, because the covenant had been actually performed, so far as the covenantor was concerned, in paying the £10,000, and the liability did not attach till afterwards. It was not the case of a will directing that a sum should be paid clear, and in which the word "clear" must mean clear of everything payable under the will, it was a covenant by the settlor with the trustees, and the succession duty never attached at all till the £10,000 came into the hands of the trustees. That has nothing to do with the will before me. I must hold that, by force of the word "clear," the part of the fund appointed as residue must pay all the outgoings which might otherwise come from these particular appointed shares. The costs must come out of the residue.

Solicitors, *Collyer, Bristow, & Co.; Kearsey, Hawes, & Walsh; Morice, Toller, & Blakeeley.*

Chan. Div. Kay, J. March 5, 6, 7, 8, 15.

Barton v. North Staffordshire Railway Co. (*a*.)

Company—Forged transfer of stock—Statute of Limitations—When time begins to run—Executors joint holders of stock—Right of one to transfer—Estoppel of one joint holder—Right of other to sue.

One of two executors and trustees of a will sold out certain railway stock, which stood in their joint names as executors, by means of deeds of transfer to which he forged the name of his co-executor and trustee. In an action by the latter to compel the railway company to replace the stock,

Held, that the claim was not barred by reason of more than six years having elapsed since the date of the transfers, as time began to run, not from that date, but from the refusal of the company, when the forgery was made known to them, to treat the plaintiff as shareholder.

Held, also, that stock registered in the names of two executors could not be transferred by one of them, nor was such a transfer good as to one moiety of the stock.

Held, also, that the fact that one of the two joint owners of the stock was estopped from denying the validity of the forged transfers did not prevent the other from maintaining the action.

Trial of action.

The action was brought by the trustees of a will to have it declared that certain transfers of stock in the defendant company were invalid on the ground that the signatures of one of the alleged transferors to the deeds of transfer was forged; and for an order on the company to register the plaintiffs as the owners of such stock. On the evidence the court came to the conclusion that the forgery was established.

The stock in question formed part of the estate of S. Barton, of which he had appointed his widow, Ann Barton, and his son, T. Barton, to be trustees and executors. They both proved the will shortly after S. Barton's death in 1870, produced the probate to the railway company, and had the stock registered in their names as executors of S. Barton. The dividends were received by T. Barton, who accounted for them to the persons entitled thereto. In 1885 Ann Barton discovered that at various dates between 1880 and 1882 the whole of the stock had been transferred by T. Barton by means of transfers to which he forged her signature. In July, 1886, T. Barton absconded, and in December the action was brought by Ann Barton and a new trustee who had been appointed in place of T. Barton.

The company, by their defence, as to such of the transfers as had been made more than six years before action brought, pleaded the Statute of Limitations; also that the execution of the transfer deeds by one of the two executors was sufficient to transfer the stock, or to pass one moiety thereof; and the further question is dealt with in the judgment, whether the fact that T. Barton would have been estopped from saying that the transfers were nullities affected the claim by Ann Barton.

Rigby, Q.C., Renshaw, Q.C., and *Whittaker*, for the plaintiffs, cited *Davis* v. *Bank of England*, 2 Bing. 393, and on appeal 5 B. & C. 185; *Sloman* v. *Bank of England*, 14 Sim. 475; *Cottam* v. *Eastern Counties Railway Co.*, 9 W. R. 94, 1 J. & H. 243; *Johnson* v. *Renton*, 18 W. R. 284, L. R. 9 Eq. 181; *Bank of Ireland* v. *Trustees of Evan's Charity*, 3 W. R. 573, 5 H. L. Cas. 389; *Swan* v. *North British Australasian Co.*, 11 W. R. 862, 2 H. & C. 175 (overruling *Coles* v. *Bank of England*, 10 Ad. & E. 437); *Taylor* v. *Midland Railway Co.*, 8 W. R. 401, 28 Beav. 287; *Tayler* v. *Great Indian Peninsular Railway Co.*, 7 W. R. 182, 637, 4 De G. & J. 559.

Sir C. Russell, Q.C., Marten, Q.C., and *Farwell*, for the railway company, cited, on the plea of the Statute of Limitations, *Short* v. *M'Carthy*, 3 B. & Ald. 626; *Granger* v. *George*, 5 B. & C. 149; *Howell* v. *Young*, 5 B. & S. 259; *Smith* v. *Fox*, 6 Hare, 386; *Wilkinson* v. *Verity*, 19 W. R. 604, L. R. 6 C. P. 206; *Knox* v. *Gye*, L. R. 5 H. L. 656; and *Gibbs* v. *Guild*, 30 W. R. 407, 591, 9 Q. B. D. 59; and, as to the effect of a transfer by one of two executors, *Simpson* v. *Gutteridge*, 1 Madd. 609, and *Charlton* v. *Earl of Durham*, 17 W. R. 343, 995, L. R. 4 Ch. 433.

Swinfen Eady, for third parties, transferees of the stock.

Cur. adv. vult.

March 15.—Kay, J., after stating his conclusion from the evidence that Ann Barton's signature to the deeds of transfer had been forged by T. Barton, went on to say:—The real claim of the plaintiffs is to be treated by the railway company as shareholders. They say, and I agree with the contention, that the forged transfers must be considered as nullities. One defence raised by amendment is a plea of the Statute of Limitations. The actual plaintiffs are Ann Barton and Mrs. Ashe, who was appointed her co-trustee by the deed of the 1st of July, 1886, in the place of T. Barton. This suit was instituted on the 10th of December, 1886, more than six years after most of the attempted dealings with the stock. It is settled that after a partnership has ended any claim on simple contract by one former partner against the others in respect thereof is, prima facie, subject to be barred after the expiration of six years: *Knox* v. *Gye*. On the other hand, while a partnership is continuing there is no authority for suggesting that a claim between the partners is affected by the statute, and the opinion of Lindley, L.J., is to the contrary: Lindley on Partnership, 4th ed., p. 966. In a case of exclusion time would begin to run from the act of exclusion. B

(*a*. Reported by H. F. Amedroz, Esq., Barrister-at-Law.

has been argued in this case that if a partner does not draw his share of profits or act as partner for six years, he, at the end of that time, loses all remedy against his co-partners, and therefore practically ceases to be a partner. And it is urged that, this being the case as to a partnership, the analogy ought to be followed in railway companies and other trading corporations, and that a shareholder who makes no claim for six years has no remedy in respect of his share against the company. If this be so, any such company might direct that after six years' silence a pen should be drawn through the shareholder's name on the register, and he would practically cease to be a member of the corporation. And, in answer to a question from the court, the argument was pressed to this extent. Such a conclusion shows that there must be a fallacy in the premises. I know of no authority for saying that a partner who does nothing for six years loses all remedies against his co-partners. Time only begins to run against him from an act of exclusion. If the analogy be applicable, there must be a similar act in the case of a shareholder to enable the company to avail itself of the statute against him. Nothing of the kind took place here until the resistance by the company to the claim made in this action. The cause of action is, not the invalid transfers of the shares in question, but the refusal of the company, when the forgery was made known to them, to treat the plaintiffs as shareholders. It is an elementary principle that time does not begin to run until there is a complete cause of action, and there was no complete cause of action in this case until such refusal.

In *Davis* v. *The Bank of England* there is a judgment of Best, C.J., in which the question of the Statute of Limitations in a similar case is considered. The facts of that case somewhat resembled the present. Certain sums of Consols and other Government securities standing in the name of the plaintiff had been sold under forged powers of attorney. The plaintiff sued the Bank of England in an action on the case for permitting the transfer without his authority, and for refusing to pay him dividends. The action was brought within six years from the date of the sales, so that no decision on the question of the Statute of Limitations was necessary, but in the judgment Best, C.J., said: "We cannot do justice to the plaintiff unless we hold that the stocks are still his. Another consequence of the stocks being considered as transferred will be most alarming to those who live at a distance from London, and receive their dividends by attorney—namely, that their claim to compensation, in case their stocks should be transferred without their authority, may be barred by the Statute of Limitations." Later on he says: "If the plaintiff's action had been founded on the concealment of the forgeries, it could not have been supported, but the action is founded on the refusal of the bank to pay on demand the dividends of the plaintiff due on stocks belonging to him," and judgment was given for the plaintiff accordingly.

That decision was reversed in error upon the ground that there was no allegation in the declaration and no finding in the verdict that the bank ever had received the dividends from the Government, but the judgment of Best, C.J., has not been considered as affected by such reversal: *Coles* v. *Bank of England* and *Sloman* v. *Bank of England*.

Then it was suggested that, Thomas Barton and Ann Barton being co-executors, one of them alone could have transferred the stock which was registered in the names of both. No authority for this proposition was cited, and I am clearly of opinion that, whatever the powers of executors may be as to other property vested in them in that character, they have no such power as to railway shares or stock, which are governed by the Companies Clauses Act. With respect to these their rights and liabilities as between themselves and the company are the same as those of other shareholders, and the company is expressly exonerated by section 20 from being bound to see to the execution of any trust. The next argument was that if they are to be treated as joint holders of the stock the transfers must be good as to one moiety, because it is not denied that they were executed by Thomas Barton. This was answered by the late Vice-Chancellor of England in *Sloman* v. *The Bank of England*. If the transfers were good as to one half the other half would remain in the names of the two, and he might then transfer one moiety of that, and so on until the residuum was infinitesimal.

Another consideration, which was not pressed at the bar, but which I cannot overlook, is that it may be said that this action is practically brought by Thomas Barton, as one of the co-plaintiffs. Mrs. Ashe has been appointed a trustee in his place. Of course she is not executrix of Samuel Barton, but she and Ann Barton are suing as co-trustees of the will, and, as far as the legal interests in this stock are concerned, the suit may be said to be the same as a suit by or in the names of Thomas and Ann Barton. One of two joint owners having forged the name of the other to transfers, the two then come and say those transfers are nullities. Doubtless they are; but could Thomas Barton be heard to say so, and, if not, how does this estoppel affect Ann Barton? I apprehend that the answer is that in equity Ann Barton has sufficient interest to enable her to sue, making Thomas Barton a defendant. Of course, if he were here, the company might have remedies against him personally—criminal and civil. But at the suit of Ann Barton they could not deny that the stock had not been validly transferred. This seems to have been taken for granted in more than one case.

In *Sloman* v. *Bank of England* Government stock standing in the names of two trustees was sold by one of them under a forged power of attorney. The bill was filed by the other trustee and the beneficiaries, suggesting that the only remedy was in equity, for if an action had been brought it must have been in the joint names of the two trustees, one of whom had fraudulently sold the stock. It was held by the Vice-Chancellor of England that relief could be had in equity, because the other trustee could say against the bank: "Stock stood in my name, and I have not authorized the transfer of it. You are responsible to me"—that is to say, "You must make the account stand as it ought to have stood."

And in *Taylor* v. *The Midland Railway*, where stock of the Midland Railway Co. standing in the names of Taylor and Bright was attempted to be transferred by Bright by a deed of transfer to which he forged the name of Taylor, after Taylor's death his legal personal representatives were held entitled to recover his share of the stock against the railway company. And this was affirmed in the House of Lords (10 W. R. 382, 8 H. L. Cas. 751), and it was distinctly decided that there was a right to sue in equity, even if the right at law was gone by the death of Taylor in the lifetime of Bright.

It was suggested that the pleadings should be amended by allowing a counter-claim, on the ground that the money for the purchase of the shares was properly paid to Thomas Barton as one of two executors. The answer is obvious. The money was not paid by the railway company, but by the purchasers of the shares. They are not parties, and I am not dealing with their rights in any way. Another answer is that, if the railway company could make any claim to this money, that claim must be made against Thomas Barton, not against the estate of the late Samuel Barton. The claim must proceed upon an admission that the money was obtained by forgery and fraud. How could the estate be made liable for it? I cannot permit such an amendment. The defence as actually framed denies the forgery, and also pleads that the loss has been occasioned by the

negligence of Ann Barton. This latter point was not insisted on at the bar, and, I think, properly, for it seems to me that no such case of negligence is established by the evidence. Upon the whole, I am of opinion that the plaintiffs have made out their case and are entitled to a declaration that the alleged transfers were invalid by reason of the forgery of the name of Ann Barton as a person executing the same, and the railway company must be ordered to register the plaintiffs as owners of the shares. No doubt the matter deserved the closest investigation, and it was quite natural that the railway company should desire to have it formally tried. But the present plaintiffs are, I think, free from all blame, and, as my opinion upon all the points raised is in their favour, I think they are entitled to judgment, with costs. I observe that the costs were given to the plaintiff in *Sloman* v. *The Bank of England*.

Solicitors, *Stephens & Stephens*, for *H. Hand*, Macclesfield; *Burchell & Co.*; *Taylor, Hoare, & Box*.

Chan. Div. North, J. June 5.

WARING v. SCOTLAND. (*a*.)

Vendor and purchaser—Agreement for sale of "interest in a lease"—Title shown to an under-lease.

A vendor agreed to sell "all his interest in the lease held by him of Verulam Church." It turned out that the vendor only had a title to an under-lease for a term less by three days than the term granted by the original lease.

Held, that the purchaser could not, on that ground, refuse to complete.

Madeley *v.* Booth, 2 *De G. & Sm.* 718, *distinguished.*

Further consideration.

This was the further consideration of an action by a vendor to enforce specific performance of an agreement to purchase a lease.

By the agreement, which was dated the 15th of August, 1885, the committee of Verulam Church, Kennington-road, Surrey, agreed to purchase from Dr. Waring "all his interest in the lease held by him of Verulam Church for the sum of £550." The purchasers refused to complete the contract, and this action was brought by Dr. Waring for specific performance of the agreement.

The plaintiff, by his statement of claim, alleged that he held the property "for a term of ninety-three years and a quarter from the 25th of December, 1824, under a lease dated the 24th of March, 1825."

At the trial of the action an inquiry was directed whether a good title could be made to the premises comprised in the agreement, and the further hearing of the action was adjourned.

The chief clerk found that a good title "can be made to a derivative term of ninety-three and a quarter years from the 25th of December, 1824, less three days, created by an indenture dated the 5th of June, 1841, and transferred by an indenture dated the 4th of August, 1846."

The deed of the 5th of June, 1841, was a mortgage of the property by way of underlease for the original term, less the last three days thereof, and the mortgagee afterwards sold the property under his power of sale.

D. L. Alexander, for the plaintiff.

Cozens-Hardy, Q.C., and *Gregson*, for the defendants.—A vendor of a lease who only shows a title to an underlease cannot enforce specific performance: *Madeley* v. *Booth*, 2 De G. & Sm. 718. No doubt in *Camberwell and South London Building Society* v. *Holloway*, 28 W. R. 222, 13 Ch. D. 754, Jessel, M.R., expressed his disapproval of *Madeley* v. *Booth*. The latter case, however, has never been overruled, and is a binding authority.

Alexander in reply.—The vendor in the present case only agreed to sell "his interest in the lease"; he did not agree to sell the lease. This case is, therefore, distinguishable from *Madeley* v. *Booth*.

NORTH, J.—I am of opinion that, by reason of the use of the words "all the interest of the vendor in the lease held by him," the present case is distinguishable from *Madeley* v. *Booth*. I therefore overrule the purchasers' objection to the title.

Solicitor for the plaintiff, *G. W. Barnard*.

Solicitors for the defendants, *Burchell & Co.*

(*a*.) Reported by G. E. JEFFERY, Esq., Barrister-at-Law.

Chan. Div. North, J. Dec. 15.

COOKE v. COOKE. (*a*.)

Will—Construction—Appointment—Absolute interest—Void restriction—Settlement—Infant—Ratification.

By three marriage settlements made in 1834 power was given to the intended husband and wife, or the survivor of them, by deed or by will, to appoint the settled property among the children of the intended marriage. There were three daughters, one unmarried and two married. The wife died without having joined in making any appointment, and the husband, by his will, appointed the property among the three daughters equally, subject to the proviso that the share of any daughter who should be unmarried at his decease should be held in trust for her for life for her separate use, and after her decease, as to capital and income, in case she should leave children, in trust for such persons as she should appoint, and in default of appointment or if she should not leave issue upon trust in favour of the other children. The unmarried daughter remained single at her father's death.

Held, that she was entitled to her share absolutely, the proviso being void for remoteness and inseverable.

By one of the three settlements made in 1834, to which the father and mother of the intended wife, the intended husband, and the intended wife—who was then an infant—were parties, the father and mother of the intended wife agreed, and the intended husband covenanted, that the husband and wife would, on her attaining twenty-one, convey the wife's reversionary freehold to the trustees upon the trusts of the settlement. In 1836 the husband and wife—the latter having attained twenty-one—conveyed the freehold to the trustees.

Held, that, for the purpose of the rule against perpetuities, the real estate was settled and the power of appointment conferred in 1834.

By a settlement dated the 31st of March, 1834, and made in consideration of the marriage then intended, and shortly afterwards solemnized, between Isaac Allen Cooke and Mary Ann Cole Wathen, an infant, a third share of two sums of £700 and £4,000 Consols to which Mary Ann Cole Wathen was entitled in reversion, and also two sums of £2,000 each, and an annuity of £[illegible] from her father, were settled in trust, after the death of the intended husband and wife, to pay the same, and all dividends, interest, and annual proceeds, "unto the children or to all or such of the children of the said intended marriage, and in such parts, shares, and proportions, if the appointment shall be in favour of more than one, and

(*a*.) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

at such ages or times, and with such provisions for maintenance, with such restrictions, and generally in such manner and form as they, the said Isaac Allan Cooke and Mary Ann Cole Wathen, his intended wife, or the survivor of them, shall by any deed or deeds, instrument or instruments in writing, duly executed in the presence of and attested by one, two, or more credible witness or witnesses, or the survivor of them, by his or her last will and testament, duly executed in the presence of and attested by one, two, or more credible witness or witnesses, limit, direct, or appoint the same."

By another settlement of the same date, George Wathen and Sarah, his wife, the father and mother of the intended wife, in consideration of the intended marriage and of the settlements agreed and declared, and Isaac Allan Cooke, the intended husband, consented, promised, and agreed with the trustees of the settlement, that in case the marriage should take place, they, Isaac Allan Cooke and Mary Ann Cole Wathen, would, immediately after Mary Ann Cole Wathen should have attained the age of twenty-one years, convey and assure to the trustees, subject to the life estates therein of George Wathen and Sarah, his wife, the moiety or other the part or share of Mary Ann Cole Wathen of and in certain freehold and leasehold hereditaments upon the trusts of the settlement, which included a power of appointment similar to that in the previous settlement.

By another settlement of the same date, and made in consideration of the same marriage, certain personal property of Isaac Allan Cooke was settled upon trust for the intended husband and wife successively for life, with a power for the husband and wife by deed, or the survivor by deed or will, to appoint the *corpus* among the children of the intended marriage in terms similar to those of the power of appointment contained in the first-mentioned settlement, and set out above.

Mary Ann Cole Wathen, although under age, was expressed to be a party to and executed each of the three settlements. The marriage took place in 1834, and Margaret Cooke, the eldest child, was born on the 16th of March, 1835.

Mrs. Cooke attained twenty-one; and by an indenture dated the 5th of October, 1836, indorsed on the first of the three settlements she and her husband assigned to the trustees of the settlement her reversionary third share in the two sums of £700 and £4,000 to be held upon the trusts of the settlement.

Also by another indenture of the same date indorsed on the second settlement, Mr. and Mrs. Cooke granted and assigned to the trustees of the settlement her reversionary freehold and leasehold property respectively, to be held upon the trusts of the settlement.

Mrs. Cooke died in January, 1863, leaving three children of the marriage, Margaret Cooke, Agnes, the wife of Arthur Richard Lewis Whish, and Georgina Mildred, the wife of Maitland Moore Lane. No joint appointment among the children of the marriage was made by Mr. and Mrs. Cooke under the powers given by the settlements.

Isaac Allan Cooke died in 1874, having by his will, dated the 21st of September, 1872, provided as follows: "Now in exercise of the power so reserved to me by the said three several indentures respectively, and of any other power or powers respectively enabling me in this behalf, I hereby direct and appoint that all and singular the said freehold and leasehold hereditaments and premises, and the moneys and the securities representing the same if sold, and all other the said moneys, stocks, funds, and securities comprised in the said three several indentures, or either of them, shall go to and be vested in my three surviving children of the said marriage—namely, Margaret Cooke, Agnes, the wife of Arthur Richard Lewis Whish, and Georgina Mildred, the wife of Maitland Moore Lane, in equal shares and proportions, subject, nevertheless, as to the share of either of my said children who may be unmarried at the time of my decease, to the proviso and declaration next hereinafter contained, that is to say: Provided, and I hereby expressly declare, that in case either of my said three surviving children shall be unmarried at the time of my decease, the share of such unmarried child shall be held by the trustees or trustee of this my will upon trust to pay the income and annual proceeds thereof from the day of my decease unto such unmarried child during her life for her separate use, independently of any husband with whom she may intermarry, without power of anticipation, for which income and annual proceeds her receipt in writing shall be sufficient discharge; and from and after the decease of such unmarried child, as to as well her share and the income and annual proceeds thereof, in case the said unmarried child shall die leaving issue, upon trust for such person or persons, and for such purposes, as such unmarried child, covert or sole, shall by will appoint. And in default of appointment upon such trusts and with such power equally in favour of my other children or child as shall correspond with the preceding trusts and power in favour of such unmarried child; but if such unmarried child shall die without leaving issue, then upon the same trusts and with the same power as are hereinbefore declared in the event of the said unmarried child dying leaving issue and without having exercised the power of appointment in that case given."

This was an originating summons by Margaret Cooke for, among other things, a declaration that she was absolutely entitled as one of the appointees under her father's will to one-third of the property comprised in the settlement. The two other daughters of the testator with their husbands and the surviving trustee of the settlement were the defendants.

Cozens-Hardy, Q.C., and *Kenyon Parker*, for the plaintiff.—The plaintiff takes an absolute interest under the appointment, the limitation cutting down the interest being void for remoteness; and the contingent life interests of the other daughters, being inseparably mixed up with the void limitation, are also void: *Morgan* v. *Gronow*, L. R. 16 Eq. 1, 21 W. R. Dig. 176; *Berrie* v. *Howitt*, W. N., 1867, p. 128. If, as has been suggested, the settlement of the real estate of Mrs. Cooke must be considered to date from the 5th of October, 1836, when the property was granted to the trustees by her after attaining twenty-one, and after the birth of the plaintiff, then the limitation cutting down her estate would not be void for remoteness. But the settlement was only voidable at the date of its execution, not void, and, on being confirmed by Mrs. Cooke when of age, took effect from the 31st of March, 1834: *Smith* v. *Lucas*, 30 W. R. 451, 18 Ch. D. 531; *Burnaby* v. *Equitable Reversionary Interest Society*, 33 W. R. 639, 28 Ch. D. 416.

Cookson Crackanthorpe, Q.C., and *Townsend*, for the two other daughters.—The contingent life interests of the other daughters are separable from the limitation, and are valid: *Whittell* v. *Dudin*, 2 Jac. & W. 279; *Carver* v. *Bowles*, 2 Russ. & My. 301, 306; *Churchill* v. *Churchill*, 16 W. R. 182, L. R. 5 Eq. 44; Jarman on Wills, 4th ed., p. 872; *Carr* v. *Atkinson*, 20 W. R. 620, L. R. 14 Eq. 397; *Webb* v. *Sadler*, 21 W. R. 394, L. R. 8 Ch. 419; *Slack* v. *Dakyns*, 23 W. R. 118, L. R. 10 Ch. 35; *Williamson* v. *Farwell*, 35 Ch. D. 128, 35 W. R. Dig. 151. The settlement of the wife's real estate must be regarded as taking effect from the 5th of October, 1836. The wife being a married woman who could not contract could not confirm it on that date; but the conveyance of that date by her was a conveyance *de novo*: *Morgan* v. *Gronow*; *Berrie* v. *Howitt*; *Buckmaster* v. *Buckmaster*, 35 W. R. 25, 35 Ch. D. 21.

George Foster Cooke, for the surviving trustee.

North, J.—There are two points for decision in this case. The first is as to the construction of the will of Isaac Allan Cooke, the surviving husband, who, by his will, recites the powers he had under the three settlements, and then proceeds:—[His lordship read the terms of the appointment set out above to his three daughters absolutely, and continued:—] Stopping there, there would be no question that the effect of that appointment was that the daughters took in equal shares absolutely. But it is said that what follows cuts down the effect of that gift in respect of the plaintiff's share. What follows is this:—"Subject nevertheless as to the share of either of my said children who may be unmarried at the time of my decease to the proviso and declaration next hereinafter contained." That is the only qualification imposed upon the previous absolute gift. The testator had three daughters, one unmarried and two married; and I think he was there referring to the possibility, not only of the unmarried daughter remaining unmarried, but also of one or more of his daughters being a widow or widows, and that he conceived the possibility of something happening which would render it desirable that the subsequent direction should apply to the share of any daughter unmarried at the time of his death, and there is this contingent provision possibly applicable to all or any of the shares. Unless the contingency happens the shares remain absolute. The proviso is as follows:—[His lordship read the proviso set out above in the testator's will as to the share of either of the daughters who may be unmarried at his death.] The testator proceeds in a particular event to impose a restriction on the enjoyment of the shares. It is not disputed that the effect of the restriction would be to tie up the shares longer than the rules against perpetuity allow. That being so, what becomes of the property in the case of the plaintiff's share? Is it undisposed of; or do the trusts of the other children's life interest take effect; or does the gift to the three in equal shares and proportions prevail so that the plaintiff gets her share absolutely? In my opinion the last is the right construction. A few cases have been referred to out of a very large number on this point. The rule, as I understand it, is, that where there is an absolute gift followed by an attempt to limit the effect of that gift, which limitation for some reason cannot take effect, the original gift will take effect; but if on the true construction there is no original gift, independently of the void limitation, you cannot sever the gift into two parts, and the whole gift fails.

I do not think it worth while to refer to the cases. But *Whittell* v. *Dudin* is one of those cases which has been recognized as an authority by the subsequent cases, including *Lassence* v. *Tierney*, 1 Mac. & G. 551, in which the Lord Chancellor refers to *Whittell* v. *Dudin* as a case in which a rule had been expounded, and says: "*Carver* v. *Bowles*, 2 Russ. & My. 301, and *Kampf* v. *Jones*, 2 Keen, 756, which was founded upon it, were cases of the execution of powers in which there were absolute appointments within the powers and attempts to modify the enjoyment beyond the powers; and it was held that the absolute appointments were to prevail."

In the present case I do not doubt that the testator did not intend the plaintiff to take absolutely under the first gift, because he goes on to engraft on the gift to her subsequent limitations, but as those limitations are illegal they cannot be allowed to prevail, and the absolute gift to her must take effect, unaffected by them.

That disposes of the case in respect of all the property except the funds representing Mrs. Cooke's interest in the freehold. As to that, the matter stands in this way. The settlement was made in 1834, and the plaintiff was born in 1835. Mrs. Cooke, having attained twenty-one, ratified the settlement in 1836. The settlement itself was not a covenant to settle after-acquired property, but it was an agreement by the father and mother of the intended wife, in consideration of the intended marriage and the several settlements, and a covenant by the intended husband that in case the marriage should take effect the husband and wife would, immediately after she should attain twenty-one, convey her freehold reversionary property to the trustees of the settlement. Therefore they were dealing, not with after-acquired property, but with property which at that time did belong to the lady, who was an infant, but was under no incapacity except infancy. It is said that that settlement of freeholds was absolutely void. I know of no ground for saying so. To hold that it was would be to go against *Smith* v. *Lucas*. The settlement was valid unless avoided by her afterwards. It was voidable, but it never was avoided. It remained binding until 1836, when she executed a deed in which her husband concurred, and which was duly acknowledged, and was intended to be a confirmation of the settlement, whatever the legal effect of it was. That may depend in some respects on its terms, but no one can read it without seeing that the very thing they did intend to do was to confirm the settlement.

In my opinion the estate was bound already by the agreement, which was voidable and not void, and Mrs. Cooke did, by confirming it, do everything that was required to make the settlement binding. I think that she could make a conveyance in favour of the trustees just as much as to anybody else, and I hold that for the purpose of the rule against perpetuities the power over the real estate was conferred at the date of the marriage settlement.

But it is said that at the time the confirmation was made the wife was under coverture, and could not confirm the original settlement, and could only by deed duly acknowledged convey her real estate. That I do not understand. The argument seems to be that she could deal with her real estate in favour of anybody, subject to this—that the only persons to whom she could not convey were the trustees to whom she had agreed to convey.

Solicitors, *Thomas White & Sons; Clarke, Woodcock, & Ryland; Farrer & Co.*

Chan. Div. Stirling, J. March 7, 8, 15.

Roots v. Williamson. (a.)

Company — Shares — Transfer — Inchoate legal title — Pre-existing equitable title.

The plaintiff, a married woman living apart from her husband, purchased, out of moneys belonging to her for her separate use, 175 shares in the W. L. A. Co., which were transferred to, and registered in the name of, the defendant W., who held as trustee for the plaintiff for her separate use.

In February, 1886, W. executed a transfer of seventy-five of the plaintiff's shares to the defendants H. and A., leaving blanks for the date and the consideration, which he sent to them, together with the certificates of the shares as a security for a debt due from his firm.

On the 5th of May the defendants H. and A. filled in the blank for the consideration with five shillings, and that for date with the 4th of May; and, on the 6th of May, the transfer, together with the certificates, was sent to the company for registration. Immediately on the receipt of the transfer, the manager of the company wrote to the plaintiff informing her of the fact that

(a.) Reported by W. Ivimey Cook, Esq., Barrister-at-Law.

thereupon instituted the present action to restrain the defendants H. and A. from dealing with the shares.

The deed of settlement by which the company was originally constituted provided (clause 5) that no person claiming to be the proprietor of any share by transfer should be entitled to be treated or recognized as such unless and until he should have been registered in the register of shareholders as the proprietor of the shares; (clause 6) that no person should be entitled to be registered in the register of shareholders as the proprietor of any share unless and until he should, by the execution of settlement or some deed referring thereto, have undertaken all the liabilities, duties, and obligations of a shareholder in respect of such share; and (clause 14) that it should be essential to the legal validity of a transfer that the deed by which it was effected should be deposited or left at the office of the company.

Held, that the defendants H. and A. had not shown a legal title in themselves, or (as between themselves and the company) an absolute and unconditional right to be registered as shareholders in the place of the defendant W., but that their title was inchoate only, and therefore insufficient to defeat the prior equitable title of the plaintiff.

Dodds *v.* Hills, 2 *H. & M.* 424, 13 *W. R. Ch. Dig.* 57, *distinguished.*

Trial of action.

The plaintiff was a married woman living apart from her husband.

In 1876 she purchased, for the sum of £496, part of her separate estate, 175 shares of £10 each in the Whittington Life Assurance Co., and the shares were registered in the name of A. M. Waller, as trustee for the plaintiff, for her separate use.

The Whittington Life Assurance Co. was originally formed under the 7 & 8 Vict. c. 110, but was subsequently registered under the Companies Act, 1862.

In March, 1880, Waller, at the request of the plaintiff, transferred the shares to Williamson as trustee for the plaintiff for her separate use.

On the 12th of April, 1881, the plaintiff gave to Williamson the following written authority:—

"I hereby authorize Mr. G. S. Williamson, of East Dulwich, to dispose of the whole or part of the 175 shares he holds on my behalf in the Whittington Life Assurance Co.

(Signed) "E. M. Roots."

On the 9th of August, 1883, Williamson, at the request of the plaintiff, gave to her an I O U for £496, the original price of the shares.

Williamson was a member of the firm of Williamson & Nelson, who carried on business in Wood-street, in the City of London, and in January, 1886, the firm were indebted on a current account to the defendants Hodgkinson & Arnold to the amount of £200.

Early in February, 1886, Williamson executed a transfer of seventy-five of the plaintiff's shares to Hodgkinson and Arnold, which he sent to them with the certificates of the shares as security for the debt of his firm.

The transfer was in a printed form, and was substantially in accordance with the forms required by the deed of settlement, except that the final clause was omitted and it contained no reference to the deed of settlement.

The blanks for the date and the consideration were not filled up.

On the 6th of April, 1886, the plaintiff wrote to the manager of the company a letter stating that Williamson held the shares in trust for her, and asking whether the shares could be transferred either to herself or to her daughter. To this the manager replied on the 29th of April to the effect that the shares must be transferred by Williamson and could not be transferred to the plaintiff, but might be transferred to her daughter.

On the 4th or 5th of May the defendants Hodgkinson and Arnold executed the transfer, the blanks for consideration being filled up with 5s., and that for date with the 4th of May, and on the 6th of May Messrs. Fernyhough & Ashe, who were brokers in Manchester and acted on behalf of Hodgkinson and Arnold, sent the transfer along with the certificates to the company for registration.

Immediately on receipt of the transfer the manager of the company wrote on the 7th of May to the plaintiff informing her of the fact, and on the same day he wrote to Fernyhough & Ashe to the effect that he had notified the plaintiff of the transfer, and awaited her reply or action before submitting the transfer to the board for approval.

On the 10th of May the plaintiff commenced this action to assert her title to the shares. The action was originally against Williamson alone, and on the 3rd of May an injunction was obtained against him. Subsequently the company were made parties, but on the 20th of May proceedings were stayed against them upon their undertaking not to register the transfer and to deal with the shares and certificates as the court should direct. Hodgkinson and Arnold were then added as parties, and on the 27th of May an interlocutory injunction was obtained restraining them from dealing with the seventy-five shares and from completing or allowing to be completed any transfer of or dealings with the said shares or any portion thereof except to the plaintiff.

The deed of settlement of the company provided as follows:—

4. "That every person who shall from time to time be or appear registered as the proprietor of any share in the register of shareholders to be kept for the purposes of the company pursuant to the said Act shall, unless and until his share shall, by operation of law or otherwise conformably to the provisions herein contained, become vested in some other person, be treated and recognized by the company, so far as is consistent with the provisions of the said Act, as the lawful and rightful proprietor of such share, although in fact he may have been improperly so registered, and no other person claiming or entitled to be the proprietor of such share shall have any claim against the company in respect thereof, but only against the person who shall be registered and his representatives."

5. "That no person claiming to be the proprietor of any share, whether by original subscription, purchase, transfer, operation of law, or otherwise, shall be entitled to be treated or recognized as such as between himself and the company, or to transfer his share, unless and until he shall have been registered in the register of shareholders aforesaid as the proprietor of such share; provided, nevertheless, that this provision shall not operate so as to release any person from any agreement or engagement on his part to become the proprietor of share in the company or from any liability or obligation in respect of any agreement or engagement."

6. "That no person other than the legal personal representative of any deceased shareholder, or the husband of any deceased shareholder, or the husband of any female shareholder, or the assignee of any bankrupt or insolvent shareholder, shall be entitled to be registered in the register of shareholders as the proprietor of any share unless and until he shall, by his execution of these presents or some deed referring thereto, have undertaken all the liabilities, duties, and obligations of a shareholder in respect of such share."

13. "That the company shall in no case be in anywise bound to notice any trust, lien, charge, incumbrance, or equitable right or interest affecting any share distinct from the legal title thereto."

14. "That" (with certain exceptions) "every transfer of shares shall be effected by deed which, when

executed, shall be deposited or left at the office and remain in the custody of the company, and such deed shall be according to the form A. contained in the schedule hereto or to the like effect."

Form A. was as follows:—

This indenture, made between of the one part and of the other part, witnesseth that in consideration of the sum of paid to me by the said , do hereby transfer to the said shares, numbered , in the undertaking called "The Whittington Life Assurance Co.," to hold unto the said , his executors, administrators, and assigns (or successors and assigns), subject to the several conditions on which I hold the same at the time of the execution hereof; and I, the said , do hereby agree to take the said shares subject to the same conditions and to the provisions of the deed or deeds of settlement of the said company.

As witness our hands and seals the day of .

Signed, sealed, and delivered by the above-named in the presence of .

By clause 121 it was provided (*inter alia*) as follows:—"The word shareholder shall be taken to mean any person who shall or may become a proprietor or owner of any share in the company either by subscription, purchase, or bequest, marriage, operation of law, or other means whatsoever, and whose names shall for the time being be registered in the register of shareholders hereinbefore mentioned as the present proprietor of such share."

Buckley, Q.C., and *Mulligan*, for the plaintiff, contended that the equitable title of the plaintiff must prevail over that of the defendants Hodgkinson and Arnold.

They referred to *Société Générale de Paris* v. *Walker*, 34 W. R. 662, 11 App. Cas. 20; *Hibblewhite* v. *McMorine*, 6 M. & W. 200; *Tayler* v. *Great Indian Peninsular Railway Co.*, 7 W. R. 182; *Swan* v. *North British Australasian Co.*, 10 W. R. 841, 7 H. & N. 603; *Knill* v. *Williams*, 10 East. 431; *Suffell* v. *Bank of England*, 30 W. R. 932, 9 Q. B. D. 555; *Pigot's case*, 11 Rep. 26*b*.; *Master* v. *Miller*, 4 T. R. 320, 1 Sm. L. C., 8th ed., p. 857; *Shropshire Union, &c., Co.* v. *Reg.*, 23 W. R. 709, L. R. 7 H. L. 496; *Easton* v. *London Joint Stock Co.*, 35 W. R. 220, 34 Ch. D. 95; *Prince* v. *Prince*, 14 W. R. 383, L. R. 1 Eq. 490; *Colonial Bank* v. *Whinney*, 34 W. R. 705, 11 App. Cas. 426; *France* v. *Clark*, 31 W. R. 374, 32 *Ibid.* 466, 22 Ch. D. 830, 26 *Ibid.* 257, 7 & 8 Vict. c. 110, s. 54. [STIRLING, J., referred to *Davidson* v. *Cooper*, 11 M. & W. 778, 13 *Ibid.* 343.]

Graham Hastings, Q.C., and *G. Broke Freeman*, for the defendants Hodgkinson and Arnold submitted that by reason of the transfer to them they had obtained priority over the plaintiff.

They referred to *Nanney* v. *Morgan*, 35 W. R. 713, *ante*, p. 677, 35 Ch. D. 598, 37 *Ibid.* 346; *Dodds* v. *Hills*, 2 H. & M. 424, 13 W. R. Ch. Dig. 57; *Société Générale de Paris* v. *Tramways Union Co.*, 14 Q. B. D. 424, 33 W. R. Dig. 44; *Briggs* v. *Massey*, 42 L. T. N. S. 49; *In re Tahiti Cotton Co., Ex parte Sargent*, 22 W. R. 815, L. R. 17 Eq. 273; Lindley on Partnership, 4th ed., pp. 663, 664.

Buckley replied.

Cur. adv. vult.

March 15.—STIRLING, J. (after stating the facts as above, continued as follows:—) The question to be decided is whether the title of the plaintiff to the seventy-five shares, or that of the defendants Hodgkinson and Arnold is to prevail. Under the circumstances which I have stated the plaintiff had unquestionably in the first instance a clear equitable title to the shares registered in the name of Williamson. That title was, however, liable to be defeated by a legal title obtained through transfer; and it might also be defeated by such conduct or representations on the part of plaintiff as, to use the words of Lord Cairns, "would operate and cause to forfeit and take away the pre-existing equitable title": *Shropshire Union Railway Co.* v. *Reg.*

It has been contended for the defendants Hodgkinson and Arnold that the documents of the 12th of April, 1881, and the 9th of August, 1883, have the effect of creating in their favour and as against the plaintiff such a prior and countervailing equity. I am unable, however, to see how this can be. These defendants did not deal with Williamson on the faith of these documents; and even if they had so done I do not think they were entitled by virtue of them to take the shares as a security for the antecedent debt of Williamson. There is a wide difference between taking the shares as security for an advance and taking them as security for an antecedent debt. In the former case Williamson would be presumed to be acting on behalf of the plaintiff and within the scope of his authority; in the latter he would, *primâ facie* at least, be taken to act on his own behalf, and contrary to the authority conferred on him by the plaintiff.

The real question is, Whether Hodgkinson and Arnold have, by the transfer, acquired such a legal estate as to defeat the pre-existing equitable title of the plaintiff? It was contended, in the first place, on behalf of the plaintiff, that the transfer was materially altered after the execution of it by Williamson, and so became void, and ceased to be a deed within the meaning of the clauses of the deed of settlement relating to transfer. I think it unnecessary to express any opinion on this point, and assume (without deciding) that the transfer was a valid and effectual deed when it was sent to the company on the 6th of May, 1886. It was further contended on behalf of the plaintiff that the defendants Hodgkinson and Arnold had not, at the time when notice of the plaintiff's claim was given to the company, and have not since had, and have not now, a complete legal title to these shares, and both in support of, and in opposition to, this contention the case of *The Société Générale de Paris* v. *Walker* was much relied on. In that case the articles of association provided (26) that shares should be transferable only by deed executed by the transferor and transferee, and duly entered in the register of transfer; and (32) that a person should not be registered as the transferee of a share until the instrument of transfer, duly executed, had been left with the secretary to be kept with the records of the company. In advising the House of Lords Earl Selborne says:—"The courts below both thought, and I agree with them, that there was not, as against the respondents, any sufficient evidence of a delivery of the completed transfer by James Montgomery Walker. But, even if there had been such evidence, I should not myself have considered a merely inchoate title by an unregistered transfer equivalent for the present purpose to a legal estate in the shares. Such a transfer might, indeed, give a legal right of action against the company if they, without just cause, refused to register it; it might also be a good foundation for an application to a competent court to rectify the register. But it could not, under the 26th article of association of the Tramways Co. confer (while unregistered) a legal title to the shares themselves; nor do I think that the fact of its execution, and of a claim having been made to register it before the company had notice of the prior equitable title, would necessarily make it the duty of the company, after receiving such notice, to register it, or of a court to compel them to do so, and thereby to effect a transfer till then incomplete. If, indeed, all necessary conditions have been fulfilled to give the transferee, as between himself and the company, a present absolute unconditional

tional right to have the transfer registered before the company was informed of the existence of a better title, the case might have been different."

In reading this passage the provisions of the articles of association of the company are doubtless to be borne in mind. So reading it, I think it may be inferred that the following propositions are sanctioned by his lordship's authority. 1. A merely inchoate title by transfer is not equivalent for the purpose of defeating a pre-existing equitable title to a legal estate in the shares. 2. The title by transfer is to be deemed inchoate only (within the meaning of the last proposition), if not until a complete legal title is acquired, at all events unless and until all necessary conditions have been fulfilled to give the transferee, as between himself and the company, a present absolute and unconditional right to have the transfer registered before the company was informed of the existence of a better title. 3. A company having notice of a prior equitable title is not necessarily bound to act upon a transfer which confers an inchoate title, only so as to effectuate a fraud till then incomplete. Lord Blackburn's speech in the same case is also of importance. [His lordship read the passage commencing, "Lindley, L.J., in the present case says," and ending, "After the receipt of that notice nothing which they did could have affected the prior right of the respondents."]

It would seem, therefore, to be his lordship's opinion that a company receiving a transfer for registration are not bound to act on it at once, even though in order, but are entitled to a reasonable time to make inquiries, and that if, before the expiration of such reasonable time, notice is given to them of the existence of a prior equitable title, they are not necessarily bound to proceed further. The inference seems to be that until the company have in some way shown their acceptance of the transfer the legal title is incomplete. Lord Watson concurs; Lord Fitzgerald does not consider it necessary to decide the point; the Lord Chancellor (Lord Halsbury) concurs with Lord Blackburn. The case of *Nanney* v. *Morgan*, recently decided in the Court of Appeal, has an important bearing on the question at what point the legal title to shares becomes complete. That case was decided with reference to shares in a company governed by the Companies Clauses Act, 1845, but the *ratio decidendi* throws some light upon the present case.

The leading judgment was delivered by Cotton, L.J., who says:—[His lordship quoted the passage at p. 353 commencing with the words "If the effect of a transfer of shares" and concluding with the words "trustees of the marriage settlement"]. Sir James Hannen concurs without adding any observations. Lopes, L.J., at p. 356, says: "the transferor, until the delivery of the deed of transfer to the secretary, is subject to all the liabilities and entitled to all the rights which belong to a shareholder or stockholder, and, in my opinion, until the requisite formalities are complied with, he continues the legal proprietor of the stock or shares subject to that proprietorship being divested, which it may be at any moment by a compliance with the requisite formalities." The reasoning on which this judgment is based seems to show that the transfer is not complete until everything has been done which is necessary to put the transferee into the position of the transferor, or possibly a narrower view might be that, where the transfer has to be left with the company it does not take effect until the officers of the company have examined it and accepted it as properly left. This would seem to agree with what is laid down by Lord Blackburn in the speech to which I have referred.

I have now to apply the principles derived from these, the most recent and important authorities, to the present case, and must consider whether the defendants Hodgkinson and Arnold have shown a legal title in themselves or (as between themselves and the company) an absolute and unconditional right to be registered as shareholders in the place of Williamson; and for this purpose I must refer to the clauses of the deed of settlement. The form A. given in the schedule to the deed of settlement as the form in which, according to clause 14, every transfer of shares is to be effected, differs from that which was executed in this case, and concludes "and I, the said (transferee) do hereby agree to take the said shares subject to the same conditions and to the provisions of the deed or deeds of settlement of the said company," and I am of opinion that under clause 14 it was essential to the legal validity of a transfer that the deed by which it was effected should be deposited or left at the office of the company. Further, clause 5 provides that no person claiming to be the proprietor of any share by transfer shall be entitled to be treated or recognized as such unless and until he shall have been registered in the register of shareholders as the proprietor of the shares; and clause 6 provides that no person (with certain exceptions unnecessary to be regarded) is to be entitled to be registered in the register of shareholders as the proprietor of any share unless and until he shall, by the execution of the deed of settlement or some deed referring thereto, have undertaken all the liabilities, duties, and obligations of a shareholder in respect of a share.

First of all, then, have the transferees acquired the legal title to the shares which the transferor had? The answer must be in the negative, for by clause 5 no person claiming to be the proprietor of a share shall be entitled to be treated as such, as between himself and the company, unless and until he shall have been registered in the register of shareholders as the proprietor of the share. This makes registration in the register of shareholders essential to the completion of the title, and brings the case almost within the very terms of *Société Générale de Paris* v. *Walker*.

The same conclusion may be arrived at in another way. As I have said, clause 14 renders it, in my opinion, essential that the transfer should be left at the office of the company. But, regard being had to clauses 5 and 6, I think it is not enough that it should be so left. The officers of the company charged with the duty of receiving the transfer must examine it and ascertain whether it complies with the requirements of the deed of settlement, and if it does not it is their duty to reject it, and I think it follows both from what is laid down by Lord Blackburn in the case of *Société Générale de Paris* v. *Walker*, and by the Court of Appeal in the case of *Nanney* v. *Morgan*, that it is not until this has been done and the transfer has been accepted by the company as a proper transfer that it becomes effectual as between the company and the transferee. Now there is no controversy that matters remain as they stood on the 7th of May, 1886, and that the transfer has not been accepted by the company as a proper transfer, and the company are not bound to accept it so as to effectuate a fraud which is still incomplete.

Lastly, let us apply the alternative test used by Lord Selborne in *Société Générale de Paris* v. *Walker*—viz., whether on May 6, 1886, the defendants Hodgkinson and Arnold had acquired "an absolute and unconditional right to be registered as shareholders." Now the transfer executed by Williamson does not refer to the deed of settlement. No offer to execute the deed of settlement has been made by Hodgkinson and Arnold, nor have they executed that deed. By virtue of clause 6 they are, therefore, not entitled to be registered on the register of shareholders as the proprietors of the shares, and by virtue of clause 5 they are not entitled, as between themselves and the company, to be treated or recognized as the proprietors of the shares. Their title, therefore, is inchoate only, and therefore it is insufficient to defeat that of the plaintiff.

I ought, perhaps, to refer to the case of *Dodds* v.

Hills, upon which much reliance has been placed by the defendants during the course of the argument. In that case a sole trustee of shares executed a transfer of the shares and delivered it with the certificates to a mortgagee who had no notice of the trust, but who afterwards received notice of the trust, and then got the transfer registered by the company. And the case may, therefore, be cited as an authority for the proposition that, where a person having an inchoate title completes his title by getting in the legal estate, he will not, as an ordinary rule, be deprived in favour of a person having only an equitable title of the advantage he has thereby obtained. But in the present case the company had notice of the breach of trust before the transfer was sent to them for registration (which does not appear to have been the case in *Dodds* v. *Hills*), and the legal title never was completed. This distinguishes the present case from *Dodds* v. *Hills*, and it is, therefore, unnecessary for me to consider whether all the propositions laid down by the Vice-Chancellor in that case are entirely consistent with the more recent decisions.

I accordingly hold that the title of the plaintiff to these shares must prevail, and that there must be judgment against Williamson, with costs.

Solicitor for the plaintiff, *Worrell*.

Solicitor for the defendants, *Rexworthy*.

Chan. Div. } June 12, 13.
Kekewich, J. }

HILTON *v.* TUCKER. (*a.*)

Pledge — Validity — Delivery to pledgee — Document regulating the rights of the pledgee—Contract for pledge—Delivery not contemporaneous with advance—Bills of Sale Act, 1878 (41 *&* 42 *Vict.* c. 31), *ss.* 3, 4—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 *&* 46 *Vict.* c. 43), *ss.* 8, 9.

In order to make a valid pledge, it is not necessary for delivery of possession to be contemporaneous with the advance of the money; it is sufficient if the money is advanced on a contract that the goods shall be delivered and the goods are in fact afterwards handed over under the contract. But until the goods are so handed over, there is no valid pledge, delivery being an essential part of a pledge.

Reeves *v.* Capper, 5 *Bing. N. C.* 136, *followed.*

Where there is a valid pledge, the Bills of Sale Acts, 1878 *and* 1882, *have no application, although a document regulating the rights of the parties may have been subsequently executed.*

The handing over of the key of a warehouse or room must, in order to amount to constructive delivery of goods stored in the warehouse or room, be made under such circumstances that it in fact passes full control over the goods.

A. agreed to advance money to B. on the security of goods to be deposited in a room of which A. was to have control. B. hired a room, deposited the goods in it, and placed a key of it at the disposal of C., who was also employed by B. to make a list of the goods in the room, which list was apparently, to some extent at any rate, intended for the convenience or benefit of A. On the day the goods were deposited B. wrote to A. to inform him of the deposit and the proposed list, and added that C. "has the key, which I place entirely at your disposal."

Held, that there was, under the circumstances, a good constructive delivery of possession of the goods to A., notwithstanding the fact that B. subsequently continued to have access to the room, and exercised various acts of control over the goods.

(*a.*) Reported by R. H. DEANE, Esq., Barrister-at-Law.

Trial of action.

This action was brought by James Hilton against Mildred Anna Rosalie Tucker, as administratrix of the estate of her father, Stephen Isaacson Tucker, for a declaration that the plaintiff was entitled to possession of a collection of portraits, prints, and effects stored in a certain room in Oxford Mansions, Oxford-street, as security for principal and interest moneys due to him under two bonds for £1,250 each. The plaintiff also asked for an account, a sale of the property, and other subsidiary relief.

It appeared that in the month of November, 1883, the plaintiff had agreed, at S. I. Tucker's request, to make him an advance upon the security of some title deeds, but before this agreement had been acted on it was arranged between the parties, at Tucker's instance, that in lieu of the deeds a collection of prints and other articles belonging to him should be deposited, as security for the money to be advanced, in a room to be taken by Tucker for the purpose, but to be under the plaintiff's control.

On the 19th of the same month Hilton made a first advance to Tucker of £1,250, for which a bond was given the next day. Tucker then took a room in Oxford Mansions, a portion of which building is occupied by the Archæological Society, of which both parties were members; the collection was moved into the room, and on the 21st of December Tucker wrote to the plaintiff as follows:—

"21st December, 1883.

"Dear Hilton,—The collection was moved in to-day, and I have arranged with Larking (R.A.) to spend, subject to your approval—for I thought it would be better for you to have one already, in a sense, under your control—a certain time in the room every day in making a list. This I will afterwards edit into a perfect catalogue. . . . Larking has the key, which I place entirely at your disposal. STEPHEN I. TUCKER."

On the 24th of December the plaintiff made a further advance of £1,250 to Tucker, a bond for which was given on the 11th of January, 1884. On the same day Tucker wrote the following letter to the plaintiff:—

"London, 11th January, 1884.

"Dear Sir,—You having advanced to me the sum of £2,500 on two bonds for £1,250 each executed by me, I hereby request and authorize you to retain possession of my collection of engraved portraits, prints, and all other property now deposited by me in a certain room in Oxford Mansions, Oxford-street, the key of which room is at present in your possession or power; and I hereby acknowledge your right to retain possession of such portraits, prints, and property until the whole sum is paid, with interest at five per cent., from the dates of the bonds respectively. STEPHEN I. TUCKER.

"Somerset H."

The plaintiff did not take physical possession of the property, or have sole possession of the key till after Tucker's death in January, 1887. Tucker, on the other hand, was in the habit of going to the room and exercising various acts of control over the goods up to the time of his death, and was stated by one of the witnesses, who had been steward or superintendent of the house, to have removed two of the pictures on one occasion.

It was stated on behalf of the plaintiff that after Tucker's death a clerk, representing the defendant, had attempted to take forcible possession of the property and threatened to break into the room.

Henn Collins, Q.C., and *J. Bradford*, for the plaintiff.—We are pledgees. Where possession has been acquired, and a document regulating the rights of the parties is then drawn up, it is not a bill of sale. The test seems to be whether possession has been acquired

before the document is executed: *Ex parte Hubbard*, 35 W. R. 2, 17 Q. B. D. 690. We had possession given us on December 21, 1883, and the letter which is alleged to be a bill of sale was not written till the 11th of January, 1884.

Barber, Q.C., and *Aldred Rowden*, for the defendant.—The plaintiff had no key, and never exercised any act of possession till after Tucker's death. Tucker paid the rent and retained the control of the room and its contents. The evidence is, upon the authorities, wholly insufficient to establish the case that possession was given. In *In re Cunningham*, 33 W. R. 387, 28 Ch. D. 682, the document was subsequent to deposit. To make a good pledge there must be an immediate transfer. An agreement to pledge is a "licence to take possession of personal chattels as security," or an "assurance of personal chattels" within section 4 of the Bills of Sale Act, 1878. At the date of the letter of January, 1884, the plaintiff had not possession as a fact. It has never been decided how far delivery of a key is delivery of possession, and we submit that the mere delivery of the key of a room without more does not pass a special property in chattels stored there, such as is necessary to make a valid pledge. To hold that there is a good pledge where possession is not given till after the money has been advanced, would open a very wide door to fraud of the character the Bills of Sale Acts were intended to prevent. No property, general or special, in chattels, can pass in law, except by (1) pledge, (2) bill of sale. Unless the advance and possession are contemporaneous, there is no pledge. *Ex parte Hubbard* merely shows that if there is a real transaction of pawn, it is not upset by the fact that there is a document.

They also referred to *Ex parte Close*, 33 W. R. 228, 14 Q. B. D. 386; *Ex parte Parsons*, 34 W. R. 329, 16 Q. B. D. 532: *Ancona* v. *Rogers*, 24 W. R. 1000, 1 Ex. D. 285; *Meyerstein* v. *Barber*, 15 W. R. 173, L. R. 2 C. P. 38; and Coote on Mortgages, 5th ed., vol. 1, p. 640.

Henn Collins in reply.—I am now in possession. There was an agreement for a pledge, and if that was followed by possession while the agreement was still subsisting, then there was a valid pledge, though not till delivery of possession: *Reeves* v. *Capper*, 5 Bing. N. C. 136. The mere fact that there is a document does not affect the pledge, if what happens afterwards is consistent with the agreement.

He also referred to *Ellis* v. *Hunt*, 3 T. R. 464; *Chaplin* v. *Rogers*, 1 East, 192; *Whitehead* v. *Clifford*, 5 Taunt. 518; and *North Central Wagon Co.* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, 34 W. R. 430, 32 Ch. D. 477.

Kekewich, J.—It would not be right to describe this as a bill of sale case. If it is a bill of sale case there is no bill of sale which has been or can be registered, so that the mere statement of the case in that way implies the plaintiff's failure. The plaintiff's case is that there has been a pledge of the goods, and the defendant's case is that there has been no pledge. What constitutes a pledge is almost common knowledge, but I will take, as a description, the words of Bowen, L.J., in the case of *Ex parte Hubbard*, where he says, "There is another entirely distinct transaction, which was known to the Romans, and has been long familiar to English law, the transaction of a pawn or pledge, where there must be a delivery of the goods pledged to the pledgee, but only a special property in them passes to him, in order that they may be dealt with by him, if necessary, to enforce his rights, no general property in the goods remaining in the pledgor." A pledge, therefore, consists in the delivery—at least, that is an essential part of the transaction. In *Meyerstein* v. *Barber*, Willes, J., said, "With respect to a pledge, according to the law of this country, a mere contract to pledge even specific goods, and even although the money is actually advanced upon the face of the contract, is not sufficient to carry the legal property in the goods."

It is not necessary for me to examine either of the Bills of Sale Acts of 1878 and 1882, as they do not deal with parol contracts or pledges, which are left to be dealt with by the common law. As I understand the cases they go the length of deciding that if you have a pledge by contract and delivery, it can now be enforced, irrespective of the statutes or the decisions on them. The question is, therefore, whether there is here a pledge of that character. As to the bargain, there is no doubt that the plaintiff, in the autumn of 1883, agreed to make certain advances to Tucker on the security of some title deeds, and that the security was afterwards changed, with the plaintiff's consent, for that of the prints and goods in question. No money was advanced till the 19th of November, 1883, when the first advance of £1,250 was made, a further advance of £1,250 being made about a month later. Before the first advance there was no delivery of the goods—that is common ground—but about the date of the second advance there was delivery of possession, which was practically contemporaneous with that advance. There was, therefore, a contract binding in honour, but whether it was also binding in law is what I have now to decide. Such a contract might have given rise to a legal or equitable right to specific performance such as was referred to on the authority of Lord Westbury in *Holroyd* v. *Marshall*, 11 W. R., at p. 172, 10 H. L. Cas., at p. 209, but was not sufficient to pass either a general or a special property in the goods, which remained vested in Tucker. They were afterwards dealt with in a very peculiar manner. Having been, up to December 21, 1883, under the control of Tucker, they were not then delivered, in the ordinary sense, to the lender, but they were deposited in a house selected merely because part of it was occupied by the Archæological Society, of which society both parties were members. A room was taken there by Tucker for the purpose of depositing them, and he was the tenant of it, and paid the rent and expenses of keeping it in order—so that in no sense was it Hilton's room. The key, or keys—for there seem to have been two—were kept hung up in the porter's or steward's office in the way that is usual in the case of flats, so that the tenant can get it from time to time when he wishes to go into his room. If the case stopped there I should hold that possession was not given at that time. But there is more. Mr. Tucker, in his letter of the 21st of December, 1883, refers to the collection having been moved in on that day, and refers to the arrangement that a list should be made; but then he goes on to say: "Larking has the key, which I place entirely at your disposal." The key was there, and it is immaterial whether it was in Larking's physical possession, or in that of the superintendent or steward of the rooms, or that it was also at the disposal of Tucker. Then, as to two of the pictures having been carried away, it certainly shows some control over the room on the part of Tucker, but I do not think any importance is to be attached to the fact, as out of such a large collection it is quite possible that one or two might have been removed by Mr. Hilton's permission, or they might have been taken wrongfully, though I do not for a moment impute that. This state of things went on till the 11th of January following, when Tucker wrote the letter that is said to be a bill of sale which ought to have been registered. [His lordship read the letter of the 11th of January, 1884]. I admit Mr. Barber's contention that authority to retain does not necessarily imply that possession had already been given, but the letter goes on "the key of which room is at present in your possession or power." To my mind that

is a statement by Tucker quite consistent with the previous letter. Is there anything inconsistent with Hilton's possession in Tucker's access and control? No doubt it would have been more satisfactory if the plaintiff had had exclusive control of the goods. But assuming the *bona fides* of both parties, it seems to me quite consistent with the honesty of the transactions that Tucker should have retained some control over the property. I do not rely upon the fact of the key having been handed over. Several cases were cited as to the effect of such delivery, but when examined they all merely go to this—that in order to amount to constructive possession, the delivery of the key must have been made under such circumstances that it really does pass full control over the goods, as in the case of timber in a warehouse—it being clearly impossible to hand over such goods bodily. The key, then, is a symbol where it is practically impossible to give possession of the property itself. I think that runs through all the cases.

But then I have to decide that question of law, whether the delivery must be actually contemporaneous with the advance in order to make a valid pledge. I do not mean in such a case as where the delivery is made an hour, or even a day, after the advance, but where, as here, it is made a month after, but then made in pursuance and fulfilment of the contract under which the advance was made. Until delivery there is nothing but a contract. I am not aware of any authority to the effect that the advance and delivery must be contemporaneous—so long as the delivery is made in fulfilment of the contract—and *Reeves* v. *Capper* is an authority the other way. Mr. Barber says that case would not be decided in that way now, but, even if that be so, it is binding on me till overruled. However, irrespective of that case, I cannot understand why actual delivery must be contemporaneous with the advance. It seems to me the transaction may be divided into two parts, though the lender has no remedy till he has actually got the goods. I think there is a very small opening for fraud in holding that if money is advanced on a contract that goods shall be delivered, and then the goods are handed over pursuant to the contract, there is in the result a valid pledge. I think the plaintiff is entitled to the relief he asks, and to add his costs to his security.

Judgment for the plaintiff.

Solicitors for the plaintiff, *Curtis & Hilton.*

Solicitor for the defendant, *H. C. Godfray.*

Chan. Div. Kekewich, J. } May 31; June 1, 4.

Dooby v. Watson. (a.)

Solicitor and client—Fiduciary relation—Investment on insufficient security—Misrepresentation—Negligence—Statute of Limitations—Trustee and cestui que trust.

Where money is received by a solicitor for a client to be invested on a particular mortgage selected by the client, or on a mortgage to be selected by the solicitor, but subject to the client's approval, the solicitor, in the absence of special circumstances, is not responsible on the footing of a trustee for the sufficiency of the security, but is only liable as a solicitor for negligence, if proved, and in that case is not excluded from the benefit of the Statute of Limitations. But where the money is received to be invested at the solicitor's discretion, and the client takes no part in the selection, the solicitor is liable, on the footing of a trustee, if the security turns out to have been insufficient and such as a trustee would not have been justified in investing on.

There is nothing improper in a solicitor advising a client who owes him money to sell or mortgage property and allow the solicitor to receive the purchase or mortgage-money and retain out of it the amount owing to himself from the client; and it makes no difference that the purchase or mortgage-money is paid or advanced by another client acting upon the solicitor's advice. But such a transaction, if challenged, will be closely scanned to see whether the solicitor has acted in good faith and with due regard to his client's interests.

A small piece of land included in a mortgage for £5,000 was sold, and the mortgagee, being advised in good faith by her solicitor that the remaining land was a sufficient security for her money, and being herself reluctant to break into her investment, allowed the price (£230) to be received by the owners of a second mortgage, in which the solicitor himself had an indirect interest, as being responsible to clients for the money advanced on it. The security turned out insufficient for the first mortgage.

Held, that the solicitor had not by his conduct constituted himself a trustee for his client the first mortgagee, so as to be liable to make good to her the loss of the sum of £230.

Craig v. Watson, 8 *Beav.* 427; Smith v. Pocock, 2 *W. R.* 285, 2 *Drew.* 197; *and* Burdick v. Garrick, 18 *W. R.* 387, *L. R.* 5 *Ch.* 233, *distinguished.*

Mare v. Lewis, 4 *Ir. Rep. Eq.* 219, 18 *W. R. Ch. Dig.* 97, *commented on.*

Trial of action.

This action was brought to make the defendant, James Watson, a solicitor, liable, both personally and as executor under the will of William Watson, his father, in respect of an investment of £5,000 on the security of a mortgage which had turned out to be insufficient.

It appeared that William Watson and James Watson, who were solicitors carrying on business in partnership at Hull and Hedon, in Yorkshire, under the style of Watson & Son, had, for many years prior to 1877, been in the habit of acting, when required, as solicitors for the plaintiff, and this continued down to the death of William Watson, which occurred in January, 1879, after which James Watson, in partnership with Robert Carrick, still continued to act for her, when required, till recently.

The plaintiff, Mrs. Dooby, was an elderly widow lady residing in the neighbourhood of Hull, and about the year 1867 she had purchased or acquired a property called Ganstead, situated in the same locality, which she sold in 1876 for £10,250. William Watson acted as her solicitor in this sale, and it was completed and the money paid on the 6th of April, 1877. At that time Watson & Son had two clients named Charles and William Marsdin, each of whom owned land, and it was now suggested for the plaintiff that these two properties, which adjoined each other, were to be regarded as forming two parts of one farm, the part owned by William containing the homestead. Charles Marsdin had agreed to sell his part to his brother William for £6,800, and the sale was completed somewhere about the same time as the sale of the plaintiff's estate of Ganstead. Both Charles and William Marsdin were largely indebted to the Watsons' firm up to the time of these transactions. Of the £10,250 realized for the Ganstead property, £5,250 was paid into the plaintiff's account at Smith's bank at Hull, but the remaining £5,000, as to which the dispute arises, was retained by Messrs. Watson to be invested for the plaintiff, who stated that she trusted them implicitly to find a safe and proper investment for it. The money was invested on the security of a mortgage of the land purchased by William Marsdin from his brother Charles, and the inference drawn from the evidence at this point by the learned judge was that the plaintiff knew and approved of such investment.

(a.) Reported by R. H. Deane, Esq., Barrister-at-Law.

It was admitted by the defendant James Watson that a prior mortgage on the property was (no doubt, partly out of the plaintiff's £5,000) paid off to himself and a Mr. Robinson, who were practically trustees of it for the firm, but he stated that the money, or part of it, secured by that mortgage really belonged to clients of theirs who had entrusted it for investment to the firm as their solicitors, though there might be a contingent liability for it on the part of the firm.

No valuation had been procured for the purpose of the mortgage, though the land had been valued for the sale from Charles to William Marsdin. In June of the ensuing year, 1878, an acre or two of the mortgaged land was sold for £230, and the plaintiff alleged that in consequence of Messrs. Watson having untruly represented to her that the mortgage was a perfectly good security for her principal money, she allowed the £230 to be received by Thomas Robinson and James Watson as the persons entitled to a second mortgage on the property, and that in that second mortgage the Watsons themselves were the persons beneficially interested. But it was stated by the other side that the money secured belonged to clients of the firm.

The defendant William Marsdin subsequently presented a petition for liquidation of his affairs by arrangement, and all his interest in the mortgaged property afterwards became vested in the defendant W. J. Clegg as official receiver in bankruptcy, but William Marsdin himself died after the statement of claim was delivered, and Clegg did not appear.

The plaintiff claimed an account on the footing of wilful default of the sum of £5,000 received by the defendant Watson and his firm from her for investment, and a declaration that he was liable both personally and as executor of William Watson to make good any deficiency in the mortgage money. In the alternative she asked for a declaration that James Watson was liable personally and as executor of William Watson to repay her the £230, the proceeds of the sale of June, 1878, with interest at five per cent. till payment. She also claimed against William Marsdin, the mortgagor, an account and payment, and a sale of the mortgaged land, and application of the proceeds towards payment of what should be found due.

Seward Brice, Q.C., and *Butcher*, for the plaintiff.—The plaintiff trusted Watson & Son implicitly, and left the finding of an investment entirely in their hands. They represented that the security was a proper one, which it was not, and they put themselves, by their conduct, in the position of trustees. As to £3,000 out of the £5,000, they never put it into the mortgage at all, but applied it in paying Marsdin's debt to themselves. The plaintiff did not discover till 1884 that her security was only on the part of the farm bought from Charles Marsdin, which was almost unlettable without the other. The ledger shows that no money passed on the sale to William or on the mortgage by him—there were only paper entries, and the firm retained the money in payment of the debts to themselves. They were so guilty of negligence as solicitors, and as advising the plaintiffs financially. They omitted to obtain a valuation of the land: *Ingle* v. *Partridge*, 34 Beav. 411; *Fry* v. *Tapson*, 33 W. R. 113, 28 Ch. D. 268. As to the "confidence and trust," we rely on *Smith* v. *Pococke*, 2 W. R. 285, 2 Drewry, 197, and *Craig* v. *Watson*, 8 Beav. 427; and where there is a fiduciary relation or express trust the Statute of Limitations cannot be set up as a bar: *Burdick* v. *Garrick*, 18 W. R. 1171, L. R. 5 Ch. App. 233; *Banner* v. *Berridge*, 29 W. R. 264, 18 Ch. 254; *Flitcroft's case*, 31 W. R. 174, 21 Ch. D. 519. It was owing to the defendant's wrongful conduct that the negligence was not discovered sooner: *Ecclesiastical Commissioners* v. *North-Eastern Railway*, 36 W. R. 158, 4 Ch. D. 845.

They also referred to *Blair* v. *Bromley*, 5 Hs. 542, and *Brooksbank* v. *Smith*, 2 Yo. & Coll. Ex. Cas. 58.

Barber, Q.C., *Warmington, Q.C.*, and *Warrington*, for the defendant James Watson.—If the defendant is held liable on these facts, solicitors will be liable in every case where they receive the purchase-money arising from a sale for investment, which is certainly what they have to do in the ordinary course of their business without being money scriveners. If you are to raise the relation of solicitor and client to that of trustee and *cestui que trust*, you must show very special circumstances, and there are no such here. In *Smith* v. *Pococke* the circumstances were very strong. In *Craig* v. *Watson* the solicitor took the security in his own name, and executed a deed declaring himself a trustee, and in *Burdick* v. *Garrick* there was a deed expressly constituting the solicitors trustees. [KEKEWICH, J.—The difficulty is the comment on that case in *Banner* v. *Berridge*, where Kay, J. (on p. 264), applies the doctrine to a mere depositee.] That goes beyond the case commented on, and, besides, we are not a depositee. *Howell* v. *Young*, 5 Barn. & Cress. 259, shows that the Statute of Limitations runs from the time of the negligence and not from the time of its discovery. There are here none of the incidents necessary to constitute a trust. As to the omission to get a valuation, of course that would have been negligence in trustees. Messrs. Watsons' *bonâ fide* belief in the goodness of the security was shown by their taking a second mortgage on the property. The conclusion from the facts is that the £5,000 was placed in the Watsons' hands to be invested on the particular mortgage of William Marsdin's farm. No doubt Messrs. Watson were, in the first instance, instructed to look out for a security, but that was before they had the money. On the whole case we submit that the relation that existed between them and the plaintiff was only that of solicitors and client, and not that of trustees and *cestui que trust;* that there was no negligence, and, if there was, the Statute of Limitations is a complete bar, and that it is no answer to say that the negligence was not discovered till less than six years before action.

They also referred to *Mare* v. *Lewis*, 4 Ir. Rep. Eq. 219, 18 W. R. Ch. Dig. 1; *In re Hindmarsh*, 8 W. R. 203, 1 Dr. & Sm. 129; *Watson* v. *Woodman*, 24 W. R. 47, L. R. 20 Eq. 721; and *British Mutual Investment Co.* v. *Cobbold*, 23 W. R. 487, L. R. 19 Eq. 627.

Seward Brice replied.

KEKEWICH, J.—This case promised at one time to be more fruitful in questions of law than it is now likely to be, as far as I am concerned, and it also presents considerable difficulty as to the facts. It is a case of large importance to the parties concerned, and also raises questions of importance to practising solicitors and their clients. One fact is prominent in the foreground, that in 1877 the plaintiff, Mrs. Dooby, employed the firm of Watson & Sons as solicitors, or Mr. William Watson, a member of that firm, as solicitor, to sell the Ganstead estate, and receive and invest the proceeds of the sale; and he did sell it and did receive the purchase-money, and dealt with it in two parts. As to one part there is no question, but as to the other part arises the question with which I am now concerned. The £5,000 of which the part in question consisted was invested on a particular mortgage—viz., of land belonging to William Marsdin. There is no doubt that Mrs. Dooby placed the utmost confidence in Mr. William Watson for the carrying out of these purposes, as was natural, and as most clients, male and female, do in the solicitors on whose experience and integrity they rely. The money was invested on this mortgage, and the security turns out to be insufficient. If Mrs. Dooby's confidence in Mr. Watson was misplaced, if the business was not well done, if Mr. Watson failed to use proper care and diligence in ascer-

taining that the security was a good one, or even if he did not manage to know what he ought to have known about it, he became liable for negligence. The transaction, however, took place more than six years before this action was commenced, and the action as an ordinary action for negligence is, therefore, barred by the Statute of Limitations. If any excuse were wanted for dismissing it on that ground there could surely be nothing worse in the public interest than the digging up of such matters after the principal actor in them is dead, and unable, therefore, to give his account of what took place. As an ordinary action of negligence, then, it fails, but it is said there were in this case exceptional circumstances which take it out of the Statute of Limitations. The plaintiff's counsel hesitated to impute fraud openly, but they hinted at it, and they argued that the conduct of Mr. Watson in concealing the true state of affairs by his misrepresentations was such that the statute had no application unless six years had passed since the plaintiff might, with reasonable diligence, have discovered the negligence complained of, and that Mrs. Dooby was not made aware of the circumstances from which the negligence was inferred until she consulted her present solicitor. If those circumstances had any real existence, they would only be useful as a ground for giving relief of a different character—that is, as tending to show that the relation of trustee and *cestui que trust* was established, in which case the plaintiff would have been entitled to relief quite apart from the ground of negligence. I may, therefore, pass over these circumstances now except so far as they can be held to have constituted the relation of trustee and *cestui que trust*, which would itself be sufficient to exclude the statute.

That, then, is the real question, Whether that relation was established? It is true enough that there was a trust in one sense, as there is in almost all the relations of life. But in a court of equity the term has a technical and defined meaning. First, there must be a person—the trustee—who is to hold the property in trust for someone; secondly, there must be property which is held in trust; and, thirdly, there must be a person or persons in trust for whom the property is held before we get the relation of trustee and *cestui que trust*. Let me now examine the relation in which Mrs. Dooby stood to Mr. Watson in 1877. Putting aside the case where a solicitor is intended to make a profit or commission on investments—where, in fact, he acts as a money scrivener—the position of a solicitor with reference to money intrusted to him for investment varies in different cases, and I apprehend the cases fall into three classes—(1) where a solicitor receives the money in order to invest it on a particular mortgage, either selected by the client independently or upon the solicitor's advice; (2) where the solicitor receives the money in order to find a mortgage for it, subject to the client's approval; (3) where the solicitor does far more, and the client, for some reason or other, takes little or no part, the onerous duty and responsibility of selecting a good mortgage being left entirely in the solicitor's hands—a responsibility which is beyond the ordinary duty of solicitors, and which many of them prefer not to undertake. In cases (1) and (2) the solicitor is responsible only for negligence which falls within the Statute of Limitations. In case (3) he is responsible for selecting a good mortgage, and it has been a serious question here whether Mr. Watson is not responsible for having selected a bad mortgage.

I must notice one other matter before coming to the facts. Mr. Brice said that Mr. Watson's interests conflicted with his duty to his client. He was solicitor for William and Charles Marsdin as well as for Mrs. Dooby, and in 1877 both the Marsdins were indebted to his firm, and, to put the matter shortly, the result of the whole transaction was that Mr. Watson's firm was in a far better position after than before that transaction. It may be that the money did not go as a whole to pay off the debts due to them from the Marsdins, but certainly there was an advantage to the firm from the transaction. But now, would there have been anything improper in Mr. Watson going to Charles Marsdin and saying, "You owe us £3,000; you have got a farm—sell it, and let us receive the purchase-money and pay off your debt," or going to William Marsdin and saying; "You owe us money; mortgage your farm, and let us receive the money and pay off your debt"? I apprehend it would have been a perfectly straightforward course of conduct, and I think it makes no difference that Mrs. Dooby's purchase-money was also paid into the solicitor's hands, and never went out of them, but was placed to Marsdin's credit, and employed to pay his debts. It is only fair to say, however, that this is not exactly what really occurred here, as shown by the evidence, for the sale of Charles Marsdin's farm to his brother was not the Watsons' doing, so that the case is not so strong against them. No doubt there were the three clients and the indebtedness, and therefore it is right to look narrowly into the transaction. Mrs. Dooby wanted to invest £5,000 at that time, and then Mr. Watson became aware of the sale to William Marsdin, and that the money was wanted on mortgage. I have to infer from the evidence whether the proposed mortgage was discussed with Mrs. Dooby. She is clear that she heard nothing of it till some time later, but, then, as she herself said, she is getting on in years, and while I give perfect credit to her evidence, I cannot set her memory against documents. Mr. James Watson produced his father's diary which shows, as solicitors' diaries ought to show, precisely what occurred. Mr. Watson did see Mrs. Dooby twice, and went into the matter thoroughly with her, and we find on each occasion a reference to the particular mortgage. Am I to infer that he, intending fraud, wrote down a charge against himself of retaining £5,000? Moreover, a memorandum was discovered in Mr. Watson's handwriting which I must hold to have been made contemporaneously with the matters referred to in it, and in it he again charged himself with £5,000 retained for Marsdin's mortgage. That being so, what was the position? Mr. Watson was asked by Mrs. Dooby to find an investment for £5,000, and he did find one, and she knew and approved of it.

My conclusion is that the relation existing was No. (1)—the particular mortgage was found before anything was settled or the money in hand, and was then approved by Mrs. Dooby. There was a trust, but it was fully performed when the mortgage deed was executed.

But then it was said that Mr. Watson had represented that the mortgage was on the entire farm, including the homestead, and land of William Marsdin's not purchased from his brother. There is not, however, the slightest ground shown on the evidence for this allegation. There in 1878 a small piece of the land was sold for £230—a high price—which was received by the second mortgagee, and this is made a ground of complaint against the solicitors, because they had told Mrs. Dooby that the mortgage was safe. There may have been an error of judgment, but the fact was, as she said in her evidence, she did not wish to break in upon her mortgage for £5,000. One thing more—it was said that Mr. Watson did not take proper precautions to ascertain the value of the land, and cases were cited where trustees have been held liable for such an omission. Mr. Coulman's valuation was for a different purpose, and if anything depended on it I should not excuse Mr. Watson's diligence in that matter. But I am not disposed to decide the point, as it could only have reference to the question of negligence. If there was a trust the point would be very important, but my conclusion of fact being that the plaintiff approved of this mortgage, and that there was

accordingly no trust in the sense contended, for it ceases to be so. I have therefore very little to say about the cases. To my mind the one case that is most useful is *Craig* v. *Watson*, but it is impossible to read Lord Langdale's judgment without seeing that he considered the solicitor there did act with some sinister object of his own, and took a low view of the duty of a solicitor.

Smith v. *Pococke* was also a case of improper conduct and fraud, and has, therefore, no application here. *Burdich* v. *Garrick* merely shows that the doctrine of trustee and *cestui que trust* ought to be extended to many cases to which *primâ facie* it might not have been thought applicable. The Irish case (*Mare* v. *Lewis*) only applies the law to the facts there mentioned, and the Vice-Chancellor makes some observations on trusts for general investment which may require reconsideration hereafter, but, not being directly in point now, may be passed by. The other cases cited on the question of the Statute of Limitations were useful and instructive, but they all tend to one point—where you find property intrusted to a solicitor for investment there is a trust, and that excludes the statute. Mr. Watson was not a trustee in that sense. The action, therefore, fails against him, and he must have his costs. As against the other defendants or defendant the plaintiff is entitled to the relief she asks and to add her costs.

Action dismissed as against the defendant Watson. Judgment for plaintiff as against the other defendants.

Solicitors, *Harper & Battcock; Collyer - Bristow, Withers, Russell, & Hill.*

Q. B. Div. (Wills and Grantham, JJ.) June 13.

Blair v. Eisler. (*a*.)

Solicitor—Privilege—County Courts Acts, 1849 (12 & 13 *Vict. c.* 101), *s.* 18, *and* 1867 (30 & 31 *Vict. c.* 142), ss. 5, 34.

Where a solicitor, as plaintiff in an action upon a bill of costs commenced in the High Court, recovers less than £20, he becomes subject to the provisions of section 5 *of the County Courts Act*, 1867, *as to costs, and any privilege which he may have had of bringing the action in the High Court is taken away by section* 18 *of the County Courts Act*, 1849, *which is incorporated into the County Courts Act*, 1867, *by section* 34.

Appeal from an order of Charles, J., at chambers, allowing the plaintiffs costs on the High Court scale.

The plaintiffs were solicitors who had brought an action against the defendant in the High Court for a bill of costs. The action was, upon the delivery of a defence and counter-claim by the defendant, remitted to the county court. The defendant did not appear, and judgment was given for the plaintiffs for £22, subject to taxation of the bill. On taxation the amount recoverable was reduced to £19. Upon an application by the plaintiffs at chambers Charles, J., certified for costs on the High Court scale, from which order the defendant now appealed.

Scarlett, for the defendant.—No privilege attaches to the plaintiffs as solicitors to bring their action in the High Court. They are subject to the provisions of the County Courts Act by section 18 of the County Courts Act, 1849, and having commenced their action in the High Court they are not entitled to High Court costs upon recovering less than £20.

Dickens, for the plaintiffs.—Section 18 of the Act of 1849 only took away the privilege of solicitors in respect of their being sued, not where they themselves sue; and it only applies to cases for which the county courts were specially created, not to actions on the bills of costs, upon which a solicitor is still entitled to sue in the High Court. The judge exercised his discretion rightly, and this court ought not to interfere with that discretion.

Scarlett, in reply.—The court is entitled to review the judge's discretion: *Taylor* v. *Cass*, 17 W. R. 861, L. R. 4 C. P. 614.

Wills, J.—I am clearly in favour of the defendant on the point of privilege. Section 34 of the Act of 1867 incorporates the former Act of 1849. By section 18 of the Act of 1849 no privilege is to exempt a solicitor from the provisions of that Act or of the Act of 1846 (9 & 10 Vict. c. 95) for the more easy recovery of small debts. One of the provisions of the Act of 1867, with which the earlier Acts are to be read, is that, under section 5, where less than £20 is recovered in an action commenced, as this was, in the High Court the plaintiff shall not be entitled to recover costs unless the judge shall allow such costs. We cannot change the material words of the Act. Upon the merits, however, of the case we think the judge exercised his discretion rightly in allowing such costs, as the defendant, after delivering a counter-claim, did not appear, and practically had no defence.

Grantham, J., concurred.

Appeal dismissed.

Solicitors for the plaintiffs, *Blair & W. B. Girling.*

Solicitors for the defendant, *Morley & Dennison.*

Q. B. Div. (Manisty and Stephen, JJ.) June 11, 12.

Bond v. Evans. (*a*.)

Inn—Offences—Suffering gaming—Connivance—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 17.

An innkeeper kept a skittle-alley on his premises. He put up a general notice that no gaming was permitted in the alley, and he placed one O. in charge of the alley, with express directions not to allow gaming. Two men were found by constables playing cards for money in the alley in the presence of O. and to his knowledge.

Held, that the innkeeper was rightly convicted of "suffering gaming to be carried on upon his premises" under section 17 *of the Licensing Act*, 1872.

Case stated by stipendiary magistrate.

The appellant Bond, the licensee of an inn called the George and Dragon, at Longton, Staffordshire, had been charged by the superintendent of police with "suffering gaming to be carried on upon the premises" within the terms of section 17 of the Licensing Act, 1872 (35 & 36 Vict. c. 94).

The material facts were as follows:—

There was a skittle-alley on the premises of the George and Dragon Inn, in which a general direction was posted against permitting gambling in the alley. A potman, named Owen, was put in charge of the skittle-alley by the appellant, who had expressly ordered him not to allow any gaming in the alley. The constables entered the alley and found two men playing cards for money. Owen was present. Appellant did not know that the men were gambling, and they were doing so contrary to his express orders to Owen. The magistrate held that there was connivance on the part of the appellant within the meaning of *Bosley* v. *Davies*, 24 W. R. 140, 1 Q. B. D. 84, and that it was not necessary to prove

(*a*.) Reported by Spencer L. Holland, Esq., Barrister-at-Law.

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actual knowledge by the appellant to secure his conviction (*Redgate* v. *Haynes*, 1 Q. B. D. 89, 24 W. R. Dig. 141), but that, Owen being present and knowing of the gaming, connivance by the servant amounted to connivance by his master.

The appellant now appealed against this decision.

Grain, for the appellant.—The words "to suffer" gaming in section 17 of the Licensing Act, 1872, must imply some knowledge on the part of the licensee. Here he had none. The findings are all in his favour on this point: *Newman* v. *Jones*, 17 Q. B. D. 132, 34 W. R. Dig. 105; *Somerset* v. *Hart*, 32 W. R. 594, 12 Q. B. D. 360.

Green, *Q.C.*, and *Lawrence*, for the respondents.—The master is responsible for the servant's connivance: *Bosley* v. *Davies*, 24 W. R. 140, 1 Q. B. D. 84; *Mullins* v. *Collins*, 22 W. R. 297, L. R. 9 Q. B. 292. In *Newman* v. *Jones* the person conniving was not anyone under authority of the master. Here the licensee delegated his authority, and must be responsible for that delegation: *Cundy* v. *Le Cocq*, 32 W. R. 360, 13 Q. B. D. 207.

Cur. adv. vult.

June 12.—Manisty, J.—The cases in point are somewhat conflicting, and may be said to run very fine. The Act of Parliament is intended to provide for offences against public order, and it is specially important to consider the language of sections 17 and 13, as the latter throws light upon the construction of section 17. Section 13 uses the word "permit" in reference to certain offences instead of "suffer" as in section 17. Section 13 came before the courts in *Cundy* v. *Le Cocq*, and that judgment has an important bearing upon this case. That case decides that actual knowledge by the innkeeper was not an element in certain offences against public order.

In sections 14 and 16 the phrases are "knowingly permit" or "knowingly suffer." Then comes section 17 using the word "suffer" and omitting the word "knowingly." In the former statutes for preventing gaming the word "knowingly" was used. Here it is left out. The old statutes are repealed and this statute is substituted, omitting the word "knowingly." The responsibility of suffering gaming upon the premises is left entirely upon the licensee, in spite of his being shown to have given orders against any gaming. That is the decision in *Redgate* v. *Haynes*, and is very much in point here. That case, taken together with *Cundy* v. *Le Cocq*, must be binding upon us here. The case of *Somerset* v. *Hart*, relied on by the appellant, is distinguishable because here Owen was put in charge of the premises. I cannot reconcile all the passages in the judgments in that case, and I should prefer to be bound by the earlier cases. In *Newman* v. *Jones* the decision turned upon whether the appellants were liable as trustees of a club. On the whole I do not think that these two last cases were intended to overrule the earlier cases, and I therefore come to the conclusion that the conviction was right and must be upheld.

Stephen, J.—I am of the same opinion, though perhaps on somewhat different grounds. I take the cases in order of time, and the doctrine works out as follows:—In *Mullins* v. *Collins* a servant's wilful ignorance was held sufficient to make the master responsible. In *Redgate* v. *Haynes* the connivance of a hall-porter was held sufficient to make his mistress responsible. These cases were previous to *Somerset* v. *Hart*, where the facts were somewhat peculiar, and it was held that the case did not come within the earlier cases. I do not think that it can be said to militate against the earlier decisions. I do not consider *Cundy* v. *Le Cocq* to be of so much importance as my brother Manisty, but on the authority of *Bosley* v. *Davies* and *Redgate* v. *Haynes* I think that this conviction must be affirmed. I attach no great importance between the words "permit" and "suffer." The licensed person is bound to prevent gaming, otherwise he must be fined.

Appeal dismissed.

Solicitors for the appellant, *Tyrell*, for *Payne & Jones*, Hanley.

Solicitors for the respondent, *White & Sons*, for *Hand, Blakiston, Everett, & Hand*, Hanley.

Prob. Div. & Adm. Div. Admiralty. } Dec. 19.

"The Palinurus." (*a.*)

Collision — Stern light — Regulations for Preventing Collisions at Sea, arts. 2, 11—*Merchant Shipping Act*, 1873 (36 & 37 *Vict.* c. 85), *s.* 17.

Semble, *a vessel at sea carrying at her stern after sunset a white globular light, so placed as to throw its light from right astern to more than two points forward of the beam on each side of the vessel, and of such a character as to be visible at a distance of more than a mile, will, under the provisions of the 17th section of the Merchant Shipping Act*, 1873, *be deemed in fault for coming into collision with another vessel approaching in such a direction that the collision might by possibility have been contributed to by the white light at the stern, being thus carried so as to overlap the range of the side lights.*

This was an action of damage *in rem* instituted in the Liverpool District Registry on behalf of the owners of the cargo of the American ship *E. F. Sawyer* against the steamship *Palinurus* and her freight to recover the damages sustained in a collision between the two vessels in the English Channel before sunrise on the 22nd of November, 1887.

Dec. 12, 13, 14.—The action was now heard before the President, assisted by two of the Elder Brethren of the Trinity House.

Sir W. Phillimore, *Bucknell*, *Q.C.*, and *Pickford*, for the plaintiffs.

Sir R. E. Webster, *A.G.*, *Kennedy*, *Q.C.*, and *J. P. Aspinall*, for the defendants.

The facts, so far as material to this report, appear from the judgment.

Cur. adv. vult.

Dec. 19.—Hannen, P.—The first question to be considered is, What were the respective courses of these two vessels at the time when the one became visible to the other? I pass over the evidence as to the position of the vessels with regard to the shore, as it does not affect the question in dispute. For the sailing vessel it is alleged that her course was about S., she being close hauled on a light E.S.E. wind, making about two knots, and that she sighted the masthead light of the defendant ship about three points on her starboard bow at a distance of about four miles, and that after ten minutes the red light of the steamer became visible. Several alterations of the steamer's lights after this are stated in the pleadings, and deposed to by the chief officer of the *E. F. Sawyer*, but they are not spoken to by the pilot of *The E. F. Sawyer* when he states positively that the red light was never shut out from him, and that the steamer's lights gradually got broader, until, shortly before the collision, the red light was a little abaft *The E. F. Sawyer's* beam. The pilot of *The E. F. Sawyer* states that the only report made to him was "a bright light on the lee." On the part of The

(*a.*) Reported by C. F. Jemmett, Esq., Barrister-at-Law.

Palinurus it is alleged that a white light was seen at a distance of about one mile, when her course was N.E. by E.½E., and she was making six or seven knots an hour. *The Palinurus* ported slightly, and her engines were put to slow, and so continued till the loom of *The E. F. Sawyer* carrying the white light appeared ahead, and that immediately afterwards a dim green light was seen slightly on the port bow.

We see nothing in the evidence which leads us to doubt the accuracy of the statement of those on board *The Palinurus* as to her course, and I am advised that, assuming this to be correct, if she had been seen three points on the starboard bow of *The E. F. Sawyer*, at a distance of about four miles, instead of *The Palinurus's* lights getting broader, they would have closed in, and she would have passed across the bows of *The E. F. Sawyer* to the southward of the place of the collision. Having regard to the evidence of the pilot of *The E. F. Sawyer*, we do not accept the statement of the chief officer of that vessel as to the shutting in and the reopening of the red light of *The Palinurus*. If the case for *The E. F. Sawyer* as to the courses and bearings of the two vessels were correct, it would follow that *The Palinurus* never could have seen the stern light of *The E. F. Sawyer*, and it has been contended she never did see it until after the collision. No light other than the stern light which could have been taken for a light on *The E. F. Sawyer* has been shown to have existed. We are satisfied that the white light seen by those on board *The Palinurus* was the stern light of *The E. F. Sawyer*, a light which was fixed over her stern, and that it was first seen half a point on the port bow of *The Palinurus*.

The next question which arises is, How was it that the green light of the *E. F. Sawyer* was not seen until immediately before the collision? This must be accounted for in one of three ways—either that there was not a good look out on *The Palinurus*, or *The Palinurus* must have been behind the range of the green light and shot suddenly into it, or it must have been an imperfect light, not showing the proper distance. We see no reason to doubt that there was a good look out kept on *The Palinurus*. The white light was seen by the pilot of *The Palinurus* at the distance of a mile, and he acted in reference to it by porting half a point and slowing the engines of *The Palinurus* to half speed shortly afterwards. The pilot is confirmed by the second officer of the same vessel, the look out man, and the man at the wheel. Secondly, as to the point whether *The Palinurus* was behind the range of the green light and suddenly shot into it, that theory has not been put forward by the counsel for *The E. F. Sawyer*, and it is manifestly inconsistent with the plaintiffs' account of the courses and bearings of the two vessels. I mention it in order that it may be seen that it has not escaped our attention; but there are no materials on which to base an opinion that this was the cause of the green light of *The E. F. Sawyer* not having been sooner seen by *The Palinurus*. There remains only the third theory, that the green light was imperfect. That there was a green light it is admitted, and there is a strong body of evidence produced for the purpose of proving that it was a good light. On the other hand it is admitted that the green light was not seen from *The Palinurus* till after the loom of *The E. F. Sawyer* became visible. A painful duty is imposed on me of deciding whether the evidence from *The E. F. Sawyer* is to be relied upon, and I have come to the conclusion that it is not. The light had been burning thirteen hours without having been trimmed, and although it might not have required trimming, the probability of its burning dimly is greater after such a lapse of time. It is also unfortunate that this lamp, to which it is alleged attention was called immediately after the collision, was cut away from the screen with which it had fallen on *The Palinurus*, and was thrown overboard by one of the crew of *The E. F. Sawyer*. The reason given that it had taken fire may have been the true reason, but it is none the less to be regretted that so important a piece of evidence should be destroyed. I come to the conclusion, in which the Trinity Brethren concur, that the green light of *The E. F. Sawyer* was not a proper and sufficient one, and that this was the cause of the collision. I am advised, and I think, that the manœuvres of the steamer were proper and seamanlike.

A question has been discussed in this case which, in the view I take of the facts, it is not necessary to determine, but, having regard to its importance, I think it well to give my opinion, if only by way of warning for the future. It has been contended on the one side that it is contrary to the Regulations for Preventing Collisions at Sea for a vessel to carry a fixed stern light; on the other side it has been argued that it is not unlawful so to do. I abstain from saying that to carry a fixed stern light is contrary to the regulations, but it is to be remembered that the object of carrying a stern light is to warn overtaking vessels. So that if the stern light is carried in any way other than is necessary in order to give such warning, it is, in my opinion, an infringement of the regulations. If, for instance, the stern light is above the taffrail, so that it is visible all round, it is then misleading and illegal. Again, though it be below the taffrail, if it is visible over a greater area than is necessary for the guidance of overtaking vessels, I am of opinion that it is misleading and illegal. The area over which the stern light is visible ought never, either in whole or in part, to coincide with the areas of the side lights, and, if the stern light is a fixed light, it ought, at any rate, to be so screened as to prevent these areas overlapping. In the present case I have no doubt that the stern light of *The E. F. Sawyer* was visible over a portion of the area of the green light of that vessel, and this was calculated to mislead those on board *The Palinurus*. A white light can always be seen at a greater distance than a green light, and so, before the green light becomes visible, an approaching vessel which sees a white stern light may be led to suppose it is overtaking another vessel and to act accordingly, when in fact it is approaching at a right angle. I pronounce *The E. F. Sawyer* alone to blame for the collision.

Solicitors for the plaintiffs, *Hill, Dickenson, Lightbound, & Dickenson.*

Solicitors for the defendants, *Thorneley & Cameron.*

Court of Appeal.

From Chan. Div. April 10, 11; May 15.

In re BRIDGEWATER NAVIGATION CO. (*a.*)

Company—Winding up—Surplus assets—Profits arising from augmented value of capital—Mode of distribution—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 109, 133 (1) (9).

Section 133 (1) *of the Companies Act,* 1862, *must be construed together with section* 109, *and therefore the meaning to be attributed to section* 133 (1) *is not that the surplus assets are divisible per share, but that the liquidator under that section, or the court under section* 109, *is to divide the surplus assets among the parties entitled thereto.*

The articles of a company incorporated under the Act of 1862 *provided* (inter alia) (1) *that new capital might be created by the issue of new shares carrying such*

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

preferential right to dividend, or such priority in the distribution of assets, or subject to such postponement of dividend, or in the distribution of assets, as the company might by special resolution direct, but "save as specified in any such resolution, all new capital shall be subject to the same provisions in all respects as if it had been part of the original capital"; (2) that the net profits of each year should belong to the holders of shares, and be divided pro rata *upon the whole paid-up share capital of the company, and that a dividend might be declared payable thereout on the shares in proportion to the amounts paid up thereon. New capital was created by the company by the issue of new shares (called preference shares), entitling the holder thereof "to a dividend after the rate of five per cent. per annum upon the amount for the time being called up thereon, and taking precedence of . . . all dividends and claims of the holders of ordinary shares in the company," but the company did not exercise, in respect of these new shares, any of the other powers given it by the articles.*

Each preference share so issued was of £10, and the whole amount on each preference share had been paid up; each ordinary share was also of £10, but only £3 10s. thereon had been paid up when the company was wound up. The whole undertaking of the company was sold under the provisions of an Act of Parliament, and the company was wound up voluntarily. The purchase-money paid for the undertaking of the company gave a large surplus after payment of all liabilities of the company and after the return of their capital to the shareholders.

Held, on a summons taken out by the liquidators, that this surplus was to be divided amongst all the shareholders (preference and ordinary) in proportion to the sums paid up on their shares, and not according to profits.

Sheppard *v.* Scinde, &c., Railway Co., *ante, p.* 1, *discussed.*

Decision of North, J., *affirmed.*

Appeal from North, J.

In August, 1872, the Bridgewater Navigation Co. was incorporated under the Companies Acts. The memorandum of association stated the capital of the company to be £500,000 divided into 500 shares of £1,000 each, but by resolutions passed and confirmed at extraordinary general meetings of the company held in October, 1872, it was resolved that the capital, instead of being divided into 500 shares of £1,000 each, "shall be and is hereby divided into 50,000 shares of £10 each"; and that the capital of the company "shall be increased by the creation of 80,000 new shares of £10 each, amounting in the aggregate to £800,000." In 1874, by resolutions passed at extraordinary general meetings of the company, the original articles of association were annulled and new articles framed.

The following are the material clauses in the new articles:—

Clause 3 (which is identical with clause 4 of the original articles).—"The company may, by resolution, &c., . . . increase its capital . . . by the creation of new shares of such amounts per share and in the aggregate as such resolution shall direct, and any new capital so created may carry such preferential right to dividend or such priority in the distribution of assets, or be subject to such postponement of dividends, or in the distribution of assets, as any resolution of a general meeting passed previously to the issue of any such new capital shall direct. But, save as specified in any such resolution, all new capital shall be subject to the same provisions in all respects as if it had been part of the original capital mentioned in the memorandum of association."

Clause 88 (identical with clause 92 of the original articles).—"No dividend shall be paid except out of the profits of the company arising from the business of the company as shown upon the balance-sheet which shall from time to time have been examined and passed by the auditors."

Clause 85.—". . . The entire net profits of each year shall belong to the holders of the shares of the company and be divided *pro rata* upon the whole paid-up share capital of the company, and the directors may . . . declare a dividend to be payable thereout on the shares in proportion to the amounts paid up thereon."

On April 27, 1880, a resolution was passed that there should be issued "30,000 new shares of £10 each on the following terms and conditions—namely, the new shares to entitle the holders thereof to a dividend after the rate of five per cent. per annum upon the amount for the time being called up thereon, and taking precedence of, and priority over, all dividends and claims of the holders of the ordinary shares of the company."

These 30,000 new shares, hereinafter referred to as the "preference shares," were all subscribed for, and the full amount of each was paid up in cash, and the holders thereof, during the continuance of the company, regularly received five per cent. per annum thereon out of the profits of the company, which were also sufficient to pay an annual dividend averaging about eight per cent. to the holders of the ordinary shares, of which 100,000 shares of £10 each had been issued, upon which £3 10s. per share had been paid up.

The whole of the undertaking of the Bridgewater Navigation Co. was purchased by the Manchester Ship Canal Co. under statutory powers for the sum of £1,710,000, and by special resolutions passed in August, 1887, it was resolved that the Bridgewater Co. should be wound up voluntarily. After payment of all debts and liabilities of the company and repayment to the shareholders of their paid-up capital there remained a surplus of about £850,000.

On January 16, 1888, on a summons taken out by the liquidators to have the mode of distribution of this surplus determined as between the holders of preference and the holders of ordinary shares in the company, North, J., decided that the surplus was to be distributed amongst all the shareholders (preference and ordinary) in proportion to the amounts paid up on their shares. The holders of ordinary shares appealed.

Sir Horace Davey, Q.C., Cozens-Hardy, Q.C., and *O. L. Clare,* for the appellant, T. H. Birch, who had been appointed to represent the ordinary shareholders.—Our first contention is that this surplus should be distributed among the shareholders in the proportion in which they are entitled to the profits of the company as a going concern, and, therefore, that the preference shareholders are only entitled to a return of their capital, *plus* five per cent. thereon up to the day on which their capital is returned, but are entitled to nothing more, and any other good thing enures for the benefit of the ordinary shareholder, the preference shareholder having bargained away his share in the profits for the preference: *Robinson* v. *Ashton,* 23 W. R. 674, L. R. 20 Eq. 25; *Watney* v. *Wells,* 15 W. R. 627, L. R. 2 Ch. App. 250; that was the principle of distribution adopted in *Binney* v. *Mutris,* *ante,* p. 129, 12 App. Cas. 160; *Somes* v. *Currie,* 1 K. & J. 605, 3 W. R. Ch. Dig. 76; and see *Lindley* on Partnership, 5th ed., p. 403. It is also the proper principle according to the reasoning of the judgments in *Sheppard* v. *Scinde, &c, Railway Co., ante,* p. 1, though the actual decision there, under the circumstances of the case, was distribution according to the amount paid up. Again, as an alternative contention, we say that as this is a winding up, the calls unpaid on the shares should be treated as called upon and then divided: *In re Hodges' Distillery Co., Ex parte*

Maude, 19 W. R. 119, L. R. 6 Ch. App. 51, otherwise there would be no settled principle of distribution.

The point raised in the court below on behalf of the ordinary shareholders, that the issue of preference shares was *ultra vires*, was expressly abandoned on the appeal.

Rigby, Q.C., *Buckley, Q.C.*, and *Swinfen Eady*, for the respondent, G. H. Schofield, who had been appointed to represent the preference shareholders.—The result of the articles and resolutions is that the preference shareholders have the exclusive privilege of getting five per cent. before the others get anything, but that in all other respects the rights of both classes stand on the same footing. This surplus, though a profit, is not a profit arising from the carrying on of the business; it arises from the undertaking itself, and is, in fact, "capital profits." Neither *Watney* v. *Wells* nor *Robinson* v. *Ashton* decide that a surplus arising in this way is to be divided as profits. *Binney* v. *Mutrie* does not touch this case, as there it was provided by the partnership articles that the business itself, and not merely the profits, should be divided in certain proportions, and in *Somes* v. *Currie* the distribution was determined by the special circumstances of the case. When the contract is silent, as it is here, as to the division of capital profits, the principle is that distribution must be proportionate to contribution: *Sheppard* v. *Scinde, &c., Railway Co.* The fact that distribution takes place in a winding up makes no difference. Section 133, sub-section 9, of the Act of 1862, is only applicable for the purposes of making calls either for the purposes of the business or to provide for debts and liabilities, but here there are no liabilities and there can be no carrying on the business, which is dead.

Sir Horace Davey, Q.C., in reply.—There must be some definite principle for distribution of surplus assets in a voluntary winding up under the Act of 1862. Distribution according to the amount paid up is not founded on any principle, but depends on mere accident. The principle must be either (1) distribution in the proportion that the shareholders are entitled to share profits—*i.e.*, profits as a going concern—or (2) distribution in proportion to the shareholders' share in the capital of the company. Section 133 (1) of the Act of 1862* shows that distribution† under a voluntary winding up is to be "according to the rights and interests in the company" of the members, and where the articles are silent on the point the common law principles of partnership must govern, and the words "according to their rights and interests in the company" must mean "according to their shares"—that is, according to their subscribed shares: *Griffith* v. *Paget*, 25 W. R. 821, 6 Ch. D. 511; *Oakbank Oil Co.* v. *Crum*, 8 App. Cas. 65, 31 W. R. Dig. 37. Each share of the ordinary shareholders in the capital of the company is a £10 share, not a £3 10s. share. The utmost the preference shareholders can ask for, is the capitalized value of five per cent.

Napier Higgins, Q.C., and *S. Arthur Sampson*, for the liquidator.

Cur. adv. vult.

May 15.—COTTON, L.J.—This is an appeal from the decision of North, J., as to the division of a sum of money paid to the Bridgewater Navigation Co., which is being wound up voluntarily under extraordinary circumstances, as the assets of the company are sufficient, after payment of all liabilities and after returning to the shareholders the amount paid up on their shares, to leave a very large surplus.

There were two classes of shareholders in the company—viz., the holders of ordinary shares of £10 each, of which £3 10s. only was paid up and no more had ever been called for, and the holders of preference shares, also of £10 each, but on which the whole amount has been paid up. The question is, How, as between these two classes, the surplus assets is to be distributed? North, J., decided that the surplus should be divided among all the shareholders in proportion to the amounts paid up on their shares. The holders of the ordinary shares have now appealed from that.

The question has arisen in the voluntary winding up of the company under the provisions of the Companies Act, 1862, and I will at once refer to the material sections of the Act. [The Lord Justice read section 133, sub-section (1), and continued:—] On the construction of that sub-section alone it might be said that the surplus assets should be divided per share—*i.e.*, that each share was to have its aliquot proportion, not according to the amount paid up thereon, but according to the shareholders' respective rights and interests in the company; but that can hardly be the true meaning of the sub-section, for an earlier section—viz., section 109, which applied to the case of a winding up by the court or under the supervision of the court—provides that the court shall adjust the rights of the contributories amongst themselves, and distribute any surplus that may remain amongst the parties entitled thereto. It can hardly be that those two clauses should be contradictory, so that where the winding up was by the court, or under the supervision of the court, the surplus assets should be distributed in a different way from that adopted in a voluntary winding up. In my opinion the two sections must be read together, and, therefore, there cannot be attributed to section 133, sub-section (1), a direction to divide the property per share. The effect of that is that it is left, in the one case, to the court, and in the other to the liquidator, to divide the assets among the parties entitled thereto.

What ought to be done in the present case? The first contention of Sir Horace Davey was that the preference shareholders are entitled to nothing more than five per cent. on their shares, and that all the profits beyond five per cent. should go to the ordinary shareholders; and, secondly, if that were not so, that the utmost the preference shareholders would be entitled to receive was the capitalized value of the five per cent.

To determine this question it is necessary to look at the articles and the resolutions under which the preference shares were issued. [The Lord Justice then read the articles and resolutions set out above, and continued:—] In my opinion, having regard to these articles and resolutions, it would be wrong to say that the preference shareholders can get nothing more than five per cent. on their shares. No doubt these surplus assets are profits in one sense, but not profits arising from the carrying on the business of the company as a going concern. In my opinion, therefore, the provision that the preference shareholders were to have a five per cent. preferential dividend out of the profits, and that all the rest of the profits were to go to the ordinary shareholders, does not apply to such profits as these, arising from the augmented value of capital of the company obtained by a beneficial sale of its undertaking; the provision as to the five per cent. preferential dividend not being intended to apply, and not applying, to

* Section 133 (1) of the Companies Act, 1862, enacts:—"The property of the company shall be applied in satisfaction of its liabilities *pari passu*, and, subject thereto, shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their rights and interests in the company."

† Section 109 enacts:—"The court shall adjust the rights of the contributories amongst themselves and distribute any surplus that may remain amongst the parties entitled thereto."

what takes place after the carrying on the business has stopped. It would be a violation of the articles to hold otherwise. These two contentions, therefore, put forward on behalf of the ordinary shareholders, cannot prevail. Then it was said that, there being a winding up, provision should first be made for a call of £6 10s., the amount unpaid on the ordinary shares, and then that the whole should be divided equally, and the case of *Sheppard* v. *Scinde, &c., Railway Co.* was distinguished, on the ground that it was not a case of a winding up under the Companies Act, 1862, as this is. Where there is any deficiency of assets, and any power to make calls exists, the ordinary course is to make the calls, and, if that is not actually done, to treat it as done, and to deal with the remainder of the assets on that footing. But that principle only applies where there is some deficiency, and in my opinion none of the cases of that class throw any light on a case like the present one. I think that here there ought to be a distribution in accordance with the order made by North, J. All the shareholders are now to be treated as shareholders having equal rights, and the articles of the company indicate that profits are to be divided in accordance with the sums paid up on each share. The proper mode of distribution of this surplus is to divide it among all the shareholders in proportion to the sums paid up by them respectively. The same principle was acted on in *Sheppard* v. *Scinde, &c., Railway Co.*, though the case itself was not exactly similar to this. One cannot lay down any definite rule as to the distribution of assets in partnerships generally and without having regard to the contract contained in the articles in each particular case. I do not express any opinion as to the principle cited to us from Lindley on Partnership, 4th ed., vol. 1, p. 679.

FRY, L.J.—This case is an unusual one, if not unique. This is not a case of there being any deficiency of assets, but, on the contrary, of there being *l'embarras des richesses:* The question arises in the voluntary winding up of the company, under section 133, as to the distribution of surplus assets, after returning the amount of paid-up capital, according to the rights and interests of the members of the company; there is an apparent contradiction between section 133 (1) and section 109, but it is only apparent, and there is no real discrepancy between them, because the members of the company are the persons entitled thereto.

It is, therefore, incumbent on us to inquire what are the rights and interests of the members in this company. There were two classes of shareholders, and the difference between them is of a twofold character—first, as to dividend and the rights of priority; and, second, as to the amount paid up on the shares. Does the first difference—viz., that the preference shareholder should receive five per cent. dividend in priority—make any difference for the present purpose. [The Lord Justice read article 3 of the later articles, and continued:—] By this article power is given to the company to create new capital carrying preferential rights to dividend—which means, I think, annual dividend—and carrying such priority in the distribution of assets as the company may direct, with power also to postpone the payment of dividends or the distribution of assets, but except in so far as these powers are acted on the preference and the ordinary shareholders are placed in the same position. Now a resolution has been passed creating new shares, with a right of dividend at the rate of five per cent. on the capital paid up thereon in priority to the right of dividend of the ordinary shareholders. That resolution relates only to dividend, which I think means annual dividend. The other powers have not been exercised, and, therefore, except only in the right to a preferential annual dividend at the rate of five per cent., no difference is created by that preference. The second point of difference is the amount required to be paid up on the shares. Then article 85 of the later articles says that dividends are to be paid on the shares in proportion to the amounts paid-up thereon; and, therefore, the amounts paid-up being unequal, the right to dividend is unequal. How, therefore, ought this surplus fund to be distributed? The shares are all of one nominal amount, and the right to vote in respect thereof is the same in all, but the right to dividend is unequal, it is according to the amount paid up on the shares. Which of these rights is the determining, the guiding right as to distribution? Clearly, in my opinion, it is the right to dividend which must determine the right of distribution.

LOPES, L.J.—I entirely concur with the rest of the court in their view as to the proper mode of distribution, and will only add with reference to the case of *Sheppard* v. *Scinde, &c., Railway Co.*, that, though it differed in many respects from the present case, the decision involves the same principle on which we are now acting.

Appeal dismissed; the costs of all parties to be paid out of the fund set apart for ordinary shareholders.

Solicitors for the appellant, *Cunliffes & Davenport*, agents for *T. E. Sampson*, Liverpool.

Solicitors for the respondent, *Cunliffes & Davenport*, agents for *Lingards*, Manchester.

Solicitors for the liquidator, *Burgess & Cosens.*

Bankruptcy. June 22.

In re ARMSTRONG.
Ex parte BOYD. (*a.*)

Bankruptcy — Married woman trading separately—Marriage settlement—Life estate—Married Women's Property Act, 1882 (45 & 46 *Vict.* c. 75), s. 1, sub-section 5; s. 19.

A married woman who traded separately from her husband was adjudicated bankrupt in respect of her separate property pursuant to section 1, *sub-section* 5, *of the Married Women's Property Act*, 1882. *Under her marriage settlement she was entitled to a life estate in certain property for her separate use, but without any restraint on anticipation.*

Held, by Lindley *and* Lopes, L.JJ. (Lord Esher, M.R., *dissenting*), *that her life estate vested in the trustee in bankruptcy, as the claim of the trustee did not "interfere with or affect the settlement" within the meaning of section* 19 *of the Married Women's Property Act*, 1882, *the trustee claiming under and not against the settlement.*

Appeal from a judgment of the Divisional Court reversing an order of the judge of the Brentford County Court, whereby he directed the trustee in bankruptcy to pay to the bankrupt the net rents received by the trustee from the tenants of certain freehold property, and directing an account.

The bankrupt was a married woman who carried on a trade separately from her husband. Previously to her marriage she executed a marriage settlement, by which she conveyed certain freehold houses belonging to her to a trustee upon trust to pay the rents and profits to her during her life for her sole and separate use, but without any restraint on anticipation, and after her decease upon trust for such person or persons as she should, whether covert or sole, by deed or will appoint, and in default of any such appointment upon trust for her children.

On the 6th of May, 1884, the settlor was adjudged

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

bankrupt,* and the trustee in bankruptcy received the rents from the tenants of the houses included in the settlement. The county court judge made an order for repayment by the trustee of the net rents to the bankrupt, but the Divisional Court (Cave and A. L. Smith, JJ.), feeling themselves bound by the judgments in *In re Armstrong*, 17 Q. B. D. 167, which were reversed by the Court of Appeal on a different ground (34 W. R. 709, 17 Q. B. D. 521), reversed the order, but gave leave to appeal.

The bankrupt appealed.

Ribton, for the appellant.—A married woman's bankruptcy under section 1, sub-section 5, is a qualified bankruptcy—that is, it only extends to her separate property. But the effect of section 19 is to exclude separate property comprised in a marriage settlement, as nothing in the Act is to "interfere with or affect" any marriage settlement. That means that neither the provisions of a marriage settlement nor the rights of the parties under it are to be affected: *In re Whitaker*, 35 W. R. 217, 34 Ch. D. 227. Every kind of separate property would come within section 1, sub-section 5, but separate property under a marriage settlement is by section 19 taken out of the operation of the former section.

He referred to *Smith* v. *Whitlock*, 34 W. R. 414; *In re Stonor's Trusts*, 32 W. R. 413, 24 Ch. D. 195; *Beckett* v. *Tasker*, *ante*, p. 158, 19 Q. B. D. 7; *In re Armstrong*, 17 Q. B. D. 167, 34 W. R. 709, 17 Q. B. D. 521; and *Hancock* v. *Hancock*, *ante*, p. 417, 38 Ch. D. 78.

Yate Lee, for the trustee.—The trustee does not seek to "interfere with or affect" the settlement; he wishes to take the property under the settlement. Section 19 means that where any property would have been bound by a settlement but for the provisions of this Act, then nothing in the Act is to prevent the property being so bound. The restriction contained in section 19 must be applied to all the sections of the Act, and not alone to the bankruptcy section. If the contention of the bankrupt is correct, it would exclude the interest of a woman under a marriage settlement from the provisions of section 1, sub-section 2, and sections 4, 12, 13, and 14. Section 20, as to the liability of a married woman to maintain her husband, is similar to section 13 of the Married Women's Property Act, 1870, but the construction contended for by the other side would cut down that liability in the case of property coming to her under a marriage settlement. *In re Whitaker* was a case where the property, but for section 19, would not have been brought within the settlement.

He also referred to *In re Queade's Trusts*, 33 W. R. 816; *Scott* v. *Morley*, *ante*, p. 67, 20 Q. B. D. 120.

Ribton replied.

Cur. adv. vult.

June 23.—Lord ESHER, M.R.—In this case a married woman carried on a trade separately from her husband, and in respect to that trade was made a bankrupt under section 1, sub-section 5, of the Married Women's Property Act, 1882. The question raised is whether her life interest in certain property under her marriage settlement passes to her trustee in bankruptcy, and that depends upon the true construction of section 19. In my opinion it is impossible to understand that section unless one considers the purview and objects of the statute. One of the main objects, though, of course, not the only object, of the statute seems to me to have been to provide for the case of married women of limited means, who may have to employ their talents and industry in earning their living, and whose means might be taken by their husbands for their own purposes. The Legislature contemplated that a married woman might carry on a trade separately from her husband, in this respect showing that they were thinking not so much of wealthy people as of persons of limited means who would have to employ their skill and labour in a trade. You would not expect in the case of such persons an elaborate settlement with clauses against anticipation. Property is settled upon a woman, either by an ante-nuptial or a post-nuptial settlement, to provide means for her subsistence and thus to keep her from want. Therefore, in a statute which has for its object the protection of married women's property, I should expect that the Legislature would not deprive a married woman of the protection which she had before the Act. I can understand, if a married woman engages in a trade, the Legislature refusing to protect any property which has not been settled upon her. They may well say that everything except that which is settled upon her for her subsistence by a marriage settlement, whether it was originally her property or not, is to be subject to bankruptcy. The Act, without doubt, is a most difficult one to construe, and some of the provisions appear to be founded upon no intelligible principle. But when the sections are examined, the main object of the Act appears to me to be, as I have said, the protection of married women who earn their own livelihood.

Then by sub-section 5 of section 1 a married woman carrying on a trade separately from her husband is to be subject to a limited bankruptcy. I should expect that out of that wreck something would be saved to prevent her from starving. I should expect that property settled upon her by a marriage settlement would not be subject to bankruptcy. There is ample property to go into bankruptcy without it. Accordingly section 19 provides that nothing in this Act contained shall interfere with or affect any settlement. The word "affect" seems to me to have a different meaning from "interfere with," and refers to the meaning and interpretation of the settlement. With regard to the words "interfere with," it is said that to take away every advantageous effect of a settlement is not to interfere with it, but to leave it intact. That point seems to me to be too minute and too fine for the affairs of real life. In my opinion you interfere with a settlement if you do away with or diminish its ordinary and natural result or effect. It is clear to me that if this life estate passes to the trustee in bankruptcy the ordinary and natural result and effect of the settlement is interfered with. Section 1, sub-section 5, would make this life estate subject to the bankruptcy. The Act therefore brings it within the bankruptcy laws. Then section 19 provides that nothing in the Act is to interfere with or affect any settlement, referring, as I think, to a marriage settlement. In my opinion those words take a marriage settlement out of the operation of the Act. I can give no other meaning to the section than that. It is exactly what I should have anticipated the Legislature would have done. Property comprised in a marriage settlement which has been settled upon a married woman as a protection against want is not to be touched. I come, therefore, to the conclusion that this life estate was not subject to bankruptcy, and that the appeal ought to be allowed.

LINDLEY, L.J., read the following judgment:—The question in this case turns on the construction of section

* 45 & 46 Vict. c. 75, s. 1, sub-section 5:—"Every married woman carying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*."

Section 19.—"Nothing in this Act contained shall interefere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman," &c.

19 of the Married Women's Property Act, 1882, taken in connection with section 1, sub-section 5, of the same Act.

Mrs. Armstrong carried on a trade separately from her husband, and thereby became in respect of her separate property subject to the bankruptcy laws as if she were a *feme sole*: see section 1, sub-section 5. She committed an act of bankruptcy, and was thereupon adjudicated bankrupt. But, as decided by this court (34 W. R. 709, 17 Q. B. D. 521), her bankruptcy only affected her separate property, and did not affect property over which she had only a power of appointment, and which, in default of appointment, would belong to other people. On her marriage in 1881 some property was settled on her for life for her separate use with remainders over. There was no clause in the settlement restraining her from anticipation.

The question now arises whether this life estate has passed to her trustee in bankruptcy, or whether she is entitled to enjoy it notwithstanding her bankruptcy. The trustee claims it under the Bankruptcy Act, and he is entitled to it under that Act, unless his title is excluded by section 19 of the Married Women's Property Act, 1882. It is contended for Mrs. Armstrong that if it had not been for section 1, sub-section 5, of the Married Women's Property Act, 1882, the trustee could not have claimed her life interest, and that his claim thereto, being based on that section, is one to which effect cannot be given without interfering with or affecting her settlement contrary to section 19. It was further contended on her behalf that the effect of section 19 is to render it necessary to distinguish separate property to which a married woman is or becomes entitled under some settlement or agreement for a settlement and separate property to which she is or becomes entitled in some other way; and that, whilst section 1, sub-section 5, applies to a married woman's unsettled separate property, it does not apply to separate property which she takes under a settlement.

If the Act is examined it will be seen that it not only makes that to be separate property which was not so before in the absence of some agreement or trust to that effect, but the Act also annexes to separate property consequences which were not before incident to it or not incident to it to the same extent as under the Act—for example, see section 1, sub-sections 3 and 4. In extending the rights of married women care has also been taken to protect their creditors, and in some cases to extend the rights of the creditors against the separate property of married women with whom they have dealt. Now it will be observed that section 19 does not say that nothing in the Act shall interfere with or affect the incidents annexed by the Act to separate estate or the consequences which follow its creation. Section 19 refers in the early part of it to settlements, and the words "interfere with or affect any settlement" mean invalidate or render inoperative any settlement. Settlements, creating separate estate are to have the same effect as if the Act had not passed, and, so read, the section is an important proviso on section 2 and section 5. In this case the trustee is claiming under the settlement, not against it; he is not interfering with or affecting it. He claims the life estate created by it, because the married woman entitled to that life estate has done an act which amounts in point of law to an alienation of it. It is true that but for the Act she could not have been made bankrupt, or could not have aliened her life estate in the particular mode in which she has done so. But no alienation of her life estate, be it voluntary or be it involuntary, is an interference with the settlement, nor does such alienation affect it. The second clause of section 19 shows that interfering with a settlement means something different from affecting an estate created by it. The second clause would not be wanted if the construction contended for were correct.

Mr. Ribton's argument is, in truth, open to the objection that it proves too much. Considering that by far the largest portion of separate property is created by settlement, and that his argument, if acceded to, would take all separate property so created out of the operation of the Act, the consequence would be that the Act would have left the old law to apply to settled separate property, and the new to unsettled separate property. Such a construction of the Act would not only lead to the utmost confusion, but would be destructive of one of the main objects of the Act, which was to extend to all married women having separate estate, and to their creditors, the rights enumerated in the various sections. I can find no warrant for drawing any distinction between separate property acquired by settlement and separate property otherwise acquired as regards the consequences attaching to it when acquired. To draw such a distinction would not be to give effect to the statute, but practically to destroy its operations to a very great, and, in my opinion, very alarming extent.

The appeal ought to be dismissed.

I may add that in my judgment section 19 applies to all settlements, whether made before or after marriage, and is not confined to what are properly called marriage settlements, such as that made in this case.

LOPES, L.J., read the following judgment:—I agree with the judgment of Lindley, L.J., and cannot agree with the judgment of the Master of the Rolls.

Mrs. Armstrong, the bankrupt, under the settlement was entitled to the rents and profits of the houses during her life for her separate use, but expressly without any restraint on anticipation. A power is given to her to appoint the property by deed or will to such persons, for such estates, as she shall think fit. Subject to that the trustee is to hold the property for the benefit of the only child by a previous marriage and the children of the intended marriage. There are other powers. The court has now to deal only with the life interest of the bankrupt. The question is whether the life interest of the bankrupt in these houses is available for the benefit of her creditors, as being her separate property within sub-section 5 of section 1 of the Married Women's Property Act, 1882. No restraint on anticipation being imposed, the bankrupt has an absolute power of disposition in respect of her life estate. That the life estate is, in the circumstances of this case, separate property and subject to the bankruptcy laws, is beyond question, unless it can be brought within section 19 of the same Act. There being no restriction against anticipation, the words of section 19 applicable are, "Nothing in this Act contained shall interfere with or affect any settlement, or agreement for a settlement, made or to be made, whether before or after marriage, respecting the property of any married woman." It is contended that this limits the meaning of the words "separate property" in sub-section 5 of section 1, and makes those words applicable only to unsettled, as distinguished from settled, separate property; in fact, excluding from the operation of sub-section 5 of section 1 all separate property which is settled, although the married woman has absolute power of disposing of it *inter vivos* or by will in the same way as a *feme sole*. It would require strong and unequivocal language to justify such a construction. The Legislature, in my opinion, contemplated nothing so unreasonable. All that is intended is that the provisions of settlements are not by the Act to be invalidated. It is an interference with the provisions of the settlements, not an interference with settled property under settlements over which the married woman has absolute control, that is contemplated. If the trustee here was claiming in derogation of the provisions of the settlement, I could understand Mr. Ribton's contention; but he is really claiming under, and in affirmance of, the provisions—claiming in the same way as any other

alienee to whom the life interest was conveyed, the only difference being that the alienation here is the act of the law, and not the voluntary act of the party.

I am of opinion, therefore, that the life interest of the bankrupt in these houses is her separate property within sub-section 5 of section 1, and that section 19 does not prevent that sub-section from applying.

Appeal dismissed.

Solicitors for the appellant, *Woodbridge & Sons.*

Solicitors for the trustee, *J. A. & H. E. Farnfield.*

From Q. B. Div. June 29.

REG. (ON THE RELATION OF F. K. MUNTON) v. LORD TRURO. (a.)

Middlesex Registry Act—Copyhold estates—Enfranchisement deed—Attesting witness—Execution by grantor or grantee—Commissioners to administer oaths—Masters in chancery ordinary and extraordinary—7 Anne, c. 20, ss. 1, 5, 17—15 & 16 Vict. c. 80—16 & 17 Vict. c. 78, s. 2.

An enfranchisement deed is not a deed merely conveying copyhold estates, but one conveying the freehold, and is therefore not within the exception of 7 Anne, c. 20, s. 17, excluding from registration copyhold estates.

It is not necessary that one of the witnesses attesting the memorial of a deed to be enrolled in the registry under 7 Anne, c. 20, s. 5, shall be a witness to the execution of the deed by a grantor, and it is sufficient if he be a witness to the execution of the deed by a grantee.

A London commissioner to administer oaths in chancery appointed under 16 & 17 Vict. c. 78, s. 2, has power to administer the oath required by 7 Anne, c. 20, s. 5.

This was an appeal from two decisions of two divisional courts (reported 35 W. R. 808, W. N., 1888, p. 91), granting a *mandamus* directing Lord Truro to receive and register a certain deed in the Middlesex Registry.

The deed in question was an indenture made between the Duke of Northumberland and Earl Percy of the one part, and George Bohn and F. K. Munton of the other part, and was an enfranchisement deed whereby the copyhold lands held by Bohn and Munton were granted to them as freehold. Three points were raised—(1) Whether the estate conveyed by the deed was not one which was exempted from registration under 7 Anne, c. 20, s. 17; (2) Whether the witness required to take the oath of execution may be the witness to the execution of the deed by either grantor or grantee under section 5 of that Act; (3) Whether the oath of such witness may be taken before a London commissioner to administer oaths qualified under 16 & 17 Vict. c. 78, s. 2.

Section 17 of 7 Anne, c. 20 provides that this Act shall not extend to any copyhold estates, &c.

Section 5 of 7 Anne, c. 20, so far as material for this report, provides:—"All memorials so to be registered shall be put into writing in vellum or parchment and brought to the said office, and, in case of deeds and conveyances, shall be under the hand and seal of some one of the grantors, or some or one of the grantees, his or their heirs, &c., attested by two witnesses, one whereof to be one of the witnesses to the execution of such deed or conveyance, which witness shall, upon his oath before one of the said registrars or masters, or before a master in chancery ordinary or extraordinary, prove the signing and sealing of such memorial and the execution of the deed or conveyance mentioned in such memorial, which respective oaths the said registrars or masters and masters in chancery are hereby empowered to administer."

By 15 & 16 Vict. c. 80 the masters in ordinary were abolished.

By 16 & 17 Vict. c. 78, ss. 1, 2, it is provided that:—

(1) The persons now styled masters extraordinary in chancery shall cease to be so styled, and they and all persons hereafter appointed by the Lord Chancellor to execute like duties in England shall be designated "commissioners to administer oaths in chancery in England," and shall possess and exercise all such powers and discharge all such duties as now appertain to the office of master extraordinary in chancery by virtue of any statute or order of the Court of Chancery, or of the Lord Chancellor, or usage in that behalf or otherwise.

(2) It shall be lawful for the Lord Chancellor from time to time to appoint any persons practising as solicitors within ten miles from Lincoln's-inn Hall at their respective places of business to administer oaths and take declarations, affirmations, and attestations of honour in chancery, and to possess all such other powers and to discharge all such other duties as aforesaid, and such persons shall be styled "London commissioners to administer oaths in chancery."

The Judicature Act, 1873, s. 77, in effect attached all commissioners appointed under 16 & 17 Vict. c. 78 to the Supreme Court.

The oath of the attesting witness, who was a witness to the execution of the deed by a grantee, had been taken before a London commissioner qualified under 16 & 17 Vict. c. 78, s. 2.

Channell, Q.C., and *W. B. Trevelyan* (*Sir R. E. Webster, A.G.*, with them), for Lord Truro.—Firstly, this is not such a deed as the registrar can be required to register. 7 Anne, c. 20, s. 17, excludes from the Act copyhold estates. This is a conveyance of a copyhold estate, and therefore not within the Act. Secondly, the witness who has taken the oath of execution was a witness to the execution by a grantee only—that is, a person who is not a necessary party. The witness should be witness to execution by a party from whom estate moves: *Jack v. Armstrong*, 1 Hud. & B. 727, a decision on the Irish Registration Act, in which similar words are used; *In re Stephens*, Ir. Rep. 10 Eq. 282, 24 W. R. Dig. 125. Lord St. Leonards says (V. & P., 8th ed., p. 970: "The intention of the Legislature clearly was that no deed should be memorialized the execution of which by the granting party was not proved, because execution by the grantee is by an unnecessary party." But the note is omitted in the later editions of Lord St. Leonards' book. [They also cited *Sadlier v. Biggs*, 4 H. L. Cas. 435; Davidson's Precedents (1877), p. 197.] On the third point—viz., whether the commissioner before whom the oath was taken was competent to receive the oath required by the Act—the same arguments and cases were urged as in the court below.

R. T. Reid, Q.C. (*W. Murray* with him), for F. K. Munton, was called upon only on the second point as to the witness.—Section 5, whilst expressly referring to grantor and grantee, does not draw the distinction in regard to the witness required to take the oath. The Irish Act, though similar in the words used in the corresponding section in its preamble, says it was expressly passed to guard against forgeries, and not merely to secure publicity as under this Act.

He also cited *Essex v. Baugh*, 1 Y. & C. C. C. 620.

COTTON, L.J.—Several points have been argued in this case, of which the first and most important is, whether a deed of the description in this case is one which requires registration. It is submitted by Lord Truro that this deed, being an enfranchisement deed, is not subject to registration under the Act of Anne, which, in section 17, provides that the Act "shall not extend to any copy-

(a.) Reported by F. T. DUKA, Esq., Barrister-at-Law.

hold estates," but this is a wrong construction, for this is not a deed relating to copyhold estates but relating to the freehold, and conveying the freehold to the copyhold tenant, and not merely a conveyance of a copyhold estate, which is all that is excluded by this section of the Act. We have here a conveyance of land with all the mines and minerals thereunder, and any subsequent purchaser would obtain the freehold and not a copyhold interest.

The second point is as to whether the witness to the memorial, who was a witness of the execution of the deed by the grantees, was competent to take the oath required by section 5, it being contended by Lord Truro that, by section 5, the witness to be sworn must be a witness to the execution by a grantor, which was not the case here. Now section 5 says that memorials in the case of deeds and conveyances shall be under the hand and seal of some or one of the grantors, or some or one of the grantees, his or their heirs, executors, or administrators, attested by two witnesses, one whereof to be one of the witnesses to the execution of such deed or conveyance, "which witness shall, upon his oath before one of the said registrars or masters, or before a master in chancery, ordinary or extraordinary, prove the signing and sealing of such memorial, and the execution of the deed or conveyance mentioned in such memorial." But the construction contended for on behalf of Lord Truro is too narrow, and the witness to the execution of the deed by the grantee, though it is not absolutely necessary for the grantee to execute the deed, is sufficient. In this very section a distinction is drawn between the grantor and grantee, and if it had been intended to make a distinction as to the witnesses the section would have said so. Possibly the procedure was adopted to prevent fictitious deeds being placed on the register. My only doubt on this point arose through what was said by Lord St. Leonards in his book on Vendors and Purchasers, 8th ed., p. 970, and to a decision in the Irish courts on the Irish Act. Now the opinion of Lord St. Leonards is worthy of the greatest respect, as he was an eminent lawyer, but it is a remarkable fact that the note on this point is omitted in the later editions of his book. The Irish decision is on the Irish Act, in which similar language is used in the corresponding section, but the preamble of that Act shows that one of its objects was to guard against forgeries, and this probably accounts for the decision. We are not bound by the Irish decision, and so we act on our own opinion, and we think the objection is not good. As to the last point, it is suggested that the person before whom the oath was taken is not a proper person to take the oath. The Act provides (section 5) that the oath is to be taken before one of the registrars or masters, or before a master in chancery, ordinary or extraordinary, and it is said that as they have been abolished it cannot be taken before their practical successors. To determine this we must look to the Act of 1853 alone for our decision. For the Judicature Act does not deprive a London commissioner of any power he had before that Act was passed. Now prior to the Act of 1853 the masters were authorized to take the oath of persons residing in certain circles, and when the masters were abolished the Act of 1853 appointed commissioners in their place, but it is suggested that the duty was originally imposed on the masters as *personæ designatæ*, and not as part of their office, and therefore did not pass to the commissioners who succeeded them. But I think the Act of Anne gave the powers and duties to those fulfilling the office, and in fact the registrar does not raise the objection in respect of affidavits sworn before commissioners beyond the ten mile radius to which the jurisdiction of country commissioners was limited. Now section 1 gives the powers of masters extraordinary to country commissioners outside the ten mile radius, and section 2 gives the like powers to London commissioners, and section 5 provides that the powers of the Lord Chancellor for the appointment of commissioners to take oaths shall not be limited. The present commissioners are appointed in substitution for the old masters. The appeal therefore fails.

BOWEN, L.J., I concur as to the first and third points, and I only touch on the second because our decision is apparently at variance with the Irish decision on the similar words of the Irish Act. Section 5 of the Act of Queen Anne provides that the oath is to be taken by one of the witnesses who was a witness to the execution of the deed, and it is contended that no one can be such a witness except a person who saw the execution of the deed by the party from whom the estate moves. The section is doubtful, but there are several reasons against this construction. Nothing in the Act says the witness is to be a witness of the execution by the person from whom the estates moves. Now who are the witnesses of a deed executed by more than one party: where there are several grantors and grantees all the witnesses of all the parties are the witnesses to the deed. Now the section says when it speaks of the witness to the execution that the oath is to be taken by one of the witnesses to the execution. This is amply satisfied by producing one of the class. We receive considerable guidance from the preamble of the Act. The object of the Act is "for the publick registry of deeds, conveyances, and wills, and other incumbrances which shall be made of or that may affect" any hereditaments in Middlesex—that is, the object of the Act is to prevent secret conveyances. Publicity and notice to the world of owners of property is the object to be borne in mind in construing the Act. It imposes certain solemnities without which, but for the Act, the deeds would be perfectly valid, on pain of forfeiture. It is, therefore, a penal Act, and therefore no wider construction should be given than necessary for carrying out the object of the Legislature. Here lies the distinction between the Irish case and this case. The object of the Irish Act was to strike at forgery, and not secrecy only. This being the object of the Irish statute, the court might well think they would not secure the entire object of the Legislature without coming to the conclusion they did. As to the opinion of Lord St. Leonards, I have nothing to add to the view expressed by Cotton, L.J.

FRY, L.J., concurred.

Solicitors for Lord Truro, *Waineright & Baillie.*

Solicitors for F. K. Munton, *Munton & Morris.*

From Q. B. Div. May 31; June 22.

REG. v. COMMISSIONERS FOR SPECIAL PURPOSES OF INCOME TAX. (a.)

Revenue—Income tax—Claim for repayment—Discovery and proof of over-assessment—"Within or at the end of the year"—5 & 6 Vict. c. 35, s. 133.

By section 133 of 5 & 6 Vict. c. 35, "If, within or at the end of the year current at the time of making any assessment under this Act, . . . any person . . . shall find and shall prove to the satisfaction of the commissioners by whom the assessment was made that his profits and gains during such year for which the computation was made fell short of the sum so computed, . . . it shall be lawful for the said commissioners, . . . in case the sum assessed shall have been paid, to certify under their hands to the commissioners for special purposes the amount of the sum overpaid, . . . and

(a.) Reported by A. P. PERCIVAL KEEP, *Esq.*, Barrister-at-Law.

thereupon the last-named commissioners shall issue an order for the repayment of such sum as shall have been so overpaid."

In March, 1887, *the appellants made a claim for repayment of income tax assessed on profits for the years ending April,* 1884, *and April,* 1885. *The general commissioners, after inquiry, granted their certificate. The special commissioners having refused to issue an order for the repayment of the sum, application was made for a* mandamus *to compel them to do so.*

Held, that a mandamus *would lie, and that the meaning of the section was that the over-assessment should be found and proved as soon after the end of the year as, by using all reasonable and proper exertions, the applicant could ascertain it.*

Per Lord Esher, M.R.—*The general commissioners are the final judges as to whether the application has been made in time or not, and their certificate is binding on the special commissioners, who have no power to question their decision.*

Per Lindley, L.J.—*When a certificate has been granted by the general commissioners, the* onus *of proving that the application was not made in time is thrown on the Crown, and the mere production of the dates of the application and of the years for which the certificate has been granted is not sufficient ground for disregarding the certificate.*

Appeal from the decision of a divisional court (Cave and Grantham, JJ.), *ante*, p. 671, 20 Q. B. D. 549.

In March, 1887, the Cape Copper Mining Co. (Limited) applied to the general commissioners for income tax for certificates entitling them to a repayment of income tax alleged to have been overpaid in the years of assessment ending respectively April 5, 1884, April 5, 1885, and April 5, 1886. The general commissioners, after due inquiry, granted a certificate for each year. On the case coming before the special commissioners they allowed the claim for 1886, but disallowed the other two. The company then applied to the Divisional Court for a *mandamus* to compel the special commissioners to order repayment of the overpayments for 1884 and 1885. The Divisional Court differed, Grantham, J., holding that a *mandamus* should be granted, and Cave, J., that it should not. Grantham, J., having withdrawn his judgment, the Cape Copper Mining Co. appealed.

Sir Horace Davey, Q.C., Meadows White, Q.C., and *Pollard,* for the appellants.

Sir R. E. Webster, A.G., Sir E. Clarke, S.G., and *Thomas Hewitt,* for the respondents.

The following cases were cited: *Reg.* v. *Lords of the Treasury,* 16 Q. B. 357; *Reg.* v. *Lords Commissioners of the Treasury,* 20 W. R. 336, L. R. 7 Q. B. 387; *Reg.* v. *Commissioners of Woods and Forests,* 15 Q. B. 761; *In re Nathan,* 32 W. R. 543, 12 Q. B. D. 461; *Reg.* v. *Lords of Treasury,* 4 A. & E. 286.

Cur. adv. vult.

June 23.—Lord ESHER, M.R.—In this case the appellant company had been assessed to, and had paid, income tax in respect of the trade carried on by them. They asserted a considerable time afterwards that they had overpaid, and they accordingly applied for a repayment. The case was taken before the general assessment commissioners, and they inquired into the matter, and after hearing the facts came to the conclusion that there had been an overpayment, and they gave a certificate to that effect. If they had jurisdiction to inquire, there is no doubt that the certificate is in proper form. The certificate is then taken by the company to the special commissioners, and they are asked to make an order for the repayment of the money so overpaid. That they declined to do, on the ground that the general commissioners had exceeded their jurisdiction in granting the certificate. Thereupon application is made for a *mandamus* to compel the special commissioners to make the order.

On the one side objection was taken that a *mandamus* would not lie against the special commissioners, and on the other it was said that the certificate when once granted was binding on the special commissioners, and that they had no power to say that the general commissioners had acted without jurisdiction. The Divisional Court were divided in their opinion, and, the junior judge having withdrawn his judgment, the decision stands that the *mandamus* is not to issue.

Now as to the first point I think there is no difference of opinion here that the special commissioners have a public duty to perform, and, therefore, that if this be a proper case for a *mandamus*, a *mandamus* will lie. Now is this a proper case? Had the special commissioners any right or power to object to the certificate which had been granted? It may well be that it is no part of the duty of the special commissioners to raise objection to certificates granted by the general commissioners. It may be that it is the duty of the Crown to interfere if the certificate has been improperly granted, and to move to have it brought up and quashed. But I think it is unnecessary to decide that now. The question really depends on the true construction of section 133 of 5 & 6 Vict. c. 35. The objection is that the appellant company did not find and prove the admitted overpayment "within or at the end of the year current" at the time of making the assessment. It is clear that it was not discovered or proved within the year. Was it, however, found and proved at the end of the year? It is not suggested that the words "at the end of the year" must be read in their strictest sense as meaning the very moment at which the year ends. The contention on the one side is that the words mean at any time after the end of the year, and on the other that they mean as nearly as possible to the end of the year, and that a period must be laid down by the court, and every case brought within it. The section deals with a matter of business, and it must be dealt with in a business-like common-sense way. In my opinion neither of the contentions is entirely correct. There are cases in which the discovery of an overpayment may obviously be made clear in a very short time, but where mercantile people who are engaged in very large transactions are in question it is impossible to say that an overpayment can be discovered with the same ease and speed as in the case of smaller businesses. I think the meaning given to the words must be sufficiently elastic to be reasonably applicable to all cases to which they may apply. I do not think we can say that they mean either at any time after the end of the year or that we can fix an exact period within which they must fall. I think that the discovery and proof of the overpayment must be made in as short a time as, by using all reasonable and proper exertions, the party claiming can possibly have ascertained the fact and amount of the overpayment.

If there is any real delay on the part of the claimant he is too late, but if he has made every exertion which he ought to have made, whether a year or two years have elapsed, he has still satisfied, in my opinion, the meaning of the section if he can show that he could not have found out the overpayment in less time. It must be a matter of inquiry in each case whether all proper exertions have been used. With whom, then, does the decision rest? In my opinion with the general commissioners. It is their duty to decide, first, whether they are satisfied that the discovery of overpayment has been made as soon as possible, and then they have to say whether there has been an actual overpayment proved to their satisfaction. Now can their decision be afterwards questioned? It has been said that their jurisdiction depends upon the proper decision of the first question, and that

they cannot give themselves jurisdiction by deciding it wrongly. I have given the matter my careful attention, and I have come to the conclusion that this argument is misleading. No doubt in one sense that formula is right, but it is, I think, inapplicable here. When an inferior tribunal is constituted the Legislature has to consider what power and jurisdiction should be given to it. It may say that if certain facts exist the tribunal will have jurisdiction, but not if they do not exist. Then if that tribunal seeks to exercise that jurisdiction where such facts do not exist they will have no jurisdiction, and cannot give themselves jurisdiction by asserting the existence of such facts. But, on the other hand, if the Legislature entrust them with a jurisdiction over two sets of facts, the one depending upon the other, and give them power to decide whether the preliminary facts exist, the existence of which will entitle them to go further, then they have a comprehensive jurisdiction, and can exercise it as much with regard to the first as with regard to the second set of facts. The Legislature has also to consider in such a case whether an appeal shall be given, and if they grant no appeal there is none. In this case, therefore, I think that the Legislature have given the general commissioners a comprehensive jurisdiction, first, to decide whether the application has been made in time, and, secondly, whether there has really been an overpayment. There is no appeal from their decision on either of these points. In my opinion, therefore, their decision and certificate was final as to both points, and the special commissioners had no power to question their jurisdiction or to refuse to act upon the certificate. Even if I thought that they had not jurisdiction to decide whether the application had been made in time, I think that the Crown have brought forward no facts to show that their decision on this point was wrong. I am, therefore, of opinion that the decision of the Divisional Court as it at present stands, must be reversed, and that this *mandamus* must go.

Lindley, L.J.—I am of the same opinion. The question turns on an examination of a number of sections of the Income Tax Acts, and especially on the true construction of section 133 of 5 & 6 Vict. c. 35. The real difficulty is as to the meaning of the words "within or at the end of the year." Of course, at the end of the year does not mean when the clock strikes at midnight on the last day of the year. That would be giving to "at the end of the year" the same meaning as "within the year." What construction, then, can we put upon it so that it may be worked in a businesslike manner. The section is applicable to persons engaged in all classes and degrees of business. In this particular case the appellants have offices in this country and mines abroad. It is clear, therefore, that they could not ascertain an overpayment with the same degree of celerity with which it might be discovered by other persons. The company have gone before the general commissioners and have satisfied them both that there has been an overpayment and that they have discovered it within a reasonable time. They have therefore granted the company their certificate. That being so, the special commissioners cannot take up any ground except want of jurisdiction on the part of the general commissioners. If the Master of the Rolls' view is right, that the general commissioners are the final judges of whether the application is in time or not, the special commissioners are bound by the certificate. For my own part I do not think the language of the Act is sufficiently plain to make the general commissioners final judges of what is a proper time. But I think that the certificate throws on the Crown the *onus* of proving that the application was not made in reasonable time. They have merely produced before us the dates of the application, and I do not think that we should be justified in saying from those alone that the application was made too late. In my opinion the meaning of the section is that the overassessment should be found and proved as soon after the end of each year as is possible, having regard to the facts and circumstances of each particular case. I do not think it means either exactly at the end or at any particular time after the end or even within a reasonable time after the end, unless that implies diligence on the part of the applicant. In this case I think that there are no materials before us from which we can infer that there has not been due diligence in ascertaining the overpayment. I agree, therefore, rather in the view of the section taken by Cave, J., than in that taken by Grantham, J., in the court below, but I think there was no evidence on which the special commissioners could act, and therefore that this money must be repaid.

As to the question of *mandamus*, I am of opinion that it will lie in this case. It is difficult to draw a precise line, but I think this is not a case for a petition of right. The applicant has to get something before he can apply for the money—namely, an order for its payment.

After looking at the cases cited to us on this point I have come to the conclusion that a *mandamus* will lie against the special commissioners to compel them to issue an order for the repayment of this money.

Appeal allowed.

Solicitor for the appellants, *J. Sheppard.*

Solicitor for the respondent, *The Solicitor of Inland Revenue.*

High Court of Justice.

Chan. Div.
Chitty, J.

June 22.

Vernon v. Croft. (a.)

Petition — Fund in court — Payment out — Parties — Service — Contingent interests — Stop order — Mortgagees.

Where a contingent interest in a fund in court has been mortgaged and the mortgagee places a stop order on the fund, but the mortgagor dies before his interest vests, the persons ultimately entitled to the fund, upon applying for payment out, need not serve such mortgagee.

A petition was presented for the payment out of court of a fund of £10,000, which had been carried over to a separate account.

All persons having an interest in the fund at the date of the petition appeared at the hearing, and the order was made.

It appeared in the petition that two persons, each of whom had a contingent interest in the fund, had mortgaged their respective interests in the fund and died before such interests became vested interests. Each of the mortgagees had placed a stop order upon the fund. Under these circumstances the registrar objected to draw the order in the absence of the mortgagees.

S. Dickenson mentioned the matter, and submitted that the mortgagees were not necessary parties, inasmuch as the persons through whom they claimed never became entitled.

Chitty, J., directed the order to go.

Solicitors, *Garrard, James, & Co.*

(a.) Reported by A. D. Maclaren, Esq., Barrister-at-Law.

Chan. Div. North, J. June 15.

MORITZ v. STEPHAN. (a.)

Practice—Service of writ out of jurisdiction—Charging order—Breach of contract—Rules of Supreme Court, 1883, ord. 11, r. 1 (e); ord. 46, r. 1—1 & 2 Vict. c. 110, s. 14.

Ord. 11, r. 1 (e), of the Rules of the Supreme Court, 1883, does not apply to the case of an action to enforce a charge obtained on shares under 1 & 2 Vict. c. 110, s. 14, and consequently leave cannot be obtained to issue a writ for service out of the jurisdiction in such an action.

Motion.

This was a motion for leave to issue a writ for service out of the jurisdiction under ord. 11, r. 1 (*e*).

The applicant had recovered a judgment for a debt against the person upon whom he wished to effect service, and had also obtained an order, under ord. 46, r. 1, charging certain shares belonging to the debtor with payment of the judgment debt. He now proposed to bring an action to enforce the charge on the shares. The debtor was residing out of the jurisdiction.

Ord. 11, r. 1, of the Rules of the Supreme Court, 1883, provides that service out of the jurisdiction of a writ of summons may be allowed whenever (*inter alia*) "(*e*) The action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction."

Ord. 46, r. 1, provides that "an order charging stock or shares may be made by any divisional court or by any judge, and the proceedings for obtaining such order shall be such as are directed, and the effect shall be such as is provided by the Acts, 1 & 2 Vict. c. 110, ss. 14 and 15, and 3 & 4 Vict. c. 82, s. 1."

That 1 & 2 Vict. c. 110, s. 14 enacts "That if any person against whom any judgment shall have been entered up in any of her Majesty's superior courts at Westminster shall have any Government stock, funds, or annuities, or any stock or shares of or in any public company in England (whether incorporated or not), standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the superior courts, on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor."

E. Ford, for the motion.—By virtue of the provisions of Statute 1 & 2 Vict. c. 110, s. 14, the charging order entitles the judgment debtor to all the remedies to which he would have been entitled if the charge had been made by the contract of the judgment debtor; and this brings the case within the scope of ord. 11, r. 1 (*e*), which provides for service out of the jurisdiction in case of breach of contract.

He referred to *Piget* v. *Ede*, 22 W. R. 625, L. R. 8 Eq. 118; *Liggott* v. *Western*, 32 W. R. 460, 12 Q. B. D. 287.

NORTH, J., after stating the facts and reading section 14 of 1 & 2 Vict. c. 110, proceeded:—That statute enables the judge to order that the shares of a judgment debtor shall stand charged with the payment of the judgment debt and interest, and provides that such order shall entitle the creditor to all such remedies as he would have been entitled to if the charge had been made in his favour by the judgment debtor. The order has been made, and the shares are charged with payment of the amount of the judgment debt. Suppose that the charge had been created by a memorandum by the judgment debtor that the shares should be charged with that amount. The statute says that the creditor shall be entitled to all the remedies to which he would be entitled if the charge had been so created. But that does not make a contract by the judgment debtor to pay the amount of the judgment debt. There is no bargain to pay the amount, or as to the time when it is to be paid, but only that the shares shall be charged with its payment. But to enable me to make the order asked for, I must find that there has been a breach of contract, because ord. 11, r. 1 (*e*), says breach. Supposing the judgment debtor had charged the shares with the payment of the amount of the judgment debt, where is there any breach? I do not see any breach, and therefore ord. 11, r. 1 (*e*), does not apply to this case, and I cannot make the order asked for.

Solicitor, *Clarence Harcourt*.

(a.) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

Chan. Div. Stirling, J. April 25, 26; May 2.

In re BLUNDELL.

BLUNDELL v. BLUNDELL. (a.)

Solicitor—Costs—Trustee—Breach of trust—Solicitor for defaulting trustee—Constructive trustee.

In order to preclude a solicitor from accepting from a trustee payment, out of the trust estate, of costs incurred in the administration of the trust estate it must be conclusively shown that the solicitor, at the time of receiving such payment, had knowledge that the trustee had been guilty of such a breach of trust as to incapacitate him (the trustee) from resorting to the trust estate for the payment of such costs.

Staniar v. Evans, 35 *W. R.* 286, 34 *Ch. D.* 470, *distinguished.*

Adjourned summons.

Thomas Blundell, by his will dated the 21st of April, 1882, appointed T. Harrington, R. Berry, and his son, the defendant G. T. Blundell, trustees and executors thereof, and declared that the defendant should have the option of purchasing his business and the leasehold premises upon which the same was carried on, with the stock-in-trade, &c., at the price of £6,000, or, if he should decline to take it at that sum, at a valuation to be made according to the instructions of his executors. And the testator devised and bequeathed his residuary estate and effects, including his business and leasehold premises, if his said son should not elect to purchase, to his trustees and executors upon trust to sell the same, and, after payment out of the proceeds of certain legacies, to pay one moiety of the residue to his son, the defendant, absolutely, and to invest the other moiety and apply the income thereof for the benefit of his son, J. W. Blundell, and after his death upon trust for his children. The will contained no power to carry on the business.

The testator died on the 14th of September, 1882.

The defendant alone proved the will, and employed Messrs. Bower, Cotton, & Bower, a firm of solicitors, to act for him in the execution of the trust. He did not exercise the option given to him by the will, but by the device of a sale by auction of the business to a nominee

(a.) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

of his own, from whom he took it over, succeeded in getting it into his own hands.

Messrs. Bower, Cotton, & Bower had advised the defendant that he could not purchase the business without the leave of the court, and he acted contrary to their advice in attempting to do so.

In November, 1884, an action was brought by the infant beneficiaries against the defendant for the administration of the testator's estate.

The defendant subsequently became bankrupt.

Messrs. Bower, Cotton, & Bower transacted a considerable amount of business in connection with the estate, which was a large one, and received large sums of money from the executor on account of their costs.

This was a summons by creditors who had the conduct of the action, asking that Messrs. Bower, Cotton, & Bower might be ordered to pay into court the moneys so received by them.

W. F. Robinson, Q.C., and *E. Ford*, for the motion.—Messrs. Bower, Cotton, & Bower are not entitled to retain the moneys paid to them by the defendant in respect of costs. They were aware at the time of such payment that he had committed a breach of trust which would deprive him of his right, as trustee, to resort to the trust estate for payment of these costs, and they cannot, therefore, stand in a better position than the defendant: *Staniar* v. *Evans*, 35 W. R. 286, 34 Ch. D. 470.

They also referred to *Morgan* v. *Stephens*, 3 Giff. 226, 9 W. R. Ch. Dig. 89.

Buckley, Q.C., and *Levett*, for Messrs. Bower, Cotton, & Bower.—The case of *Staniar* v. *Evans* is not an authority for the proposition for which it is cited. A solicitor cannot be called upon to refund money which has been paid to him in respect of costs unless it can be shown that he has received it under such circumstances as to make him a constructive trustee of it. Here there is no sufficient evidence to show that such was the case.

They referred to *Barnes* v. *Addy*, 22 W. R. 505, L. R. 9 Ch. 244; *Maw* v. *Pearson*, 28 Beav. 196, 9 W. R. Ch. D. 52; *Harries* v. *Rees*, 16 W. R. 91. [Stirling, J., referred to *In re Spencer, Spencer* v. *Hart*, 30 W. R. 296.]

Robinson replied.

Stirling, J.—This case, which has been argued at considerable length, involves a question of great importance, not only to solicitors, but to all persons who are employed by trustees to assist them in the discharge of their duties. The case which is put is this: An executor and trustee employs a solicitor to assist him in winding up his testator's estate and in the execution of the trusts of the will. I assume, and it is not disputed in the present case that the employment of that solicitor is proper. In the course of his employment the solicitor requires the trustee to make a payment to him on account of his costs. The trustee does so, and he does so, in point of fact, with the knowledge of the solicitor, out of the trust estate. It is said that the solicitor cannot retain the sum so paid to him out of the trust estate, except upon the terms that, if the trustee, upon the accounts being taken, turns out to be a defaulter, and an order is made against him for the payment of the balance into court, and he fails to do so, the solicitor should be liable to have the same order made against him. That is a very serious proposition. It seems to me that if it is well founded in principle it cannot be confined to the case of a solicitor, but must be extended to those of other persons, such as auctioneers and stockbrokers, who, as we all know, are necessarily employed by trustees, and are in the habit of deducting out of the proceeds of sales of property which they are employed to sell their own commission on the sale.

The first question I have to consider is whether that is a true statement of the law. Now, what is the position of a trustee or an executor who has to employ a solicitor, an auctioneer, or a stockbroker? He enters unquestionably into a contract with reference to the employment of a solicitor or auctioneer or stockbroker in which he himself is personally liable, but by law he is entitled to be indemnified out of the trust estate. What is that right of indemnity? I apprehend that in equity, at all events, it is not a right to be indemnified merely after he has made the necessary payments to the solicitor, the auctioneer, or the stockbroker. In equity he is entitled to be indemnified, not merely against the payments actually made, but against his liability, and that has been repeatedly held. For example, a trustee in whose name shares are standing is entitled to be indemnified by his *cestui que trust* against calls on those shares, and he is not bound, before having recourse to that indemnity, to pay the calls, but he is entitled to come to this court and ask that he may receive from his *cestui que trust* personally the amount of calls in order that he may pay them. That equity has been repeatedly enforced in this court. I may refer to the well-known case of *Cruse* v. *Paine*, decided by Giffard, V.C., 17 W. R. 45, L. R. 6 Eq. 641, and on appeal by Lord Hatherley, 17 W. R. 1033, L. R. 6 Ch. 441, and the same doctrine is laid down by the late Master of the Rolls and applied under peculiar circumstances in the well-known case of *Lacey* v. *Hill*, *Crowley's Claim*, 22 W. R. 586, L. R. 18 Eq. 182, which arose out of the will of Sir Robert Harvey. It seems to me that that being the rule a trustee has a right to resort in the first instance to the trust estate for making the proper necessary payments to the persons whom he properly employs to assist him in administering that trust estate, and that he is not bound in the first instance to pay those persons out of his own pocket and then recoup himself out of the trust estate.

I think that is in accordance with the authority so often referred to in this argument of *Barnes* v. *Addy*. In that case we find from Lord Selborne's judgment that one of the trustees who was made a defendant paid over out of the trust estate to his solicitor a sum of £55, and it was sought to charge the solicitor with that £55. Lord Selborne (at p. 254) says, "It is said he is to be charged with that (though he did not retain or use for his own benefit a single shilling of that money)." That, no doubt, is a distinction between that case and this case, but still, what Lord Selborne says there is none the less applicable to this case, "It is said he is to be charged with that (though he did not retain or use for his own benefit a single shilling of that money) because the authority of the trustees to apply the money in payment of certain costs of a previous suit which had been compromised was not obtained from this court. Now the trustee, Mr. Addy, was, as I have said, at the time, beyond question, the legal owner of the fund. He and Mr. Clark, the deceased trustee, had a right, by the terms of the will, to be indemnified against all costs properly or reasonably incurred in connection with the trust. These costs had been incurred in a suit against them in the name of the present plaintiffs, the Barnes children, by a next friend under the advice of Mr. Parker, the family solicitor, which suit, having proceeded to a certain extent, had been compromised on the terms that all three shares of this fund—the Robinson share, the Barnes share, and the Addy share—should bear their proportion of the trustees' costs. The trustee Addy authorized the sale for that purpose, and the application of the money, and it was so applied; and I am most clearly of opinion, first of all, that there is nothing before us to show that such an application was improper on the part of Mr. Addy, the trustee"; but then he adds, "But, secondly, that if it had been, the solicitor could not possibly have been held on that account responsible." The ground on which the solicitor

could not have been held to be responsible appears to be that he simply acted as agent for the trustee. He did not retain the money for his own use, but simply handed it over in payment of the costs incurred. That is an express decision by Lord Selborne that such an application of the fund was not improper on the part of Mr. Addy, and that case, therefore, seems to be an authority for the proposition that a trustee, having properly incurred expenses in administering a trust fund, is entitled to sell a part of the trust estate, and apply the proceeds directly in payment of costs. If, then, it was proper for the trustee to resort to the trust fund for payment of those costs, and to sell a part of the trust estate and apply the proceeds in payment of those costs, how can it be improper for the solicitor to receive them? I fail to see it. And to say that his right to receive and to retain can be affected by the subsequent conduct of the trustee, appears to me to be quite impossible, and it is a proposition for which there is no authority. The only authority cited in support of that proposition is a totally different case — namely, of *Stanier* v. *Evans*—from the decision of which, as I understand it, I do not at all differ. As I read that case it is this. There was a suit instituted for the execution of the trust, and by the chief clerk's certificate it was found that there was in the hands of the trustee a balance of £1,500 odd, including a sum of £660. That sum of £660 consisted of some mortgage debts which had been paid to the trustees' solicitors, together with interest, and it remained in the hands of the trustees' solicitors, but there had been no agreement between the trustee and the solicitors that the funds which had come to their hands should in any way be appropriated to the payment of costs. Then it was further proved that the trustee was, with the knowledge of the solicitor, utterly impecunious at the time the order was made for payment in, and there was no probability of his being able to pay in anything whatever.

Under those circumstances North, J., held that the solicitors were liable to pay into court the sum which they had retained in their hands, though a large sum was due to them from the trustee for costs, and the ground upon which he puts his judgment appears to me to be undeniable—that solicitors could not contract with the estate, they had no lien on the estate, they could only get a lien by means of some proper agreement with the trustee. There had been no agreement whatever entered into, the trustee himself was a defaulter, he was unable to make the payment, he could not in any way resort to the trust estate for payment of his costs, because he had already in his hands a large sum which he ought to have applied in payment of those costs, and North, J., held that, under these circumstances, the solicitor could stand in no better position than the trustee. I confess I cannot see how the decision can be quarrelled with in any way. That, however, is not a decision, to my mind, that in every case in which the solicitor of a trustee receives money in payment of costs out of the trust estate, he can stand in no better position than the trustee himself does.

Coming, therefore, to the conclusion that, in a proper case, the trustee may pay costs properly incurred direct to his solicitor out of the trust estate, I have next to consider whether there are any circumstances in this case which will make the solicitor liable, as a constructive trustee, for funds which are so received.

Upon that the case of *Barnes* v. *Addy* is again valuable. Lord Selborne (at p. 251) says:—"That is a distinction to be borne in mind throughout the case. Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making these trustees *de son tort*, or actually participating in any fraudulent conduct of the trustee to the injury of the *cestui que trust*. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers—transactions, perhaps, of which a court of equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist, with knowledge, in a dishonest and fraudulent design on the part of the trustees." That doctrine so laid down by Lord Selborne has been expressly applied to solicitors in the Court of Appeal in the case of *In re Spencer, Spencer* v. *Hart*. That was an action by the *cestuis que trust* against their trustees for administration, the solicitors of the trustees being joined as defendants. It was alleged that grossly exorbitant sums had been allowed in the accounts as costs to the trustees' solicitors, and the relief asked as against them was that their bills might be taxed. The solicitors demurred, and it was held that such an action could not be maintained by third parties, *cestuis que trust*, against solicitors, and that the proper remedy was by petition under the Solicitors Act, 1843, s. 39. Baggallay, L.J., (at p. 297) says:—"Are Messrs. Ansdell & Sons liable to the plaintiff in any other character than as solicitors? The principles on which agents can be made responsible as constructive trustees are very clearly defined by Lord Selborne in the case of *Barnes* v. *Addy*." Then he quotes from the head-note of that case in the *Law Reports*, substituting for the general word "agent" the word "solicitor," and then he goes on: "What is the case here? Are there any allegations sufficient to make them liable as constructive trustees? No; I can find nothing. There are allegations which seem to point to her solicitors having got the trust funds into their hands, but only as solicitors to the trustees. Therefore the allegation is that the trustees themselves had realized the property and received the money; and there is nothing suggesting an improper receipt of the trust moneys by the solicitors. The £700 is stated to have been received by the trustees. Then the only other suggestion is that the trustees had taken credit for £455, which they had allowed the solicitors to deduct as the amount of their bill of costs; but we do not know that that was in any way an excessive sum. If it is, it is open to the *cestui que trust* to obtain taxation of the bill under the Solicitors Act. Therefore the making of these solicitors defendants as constructive trustees cannot be justified." Then Lindley, L.J. (at p. 298), says:—"*Primâ facie*, the only persons to sue an agent are his principals, although, no doubt, it might be shown that an agent was so involved in a breach of trust committed by his principal as to stand in the position of a *quasi*-trustee, and in that case an action might be supported against him."

Therefore it seems to me that that case is a direct authority that you cannot make solicitors liable as constructive trustees except you bring them within the doctrine of the court with reference to strangers who are not themselves trustees, but who are liable in a proper case to be made to account as constructive trustees. What is the general doctrine with reference to constructive trustees of that kind? The general doctrine, I take it, is this: that a stranger to the trust receiving money from the trustee which he knows to be part of the trust estate is not liable as a constructive trustee unless there are facts brought home to him which show that to his knowledge the money is being applied in a manner which is inconsistent with the trust. And that in general terms would come to this, you must make out either that the solicitor was party to a fraud, or that he was party to a breach of trust on the part of the trustee. That appears to me to be in accordance with the decision to which I have referred, and to be further supported by the case which has been referred to of *Harris* v. *Rees*.

The real difficulty in this case is, What is sufficient to fix the solicitor with the liability of a constructive trustee? As I have said, he must be either party to a breach of trust or to some fraud, or at all events he must have brought home to him facts which show that the fund is being applied in a manner inconsistent with the trust.

In the present case the trustee and executor, as I have said, was entitled to resort in the first instance to the trust fund for payment of the necessary costs, charges, and expenses incurred by him in executing his trust. Doubtless he might commit acts which would deprive him of the right to resort to those funds. If, for example, he was an utterly impecunious man and he sold out part of the trust estate for the purpose of applying it in payment of a particular set of costs, and he did not so apply the proceeds of sale, but kept them in his own pocket, I apprehend he would be debarred from further resorting to the trust estate for the purpose of paying the same costs. It would be a breach of trust on his part so to do, and if the solicitor, with knowledge of all the facts, received payment of part of the trust estate in satisfaction of a bill of costs, I think it is very possible that he might be held under those circumstances to be a constructive trustee. But this is to be borne in mind, that in all these cases for the benefit of *cestuis que trust* themselves you are not narrowly to limit the power of the trustee to employ agents to assist him in executing the trust, and mere suspicion or intimation that something was wrong in the administration of the trust will not, to my mind, be sufficient to deprive the solicitor of the right to accept payment of part of the trust estate in satisfaction of costs, charges, and expenses properly incurred.

The general rule with reference to agents is well laid down by Sir John Leach, V.C., in the case of *Keane v. Robarts*, 4 Madd. 332, which was a case of bankers, and which was approved and followed by the House of Lords in the case of *Grey v. Johnson*. Sir John Leach, V.C. (at page 357), lays it down thus:—"Every person who acquires personal assets by a breach of trust or *devastavit* in the executor is responsible to those who are entitled under the will, if he is a party to the breach of trust. Generally speaking, he does not become a party to the breach of trust by buying or receiving as a pledge for money advanced to the executor at the time any part of the personal assets, whether specifically given by the will or otherwise, because this sale or pledge is held to be *primâ facie* consistent with the duty of an executor." Therefore a solicitor dealing with a trustee, and having no notice of any breach of trust on his part, is clearly entitled to deal with him on the footing that he is executing the trust and is doing nothing which is wrong; and he is not bound, before he accepts payment out of the trust estate, to call upon the trustee to produce his accounts and satisfy himself that he (the trustee) has acted in all respects properly. But suppose that he does know of some breach of trust, can it be held that the mere knowledge of that is sufficient to preclude him from accepting payment? That would be a formidable doctrine, again, not merely to solicitors, but to auctioneers and stockbrokers. Supposing a stockbroker had knowledge that part of a trust fund was improperly invested, and that the trustee might be called upon to make good any loss which was occasioned by that investment, would he thereby preclude himself from deducting his commission upon a proper sale of another part of the trust estate? I think it would be difficult to come to such a conclusion. To my mind, in order that the solicitor may be precluded from accepting payment out of the trust estate, you must bring home to him that at the time when he accepts payment the trustee had been guilty of such a breach of trust as to preclude him altogether from resorting to the trust estate for payment of any of those costs, and that in fact such an application was a breach of trust.

Now if that be the correct view of the law, what do we find in the present case? We find that in this case the executor improperly attempted to acquire, and did acquire, part of the trust estate for his own use and benefit. As regards the conduct of the solicitors, with one exception I cannot see anything which would lead me to cast any blame upon them whatever.

It appears to me that down to the time of the sale by auction, at which this trustee and executor did, through agents apparently, and attempted to acquire a part of the plant for his own use, they acted perfectly properly. They seem to me to have advised him that he could not do so, and that if he desired to acquire the property for his own benefit the only possible mode of doing so was by obtaining the sanction of the court in a suit properly framed for the purpose, and the fact that he had, contrary to their advice, acquired the property seems to have come upon them with the greatest surprise. The letters which passed between the solicitors and the auctioneers and trustee on and after the 19th of October, 1885, appear to me, as far as I can see, to be perfectly *bonâ fide* letters on the part of the solicitors. They were the first intimation they really had that the trustee was doing something which might be found fault with by a court of equity or by the *cestuis que trust*. Then, no doubt, at a subsequent period, there is a letter which I have not had explained to my satisfaction. That letter is the one of the 18th of March, 1885, in which they dealt with a certain balance that was remaining in the hands of the trustee in respect of the purchase-money of part of the plant. In that letter they suggest how that balance was to be dealt with in the account which they were on the point of rendering on his behalf to this court, and they suggest that it should be dealt with as a payment made to the auctioneers in the first instance, and afterwards to be paid back by the auctioneers and received by the trustee from them. Why that suggestion was made, or what good it would do to the *cestui que trust*, I confess I do not understand. But notwithstanding that there is a suggestion that in the accounts part of the transactions should appear otherwise than it really was, I cannot come to the conclusion on the evidence before me that the solicitors were party to any fraud, or that they intentionally joined in any breach of trust whatever. No doubt they had notice at the time when they received the payments, some of which were certainly made to their knowledge, out of the trust estate that the trustee had committed a breach of trust; but I do not think it was brought home to them that they had notice that the transactions were such as to preclude the trustee entirely and altogether from resorting to the trust fund for payment of his costs, or that any such amount as was ultimately held to be recoverable from the trustee could be charged against him. Even at the moment when they entered in the account in this action in April, 1885, there appears by the account they rendered to be a balance in favour of the trustee.

I do not think that the facts are sufficient to justify me in holding that the solicitors were in this case affected with such notice of the position of the trustee with reference to the trust fund that I ought to make them constructive trustees and to fix them with liability to repay these sums which they have received out of the trust estate on account of their costs.

On these grounds I think the application failed, and that the costs ought to follow the event.

Application dismissed.

Solicitors, *W. Foster; Bower, Cotton, & Bower.*

Chan. Div.
Kekewich, J.

May 5.

In re Draper's Trust. (*a*.)

Will—Direction to purchase annuity after death of life tenant—Death of annuitant before that of tenant for life—Lapse.

A testator bequeathed £1,000 Consols, over which he had a power of appointment subject to the life interest therein of his wife, to trustees on trust, after the decease of his wife, to invest the same in the purchase of an annuity for the life of his nephew, J. D.; but in case his nephew should in anywise incumber the said annuity, or be outlawed, or take the benefit of any Act of Parliament made or to be made for the relief of insolvent debtors, then he should not be entitled to receive the said annuity, but that it should fall into the residue, which the testator gave to his wife. The testator died in 1837, J. D. died in 1853, having been insolvent in 1833, but having, subsequently to that date, done no act to forfeit the annuity. The testator's wife died in 1854, having treated the annuity as lapsed, and bequeathed it to various legatees. No annuity was ever purchased for J. D.

Held, that the fund out of which the annuity was to be purchased had lapsed by the death of J. D. before the death of the testator's widow.

Semble, *a forfeiture clause in a will does not take effect if the forfeiture be committed before the date of the will.*

Petition.

John Draper, by his will, dated the 6th of December, 1835, after reciting that he had an absolute power of disposition (subject to the life interest therein of his wife, Sarah Jane) over a sum of £9,870 New £3 10s. per Cent. Annuities then standing in the names of the trustees of the will of John Willsheire, bequeathed £1,000 annuities, part of the above-mentioned sum, to John Draper and Henry Soper on trust, after the decease of his wife, to invest the same in the purchase of a Government annuity upon the life of his nephew, John Draper; but in case his nephew should in anywise assign, charge, or incumber the said annuity or any part thereof for the benefit of his creditors, or should be outlawed, or become bankrupt, or take the benefit of any Act of Parliament made or to be made for the relief of insolvent debtors, then his said nephew should not be entitled to receive the said annuity, but that it should fall into the residue of the testator's personal estate. And he gave his residuary estate to his wife. The testator died in 1837.

John Draper, the annuitant, had been insolvent in 1833, but subsequently to the testator's death he did not forfeit his right to the annuity. He died on the 31st of March, 1853, and in February, 1888, Mary Ann Caton took out letters of administration to his estate. The testator's widow died on the 5th of March, 1854, having, by her will, treated the £1,000 annuities as having fallen into the residue under the testator's will and bequeathed it to various legatees. No annuity was ever purchased for John Draper, the nephew.

In 1886 after the death of Sarah Jane Draper the surviving trustee of John Willsheire's will transferred the £1,000 annuities into the names of John Draper and Henry Soper, as trustees of the testator's will. They were paid into court, and it was now represented by a sum of £1,537 15s. 3d. Consols.

The petitioners were Mary Ann Caton and her husband, who claimed two-fifths of this sum as beneficiaries under the will of Sarah Jane Draper.

Hall, Q.C., and *Farwell*, for the petitioners.—The gift of £1,000 annuities failed and fell into the residue as the annuitant predeceased the tenant for life: *Power* v. *Hayne*, 17 W. R. 783, L. R. 8 Eq. 262.

Decimus Sturges, for parties entitled to the other three-fifths, and the trustees of John Draper's will.

R. J. Parker, for the representatives of John Draper, the annuitant.—The annuitant was absolutely entitled to the fund: *Bayley* v. *Bishop*, 9 Ves. 6; *Day* v. *Day*, 1 W. R. 402, 1 Drew. 569. No doubt the decision of Malins, V.C., in *Power* v. *Hayne* contradicts this, but I submit the earlier cases should be followed. There was no lapse. It is not necessary that the *cestui que trust* should be able to demand the handing over of the trust fund to him before he can be considered entitled to it.

Kekewich, J.—I have not heard any argument upon the question whether the words "in case my said nephew should be outlawed, or become bankrupt, or take the benefit of any Acts of Parliament made or to be made for the relief of insolvent debtors" can be applied to an insolvency before the date of the will. My present impression is that the words contemplate a future event. It has been strongly argued for the representatives of the annuitant that there was no lapse, and I am bound to express my opinion on this point. If a testator gives £100 to A. B. and A. B. dies in the testator's lifetime there is a lapse. If a testator gives £3 a year to A. B. for life, the same thing necessarily happens. Why it should not happen where a testator directs so much money to be laid out in the purchase of an annuity of so much a year I do not at present see. But that does not give the go by to the argument that the legatee is entitled to the fund which is to produce £3 a year. But I am prepared to hold that the gift of the amount to be applied in the purchase of an annuity is as much a subject of lapse as a gift of any other amount. The real argument is, that this money was never invested in the purchase of the annuity, which of course must have ceased with the life of the annuitant. The legal personal representatives say, "We are entitled to the money which ought to have been invested," and argue that it was intended for the absolute benefit of the annuitant. The testator has been particularly careful in giving this annuity, for he directs that the annuity shall in certain events go over. The case of *Day* v. *Day* has been relied on as deciding this very point. No doubt Kindersley, V.C., in that case distinctly held that the donee of a gift of this character was absolutely entitled, and he so held because he thought that the gift over in that case affected the principle upon which the courts have determined that directions to lay out in the purchase of an annuity made it imperative for the party to survive the period when such laying out took place. It seems to me that the real principle on which the courts have held annuitants entitled to the fund is not affected by holding that the residuary legatee may take the interest under such a gift as this. Malins, V.C., in *Power* v. *Hayne*, expressed his own opinion on the point, and declined to follow *Day* v. *Day*, and my own opinion coincides with that of Malins, V.C., and not with that of Kindersley, V.C. I must therefore hold the petitioners entitled to the sum which they claim.

Solicitors for the petitioners, *Pritchard, Englefield, & Co.*

Solicitors for the other parties, *C. W. Dommett; Percy Chadwick; The Official Solicitor.*

Reported by C. H. F. Christie, Esq., Barrister-at-Law.

Q. B. Div. (Cave and Wills, JJ.) June 19.

COLE, *Appellant*; MILES, *Respondent*. (*a*.)

Trespassing on railway—Conviction for—Public right of way at a certain place before making railway—Assertion of right of way over railway at such place—Claim of right—Jurisdiction of justices.

The appellant was convicted by justices in petty sessions—(1) under the 38th section of 45 & 46 Vict. c. ccxiv., for having unlawfully trespassed on a railway in such a manner as to expose himself to danger; and (2) under the 23rd section of the Regulation of Railways Act, 1868, for having been unlawfully on the railway after receiving warning not to go or pass thereon. There was, prior to the making of the railway, and prior to the Acts of Parliament authorizing the same, a public right of way for persons on foot over the land now occupied by the railway at the place where the appellant crossed, and the appellant went upon and crossed the railway, in the assertion of the right of way which formerly existed, and believing that he was entitled to do so by virtue thereof.

Held, that the conviction on both summonses was wrong—(1) because the claim of the right of way set up by the appellant ousted the jurisdiction of the justices to determine the case; and (2) because there were no provisions in the Act of Parliament extinguishing the right of way, which was consequently still in existence.

Case stated by two justices of the peace for the county of Pembroke, setting forth the facts and grounds upon which the appellant, Alfred Cole, was summarily convicted upon the 28th of January, 1888 (1) Of an offence under the statute 45 & 46 Vict. c. ccxiv., s. 38 (as amended by 46 & 47 Vict. c. 193, s. 50) (Great Western Railway Acts); (2) Of an offence under 32 Vict. c. 119, s. 23 (The Regulation of Railways Act, 1868), as amended by 34 and 35 Vict. c. 78, s. 14.

The appellant was summoned and charged by the respondent, an inspector of the Great Western Railway (1) For having, on the 30th of April, 1887, unlawfully and wilfully trespassed upon the Great Western Railway, in such a manner as to expose himself to danger, or risk of danger; (2) For having been, on the same day, unlawfully upon the said railway, not being there for the purpose of crossing the same at any authorized crossing, and after having received warning not to go or pass on the said railway. The first summons was taken out under the 38th section of 45 & 46 Vict. c. ccxiv., which imposed a penalty upon any person trespassing upon any of the railways of the company in such a manner as to expose himself to danger, or risk of danger, without having received any warning. The second summons was taken out under the 23rd section of The Regulation of Railways Act, 1868, which imposed a penalty, not exceeding 40s., upon any person who shall be or pass upon any railway, except for the purpose of crossing the same at any authorized crossing, after having received warning not to go or pass thereon.

Before the justices it was contended for the appellant (*a*) That the jurisdiction of the justices was ousted on the ground that a *bonâ fide* claim of right was set up, and that such *bonâ fide* claim of right was an answer to each of the charges; and (*b*) That the original right of way subsisted by virtue of 8 & 9 Vict. c. 20, s. 74, and otherwise, and that the appellant was entitled to cross the railway, the said right of way not being extinguished.

It was contended for the respondents (1) That the question whether the appellant acted under a *bonâ fide* claim of right, was immaterial, as the statutes made it an offence to be upon or cross the railway for any purpose, the provisions of the Acts being enacted for the safety of the individual and of the public; (2) That such a claim of right was one which could not possibly exist at law; (3) That a *bonâ fide* claim of right, to oust the jurisdiction of the justices, must be a claim of right in the nature of title or property; (4) That 8 & 9 Vict. c. 20, s. 74, did not apply, as it was not suggested that the company had failed to make any of the bridges or communications which they had been required to make, and the period within which they could be required to make further bridges or communications had long elapsed, and that the alleged right of way was impliedly destroyed by the substitution of other ways and roads, constructed under the company's Acts, and by the provisions of their Acts authorising the company to construct their line at a place which involved the physical destruction of the roadway if any over which the alleged right of way had previously existed.

The justices found—(1) That there was not such a claim of right as to oust their jurisdiction; (2) That the right of way claimed would not be an answer to either charge; (3) That a public right of footway as claimed did exist at the place in question prior to the making of the railway, and that the appellant acted in supposed assertion thereof; (4) That the said right of way was extinguished by the Acts authorising the making of the railway, and that other and reasonable means of access and communication, within a reasonable distance of the place, had been provided by the company.

The appellant was convicted on each of the summonses, and ordered to pay a fine of 1s. and costs.

The question for the opinion of the court was: Whether the justices were wrong in law in so convicting the appellant upon either or both of the said summonses.

Bowen Rowlands, Q.C., and *R. C. Glen*, for the appellant.

Finlay, Q.C., and *Asquith*, for the respondent, cited *White* v. *Feast*, 20 W. R. 382, L. R. 7 Q. B. 353; *Corporation of Yarmouth* v. *Simmons*, 26 W. R. 802, 10 Ch. D. 518.

CAVE, J.—I am of opinion that the conviction in this case was wrong, and must be quashed, and I come to that conclusion on two grounds. The first ground is that there was a question of title here, upon which the justices ought not to have adjudicated. Summonses were taken out against different persons, and amongst others against the present appellant, under two sections of two Acts of Parliament. The first summons was taken out under the 38th section of 45 & 46 Vict. c. ccxiv., which imposes a penalty on any person trespassing upon any of the railways of the company in such a manner as to expose himself to danger, or risk of danger, without having received any warning. Now I understand that section to mean that, where persons are trespassing, wandering where they have no right to be at all, the railway company may summon them before the justices, and the justices may convict them, but there is a proviso at the end of the section, and it seems to me that when a man invokes the benefit of this proviso he raises a question of title, which the justices have no right to go into. I think from what took place here that the jurisdiction of the justices was ousted by the claim of right. I think, in the language of Blackburn, J., in *White* v. *Feast*, L. R. 7 Q. B., at p. 358, that "the statute giving summary jurisdiction has the implied restriction as to title, and that the justices must keep their hands if a *bonâ fide* claim of right is set up." Consider for a moment what would be the legal consequence of holding that a magistrate had a right to decide whether a right of way was stopped or not. By the view taken on the part of the railway company, the company may summon a poor person, and get a decision against him, and, if so, is that decision against the

(*a*.) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

single person to determine the question of right against all others? I cannot think that that can be the intention of the Legislature. I think it was the intention of the Legislature to give to magistrates a power to inflict a small punishment in certain cases where no public claim is set up. I cannot think it was intended that two magistrates at petty sessions should be able to decide on that question against some person without any appeal at all, as they do determine as to questions of fact.

The section under which the second summons was taken out is the 23rd section of the Regulation of Railways Act, 1868, which imposes a penalty upon any person who shall be upon any railway except for the purpose of crossing the same at any authorized crossing, after having received warning not to go or pass thereon. There, again, it seems to me that the intention of the Legislature was to give magistrates jurisdiction in cases where a person was on the railway without any right whatever. It is quite clear that a question of such importance as that of a public right of way was not intended to be decided, and that without appeal, by two justices sitting at petty sessions.

Now it is found as a fact by the magistrates—I do not think they are the proper tribunal to find any such fact—that there was a public right of way. If so, that right still existed. Now we come to section 46 of the Railways Clauses Consolidation Act, 1845, which in effect provides that if a line of railway cross any public road, either such road shall be carried over the railway or the railway shall be carried over such road, or (with the consent of two or more justices) the railway shall cross the road (not being a public carriage road) on the level. There is here a clear intention of the Legislature that a road was not to be stopped up by a company by having authority to make a railway across it, but that they must either carry the road over the railway or the railway over the road, unless they get consent to have a level crossing.

It is said by Mr. Finlay that there is at all events an implied provision, although there may be no express one, that a road becomes stopped up by the authority to make a line of railway over it. It is perfectly monstrous to think that justices sitting in petty sessions should have this right to construe Acts of Parliament giving these implied powers. It is said with regard to the second Act, that the justices were authorized to convict, as the person was not crossing at an authorized crossing; it is hardly necessary to do more than state such a contention.

In my judgment, the appellant is entitled to succeed upon the two grounds—first, that the point was not such a one as the magistrates were authorized to take upon themselves to decide; and, secondly, that there are no provisions in the Acts of Parliament having the effect of extinguishing the right of way.

Wills, J.—I am of the same opinion. On the construction of the Acts themselves, it must be made out that the justices had jurisdiction. When questions of title arise, the petty sessions is not the proper tribunal to decide as to that. Upon the two sections which are in question here, substantially it comes to this, that the magistrates are authorized to convict in a case of trespass, but not in cases where a claim of right or title is set up. It seems to me that the magistrates were wrong in convicting at all, and even if they were not wrong in law, they were wrong as to the facts of the case. There is certainly no express provision in the Acts taking away this right of way, but Mr. Finlay says that such a provision must be implied, as it is impossible for the company to exercise their powers unless we consider that these rights were destroyed. I cannot see it in that light. By section 46 of the Railways Clauses Consolidation Act, 1845, liabilities were imposed upon railway companies, which, if observed, would protect the public. There is no trace of any intention in these Acts of Parliament that a right of way from A. to B. should be destroyed. Great reliance has been placed upon the case decided by Fry, J. (*Corporation of Yarmouth* v. *Simmons*), but it seems to me that that case does not decide anything of the kind suggested here. In that case there was no statute analogous to that dealing with railways. Section 46 of the Act of 1845 says that these rights of way shall be maintained and protected unless otherwise specially provided for by the special Act. It seems to me that the magistrates were quite wrong in the conclusion they have come to on both points. I think, therefore, that this appeal must succeed, and judgment be given for the appellant, but without costs.

Appeal allowed, without costs.

Solicitors, *G. Thompson & Son*, for *Eaton, Evans, & Williams*, Haverfordwest; *R. R. Nelson.*

House of Lords.

From C. A. (England). Nov. 24, 25, 29; Feb. 24.

Great Western Railway Co. v. Bunch. (*a.*)

Railway company — Common carriers — Passenger's luggage in carriage—Delivery to porter—Liability of company.

The plaintiff's wife arrived, with three articles of luggage, at the defendants' station forty minutes before the departure of the train by which she was to travel. A porter took the luggage from her and placed it on a trolley, and labelled two of the articles, she saying that she wished the other article—a Gladstone bag—to be put into the carriage with her, and asking the porter if it would be safe to leave it with him while she went to meet her husband, who was to travel with her, and to get her ticket. The porter replied that it would, and that he would guard the luggage and put it in the train. The train was not then alongside the platform. When she returned in ten minutes with her husband, whom she had met in the station, and who had taken her ticket for her, the bag was missing.

The county court judge found that the porter was negligent in not guarding the bag, and in not being in readiness to put the bag into the carriage.

Held (*by* Lord Halsbury, C., *and* Lords Watson, Herschell, *and* Macnaghten; Lord Bramwell *dissenting*), *that there was evidence to justify the finding of the county court judge, that the bag was in the custody of the railway company for present transit from the time of its delivery to the porter, and that the loss was due to the company's negligence.*

Semble (Lord Bramwell *dissenting*), *that, where a passenger's luggage is placed, at his request and with the assent of the company, in the carriage in which he is to travel, the contract is one of common carriage, subject to the modification that, in respect of his interference with their exclusive control of his luggage, the company is not liable for any loss or injury occurring during its transit to which the act or default of the passenger has contributed.*

Decision of the Court of Appeal (*reported* 34 *W. R.* 574, 17 *Q. B. D.* 215) *affirmed.*

Bergheim v. Great Eastern Railway (*reported* 26 *W. R.* 301, 3 *C. P. D.* 221) *disapproved.*

(*a.*) Reported by C. G. Napier Trollope, Esq., Barrister-at-Law.

This was an appeal from a decision of the Court of Appeal (Lord Esher, M.R., and Lindley, L.J.; Lopes, L.J., dissenting) reversing a decision of the Queen's Bench Division (Day, J., A. L. Smith, J., dissenting), reported 34 W. R. 574, 17 Q. B. D. 215.

In addition to the facts stated in the head-note, the following particulars will suffice for the purpose of this report:—

The tickets taken by the plaintiffs purported to be "issued subject to the conditions stated on the company's time-bills." Among these were the following:—

"LUGGAGE.—The company will not in any case be liable for luggage taken with the passengers into the carriages, but only when it is properly labelled and placed in a luggage-van. The company will not be responsible for luggage not labelled, or improperly labelled."

A notice to the following effect was also put up in a conspicuous position:—

"Passengers are required to see their luggage duly labelled, as until so labelled it will not be put into the trains, nor will the company assume or incur any responsibility in respect thereof."

"The company's servants have strict orders not to take charge of any luggage or parcels, and if passengers are desirous of leaving them under the charge of the company they must themselves take or see them taken to and deposited in the cloak-room."

The company appealed to the House of Lords.

Nov. 24, 25, 29.—*Sir H. James, Q.C.*, and *R. S. Wright*, for the appellants.—The company is not responsible for luggage retained by the passenger under his own control: *Bergheim* v. *Great Eastern Railway Co.*, 26 W. R. 301, 3 C. P. D. 221. The plaintiff's wife left the bag with the porter at her own risk. The porter was not authorised to take charge of luggage in this way. [They referred to *Lovell* v. *London, Chatham, and Dover Railway Co.*, 24 W. R. 394, and *Daniel* v. *Metropolitan Railway Co.*, 20 W. R. 57, L. R. 5 H. L. 45.] The special conditions are binding: *Walkins* v. *Rymill*, 31 W. R. 337, 10 Q. B. D. 178; *Henderson* v. *Stevenson*, L. R. 2 H. L. Sc. 470, 23 W. R. Dig. 222; *Stewart* v. *London and North-Western Railway Co.*, 12 W. R. 689, 3 H. & C. 135.

C. C. Scott, for the respondents.—The company are liable for all luggage received as common carriers, unless the passenger interferes with their control.

He referred to *Richards* v. *London, Brighton, and South Coast Railway Co.*, 7 C. B. 839; *Peek* v. *North Staffordshire Railway Co.*, 11 W. R. 1023, 10 H. L. Cas. 473; *Great Western Railway Co.* v. *Goodman*, 12 C. B. 313; and *Macrow* v. *Great Western Railway Co.*, 19 W. R. 873, L. R. 6 Q. B. 612.

R. S. Wright replied.

Feb. 24.—Lord HALSBURY, C.—The form in which this question arises for your lordships' decision is one which precludes any consideration of the propriety or impropriety of the decision of the learned county court judge as to any question of fact as to which there was legal evidence before him. I must observe that both the learned judges in the Divisional Court appear to me to have treated questions so conclusively found as nevertheless open to review. It is, perhaps, not surprising that when questions arise upon what either are, or are assumed to be, matters of daily experience, even a judge is tempted to import his own knowledge, and so give a colour to facts which he ought to treat as finally and conclusively decided by the tribunal to whom they have been remitted.

Now, in this case the facts have not been specifically found; but the learned judge has found a verdict for the plaintiffs, and has stated that finding, together with the evidence. If, therefore, it is possible to find a verdict for the plaintiffs upon that evidence, the plaintiffs are entitled to maintain their verdict. It seems to me that the two contentions which have been in debate before your lordships would resolve themselves into a question of fact, upon which there might be a difference of opinion if the facts were here open to review. Your lordships, in the first place, have to ascertain, not from any written instrument, nor from any express words of contract, what were the contract relations between the plaintiffs and the defendants. I confess I should have been better satisfied if some evidence directed to what was the practice of the particular railway company had been before us; but in this, as in other parts of the case, I must content myself with saying that, if there was enough to enable the learned judge to infer what was the practice, and from thence to infer what was the contract, I am not at liberty to review his decision.

There are, of course, some facts which both sides have assumed to be proved, and with respect to which it would be mere pedantry to suggest that they were not formally proved. That the defendants, for instance, were a railway company, carrying on the business of common carriers for hire; that the premises upon which the plaintiffs' luggage was deposited were premises belonging to and in the exclusive control of the defendant company; that the arrangement of the trains; the bringing of them to the platform, the arrangements by which the luggage, whether hand luggage or van luggage, was to be distributed, were all under the superintendence and direction of the defendant company—are all matters as to which no formal evidence is to be found in the report of the county court judge, but are also matters as to which no one has or can suggest any real doubt. I do not think that any of your lordships entertain any doubt that if the plaintiffs' luggage were intrusted to the porter for deposit and custody as distinguished from the physical handing over for the purpose of transit, the defendants would not be liable. The question really in debate is somewhat obscured by the existence of the cloak-room system, and that system, I think, is expressly guarded by the company not permitting any of their servants undertaking the guardianship of any property whatsoever, except under the circumstances and upon the conditions which the company prescribes; but I think the same question would arise, and should be decided upon precisely the same principles, if the company had no cloak-room system, and gave no authority to their servants to receive luggage at all, except as incidentally to their contract of carriage.

It is worthy of remark that Day, J., and Lopes, L.J., upon an assumed state of facts at which I think the county court judge was at liberty to arrive, lay down the law very much as I should agree it ought to be laid down. Day, J., says: "If a passenger requires him (the porter) to delay a reasonable time—while, for instance, a passenger takes a ticket—he (the porter) is responsible during all reasonable time that should elapse between the arrival at the station and the arrival on the platform of the passenger, taking the ticket being allowed for and the little journey to the platform; during all that time he is the agent of the company as bailee of the luggage which is intrusted to him; he is acting in the ordinary discharge of his duty;" and Lopes, L.J., says: "I do not think it is part of the employment of an ordinary porter to take charge of luggage beyond the time usually or reasonably—I should say reasonably—necessary for this transit"; the words of the Lord Justice, "this transit," referring to the transit of the goods from the cab or outside of the station.

The admissions of counsel have rendered it unnecessary to rely upon mere inference in this case as to the question of whether the train had been drawn up to the platform or not; and we must now accept it as a fact that neither the van nor the carriages for the passengers

were in a position to enable the hand-luggage or the van-luggage to be placed where they were intended to be deposited for the purposes of the journey.

If I were myself to be drawing inferences as to the reasonableness in point of time of the period of the plaintiff's arrival before the departure of the train by which she intended to travel, I am not certain how I should decide that question; on the one hand, forty minutes seem a long time before the departure of the train, and to call upon the servants of the company to take charge of luggage for the purpose of the journey; on the other hand, the fact that it was Christmas Eve, that the railway company were, within a very short time of the arrival of the plaintiff, issuing tickets for that journey, and that they were receiving without objection or demur van-luggage, with respect to which it is not denied that they were, in so doing, acting in pursuance of the authority conferred on them by their employers, are all circumstances from which I think it might be inferred that the time was not too long; but, in truth, I am not entitled to speculate upon the matter; this is essentially a question of fact, and the learned judge has, in this instance, specifically found that the time of the intrusting the luggage to the porter was a reasonable and proper time before the departure of the train. It seems difficult to say that, with the evidence before him to which I have adverted, it was not open to him to arrive at that conclusion.

Now, while I entirely agree that the duty of the porter, as disclosed by the evidence, is either to take the luggage to the cloak-room, if intrusted to him for the purposes of deposit, or to the train, if for the purposes of the journey, I am at a loss to understand how the circumstance that the train is not at the platform can affect the liability of the company. Assume that the company are receiving luggage for the purposes of the journey, and that they do so receive luggage for the purpose of the journey; the presence or absence of the train at the platform is a matter within the control of the company and not of the passenger; and I cannot understand what evidence there is in this case from which it could be reasonably inferred that the porter would be acting within the scope of his authority in receiving the plaintiff's luggage if the train were at the platform and beyond it if the train had not come up. Doubtless a company might make a regulation if they thought fit: "We will not receive luggage for a train forty minutes before it starts"; they might say: "We will not receive luggage to be put on a train which has not yet arrived at the platform." I should very much doubt whether any railway company has any uniform practice as to the period of time which they allow to elapse between the arrival of the train at the platform and its departure. It is enough, however, to say that in this case no evidence of any such practice was given.

If a possible inference to be derived from the facts as proved is that what the porter did in this case was the ordinary practice of the company, then I should say it would follow that the mode in which the company carried on its business was to accept the passengers' luggage at the entrance to the station and to take it to its intended destination, whether van or passenger carriage, at the option of the passenger, and that during the period of what Lopes, L.J., describes as "this short transit," it would be in the custody of the company for the purpose of, and as part of, the journey. If the train were at the platform it would, I suppose, in ordinary course, be distributed, some to the van and some to the passenger carriage, as directed; but once the porter has received and accepted it as luggage to be received and forwarded by the train about to start, it seems to me impossible to contend, and I do not understand Lopes, L.J., or Day, J., to contend, that it is not in the custody of the company for the purposes of the journey. If the porter refused to take charge of the luggage the company might be liable for refusing to carry according to their professed mode of carriage; but might not be liable for loss of goods which they refused to carry; but whether the porter would be doing his duty in refusing to take charge of the luggage during the short transit, on acting in pursuance of his masters' orders, is the very question in debate. If one assumes that it was contrary to his duty, of course the company would not be liable; if it was his duty the company would be liable.

But why am I to assume, upon the facts here put in proof, that the porter was acting contrary to his duty, and, in hopes of personal gain to himself, undertaking a course of business not imposed upon him by the orders of the railway company? I confess, for myself, I should draw the same inference that was drawn by the county court judge; but what the defendants, in order to succeed, must establish is, that the county court judge could not by law have drawn such an inference. It is suggested that Mrs. Bunch's phrase, in asking the porter whether her bag would be safe, exhibited a consciousness that she was asking a favour, and not insisting on her rights as a passenger. I admit that the word "it," grammatically, as the evidence is reported to us, appears to refer to the bag; but I think what Mrs. Bunch meant was the luggage, both van and hand luggage, upon the trolley. But, whatever Mrs Bunch meant, I think she might have asked with equal force whether the train would arrive safely at its destination; and I do not think either her question or the porter's reply would have affected the contract relations of the parties. The truth is that in the conduct of business more contracts are made by the understood course of business than are ever reduced into writing, or even into spoken words at all; and I think that, when people hold themselves out as carriers, and receive luggage at a place regularly appointed to receive luggage for the purposes of a journey, they must be understood to receive it as carriers unless they give notice to the persons from whom they receive it that they receive it in some other capacity. It may be said that I ought not to disregard the existence of the cloak-room system, and that the receipt by the company's servants is susceptible of two interpretations. I admit that this is so; but in this case Mrs. Bunch at once informed the porter that the portmanteau and the hamper, as well as the Gladstone bag, were to be put into the train; and I agree with Lindley, L.J., that the company's notices and directions to their servants are intended to apply, and upon their true construction do apply, to luggage received for purposes of deposit, and not for purposes of transit, and it is upon this part of the case that I think the finding of the learned judge is conclusive against the defendants when he finds that the time of intrusting the luggage to the porter was a reasonable and proper time before the departure of the train. Once that proposition is accepted as conclusively found, it seems to me that the law that would be laid down by the minority of the Court of Appeal would amount to this, that a passenger bringing his luggage for carriage a reasonable and proper time before the departure of the train by which the luggage is to be carried can enforce no liability upon the company in respect of his luggage except it is placed in the cloak-room as a preliminary to the transit, and a receipt given for the same. And even this inadequately represents the difficulty of the contention, since it is obvious, from the notices put in evidence, that the cloak-room tickets and receipts import that the passenger who has deposited his luggage in the cloak-room is expected to get it out again from that same cloak-room, and if he wishes to travel must again commit it to the custody of the company after he has so taken it out. It would seem, therefore, to involve this proposition, that for parcels carried in the passenger carriages the railway company never can be liable at all.

I do not know that it is absolutely necessary in this case to determine what is the exact contract between the company and the passengers, since the learned judge has found negligence against the company, and I do not understand that there is any difference of opinion among us, that, if there was any contract to take care of the bag, there is sufficient evidence of negligence. But I must express my opinion that the views expressed by Lord Truro, Jervis, C.J., Williams, J., Crowder, J., Willes, J., Keating, J., and Montagu Smith, J., do not appear to have had sufficient weight given to them: see *Richards* v. *London, Brighton, and South Coast Railway Co.*; *Talley* v. *Great Western Railway Co.*, 19 W. R. 154, L. R. 6 C. P. 44; *Butcher* v. *South-Western Railway Co.*, 3 W. R. 409, 16 C. B. 13; by the judgment in the Court of Appeal in *Bergheim* v. *Great Eastern Railway Co.* All these learned judges appear to me to adopt the view that a railway company in accepting a passenger's luggage for carriage in a passenger train, and in the carriage with the passenger himself, do enter into a contract as common carriers, modified only to the extent that if loss happens by reason of want of care of the passenger himself who has taken within his own immediate control the goods which are lost, their contract as insurers does not apply to loss occasioned by the passenger's own default.

In *Bergheim* v. *Great Eastern Railway Co.*, the Court of Appeal, commenting upon the case of *Talley* v. *Great Western Railway Co.*, do not, I think, quite accurately represent the judgment of the Court of Common Pleas. In *Talley* v. *Great Western Railway Co.* that judgment expressly assumes the general liability of the company as common carriers, but that the general liability was modified by the implied condition that the passenger should use reasonable care, the fact being that the loss was caused by his neglect to do so, and would not have happened without such negligence. The negligence in question was leaving his portmanteau in a carriage unprotected by his presence; it was found at the end of a journey cut open and its contents rifled in a carriage which he had originally travelled in as far as Swindon, but which he had negligently omitted to re-enter upon leaving the refreshment room at that station. It is obvious that if the court were right, that the general liability of the company was modified by the undertaking of the passenger to look after his own luggage while it was in the passenger carriage, he had omitted that duty. But suppose the loss had happened by reason of some circumstance which would have been no breach of that modifying stipulation, could it have been contended that the company were not responsible as common carriers, because they were carrying for hire in one part of the train and not in another? If the view thus assumed is the correct view of the law, and I think it is, the moment the porters received Mrs. Bunch's luggage, whether van or hand luggage, they received, for carriage to Bath, all the luggage of the passenger; they received the van luggage to be put into the van; they received the hand luggage to be put into the passenger carriage; and I think the learned judge was entitled to infer that their practice, and, therefore, their contract, in receiving hand luggage, was to put it into the passenger carriage, or, if the railway company did not then bring up the train to the platform, to take care of it until the carriage was drawn up and in a position to receive the hand luggage, which in my view the porter, as the agent of the railway company, had accepted and received for that purpose.

For these reasons I am of opinion that the judgment of the Court of Appeal was right, and I move your lordships that that judgment be affirmed, and that this appeal be dismissed, with costs.

Lord WATSON.—This appeal brings up for consideration the decision of a county court judge, which the higher courts and this House have no jurisdiction to review, except in so far as it involves principles of law. It is impeached upon this ground mainly, that there was no evidence before the learned judge from which it could be reasonably inferred that, at the time when it disappeared, the respondent's Gladstone bag had been delivered to, and was in the possession of, the appellant company for the purpose of carriage. The evidence, it is said, points to, and only warrants, the conclusion that the bag was in the custody of a railway porter as bailee for the respondents.

In *Butcher* v. *London and South-Western Railway Co.*, 16 C. B., at p. 22, Jervis, C.J., observed in reference to luggage which had been conveyed in the same carriage with its owner, "that, though not in express terms engrafted into it, it is a part of the contract of a railway company with its passengers that their luggage shall be delivered at the end of the journey, by the porters or servants of the company, into the carriages or other means of conveyance of the passengers from the station."

What was thus said of the termination applies equally to the commencement of a railway journey. In the ordinary course of business a passenger's luggage is received at the entrance to the station by the servants of the company, and is by them conveyed either to the van or to the carriage in which he intends to travel. I do not mean to say that railway companies are under any statutory or other obligation to provide that accommodation; but they find it for their interest to do so; and, in taking charge of luggage for these purposes, their servants act within the scope of their implied authority. Their duty is, according to prevailing usage, limited to the transport of passengers' luggage from the vehicle which brings it to the station to a train which is about to start, and does not extend to their taking charge of luggage which cannot, in any reasonable sense, be considered as in actual course of transit. It may be that railway porters do sometimes undertake the charge of luggage which is merely intended for future transit; when they do so they exceed the limits of their implied authority, and in that case their possession cannot be regarded as the possession of their employers.

If the respondents had gone to Paddington Station at noon of the 24th of December, 1884, and had then left their Gladstone bag with a porter, in order that it might accompany them on their journey to Bath by the five p.m. train, I should have had no hesitation in holding that the appellant company had not become responsible for its safe custody during the interval. In that case it would have been in accordance with well-known practice, and therefore an implied term of the subsequent contract between the parties, that the company were not to be liable unless the luggage was duly deposited in the office provided for that purpose. On the other hand, if the respondents had arrived at the station at 4.55 p.m., I entertain as little doubt that the delivery of their Gladstone bag to a porter, for the purpose of its being conveyed to the carriage in which they were about to travel, would have made the possession of their porter that of the appellant company.

Whether passenger's luggage, delivered to a railway porter, is in his possession for present, or merely with a view to future transit, is necessarily a question of degree depending upon the circumstances of the case. Railway companies, as a matter of fact, frequently provide for the travelling public, not only booking offices, but refreshment rooms, and other conveniences; and passengers who merely avail themselves of such accommodation as incidental to their use of the railway cannot be held to have temporarily ceased to prosecute their journey. *Bergheim* v. *Great Eastern Railway Co.* is a clear authority to that effect. It is impossible to fix any precise limit of time prior to the starting of a particular train within which the company are to be liable for

passenger's luggage delivered to their servants for conveyance by it, and beyond which they are not to be so liable. In my opinion the company are responsible for luggage delivered to, and in the custody of, their servants for the purpose of transit whenever it can be reasonably predicated of the passenger to whom it belongs that he is actually prosecuting his journey by rail, and is not merely waiting in order to begin its prosecution at some future time.

In the present case the evidence shows that the female respondent arrived at Paddington Station forty minutes before the train by which she and her husband travelled was timed to start. She gave her luggage into the charge of one of the appellant company's porters, saw part of it labelled, and directed the porter to place the Gladstone bag, which was not labelled, in the same compartment with herself. The respondent then left the platform and went to the booking office, for the purpose apparently either of taking her ticket or of seeing that her husband procured it for her. She there met her husband, who had taken a ticket, and on their return to the platform, about ten minutes after her arrival, they found that the labelled luggage had been placed in the van, and that the porter and the Gladstone bag had both disappeared. In these circumstances I think the county court judge might reasonably come to the conclusion that the bag continued to be in the custody and possession of the respondents for the purposes of present, and not of future transit, from the time when it was delivered to their porter until its disappearance.

In the argument for the appellants considerable stress was laid upon the fact that at the time when Mrs. Bunch left her luggage upon the platform, the five o'clock train had not come alongside it. That circumstance does not seem to me to be very material, because a passenger can have no personal knowledge of it until he reaches the platform. What appears to me to be a matter of more consequencein the present case is, that it was Christmas Eve; that there was a great crowd of passengers intending to travel by the train in question, and that the servants of the company, as might have been anticipated, were, at the time when Mrs. Bunch arrived at the station, inviting passengers to take tickets, and receiving their luggage for the purpose of its being put in the train. I attach no importance to the question put by Mrs. Bunch to the porter, or to his assurance in reply, that her luggage would be quite safe, and that he would put it in the train. A conversation of that kind could not alter the contractual relations between her and the company.

On the assumption that the appellant company did become responsible for the safe keeping of the bag in question, it was argued on their behalf that there was no evidence before the county court judge to justify the inference that its loss was due to their negligence. Upon that point I am of opinion that the evidence was sufficient to sustain the inference, but I am by no means satisfied that, in order to entitle them to judgment, the respondents were bound to prove that the appellants had been negligent. That depends upon the nature of a railway company's contract liability for hand luggage, including in that term heavier articles, such as are commonly put in the van, when these are placed, or intended to be placed, with the assent of the company's servants, in the carriage in which their owner intends to travel, as well as lighter articles which are generally, if not invariably, carried beside him.

It does not admit of question that passengers' luggage duly delivered to the company's servants for carriage in the railway van remains during its transit at the risk of the company as common carriers; but it has always been held that it would be unreasonable and unjust to make the company liable as insurers in cases where the passenger has assumed, in whole or in part, the custody and control of his own luggage. Whilst they have been in agreement to that extent, eminent judges have differed as to the nature of the contract under which hand luggage is carried, some being of opinion that it is, from first to last, a contract to carry such luggage on the same terms as its owner—that is to say, with ordinary care—others being of opinion that it is throughout a contract of common carriage, modified by the personal interference of the passenger. Whichever of these views be accepted, it is manifest that, in many instances, the resulting liability of the company will be precisely the same; but, according to the second of them, the full responsibility of the company may revive on occasions when, from causes incidental to his journey, the interference of the passenger ceases for a time, and his hand luggage is committed to the exclusive charge of their servants.

At present the ruling authority upon this point is *Bergheim* v. *Great Eastern Railway Co.*, where it appears to have been decided by the Court of Appeal, consisting of the noble and learned lord opposite (Lord Bramwell), the present Master of the Rolls, and Cotton, L.J., that the contract of the company with respect to hand luggage is merely to carry with ordinary care. Cotton, L.J., who delivered the judgment of the court, said:—"The company, therefore, must, according to ordinary principles, be held liable in respect of these goods as bailees for hire and contractors to carry, and, therefore, liable for loss or injury caused by negligence, but not otherwise; the company have, in fact, the same liability with respect to the carriage of those goods as they have with respect to the carriage of the passenger himself. This is our view on principle." The observations thus quoted were directed to the special case of a passenger's luggage which had been placed at his request, and with the assent of the company, in the carriage in which he was to travel; and the learned judge possibly did not intend to extend the principle to luggage in the exclusive custody of the company's servants for conveyance to or from the carriage.

However that may be, I prefer the principle which appears to me to have been adopted in *Richards* v. *London, Brighton, and South Coast Railway Co.* and *Butcher* v. *London and South-Western Railway Co.* I think the contract ought to be regarded as one of common carriage, subject to this modification, that in respect of his interference with their exclusive control of his luggage, the company are not liable for any loss or injury occurring during its transit to which the act or default of the passenger has been contributory.

I am, therefore, of opinion that the order of the Court of Appeal ought to be affirmed, with costs.

Lord Bramwell.—It is the custom for English railway companies, at all events for the appellants, to have porters at the entrance of their railways to receive the luggage of passengers and convey it to the van or carriage in which it is to be carried. Whether this is a duty imposed on the companies or a voluntary act on their part is immaterial. It is a duty they undertake, at least this company does, and must, like other duties, be performed with skill and without negligence.

What is this duty? I have said, to carry the passenger's luggage to the van or carriage in which it is to be carried. We all know that large packages are taken to the luggage van; smaller packages (often much too large for the comfort of other travellers) are, if requested by the passenger, taken to the carriage in which the passenger is to be carried, either that he may make use of it or take personal care of it, or, more frequently, that he may hasten away with it without waiting for it to be given out of the luggage van. There is no further duty or professed duty that I know of.

If the passenger arrives before the train is at the platform, whether of a terminal station or not, the porter may certainly refuse to do more than take

the luggage on to the platform and leave it there in charge of the passenger. Of course, if the passenger wants to get his ticket and says so, the porter must take the luggage on to the platform and wait and see to it till the passenger has got his ticket and comes to see to it himself.

If there is any duty beyond this, it is more than I know of, or ever heard of; I mean any ordinary duty. There can be no duty on the company or the porter, when the train is not at the platform, to take care of the luggage till it comes. If there is an obligation to do this for five minutes there is an obligation to do it for as many hours. Everyone knows it is not so; everyone knows that a cloak-room is provided for the custody of luggage that the passenger wants to have taken care of till it can be put in the carriage in which it is to be carried. If this is true of luggage to be carried in the luggage carriage, and that is not there, it is equally true of luggage to be carried in the passenger carriage when the passenger is not there. If the luggage carriage is not there, the porter is not bound to take charge of the luggage till it comes. Of course, if he says nothing, but takes it, and it is labelled for its destination, and left in his charge, the passenger may well suppose, and has a right to suppose, that the company has taken charge of it for the journey. The passenger cannot tell whether the luggage carriage is there, or, if not, whether the company is not content to take it to a place where it will be in readiness for the train when it comes, and be taken care of meanwhile.

So, with respect to an article to be put in the passenger carriage, if the passenger should suppose a train he meant to go by was at the platform, and walked to it, and the porter said nothing, I should say that the passenger would have a right to suppose that the company had taken charge of the parcel, and was taking it to his intended carriage. But if the porter said of luggage intended for the luggage carriage, "That carriage is not here, you must look after your luggage yourself," and the passenger does not look after it, there would be no pretence for saying the company was liable. The same thing is true of luggage to be put in the passenger carriage. It must be remembered that luggage to go in the passenger carriage, is to go in the same carriage as its owner; the passenger. Suppose a train at the platform, the passenger says, "I want this in the carriage with me," the porter proceeds with the parcel to the train, the passenger goes somewhere else, not for a minute or so, but for some sensible time, five or ten minutes, perhaps half an hour. Would he have a right to complain if his parcel was placed near the train the passenger said he was going by, or taken to the lost luggage room? I say No. If he would, on what ground? He must know that by not following and taking his seat he was attempting to impose a burthen on the company's servants which he had no right to impose. Mrs. Bunch knew that. She did not say, "You must take care of this" or "I want to go and meet my husband;" but asks whether the bag will be safe. It will be said that it is not to be expected that she would speak with the precision of a lawyer, or know the law. I agree; but I say that, treating this practically, she knew, everybody knows, that she was asking for a favour, for something to which she had no right. Does anyone believe that if the porter had said, "I can take your luggage to the luggage carriage and it will be taken care of, but you must take care of what is to go with you till you have taken your place," I say if he had said this, as he ought to have done, would anyone believe she would have any right to complain or have been surprised; always let it be remembered that she knew that it was necessary to get some promise or engagement from the porter other and more than the ordinary engagement of a porter when he takes luggage.

Now as to what he said. Of course it was not a promise or contract by him for himself or the appellants. Certainly there was no consideration for it. All it amounted to was a statement of intention—a holding out of an expectation. "Will it be safe?" "Oh, yes; I will look after it." All that this means is, it will be safe, for I shall look after it. I say that that what the porter said did not impose a duty on the appellants which did not otherwise exist, that duty existed in the appellants other than to carry the bag to the carriage in which she took her place if she took it forthwith; that if she did not take her place so that the porter could not give the parcel into her charge there, she left it in the care of the porter at her own risk. I say she knew this, as is shewn by her question to the porter, and by her acceptance of his statement.

A word on the judgment below. Lord Esher says: "Now comes the case of luggage which is not to go into the van. The porters take possession of such luggage at the same time that they take possession of the other, and they take it on to the platform or the carriage. During the whole of that time it is in process of conveyance to the place to which the passenger is going, and is in possession of a servant of the railway company." So it is, but that is just what this bag was not. There was a time during which it was not in process of conveyance, a time during which it was stationary, during which the porter had said he would guard it. Lord Esher says: "The question is whether there was evidence upon which the county court judge might reasonably find for the plaintiffs." Evidence of what? Evidence of some fact on which he might reasonably so find? What fact? We know all the facts. Lindley, L.J., says: "It seems to me a simple case of transit, not of intrusting to the porter in any sense other than that in which everything put into his hands is intrusted to him. It is very true there was a short time during which it would not be necessary for him actually to keep walking on or rolling his trolley. There was a short delay, but a delay so short as to make it utterly unreasonable to suppose that this ought to be held to be beyond the scope of his duty. It is not essential to say more than this, that the porter was acting within the scope of his employment in taking the luggage in the way he did from the cab to the train." Now, that is precisely what he did not do. He did not take it from the cab to the train. He put it down and said he would guard it, and did that. As to the time being short, it was to be as long as the lady was away, and might have been forty minutes, or more, if the plaintiff had not arrived. I agree with Lopes, L.J.: "It was not part of the employment of a porter to take charge of luggage, except during that transit, *i.e.*, from the cab to the train." I mean by that, during the time which is fairly and reasonably necessary for that transit; and see p. 228.

I make no remark on other authorities beyond this, that they show a generous struggle, on the one hand, to make powerful companies liable to individuals, and on the other hand, an effort for law and justice. Sometimes one succeeds, sometimes the other, and the same conflict accordingly.

I have not used a technical expression, not a word about bailments, &c. I have used plain and practical language. The appellants were under no duty to take care of the bag while Mrs. Bunch went to look for her husband; the porter could, and ought to, have refused to do so. Had he done so, Mrs. Bunch would therefore have no cause of complaint. By doing as he did he could impose no duty on the defendants which did not otherwise exist. Before the respondent can complain of negligence he must make out a duty to exist, before he can have done so. Not that I am sure there is a question of negligence. The sum in dispute is small, but if the question is of considerable importance. If the appellants are liable in this case, I do not know

they can avoid it in similar cases. It is certain that the porter exceeded his duty if he made the defendants liable, and I suppose other porters, from good nature or the hope of a tip, will do the same again, though expressly forbidden as this man was. The result of what took place is that the defendants are liable for not taking care of the bag during the time it did not suit Mrs. Bunch to do so.

I cannot pretend to a doubt on the case. Nor can I understand the repeated expression that the county court judge might find as he did—an expression that imports he might have found otherwise. How can that be when the actual facts are not in dispute, nor the conclusions to be drawn from them? I hold that the judgment is wrong, and should be reversed.

Lord Herschell.—No appeal lies in this case from any conclusion of fact arrived at by the county court judge. It is only if he has erred in law that his judgment can be questioned. The single point, therefore, which has to be determined is, as it seems to me, whether there was any evidence to warrant the conclusion that the plaintiff's luggage was lost owing to a breach of obligation on the part of the defendants. It is not necessary for me to state the facts. They have been fully brought before the House by those of your lordships who have preceded me. I will only say that I do not think that the question put to the porter by Mrs. Bunch, or the answer given by him, really affects the case. If the company were under an obligation towards the plaintiff in respect of the bag, I cannot think that this question and answer diminished or destroyed it. If they were not under any such obligation I do not think it was imposed upon them by the statement of the porter.

I concur entirely in the opinions which have been expressed by the noble and learned lord upon the woolsack and the noble and learned lord on my right (Lord Watson), and think it necessary to add but little. Although there was a difference of opinion amongst the judges in the court below, and your lordships do not all take the same view, I think the difference is confined within somewhat narrow limits. I believe that all the judges who have dealt with the case and all your lordships are agreed that if luggage is brought to a railway station and handed to a porter so long before the time appointed for the starting of the train, that it cannot be reasonably said to be intrusted to him for the purpose of its transit with the passenger to its destination, but must be considered as so intrusted for the purpose of being taken care of until the time for the departure of the passenger arrives, the porter is not the servant or agent of the company to undertake the custody and care of the luggage, and the company would not be liable for its loss. Railway companies have provided cloak-rooms or left-luggage offices, which are the proper receptacles for luggage brought to the station under such circumstances.

On the other hand, I do not understand my noble and learned friend (Lord Bramwell), who differs from the majority of your lorships, to doubt that the porter who receives a passenger's luggage at the entrance of the station for the purpose of conveying it to the train, does so as the servant of the company, and that they are liable as well for the luggage which the passenger intends to take with him in the carriage as that destined for the van in case it is lost during its transit to either carriage or van owing to the porter's negligence. And I understand him further to entertain the view that, though the traveller does not proceed direct to the train with his luggage, but stops for the purpose of taking his ticket, the company are nevertheless liable during the time so occupied.

Now I do not think it can be laid down that procuring a ticket is the only act incidental to the journey for which the passenger may pause on his way to the train without the company being free from liability in case the luggage is lost in the meantime; would not the case be the same if he waited to meet a person who had promised to take his ticket for him, provided always he has not come unreasonably early, and does not wait an unreasonable time? Does, then, the fact that the train by which the passenger is to depart is not at the platform when he arrives at the station make any difference? It may, no doubt, be an element in determining whether the passenger has arrived so early that the transit to his destination cannot properly be said to have commenced. But I do not think it is conclusive of the point, or that the obligation of the company is necessarily different from what it would be if the train were alongside the platform.

It is a matter of common knowledge that the practice of different railway companies, and, indeed, of the same company at different times, varies greatly as to the length of the period prior to the departure of the train during which it is drawn up at the platform. Sometimes, after being at the platform, the train is shunted out of the station, and only returns immediately before its departure. Under these circumstances it is impossible even for a passenger who arrives very shortly before the time fixed for the departure of the train to know, when he alights at the station and intrusts his luggage to a porter, whether the train is at the platform or not. The question whether the luggage can fairly be said to be in the custody of the company's servant for the purpose of transit, or of what I may term warehousing, will not, I think, be generally difficult of solution, though, as it is not possible to lay down any strict line of demarcation, there will always be cases on the border where opinions may differ as to the proper conclusion to be drawn. In the present case Mrs. Bunch arrived forty minutes before the time of departure. She was about ten minutes waiting for her husband, who was to take her ticket. On the other hand it was Christmas Eve, when the trains are notoriously crowded, and prudence dictates an earlier arrival than usual. We have not to determine what would be our view of these facts. I concur with those of my noble and learned friends who think that the county court judge was warranted in point of law in arriving at the conclusion which he did with respect to them.

I have only to add that, although it is not necessary in this case to determine what is the nature of the duty devolving upon a railway company in respect of luggage carried, or intended to be carried, in the same carriage with the passenger, I am disposed to agree with my noble and learned friends in preferring the view of this duty to be derived from the cases of *Richards* v. *London, Brighton, and South Coast Railway Co.* and *Butcher* v. *South-Western Railway Co.* to that enunciated in the judgment of the Court of Appeal in *Berghein* v. *Great Eastern Railway Co.*

Lord Macnaghten.—I concur in the motion which has been proposed.

Everybody who travels by railway knows that, as a general rule, persons arriving at a station with luggage are met at the entrance of the station by railway porters ready to receive their luggage, to take it to the platform, and to put it into the train. Everybody, too, knows that, while in ordinary course the heavier articles of luggage are labelled and placed in a van under the sole control and custody of the railway company, it is the common practice for passengers to take the lighter articles of luggage, or "hand luggage," as it was called, in the carriage with them. This practice is recognized by railway companies, who provide suitable receptacles for hand luggage in passenger carriages. And it is a practice as much for the convenience of railway companies as it is for the convenience of passengers.

It was contended by the appellants that, in receiving a passenger's luggage, railway porters, though in the service of the company, and forbidden to accept any payment from the public, must be taken to be acting on behalf of the passenger, and as his agents, and that this relation continues as regards van luggage until it is labelled for the journey, and as regards hand luggage until it is placed in the carriage in which the passenger intends to travel. Further, it was contended that the contract as regards van luggage is altogether distinct and different from the contract as regards hand luggage; that, in fact, there are two separate contracts, and that whatever may be the case as regards van luggage, the railway company comes under no liability of any sort as regards hand luggage until it is placed in the passenger's carriage.

I cannot think this view correct. The services rendered by railway porters in receiving passenger's luggage, in taking it to the platform, and putting it into the train, are part of the ordinary facilities for passenger traffic which the public nowadays expects from railway companies, and which railway companies for the most part hold themselves out as ready and willing to afford. These services are covered by the fare which the passenger pays for his journey. They are offered in view of the contract which a person who presents himself with luggage at a railway station presumably either has made or is about to make. The contract, as the case may be, runs from, or relates back to, the commencement of the journey, and the journey must, I think, be taken to commence, as regards passenger's luggage, at the time when the luggage is received by the company's servants for the purpose of the journey. Thenceforward the work done in taking the luggage to the platform, in putting it into the train, in conveying it to its destination, and there delivering it, must, I think, be regarded, under ordinary circumstances, as one continuous operation to be performed under the contract. The contract is the ordinary contract of common carriers—a contract to carry securely. The contract, no doubt, becomes modified as regards that part of the luggage which is put into the passenger's carriage. At the passenger's request, or at his instance, the company dispense with precautions which they think necessary for the safety of the goods they have undertaken to carry, and so the passenger relieves the company from some of the risks which otherwise would fall upon them. But, for all that, the contract is one contract, and in ordinary course, except so far as it may be modified by the acts or conduct of the passenger, it remains in force during the continuance of the journey, from its commencement to its end. If the reasoning in *Bergheim* v. *Great Eastern Railway Co.* seems to lead to a different conclusion, with all deference I am unable to concur in it. I prefer the view expressed by Willes, J., in *Tulley* v. *Great Western Railway Co.*

Your lordships are familiar with the evidence in the case, and I do not propose to repeat it. It is enough for the present to say that on the 24th of December, 1884, Mrs. Bunch went to Paddington with a Gladstone bag and some other luggage, meaning to travel with her husband by the 5 p.m. train to Bath. That on her arrival at the station the luggage was received by a porter in the employment of the company and taken by him to the platform for the purpose of the journey, and that the Gladstone bag was last seen on the platform with the same porter a few minutes afterwards. From that time all trace of the bag is lost. The porter and the bag vanish from the scene. It was suggested by the learned counsel for the appellants, by way of explanation, that the porter was possibly one of a number of men picked up by the company for the day to meet the pressure of Christmas traffic. But I may observe in passing that, so far as the public was concerned, there was apparently nothing to distinguish the casual helper, of whom little, if anything, is known, from the regular and trusted servants of the company.

On these bare facts standing alone, it seems to me that there would be evidence upon which the county court judge might reasonably find for the plaintiff, even if it were held that the company was not under the liability of common carriers as regards the lost bag.

But then it was contended with much earnestness that it ought to have been inferred from the circumstances of the case, and from Mrs. Bunch's conduct, that at the time of the loss the bag was not in the custody of the company for the purpose of the journey. It was said that Mrs. Bunch came to the station too soon; that she came before the train was drawn up; that she broke the journey, if the journey is to be taken as having begun, and left the bag in charge of a porter, who was then not acting as the servant of the company within the scope of his authority as such, but acting as her agent in his individual capacity; and that if this was not what she meant, it was an attempt on her part to saddle the company with a liability which they were not bound to undertake.

It seems to me that there is no substance in any of these objections. Mrs. Bunch, no doubt, came to the station somewhat early. But the one thing railway companies try to impress on the public is to come in good time; and considering the crowd likely to be attracted by cheap fares during the Christmas holidays, and the special bustle and throng on Christmas Eve, it does not seem to me that Mrs. Bunch came so unreasonably early as to relieve the company who received the luggage from the ordinary obligations flowing from that receipt. It is impossible to define within the extreme limits on both sides the proper time for arrival. Everything must depend upon the circumstances of the particular case. But among those circumstances the least important, as it seems to me, is the time when the train is drawn up at the departure platform. That is, as everybody knows, a very variable time, and a matter over which the passenger has no control, and of which he can have no notice before he comes to the station.

Then I think there is nothing in the conversation which took place between Mrs. Bunch and the porter. Mrs. Bunch's question was a very natural one. The answer she received was just what might have been expected. Nine women out of ten parting with a travelling bag on which they set any store would ask the same question, and in ninety-nine times out of a hundred the same answer would be returned. I do not think that this conversation altered the relation between the parties in the least degree. It seems to me almost absurd to treat it as a solemn negotiation by which the lady abdicated such rights as she possessed against the Great Western Railway Co., and constituted this ephemeral and evanescent porter in his individual capacity the sole custodian of her Gladstone bag.

Nor can it, I think, be said that Mrs. Bunch broke the journey by leaving the platform to meet her husband and get her ticket. To take a ticket is a necessary incident of a railway journey. It is, at least, a very common incident in railway travelling for persons who intend to travel in company, whether they be members of the same family or not, to meet by appointment in the railway station from which they mean to start, and it is certainly not unusual in such a case for the purchase of tickets to be deferred until the meeting takes place.

It may be that a passenger who has delivered his luggage to a porter at the entrance of the station, though the delivery is in proper time for the intended journey, is not entitled as of right and under all circumstances to consider the company responsible for the safe keeping of his luggage before it is put into the train. A passenger knows that he is not the only person to be attended to, and it might not be unreasonable to hold that there is an implied agreement on his part that he

will be ready to resume possession of his luggage if the exigencies of the traffic require that it should be handed back to him in the interval before the time comes to put it into the train. No such question, however, arises here. The lost bag was not left unguarded owing to the exigencies of traffic, or neglected by the porter who took it in consequence of the pressure of conflicting duties. But I desire to say that, for my part, I am not satisfied that a passenger's luggage which has been received by the company's servants, and taken to the platform, lies there at the risk of the passenger, if he is not ready forthwith, or the moment he has got his ticket, to step into the train.

It was said that if everybody acted as Mrs. Bunch acted in this case, railway companies would require an army of porters, and that it would be almost impossible for them to carry on their business. I quite agree; but I am not much impressed by that observation. I apprehend that if all travellers acted precisely alike, if everybody arrived at a station for a particular journey at precisely the same moment, though the time of arrival were the fittest that could be imagined, there would be no little confusion, and perhaps some consternation, among the railway officials. Whatever may be the result of your lordships' judgment, there is no fear that it will have the effect of making everybody act alike. Some passengers will still give more trouble at the stations than others, but no one will give any more trouble for it. Things will go on just as usual. The fidgetty and the nervous will still come too soon; the unready and the unpunctual will still put off their chance of arrival till the last moment, and the prudent may have their calculations upset by the many accidents and hindrances that may be met with on the way to the station. And it is just because of the irregularity of individuals that the stream of traffic is regular and easily managed.

In the result, therefore, I am of opinion that the majority of the Court of Appeal were right in the view they took. The nature of the case requires that a broad view should be taken. The contract between the company and the passenger is not a contract in writing, defining with mathematical accuracy the precise limits of the incidental services which the company are prepared to render, and punishing every transgression, every attempt on the part of the passenger to exact more than his just measure of attention, with the loss of that security which belongs to a contract by common carriers. Railway companies do their best to adapt the conduct of their business to the habits of the travelling public, who resent nothing so much as petty and vexatious restrictions and regulations; and so the contract becomes moulded in matters incidental to its main purpose by that which is, and is known to be, the ordinary and every-day practice of railway companies. A narrow, technical, and jealous view of the rights of individual passengers might, perhaps, enable railway companies to escape liability in some few cases; I much doubt whether it would tend to their advantage in the long run.

Order appealed from affirmed, and appeal dismissed, with costs.

Solicitors for the appellants, *R. R. Nelson.*

Solicitors for the respondents, *Ingle, Cooper, & Holmes.*

Court of Appeal.

Bankruptcy. June 8, 24.

Ex parte Kennedy.
In re F. W. Willis. (*a.*)

Mortgage—Attornment clause—Bankruptcy petition—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 6.

An indenture of mortgage contained a clause whereby the mortgagor attorned and became tenant from quarter to quarter to the mortgagee in respect of the premises at a yearly rent, by equal quarterly payments of £2,000. The consideration for the mortgage was an advance of £20,000, on which interest at £5 per cent. per annum was to be made payable. By the terms of the mortgage deed the first payment of the above rent was to be made on the first day of the month next after any interest thereby secured should have become in arrear, but all money received by the mortgagee for rent due under the attornment was to be accepted in the first place in or towards satisfaction of the interest then in arrear. A bankruptcy petition was subsequently presented against the mortgagor, upon which he was adjudicated bankrupt, but between such petition and adjudication the mortgagee distrained under the tenancy created by the attornment, and realized the sum of £1,715. The mortgage was not registered as a bill of sale.

Held (Lord Esher, M.R., dubitante), *that the attornment clause in question fell within the first part of section 6 of the Bills of Sale Act,* 1878, *and not within the proviso of that section, which is limited to cases where possession by the mortgagee precedes the demise; that, the mortgage not being registered, the distress was therefore unlawful; and that the trustee in bankruptcy was entitled to the money realized.*

Decision of Cave, J. (ante, *p.* 639), *affirmed.*

Appeal from an order of Cave, J., sitting in bankruptcy, setting aside a distress under a mortgage.

By deed dated the 28th of January, 1884, F. W Willis demised, by way of mortgage to Lady Willoughby D'Eresby, the premises known as "Willis's Rooms" for the residue of a term of years created by certain indentures, to secure the repayment of £20,000 then advanced by her to him. The interest was payable half-yearly at the rate of £5 per cent. By the same deed Willis attorned as tenant to Lady Willoughby of the same premises from quarter to quarter at the yearly rent of £2,000, payable by equal quarterly payments, the first payment to become due the first day after the interest secured became in arrear; and all money received by Lady Willoughby as rent due under the attornment was to be accepted in satisfaction of interest. On September 25, 1885, a bankruptcy petition was presented against Willis. On November 7 Lady Willoughby distrained, under the attornment clause, for the amount of interest in arrear, and the distress realized £1,715 17s. On the 20th of November following a receiving order was made against Willis, and adjudication followed, upon which Kennedy was appointed trustee. The trustee sought to claim the produce of the distress on the ground that the attornment under which the distraint was exercised was a bill of sale under section 6 of the Bills of Sale Act, 1878, and was void as being unregistered. Upon the hearing before Cave, J., judgment was given for the trustee (*ante*, p. 639). The mortgagee now appealed.

French, Q.C., and *Lane*, for the appellant, the mortgagee.—This instrument comes within the exemption proviso of section 6 of the Bills of Sale Act, 1878, being

(*a.*) Reported by Spencer L. Holland, Esq., Barrister-at-Law.

"a demise at a fair and reasonable rent." The tenancy was quarterly, as distinct from the payment of the interest on the advance, which was half-yearly. The validity of the rent is the criterion whether the attornment effects an actual demise or is only for the security of any advance: *Ex parte Williams*, 26 W. R. 274, 7 Ch. D. 138; *In re Stockton Iron Furnace Co.*, 27 W. R. 433, 10 Ch. D. 335; *Ex parte Jackson*, 29 W. R. 253, 14 Ch. D. 725; *Hall* v. *Comfort*, 35 W. R. 48, 18 Q. B. D. 11; *Batchelor* v. *Yates*, *ante*, p. 563, 38 Ch. D. 112.

Cooper-Willis, Q.C., and *Houghton*, for the respondent, the trustee.—All the cases cited apply to instruments executed prior to the Bills of Sale Act, 1878. Section 6 aims at all mortgages where the mortgagee is not in possession. This instrument was not a real lease for any definite period. Under the proviso possession by the mortgagee is the condition precedent of the instruments exempted. The section intended to do away with attornments unless they were registered as bills of sale.

French, Q.C., replied.

Cur. adv. vult.

June 24.—LINDLEY, L.J.—The question for us to decide in this case is whether the mortgagee or the trustee in bankruptcy is entitled to £1,715, the produce of the sale of certain chattels on which the mortgagee distrained by virtue of an attornment clause in a mortgage deed dated the 28th of January, 1884. The premises were leasehold, and were the well-known "Willis's Rooms." The mortgage was for an advance of £20,000. It contained provisions for the payment of interest on that sum, and, in default, for a power of sale by the mortgagee and a power to enter. Then there was an attornment clause under which the mortgagor attorned and became, in effect, tenant to the mortgagee at a yearly rent of £2,000 by equal quarterly payments, and the money to be received in rent was to be accepted in the first place in satisfaction of the interest due on the money advanced. There was, farther, a proviso that the attornment clause was not to render it compulsory upon the mortgagee to collect the rent or become accountable for it to any subsequent mortgagee or incumbrancer. This proviso was, doubtless, put in to remove any doubt which might be held to render the mortgagee liable to account for the rent received under the attornment clause. It protects him from the equitable doctrine by which a mortgagee in possession can be called upon to account for the rent received by way of interest on the mortgage. I do not think that this proviso really affects the question before us. There is no question that the clause constitutes the relation of landlord and tenant between the parties, as has been decided in cases recently discussed. The question is, What is the effect of such relationship? That depends, not only upon the mortgage deed, but upon the Bills of Sale Act. The material portion of that Act on this point is section 6 of the Act of 1878, with the proviso expressly added in reference to attornment clauses. That proviso is not applicable to ordinary leases, nor does any section of any Bills of Sale Act apply to leases with the ordinary power of distress. In *Hall* v. *Comfort* that was practically the ground of the decision. The Bills of Sale Act, 1878, s. 6, only applies to attornments given by way of security for money advanced. The section enacts that "Every attornment . . . whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future, or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale. . . ." I will pause there to point out the effect of the enactment so far.

In *Hall* v. *Comfort* it was said that the clause does not apply to attornment in mortgages unless followed by express powers of distraint. But, if so, every attornment would be struck at as well as other instruments whereby powers of distress are given by way of security, because attornment carries with it an implied power of distress. But I think that whoever drew this section was aware that there were two forms of mortgage, one by which an express power is given to enter and distrain, and the other by attornment; the former of which is not so beneficial in the matter of distress as the latter, by which the power is incidental to the relationship created. For under the express power the mortgagee can only seize the tenant's own goods, while under the attornment clause any goods upon the premises may be seized. Consequently, an attornment clause has taken the place, to a great extent, of the other form. This section, however, must be taken to affect both classes of mortgages if they are given by way of securing interest upon an advance of money. If it is an instrument whereby a power of distress is given by way of security for any advance, that instrument is a bill of sale within the Act of Parliament, and it was admitted by the appellant that, so far as this clause by itself goes, and were it to stop there, we must hold that the attornment before us was such an instrument, and constituted a bill of sale. But the clause goes on to a proviso enacting that "nothing in this section shall extend to any mortgage of any estate or interest in any land, tenement . . . which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent." It is very difficult to give effect to all the words in this section as coupled with this proviso. The proviso does not say that nothing applicable in the Act to attornments shall affect any mortgage. How could it affect a mortgage at all unless it is one accompanied by an attornment or other clause affected by the first part of the section? Then is this second part of the section, this proviso, intended to protect attornments at a valid rent which are not, however, preceded by possession by the mortgagee?

If it was intended to confine the clause to cases where the mortgagee was in possession, I do not think the clause is very clearly drawn. At any rate, no construction will give full effect to the words "mortgage" and "mortgagee being in possession." Still, I cannot think the proviso was intended to protect a deed which in effect amounts to a loan on a mortgage of chattels without possession by the mortgagee. The expression "mortgagee being in possession" must be intended for some purpose, and gives the key to the meaning of the proviso. The true construction would seem to me to be that the proviso applies to that state of things where possession by the mortgagee precedes the demise, that such demises only are intended to be protected by this proviso. If all attornments are held to be included in the first part of the section, then the proviso is given effect to by this construction, since it proceeds to withdraw from the first part of the section attornments by way of mortgage where possession by the mortgagee precedes the demise by attornment. The general purport of bills of sale legislation is to enforce the registration, as securities, of instruments for money lending. There is nothing to warrant the conclusion that the Legislature intended to deprive landholders of their common law right to distrain, but contemplated solely the lending of money on the security of chattels. All such instruments as effected this must to be subject to registration. It must be taken that the Legislature intended to extend the scope of the Acts to attornments made by way of mortgages, but to exempt demises by a mortgagee in possession. Upon this construction which I think is the true one of this section

and proviso, it is impossible to bring within the proviso as exempted from the first part of the section any attornment executed at a fair and valid rent. To claim such exemption the facts must show a mortgagee in possession followed by a demise. That was pretended to be the case here. I think Cave, J., was right in holding this instrument to be a bill of sale within the section, and this appeal must be dismissed.

LOPES, L.J.—I entirely agree with the judgment of my brother Lindley, and the reasoning of my brother Cave in the court below. Had the first part of the section been left to stand alone there would be, it is admitted, nothing to exempt this attornment from its effect. But there follows the proviso exempting certain instruments in cases where the mortgagee is in possession. These words must be given effect to. They must be taken to refer to actual possession and a subsequent demise by the mortgagee. I believe the Legislature intended to limit the exemptions to such cases only, while they sought to invalidate mere attornment clauses in the mortgage of chattels so far as they conveyed powers of distraint. I think the present instrument does not come within the proviso.

Lord ESHER, M.R.—I do not propose to disagree with the judgments delivered. I will only say that I had my doubts, and after listening to the exceedingly able judgment of my brother Lindley those doubts are not removed, but intensified.

Appeal dismissed.

Solicitors for the appellant, *Travers, Smith, & Braithwaite.*

Solicitors for the respondent, *Blewitt & Tyler.*

From Q. B. Div. June 29.

HOLMES *v.* BRIERLEY. (*a.*)

Infant—Promise to marry—Evidence of new promise—Ratification—Infants' Relief Act, 1874 (37 & 38 *Vict. c.* 62), *s.* 2.

The defendant, while he was under age, promised to marry the plaintiff. After he came of age the plaintiff told him that her father's pecuniary circumstances were altered, and offered to release him from his engagement. The defendant was much hurt at this, and said he was ready to marry her then if she thought they were old enough. The plaintiff replied that she thought they had better wait till they were older. Subsequently the defendant refused to carry out the engagement.

Held (*reversing the decision of the* Queen's Bench Division, ante, *p.* 693), *that there was evidence on which the jury might find that there had been a new promise by the defendant after he came of age.*

Appeal from a decision of a divisional court (Huddleston, B., and Charles, J.) setting aside a verdict for the plaintiff and giving judgment for the defendant (*ante*, p. 693).

The action was for breach of promise of marriage. The defendant pleaded infancy. The facts are sufficiently set out in the judgment of Huddleston, B. The question was whether there was evidence of a new promise after the defendant came of age, or whether what was said and done between the parties only amounted to a ratification of the original promise. The Divisional Court held that there was no evidence of a new promise, but only evidence of a ratification of the old promise.

The plaintiff appealed.

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

Addison, Q.C., for the plaintiff.

Joseph Walton, for the defendant.

Lord ESHER, M.R.—In a case like this I am of opinion that the right question for the jury, if there is evidence in support of it, is the question stated by Lopes, L.J., in *Northcote* v. *Doughty*, 4 C. P. D. 385, 28 W. R. Dig. 106—viz., did the defendant intend to make a new absolute promise or merely to re-affirm the old promise? And that substantially was the question which the learned judge put to the jury in the present case. The question remains, was there evidence on which a jury might reasonably find that a new promise was made and accepted? I decline to lay down a rule for all cases. But in this case I think the jury were entitled to come to the conclusion that the plaintiff released the defendant from his engagement, and that he understood that he was free, and that he then made a fresh proposal of marriage, which she accepted. Therefore judgment must be entered for the plaintiff for the amount of the verdict. I wish to add that the only question of law decided in *Ditcham* v. *Worrall*, 29 W. R. 59, 5 C. P. D. 410, was that there was evidence to go to the jury.

LINDLEY and LOPES, L.JJ., concurred.

Appeal allowed.

Solicitor for the plaintiff, *Durant*, for *Willan*, Manchester.

Solicitors for the defendant, *Burn & Berridge*, for *Ramsden, Sykes, & Ramsden*, Huddersfield.

From Q. B. Div. [& Q. B. Div.] April 26; June 26.

GRAND JUNCTION CANAL CO. *v.* PETTY AND OTHERS. (*a.*)

Highway—Dedication—Power of canal company to dedicate tow-path to public.

A canal company has power to dedicate to the public as a highway land which has been acquired by it as a tow-path under statutory powers, if the user by the public would not be incompatible with the purposes for which the land was acquired.

R. *v.* Inhabitants of Leake, 5 *B. & Ad.* 469, *approved.*

Motion by the plaintiffs for new trial on the ground of misdirection.

Action to recover damages for trespass, for breaking and entering upon the plaintiff's towing-path, and for breaking open and destroying a gate and wall belonging to them there situate, for an injunction and a declaration that no public right of way existed along the said towing-path.

The towing-path in question is on a branch of the Grand Junction Canal, which terminates in a basin at Aylesbury. A wall runs across this basin with a gate leading from the public high road on to the towing-path. There was abundant evidence to show that for a period extending over nearly fifty years, and until quite recently, the public had been accustomed, with occasional interruptions, to enter and leave the towing-path by this gate, and to walk along the towing-path and use it, with perfect freedom, as a public footway. Occasionally, however, it appeared that persons found fishing on the path had been stopped, and within the last two or three years various notices, such as "No Thoroughfare," "For Canal Purposes only," &c., had been posted up.

(*a.*) Reported by G. K. PARRY and A. P. PERCIVAL KERR, Esqs., Barristers-at-Law.

The defendants were three labourers who, in assertion of an alleged right of way along the path, had broken down the gate, which had recently been locked. At the trial, which took place at Aylesbury before Pollock, B., and a jury, the learned judge left it as a question for the jury whether there had been such a user as showed a dedication of the towing-path by the plaintiffs to the public.

A verdict was found and judgment entered for the defendants.

Graham and *Etherington Smith*, for the applicants.—The learned judge was wrong in not directing the jury that there could not be a dedication to the public without an intention to dedicate. The evidence as to the notices posted up by the company must be held to be conclusive that no such intention existed. Under the Grand Junction Canal Act the dedication of the towing-path was *ultrà vires*, and the judge should have so ruled. The company cannot dedicate their land for any other purposes than those for which they took it under their Act: *Bostock* v. *The Staffordshire Railway Co.*, 4 E. & B. 798, 3 W. R. Dig. 151; *Mulliner* v. *Midland Railway Co.*, 27 W. R. 330, 11 Ch. D. 611.

Winch, Q.C., and *Hammond-Chambers*, for the respondents.—The question as to evidence of dedication was properly left to the jury. The company can dedicate a right of way to the public where such right of way is not inconsistent with the purposes for which they took the land under their Act of Parliament: *The Grand Surrey Canal Co.* v. *Hall*, 1 M. & G. 392; *R.* v. *Inhabitants of Leake*, 5 B. & Ad. 469. There is nothing inconsistent between the use of the path by the public for walking on and its use for the purposes of the canal.

Graham replied.

Lord COLERIDGE, C.J.—I am of opinion that the direction of the learned judge was correct, and that this application must be refused. There is a large, and in one sense overwhelming, body of evidence to prove that, down to a time comparatively recent, there had practically been a perfectly free user of the towing-path by persons accustomed to walk along it. It was urged on the part of the canal company that the path had never actually been dedicated to the public. They contend that this is conclusively proved by the fact that they had for some time posted up notices which indicated that they did not intend it to be so dedicated, and therefore no amount of user would be evidence on which the jury could find that there had been a dedication. No doubt dedication is a question of intention, and if it could be shown that there was no intention to dedicate, there could have been no dedication, but I do not think that the evidence of intention in this case must necessarily be taken as conclusive. All that was done on the part of the company was to put up certain notices and occasionally stop persons—for the most part either mischievous boys or persons who engaged in fishing (a right to which did not necessarily follow from a right of way). The learned judge was not bound to direct the jury that this was conclusive evidence against an intention to dedicate, and he was right in leaving it to them to consider whether the negative evidence against the intention overbore the positive evidence of dedication.

It is also contended that, the company having acquired the land only for the purposes of the canal, were not entitled to apply it to, or allow it to be used for, any other purpose. That is no doubt true when, as in *Bostock* v. *The Staffordshire Railway Co.* and *Mulliner* v. *Midland Railway Co.*, the purpose for which the land is used is inconsistent with the purpose for which it was acquired or for which the company was established. On the other hand, however, the cases of *Grand Surrey Canal Co.* v. *Hall* and *R.* v. *Inhabitants of Leake* lay down the principle very clearly that where land is vested in a company under an Act of Parliament it may be dedicated to the use of the public as a highway, provided that such use is not inconsistent with the purposes for which the land was originally vested under such Act. There is nothing inconsistent between the use of the towing-path by the public for the purpose of walking on it and its use by the company for canal purposes. The application therefore fails on both grounds.

MATHEW, J., concurred.

The plaintiffs appealed.

June 26.—*Graham* and *Etherington Smith*, for the appellants.

Hammond Chambers, for the respondents.

The arguments used were the same as in the court below.

Lord ESHER, M.R.—In this case a question of dedication is raised. There is no doubt as to the law relating to the dedication of a right of way. The dedication must be intentional, and it must be accepted by the public. Those are questions of evidence, and if there is evidence from which a jury can infer that there has been an intentional dedication on the one side and an acceptance of such dedication by the public on the other, the verdict cannot be disturbed. Now in this case the jury have found that there was such a dedication and acceptance, and there was sufficient evidence from which they might draw such an inference. But it is contended that, even assuming that the finding of the jury was correct, there could not have been a dedication, because the canal company are a statutory body, and have no power to dedicate any part of their statutory property to the public. That is a question of law, and in my opinion the cases on the point are not really inconsistent. In *R.* v. *Inhabitants of Leake*, at p. 478, Parke, J., says this: "If the land were vested by the Act of Parliament in commissioners so that they were thereby bound to use it for some special purpose incompatible with its public use as a highway, I should have thought that such trustees would have been incapable, in point of law, to make a dedication of it, but if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power." That appears to me to be the correct principle of decision, and I adopt it.

It has been contended that, even though the user by the public be not inconsistent with the objects for which the land is statutorily taken and the purposes for which the company was formed, yet the company have no power to dedicate to the public. I do not agree with this contention. It has not been suggested that the right of the public to walk along the tow-path would be incompatible with the purposes of the canal company. I think, therefore, the case falls within the ruling of Parke, J. A different case may arise some day where the user by the public would be inconsistent with the objects of the company, but in this case there is nothing inconsistent with those objects. That being so, the dedication would not have been illegal. I cannot suppose that the dedication was absolutely without any restriction. It is a limited dedication. The public are so to use the two-path as not to interfere with the ordinary use of the tow-path by the company and those using the canal. The public must be taken to have accepted the dedication as a limited dedication, and they would, in my opinion, have no right to interfere with or obstruct the persons properly using the canal and the tow-path for the purposes for which the canal and the tow-path were formed. I am therefore of opinion that this case is governed by the decision in *R.* v. *Inhabitants of Leake*, and I think this appeal must be dismissed.

LINDLEY, L.J.—I am of the same opinion. The only difficulty in the case is as to the question of law. It is said that the canal company were incapable of dedicating this tow-path to the public. Is that proposition maintainable? There is no evidence that the use of the tow-path by the public is in any way incompatible or inconsistent with its use by the canal company for the purposes for which that company was formed. If that point had been raised it would have been a question for the jury, and on their finding a different state of things would have arisen. It has been urged that the case of *Mulliner* v. *Midland Railway Co.* is inconsistent with *R.* v. *Inhabitants of Leake*. But I think that the former case is not in point. There the existence of the right of way was plainly inconsistent with the objects of the company, and the case is therefore distinguishable from *R.* v. *Inhabitants of Leake*. In my opinion the principle laid down in that case by Parke, J., was the correct one, and since there is no incompatibility here, I think the company had power to dedicate, and that this appeal fails.

LOPES, L.J.—Can a right of way be acquired against a corporation who has acquired land for certain specific purposes? I think such a corporation has power to dedicate to a limited extent—that is to say, to the extent that they may confer upon the public such a right of way as is not inconsistent with the purposes for which they have compulsorily taken the land so dedicated. Here there is absolutely no evidence that the user of the land by the public would be in any way inconsistent with the purposes of the canal company. That point was never taken. The result is, in my opinion, that the company had power to dedicate this tow-path, and the jury, having found that they did, in fact, dedicate it, I think the verdict and judgment must stand.

Appeal dismissed.

Solicitors for the appellants, *Field, Roscoe, & Co.*

Solicitors for the respondents, *Letts Bros.*, for *Parker & Wilkins*, Aylesbury.

From Q. B. Div. June 23.

REG. *v.* JORDAN. (*a.*)

Contempt—Committal — Jurisdiction of superior court to review—Powers of county court judge to commit—Form of warrant—County Courts Act, 1846 (9 & 10 *Vict. c.* 95), *s.* 113.

The jurisdiction of the superior court, in reviewing committals for contempt by an inferior court, is limited to the consideration whether there were materials upon which the judge ordering the committal could have reasonably inferred contempt, and whether the form of committal is in accordance with one or other of the forms laid down in section 113 *of the County Courts Act*, 1846.

Quære, *whether a committal for contempt is not a criminal matter on which no appeal from the Queen's Bench should have been heard.*

Decision of the Divisional Court (Cave *and* A. L. Smith, JJ., ante, *p.* 589), *affirmed.*

Appeal from the Divisional Court's (Cave and A. L. Smith, JJ.) refusal to quash an order of committal.

The facts of this case will be found fully set out in the report of the application to the Divisional Court (*ante*, p. 589). His Honour Judge Jordan had committed the appellant, Turner, a solicitor, for contempt of court for interrupting him, in the course of his giving judgment against an application of Turner for a new trial, with the words "That is a most unjust remark," in reference to certain statements made by the judge which Turner considered to be reflections on his personal character. It was argued for the appellant (1) that the words did not amount to a "wilful insult" to the judge so as to give him jurisdiction to commit, and (2) that the writ merely committed Turner to prison without the option of a fine which the judge had, at first, orally imposed. The facts showed that the judge had, upon the occasion of the contempt alleged to have been committed, said, "I shall fine you £5 or commit you for six days," and the entry upon the judge's note-book was "£5 or 6 days." The appellant was detained till the rising of the court, and upon his declining to withdraw the remark the judge ordered the warrant for his committal to be drawn out, without reference to the before-mentioned fine of £5 or any option.

Willis, Q.C., Vaughan Williams, and *Carrington*, for the appellant, cited *In re Pollard*, L. R. 2 P. C. 106, 17 W. R. H. L. Dig. 4; *Ex parte Pater*, 12 W. R. 823, 5 B. & S. 299.

Henn-Collins, Q.C., and *C. Russell*, for the respondent, cited *In re Crawford*, 13 Q. B. 613.

LINDLEY, L.J.—This is an application to quash an order of committal, and also to quash the writ under which the committal was executed. The warrant is signed by the judge of the Newcastle-under-Lyme County Court and sealed with his seal, and is dated the 18th of January, 1888. It duly recites the fact and date of the committal of the appellant, and by whose authority and commands the gaoler "do take the said Turner to prison and safely to keep him there for six days from this day or until he shall be sooner discharged in due course of law." The appellant was so arrested and imprisoned until released on an earlier day by a second order from the judge to the effect that he, the judge, "being satisfied that Turner has sufficiently discharged his contempt, do order him to be discharged forthwith." [The Lord Justice here recited the facts of the case as given before, and continued:—] We have not to say here whether there was or was not a contempt in fact committed. The only jurisdiction we have in reviewing the discretion of a judge in exercising his power is limited to the question whether there were before the judge any materials from which he could reasonably infer that a contempt was committed. It is no part of the duty of this court to decide upon the exercise of the discretion of the court below, except as to the question whether the particular order was a valid one. Ought this order of committal to be quashed as invalid or not? The only power of a county court judge to commit for contempt is conveyed by section 113 of the County Courts Act, 1846. By that section, where a wilful insult has been committed, &c., "the judge shall be empowered (*inter alia*), if he shall think fit, by a warrant under his hand, and sealed with the seal of the court, to commit any such offender to any prison" to which he has power to commit prisoners under the Act, "for any time not exceeding seven days, or to impose upon any such offender a fine not exceeding £5 for every such offence, and in default of payment thereof to commit the offender to any such prison as aforesaid for any time not exceeding seven days, unless the said fine be sooner paid." Now this section is only important here as showing the different forms of committal. So long as there are materials shown from which the judge below could draw a reasonable inference of contempt, we have only to consider the form of committal.

From the admitted report of the proceedings it appears that upon the alleged contempt taking place the judge said, "I shall impose a fine of £5 or committal for six days," and an entry is made by him on his book of

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

"Fine of £5 or six days." Later on there is a further discussion between the judge and Turner, when the judge held that Turner declined to apologize. It is impossible for judges not present on the occasion to realize all that took place. A vast deal depends on the manner, tone, circumstances, &c. The fact remains that the judge held that Turner did not apologize, and the judge thereupon ordered a warrant of committal to be made out. The only question of law on this first point is, Whether there were proper materials from which the judge could draw an inference that a contempt was committed? There clearly were such materials. But it is said on the second point that the warrant is wrong in form, because upon the first committal of the offense the judge imposed a fine, and only imprisonment in default, whereas the warrant in the final form only orders imprisonment. But it is clear that the judge finally ordered the warrant to be made out for committal for six days without referring to the fine. He might change his mind as to that. All that we have to go by is the authorized form under the statute. It is clear that no steps were taken to enforce the fine. No warrant was signed and sealed as required by the section. No way can be suggested in which that fine could be levied. The mere entry of the note in the judge's book is of no effect. We must go by the warrant, which is finally signed by him under his hand and sealed with the seal of his court. This warrant only recites a committal for six days. And such a committal he was authorized to make under the section. In point of law no fine was imposed. It amounts to a mere expression of his intention. When he came to exercise his power under the statute he imposed imprisonment without the option of a fine. The Divisional Court, after considering the point, held that the form of warrant applied to either imprisonment absolutely or imprisonment with the option of a fine and in default of its payment. That may be so, but I do not think it necessary for our decision to consider that point. It is sufficient for us to say that the only form of committal before us is one authorized and imposed by the law, and is the only form in which the judge, whatever his intention, has exercised the power committed to him. This appeal must, therefore, be dismissed.

Lopes, L.J.—The incident on which this appeal is founded is no doubt regrettable, and one which might perhaps have been avoided by less hastiness on either side. We have only to consider whether the power undoubtedly intrusted to a judge, but one which I have, fortunately, never found myself called upon to exercise, has been lawfully exercised. It is certainly a valuable power, but one to be cautiously and temperately exercised. There are two questions for us to decide. (1) Whether or not there was any reasonable ground on which the judge could come to the conclusion, as he did, that a contempt was committed? The jurisdiction of the superior court in matters of contempt is plainly put by Blackburn, L.J., in *Ex parte Pater* in words upon which I cannot improve: "This court has power to set right inferior courts if they act beyond their jurisdiction. But if the inferior court had before them reasonable evidence from which they could draw the conclusion that the facts which gave them jurisdiction existed, and they drew that conclusion, we cannot say that we do not draw the same conclusion, and reverse their judgment. I agree that in considering a question of contempt we must see whether the inferior court had reasonable grounds for adjudging that a contempt had been committed, but we must bear in mind that the court is the judge whether it has been treated with contempt:"

Applying the words to the present case, we have to consider whether the expressions used and uttered by one who, as a solicitor, was bound to consider himself an officer of the court, were words capable in law of being held to amount to contempt? It is impossible to say that they were not capable of being so held. If so, the fact of there being any contempt committed is one for the judge alone to decide. He has to draw the inference on reasonable materials of a contempt being intended, and as this court is bound to hold that such words were capable of conveying contempt, we must revise the conclusion to which the judge who had them and witnessed all the circumstances of their come. The second and only other question is, Whether the warrant was defective in form? It is necessary, in order to decide upon this, to refer to section 118 of the County Courts Act, 1846. There are three courses left open by that section to the judge. He may either detain the offender until the rising of the court, or he may issue a warrant for his committal, or he may by warrant impose a fine, and only commit pending the non-payment of such fine. In both the latter cases he must exercise his power by a warrant signed and sealed. The warrant here is certainly one for the absolute committal of the appellant. It is said to be bad because the judge directed earlier in the day that a fine of £5, or committal for six days, should be imposed. But what finally happened? The county court judge may have thought at first that a fine or imprisonment in default was the proper course, but he issued no warrant to that effect. The entry in his book, or on the minutes of the court-book, would be quite inoperative to carry out his intention. He was quite free to review his decision if he thought fit. No fine could have been recovered upon the authority of such entry. It appears that later on the judge was inclined to mitigate his view of the case if Turner had thought fit to apologize, but Turner, for good or bad reasons, it is not for us to say, persisted in his view of the impossibility of his withdrawing the expression. Then this warrant issue. It is one authorized by the Act, and cannot, therefore, be quashed on any plea of irregularity. I entirely agree with my brother Lindley's judgment, and with the result of the judgment in the court below.

Appeal dismissed.

Solicitor for the appellant, *G. H. Carthew.*

Solicitors for the respondent, *Smiles, Binyon, & Ollard*, for *Slaney*, Newcastle-under-Lyme.

It being found, upon inquiry, that it was doubtful whether this appeal should have been heard,

Lindley, L.J., said: "It is doubtful whether this was not a criminal matter, upon which we could not have heard an appeal. At any rate, this must not be taken as a precedent for hearing such appeals."

From Q. B. Div. June 12.

Swain v. Ayres. (a.)

Landlord and tenant—Lease—Agreement for lease—Breach of covenant to repair—Forfeiture—Notice—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict.* c. 41), s. 14.

The notice required by section 14 of the Conveyancing and Law of Property Act, 1881, *is only requisite where there is an actual existing lease or where there is an agreement for a lease of which the court will grant specific performance.*

Appeal from the decision of Charles, J. (reported 20 Q. B. D. 585).

The action was brought to recover possession of a house and premises in High-road, Lee, in the county of Kent, and for mesne profits.

(a.) Reported by A. P. Perceval Keane, Esq., Barrister-at-Law.

It appeared that, by an agreement dated July 25, 1853, E. Larwell, for himself, his executors, administrators, and assigns, agreed to let the premises in question to H. G. Mortimer, his executors, administrators, and assigns, from June 24, 1853, for a term of eighty years at a specified annual rent, and Mortimer agreed to accept a lease of the premises. The agreement further provided that the lease should contain all usual covenants, and particularly covenants to pay rent and to keep the property in good repair, and that, on the breach of any of the covenants by Mortimer, Larwell should be at liberty to re-enter and take possession.

The plaintiff was the assignee of the reversion expectant upon the determination of the term of eighty years, and the defendant was the assignee of Mortimer's interest.

In 1887, when the writ was issued, a year's rent was due in respect of the premises, and the premises had not been kept in repair in accordance with the terms of the agreement.

The defendant contended that he was entitled to notice, which it was admitted had not been given before action, under section 14 of the Conveyancing and Law of Property Act, 1881.

The section provides that: "A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable by action or otherwise unless and until the lessor serve on the lessee a notice specifying the particular breach complained of; and, if the breach is capable of remedy, requiring the lessee to remedy the breach."

Charles, J., held that the agreement did not constitute a lease within the meaning of the section, and gave judgment for the plaintiff.

The defendant appealed.

Cavanagh and *Moyses*, for the appellant. — The defendant has paid rent for many years. He is therefore tenant from year to year. A tenancy from year to year has always been regarded as a lease: Shepherd's Touchstone, vol. 1, p. 266. There was here an agreement for a lease and a subsequent payment of rent. That is in itself sufficient to constitute a lease: *Bennett* v. *Ireland*, E. B. & E. 334, 7 W. R. C. L. Dig. 47; *Coatsworth* v. *Johnson*, 55 L. J. Q. B. 220, 34 W. R. Dig. 94. This would be good as a lease in equity: *Hill* v. *Barclay*, 16 Ves. 403; *Walsh* v. *Lonsdale*, 31 W. R. 109, 21 Ch. D. 9. There were special circumstances in this case which would have induced a court of equity to grant specific performance of the agreement even although there had been a breach of the covenant to repair. Finally, the reason that a court of equity would not grant specific performance of an agreement for a lease where there had been a breach of covenant was because it would do nothing in vain, and the lease would be liable to be immediately set aside by the entry of the lessor; but since the Conveyancing Act the lessor cannot enter for breach of covenant without giving the notice prescribed by section 14. Therefore the courts will now grant specific performance of an agreement for a lease even when there has been a breach of covenant.

They also referred to *Doe d. Rigg* v. *Bell*, 5 T. R. 471; *Clayton* v. *Blakey*, 8 T. R. 3; *In re Maughan*, 33 W. R. 308, 14 Q. B. D. 956; *Gourlay* v. *Duke of Somerset*, 1 Ves. & B. 68.

Pinlay, Q.C., and *Lush Wilson*, for the respondent, were not called upon to argue.

Lord ESHER, M.R.—In this case the defendant was, in my opinion, tenant to the plaintiff. He was a tenant upon the terms of the agreement for a lease so far as they were applicable to such a tenancy, and therefore he held upon the terms that he would keep the premises in repair, and that if he did not do so the landlord might re-enter. If he was a tenant his landlord had at law a right to re-enter and to eject him if he refused to go when he had broken the covenants. That was the case prior to the Conveyancing Act, 1881. Now, is this tenant entitled to the protection of section 14 of that Act? That depends upon whether he is in such a position as to come within the terms of the section. It says: "A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable by action or otherwise unless and until the lessor serve on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach." That is the protection which the defendant claims to have. The words are "in a lease." Now, has the defendant a lease? *Primâ facie* the section applies to the case of an existing lease, and it is clear that there is no lease in existence here in the ordinary signification of the term. The section, *primâ facie*, does not apply to a mere case of tenancy, if such can exist without a lease. But it is said that the word "lease" comprises an agreement for a lease even before entry or payment of any rent. I think that contention is contrary to the ordinary meaning of language. Charles, J., has held that the word "lease" does not comprise in this section such an agreement for a lease as this; and he fortifies that opinion by pointing out that in this very Act, when the Legislature desire, in section 18, to include agreements for leases, it expressly mentions them. I think that fortification was quite right, but I think it was unnecessary. It has been urged that those two sections of the Act have a different scope. That may be so; but that is not the point. I think that the word "lease" does not include an agreement for a lease merely because such an agreement exists.

Now does the word "lease" apply to anything more than an actual tangible existing lease? I think it applies to what is in law equivalent to a tangible lease.

The distinction between law and equity has now been abolished, and the court can enforce either. Therefore, where a court of equity would formerly have decreed specific performance of an agreement for a lease, that agreement will be held in both divisions to be equivalent to a lease and will be treated as though it were the actual lease.

Now in this case, as I have said, the defendant had a tenancy by reason of his being in possession and having paid rent to the landlord. He held that tenancy upon so many of the terms of the agreement for a lease as were applicable to a tenancy from year to year. According to the view expressed by Sir George Jessel in *Walsh* v. *Lonsdale*, if the court of equity would have granted specific performance of the agreement, he would hold upon the terms which would be introduced into the lease according to the agreement. It was rightly stated in *Bennett* v. *Ireland* that the holding would at common law have been on such of the terms of the agreement as would be applicable to a tenancy from year to year. If, however, the court would not give specific performance, then he would have only a tenancy and not a lease, and that in itself would not entitle him to the protection given by section 14. Therefore, unless the defendant here is in such a position that he could obtain specific performance of the agreement for a lease, he is not entitled to the protection of the section. Could he have obtained specific performance? It is contended that he could. It is clear that the court would not treat an agreement as an existing lease if they would not grant specific performance of it. It is also clear that the court of equity would not grant specific performance of an agreement for a lease where there had been a breach of the covenant to repair. But it is said

that the Conveyancing Act has altered the principle on which the court used to act. It is said that the court would grant specific performance of the agreement for a lease now because section 14 would apply and would give the tenant at once a *locus pœnitentiæ*. But before section 14 can apply there must be a lease or something equivalent to a lease, and it is a contradiction to say that the court will consider this as equivalent to a lease because section 14 applies.

Then it was urged that under the particular circumstances of this case the court would grant specific performance of the agreement, although there had been a breach of covenant. Unless there were other special circumstances it is clear that the court would not have granted specific performance. If there were any such special circumstances, such as surprise, or some other excuse, they were neither pleaded, nor were they brought forward at the trial. It is impossible to allow them to be brought forward now, and we must treat the case as if no such special circumstances existed. Therefore I think that the court would not grant specific performance of this agreement, that there is no lease in existence, and that the case does not fall within section 14, but that it is a mere tenancy, and not a lease. This decision may be a step further than we went in *Coatsworth* v. *Johnson* but I think the judgment there clearly shows that we were prepared to go so far.

LINDLEY, L.J.—The only question raised at the trial was whether or not the defendant was entitled to the protection of section 14. That was the sole point, and upon that point I think the decision of Charles, J., was correct. I think it would be wrong, looking at the language of the section, to hold that an agreement for a lease was the same as a lease. It is unnecessary now to say for what purposes an agreement for a lease and a lease are the same. I do not think this was a lease either at law or equity. It is said that this is a case in which specific performance would be decreed. *Primâ facie* a breach of covenant to repair is fatal to a decree of specific performance, but there may be special circumstances modifying this. No such circumstances have, however, been pleaded or raised at the trial, and it is too late to go into them now. I think Mr. Cavanagh's suggestion, that the principle on which the courts acted in granting or refusing specific performance of an agreement for a lease has been swept away by the Conveyancing Act, 1881, is most startling. But on being looked into it comes to this—that the court will grant specific performance of an agreement because section 14 applies; but it must be shown that section 14 applies before the court will grant specific performance. Section 14 applies only to leases, or to such agreements for leases, as the court will grant specific performance of. It is, therefore, arguing in a circle. The Act has been in force since 1881, and this is the first time that this contention has been raised. I cannot assent to it. I think it is unsound, and in fairness to the opposite side, if raised, it ought to have been raised on the pleadings. I think that answers the whole point. This is not a lease, and I think, under the circumstances before him, Charles, J., was right, and this appeal must be dismissed.

LOPES, L.J.—The position of the defendant is that he is tenant from year to year under the terms of the agreement for a lease as far as they are applicable. That being so, there is no lease within the meaning of section 14. It is said that the agreement is equivalent to a lease because the court of equity would grant specific performance of it. Even if this were true, which I doubt, I think that, having regard to the pleadings and evidence before the court, it would not grant specific performance. I cannot agree that the Conveyancing Act has altered the practice of the Courts of Chancery. I am clearly of opinion that the case is not within section 14, and that this appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Purser & Cooper.*

Solicitor for the respondent, *W. Bristow.*

From Q. B. Div. June 11.

LOCKHART *v.* MAYOR, &c., OF ST. ALBANS. (*a*)

Practice—Special case—Omission to serve application on each of justices present at hearing—Summary Jurisdiction Act, 1879 (42 & 43 *Vict. c.* 49), *s.* 33—*Summary Jurisdiction Rules,* 1886, *r.* 18.

The court has no jurisdiction to entertain a special case stated under the Summary Jurisdiction Act, 1879, *s.* 33, *unless the directions given by the Summary Jurisdiction Rules,* 1886, *r.* 18, *have been complied with.*

South Staffordshire Waterworks Co. *v.* Stone, 19 *Q. B. D.* 168, 35 *W. R. Dig.* 110, *approved.*

Appeal from the decision of a divisional court (Stephen and A. L. Smith, JJ.)

On March 17, 1887, an order was made against the plaintiff at petty sessions at St. Albans, after a hearing by the justices, to pay a certain sum, being part of the costs incurred by the defendants in paving a road adjoining his premises under the provisions of the Public Health Act, 1875. Counsel for the plaintiff at once informed the justices orally of his intention to apply for a case, which the justices then signified their willingness to grant.

On March 23 the plaintiff's solicitor served the clerk to the justices with an application in writing, addressed to the justices who made the order, requesting them to state a case, but no similar applications were served upon the justices present at the hearing.

The justices stated a case for the decision of the court, but upon the matter coming before the Queen's Bench Division objection was taken that rule 18 of the Summary Jurisdiction Rules, 1886, had not been complied with. The rule requires that "An application to a court of summary jurisdiction under section 33 of the Summary Jurisdiction Act, 1879, to state a case shall be made in writing and a copy left with the clerk of the court."

The Divisional Court held that they were bound by the decision in *South Staffordshire Waterworks Co.* v. *Stone,* 19 Q. B. D. 168, 35 W. R. Dig. 110, and that they had, therefore, no jurisdiction to hear the case.

The plaintiff appealed.

J. P. Grain and *Reginald Kemp,* for the appellant.—The rules are merely directory. No injustice was done, as the magistrates had been asked, and had agreed, to state a case. The stating of the case cures the defects in applying for it.

Lumley Smith, Q.C., and *Richard Muir,* for the respondents, were not called upon to argue.

Lord EHER, M.R.—The only question in this case is whether the Divisional Court had jurisdiction to entertain this appeal or not. The power to bring such an appeal is given by section 33 of the Summary Jurisdiction Act, 1879, and by that section it is provided that the application for a special case "shall be made in such manner as may be from time to time directed by rules under this Act." The effect of that is to read the rules into the Act. By rule 18 of the Summary Jurisdiction Rules, 1886, "An application to a court of summary

(*a*.) Reported by A. P. PERCEVAL KEMP, Esq., Barrister-at-Law

jurisdiction to state a special case shall be made in writing, and a copy left with the clerk of the court." There are a long series of cases beginning with *Morgan v. Edwards*, 29 L. J. M. C. 108, 8 W. R. C. L. Dig. 2, which decide that in regard to a statute relating to subject-matter similar to this, with similar directions as to appeals from magistrates, that which is directed to be done must be done in order to give the court jurisdiction. The directions are not mere directions, but they are conditions precedent to enable the court to hear the appeal. I therefore agree with the decision of the Divisional Court in *South Staffordshire Waterworks Co. v. Stone*. It is an authority directly in point, and we think it is right.

The directions, therefore, being conditions precedent to the hearing of the appeal, have they been complied with here? It is plain that they have not. The plaintiff's counsel stated orally to the magistrates at the hearing that he should apply for a case. The application was drawn up in writing, but instead of being sent to the justices it was simply served on their clerk. It was therefore, so far as we know, not called to the attention of the justices at all. The case of *Ex parte Curtis*, 3 Q. B. D. 13, shows that the application must be served on each of the justices who were parties to the proceeding. I think, therefore, that the condition was not complied with, and that the court had no jurisdiction to hear the appeal.

Lindley, L.J.—I am of the same opinion, and I think it is impossible to arrive at any other conclusion. We cannot overrule the long series of authorities which decide that such directions must be observed in order to entitle the court to hear the appeal.

Lopes, L.J.—I think that the directions given by rule 18 must be complied with before the court can hear the appeal. In this case there was no written application to the justices to state a case. That was, in my opinion, a condition precedent to the hearing of the appeal, and, the rule not having been complied with, the court had no jurisdiction to entertain the appeal, and were right in refusing to hear it.

Appeal dismissed.

Solicitors for the appellants, *Lovell, Sons, & Pitfield*, for *H. E. Lockhart*, Luton.

Solicitor for the respondent, *G. C. Annesley*.

High Court of Justice.

Chan. Div. } Kay, J. } Feb. 20.

Howard v. Patent Ivory Manufacturing Co. (a.)

Company—Contract by trustee for intended company—Ratification—New contract—Borrowing power over "properties and rights" of company—Mortgage of uncalled capital.

The directors of a company, in accordance with the provisions of its memorandum and articles, adopted an agreement entered into before its formation by a trustee for the company for the purchase of certain leasehold premises and other property (the vendor of which was one of the directors), the price having been previously varied with his consent by substituting debentures for cash payment. The leasehold premises were accordingly assigned to the company, who sealed the deed of assignment and took possession of the premises, and carried on their business there. And the debentures were issued to the vendor and his nominees.

The company was afterwards wound up, and the liquidator obtained from the vendor an assignment of the other property comprised in the agreement.

On a claim by the debenture holders to enforce their security,

Held, that there existed a contract between the company and the vendor to the effect of the previous agreement, with the variation as to payment, and that the debentures were issued for the purpose of such payment, and were valid.

In re Northumberland Avenue Hotel Co., 33 *Ch. D.* 16, 35 W. R. Dig. 38, *considered and distinguished.*

A power to mortgage the company's "properties and rights"

Held, to include a power to mortgage the uncalled capital of the company.

Bank of South Australia *v.* Abrahams, 23 *W. R.* 668, *L. R.* 6 *P. C.* 265, *distinguished.*

Trial of issues in the action.

By an agreement of the 25th of April, 1885, T. R. Jordan agreed to sell to W. Wyber, as trustee on behalf of a company about to be formed under the name of the Patent Ivory Manufacturing Co., a certain invention and patents for the same, and Jordan and R. E. Commans agreed to sell to the company certain leasehold premises, stock, and goodwill, for a sum of £36,500, payable £6,500 in cash to Jordan and Commans, and the balance in fully paid-up shares to them or their nominees.

The company was registered on the 29th of April, and the memorandum of association stated that the objects of the company were (*inter alia*) to adopt, ratify, and carry into effect (either with or without variation) the agreement of the 25th of April, 1885; to acquire the invention, patents, mills and premises, plant, machinery, stock in trade, and goodwill above-mentioned and other property; and to borrow money on behalf of the company, and mortgage, sell, and dispose of all or any part of the company's properties and rights.

The articles of association provided as follows:—(Art. 3) "The directors shall forthwith adopt, on behalf of the company, the agreement of the 25th of April, 1885, mentioned in the memorandum of association, and shall carry the same into effect, with full power, nevertheless, from time to time to agree to any modification thereof; (art. 94) the management of the business and the control of the company shall be vested in the directors, who, in addition to the powers and authorities by these articles expressly conferred on them, may exercise all such powers and do all such acts and things as may be exercised or done by the company, and are not hereby or by the statutes expressly directed or required to be exercised or done by the company in general meeting; but subject, nevertheless, to any regulations from time to time made by the company in general meeting, provided that no regulation shall invalidate any prior act of the directors which would have been valid if such regulation had not been made; (art. 95) without prejudice to the general powers conferred by the last preceding article, and of the other powers conferred by these articles, it is hereby expressly declared that the directors shall have the following powers (*a*) to execute all deeds and documents which they from time to time think necessary, and for that or any necessary or advisable purpose to use the common seal of the company, (*b*) to borrow from time to time, on behalf of the company, such sums of money not exceeding in the whole at any one time £1,000 as the directors think necessary or advisable; also to raise such further moneys as may be authorized from time to time by resolution of any general meeting of shareholders summoned for the purpose, (*c*) to secure the repayment of any moneys so borrowed

(a.) Reported by H. F. Ambroz, Esq., Barrister-at-Law.

together with interest, by debentures, mortgages, . . . or otherwise, and generally in such manner and upon such of the property and assets of the company and upon such terms and conditions as the directors may think fit.

At a meeting of the directors on the 27th of May, 1885, at which Jordan, who was a director, was present, it was resolved that the agreement of the 25th of April, 1885, should be and the same was thereby adopted.

At a similar meeting on the 6th of June, 1885, Jordan again being present, it was resolved that, in consideration of Jordan's accepting £3,000 in cash and £3,500 in debenture stock in the company, bearing interest at the rate of six per cent. per annum (the expression debenture stock being apparently used by inadvertence instead of debentures), an allotment of shares should be proceeded with, and an allotment of shares to Jordan and others was then made.

At a meeting on the 17th of June, Jordan again being present, it was resolved that the company's seal should be affixed to the agreement of the 25th of April, 1885—this, in fact, was never done—and to the thirty-five debentures of £100 each to Jordan and Commans in part payment of the £6,500; and to the deed of assignment of the leasehold premises. By this deed, which was executed by Jordan and by the company under their seal, after reciting the original lease and assignment to Jordan, the assent of the lessor to the assignment, and that Jordan had agreed to sell the premises to the company for £200, Jordan, in pursuance of that agreement, assigned the premises to the company. And the company thereupon entered into possession of the leasehold premises and carried on their business there. Also the thirty-five mortgage debentures were duly issued to Jordan and Commans, bearing interest at six per cent., and expressed to be a charge upon the company's "undertaking, and all its property, both present and future, including its capital for the time being uncalled."

On the 13th of September, 1886, the holders of these debentures, who were all directors of the company, gave notice calling in the principal money thereby secured, and on the 16th of September a petition was presented for winding up the company, on which, on the 6th of November, an order was made and an official liquidator appointed.

On the 3rd of March, 1887, by an indenture between Jordan of the first part, the company of the second part, and the liquidator of the third part, reciting the agreement of the 25th of April, 1885, the incorporation of the company, that the agreement was duly adopted by the company on the 27th of May, 1885, that the payment of cash and allotment of shares to Jordan as afterwards varied was agreed to by the company, and the grant of the letters patent, Jordan, at the request of the liquidator, assigned his interest in the letters patent to the company.

This action was brought by one of the holders of the thirty-five debentures on behalf of himself and the other debenture holders to establish and enforce their securities, and on the 31st of March, 1887, on the application of the plaintiff and Jordan, an order was made that the following issues be tried—(1) whether any and which of the thirty-five debentures were invalid, and (2) what property of the company was charged by such debentures?

Byrne, Q.C., and *Spence*, for the plaintiff and other debenture holders.—The directors had power to, and did, adopt the agreement of the 25th of April, 1885, as modified by the payment in debentures instead of cash, and this amounts to a new contract by the company with Jordan. Besides, the company entered and used the leasehold premises, and both the company and the liquidator took assignments thereof. The debentures were issued on account of a good debt from the company, and are therefore valid: *Blackburn Building Society* v. *Cunliffe, Brooks, & Co.*, 31 W. R. 96, 22 Ch. D. 61. [Kay, J., referred to *Gregory* v. *Mighell*, 18 Ves. 328, and *Wilson* v. *West Hartlepool Railway Co.*, 13 W. R. 361, 2 De G. J. & S. 475.]

Millar, Q.C., and *L. H. Rosenthal*, for the liquidator.—The agreement of the 25th of April 1885 was not binding on the company, when formed, and there is no evidence of a new contract by the company: *In re Express Engineering Co.*, 29 W. R. 342, 16 Ch. D. 125, and *In re Northumberland Avenue Hotel Co.*, 33 Ch. D. 16, 35 W. R. Dig. 38. At any rate, the directors had no power to borrow beyond £1,000, and the fact that the debentures were issued for a pre-existing debt is immaterial: *In re Inns of Court Hotel Co.*, L. R. 6 Eq. 82, 16 W. R. Ch. Dig. 65; *Landowners', &c., Co.* v. *Ashford*, 16 Ch. D. 411, 29 W. R. Dig. 141; *Irvine* v. *Union Bank of Australia*, 25 W. R. 682, 2 App. Cas. 366. And the debentures are invalid so far as they affect unpaid capital: *Bank of South Australia* v. *Abrahams*, 23 W. R. 668, L. R. 6 P. C. 265; *Stanley's case*, 12 W. R. 894, 4 De G. J. & S. 407.

Byrne, in reply.—The power of borrowing under the memorandum of association is not limited by the power given by article 95. The words "properties and rights" of the company are sufficient to include unpaid capital.

Kay, J. [after referring to the memorandum and articles of association of the company as above set out, and stating the facts of the case, and observing that there could be no kind of doubt that the leasehold premises were assigned by Jordan to the company in pursuance of the arrangement made by the directors, of whom he was one, in his presence and with his assent, that the company should adopt the agreement made by Jordan before the company had been formed, continued as follows:—] The liquidator now comes here and, in the name of the company, says, "It is quite true that I have got all this property"—it is very nearly, I am told, all the property comprised in the agreement of the 25th of April, 1885—"it is quite true that the company, on the 27th of May, 1885, adopted the agreement by resolution, Mr. Jordan being present and assenting; and it is quite true that the agreement with Mr. Jordan was varied by inducing him to take instead of cash a certain amount of his payment in debentures, and thereupon these debentures were issued; now, with this deed in my hand, which I have myself obtained since the winding up, I say that the whole thing was void, and that these debenture-holders are entitled to nothing." Well, one would condemn that, if it were the act of an individual, rather strongly. It is said that companies have no conscience; but the liquidator of a company might as well have a conscience, especially when acting in the character of an officer of this court. This court does not allow itself to act dishonestly, and a more thoroughly dishonest proceeding than that would be I cannot well imagine.

But it is said that I am bound by authority. Now, how stands the law? It has been settled by numerous cases that where a company takes possession of landed property under a parol agreement, without having executed any document under its seal, or any writing signed by any agent (such as would satisfy the well known provisions of the 37th section of the Companies Act, 1867) such company may be just as much bound by the equitable rule of part performance, although it is a corporation, as an individual may be. There are many authorities on that point. They are all collected in the work of Fry, L.J., on Specific Performance (2nd ed., p. 280), but I will refer to one case, to which I called the attention of counsel during the argument, which contains the expression of the opinion of a

the most eminent judges we have had of late years—the late Lord Justice Turner. In the case of *Wilson v. The West Hartlepool Railway Co.* that learned judge says: "It was contended on their part that companies are not bound by acts of part performance, and that the acts which have been done in this case furnish no equity against the defendants, because they are acts to the prejudice of the defendants only, and not of the plaintiff; but I cannot accede to either of these arguments. Neither of them is, in my opinion, consistent with the principle on which this court proceeds in cases of part performance. The court proceeds in such cases on the ground of fraud, and I cannot hold that acts which, if done by an individual, would amount to a fraud, ought not to be so considered if done by a company, nor can I say that it is no prejudice to the plaintiff to have been permitted to take possession on the faith of an agreement, and afterwards to be held liable to be treated as a trespasser and turned out of possession on the ground that there was no agreement. There is authority for saying that in the eye of this court it is a fraud to set up the absence of agreement when possession has been given upon the faith of it." That is a very distinct decision which, so far as I know, has never been departed from, that the rule of equity that part performance will take a case out of the Statute of Frauds applies to an incorporated company, and that an incorporated company which comes within that doctrine of part performance is just as much bound by it as if it were an individual. In the same case there is a summary of another part of the law to which I have often had occasion to refer: "Where possession has been given on the faith of an agreement, it is, I think, the duty of the court, as far as it is possible to do so, to ascertain the terms of the agreement and to give effect to it."

But then it is said that here there was no agreement between the company and Mr. Jordan. There was an agreement between Mr. Jordan and a person who professed to be trustee for the company before the company was formed. But that agreement, it is said, is completely null and void, and could not be ratified by the company; and, under the circumstances, the court cannot infer that there ever was an agreement, either parol or otherwise, between Mr. Jordan and the company. The authorities for that are some well-known cases, all of which, I believe, proceed upon the case of *Kelner* v. *Baxter*, 15 W. R. 276, L. R. 2 C. P. 174. The case mainly relied upon is *In re Northumberland Avenue Hotel Co.*, but before proceeding to consider that I will notice another case in which the decision was in favour of the company—*In re The Empress Engineering Co.* I notice that case for this reason, that the late Master of the Rolls, Sir George Jessel, in giving judgment, said:—"The contract between the promoters and the so-called agent for the company, of course, was not a contract binding upon the company, for the company had then no existence, nor could it become binding on the company by ratification, because it has been decided, and, as it appears to me, well decided, that there cannot in law be an effectual ratification of a contract which could not have been made binding on the ratifier at the time it was made, because the ratifier was not then in existence." But he adds this:—"It does not follow from that that acts may not be done by the company after its formation which make a new contract to the same effect as the old one, but that stands on a different principle." That is to say, recognizing entirely the well-settled law that a company is bound by acts of part performance, and that when you find a company in possession of the property of another person you are bound, if you can, to refer that possession, not to trespass, but to contract, and as Turner, L.J., said in the words I have quoted, to find out, if you possibly can, what that contract is, the Master of the Rolls excepts from the judgment which he is giving in that case, cases of that kind where there have been acts of a company from which you can infer, and from which you ought to infer, that there was a contract by the company after its formation.

Now the case mainly relied upon—namely, *In re the Northumberland Avenue Hotel Co.*—is certainly one of very considerable difficulty, but in order to ascertain whether it binds me here to hold that there was no contract, I must see whether the facts were the same. In the first place, before I refer to that case, I must observe that the question whether there was a contract between this company and Mr. Jordan is a question, not of law, but of fact. Am I bound, because in one case the court, upon evidence before it, came to the conclusion as a matter of fact that there was no written contract, to hold that in this case there was no such written contract? The finding of a jury upon one set of facts does not bind the jury upon another set of facts; nor does the finding of any court bind another court where the facts are not the same.

In the case of *In re the Northumberland Avenue Hotel Co.* the facts were these:—Wallis having negotiated with the Metropolitan Board of Works for a grant to him of a lease of certain land for eighty years at a large rent upon his erecting certain buildings within a specified time, entered into an agreement in writing with them on the 2nd of October, 1882. But before he had got his own agreement, an agreement dated the 24th of July, 1882, had been entered into between one Nunneley and Doyle "as trustee for and on behalf of an intended company to be called the Northumberland Avenue Hotel Co. (limited)," which recited that Nunneley, as agent for and on behalf of Wallis, had agreed to grant to the company, and that Doyle, on behalf of the company, had agreed to take, an underlease, subject to certain conditions, for eighty years less one day of the original lease. The agreement contained stipulations like those in ordinary building agreements, and by clause 23, reciting that Wallis was negotiating for further plots of land, the company purported to agree (for they were not then in existence) to become lessees of them at such rent and upon such conditions as might be agreed upon between them and Wallis. So far that case was quite like the present case. The contract to which I have just referred was made before the company was formed; of course, it could not bind an unformed company which was formed afterwards. The company was formed the next day, the 25th of July. The agreement was not mentioned in the memorandum of association, but the 2nd clause of the articles of association purported to adopt it, and provided that the company should carry it into effect, subject to any modification which might be agreed upon between Nunneley and the company. The company, after their incorporation, did not enter into any further agreement in writing with Wallis, but they acted on the agreement of the 24th of July, 1882—that is to say, the agreement made before the company was formed. The company took possession of the ground and spent £40,000 in building upon it. There was no note or memorandum of contract with Wallis or seal on behalf of the company after their incorporation. Wallis afterwards commenced an action against the company for specific performance of the 23rd clause of the agreement, by which they were to take certain other plots of land from him. This action was compromised, and the company agreed to accept a lease of the additional ground. That agreement, of course, did not at all refer to the rest of the contract between them. The company paid the rent to Wallis, and several resolutions were passed, with the assent of Wallis, purporting to modify some of the terms of the agreement of the 24th of July, 1882, but none of these modifications were carried into effect by means of any written document.

Now I confess that that last part of the case does seem

to me to create very considerable difficulty. If the company did agree with Wallis to modify the original agreement I should have thought on the face of it, though, of course, I am wrong, that there was enough evidence to justify the court in inferring that they had entered into an agreement with Wallis to the same effect as that original agreement, especially when you couple with that the fact that they had taken possession of the land. However, what actually occurred was this: afterwards the company did not get sufficient capital to enable them to continue their works, and Wallis served them with notice to re-enter. On the 13th of May, 1884, the Metropolitan Board of Works, the ground landlords, the original lessors to Wallis, put an end to the agreement with Wallis; so that the property was entirely recovered under a title paramount by the Metropolitan Board of Works, and they resumed possession. Then the company was wound up, and Wallis became bankrupt, and the trustee in bankruptcy of Wallis took out a summons to be admitted a creditor for damages for breach of the agreement. The thing was gone, and the court had to consider whether there had been a binding agreement under the circumstances between Wallis and the company, and such breach of it as entitled his trustee in bankruptcy to prove for damages against the company. These are the material parts of the judgments. Cotton, L.J., said: "But it is said that we ought to hold that there was a contract entered into between the company and Wallis on the same terms (except so far as they were subsequently modified) as those contained in the contract of the 24th of July, 1882. In my opinion that will not hold. It is very true that there were transactions between Wallis and the company in which the company acted on the terms of that contract entered into with Wallis by the person who said he was trustee for them. But why did the company do so? The company seem to have considered, or rather its directors seem to have considered, that the contract was a contract binding on the company. But the erroneous opinion that a contract entered into before the company came into existence was binding on the company, and the acting on that erroneous opinion, does not make a good contract between the company and Mr. Wallis; and all the acts which occurred subsequently to the existence of the company were acts proceeding on the erroneous assumption that the contract of the 24th of July was binding on the company. In my opinion that explains the whole of these transactions. The case is entirely different from those cases which have been referred to where the court, finding a person in possession of land of a corporation, and paying rent, has held that there was a contract of tenancy. There was no mode of explaining why the occupier was there, except a tenancy, unless he was to be treated as a trespasser. The receipt of rent by the corporation negatived his being a trespasser, and it was therefore held that there was a tenancy. Here we can account, and in my opinion we ought to account, for the possession by the company, and for what it has done, by reference to the agreement of the 24th of July, which the directors erroneously and wrongly assumed to be binding upon them." Then Lindley, L.J., said that he was of the same opinion, and added: "The more closely the case is investigated the more plainly does it appear that there never was any contract between the company and Wallis." That was a finding, as I have said, of fact.

Now, am I bound to find that there never was any contract as a result of the facts proved in the present case? Here there was passed in Mr. Jordan's presence a resolution of the board of directors, to which he was a party, adopting this agreement. There was the conveyance by Mr. Jordan of the leasehold property comprised in the agreement, and the seal of the company was affixed to it—clearly and obviously carrying out the contract between Mr. Jordan and the company, which the company, by that adoption, seem to me distinctly to have made. There were no such facts as these in the case of *In re the Northumberland Avenue Hotel Co.* Besides all that, I have here the payment of part of the price in debentures. That was a variation of the contract made by distinct agreement with Mr. Jordan, after the passing of a resolution for the issue of the debentures contemporaneously with the deed by which Mr. Jordan assigned part of the property to the company. After the winding up the liquidator took an assignment of all the rest of the property of which he could possibly get an assignment in pursuance of the very same arrangement. Now he comes to the court and asks the court to say that there never was a contract between the company and Mr. Jordan. He says "True I have taken from Mr. Jordan everything I could possibly get from him. The company took an assignment of the leasehold premises which they have held ever since. I have treated all these as assets of the company, and I now turn round and say that there never was such an agreement." Such a course of conduct would be, as I have characterized it during the argument, the most flagrant dishonesty. It is saying "You shall not be paid for the property at all." I should not hold that unless I were bound by authorities very much more stringent than those which have been cited. Nor do I think that any branch of the court would hold anything of that kind. In my opinion it is very clear that there was a contract between Mr. Jordan and the company. That is the only possible inference I can draw from the facts which I have stated. Therefore, so far as that matter goes, I think it is perfectly plain that the money for which these debentures were issued in payment was due at the date when the debentures were issued, because I am quite clear that this contract existed on the 17th of June, and indeed on the 27th of May, when Mr. Jordan agreed with the other directors that the contract should be adopted as between himself and the company.

Then I have to consider certain other points which have been raised. One of them is this. It is said that these debentures, on the face of them, purport to bind the undertaking and all the property of the company, both present and future, including the capital for the time being uncalled; and it is said that that is invalid. The authority cited in support of that proposition is *Bank of South Australia* v. *Abrahams*, in which, there being a power to directors to charge the property of the company, it was held that that did not authorize them to include in such charge future calls—or, in other words, the unpaid capital of the company. In *Stanley's case*, which was there approved, there was a power to charge the property and funds of the company. But in the present case the terms of the memorandum of association, which, as Lord Cairns said in *Ashbury Railway Carriage and Iron Co.* v. *Riche*, 24 W. R. 794, L. R. 7 H. L. 653, at p. 668, is "the charter of the company," were these—"To borrow money on behalf of the company, and to mortgage, sell, or dispose of all or any part of the company's property and rights." It is one thing to say that the power of mortgaging the property of a company does not authorize the mortgage of that which at the time was not its property but might thereafter become its property; but it is quite another thing, and it is going much further, to say that a power to mortgage the rights of a company does not authorize a mortgage of a right which the company has, by contract, to call up the uncalled capital. In my opinion these debentures were framed rightly enough, and do include the uncalled capital.

Now, it has not been denied that, to the extent to which there was a *bonâ fide* debt, it was legitimate to issue debentures to the creditor, and to treat that as a borrowing. That has been decided in several of the cases that were cited—as, for instance, *In re The Imo*

of Court Hotel Co., and *Landowners', &c., Co.* v. *Ashford.* I have no doubt that that is the law, and the reason for it is quite clear and obvious. If you might not issue debentures to a creditor under a borrowing power it would come to this, that you would have to issue debentures to the bankers, or to somebody else, who would advance the money, and then pay that money over to the creditor, or issue debentures to the creditor himself, he lending you money first, and then you paying it back to him. Of course, it is obvious that such a roundabout proceeding as that need not be resorted to, and the court looks to the substance of the matter. Therefore the issue of debentures under the borrowing power to a person who is already a creditor of the company may well be treated as a proper issue of debentures.

But then a very much more serious question has been raised, and that is this. These debentures were issued by the directors, and it is said that the power of the directors to issue debentures is limited; and the limit is very plain when you look at article 95, which is as follows:—The directors are empowered "to borrow from time to time on behalf of the company such sums of money, not exceeding in the whole at any one time £1,000, as the directors think necessary or advisable, also to raise such further moneys as may be authorised from time to time by resolution of any general meeting of shareholders summoned for the purpose." So that when the directors have borrowed up to £1,000, and there are existing loans unpaid to that amount, the borrowing power of the directors is exhausted, and no more can be borrowed without the authority of a general meeting of shareholders. Then the next article is, "To secure the repayment of any moneys so borrowed, together with the interest, by debentures." Therefore the directors could only issue valid debentures for moneys borrowed by themselves, without the assent of a general meeting, to the extent of the borrowing power; beyond that, in order to authorize themselves to borrow and to issue debentures, there must be the assent of the general meeting.

Now, in this case, unfortunately for the holders of these debentures, they are all directors, and therefore the well-known authorities which make it necessary to see whether the internal regulations of a company have been observed or not, do not apply; because, of course, the directors must be taken to know that the internal requirements of the company had not been observed in the case of these debentures. Accordingly, I am very sorry to say that I cannot treat the debentures as valid to the extent of more than £1,000. How that sum is to allotted between the different parties I do not know. I have heard nothing on that point. I must treat the issue of the debentures as being invalid within the knowledge of the directors beyond the amount of £1,000.

There must be a declaration that the first ten only of the thirty-five debentures, taking them according to their numbers, are valid.

Solicitors, *Keddey Ray Fletcher; Saul Solomon.*

Chan. Div. North, J. June 27.

In re Churchill.

Manisty *v.* Churchill. (*a.*)

Principal and surety—Crown debt—Payment of debt by surety—Rights of surety—Mercantile Law Amendment Act, 1856 (19 & 20 *Vict. c.* 97), *s.* 5.

A surety who has paid a debt due to the Crown from his deceased principal debtor is entitled to stand in the places of the Crown, and to be admitted as a creditor of the estate of the principal debtor in priority to all other creditors.

Adjourned summons.

On the 8th of July, 1875, Francis George, Lord Churchill entered into a bond with the Crown for the payment by instalments of £500 each of a sum of £7,083 4*s.* 5*d.*, being the amount of principal, interest, and costs due from him in respect of money in his hands as Commandant of the Queen's Own Oxfordshire Yeomanry, for the recovery of which proceedings had been instituted in the Court of Exchequer at the suit of the Attorney-General.

At the same time, and as a part of the arrangement, Francis Nathaniel, Marquis Conyngham entered into a bond of equal date as surety for Lord Churchill for payment of any balance which should remain unpaid at the death of the latter.

The Marquis Conyngham died on the 17th of July, 1876, and his will was proved in the Principal Registry of the Probate Division of her Majesty's High Court of Justice on the 25th of August, 1876, the present trustees being Sir Theodore Henry Brinckman and William Henry Saltwell.

The instalments of £500 agreed to be paid by Lord Churchill, as mentioned in his bond, were paid up to the 1st of May, 1879, but in consequence of the agricultural depression no payment was ever made by him after that date, and in 1880 a writ of extent was issued and an inquisition was held, but without effect, his lordship's real estate being subject to prior incumbrances and charges which left no margin available to answer the Crown debt.

Lord Churchill died on the 24th of November, 1886, intestate.

On the 5th of January, 1887, Sir Theodore Henry Brinckman and William Henry Saltwell, as trustees of the will of The Marquis Conyngham, and in pursuance of the bond entered into by him with the Crown, paid to the Crown the sum of £5,171 13*s.* 9*d.*, being the balance of the principal remaining due at the death of Lord Churchill under his bond, with the interest due thereon, for which sum a receipt was given by the solicitor for the affairs of her Majesty's Treasury and indorsed upon the bond entered into by the Marquis Conyngham, which receipt is as follows:—

"Received this 5th day of January, 1887, of Sir Theodore Henry Brinckman, Baronet, and William Henry Saltwell, trustees of the estate of the within-named Francis Nathaniel, Marquis Conyngham, the sum of £5,171 13*s.* 9*d.*, in full discharge of the principal money and interest secured by the within-written bond, which is hereby delivered up, together with the within-mentioned bond of Francis George Spencer, Baron Churchill.

"Augustus K. Stephenson,
"Solicitor for the Affairs of her Majesty's Treasury."

The Crown debt was never registered nor was a writ of execution ever registered in respect of the same debt.

The action was brought by the trustees of the Law Life Insurance Office, on behalf of themselves and all other creditors of the late Lord Churchill, for the administration of his estate, which is insolvent, the defendant being the administrator of the estate.

This was a summons by Sir Theodore Henry Brinckman and William Henry Saltwell as trustees of the late Marquis Conyngham, who, having paid out of their testator's estate £5,171 13*s.* 9*d.*, the amount of the debt due to the Crown, claimed as representatives of the surety to have the same rights against the estate of the intestate principal debtor, and to have the same priority in the administration of his estate, as the Crown would have had, their claim to priority being opposed by the plaintiffs in the action.

(*a.*) Reported by J. Trustram, Esq., Barrister-at-Law.

Cozens-Hardy, Q.C., and *W. F. Hamilton*, for the summons.—The Crown is entitled to priority in payment of its debts: *In re Henley & Co.*, 26 W. R. 885, 9 Ch. D. 469; *In re Oriental Bank Corporation, Ex parte The Crown*, 28 Ch. D. 643, 33 W. R. Dig. 47; Bankruptcy Act, 1883, s. 150; *In re Maggi*, 30 W. R. 729, 20 Ch. D. 545; Judicature Act, 1875, s. 10; *In re Williams, ante*, p. 34, 36 Ch. D. 573; *In re M'Myn*, 35 W. R. 179, 33 Ch. D. 575. The surety who has paid a Crown debt of his principal debtor is entitled to stand in the place of the Crown: *Reg.* v. *Bennett*, Wightwick, 1; *Reg.* v. *Doughty*, Ibid., 2.

They also referred to the Mercantile Law Amendment Act, 1856, s. 5; *Thomas* v. *Patent Lionite Co.*, 29 W. R. 596, 17 Ch. D. 250.

Cookson Crackanthorpe, Q.C., and *Method*, for the plaintiffs.—Although the Crown may be entitled to priority in payment of its debts, yet the surety who has paid a Crown debt of his principal debtor is not entitled to the priority of the Crown as against personal estate. The cases of *Reg.* v. *Bennett* and *Reg.* v. *Doughty* deal with extents, and are not in point.

They referred to the Bankruptcy Act, 1883, s. 40; the Mercantile Law Amendment Act, 1856, s. 5; *In re Russell*, 29 Ch. D. 254, 33 W. R. Dig. 170; *In re M'Myn*.

North, J.—I think that the claim of the applicant is well founded. The claim is for a debt in respect of which the Crown is entitled to priority because of its right to be paid in preference to other creditors. By the ordinary rule a surety has a clear well-founded right on general principle to stand in the place of the creditor against the estate of the debtor whose debt the surety has paid. There used to be a technical difficulty which prevented him from obtaining his remedy in some cases. That difficulty was removed by the Mercantile Law Amendment Act, 1856, which provides, by section 5, that a surety for the debt of another who pays such debt shall be entitled to have assigned to him every judgment, specialty, or other security which shall be held by the creditor in respect of such debt "whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt . . . and such person shall be entitled to stand in the place of the creditor and to use all the remedies . . . of the creditor." In the present case the surety has paid the debt of the principal debtor which was due to the Crown, and is entitled to priority independently of that Act. He is entitled to use the words of the Act "to stand in the place of the creditor and to use all the remedies" of the creditor in order to obtain indemnification. The right of the Crown was transferred to the surety, and he is entitled to recover what the Crown could have recovered from the estate of the debtor. If authority were wanting the case of *In re M'Myn* shows that where the creditor has a right to be paid before other creditors, the surety who has paid the debt due to the creditor has by the general law the right to the same priority. In that case the creditor whose debt the surety paid had a right to be paid first through having got a judgment. I see no difference between that case and the case of priority being obtained by the general law. It seems to me immaterial whether the right of priority was gained by reason of the creditor having obtained a judgment, or by reason of the creditor having been the Crown. I am of opinion that the applicants are entitled to stand in the place of the Crown, and to be admitted as creditors of the intestate's estate in priority to all other creditors.

Solicitors, *Benbow, Saltwell, & Tryon; Walters, Deverell, & Co.*

Chan. Div. North, J. — June 25.

In re Chifferiel.

Chifferiel *v.* Watson. (a.)

Practice — Adjourned summons — Evidence filed after hearing by chief clerk—Time for filing evidence fixed by chief clerk.

On the hearing of an adjourned summons evidence filed after the time fixed by the chief clerk for the filing of evidence cannot be used unless special leave to use fresh evidence has been given either by the judge or the chief clerk.

This rule does not apply where no time has been fixed for the filing of evidence.

Adjourned summons.

This was a summons by a purchaser of property sold in the action under the direction of the court asking for a declaration that he was entitled to compensation in respect of an alleged misdescription of the property in the particulars of sale, and that the amount of the compensation might be determined.

The summons was heard by the chief clerk on the 19th of March, and on the 20th of March he expressed his opinion that the purchaser was entitled to compensation. At the request of the vendors the summons was adjourned into court.

On the 15th of May the vendors filed two fresh affidavits. No time had been fixed within which affidavits were to be filed.

The summons now came on for hearing, and the purchaser objected to the new affidavits being used.

Cozens-Hardy, Q.C., and *Beaumont*, for the vendors.—These affidavits could be used in the Appeal Court without leave, this being an interlocutory application: ord. 58, r. 4. We ask, therefore, to be allowed to use them now.

Napier-Higgins, Q.C., and *G. H. Lea*, for the purchaser.—This is not an interlocutory application; it is an application in the nature of an action, and ought, therefore, to be governed by the same rules. The vendors ought not, therefore, to be allowed to use these affidavits.

North, J.—I think I must allow these affidavits to be used, but the vendors must pay the costs of the day. The purchaser must have an opportunity of answering them, and he must file his evidence in reply within ten days. I consider that the chief clerk's fixing a time within which evidence is to be filed is exactly the same thing as if the judge fixed the time. The hearing of an application before the chief clerk is exactly the same as the hearing before the judge, subject to this, that the parties have a right, if they so desire, to have the matter heard by the judge personally. I have not the slightest doubt as to the power of a judge in chambers to fix a time for the filing of evidence on any application. In future I shall allow no affidavit to be used before me which has been filed after the time fixed by the chief clerk for the filing of evidence unless I have given special leave to use new evidence, or unless the chief clerk has done so, which is the same thing. This rule will not necessarily apply to affidavits filed after the hearing by the chief clerk if no time has been fixed. I must deal with such cases as best I can when they arise.

[During the hearing Mr. Lavie, the registrar, referred the court to a manuscript note of a case of *In re Pooley* (before the Court of Appeal on May 6, 1885), in which, objection having been taken to the reading of an affidavit which had not been before the chief clerk in

(a.) Reported by G. E. Jenner, Esq., Barrister-at-Law.

chambers, Cotton, L.J., said that all affidavits filed before the matter came before the judge in court could be used if proper notice were given, even though they had not been used before the chief clerk. It did not appear that any time had been fixed for the filing of affidavits.]

Solicitors for the purchaser, *Pickett & Mytton.*

Solicitors for the vendors, *Beaumont & Son.*

Chan. Div. North, J. } May 15.

RICHARDSON *v.* FEARY. (*a.*)

Partition—Sale—Application for sale by owner of less than a moiety of the property—Discretion of court—Partition Act, 1868 (31 & 32 *Vict. c.* 40), *s.* 5.

Upon the application for a sale of property by the owner of less than a moiety under section 5 *of the Partition Act,* 1868, *the court will not direct a sale, even though none of the other persons interested undertake to purchase the applicant's share, unless the applicant shows some good reason why a sale should be made.*

Further consideration.

This was a partition action in which the plaintiff claimed a sale of the property and division of the proceeds of sale among the persons interested, or, in the alternative, a partition. At the trial of the action an inquiry was directed who were the persons interested in the property, and for what estates and interests, and in what shares and proportions. The chief clerk, by his certificate, found that the plaintiff Elizabeth Richardson, widow, was absolutely entitled to one undivided eighth share, that the defendant Neville Feary was absolutely entitled to two undivided eighth shares, subject to certain incumbrances created by him, that the defendant Neville Feary was entitled to an undivided eighth share as the surviving trustee of the marriage settlement of the defendants Thomas Cooke and Susannah, his wife, that the defendant Susannah Cooke and her husband in her right was absolutely entitled (subject to certain incumbrances) to another undivided eighth share, that the defendant Ann Matilda Nix, widow, was absolutely entitled (subject to a mortgage) to two undivided eighth shares, and that the defendants Neville Feary and Thomas Cooke, as trustees of the married settlement of Hannah Aiken, were entitled to the remaining undivided eighth share.

The action now came on for further consideration. The plaintiff desired that the property should be sold.

Farwell, for the plaintiff.—Section 5 of the Partition Act, 1868, gives any person interested in the property a right to a sale, unless the other parties interested, or some of them, agree to buy him out, or, if they do not do this, they must show some good reason why a sale should not be directed.

He referred to *Drinkwater* v. *Ratcliffe*, 24 W. R. 25, L. R. 20 Eq. 528; *Williams* v. *Games*, 23 W. R. 779, L. R. 10 Ch. 204; and *Pitt* v. *Jones*, 29 W. R. 33, 5 App. Cas. 651.

Le Riche, for Mr. and Mrs. Cooke, supported the request for sale.

Comens-Hardy, Q.C., and *Leonard Field*, for the defendants Neville Feary and Mrs. Nix,

Vernon R. Smith, for the mortgagees of Neville Feary, and

P. F. Wheeler, for a mortgagee of Mrs. Nix, all of whom opposed a sale, were not called on.

NORTH, J.—In a proper case the court could direct a sale under section 3 of the Act. The present application for a sale is not made under section 3, but under section 5, and it follows that none of the circumstances mentioned in section 3 as justifying the court in ordering a sale of the property exist here. It cannot be said that for any of the reasons mentioned in section 3 a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a distribution of the property between them. Under section 4 it is not open to the court to refuse a request for a sale of the property made by a party or parties interested to the extent of a moiety in the property "unless it sees good reason to the contrary." The words of section 4 are much stronger than those of either section 3 or section 5. Then section 5 says that, if any party interested requests a sale instead of a partition, the court may, "if it thinks fit," direct a sale, unless the other parties interested undertake to purchase the share of the party requesting a sale. I have been asked to construe this section as if it was expressed in the same terms as section 4, as meaning that, if any party requests a sale the court shall direct a sale, unless it sees good reason to the contrary. The difference between the language of the two sections is significant, and I have no doubt that section 5 was intended to give the court a different power from that which is given by section 4. I do not think that *Williams* v. *Games* has any application to the present case.

In *Drinkwater* v. *Ratcliffe* Sir G. Jessel, M.R., said, "The 5th section provides that if any party interested in the property requests the court to direct a sale of the property instead of a division, the court may, if it thinks fit (this is discretionary again), unless the other parties interested in the property undertake to purchase, give all necessary and proper directions for such sale. What does that mean? Under the 4th, where the parties requesting a sale have got more than a moiety you do not want that; it consequently applies to the case of the owners of less than a moiety making the request. Now that case is provided for by the 3rd section, in every possible case where the court thinks a sale is proper, and for the benefit of the parties interested. Therefore the 5th must apply to a case where the court sees no reason for preferring a sale to a partition. That case is not provided for by the 3rd, nor is it provided for by the 4th section. Where the court sees no reason at all, still any party interested may apply." That is quite a different thing from saying that, if the court sees no reason at all for preferring a sale to a partition, it shall, on the application of any party interested, direct a sale. *Pitt* v. *Jones* is not a direct authority on the present question, though no doubt there were some observations made by Lord Watson which do give some colour to Mr. Farwell's argument. But those observations were addressed to an entirely different question — viz., whether, when one party desired to have a sale, and the other parties were willing to purchase his share, he could be compelled to sell his share at the valuation made of it? I do not think there is anything in *Pitt* v. *Jones* which obliges me to hold that where a power is given to the court to direct a sale "if it thinks fit," it is compelled to order a sale, especially having regard to what Sir G. Jessel, M.R., said in *Drinkwater* v. *Ratcliffe*. In *Pitt* v. *Jones* Lord Blackburn said, "Section 5 says that in every case of a suit for partition (whether the sale would or would not be more beneficial for the parties than a partition) if any party (whether owning more or less than a moiety) requests a sale, the court shall have a discretion to order such a sale, unless the parties opposing a sale are willing to take his share at a valuation. But it does not say, nor do I think it was intended to say, that a party who requests a sale of the whole must take that valuation; I think it means that if a party presses for a sale, and the court thinks that the

(*a.*) Reported by G. H. JEFFERY, Esq., Barrister-at-Law.

opposing parties in fairness ought either to buy him out or consent to a sale, it may order a sale unless they will agree to take his valuation, in which case the party requesting a sale may either accept that valuation or not. If he does not choose to accept that valuation he cannot be forced to do so, but will then have his common law right to a partition." In these remarks, if I may say so, I entirely concur. But here the party who is pressing for a sale has not satisfied me that in fairness the parties who oppose a sale ought either to buy him out or to submit to have the property sold. The majority of the judges in *Pitt* v. *Jones* took the same view of section 5 as I do. Lord Watson no doubt went further than any of the other noble lords, but he was not actually dealing with the present question. I think that section 5 is not synonymous with section 4, but the party who applies under section 5 for a sale must show some reason for it. I think the court has a discretion whether it will direct a sale, and no reason has been shown to induce me to do so.

Cozens-Hardy, Q.C.—A partition ought not to be made as between the owners of the six-eighths, as they do not desire it. [North, J.—Have they any right to cut off a portion of the property and give it to the plaintiff?] The plaintiff is entitled to his share, but it is not necessary that, in making a partition, an aliquot share of each species of property should be allotted to each of the tenants in common: *Hobson* v. *Sherwood*, 4 Beav. 184; *Peers* v. *Needham*, 2 W. R. 514, 19 Beav. 316.

North, J.—I see no difficulty in allotting six parts to the owners of six undivided eighths as tenants in common. If all the persons interested in one-eighth agree with all those who are interested in another one-eighth that they will do so, they can remain tenants in common.

Cozens-Hardy, Q.C.—No costs ought to be given up to the trial of the action: *Porter* v. *Lopes*, 7 Ch. D. 358, 26 W. R. Dig. 157.

Farwell.—The usual rule is that the costs shall be borne by the parties in proportion to their interests: *Ball* v. *Kemp Welch*, 14 Ch. D. 512, 28 W. R. Dig. 66.

North, J.—In the present case no benefit has been derived from the Partition Act. I shall, therefore, adopt the old rule of the Court of Chancery, and shall give no costs up to the date of the inquiry. The subsequent costs will be borne rateably.

Solicitors, *Paterson, Snow, & Co.; Le Riche & Norman; Field, Roscoe, & Co.; F. & T. Smith & Sons; H. R. Reynolds.*

Chan. Div. } April 10, 11; May 14, 18.
Kekewich, J. }

Postlethwaite *v.* Rickman. (*a.*)

Trustee—Purchase of trust estate in name of stranger—Repurchase by trustee—Onus of proof.

A testator devised his property, including the S. Farm, to A., B., and C., upon trust to sell and divide the proceeds amongst several persons, A. being one. By deed dated the 24th of March, 1854, A., B., and C., as trustees, conveyed this farm to W. for £1,814 17s. 2d. In June, 1854, W. reconveyed the farm to B. for £1,831 9s. 7d. In July, 1870, B. purchased with his own moneys the X. property for £787 11s., and in 1874 he sold the S. Farm and X. to M. for £9,587 10s.

Held, that the purchase by W. as nominee of B. vitiated the repurchase by B., and that his representatives must account for the profits made by the different dealings with the trust property.

Held, also, that the burden of proof lies on the plaintiff in a case of repurchase by a trustee where the facts are known to both parties.

Trial of action.

William Postlethwaite, who died in 1843, devised his property to J. L. Postlethwaite, W. C. Rickman, and the defendant, J. J. Tourle, upon trust to sell and divide the same amongst several persons, of whom J. L. Postlethwaite was one. Part of the property consisted of Standfast Farm, in the county of Southampton. In March, 1854, the three trustees of the will conveyed the farm to one Walker, who paid a sum of £1,814 17s. 2d. In June, 1854, Walker reconveyed the farm to W. C. Rickman, one of the trustees, for his own use for £1,831 9s. 7d. In July, 1870, W. C. Rickman purchased an adjoining property called Snailings for £787 11s., and in 1874 he sold the whole of both properties to another person for £9,587 10s. J. L. Postlethwaite died in May, 1871, and W. C. Rickman in June, 1886, and this action was brought in November, 1886, by J. R. Postlethwaite, W. E. G. Postlethwaite, and Josephine Postlethwaite, the children and persons entitled to the estate of J. L. Postlethwaite against E. F. Rickman and E. J. Hone, the executors of W. C. Rickman, and J. J. Tourle, the surviving trustee and executor of the testator. The plaintiffs alleged that in the matter of the agreement for the purchase of Standfast Farm, Walker was really a trustee for W. C. Rickman, and was put forward by the latter as the purchaser in order to conceal from the persons interested in the testator's estate the fact that W. C. Rickman was the real purchaser, and in consequence of his having been advised that, as a trustee of the will, he could not purchase the property. They also alleged that J. L. Postlethwaite never knew or had notice that Walker purchased as such trustee or agent for W. C. Rickman, or that the property had ever been assured to Rickman, and that they first knew it in July, 1886. And they claimed a declaration that the conveyance of March, 1854, was not binding upon them, and that the defendants were jointly and severally liable to make good to the plaintiffs their proportion of the profits realized by W. C. Rickman by the enjoyment and resale of the premises.

The claim against Tourle was withdrawn at the hearing.

Warmington, Q.C., and *A. Terrell*, for the plaintiffs.

Rigby, Q.C., and *Rowden*, for the defendants.

The arguments sufficiently appear from the judgment.

Kekewich, J.—The transaction sought to be set aside took place in 1854, thirty-two years before the date of the commencement of this action. But the plaintiffs, until 1886, had no knowledge or notice of the facts on which they found their claim, so, if they establish their case, they are not barred by *laches*, though, from lapse of time, it is difficult for them to do so. A purchase by a trustee of property intrusted to him for sale is held improper, on the ground that it is impossible for any man to be at the same time buyer and seller. The plaintiffs say it was a breach of duty on the part of W. C. Rickman to purchase this property, even at the best price, and that, whether that be fraud or not, that is enough. I think it is a legal fraud as defined in *Peek* v. *Gurney*, 37 Ch. D. 541. There is a moral duty to observe the terms of a contract, and a breach of that duty may be styled fraud. The law is expounded in *Ex parte Lacey*, 6 Ves. 625, and has never been questioned. The difficulty in each case is to discover whether there has been a purchase of this kind, and the question is a mixed one of law and fact. *Baker* v. *Peck*,

(*a.*) Reported by C. H. F. Christie, Esq., Barrister-at-Law.

9 W. R. 186, 472, and *Hall* v. *Hallet*, 1 Cox, 134, are of very little help. The rule against a purchase by a trustee for sale has ever been strictly applied to an executor who necessarily occupies that position. Mellish, L.J., in *Parker* v. *McKenna*, 23 W. R. 271, at p. 281, L. R. 10 Ch. 96, at p. 125, considers that, as long as the contract remains executory, and the trustee or agent has power either to enforce or rescind or alter it, he cannot repurchase the property from his own purchaser, except for the benefit of his principal, but the observations which follow show that the Lord Justice did not intend to decide that when once the contract is executed the trustee can purchase for his own benefit. And a trustee cannot attain this end by selling to a nominee if the latter finds the money or subjects himself to covenants under an agreement for indemnity.

In the case of a promise not legally enforceable, if that promise be performed, so that the selling trustee obtains the benefit of the purchase, he cannot hold it against the *cestui que trust*. If a trustee sell to a stranger over whom he has some influence with a feeling of certainty that he would be allowed to repurchase if he wished, he can hold that against his *cestui que trust*, and the repurchase would not be vitiated. But where there is an understanding, not expressed, but which is binding between friends and gentlemen, the repurchase by the trustee, on the strength of that understanding, cannot be held good, even though there be no corresponding right on the part of the first purchaser to be relieved by the trustee. [His lordship then discussed and commented on the facts, and continued :—] The plaintiffs cannot depend on the weakness of the defendants' case; it is for them to establish the facts necessary to entitle them to relief. This I hold they have done.

*Judgment for the plaintiffs with costs, except as against Tourle, who was to have his costs, but such latter costs not to be added to those which the plaintiffs are entitled to recover.**

Solicitor for the plaintiffs, *T. Edwards.*

Solicitors for the defendants Rickman and Hone, *Randall & Bucknill.*

Solicitor for the defendant Tourle, *J. J. Tourle.*

Q. B. Div. (Manisty and Stephen, JJ.) June 29.

Clarke v. Berger. (*a.*)

Practice—R. S. C., 1883, *ord.* 3, *r.* 6; *ord.* 14, *r.* 1—*Writ specially indorsed—Final judgment.*

A writ which claims payment of a sum which is in dispute, besides payment of a liquidated demand, is not specially indorsed so as to entitle the plaintiff to summary judgment for the liquidated demand.

In this action, which was brought by a landlord against his tenant, the writ was indorsed with a claim for

Rent	£68 15 0
Making good dilapidations . .	289 16 0
	£358 11 0
By unexhausted manures, &c. .	58 10 0
	£300 1 0

This was an appeal from an order of Cave, J., in chambers, rescinding an order of a master who had given judgment for the plaintiff under ord. 14, r. 1, for £68 15s., and had given leave to defend as to the rest of the claim.

* See *Barrow's case*, 14 Ch. D., at p. 445.

(*a.*) Reported by Spencer L. Holland, Esq., Barrister-at-Law.

Crawford, for the plaintiff, contended that, as the claim for rent was admitted, the master was right in giving judgment for that part of the claim, it being a "debt or liquidated demand in money" under ord. 3, r. 6.

Vaughan Williams, for the defendant, cited *Imbert-Terry* v. *Carver*, 35 W. R. 328, 34 Ch. D. 506.

Crawford, in reply, contended that *Hill* v. *Sidebottom*, 47 L. T. N. S. 224, 31 W. R. Dig. 157, was in his favour.

Manisty, J.—The only question in this case is whether or not the indorsement on the writ is "special." Order 14, under which this judgment was made, only applies to writs specially indorsed under order 3, and we must look at this writ and at ord. 3, r. 6, which tells us what a specially indorsed writ is. Now this writ seems to me to include a demand which both parties agree is unliquidated and disputed. The £68 15s. for the rent is not disputed, but as to the £289 16s. there is some valuation which is the subject of dispute between the parties. There are decisions as to the reading of ord. 3, r. 6. In *Hill* v. *Sidebottom* something more than a liquidated demand was claimed, and for that reason it was held that the writ was not specially indorsed under ord. 3, r. 6. That case was followed in *Imbert-Terry* v. *Carver*, where equitable relief was sought as well as payment of a liquidated demand. There must not be something in addition to a "debt or liquidated demand." It seems to me that the master was clearly wrong in giving judgment for the £68 15s.

Stephen, J.—I am of the same opinion. It is clear that in this case the plaintiff claims something more than a liquidated demand. The valuation by which the sum of £289 16s. was arrived at is challenged, and it cannot therefore be considered to be a liquidated demand.

The appeal must be dismissed, with costs to the defendant in any event.

Appeal dismissed.

Solicitor for the plaintiff, *Ernest Todd.*

Solicitor for the defendant, *R. L. Chamberlain.*

Q. B. Div. (Wills and Grantham, JJ.) June 8.

Osborne v. London and North-Western Railway Co. (*a.*)

Negligence—Volenti non fit injuria—*Voluntary undertaking of risk by plaintiff—Question of fact—Finding at the trial—Inference of fact for the court.*

When, in an action of negligence, the defendant relies on the doctrine Volenti non fit injuria, *he must obtain a finding at the trial that the plaintiff voluntarily took the risk upon himself and had a full knowledge of the nature and extent of the danger. Otherwise the court will not give judgment for the defendant on the ground that such a finding is the only inference which can properly be drawn from the facts.*

Appeal from a judgment of the judge of the county court of Warwickshire, holden at Birmingham.

The plaintiff sought to recover damages from the defendant company for injuries sustained by him in falling down on a flight of steps leading to the platform of the defendants' station at Perry Bar, by reason of the worn and defective condition of the steps and the defendants' negligence in not clearing the steps of snow and ice. The plaintiff, in his evidence, said that he

(*a.*) Reported by F. G. Rucker, Esq., Barrister-at-Law.

lived at Perry Bar, and was a season-ticket holder on the defendants' line; on the 21st of March, 1887, he was going down the stone steps leading from the road to the platform, to get by train to Birmingham; the steps were covered with a light layer of snow, which had been trodden down and had frozen again; the steps were worn and hollowed and slippery; he went down carefully, but at the fourth or fifth step he slipped and fell and dislocated his wrist. In cross-examination he said that there were also some wooden steps, but the stone steps were nearest to his house; the steps were dangerous without snow on them; he thought it was dangerous to go down, so he went down carefully, taking hold of the rail; he knew the station well. The defence was that there was no negligence on the part of the defendants, or, if there was, that there was contributory negligence on the part of the plaintiff; and that the defendants were not liable on the ground that *Volenti non fit injuria*. The county court judge, after hearing evidence on both sides, found that the accident was caused by the worn and defective state of the steps and by the negligence of the defendants in not clearing away the snow, and that there was no contributory negligence on the part of the plaintiff. And he held that the maxim *Volenti non fit injuria* did not apply. He gave judgment for the plaintiff for the agreed sum of £25.

Alfred Young, for the defendants.—The defendants rely on the admissions made by the plaintiff himself in his evidence. The county court judge ought to have held that the accident was solely due to the plaintiff's own conduct. It is clearly a case to which the doctrine *Volenti non fit injuria* applies; and therefore the defendants are entitled to judgment: *Thomas* v. *Quartermaine*, 35 W. R. 555, 18 Q. B. D. 685.

W. Wills, for the plaintiff.—The question whether the doctrine *Volenti non fit injuria* applies depends on a a question of fact, which must be taken to have been found in the plaintiff's favour: *Yarmouth* v. *France*, *ante*, p. 281, 19 Q. B. D. 647.

He also referred to *Woodley* v. *Metropolitan District Railway Co.*, 2 Ex. D. 384, 25 W. R. Dig. 155; *Crafter* v. *Metropolitan Railway Co.*, 14 W. R. 334, L. R. 1 C. P. 300; and *Longmore* v. *Great Western Railway Co.*, 19 C. B. N. S. 183.

Wills, J.—I am of opinion that this appeal must be dismissed. *Thomas* v. *Quartermaine* is a case which requires to be very carefully applied. For the present purpose it is sufficient to take that view of it which was taken by Lord Esher, M.R., in *Yarmouth* v. *France*. I think that the proper rule to be drawn from the two cases is that, where the defence of *Volenti non fit injuria* is raised, it is for the defendant to establish affirmatively the facts which are necessary to support that defence—viz., that the plaintiff voluntarily took the risk upon himself, and had a full knowledge of the nature and extent of the danger. It is doubtful whether the learned county court judge took this point into consideration. But it is the defendant that wants a finding of fact to that effect. The plaintiff does not want any finding. The defendant is not entitled, without obtaining any such finding, to come and ask this court to say that the only proper inference to be drawn from the facts proved is that the plaintiff did voluntarily undertake the risk with full knowledge of the danger.

Grantham, J., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *E. F. Mason & Son.*

Solicitors for the defendants, *Johnson, Barclay, Johnson, & Rogers.*

Q. B. Div. (Field and Wills, JJ.) April 24.

Dowes v. Salmon. (a.)

Bill of sale—Bills of Sale Acts, 1878 (41 & 42 Vict. c. 31) and 1882 (45 & 46 Vict. c. 43)—Misdescription of grantor's name in bill of sale—Intent to conceal—Registration.

The Christian name of the grantor of a bill of sale was wrongly described for the purpose of concealing the fact that he had given a bill of sale.

Held, that this did not render the registration of the bill invalid.

Appeal by an execution creditor from the decision of the judge of the county court of Surrey, holden at Lambeth.

This was an interpleader issue between the Consolidated Credit and Mortgage Corporation (Limited), claiming certain goods as grantees under a bill of sale, and one Downs, the execution creditor of the grantor.

The bill of sale purported to be given by "Alfred Salmon and Edith Campbell, wife of Alfred Salmon," whereas the real name of the grantor was George Henry Arthur Salmon. The name of the wife (also a grantee) was correct. The misdescription was effected purposely, as Mr. G. H. A. Salmon was applying for a clerkship in the City, and it would have been prejudicial to him if it were known that he had given a bill of sale. The county court judge held that the misdescription had been wilfully made by both grantors for the above reason, but that there was no evidence that the grantees were aware of the misdescription, or that anyone had been deceived by it, and therefore, on the authority of *Ex parte McHattie, In re Wood*, 27 W. R. 327, 10 Ch. D. 358, held that the bill of sale was good.

U. E. Jones, for the appellant.—The bill of sale was bad. The name of the husband was wilfully misscribed for the purpose of concealing the bill of sale from any person who might search the register. This case is distinguishable from *Ex parte McHattie, In re Wood*, for there the bill of sale was executed by the grantor in his name of "Joseph Wood," although he was generally known as "Joseph Albert Wood," and the name was in that case given with sufficient correctness to enable a person to ascertain from the register whether he had or had not given a bill of sale. *Foulger* v. *Taylor*, 1 L. T. N. S. 57, 8 W. R. C. L. Dig. 11, and *Luckin* v. *Bailey*, 18 W. R. 43, are also in point.

Jelf, Q.C., and *W. H. Clay*, for the respondents, were not called upon.

Field, J.—It is quite plain that in this case the grantors of a bill of sale, a man and his wife, committed a deliberate fraud upon the Act of Parliament by deliberately intending to deceive the public. It is collateral that their motive was that which was stated in evidence—viz., the husband was applying for a clerkship in the City, and it would have prejudiced him if it were known that he had given a bill of sale. There is no evidence that the execution creditor was misled by the misdescription, nor is it alleged that he did not know the description was incorrect. It was objected before the county court judge that the Christian name of the husband was incorrectly given as "Alfred," his true Christian name being "George Henry Arthur," and that his wife was described as "wife of Alfred Salmon." The bill of sale itself was not impeached as being in itself a bad bill of sale, but for not having been duly registered. Does it come under the disabling provisions of the Bills of Sale Acts? Non-compliance with the requirements of section 10, sub-section 2, of 41 & 42 Vict. c. 31 makes the registration bad. This would, by virtue of 5 & 46

(a.) Reported by Sir Sherston Baker, Barrister-at-Law.

Vict. c. 48, s. 8, render the bill of sale void in respect of the personal chattels comprised in it. Then section 10, subsection 2, of the first-mentioned Act requires that a bill of sale, "and also a true copy of such bill, and of every attestation of the execution of such bill, together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same . . . . . shall be filed with the registrar within seven days after the making or giving of such bill of sale." This provision might mean that the affidavit should state that the bill of sale was duly executed by the person who in the terms of it professed to be the grantor; but I am of opinion that it would be giving too broad a construction to this provision if we held that it was meant to include a correct statement of the grantor's Christian name. It is also enacted that the affidavit must give a "description of the residence and occupation" of the grantor. The description of Mrs. Salmon as "the wife of Alfred Salmon" clearly did not describe her occupation. With regard to the Christian name of the husband, the Court of Appeal, in *Ex parte McHattie, In re Wood*, relied on the fact that the Bills of Sale Act, 1854, which was in question in that case, did not require the names of the grantor to be stated on the register, and as the Bills of Sale Acts, 1878 and 1882, do not require it either, I am of opinion that the decision of the county court judge was right, and this appeal must be dismissed.

Wills, J., concurred.

Appeal dismissed; leave to appeal refused.

Solicitors for the appellants, *R. B. Wheatley & Son.*

Solicitors for the respondent, *Vanderpump & Eve.*

Q. B. Div. (Field and Wills, JJ.) April 23.

Reg. v. Sir James Ingham (a.)

Revenue—Excise—Jurisdiction of magistrate to hear information—Customs and Inland Revenue Act, 1887 (50 & 51 *Vict. c.* 15), *s.* 4.

An information for the recovery of an excise penalty under section 4 of the Customs and Inland Revenue Act, 1887, may be preferred before a metropolitan police magistrate for an offence committed within his jurisdiction by virtue of 15 & 16 *Vict. c.* 61.

Order *nisi* for a *mandamus* calling on a metropolitan police magistrate (Sir James Ingham) to show cause why he should not hear and determine the matter of an information exhibited by order of the Commissioners of Inland Revenue against one Adams, a tobacconist, for the recovery of an excise penalty under 50 & 51 Vict. c. 15, s. 4.

By that section it is enacted that, "If any manufacturer of tobacco shall have in his custody or possession any tobacco (except tobacco which must undergo some process of treatment or manufacture before it is fit for sale), or if any dealer in or retailer of tobacco shall have in his custody or possession any tobacco, and such tobacco shall in either case on being dried at a temperature of 212° Fahr. be decreased in weight by more than thirty-five per cent., he shall incur an excise penalty of £50; and the tobacco shall be forfeited."

The learned magistrate doubted whether he had jurisdiction, and refused to hear the information in order that the question as to jurisdiction might be decided on appeal.

Mead showed cause.

Sir H. Clarke, S.G., and *Danckwerts*, in support of the rule, were not called upon.

Field, J.—An objection to the hearing of this information was raised on the ground that, though a new offence was created by the Act 50 & 51 Vict. c. 15, under section 4 of which the information was laid, no provision was made for the recovery of the penalty; and that the learned magistrate had no jurisdiction. On the other hand it was contended that jurisdiction was conferred by 15 & 16 Vict. c. 61, an Act relating to summary proceedings for penalties under the Acts relating to the excise, together with the creation of the offence in 50 & 51 Vict. c. 15, by which the amount of penalty for its commission is provided; and it is clear, therefore, that the Legislature understood there was a mode by which the penalty could be enforced. That mode is provided by 15 & 16 Vict. c. 61, which confers on the metropolitan police magistrates a concurrent jurisdiction with the Commissioners of Inland Revenue within the limits of the chief office of Inland Revenue in London, "for the recovery of any penalty imposed by any Act or Acts relating to the revenue of excise and incurred for or by reason of any offence committed against such Act or Acts." It is contended for the Crown that these words confer jurisdiction on Sir James Ingham to hear and determine this information, and I am of that opinion. The word "imposed" is not limited to any particular time or to the previous Acts. The Consolidation Excise Act (7 & 8 Geo. 4, c. 53), recited as the foundation of the 15 & 16 Vict. c. 61, where the words "imposed or to be imposed" are used in section 2, was relied upon by the counsel showing cause as a reason for limiting the word "imposed" in the later Act, but it is only an instance where the Legislature has used, as is often the case, language of larger import, and does not induce me to construe the words of the later Act in a more restricted sense.

Wills, J.—I am of the same opinion. The argument in support of this order rests upon the narrowest construction of the word "imposed." It is said that the words "to be imposed" would have to be used in order to include offences under future Acts, but as in the line following the past participle is employed in the word "committed," and the word "imposed" is placed in close contiguity to a word which must be used in the wider sense, this argument cannot be maintained. The present case is not like that class of case where new rights are created or old rights restricted, and to which a rule of strict construction is applicable to a statute, but it is a modification of the older law and is in favour of the subject.

Order absolute.

Solicitor for the commissioners, *Solicitor of Inland Revenue.*

Q. B. Div. (Cave and A. L. Smith, JJ.) May 12, 14.

Mullenheim v. Coulson (No. 2). (a.)

Practice—Suing or defending in forma pauperis—Proceedings on Crown side of Queen's Bench Division—Prohibition—Ord. 16, *r.* 22—*Ord.* 68, *rr.* 1, 2.

In proceedings on the Crown side of the Queen's Bench Division there is no power to admit a person to sue or defend in forma pauperis.

Appeal from a master to a judge at chambers referred to the court.

The action was for illegal distress, and was brought in

(a.) Reported by A. H. Tonn, Esq., Barrister-at-Law.

(a.) Reported by R. G. Recum, Esq., Barrister-at-Law.

the High Court against the defendant Coulson, on whose application it was remitted to the county court of Middlesex under section 10 of the County Courts Act, 1867. The county court judge gave the plaintiff leave to add one Ferdinand Strausberg as a defendant, and ultimately gave judgment against both defendants. Strausberg then obtained from the judge at chambers an order for a prohibition prohibiting all further proceedings against him under the judgment, and this order was affirmed on appeal by the Divisional Court (*ante*, p. 524). The plaintiff, having given notice of appeal to the Court of Appeal, applied *ex parte* to a master at chambers, and obtained an order admitting him to proceed *in formâ pauperis*. On the application of Strausberg the master rescinded this *ex parte* order. The plaintiff then appealed to Denman, J., who referred the matter to the court.

Overend, for the plaintiff.

G. S. Bower, for Strausberg.

CAVE, J.—I am of opinion that there is no power to admit this appellant to appeal *in formâ pauperis* from the order of the Divisional Court granting a prohibition. It being admitted that no precedent could be found before the Rules of 1883, the question must depend on whether the case comes within ord. 16, r. 22. But the effect of ord. 68, rr. 1, 2, is that order 16 does not apply to proceedings on the Crown Side of the Queen's Bench Division. Neither do the Crown Office Rules contain any provision for appealing *in formâ pauperis*. Therefore I am of opinion that the order rescinding the *ex parte* order was right.

A. L. SMITH, J., concurred.

Appeal dismissed.

Solicitor for the plaintiff, *G. W. Churchley*.

Solicitor for Strausberg, *W. Mitchell*.

Prob. Div. & Adm. Div. Admiralty. } Feb. 15, 21.

"THE FLYING SERPENT" AND "THE NIOBE." (*a*.)

Ship—Damage—Tug and tow—Liability of tow for negligence of tug.

A steam-tug towing a ship at sea with a long scope of hawser came into collision at night with another ship, whose owners instituted an action of damage against both the steam-tug and the ship she had had in tow, and therein claimed to recover the damage sustained in the collision. The statement of claim alleged that the owners of the steam-tug had admitted their liability for the collision, and had obtained an order limiting the amount of such liability under the Merchant Shipping Acts. At the hearing the court found as a fact that there had been a bad look-out on the steam-tug; that the ship she had come into collision with had kept her course; and that the ship in tow had contributed to the collision by a bad look-out, and by not porting her helm and checking the course of the steam-tug.

Held, that the ship in tow was liable for the damages proceeded for in the action.

*Quære, if, as matter of law, the tow would not have been equally liable even if those on board her had not by any negligent act of theirs in fact contributed to the collision.**

This was an action of damage instituted on behalf of the owners of the ship *Valetta* and her cargo against the ship *Niobe* and her freight, and against the steam-tug *Flying Serpent* and her freight.

The action was brought to recover the damage sustained by *The Valetta* on the 23rd of March, 1887, when *The Flying Serpent*, having *The Niobe* in tow, came into collision with *The Valetta* in St. George's Channel, off the South Tuskar Light, and caused her to sink, together with her cargo.

The statement of claim alleged that *The Valetta* had kept her course until a collision appeared to be inevitable; that at the time of the collision *The Flying Serpent* was under engagement with the owners of *The Niobe* to tow her to Cardiff, and those on board *The Flying Serpent* were the servants of the owners of *The Niobe*, and were subject to the control and orders of those on board *The Niobe*, and that the owners of *The Flying Serpent* had admitted their liability for the collision, and obtained an order limiting their liability under the Merchant Shipping Acts. The statement of claim further imputed blame to those on board *The Flying Serpent* and *The Niobe* for not keeping a good look-out, and for not keeping out of the way of *The Valetta*, and also charged those on board *The Niobe* with having neglected to give proper orders to *The Flying Serpent* to keep herself and *The Niobe* out of the way of *The Valetta*.

The defendants, the owners of *The Niobe*, alleged in the defence that at the time of the loss of *The Valetta* they had entered into a contract of towage with the owners of *The Flying Serpent* for those on board that vessel to have the control over the towage and course of the two vessels; that on the 22nd of March, 1887, *The Niobe* left Greenock in tow of *The Flying Serpent*, with a scope of ninety fathom of hawser between the two vessels, and from that time until the collision therein mentioned *The Flying Serpent* had the control of the towage and course of the two vessels; that *The Flying Serpent* neglected to keep out of the way of *The Valetta*, and came into collision with her, doing her so much damage that she sank, whilst *The Niobe* slightly touched the quarter of *The Valetta* without doing her any damage; and that the defendants denied that those on board *The Flying Serpent* were the servants of the owners of *The Niobe*, or subject to the orders or control of those on board *The Niobe*, or in such a position that those on board *The Niobe* could exercise any control or give any orders to *The Flying Serpent*, and submitted that those on board *The Niobe* were not guilty of negligence, and were in no way liable for the negligence of *The Flying Serpent*, or those on board her, such persons being independent contractors, over whom the defendants had no control.

Feb. 15.—The action was now heard before the President, assisted by two of the Elder Brethren of the Trinity House.

The result of the evidence and so much of the arguments as are material to this report appear from the judgment.

Myburgh, Q.C., and *Hollams*, for the plaintiffs.

Sir W. Phillimore and *Barnes*, for the defendants.

The following cases were referred to and commented on by both the counsel for the plaintiffs and the counsel for the defendants:—*The Gipsy King*, 2 W. Rob. 377; *The Christina*, 3 W. Rob. 27, 6 Moo. P. C. C. 381; *The Ticonderoga*, Swa. 215; *The Singuasi*, 5 P. D. 241, 29 W. R. Dig. 199; *The Cleadon*, 14 Moo. P. C. C.

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* See *The Jane Bacon*, 27 W. R. 35; *The Kingston-by-Sea*, 3 W. Rob. 152; *The Cleadon*, 14 Moo. P. C. C. 92, 9 W. R. H. L. Dig. 15. It is to be noticed that in the case of *The Stormcock*, 5 Asp. Mar. Law Cas. 470, referred to *infra*, there was no claim before the court against the vessel which was in tow of *The Stormcock* at the time of the collision, and the owners of such vessel were no parties to the suit.

(*a*.) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

42, 9 W. R. H. L. Dig. 15; *The Sisters*, 24 W. R. 112, 9 P. D. 117; *The American and Syria*, 22 W. R. 927, L. R. 6 P. C. 127; *Smith* v. *The St. Lawrence Tow Boat Co.*, L. R. 5 P. C. 308; *The Stormcock*, 5 App. Mar. Law Cas. 470; *Spaight* v. *Tedcastle*, 29 W. R. 761, 6 App. Cas. 217; *Jones* v. *The Corporation of Liverpool*, 33 W. R. 551, 14 Q. B. D. 890.

Cur. adv. vult.

Feb. 21.—HANNEN, P.—The collision which was the subject of inquiry in this case occurred on the night of the 23rd of March, 1887, between the sailing vessel *Valetta* and the steam-tug *Flying Serpent*, whilst the latter was engaged in towing the ship *Niobe* from Greenock to Cardiff. *The Valetta* was sailing on a course N.E. by E., with a N.W. wind, at a rate of seven and a half knots, with her side lights burning brightly, when the look-out saw the two masthead lights of *The Flying Serpent* at a distance estimated at three miles, and about three points on *The Valetta's* port bow. The green light of the tug and her tow soon after came in view. *The Valetta* kept her course, but *The Flying Serpent* continued to approach *The Valetta* until, with her stem and starboard bow, she struck *The Valetta's* port bow, causing such damage that *The Valetta* shortly afterwards sank, and two of her crew were drowned.

For *The Niobe* it was contended that the collision was caused solely by the negligence of *The Flying Serpent*, and that she, *The Niobe*, is not responsible for the conduct of the tug. I shall first consider whether there was any negligence on the part of *The Niobe*; and, secondly, whether that negligence, if it existed, contributed to the collision.

The Flying Serpent and her tow were on a S.S.W. course and had *The Valetta* on their starboard bows, while *The Valetta*, sailing on a converging course of N.E. by E. had the tug and tow on her port bow. There can be no doubt that there was a defective look-out on *The Flying Serpent*, and that she consequently took no step to keep out of the way of *The Valetta*. Let us see what was the state of things on board of *The Niobe*.

The Flying Serpent was towing *The Niobe* with a scope of hawser of about 100 fathoms. The look-out man on *The Niobe* says that he first saw a dim, bright light on *The Valetta* two points on the port bow at about four ships' lengths off. This, then, must have been when *The Flying Serpent* was close to *The Valetta*. The white light which the look-out man saw was, as the captain of *The Niobe* conjectures, probably a companion or binnacle light. The look-out man reported this light, and immediately afterwards saw the loom of *The Valetta's* sails, and then the red light; but before he had time to report it he heard the crash of the collision, which he says took place immediately after he saw the sails. Later on he stated he only saw the red light after he heard the crash, and finally he said he almost "saw the lot at once." This evidence seems to show very cleary that there was a bad look-out on *The Niobe*.

The evidence of the captain of *The Niobe* does not materially alter that of the look-out. The captain "was below when he heard the report of a light." He immediately came on deck and saw a white light two or three points on the starboard bow at a distance which he cannot estimate; he immediately ordered the helm hard-a-port. He did not hear the crash or know when the tow rope was cast off, but he thinks seven or eight minutes elapsed from giving the order hard-a-port till *The Niobe* struck *The Valetta*, or after the tug struck her. Seven or eight minutes is probably more time than passed between the order hard-a-port and the collision of *The Niobe* with *The Valetta*. But this question of time is not material, as I think that all that could be done was done when the light of *The Valetta* was seen, but I consider that it ought to have been seen sooner.

The next question is, Whether this negligence of *The Niobe* contributed to the collision between *The Flying Serpent* and *The Valetta*?

On this, I think the evidence of the captain of *The Niobe* decisive. He says that if he saw his tug taking a wrong course he certainly should endeavour to control the tug. If he saw the tug taking a direction leading to danger he should apprise her of it, and that he should do by altering his own course, and this would be an effectual mode of doing it. That if he had seen the red light of *The Valetta* sooner he should have ported sooner, but that he should let the tug get within a mile—about a mile—before he should have thought it necessary to port, and that, as it was, his porting was so late that the tug could not take the hint.

If he had seen the red light at half a mile he could have "girted" the tug—that is, he could have checked her by shearing to the right under a port helm. "Girting" the tug, he says, is a common manœuvre.

I have put the question to the Trinity Brethren whether, if the red light of *The Valetta* had been sooner seen by those on board *The Niobe* she could, by porting her helm, have checked the course of the tug, and have prevented the collision between the tug and *The Valetta*. I am advised that she could, and that that would have been the proper seamanlike manner to adopt in the circumstances. And as I find as a fact that there was nothing to prevent the red light of *The Valetta* being seen at the regulation distance, it follows that the bad look-out of *The Niobe* contributed to the collision. I am further advised that if *The Valetta* had been seen sooner *The Niobe* ought to have signalled by lights to her tug that she was moving into danger. And to the objection that this might have distracted the attention of those on the tug from looking ahead, the answer is, that *The Niobe* would have had no right to assume that there would not be a sufficient look-out on the tug to look forward as well as astern.

Taking this view of the facts, I doubt if the questions of law which have been discussed before me arise upon this occasion, but I will shortly state my opinion upon the points raised. It was contended that the relation of the tug-owner to the tow-owner is that of an independent contractor, and therefore that the principle of the case of *Quarman* v. *Burnett*, 6 M. & W. 499, is applicable, and the tow-owner and his vessel are not responsible for the negligence of the tug-owner and his servants. The basis of the decision in *Quarman* v. *Burnett* is that the hirer of horses with a driver from a jobmaster has not, under ordinary circumstances, the management of the horses; but Parke, B., says:—"It is undoubtedly true that there may be special circumstances which may render the hirer of job horses and servants responsible for the neglect of a servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct, as by taking the actual management of the horses, or ordering the servant to drive in a particular manner which occasions the damage complained of, or to absent himself at one particular moment, and the like." But it appears to me that the authorities clearly establish that the tow has, under the ordinary contract of towage, control over the tug. The tug and tow are engaged in a common undertaking of which the general management and command belongs to the tow, and in order that she should efficiently execute this command it is necessary that she should have a good look-out, and should not merely allow herself to be drawn, or the tug to go, in a course which will cause damage to another vessel. As Dr. Lushington has pointed out, it is essential to the safety of vessels being towed that there should not be a divided command, and convenience has established that the undivided authority shall belong to the tow. The pilot, if there be one, takes his station on his tow, and the officers of the tow are usually, as in the present case, of a higher class and better able to direct the navigation

than those of the tug. The practice which experience has dictated has received the sanction of many legal decisions, and has been recognized in the House of Lords in *Spaight* v. *Tedcastle*, where Lord Blackburn says that it is the duty of the tug to carry out the directions received from the ship, and of the Judicial Committee of the Privy Council in *The American and The Syria*, although in the latter case it was held from the special circumstances that the command belonged to the tug and not to the tow. I may observe that it is clear from the evidence in this case that it was perfectly well understood by the captains of the tug and tow that the latter had the control of their movements, and that it was the duty of those navigating the tow to keep a look-out and check the tug if it were going wrong. It was argued, however, that whatever the relation of the tug and tow may generally be, they were reversed in this case by special circumstances; first, by the contract of towage between the parties, but there is nothing in the contract of towage but a bare agreement to tow; secondly, by the fact that the towage was at sea with a long scope of hawser, and that this gives rise to different duties on the part of the two vessels to those which exist on a river towage with a shorter scope of cable. I agree that in a towage at sea with a long scope of hawser it is more difficult for the tow to communicate with the tug.

If it had been shown that *The Flying Serpent* had, by some sudden manœuvre, which those on board *The Niobe* could not control, brought about the collision, I myself should have considered that *The Niobe* had been guilty of no negligence. In *The Stormcock* I held the tug to be responsible, because the tug, which was originally steering a safe course, suddenly departed from it that the tow could not check her or follow without striking another vessel, and I think that the same result would follow in a river towage in like circumstances. But in the present case the action of *The Flying Serpent* was not sudden, and might have been prevented by those on board *The Niobe* if they had done their duty. Lastly, it was contended that *The Niobe* was not liable because the damage sustained by *The Valetta* was not done by contact with her. I am of opinion that this is immaterial where, as I find in this case to be the fact, the collision between the tug and the plaintiffs vessel might have been avoided but for the contributory negligence of the tow.

Solicitors for the plaintiffs, *Hollams, Son, & Coward.*

Solicitors for the defendants, *W. Crump & Sons.*

Prob. Div. & Adm. Div.: Admiralty: } Jan. 31.; Feb. 14.

"THE ARGENTINO." (a.)

Damage—Loss of beneficial agreement to collect and carry cargo—Registrar and merchants.

Where a ship is prevented by a collision from fulfilling a beneficial agreement to collect cargo and carry it on a specified voyage, the loss of any definite advantage which, but for the collision, would have arisen from such agreement is to be taken into account in estimating the damages sustained by the shipowner in consequence of the collision.

This was a petition in objection to the report of the registrar in consolidated actions of damage instituted respectively on behalf of the owners of the steamship *Gracie* against the steamship *Argentino*, and on behalf of the owners of *The Argentino* against *The Gracie*.

The report of the registrar and the schedules annexed thereto stated (*inter alia*) as follows:—Whereas the damages sustained by the plaintiffs and defendants by reason of the collision in question in these consolidated action have, by consent of parties, been duly referred to the registrar, assisted by merchants, to assess the amount thereof upon the basis of both vessels being to blame for the said collision, . . . I find that the plaintiffs and defendants respectively have sustained loss or damage by reason of the said collision to the extent stated in the schedules 1 and 2 hereto annexed. . . . The collision in this case, between *The Argentino* and *The Gracie*, took place in the Thames on the 7th of February, 1887. It was agreed between the parties that both ships were to blame, and that the damage sustained by each respectively should be investigated by the registrar and merchants. No difficulty exists in respect of the damage sustained by *The Gracie*, but the owners of *The Argentino* advance a claim for special damages, "item No. 16 in schedule 1," under the following circumstances:—Messrs. Westcott & Laurence are shipbrokers in London who collect cargo at Antwerp and London for conveyance to the Black Sea by two different routes, and the vessels employed for each voyage call at different specified ports on the way, one route or round ending at Batoum, the other at Odessa. About a week or ten days previous to the collision above mentioned, when *The Argentino* was at sea on a voyage from Sebastopol with a cargo of wheat for London, Mr. Westcott, a partner in the above-named firm, called at the office of Mr. Porteous, the managing owner of *The Argentino*, and inquired if he had a boat to load for the Batoum route, and being informed of the expected arrival of *The Argentino*, it was verbally arranged that *The Argentino*, as soon as she arrived, discharged her cargo, and could be ready, should proceed to Antwerp to load for the Batoum route. Later on, after *The Argentino* had arrived in the Thames and had collided with *The Gracie*, and in consequence needed repairs which would take some considerable time, it was arranged between Mr. Westcott and Mr. Porteous that Mr. Westcott should engage another vessel in lieu of *The Argentino* for the contemplated voyage to Batoum, and accordingly Mr. Westcott did engage the ship *Beta*, which loaded at Antwerp and in London, and made the same round to Batoum which it was intended *The Argentino* should make.

The Beta commenced this round by leaving London for Antwerp on the 7th of March, and after loading some cargo there returned to London for further cargo and finally sailed from the Thames about the 20th of March.

The repairs to *The Argentino* were finished on the 18th of March, and a few days before that date Mr. Westcott proposed to Mr. Porteous to load *The Argentino* for the Odessa route, an offer which Mr. Porteous accepted; and accordingly, on the 19th or 20th of March the ship left London for Antwerp where she loaded about 260 tons, sailed thence for London on the 27th, where she loaded 1,000 tons more, and finally sailed from London on the Odessa route on the 10th of April. The result of the voyages of *The Beta* and *The Argentino* respectively seems to be that *The Beta* earned a gross freight on the Batoum round of £1,536, *The Argentino* a gross freight of £1,[illegible], showing a difference of £155, which sum [illegible] a loss or damage arising from the collision. It [illegible] further said that had *The Argentino* made the same round as *The Beta* did, she would have loaded [illegible] cargo, and, being a larger vessel, would have [illegible]quently earned a larger gross freight than *The Beta*, £93, which is claimed as a further loss resulting from the collision. Then, again, *The Argentino* [illegible] days longer loading than *The Beta*, which is [illegible] to her cargo not being equally ready for [illegible] *The Beta's*, eight days of demurrage of the ship

(a.) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

claimed at the extravagant rate of £89 11s. 2d. per day, equal to £837 13s. 4d., thus making a total claim for consequential damages under the head of £785 12s. 4d. I am of opinion that the claim is too remote, and cannot be sustained. It seems to me that there is a broad distinction between this case and that of *The Star of India*, 25 W. R. 377, 1 P. D. 466, where the late judge of the Admiralty Court held that in estimating damages arising from a collision the loss of a beneficial charter-party under which the ship would have earned a specific amount of freight must be considered. The circumstances of that case were very different from those of the present case. In this case there was a mere verbal arrangement to allow *The Argentino* to load for the Batoum route in the usual way without any promise of a full cargo or guarantee as to the rate of freight. The shipowner had to take these risks. The arrangement had not the force and the effect of a definite charter-party, under which a specific amount of gross freight is contracted for. Then the substituted arrangement under which *The Argentino* went on the Odessa round was voluntarily made on the expectation, which both parties entertained, that it would prove as favourable in its results as the first arrangement for the Batoum round.

Mr. Porteous admitted that he took his chance as to the quantity of cargo the ship would get, and as to the rate of freight, and that he accepted the second offer because Mr. Westcott led him to think the ship would do as well with it. There is no evidence before us that *The Argentino* could not have got employment as profitable as *The Beta's* from other brokers or other directions, if it had been sought or inquired for, and it appears to me that because, in the result, the employment the owner accepted for his ship accidently proved to be less favourable than he was led to anticipate, and probably less favourable than if she had sailed on the Batoum route as originally intended, he is not thereby entitled to claim compensation for his disappointed expectations as if they were the necessary result of the collision. . . .

—Claim of owners of steamship *Argentino*.—No. 2.—Schedule referred to in the annexed report.

	Claimed. £ s. d.	Allowed. £ s. d.
16. Loss of profit on succeeding voyage, which had been contracted for but which defendants were unable to carry out, and for which another steamer was substituted, including eight days' time lost in loading cargo upon next voyage beyond the time which would have been consumed in loading the cargo originally contracted for.	785 16 5	0 0 0

With interest at four per cent. per annum from the first of April, 1887, until paid.

Jan. 31.—The petition on objection was now heard.

Sir W. Phillimore, Q.C., and *Boyd*, for the owners of the *Argentino* in objection to the report of the registrar.—In consequence of the collision the owners of *The Argentino* have lost the profit they would have made under their contract with Messrs. Westcott & Laurence. They are therefore clearly entitled to have the loss they so sustained taken into consideration in the assessment of the damages: *The Star of India*; *The Consett*, 5 P. D. 229.

Finlay, Q.C., and *Nelson*, for the owners of *The Gracie*.—There was no contract that the owners of *The Argentino* should receive any profit from *The Argentino* taking her turn at Messrs. Westcott & Laurence's wharf. The transaction was merely speculative, and the registrar has rightly come to the conclusion that the expectation of receiving a benefit from placing their vessel at Messrs. Westcott & Laurence's disposal is too remote to be considered as an element in assessing the damages in this case: *The Parana*, 25 W. R. 596, 2 P. D. 118; *The Notting Hill*, 32 W. R. 764, 9 P. D. 105; *The Clarence*, 3 W. Rob. 263.

Feb. 14.—Hannen, P.—*The Argentino* came into collision with a vessel called *The Gracie*, and it was agreed that both vessels should be held to blame. No question arose as to the damages which the owners of *The Gracie* were entitled to recover, but a question arose as to those which the owners of *The Argentino* were entitled to recover. It appears that shortly before the collision an arrangement—I use a neutral expression—was come to between the owners of *The Argentino* and the firm of Messrs. Westcott & Laurence, shipbrokers, of London, that *The Argentino* should take its place on a line of vessels which Messrs. Westcott & Laurence were in the habit of employing for the purpose of carrying cargo from their customers to ports in the Black Sea. *The Argentino*, in consequence of the collision, was under repair for a considerable time, and was unable to take her place in that line so as to earn the freight which she would have earned if she had gone on the voyage. When it was seen that it was impossible that she could take that place, Messrs. Westcott & Laurence engaged another ship called *The Beta*, which accordingly collected freight in London and in Antwerp, and proceeded on the voyage which *The Argentino* would have taken but for the accident, or unless some other event had intervened. It was claimed on the part of *The Argentino* that her owners were entitled to compensation for loss of the advantages which they would have derived from the arrangement made with Messrs. Westcott & Laurence. The learned registrar, assisted by merchants, has found that *The Argentino* was not entitled to make that claim, it being considered by them that the damage so claimed was too remote. The learned registrar says, with regard to what I have called an arrangement, that "it was verbally arranged that *The Argentino*, as soon as she arrived, discharged her cargo, and could be ready, should proceed to Antwerp to load for the Batoum route," and he says, at a later part of the report, "in this case there was a mere verbal arrangement to allow *The Argentino* to load for the Batoum route in the usual way, without any promise of a full cargo or guarantee as to the rate of freight." Now it was argued that the learned registrar based his judgment upon the fact that it was a mere verbal arrangement as distinguished from a written agreement. I doubt that that was in the mind of the learned registrar. I think he more probably insisted on the agreement being verbal in this sense—namely, that it did not lead him to the conclusion that it was a binding arrangement, and if I agreed with him in that which I take to be his finding, I should have nothing to say against his report, but I am of opinion that that is not a true view of the facts. It appears that Messrs. Westcott & Laurence were in the habit of collecting from their customers goods which they sent to the Black Sea, and that they have certain rates of freight for so doing, their profit being obtained by a commission upon these freights. This course of business was perfectly well known to both parties, for it appears that *The Argentino* herself had been employed upon these lines, and the probability of a remunerative employment of *The Argentino* was thus in the contemplation of both parties. The contract, therefore, in fact, was that in consideration that Mr. Porteous supplied *The Argentino* to carry the cargo collected by Messrs. Westcott & Laurence, Porteous allowed that vessel to collect that cargo and carry

it on the advertised voyage. That was a binding agreement. If, for instance, *The Argentino* had not been ready, and Messrs. Westcott & Laurence had been obliged to engage another vessel, they would have had a ground of action against *The Argentino* for any loss they had sustained. What leads me strongly to the opinion that what took place was not a mere negotiation is that *The Argentino* was, to the knowledge of her owners, advertised to load and sail after *The Rome*, and it was as sure as anything in business can be that *The Argentino*, except for some accident, would reap the benefit of this contract. The registrar, in his report, states that he was referred to the case of *The Star of India*, in which the loss sustained by the inability to fulfil a certain charter-party was allowed by the late judge of the Admiralty Court to be taken into consideration in estimating the amount of damages resulting from a collision. But the registrar distinguishes that case from the present on the ground that the arrangement in the present case was a mere verbal agreement to allow *The Argentino* to load for the Batoum route in the usual way, without any promise of a full cargo or a guaranteed rate of freight. The arrangement, the registrar says, had not the full force or effect of a definite charter-party under which a specific rate of gross freight was contracted for. It is there that I differ from him. There is nothing special in the fact that the advantage is to be derived from a definite charter-party. It is sufficient if there is something which leads to a definite assurance that some benefit will be derived, whether it be from a charter-party or any other agreement not a charter-party. The case of *The Star of India* was followed in the case of *The Conseil*, in which Sir Robert Phillimore equally allowed loss from inability to fulfil a charter-party. I also find an earlier case, in which the principle upon which the court proceeds is clearly laid down. It is the case of *The Clarence*. There Dr. Lushington said:—"It does not follow as a matter of necessity that anything is due for the detention of a vessel whilst under repair. Under some circumstances, undoubtedly, such a consequence will follow, as, for example, where a fishing voyage is lost, or where the vessel would have been beneficially employed. The *onus* of proving her loss rests with the plaintiff, and this *onus* has not been discharged on the present occasion. Had the owners of *The Clarence* proved that the vessel would have earned freight, and that such freight was lost by the collision, the case would have fallen within the principle to which I have last adverted. I therefore pronounce against the objection, and confirm the report, with costs." In the present case I am of opinion that the owners of *The Argentino* have proved that their vessel would have earned freight, and that such freight was lost by the collision. The nature of the advantage which she has lost is, indeed, not as clear as it would have been under a charter-party. At the same time its character is clear, though the amount is uncertain. *The Argentino* was entitled to take her turn as publicly advertised, and to receive for carriage such cargo as had been collected for that voyage by Messrs. Wescott & Laurence. The rate of freight was fixed. The only thing that remained in uncertainty was whether or not there would be a full cargo, though the contract was entered into in the expectation that there would be a full cargo. I am of opinion, therefore, that it can be held that a definite advantage, which would have been derived from the arrangement with Messrs. Westcott & Laurence, was prevented by the collision from being attained by the owners of the *The Argentino*, and that, therefore, the loss ought to be taken into account in estimating the damages they have suffered. It was sought, in argument, to liken this to the case of *The Parana*, where it was held that loss of market could not be allowed, but Mellish, L.J., clearly pointed out the reason for that decision—viz., that the loss of a market is purely speculative. I think that there is nothing speculative about the loss in the present case, its nature is defined, and its amount is ascertainable. I am, therefore, of opinion that the amount of damages allowed to the owners of *The Argentino* is not sufficient, and that the amount which *The Argentino* has really lost must be ascertained. It does not follow that damages for the detention of a vessel should necessarily be allowed, but it is usually assumed that a vessel will find employment. *Primâ facie*, *The Argentino* lost all the profit she would have gained if she had been allowed to take her turn as arranged, but she is not on that account entitled to remain idle, and she will only be allowed such damages as would result from her being obliged to be employed in some less remunerative way than she would have been employed in under her original contract. It is said by the registrar that there was no evidence before us that *The Argentino* could not have got employment as profitable as *The Beta's* from brokers in other directions if it had been sought for. If the registrar and merchants, from evidence before them or from their own great and special knowledge of these matters, had been able to say that *The Argentino* was not properly employed in going on the Odessa route, I should not have dissented from this view, but I think it is incorrect to say that *The Argentino* was bound to show that she could not have got employment as profitable as *The Beta's* from other brokers. The question is, Whether there was anything to show that this substituted voyage, entered into in good faith, was not the best thing under the circumstances? If it was, then the difference between the advantage derived from the two voyages must be taken as a natural result of the impossibility of fulfilling the contract.

Therefore, I think that this case must go back to the registrar to ascertain the amount of loss which the owners of *The Argentino* suffered from their vessel not being able to fulfil her contract. In this particular case there was another voyage which lasted about the same time as the voyage to Batoum would have taken, and so it naturally presents itself as a subject of comparison. Great difficulties might have arisen had *The Argentino* been employed on a totally different service on a voyage which might have lasted a very much longer or shorter time, but as it is there is an easy means of ascertaining the loss sustained by *The Argentino*. It is said that the cargo was, in fact, laden more expeditiously on *The Beta* than on *The Argentino* by eight days, and damages are therefore asked for specifically on that head. But I am of opinion that this cannot be treated as a specific amount of damage, though it must be taken into consideration. It will depend whether, in the employment of a vessel in the ordinary way, eight days' demurrage is an extraordinary length of time, if it was, and if the owners of *The Argentino* entered into a contract which enabled them to be detained for an unreasonable number of days, that loss must not fall on the owners of *The Gracie*. But if eight days or any other number of days is a reasonable amount of demurrage, and is usually contemplated in loading a vessel of the class of *The Argentino*, then that must be taken into consideration in estimating the damages in this case. As to the capacity of *The Argentino*, it appears she was larger than *The Beta*. If the facts are as alleged she would have obtained a cargo greater in quantity than that *The Beta* carried. The difference would be part of the loss sustained by the collision. I must, in the result, remit the report to the registrar for reconsideration on the principles which I have laid down.

Solicitors for the owners of *The Gracie*, *Lewis & Co.*

Solicitors for the owners of *The Argentino*, *Downing & Holman*

Court of Appeal.

From Chan. Div. March 15.

In re BUTLER'S TRUSTS.

HUGHES *v.* ANDERSON. (*a.*)

Joint tenancy—Severance—Marriage—Wife's chose in action.

Marriage does not operate as a severance of the wife's joint tenancy in a chose in action (*bank stock*) *which has not been reduced into possession by the husband.*

Baillie *v.* Treharne, 29 W. R. 729, 17 *Ch. D.* 388, *disapproved.*

The question in this case was whether the joint tenancy in a *chose in action* had been severed by the marriage of one of the joint tenants (a woman), the *chose in action* not having been reduced into possession by the husband.

By his will, made in February, 1865, W. H. Butler, who died on the 11th of October, 1865, bequeathed to his executors, one of whom was his wife, certain leasehold property, furniture, policy moneys, and all other property belonging to him at his death, upon trust to pay his debts, and he directed that the residue should be appropriated to the support of his widow and her two children, a son and a daughter.

The testator left no real estate, and the residue of his personal estate, amounting to £849, was, in 1867, invested in the purchase, in the names of the surviving executors, John Gibbs and Elizabeth Butler (the testator's widow), of £311 18*s.* 9d. bank stock.

In 1868 Elizabeth Butler was married to her present husband, D. G. Anderson. The testator left two children, Bessie Alice, who died in 1879 an infant and unmarried, and William Henry, who died in 1886, having attained twenty-one, and leaving a widow and one child, an infant.

In July, 1887, the bank stock was transferred into the names of Mrs. Anderson and the plaintiffs, Hughes and Colcutt, who had been appointed new trustees of the will. D. G. Anderson was not a party to any transfer or sale of the property, and never interfered with it in any way whatever.

On the 31st of October, 1887, an originating summons was taken out by Hughes and Colcutt against Mr. and Mrs. Anderson and the widow and infant child of William Henry Butler the son, raising the question whether Mrs. Anderson was absolutely entitled to the testator's residuary estate.

North, J., held that the widow and the two children of the testator became on his death entitled to the residue of his estate as joint tenants, but (following *Baillie* v. *Treharne*, 29 W. R. 729, 17 Ch. D. 388) that the marriage of the widow with Anderson in 1868 severed the joint tenancy, and that she thereupon became absolutely entitled to one-third of the residuary estate, and that the legal personal representative of the testator's son, William Henry Butler, the survivor of the two children, was entitled to the remaining two-thirds.

From this decision Mr. and Mrs. Anderson appealed.

Cozens-Hardy, Q.C., and *Marcy*, for the appellants.

Cookson-Crackanthorpe, Q.C., and *Theobald*, for the respondents.

The arguments and the cases cited sufficiently appear from the judgments.

COTTON, L.J.—This appeal raises a nice point which, except for the case of *Baillie* v. *Treharne*, has now come for the first time for decision. The question is whether, when a woman entitled to an equitable interest as joint tenant in a *chose in action* marries, the marriage by itself is a severance of the joint tenancy.

We must go back to the old authorities, which lay down the principle upon which the question must be solved.

Lord Coke says (Co. Litt. 185b):—"Two *femes*, joyntenants of a lease for yeares, one of them taketh husband and dieth, yet the terme shall survive; for though all chattells real are given to the husband if he survive, yet the survivor between the joyntenants is the elder title, and after the marriage the *feme* continued sole possessed; for if the husband dyeth the *feme* shall have it and not the executors of the husband. But otherwise it is of personall goods."

It is said that the words "personal goods" were used by Lord Coke in the widest possible sense, as including all personal property whatsoever. But there is another passage (p. 351a) which shows that Lord Coke did not use the words in that sense:—"But chattels real being of a mixt nature—viz., partly in possession and partly in action, which happen during the coverture—the husband shall have by the intermarriage if hee survive his wife, albeit he reduceth them not into possession in her lifetime; but if the wife surviveth him she shall have them. As if the husband be seised of a rent service, charge, or seck, in the right of his wife, the rent become due during the coverture, the wife dieth, the husband shall have the arerages; but if the wife survive the husband she shall have them, and not the executors of the husband."

Then follows the passage which shows that in the previous passage he meant by "personal goods" property passing by delivery. He proceeds (p. 351b):—"But the marriage is an absolute gift of all chattels personal in possession in her owne right, whether the husband survive the wife or no; but if they be in action, as debts by obligation, contract, or otherwise, the husband shall not have them unlesse he and his wife recover them." That seems to lay down a principle which has been acted upon in later cases.

In *In re Barton's Will*, 10 Hare, 12, Turner, V.C., after referring to the passage which I have read from Co. Litt. (p. 185b.), proceeds:—"The authority referred to by Lord Coke is the case of *Bracebridge* v. *Cook*, Plowd. 418. In that case, after stating that if a woman having a term of years takes a husband, the husband cannot devise the term to another by his will; for the wife at the time of the death and before the death had the estate in her, which will prevent and frustrate the devise, . . . but otherwise it is of chattels personal; for if a woman who has personal goods takes a husband, the law divests the property out of the wife and vests it in the husband only; and so it is if a stranger gives personal goods to a *feme covert* and to a stranger, the jointure is presently severed by the law so that the survivor of the wife or of the other shall not have the whole, but the husband and the other are tenants in common presently, and the title of such of them as first dies shall go to the executors." He means that the joint tenancy is severed in the goods because in the chattels there referred to the husband has, by force of his position, the right to take them, and by taking them to divest the property out of the wife. Then the passage goes on:—"For chattels personal are esteemed in law of less value and are of a baser degree than chattels real, and so there is a diversity between them; and it is added that, the case being one of a chattel real, the coverture of the wife makes no severance of the jointure, nor is it any impediment to the plaintiff having the whole as survivor." So far the Vice-Chancellor has been dealing with the case of *Bracebridge* v. *Cook*, and he pro-

(*a.*) Reported by C. HERBERT BROWN, Esq., Barrister-at-Law.

ceeds:—"Thus it appears that, in the case of chattels real, the joint tenancy is not severed by the marriage, because the property does not vest in the husband; but in the case of chattels personal it is severed by the marriage, because the property does vest in her." The report says "her," but that is obviously a mistake for "him." "In the present case," continues the Vice-Chancellor, "the property was a mere chattel personal, but the wife's interest was reversionary, and therefore the title of the husband or his assigns could not arise till after the death of the wife in his lifetime. The case, therefore, seems to me to fall within the principle of the rule which applies to chattels real, and not of the rule which applies to chattels personal; and consequently the joint tenancy was not severed by the marriage, but continued till the death of the wife."

It is clear that by "chattels personal" the Vice-Chancellor meant chattels passing by delivery. A wife's *chose in action* does not vest in the husband by marriage, and it would be a strange thing if marriage in respect of such property were to have any greater effect than it would as regards a wife's undivided moiety in a term or chattel real. As regards the latter the husband can at once execute a deed which will have the effect of severing the joint tenancy, but he cannot do that in regard to her *choses in action*. I do not see, therefore, why marriage should sever the wife's joint tenancy in a *chose in action* while it does not do so in her chattels real. We were referred to a passage in the judgment of James, V.C., in *Armstrong* v. *Armstrong*, 17 W. R. 571, L. R. 7 Eq., at p. 522, which would look as if that learned judge considered that a *chose in action* in possession was to be considered as personal goods within the meaning of the passage in Co. Litt. He does not take the point which we now have to decide, because it was not necessary for his purpose, the *chose in action* there being reversionary, "which the husband could not have reduced into possession during the coverture"; but I take it that he did not intend to apply to a *chose in action*, which is not reversionary, the term "chattel personal in possession" in the sense in which that term is used as meaning a chattel which, by the mere act of marriage, becomes vested in the husband. The only case in favour of the respondent's view is *Baillie* v. *Treharne*, and there Malins, V.C., undoubtedly does express a view which is contrary to what I consider to be the true one. He says, "A joint tenancy can always be severed by assignment, and that may be done either by deed or by operation of law, as on marriage, by which the personal property of the wife is given to the husband as much as if it was assigned by deed." That, no doubt, is the case with regard to personal goods which are capable of being taken into manual possession. But, as regards the wife's *choses in action*, it is wrong to say that marriage has the same effect of assigning them to the husband as a deed executed by the wife before marriage would have had. On the marriage the husband acquires the right to reduce her *choses in action* into possession, or, if they are reversionary, he can reduce them into possession if he be the survivor. But that is a right entirely different from what the husband would get if the wife were to assign such property to him by deed executed before marriage. In my opinion the Vice-Chancellor did not take note of what is the true effect of marriage upon the wife's *choses in action*, and I must dissent from his decision, which North, J., has followed. The appeal will therefore be allowed.

LINDLEY, L.J.—I am of the same opinion. The only intelligible rule is that laid down in *Bracebridge* v. *Cook*. In that case a lessee for years granted his estate to a *feme covert* and another, and the question was whether or no thereby the term remained in jointure, or if the jointure was dissolved by the interest of the husband; and the court held the law to be that, "if a man who has a lease for years grants his term to a *feme covert* and another, or if a *feme covert* and another are joint tenants for years, and she takes husband, the jointure is not dissolved, but continues. But otherwise it is of chattels personal; for if a woman who has personal goods takes husband, the law divests the property out of the wife and vests it in the husband only. And so it is if a stranger gives personal goods to a *feme covert* and another; the jointure is presently severed by the law, so that the whole shall not go to the survivor of the wife and the other, but the husband and the other are tenants in common presently, and the title of such of them as first dies shall go to the executors; for chattels personal are esteemed in law of less value, and are of a baser degree, than chattels real, and so there is a diversity between them. Therefore here, inasmuch as this is a chattel real, the coverture of the wife makes no severance of the jointure." The marriage of a woman does not vest the property in her *choses in action* in the husband, and therefore, if she is a joint tenant of a *chose in action*, the marriage does not sever the joint tenancy.

BOWEN, L.J.—I am of the same opinion. In the case of chattels personal, marriage, by process of law, diverts the property in them out of the wife. In the case of chattels real (leaseholds) it does not; the husband acquires a right to make the property his own, but a *novus actus interveniens* on his part is necessary. In the case of a *chose in action* marriage does not divest the property out of the wife, and all that the husband acquires by the marriage is a right to reduce the *chose in action* into possession. The interest of the wife in this case being an interest in a *chose in action*, the joint tenancy was not severed by the marriage. I will add nothing to what has been said with reference to *Baillie* v. *Treharne*.

Order of North, J., discharged so far as it declared the marriage of the defendant Mrs. Anderson in 1868 to be a severance of the joint tenancy.

Solicitors for all parties, *Collis & Mallam*.

From Chan. Div. July 16, 17.

In re LAND DEVELOPMENT ASSOCIATION. KENT'S CASE. (*a*.)

Company—Shares—Plea of payment in cash—Fraudulent preference—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 164—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 38, 48.

K., a shareholder in a company, whose directors were authorized to receive from shareholders payments in respect of future calls, took an assignment from a creditor of the company of a debt due by the company, and, on April 2, 1886, *the directors resolved that the seal of the company be affixed to this assignment, and that a sufficient part of the debt so assigned be applied in paying up in full the shares held by K., in accordance with K.'s request to that effect.*

No part of the debt so assigned to K. was payable by the company till June 30, 1886, *nor had any call been made on April* 2 *in respect of K.'s shares. Beyond the minutes of the above resolutions, the books of the company contained no entry as to the above transaction, and no contract as to the mode of payment for the shares was registered under section* 25 *of the Companies Act* 1862. *On April* 20, 1886, *a winding-up order was made, on a creditor's petition, presented on April* 5.

(*a*.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

Held (*affirming* Kay, J., ante, *p.* 570, 37 *Ch. D.* 508), *that the transaction was not equivalent to, and could not support a plea of, payment in cash within the principle laid down in* Spargo's case, 21 *W. R.* 306, *L. R.* 8 *Ch. App.* 407, *and* White's case, 27 *W. R.* 895, 12 *Ch. D.* 511; *and that K. was therefore liable for calls made in the winding up in respect of the shares.*

Ferra's case, 22 *W. R.* 386, *L. R.* 9 *Ch. App.* 355, *distinguished.*

Held, also, on the evidence, that, on April 2, 1886, *the company was, to the knowledge of the directors, in an insolvent state, and that the transaction of that date was invalid as a fraudulent preference within section* 164 *of the Companies Act*, 1862.

Appeal from Kay, J. (reported *ante*, p. 570, 37 Ch. D. 508).

A summons had been taken out by the liquidator in the winding up of the Land Development Association for the purpose of enforcing payment by Kent, the present appellant, of a call for £811 on shares in respect of which he had been placed on the list of contributories. Kent contended that the shares in question had been fully paid for, and relied on the following transaction as sufficient to support his plea of payment.

In 1885 one Eicholz claimed a large sum of money from the company. In November, 1885, an arrangement was come to between Eicholz and the company, whereby in effect the company acknowledged their indebtedness to Eicholz, and agreed to pay the same in four instalments, of which the first instalment, £3,000, was to become payable on June 30, 1886. Kent agreed with Eicholz to purchase this debt due by the company to Eicholz.

On April 2, 1886, Kent wrote to the directors of the company requesting them to transfer from the amount due in respect of the debt due by the company to Eicholz, and assigned by Eicholz to Kent, a sum sufficient to pay up in full the shares standing in Kent's name. At a board meeting of directors held the same day it was resolved that "the seal of the association be affixed to the assignment from Eicholz to Kent of the association's indebtness to Eicholz as expressed therein," and that "the debt assigned by Eicholz to Kent as aforesaid be applied in paying up in full the shares mentioned in Kent's letter of this date." Except the minutes of these resolutions there was no entry in the books of the company with reference to the transactions, and no contract in writing had been registered under section 25 of the Act of 1867. At the date of these resolutions no call on the shares held by Kent had been made. Article 11 of the articles of association empowered the directors to receive in advance all or any part of the moneys due on shares beyond the sums actually called for on them.

On April 5, 1886, a petition for the winding up of the company was presented by a creditor, and on April 20 a winding-up order was made.

Kay, J., held that there had been nothing equivalent to payment in cash within section 25, and that Kent was therefore liable for the call made.

Kent appealed, and appeared in person.

The arguments and cases relied on by him appear sufficiently from the report below, and are fully dealt with in the judgment.

Marten, Q.C., and *Vernon Smith*, for the respondent, the liquidator, were not called on.

COTTON, L.J.—This is an appeal from a decision of Kay, J., holding the appellant liable to pay a call of £811 on shares, in respect of which he has been placed on the list of contributories. The appellant contends that this sum must be treated as paid—*i.e.*, that, having regard to the transaction of the 2nd of April, there has been a payment of the amount due on the shares within the principle laid down in *Spargo's case*, 21 W. R. 306, L. R. 8 Ch. App. 407, and other cases. In *Spargo's case*—the whole question turning on section 25 of the Act of 1867—James, L.J., says, "It was considered that there was mischief in collateral contracts of that kind which deprived creditors of the remedies they would expect to have against persons whose names they saw registered on the list of shareholders. . . . But if a transaction resulted in this, that there was on the one side a *bonâ fide* debt payable in money at once for the purchase of property, and on the other side a *bonâ fide* liability to pay money at once on shares, so that if bank-notes had been handed from one side of the table to the other in payment of calls they might legitimately have been handed back in payment for the property, . . . it appears to me that this Act of Parliament did not make it necessary that the formality should be gone through of the money being handed over and taken back again, but that if the two demands are set off against each other the shares have been paid for in cash. If it comes to this, that there was a debt in money payable immediately by the company to the shareholder, and an equal debt payable immediately by the shareholder to the company, and that each was accepted in full payment of the other, the company could have pleaded payment in an action brought against them, and the shareholder could have pleaded payment in cash in a corresponding action brought by the company against him for calls. Supposing the transaction to be an honest transaction, it would in a court of law be sufficient evidence in support of a plea of payment in cash, and it appears to me that it is sufficient for this court sitting in a winding-up matter." Mellish, L.J., though not using exactly similar terms, must be considered as assenting to the view expressed by James, L.J., for he says, "Nothing is clearer than that, if parties account with each other, and sums are stated to be due on one side and sums to an equal amount due on the other side on that account, and those accounts are settled by both parties, it is exactly the same thing as if the sums due on both sides had been paid." In *White's case*, 27 W. R. 895, 12 Ch. D. 511, I myself expressed the same view.

We must now apply the principle laid down in these cases to the present case, having regard to section 25 of the Act of 1867.

These shares were standing in Kent's name, and article 11 of the articles of association provided that the directors might receive from any member willing to advance the same all or any of the moneys due upon the share or shares held by him beyond the sums actually called for. On the 2nd of April, 1886, no call had been actually made, but, assuming that on that date there was a debt due by the company to Eicholz, under the arrangement of November, 1885, exceeding the amount of the uncalled liability in respect of Kent's shares, yet under the agreement of November, 1885, the debt due by the company to Eicholz was payable at certain specified times, and no portion of it was payable on the 2nd of April, nor until the 30th of June, 1886. [The Lord Justice then referred to Kent's letter of the 2nd of April, and the resolution passed by the directors on the same day, "That the debt assigned by Eicholz to Kent be applied in paying up in full the shares mentioned in Kent's letter," and continued:—] Can it be said that that transaction of the 2nd of April would in any way support the plea of payment in cash? Both the debt due by the company to Eicholz and the liability of Kent to the company in respect of his shares, on which no call had then been made, were at that date matters *in futuro*, and the agreement between the company and Kent was in respect of a future thing to be done when those debts became payable.

In my opinion, therefore, the transaction cannot come within the principle laid down by James, L.J., in

Spargo's case. As to what was said by Kay, J., that if there had been an entry in the books of the company showing that the debt due by the company to Eicholz had been written off, I think what he meant was that such an entry might have been—not evidence of what had been agreed to, but as constituting, in fact, a new agreement as to payment. However there was no such entry. The case is, therefore, quite distinct from *Ferrao's case*, 22 W. R. 386, L. R. 9 Ch. App. 355, which has been relied on by Mr. Kent. It is quite true that in *Ferrao's case* there were no calls actually due, but the court held that the moment the company, in pursuance of the judge's order, made the entry crediting the shares of Ferrao with the £700, that was to be treated as a payment in cash for the amount due on the shares. That case is wholly distinct from the present one. But then the appellant contended that the resolution of April 2 was an agreement that the Eicholz debt should be treated as presently payable, and for payment of the same to the extent of £811. In my opinion the resolution does not amount to an agreement to that effect.

I have also come to the conclusion that, under the circumstances, the transaction would be such as to give Kent, as assignee of Eicholz's debt, a fraudulent preference, and the fact that the debt due to Eicholz was of a larger amount than Kent's liability in respect of calls is utterly immaterial. I think that the company, at the time of the transaction, was not in a position to pay its debts as they became due. A winding-up petition was presented only three days after the date of the transaction referred to, and a winding-up order was made on that petition within three weeks afterwards. We have therefore to consider the effect of section 48 of the Bankruptcy Act, 1883, and of section 164 of the Companies Act, 1862. [The Lord Justice read these sections, and continued:—] It was said that section 38 of the Bankruptcy Act, as to mutual credits and set off, would prevent this transaction from being a fraudulent preference. But, in my opinion, that section does not protect any transaction from being a fraudulent preference which otherwise would be deemed so; and there is, further, an express provision in the Companies Act, 1862, that a person in the position of shareholder as well as creditor of a company cannot claim in the winding up of a company in competition with outside creditors. The present case is very like *Sykes' case*, L. R. 13 Eq. 255, 20 W. R. Ch. Dig. 49, where the articles gave a similar power to the directors to receive payment of calls in advance, and the directors paid in advance the amount remaining uncalled on their shares, and then immediately appropriated the sums so paid for their own fees, and it was held that the transaction was not *bonâ fide*, and that the directors were not thereby relieved from liability upon their shares. I am of opinion, then, that this appeal fails.

FRY, L.J.—The appellant contends that he has paid the whole amount on the shares held by him, and he relies on the resolution and the agreement of April 2, 1886, in support of that plea. How did things stand on that date? Eicholz had then a large claim against the company, and under an agreement of November, 1885, a sum of £3,000 was payable by the company to Eicholz on June 30, 1886, and an unascertained balance was payable in the December following. That being the state of affairs the company on April 2, 1886, affix their seal to a document by which Eicholz assigned to Kent four several sums of money, in respect of which the company agreed they were indebted to Eicholz. These sums were treated by the company as a debt *debitum in præsenti solvendum in futuro*, and although a debt also then existed, due from Kent to the company, it was not a debt payable *in præsenti* but *in futuro*. The company then pass this resolution. [The Lord Justice read the resolution of April 2, and continued:—] The question is, Does that transaction amount to a payment of the amount unpaid on Kent's shares within the meaning of section 25. If we were at liberty to have recourse to the very words of the section no question could arise, but the effect of *Spargo's case* and *White's case* has been to strike out from the section the words "in cash," and we are bound by those decisions. We have, therefore, to inquire whether the transaction here amounted to payment in law, and I say unhesitatingly it did not. There was no actual settling of accounts in the books of the company; there was merely a resolution, in effect, that the debt due to Eicholz "be applied"—*i.e.*, shall be applied—as a set off against the debt due by Kent on his shares as and when the same became payable. It was not a transaction by which the sums due were treated as then payable. But, even if it were so, I think the transaction would be void as a fraudulent preference. The company was, as Mr. Kent himself expressed it, "commercially insolvent" at a period not very long before the date of this transaction, and though it is true that in the interval the arrangement with Eicholz had been come to, I cannot agree with Mr. Kent in considering that that arrangement substantially altered the position of the company. On April 5 two petitions for the winding up of the company were presented, and it is admitted that since the winding up not a shilling has been paid to creditors. To my mind the obviously true conclusion is that on April 2 the company were unable to pay their debts out of their own moneys as they became due. I think the object of the transaction was to give Mr. Kent a preference over other creditors so that he might receive payment in full when the other creditors would not.

Even apart from section 164 of the Companies Act, 1862, I think the transaction could not stand. It was sanctioned at a meeting of directors held on April 2. The position of the company was known to the directors, and Mr. Kent admitted that one of the directors, Mr. Shurley, who acted as chairman at the meeting, had promised to favour Kent's application, it being part of the arrangement that that director should be relieved from liability in respect of his own debt. If that were so I can only say that the whole transaction was either "a sham, or fraud, or deceit."

LOPES, L.J.—Mr. Kent says that the shares are fully paid up. This depends on section 25 of the Act of 1867. [His lordship read the section, and continued:—] I think the meaning of that is, that a person is to be prohibited from contracting that shares are to be paid for otherwise than in cash, except by means of a contract registered at or before the issue of the shares. In this case there has been no registered contract. Has there been payment in cash? The cases show that any transaction which would, in an action for calls on the shares, support in law a plea of payment, amounts to payment in cash. What is the nature of the agreement here? A debt payable not *in præsenti* is to be set off against a liability for calls on shares not then payable. There is no entry in the books of the company other than the resolution referred to. In my opinion the transaction does not amount to payment. *Ferrao's case* is not in favour of the appellant, but against him. There it was held that the actual writing off of the sum in the books of the company was evidence of payment. The case of *Eyles* v. *Ellis*, 4 Bing. 112, shows that such an entry in the books of a company is evidence of payment. I am of opinion, also, that the transaction of April 2 did amount to a fraudulent preference. On the other matters I forbear to make any observation.

Appeal dismissed.

Solicitors, *Badham & Williams; H. C. Morris.*

From Lancaster Palatine Ct. of Chan. } July 5.

In re WILLIAM HUGHES. (*a.*)

Imperfect testamentary instrument — Donatio mortis causâ.

A., having made his will in 1880, *by which he gave the income of his property to his wife B., fell ill in* 1887, *and, being in anticipation of death, signed the following document:*—" 1887, *March* 1.—*I give all my insurance money that is coming to me to my wife B. for her own use, as well as* £200 *in the bank. This is my wish.—A. Witness, C.*" *This document was, at A.'s request, placed with his will, and remained there till his death in April,* 1887. *Evidence having been admitted as to the circumstances attending the execution of the document,*

Held, that it was intended as a testamentary instrument, and, not having been properly attested according to the Wills Act, could not take effect as a will.

Held, also, that effect could not be given to the document as a donatio mortis causâ, *or as an immediate assignment of the property therein mentioned.*

This was an appeal from a decision of the Vice-Chancellor of the Palatine Court, holding that there had been a valid transfer by William Hughes, the testator, to his widow, Hannah Hughes, of a sum of £307 8s. 1d., which had been paid by the Prudential Assurance Co. in respect of a policy of insurance on the testator's life, and of £200 standing to his credit at the time of his death in the North and South Wales Banking Co.

By his will, dated the 25th of June, 1880, William Hughes gave all his property to trustees on trust to convert and invest and pay the income to his wife Hannah during widowhood, and on the determination of her interest to pay the principal to his nephews and nieces.

In February, 1887, William Hughes was very ill; and on the 1st of March, 1887, being in expectation of immediate death, he asked his wife for his will, which was kept in a desk of which he had the key, telling her that he did not expect to live through the day. After reading over the will and explaining it to her he wrote out the following paper, and calling for his wife's niece signed it in her presence, and she attested it:—

"I give all my insurance money that is coming to me to my wife Hannah, for her own use, as well as £200 in the bank. This is my wish.—WILLIAM HUGHES.

"Witness.—CAROLINE MARY TINSLEY."

At the time of signing this document William Hughes said to Miss Tinsley: "I am leaving my insurance money and the money in the bank to your aunt for her own use to do as she likes with," and used a similar expression to his wife.

The paper was then folded up in the will, which was locked up again in the desk, where it remained until the death of William Hughes on the 19th of April, 1887.

The Vice-Chancellor of the Palatine Court held that the document was not a testamentary instrument, but operated from its date, and was a complete gift of the property to the wife, as a transfer.

The beneficiaries, other than the widow, appealed.

F. Thompson, in support of the appeal.—The document of the 1st of March, 1887, was a testamentary instrument in its nature and intention, and, not having been attested according to the provisions of the Wills Act, is inoperative. On the face of it the document shows that it was only to be operative in the event of the death of William Hughes; and unless an instrument is plainly intended to operate as a gift *inter vivos*, evidence of surrounding circumstances is admissible to show that it was intended to be testamentary: *In the Goods of English*, 13 W. R. 503, 3 Sw. & Tr. 586; *Robertson* v. *Smith*, L. R. 2 P. & M. 43, 18 W. R. Prob. Dig. 15; *Jones* v. *Nicholay*, 2 Rob. Eccl. 288, 14 Jur. 676, followed by Sir C. Cresswell in *In the Goods of Marsden*, 1 Sw. & Tr. 542, 8 W. R. Prob. Dig. 9; *In the Goods of Coles*, 20 W. R. 214, L. R. 2 P. & M. 362; *In re Patterson*, 12 W. R. 941. If, as I submit, it was inoperative as a testamentary instrument, it cannot be construed as a gift *inter vivos* in order that effect may be given to it.

Neville, Q.C., and *P. H. Lawrence*, for Mrs. Hughes, the respondent.—Though intended as a will the document may be upheld as a *donatio mortis causâ*, to take effect in the event of the donor's death: *Stainland* v. *Wilott*, 3 Mac. & G. 664, 677. It may, at any rate, be supported as an equitable assignment of a *chose in action*: Judicature Act, 1873, s. 25, sub-section (6).

They also referred to *Gorringe* v. *Irwell India-Rubber Works*, 35 W. R. 86, 34 Ch. D. 128; *Harding* v. *Harding*, 34 W. R. 775, 17 Q. B. D. 442; *In re King's Estate*, 28 W. R. 344.

COTTON, L.J.—This is an appeal from a decision of the Vice-Chancellor of the Duchy, to the effect that the widow of Mr. Hughes is entitled under this document to the property mentioned therein—namely, a sum of about £300 secured by a policy of insurance on his life, and which has been received by his executors since his death, and a balance of some £200 at the date of the document standing to the credit of his banking account. The document upon which the widow's claim rests is in these terms. [His lordship read the document.] Now, judging both by the form of this document and by the circumstances attending its execution, and the fact that the testator placed it with his will, and that it was kept with his will until his death, I believe that this writing was intended to be testamentary. The gift is of moneys "coming to me," which, as the moneys were secured by a policy on his life, could only point to the time of his death; and I think that the same period is indicated for the gift of the money in the bank, which is joined to the other gift.

In my opinion the document is, on the face of it, testamentary, and, not being attested as required by law, we cannot accept it, or we should be doing away with the Wills Act altogether.

It has been argued that the gift, or so-called gift, may operate as a *donatio mortis causâ*; but, in my opinion, this argument cannot succeed. If a chattel or a deposit note be handed over by a person in contemplation of death, so as to confer a complete title on the donee, there may be a good *donatio mortis causâ*. But the subject of this alleged gift was not property the title to which or the evidence of title to which passes by delivery, to which property alone, speaking generally, the doctrine of *donatio mortis causâ* applies.

It has been suggested in argument that this document can be supported as a good assignment in equity, though not at law. This, however, is not the case. The transaction was not an assignment by the testator to the widow immediately, but only a direction that she should, after his death, be entitled to the moneys to be derived from the policy. The cases cited, therefore, on behalf of the widow do not assist her.

In my opinion the decision of the Vice-Chancellor was wrong and must be reversed.

BOWEN, L.J.—I am of the same opinion. The true inference, as it seems to me, to be drawn from the document and the circumstances is that the testator intended it as a will or testamentary instrument. He had it placed with his will; it was not delivered to the donee; the condition of the property referred to in it was left the same as before; the moneys to be derived from the policy could only come to him after his death; and the

(*a.*) Reported by C. HERBERT BROWN, Esq., Barrister-at-Law.

document concluded with these words: "This is my wish."

It has been urged on behalf of the widow that the case is one of *donatio mortis causâ*. Now it is perfectly true that there may be *donationes mortis causâ* of policies and bonds and other documents evidencing the title to *choses in action*; but, speaking broadly, the subjects of *donationes mortis causâ* must be things the title to which, or the evidence of title to which, passes by delivery. Where, as in the present case, there is no change of possession operating as an immediate transfer, the court cannot allow the doctrine of *donatio mortis causâ* to be applicable. If we decided otherwise we should, in effect, be enabling persons to drive a coach and four through the Wills Act.

FRY, L.J.—I am of the same opinion. The real point in the case seems to me to be that to which Mr. Thompson addressed himself—namely, the question whether this document is testamentary or not. And I entirely agree with my learned brethren that it is testamentary, and, as such, ineffectual as not satisfying the requirements of the Wills Act. If, as this court has decided, the instrument is testamentary, it cannot be an assignment. So the decision of the court disposes of the argument that it is a *donatio mortis causâ*.

Appeal allowed.

Solicitors, *Kemble & Co.*, for *Sharman, Ayrton, & Radcliffe*, Liverpool; *Kent, McKenna, & Kent*, Liverpool.

From Q. B. Div. July 14.

McGOUGH v. LANCASTER BURIAL BOARD. (a.)

Burial Acts, 1852 (15 & 16 *Vict*, c. 85), *ss.* 33, 38, *and* 1853 (16 & 17 *Vict.* c. 134), *s.* 7—*Grant of exclusive right of burial—Right to place glass shade with flowers on grave.*

A burial board, pursuant to the powers of section 33 *of* 15 & 16 *Vict.* c. 85, *granted to the plaintiff "the exclusive right of burial in perpetuity" in a certain grave in their cemetery, and permitted him to erect a gravestone thereon. The plaintiff having placed on the grave a small stand with flowers on it, covered by a glass shade and wire frame,*

Held, that, under section 33, *the plaintiff was not entitled to place these things upon the grave, and that the burial board could remove them under the general power of control over the cemetery vested in them by section* 38 *of the Act.*

Appeal from a judgment of the Queen's Bench Division, reported *ante*, p. 159.

The defendants had provided a burial-ground, called Lancaster Cemetery, under the provisions of 15 & 16 Vict. c. 85, as extended by section 7 of 16 & 17 Vict. c. 134. The defendants, by virtue of the powers conferred on them by the above Acts, granted to the plaintiff, James McGough, in consideration of the sum of one guinea, "the exclusive right of burial in the grave space (describing it), to hold the same to the said James McGough, his heirs and assigns, in perpetuity for the purpose of burial," subject to the payment of certain fees reserved by the Acts, "and also subject to the regulations now in force, or which may hereafter be issued with regard to interments in the said cemetery by her Majesty's Secretary of State or by the said board or any other competent authority." The plaintiff buried his daughter in the grave, and erected a gravestone thereon with the permission of the defendants. The grave was in the unconsecrated part of the cemetery. The plaintiff without the permission of the defendants, placed upon the grave a small round stand with flowers on it covered by a glass shade, the shade being protected by a galvanized wire frame. The defendants thereupon removed them. The frame was fifteen inches high from the ground and fourteen inches wide. The defendants had for several years declined to allow glass shades and stands to be placed on the graves, and in removing the above articles they acted under their general power of control over the cemetery, and not under any special regulation. The plaintiff brought this action in the Lancaster County Court to recover damages for the alleged wrongful removal. The judge found that the wreath, shade, and frame were usual and proper, and gave judgment for the plaintiff. The Divisional Court (Wills and Grantham, JJ.) entered judgment for the defendants (*ante*, p. 159). The plaintiff appealed.

15 & 16 Vict. c. 85 (The Metropolitan Burial Act, 1852) s. 33: "Any burial board, under such restrictions and conditions as they think proper, may sell the exclusive right of the burial, either in perpetuity or for a limited period, in any part of any burial-ground provided by such board, and also the right of constructing any vault or place of burial with the exclusive right of burial therein in perpetuity or for a limited period, and also the right of erecting and placing any monument, gravestone, tablet, or monumental inscription in such burial-ground. . . ."

Section 38: "The general management, regulation, and control of the burial-grounds provided under this Act shall, subject to the provisions of this Act and the regulations to be made thereunder, be vested in and exercised by the respective burial boards providing the same. . . ."

By 16 & 17 Vict. c. 134, s. 7, the provisions of (*inter alia*) sections 10 to 42 of 15 & 16 Vict. c. 85 were extended to parishes not in the Metropolis.

Crompton, Q.C., for the plaintiff.

R. O. B. Lane, for the defendants.

The arguments were the same as in the court below.

Lord ESHER, M.R.—Whatever may be our opinion as to the feelings and taste of the defendants, we have only to determine what the law is. I cannot agree with the judgment of the county court judge. He speaks of a right of property in the plot apart from and beyond the right of burial. I cannot agree with that. The plaintiff has only statutory rights, and those are the only rights the burial board could give him. If they had purported to give him more their act would be *ultra vires* and void. The grant therefore only gave him statutory rights. Those rights are specified in section 33 of the Burial Act, 1852. In my opinion the board have no power to grant a freehold estate in the plot. They have power to grant the exclusive right of burial either in perpetuity or for a limited period. They have also power to grant the right of constructing a vault as a place of burial; the only right that can be exercised in that vault being the exclusive right of burial therein. They can also grant the right of erecting a monument, gravestone, &c. Those three things the board have the power to grant, and any grant in excess of that would be void. The grant must be by way of sale. The plaintiff, by his grant, has the exclusive right of burial in perpetuity in a particular grave space, and I assume that he had, not by the grant but by something not before us, the right of placing a gravestone over the grave. He exercised both those rights. He went beyond that, however, and placed, either on the grave or on the gravestone, a wreath of flowers and a glass shade with a wire frame to protect them. The plaintiff had no legal right to do that. He had only the right of burial and of erecting a gravestone. I have no

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

doubt that that right would carry a right to put an inscription on the gravestone. Therefore when he put this frame on the grave he had no legal right to do it. But the case does not rest there. By section 38 the control and regulation of the cemetery is given to the burial-board. There is no appeal from them as to the mode in which they exercise their control. It is a general control that they exercise, and I do not know that they could exercise it differently in one case from another. The board here have exercised the control conferred upon them by section 38, and I cannot see that there is any appeal from them upon that point. The appeal must, therefore, be dismissed.

LINDLEY, L.J.—I am of the same opinion. The question turns upon the true construction of two sections of the Burial Act, 1852—sections 33 and 38. By section 33 the burial board have the power, under such restrictions and conditions as they think proper, to sell the exclusive right of burial in any part of the burial-ground. Burial-grounds generally consist, as in the present case, of a consecrated and an unconsecrated part. The power to grant the exclusive right of burial extends to both parts. Then by section 38 the general management, regulation, and control of the burial-ground is to be vested in, and exercised by, the burial board. This last duty is imposed upon them. They are the custodians of the burial-ground, and it is their duty to exercise control over it. Such being their powers, they have granted to the plaintiff the exclusive right of burial in a certain grave space in perpetuity subject to the regulations now in force, or which may hereafter be issued with regard to interments by the Secretary of State or by the board. I cannot altogether disregard these last words. I cannot go the length of saying, as Willes, J., seems to have said, in *Ashby* v. *Harris*, 16 W. R. 869, L. R. 3 C. P. 523, that no regard should be paid to them. In my opinion, it is impossible to say that the board cannot prohibit a glass frame and wire cover being placed on the graves. In their view the frame is objectionable, and we have only to see whether they are acting within their legal rights. It is not like the case of *Ashby* v. *Harris*, where it was held that a right of planting flowers and renewing them could be inferred from the obligation in the grant to keep the gravestone and its appurtenances in repair. But, even assuming the plaintiff has a right to keep the grave space in repair, what he has done here has nothing to do with keeping it in repair. I cannot, therefore, say that the board could not, in point of law, object to this frame.

BOWEN, L.J.—I also think that we cannot interfere with the view taken by the burial board. With respect to the grant by the board to the plaintiff, the truth is that it creates a statutory right which must be measured by and interpreted according to the language of the statute. I think it is worth while, with a view to construe the statute, to consider what would be the rights of parishioners at common law with respect to burial in the parish churchyard. The common law is beyond doubt. The churchyard as well as the church is the freehold of the incumbent, subject to the right of the parishioners to burial there. The incumbent has certain personal rights and interests in it, but he holds it upon trust as a place of burial for the parishioners. The erection of monuments and tombstones in churchyards is a very usual practice, but according to strict law the leave of the ordinary must first be obtained. When Lord Coke says (3 Inst. 202) that the erection of tombs or monuments in a churchyard is lawful, the meaning is, as laid down by Lord Stowell in *Bardin* v. *Calcott*, 1 Hagg. Cons. 14, that it must be done with the consent of the ordinary. In practice, if the incumbent gives his consent in the first instance, the consent of the ordinary is presumed after the lapse of a reasonable time. It is to be observed that the law does not give the parishioner the right of deciding what shall be placed upon the grave. The ultimate control of that is reserved by the common law to the ordinary. Now let us consider the Burial Act, 1852. When Parliament created cemeteries to take the place of churchyards, one would expect the control over the cemetery to be reserved in the same way as the control over the churchyard was reserved at common law to the ordinary. Accordingly we find that the Burial Act, 1852, strictly defines, by section 33, what the burial board may grant, and by section 38 who is to control the burial-ground. By section 33 what may be granted by the board is a strictly statutory right, and we must look at the words of that section to see what that right is. The board may sell, under such restrictions and regulations as they think proper, the exclusive right of burial in any plot. The board may also sell the right of constructing a vault or place of burial with the exclusive right of burial therein. And, lastly, it may sell the right of erecting and placing a monument, gravestone, tablet, or monumental inscription. It necessarily follows, *ex vi termini*, that the first of these three grants cannot include the last, and so the selling of the exclusive right of burial does not include the right to erect a monument or gravestone. The purchaser of the exclusive right of burial in a plot buys the right which the parishioner had in his churchyard. The plaintiff has purchased the exclusive right of burial in a certain grave, subject to certain restrictions. By the terms of the grant the plaintiff bought the exclusive right of burial, subject, in the first place, to the payment of certain fees, and subject, also, to the regulations made by the Secretary of State or by the board, limitations which are authorized by the section. I will assume that the plaintiff has bought the right of placing a gravestone over the grave, or at any rate had the leave and licence of the board to do it, and that such leave and licence was irrevocable. He has, therefore, the exclusive right of burial and of erecting a gravestone. He has not got the right of placing on the grave a glass cover and frame to protect flowers. However unobjectionable it may be, he has not bought the right to do it. It was suggested in *Ashby* v. *Harris* that the right to place flowers on the grave was incident to the right of burial. I say nothing about that. That is not the case here. Further, section 38 gives the burial board the right of managing, regulating, and controlling the cemetery, and under that section the board were authorized to act in the way they did here. Therefore, upon both these sections the plaintiff's claim fails.

Appeal dismissed.

Solicitors for the plaintiff, *Tahourdine & Hargreaves*, for *Johnson & Tilly*, Lancaster.

Solicitors for the defendants, *Brownlow & Howe*, for *Swainson, Son, & Roper*, Lancaster.

From Q. B. Div. June 5.

WHITELEY *v.* BARLEY. (*a*.)

Corporation—Officer of local authority—"Concerned or interested" in contract—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 193.

By certain contracts entered into by a local authority for the purposes of the Public Health Act, 1875, *it was provided that the contractors should pay to the surveyor of the local authority for taking out bills of quantities a*

(*a*.) Reported by A. P. PERCIVAL KEEP, Esq., Barrister-at-Law

percentage upon the amount which he should certify to be due from the local authority to the contractor.

Held, that the surveyor was concerned or interested in the contracts within the meaning of section 193 *of the Public Health Act,* 1875, *and was liable to a penalty in respect of each.*

Decision of Mathew, J. (ante, *p.* 553, 20 *Q. B. D.* 196), *affirmed.*

Appeal from the decision of Mathew, J. (reported *ante*, p. 553, 20 Q. B. D. 196).

The action was brought to recover penalties under section 193 of the Public Health Act, 1875.

The defendant was town surveyor to the corporation of Ramsgate, who were the local authority for the borough. In 1883, the corporation being desirous of effecting improvements in the sewering and paving of certain streets, the defendant, at their instance, took out the quantities. On these tenders were made, and three contracts were entered into by the corporation, in which it was provided that the contractors should pay the defendant for his services in taking out the bills of quantities by giving him two and a half per cent. on the amount payable under the contracts, for which amount he was to certify.

The defendant had also prepared a drainage scheme, for the purposes of which other contracts had been entered into by the corporation, in which it was also provided that the contractors should pay a percentage in respect of the bills of quantities.

Mathew, J., held that the defendant was liable to a penalty in respect of each contract as having been concerned or interested therein within the meaning of section 193.

The defendant appealed.

Finlay, Q.C., *Tindal Atkinson*, and *Crispe*, for the appellant.

Kemp, Q.C., and *H. F. Dickens*, for the respondent.

The arguments used were the same as in the court below.

Lord ESHER, M.R. (after stating the facts).—It was no part of the defendant's ordinary work as surveyor to make out these bills of quantities. He must have known that the corporation could not direct him to make them out, but could only request him to do so. There was no contract that they should pay him for the extra work, nor was there any contract between him and the contractors. The contracts were simply between them and the corporation that they should pay this percentage to the defendant, or to the corporation for the defendant. The defendant could therefore only get this percentage by the existence of these contracts. It is immaterial to decide whether he could have maintained an action against the contractors for work and labour done, since it is clear that this percentage could only be recovered by him by means of the contracts. If the corporation had sued the contractors on the contracts, and had recovered the percentage, they would undoubtedly have been bound to hold it as trustees for the defendant, and if they refused themselves to sue for it on the contracts they would, I have no doubt, have been compelled to allow the use of their name to the defendant in bringing an action to recover this percentage. The defendant could, therefore, only obtain the percentage by reason of the existence of these contracts, and can it, therefore, be said that he was not interested in them?

It has been argued that he does not come within the terms of the section unless he is able to maintain an action in his own name. I do not think that is the test. The test seems to me to be this: Could he get this percentage in any way other than by the existence of these contracts? It is plain that he could not, and therefore, in my opinion, his position is exactly that at which the Act is aimed. The larger the quantities made out by him the larger would be the amount of the contract, and the larger would be his percentage. His interest would therefore be direct and apparent. It is the very temptation at which the Act strikes. It is true that there is no impeachment whatever against the honour and integrity of this gentleman, and there is no suspicion that he has yielded to the temptation. But the intention of the Act was to guard those who might be weaker, from such a temptation, and he, although no doubt innocent, is within the terms of the section, and is struck by it. Therefore, however sorry we may be to come to such a conclusion, I think that we are bound to say that the judgment of Mathew, J., is right, and must be affirmed. I have said so much in relation to the contracts for paving and sewering the streets, but I think the position is precisely the same with respect to the drainage contracts. The judgment must, therefore, be affirmed against the defendant for all the penalties.

LINDLEY, L.J.—I am unable to come to any other conclusion than that which has been expressed by the Master of the Rolls. The only question is whether this gentleman is within the terms of section 193 of the Public Health Act, 1875. That section enacts that officers or servants employed by the local authority "shall not in anywise be concerned or interested" in any contract made with such authority for any of the purposes of the Act. The circumstances of this case are such that it is, in my opinion, impossible to say that the defendant is not concerned or interested in these contracts. His interest is most palpable and unmistakeable. To my mind it does not matter in the least whether his paymaster be the contractor or the corporation, or whether this percentage be called an allowance or not. If under the name of an allowance he gets something which gives him an interest in the contract, he is within the terms of the section. As long as the amount to be received by him varies with the amount of the contract it is absolutely impossible to contend that he is not interested in the contract, and he comes within the meaning of the section. I agree that this appeal must be dismissed.

LOPES, L.J.—I very much regret to have to arrive at a conclusion adverse to the defendant, but I am clearly of opinion that this case falls alike within the language used, and the mischief struck at, in section 193. I only desire to add that, in my opinion, if the percentage for the quantities had been payable by the local authority instead of by the contractors the section would be equally applicable.

Appeal dismissed.

Solicitors for the appellant, *Meredith, Roberts, & Mills*, for *Hubbard*, Ramsgate.

Solicitors for the respondent, *Kingsford, Dorman, & Co.*, for *Hills*, Margate.

High Court of Justice.

Chan. Div. Kay, J. June 23, 25.

In re BRIANT.

POULTER *v.* SHACKEL. (*a.*)

Will—Direction to deduct debts due from children—Legacy to daughter—Debt due from daughter's husband—Retainer by executor—Set-off—Equity to a settlement—Separate estate—"Absolute."

A testator gave the residue of his estate to his wife for life, and then to his children equally, "for his, her, or their own absolute use and benefit."

Held, that this did not give the daughters a separate estate.

He then directed his trustees to deduct any debt due to him from any of his said children from their respective shares. One of his daughters was married, without any settlement and in poor circumstances. Her husband was indebted to the testator, and the executors desired to set off the husband's debt against his wife's legacy.

Held, that their right to deduct the debt from the legacy was subject to the wife's equity to a settlement, and that, part of the fund must be settled on her.

Knight *v.* Knight, 22 *W. R.* 792, *L. R.* 18 *Eq.* 487, *dissented from.*

Further consideration.

The question was whether a debt due to the testator by the husband of a legatee ought to be set off against her legacy, or whether she was entitled to have part of it settled on her and her children.

Robert Briant, by his will of the 22nd of June, 1875, after certain specific legacies, gave all his real and personal estate to trustees upon trust for his wife for life, and after her decease upon trust to transfer a share in the Whitchurch Bridge to his son R. B. Briant, and convert the residue and pay the proceeds unto all his children in equal shares for his, her, or their own absolute use and benefit. He declared that the share of Mrs. Shepherd, one of his daughters, should be for her separate use, and he directed his trustees to deduct any debt due to him from any or either of his said children, with interest thereon at five per cent., from the shares or share to which they, he, or she were entitled under that his will.

The testator died in 1877, leaving six children, one of whom, Sarah, was married to Edward Shackel in 1857.

The testator's widow died on the 5th of February, 1886.

Edward Shackel owed £725 5s. to the testator, and the question was whether this sum ought to be deducted from the share bequeathed to his wife, which amounted to about £600.

Mrs. Shackel was possessed of an income of £70 a year derived from property devised to her for life and then to her children by an uncle; and Edward Shackel had no means except that he made about £60 a year by his occupation of a rent collector. They had six children to support.

MacSwinney, for Mr. and Mrs. Shackel.—The word "absolute" shows that the legacy is for the separate use of Mrs. Shackel: Seton on Decrees, 4th ed., p. 690; *In re Tursey's Trusts*, 14 W. R. 474, L. R. 1 Eq. 561. [KAY, J.—That does not make it separate estate. You must have something to show that she is to take it apart from her husband.]

Marten, Q.C., and *V. Hawkins*, for the executors.—The husband is a debtor to the testator's estate and cannot claim payment of the legacy without paying the debt. That the legacy is to the wife does not matter, as it is by law payable to him; it is really a gift to him. It has been reduced into possession by his making a claim for it, and she has no right to a settlement. Her equity only arose when the claim was made: *Bousfield* v. *Lawford*, 11 W. R. 842, 1 De G. J. & S. 459; *Osborn* v. *Morgan*, 9 Hare, 432; *Knight* v. *Knight*, 22 W. R. 792, L. R. 18 Eq. 487; *Ranking* v. *Barnard*, 5 Mad. 32; *Carr* v. *Taylor*, 10 Ves. 574; *Lady Elibank* v. *Montolieu*, 5 Ves. 737; *In re Batchelor's Estate*, 21 W. R. 901, L. R. 16 Eq. 481; *Ex parte O'Ferrall*, 1 G. & J. 347; *McCormick* v. *Garnett*, 2 W. R. 154, 408, 2 Sm. & G. 37, 5 De G. M. & G. 278; *McMahon* v. *Burchell*, 3 Hare, 97, 5 *Ibid.*, 322; *In re Cordwell's Estate*, 23 W. R. 826, L. R. 20 Eq. 644; *Burrough* v. *Moss*, 10 B. & C. 558; *Hall* v. *Hill*, 1 Dr. & War. 94, 109.

MacSwinney, for Mrs. Shackel.—It is an equitable *chose in action*, and there has been no reduction into possession. Mr. Shackel can do very little to support his wife, and she is entitled to a settlement out of this share. The husband's debts cannot be set off against her legacy: *Taunton* v. *Morris*, 27 W. R. 718, 11 Ch. D. 779.

Rowden, for another married daughter whose legacy was settled, and whose husband also owed a debt to the testator's estate.

KAY, J.—This case raises a difficult question of law. The facts I understand to be shortly these. The testator gives his residuary property upon trust to convert and divide the proceeds between certain persons, one of whom, being his daughter, was then a married woman. That direction was subject to a preceding tenancy for life which has now ceased. The husband and wife are both living. There was no settlement made upon their marriage. The husband is, according to the evidence, in business, which produces a very small income; and the husband and wife have six children; the only other property of the wife being the sum of £70 a year, as to which I am not told whether it is settled to her separate use or not, to which she is entitled under another will for her life.

Now, first of all, the husband is indebted to the testator in a sum of some £750, which is very much more than the share of the residue which is so bequeathed in trust for the wife; and the first question here is, whether the executors of the testator have a right to set off that debt due from the husband to the estate of the testator against the provision made for the wife? Now, as to that, the cases have determined that there does exist such a right of retainer. In *Ranking* v. *Barnard*, where there was a legacy of £1,000 to the wife of John Anderson, and John Anderson was indebted to the testator in a sum of £27,000, and he had become bankrupt after the death of the testator, the question was whether that large debt could be retained as against the legacy to his wife. The Vice-Chancellor, Sir John Leach, says:—"My present impression is, that this legacy might have been retained by the executors if there had been no bankruptcy, and that the assignees can only stand in the situation of the bankrupt, but I will look into the cases." Then at a later date he says this:—"The view I take of this point is confirmed on looking into the cases. In *Jeffs* v. *Wood*, 2nd Peere Williams, 128, the judgment of Sir J. Jekyll is in strict conformity with the opinion which I before expressed, that a legacy to the wife is at law a legacy to the husband; but in equity it is subject to a claim of the wife for a provision out of it for herself and her children. This lady has died without asserting such a claim; and the legacy, being discharged of her equity, would have become the absolute property of the husband if there had been no bankruptcy. It is clear that as against the husband the executors of the testatrix

(*a.*) Reported by H. C. ROPER, Esq., Barrister-at-Law.

would have had a right to satisfy the legacy by writing off so much of the debt due from the husband to the estate of the testatrix, and they must have the same right against the assignees of the husband."

I take it, therefore, to be perfectly well settled that, as against the right of the husband in the legacy given to his wife, the executors of the testator may set off the debt due from the husband to the testator in his lifetime.

Then arises the question, supposing the wife to assert her equity to a settlement, the property being such as she could assert her equity against or in respect of, does the equity precede this right of retainer, or does the right of retainer precede the equity? The argument is this, and it is well founded in many of its propositions. An equity to a settlement arises when the husband makes a claim to the property. Upon his making the claim to the property he is compelled to do equity, and if the wife is not properly provided for, the court, at the instance of the wife, will direct a settlement of all her property, or a part of the property, according to the circumstances, upon her and her children. It is said that the equity only arises when the claim is made. Well, that has been modified in some of the recent cases, as we know, because now the wife is enabled, in a court of equity, to assert that equity. She may herself take proceedings to assert the equity, and even when the claim is made by the husband. That has been asserted in many cases, and was expressly decided in the case of *Wortham* v. *Pemberton*, 1 De G. & Sm. 644, amongst others. The argument therefore is, that as, according to the decision in *Osborn* v. *Morgan*, the right to an equity to a settlement really only arises when a claim is made to the fund, the husband, in this case, would be prevented from making a claim by this right of retainer against him; but I think there is a fallacy in that argument; because, of course, the right of retainer may or may not be exercised. The husband may make his claim and then the wife may say, "I assert my right to an equity to a settlement." Then the executors may say, we on our part, as against anything belonging to the husband, assert our right, as against the husband, to be paid the debt which he owed to the estate of the testator.

However, that is a matter which has been the subject of many decisions. I have here the book which is always looked to in cases of this kind—namely, "Williams on Executors," and at p. 1214 of the 6th edition I find that it is stated thus:—"At law a legacy to the wife is a legacy to the husband; but in equity, where a legacy is given to a married woman, it is subject to a claim of the wife for a provision out of it for herself and her children." Then the case of *Lady Elibank* v. *Montolieu* is cited, where it is stated in this way:—"Upon the bill of a married woman entitled to a share of the personal estate as one of the next of kin of the intestate against her husband and the administrator, the latter claiming to retain towards satisfaction of a debt by bond from the husband to him, it was declared that he was not entitled to retain, but that the plaintiff's share was subject to a farther provision in favour of her and her children; the settlement upon her marriage being inadequate to the fortune she then possessed, and it was referred to the master to see a proper settlement made on her and her children, regard being had to the extent of her fortune and the settlement already made upon her."

The case that is exactly in point is the case of *Carr* v. *Taylor*, where the wife claimed under her equity a settlement out of an interest arising to her as next of kin; and the administrator of the intestate against whose estate she made the claim sought to set off a debt from the husband to the intestate's estate. There had been in that case a settlement by the husband in consideration of the fortune or fortunes which he would have or receive upon his marriage. The settlement was an ante-nuptial settlement expressed to be in consideration of the fortune or fortunes which the husband would have or receive upon his marriage with the intended wife, and he made a settlement of property of his own. This property accrued after the marriage to the wife, and the Master of the Rolls, Sir William Grant, in giving his judgment, said:—"The doubt in this case is whether the husband ought to be considered a purchaser of the whole fortune of his wife or only of that which he was actually to receive with her at the marriage. If he was a purchaser of the whole she is not entitled to any provision out of what has since accrued; if he was not a purchaser of the whole, she will, by the rule of the court, be entitled to an additional provision out of that additional fortune. The rule is established that to make the husband a purchaser of the whole the settlement must either express or clearly import that intention. This settlement does not express that intention or clearly import it, and the meaning seems to be that the husband should take only what was to become his immediately upon the marriage. It is not alleged that the provision to be made for her was more than adequate to that fortune. With regard to the claim of set off made by the administratrix of Taylor, upon the ground that the plaintiff's husband was indebted to the estate of the intestate, whatever controversy there might have been upon the right of the husband to sue in his own name for the legal *chose in action* of his wife, he could not sue for this fund without joining her; and if he had obtained a decree for it in her life and died before he had reduced it into possession it would have survived. This is a case therefore in which there can be no set off for the debt of the husband." In this case the bill was filed by the married woman, seeking actively to have the settlement of the property made. As far as I can gather, the husband was living, and his assignees were parties to the action.

Then the matter came before Lord Selborne, when sitting for the Master of the Rolls, in the case of *In re Batchelor*, and there, according to the marginal note, it was this:—"A married woman, whose husband was indebted to a testator, having become entitled under his will to a legacy in reversion not limited to her separate use, joined with her husband in assigning it to L. for value, by deed duly executed and acknowledged by her under 20 & 21 Vict. c. 57"—that is, Malin's Act. "On the reversion falling in the executors of the testator claimed to be entitled to retain the amount of the debt and of the legacy. Held, that there was no right of retainer, and that L. must be paid in full."

Lord Selborne said this: "The general law of the court is that a legatee who is also debtor to the testator's estate cannot (unless an intention that he should do so is manifested by the will) claim payment of his legacy without paying the debt, and therefore that the executors may, in such a case, retain the debt out of the legacy when payable. It may be observed (says Sir Edward Vaughan Williams in his work on the Law of Executors) that the term set off is somewhat inaccurately used in cases of this kind. The proper use of that expression seems applicable only to the mutual demand of debtor and creditor. A right of this nature is rather a right to pay out of the fund in hand than a right of set-off. And such a right of payment can only arise where there is a right to receive the debt so to be paid; and the legacy or fund so to be applied in payment of that debt must be payable by the person entitled to receive the debt. A legacy given to a married woman, but payable by law to her husband, is in the same position for this purpose as a legacy to the husband himself. Inasmuch, however, as the husband's right is subject to the wife's chance of survivorship as long as the legacy is reversionary, and to her equity to a settlement

when it becomes vested in possession during the marriage, the right of retainer for the husband's debt is also subject to those rights, and it would seem to be most consistent with sound principle that every right and power of the wife, as distinct from her husband, ought in such a case to prevail over the claim of retainer for her husband's debt."

I therefore do not hesitate to hold, as to that right of retainer, that the equity to a settlement is prior to the right of retainer by the executor in respect of the husband's debt, and I confess my own opinion goes the same way completely; because, after all, although it is said that the legacy to the wife is a legacy to the husband at law, yet the husband's right is strictly limited. The legacy is a legacy to the wife; the husband takes it in right of the wife; and, in a case like this, it is clear, as was pointed out in one of the judgments I have just read, that the husband could only sue for it joining the wife. Of course I am dealing with this case as a case which does not come within the Married Women's Property Act. I am told it does not. If the wife dies before the husband reduced it into possession I think it is equally clear the husband must take out administration. Therefore it seems to me to be reasonable to say that the right of the wife is a right, as between her and the husband, which attaches before the right of retainer against the husband on the part of the executors and administrators of the deceased, from whom and from whose bounty the wife derives this advantage.

Therefore I must hold that the right of retainer in this case is subject to the wife's equity to a settlement. Of course it would be perfectly valid and must be enforced as against any part of this fund which belonged to the husband.

Then the question arises how much of this fund ought, under the circumstances, to be settled? The circumstances, as I understand them, are these: The wife is entitled to some £70 a year for her life under a provision made for her by someone else; it does not appear (as I have before said) whether for her separate use or not. There was no settlement upon the marriage. There are six children of the marriage. The wife has been for some years partially paralyzed, and the husband is a man in a very small way of business; he seems to be indebted to this testator's estate to the amount of £725, which there does not appear to be much chance of his being able to pay, as he is making, it is said, only some £60 a year by his business. I must look, no doubt, at all the circumstances, and I do not forget, amongst those circumstances, that whatever may be settled in this case upon the wife will diminish to that extent the fund which will be coming to the other residuary legatees. Her claim really is a claim which will affect them considerably. But, upon the whole, not disregarding that circumstance, I think that I must order £500 of this fund to be settled upon the wife, and I direct it to be settled in this way. The settlement will be made by the declaration of the court now: Declare that £500 of this fund ought to be settled for the separate use of this married woman, without power of anticipation, and after her death the capital to her children as she may appoint by will, and, in default of appointment, to the children who, being sons, may attain the age of twenty-one years or, being daughters, may attain that age or marry; in default of such children, of course, the fund would belong to the wife. As to the rest of the fund, if there be any remaining, it ought to be applied, in my opinion, for the benefit of the other residuary legatees, and ought to be retained by the executors and applied by them for the benefit of the other residuary legatees, excluding the wife.

I believe that is all. The fund may be paid into court if it is thought desirable that it should be so, or the trustees may retain it in their hands on those trusts.

There is one thing I have omitted to mention in giving judgment. I ought to have noticed the case of *Knight* v. *Knight*, before Hall, V.C., which seems at first sight to be contrary to those authorities of *Carr* v. *Taylor* and *In re Batchelor* which I have cited. In that case of *Knight* v. *Knight* the debt which it was sought to set off was a debt due from the husband as executor. He himself was the executor, and received assets of the deceased testator who had given the legacy to his wife. He being indebted as executor, the wife sought to have her legacy nevertheless settled upon her, and it was held that no equity to a settlement arose. These other cases were not cited there, but I cannot for a moment imagine that they were not present to the mind of such an accomplished judge as Hall, V.C., and therefore I presume that he thought that some difference must have arisen from the fact that the debt in that case was not a debt due to the testator in his lifetime, and was a debt due from the husband as executor of the testator. At present I do not appreciate the difference myself, but I cannot treat it at all as an authority which would in any way overrule the cases of *Carr* v. *Taylor* and *In re Batchelor*, both of which cases were decided before it.

Solicitors, *Reep, Lane, & Co.; Marshall & Haslip*, for *Beale & Martin*, Reading; *Soames, Edwards, & Jones.*

Chan. Div. } Chitty, J. } June 12.

In re HULL, BARNSLEY, AND WEST RIDING RAILWAY AND DOCK CO. (*a.*)

Railway company—Surplus lands—Debenture holders—Railway Companies Act, 1867 (30 & 31 *Vict. c.* 127), *s.* 23.

The debenture-holders of a railway company have no lien on the surplus lands of a railway company under section 23 *of the Railway Companies Act*, 1867, *and have no priority in respect thereof over other creditors.*

Adjourned summons.

This summons was adjourned into court in order to determine whether the debenture holders of the above-named company were, under the terms of the 23rd section* of the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), entitled to a lien on the surplus lands of the company, and therefore entitled to priority over

* Section 23.—All money borrowed, or to be borrowed, by a company "on mortgage or bond or debenture stock under the provisions of any Act authorizing the borrowing thereof shall have priority against the company, and the property from time to time of the company, over all other claims on account of any debts incurred or engagements entered into by them after the passing of this Act: Provided always that this priority shall not affect any claim against the company in respect of any rent-charge granted, or to be granted, by them in pursuance of the Lands Clauses Consolidation Act, 1845, or the Lands Clauses Consolidation Acts Amendment Act, 1860, or in respect of any rent or sum reserved by or payable under any lease granted or made to the company by any person in pursuance of any Act relating to the company which is entitled to rank in priority to or *pari passu* with the interest or dividends on the mortgages, bonds, and debenture stock; nor shall anything hereinbefore contained affect any claim for land taken, used, or occupied by the company for the purposes of the railway, or injuriously affected by the construction thereof, or by the exercise of any powers conferred on the company."

(*a.*) Reported by A. D. MACLAREN, Esq., Barrister-at-Law.

other creditors in respect of such lands or the proceeds of sale representing the same.

Certain judgment creditors of the Hull and Barnsley, &c., Co. presented a petition in the matter of that company and of the Company Acts, 1880, 1885, and 1886, and of the Railway Companies Act, 1867. On the 6th of January, 1887, an order was made appointing the persons therein named receivers and managers, and directing an inquiry whether there were any other, and, if any, what, debts of the said company, and whether the same, or any, and, if any, which of them, were incumbrances or charges on the undertaking or the tolls and moneys arising out of the same, or any and what part of the same respectively, and how the same respectively were created, and what were the rights and priorities of the persons for the time being interested therein.

Default had been made by the company in payment of the moneys secured by the debentures of the company, and the debenture holders obtained leave to attend the proceedings under the order of the 6th of January, 1887, and then took out a summons asking for a declaration that they were entitled to a lien on the company's surplus lands, or on the moneys representing the same, in priority to the claims of all other creditors of the company.

The debenture was in the form of the mortgage deed which is set out in schedule C. to the Companies Clauses Act, 1845 (8 Vict. c. 16).

Chadwyck Healey, for the debenture holders, referred to *Gardner* v. *London, Chatham, and Dover Railway Co.* (*No.* 1), 15 W. R. 325, L. R. 2 Ch. App. 201, and to section 23 of the Railway Companies Act, 1867.

Reginald Bray, for the judgment creditors.

CHITTY, J., after stating the circumstances above mentioned, continued as follows: — The debenture holders come forward and say they are within the inquiry, and have either a lien, a charge, or an incumbrance upon the superfluous lands. The mere statement of that appears, after the case of *Gardner* v. *London, Chatham, and Dover Railway Co.* (No. 1), startling; but Mr. Chadwyck Healey is bound to admit that, after *Gardner's case*, as a general proposition, the debenture holders—by which I mean those who have a covenant or an obligation to receive payment, in other words, a statutory mortgage on the undertaking itself—have no lien or charge or incumbrance on the superfluous lands. That is the position from which Mr. Chadwyck Healey started. He has brought before me the 23rd section of the Railway Companies Act, 1867, and on that he founds an argument, relying on the words of the section as creating a charge in favour of the debenture holders. I have read the section through, and I am not satisfied that I am at the present moment in the position to say exactly what the section does mean, or to give a judicial determination as to its scope and effect. But all I have to do is to say whether this particular claim is within the section, and it appears to me that there are no words to justify the court in holding that the section has created that which did not exist before—viz., a specific lien upon the superfluous lands in favour of debenture holders who had no such lien apart from the section. The words are, "All money borrowed, or to be borrowed, by a company on mortgage or bond or debenture stock under the provisions of any Act authorizing the borrowing thereof shall have priority against the company, and the property from time to time of the company, over all other claims on account of any debts incurred or engagements entered into by them after the passing of this Act." Then there are certain provisions which I do not read now. The enactment, therefore, in that section confers a priority; but it appears to me there is involved in that some existing charge or lien. At any rate, whether that is correct or not, words which only say there shall be a priority are not sufficient to create a charge, and I do not think it is the meaning of the Legislature, whatever the true exposition of this section may be, because, if it is so, the charge would attach to the superfluous lands themselves, and the company never could deal with the superfluous lands. That difficulty was seen by Mr. Chadwyck Healey, who endeavoured to take some particular point at the time at which he said his charge (using a dangerous term of argument which counsel must have recourse to sometimes) crystallized—when the judgment creditor asserted his right as against the surplus lands. There were other equally ingenious and subtle suggestions, but none of them have any foundation whatever in the language of the section itself. Then, not accepting his argument—in fact, rejecting his argument—that there is a specific lien or charge, he seems to me to be outside the order, because it is only an inquiry as to what are the liens.

But Mr. Chadwyck Healey contends in some way or other, when the court had in its hands the proceeds of the sale of the superfluous lands sold at the instance of the judgment creditors, who have a right to have the land sold under the Act, and to be paid, subject, of course, to any prior liens, charges, or incumbrances, it was administering an estate, and that he had a right, as he said, to be paid. I cannot find that in the section. I can find nothing that will justify that, which is, to my mind, a very ingenious suggestion. I have not pretended to give anything like an exhaustive interpretation of the section itself, which I leave to a future occasion, should the section be ever submitted to judicial construction again, but the substance of my judgment is that this is not a prior security of the debenture holders.

Solicitors, *Spencer Whitehead*, for *Milward & Co.* Birmingham; *Hargrove & Co.*

Chan. Div. }
Kekewich, J. } July 12.

GOODDEN *v.* COLES. (*a.*)

Mortgage—Glebe—Parties to foreclosure action—Patron.

The vicar of a parish mortgaged part of the glebe under the powers of a statute giving owners of limited interests in land power to charge the costs of certain improvements on the land. The mortgagee brought an action for payment, or foreclosure, or sale.

Held, that the patron, having no interest in the soil, but only in the right of appointment to the cure of souls, need not be joined as a party to the action.

Trial of action.

The plaintiffs were the executors of C. C. Goodden, the mortgagee under an indenture of mortgage of November 3, 1862, made in pursuance of the powers conferred on "owners of a limited interest" in lands under "The Landowners' West of England and South Wales Land Drainage and Inclosure Companies Act, 1849," between the Rev. Thomas Fitzherbert, vicar of Marston Magna, in the county of Somerset, of the first part, the Landowners' West of England and South Wales Land Drainage and Inclosure Co., of the second part, and C. C. Goodden, of the third part, whereby T. Fitzherbert charged the lands therein mentioned, being part of the glebe of the parish of Marston Magna, with the payment of £493 7s. 6d., which had been applied in the execution of drainage works and improvements thereon. The interest was paid by T. Fitzherbert until his death in 1878,

(*a.*) Reported by J. W. GREIG, Esq., Barrister-at-Law.

when the defendant, the present vicar, became possessed of the lands in question. Interest fell into arrear, and this action was brought for payment of principal and interest, and, in default, foreclosure or sale. The defendant alleged that the patrons of the living, the dean and chapter of the church of the Holy Trinity at Bristol, ought to have been made parties.

The defendant did not appear at the trial.

Cust, for the plaintiffs.—The patron of the living has no interest in the glebe, and is, therefore, not a necessary party to this action, his only right being to appoint to the cure of souls. In an analogous case—*Scottish Widows' Fund* v. *Craig*, 30 W. R. 364, 20 Ch. D. 208—it was held that the Ecclesiastical Commissioners were not necessary parties to an action of a similar character to this; and in *Acland* v. *Napleton*, an unreported case before Chitty, J., it was decided that a vicar is the "owner of a limited interest in land" within the meaning of this Act.

KEKEWICH, J.—I think the case cited by Mr. Cust of *Acland* v. *Napleton* is directly in point as to whether the vicar is an owner of a limited interest within the meaning of the Act. I also agree with him that the patron of the living is not a necessary party to a suit for foreclosure of the glebe. There will, therefore, be the usual foreclosure decree, with costs.

Solicitors for the plaintiffs, *Newman, Paynter, & Co.*

Q. B. Div. (Cave and Wills, JJ.) June 20, 27.

In re SHEFFIELD PERMANENT BUILDING SOCIETY. *Ex parte* WATSON. (*a.*)

Building society — Advance to, before acquisition of borrowing powers — Attempted compromise after — Loan to pay off invalid claim—Estoppel.

J. W. lent money to a building society, which had no borrowing powers, on the promissory notes of the directors. His representative demanded repayment of the amount, but eventually agreed to refrain from proceedings, the directors giving him a loan certificate under seal of the society for the sum advanced. After the loan and before the demand for repayment, the society obtained borrowing powers. The society was wound up, and the representative of J. W. claimed to rank as a creditor against the assets of the society. The county court judge disallowed his claim.

Held, that the society was not estopped from disputing the claim; that no compromise had been established, and that the transaction with the representative of J. W., being in fact an advance to pay off an invalid claim, was illegal; and that the county court judge was right.

Appeal from the decision of the county court judge of Sheffield, holding that the claim of the appellant ought not to be allowed to rank as a debt against the assets of the Sheffield Permanent Benefit Society, now being wound up under a supervision order made on the 9th of December, 1886.

The society was established in 1863, and as at first constituted had no power to borrow. In 1868 John Watson lent the society £200 on a promissory note payable three months after demand. Shortly afterwards he lent the society a further sum of £1,000 on a similar note payable six months after demand. On the 21st of June, 1876, the rules were altered, and the society acquired borrowing powers to a limited extent. In 1884 John Watson died intestate, and letters of administration were granted to the present appellant. On the 29th of December, 1884, the administrator required the society to repay the money advanced by the intestate. Several interviews took place between the solicitor of the administrator and the secretary of the society with reference to the repayment of the £1,200, and ultimately, on the 22nd of August, 1885, the administrator agreed to refrain from instituting proceedings against the society for the repayment of the loan, on the directors giving him a deposit note for the amount. On the 2nd of October, 1885, the directors gave the appellant a deposit note for the £1,200 dated the 1st of July, 1885. On the 29th of October, 1886, the appellant, in accordance with the terms of the deposit note, gave the society three months' notice to pay off the amount. The application to the county court judge was made by the liquidators of the society, who asked for directions whether this claim should or should not be allowed by them as a debt owing by the society. The judge held that the claim could not be allowed.

Buckley, Q.C., and *Robson*, for Watson.—The certificate, being signed by the directors and sealed, is binding on the society. The arrangement by which Watson took the certificate instead of suing for his money is a good consideration. There was, in fact, a compromise of his claim, and the company is estopped from disputing it. The directors had full powers to compromise claims.

They referred to *Hill* v. *Manchester Waterworks Co.*, 2 B. & Ad. 544; *Horton* v. *Westminster Improvement Commissioners*, 7 Ex. 780; *Batti's case*, 26 W. R. 441, 8 Ch. D. 334.

Upjohn, for the liquidator.—The only right the depositor had in this case was to sue the directors on the debt or for breach of warranty or else, as against the society, to follow the money. There was no consideration for any compromise, and in fact there was none.

He cited *Blackburn Building Society* v. *Cunliffe Brookes* (No. 2), 29 Ch. D. 902, 34 W. R. Dig. 25; *Cook* v. *Wright*, 1 B. & S. 559; *Southall* v. *Rigg*, 20 L. J. C. P. 145; *Fountaine* v. *Carnarvon Railway Co.*, 16 W. R. 476, L. R. 5 Eq. 316.

Buckley, Q.C., in reply, referred to *Ex parte Chippendale, In re German Mining Co.*, 2 W. R. 543, 4 De G. M. & G. 19, 51.

Cur. adv. vult.

June 27.—CAVE, J., after stating the facts of the case as above set out, continued:—Mr. Buckley, for the appellant, contended that, as the deposit note was under the seal of the society, the society was estopped from disputing its validity, and for this position he cited *Hill* v. *Manchester and Salford Waterworks*, and *Horton* v. *Westminster Improvement Commissioners*. But it is well established that a corporate body cannot be estopped by deed or otherwise from showing that it had no power to do that which it purports to have done: *Fairtitle* v. *Gilbert*, 2 T. R. 169; and there is nothing in the cases cited inconsistent with this doctrine. Secondly, it was urged that the borrower, even if he had no valid debt, was entitled to stand in the place of those whose claims against the society had been satisfied out of his money, and that he therefore had a valid claim against the society for something at all events which the directors had authority to compromise by giving him the deposit note in question. The answer to this contention is, that it does not represent what actually took place. The directors never intended to compromise a doubtful claim. They recognized the promissory notes given to John Watson as constituting valid claims against the society, which, in fact, they were not, and then gave the deposit note in question in exchange for the promissory notes, or, in other words, they issued the deposit note to discharge a non-existent liability. Hence it is clear that the result of the transaction was that a deposit note was given in

(*a.*) Reported by A. H. TODD, Esq., Barrister-at-Law.

consideration of the discharge of an invalid debt. The society, if the deposit note were held good, would be £1,200 worse by the transaction. How can that be regarded as a borrowing transaction? It seems clear that a deposit note given under such circumstances can have no greater validity than the alleged debt for which it is substituted. In the observations of Lord Selborne in the *Blackburn Building Society* v. *Brooks & Co.*, a passage was cited to us from the judgment of Wood, V.C., in *Fountaine* v. *Carmarthen Railway Co.*, in which that learned judge is reported to have said that Mr. Week's debenture was void *ab initio*, and the directors did not, as they ought to have done, put him in a proper position by issuing to him a new debenture. I am unable to understand the words "as they ought to have done," or to reconcile them with the decision of the Court of Appeal in the *Blackburn Building Society* v. *Brooks*, which, as a decision of the Court of Appeal, is binding upon us, and, in my judgment, governs this case. Lastly, it was said that the claim of the appellant might be supported on the grounds taken in *Ex parte Chippendale, In re German Mining Co.* It is unnecessary to go into the facts of that case. They are entirely different from the facts of the case before us; and the doctrine laid down there is quite inapplicable here. In my judgment the decision of the court below must be upheld, and the appeal dismissed.

WILLS, J.—In the year 1868, the society being an unincorporated building society, and having, therefore, no power to borrow, nevertheless had borrowed £1,200 from John Watson, which was secured upon notes of the directors, to be repaid out of the funds of the society. The result was that the lender had no recourse against the society to recover the money lent, but had a right to trace it and claim the securities in which it could be shown to have been invested, or to be repaid such portions as could be shown to have been expended in satisfying the lawful liabilities of the society. In the year 1876 the society was incorporated under 37 & 38 Vict. c. 42, and acquired a power to borrow, and in 1885 the transaction took place which is now impeached. The administrator of the lender gave up the notes of the directors which were his security and took in place of them the loan note of the society—an instrument good in form and constituting, if valid, an obligation on the part of the society to pay £1,200 to the present appellant personally. I take this to be equivalent to the payment by the society of £1,200 to the appellant as personal representative of the original lender and the advance of £1,200 by the appellant to the society. The question is whether, under such circumstances, an action will lie for the £1,200 so advanced. No question arises at present as to whether the statutory limit of amount was exceeded when the foregoing arrangement was made. It was strenuously argued that the loan note of the society under its seal (affixed with all due formalities), which stated that the money was lent by the appellant on the day the instrument bears date, creates an estoppel which prevents the society from now saying that the money was lent, not then, but on an earlier date, and that, if so, as the advance was made when they had power to borrow, the appellant's case is made out. It will be seen that in the view I take this proposition does not help the appellant. The only estoppel suggested is one that would oblige us to treat the money as lent at the date of the instrument; and as I start with the proposition that the transaction is the equivalent of two, one of which consisted in an advance of £1,200 by the appellant, the estoppel carries his case no farther. The objection to the appellant's case lies much deeper. It is that you must take the whole transaction together and see whether it can stand. You cannot take one half of it only and say that because if that stood by itself (and was, therefore, something very different from what it really was) it would be good, it can still stand when considered as part of a larger whole. If the whole transaction to which the appellant and the directors were parties was illegal, it is quite immaterial by what machinery it was carried out, and if both the contracting parties, with full and equal knowledge of the material facts, concurred in a transaction the effect and object of which was to make an illegal appropriation of funds of the society, such a dealing cannot be taken to pieces, and one half of it be treated apart from the other. Nor does it make any difference that the parties acted, as they did in this case, with perfect good faith. They are bound by the law, though they did not understand it. If this be once understood it seems to me that a few words are sufficient to dispose of this case. It is not necessary here to resort to the rule laid down in *Chapple* v. *Brunswick Building Society*, 29 W. R. 153, 539, 6 Q. B. D. 696, to the effect that persons dealing with a corporation having a limited power of borrowing are put upon inquiry whether that limit is being exceeded. In this transaction all the facts were equally known to both parties, and its object was that which is its essential vice—viz., that the money was borrowed for the purpose of repaying a loan illegally contracted, and to the payment of which, as a loan, the funds of the society could not be legally applied. If this be the true result of the facts it is clear that the contract belongs to a class to which effect cannot be given by a court of justice, however innocent the parties may have been of any fraudulent or immoral motive. They intended to do a thing which was against the law.

The only authority cited which gives any countenance to such a claim is *Fountaine* v. *Carmarthen Railway Co.* In that case a Mr. Weeks had lent a sum of money on debenture to the defendant company. At the time that he did so their borrowing powers were already exceeded. Page-Wood, V.C., held that this debenture was void *ab initio*, and added: "The directors did not, as they ought to have done, put him in a proper position by issuing to him a new debenture." I see no substantial distinction between issuing a new debenture to replace a void one—which would have amounted to a payment of the void debenture by the money freshly borrowed—and the present case, and if the *obiter dictum* of the learned Vice-Chancellor be right the directors in the present case did only what they ought to have done, and the loan note of 1885 was good. But questions of this kind have been very much discussed since then, and I do not think it possible to reconcile the view so presented with the later decisions of the Court of Appeal, nor, I must add, with sound legal principles. If the directors ought to have issued a fresh debenture when the company became legally capable of borrowing, in exchange for one which did not bind the company, they certainly would have been at liberty to pay the original debt out of the funds of the company, and yet this is exactly what the Court of Appeal, in *The Blackburn Building Society* v. *Brooks & Co.*, held could not be done. It is impossible to reconcile the *dictum* of Page-Wood, V.C., with the very explicit statement of the grounds upon which the Court of Appeal based its decision in that case. Mr. Buckley suggested that in the *Blackburn case* the *ratio decidendi* was that the bankers had paid themselves, and that it really amounted to nothing more than a decision that *Clayton's case*, 1 Mer. 572, did not apply. To hold, however, that *Clayton's case* did not apply would be to hold much to the same effect as the judgment of the Court of Appeal. But it is clear that the decision went upon no mere technical ground, but upon the broad and intelligible principle that where the payment was beyond the proper scope of the authority of the directors, and where the person receiving the payment had full means of knowing, had he appreciated the fact that it was so, the money to

paid could not be held by the recipient but must be repaid.

That case appears to me to be decisive of the present. If it would have been unlawful for the directors to pay the money originally lent to them, how could it be lawful for them and the appellant to make a binding agreement that they should repay him money he was lending to them for the express purpose of making an unlawful application of it? and what does it matter with what forms and solemnities such a transaction was carried out?

It was sought to support the transaction as a compromise by which the appellant, as administrator, gave up his right to follow the original £1,200 if he could, and claim the benefit of any securities upon which it was invested or the repayment of such portions of it as he could show to have been applied in payment of the legal liabilities of the society. I am not prepared to say that such a compromise might not be supported. The answer to the argument is that the facts disprove it. The transaction of 1885, moreover, must be taken as a whole so far as the society is concerned, and whatever rights the appellant, as administrator, had against the funds of the society remain, except in so far as they may be affected by lapse of time. Though the result is to be regretted, the decision of the county court judge must be upheld.

Appeal dismissed.

Solicitors for the appellant, *Wynne & Co.*, for *A. Taylor*, Sheffield.

Solicitors for the respondent, *Prior, Church, & Adams*, for *H. Bramley & W. H. Foster*, Sheffield.

Q. B. Div. (Cave and Wills, JJ.) June 21, 23.

Slater v. Mayor, &c., of Burnley. (a.)

Compulsory payment — Right to recover back overpayment—Water rate assessed on "gross rental" instead of "rateable value"—Action for difference overpaid.

The defendants, as sanitary authority for the borough of B., had demanded from the plaintiff, and the plaintiff had paid, a water rent of £8 15s. 4d., such rate being calculated on the "gross rental" of the plaintiff's premises. The plaintiff, contending that such rate ought to have been assessed on the "rateable value" only, brought an action in the county court to recover the difference so overpaid. The defendants had no power to distrain for the rate, but they had a power to stop the water supply for non-payment; they had not stopped the water supply, and had not threatened to do so.

The county court judge held that the payment was not a voluntary one, and could be recovered back, on the ground that the defendants had a power to stop the water supply.

Held, that the payment was a voluntary one, and could not be recovered back.

Appeal, on behalf of the defendants, from the county court of Lancashire, holden at Burnley.

The action was brought by the plaintiff to recover from the defendants, who were the sanitary authority for the borough of Burnley, the sum of £1 11s. 6d., which he alleged he had paid under compulsion, in respect of a water rent due in respect of certain houses belonging to the plaintiff.

The corporation, as such sanitary authority, were entitled, under their private Acts, to charge a water rent at the rate of five per cent. per annum on the "annual value." They had for some years previously adopted as their basis of valuation the "gross rental" of premises, but about the end of the year 1887 they had altered their basis of calculation from the "gross rental" to the "rateable value," believing that that was what they were entitled to as the "annual value."

The water rent for the quarter ending the 25th of December, 1887, demanded by the defendants, and paid by the plaintiff, was £8 15s. 4d., such sum being five per cent. on the "gross rental" of the premises. The plaintiff contended that the rate ought to have been assessed, not on the "gross rental," but on the "rateable value" of the premises, in which case the rate would have been £7 3s. 10d. The plaintiff had paid the larger sum, and now brought the present action in the county court to recover the difference so overpaid.

Two points arose in this case—first, whether the payment made by the plaintiff was, under the circumstances, a compulsory payment, so as to entitle the plaintiff to recover the difference overpaid, and, secondly, whether, on the construction of the special Acts relating to the borough—viz., the Burnley Borough Improvement Acts, 1871 and 1883, section 68 of the Waterworks Clauses Act, 1847, was incorporated into the local Acts, so as to make the determination of the dispute as to "annual value" of the premises by two justices a condition precedent to the right to bring the action.

The learned county court judge held that, as the corporation had the power to stop the water supply for non-payment of the water rent, the payment by the plaintiff was not a voluntary payment, and could, therefore, be recovered back.

He also held, on the construction of the special Acts, that section 68 of the Waterworks Clauses Act, 1847, was not incorporated.

This second point depended altogether on the sections of the special Acts.

The corporation had power to stop the water supply for non-payment of the water rent, but in this case they had not done so, and had not threatened to do so.

They also had a power to distrain for the water rent if the amount did not exceed 20s. a quarter, which, therefore, did not apply to the present case.

Henn Collins, Q.C., and *Sutton*, for the appellants.—The question is whether, under the circumstances found by the county court judge, there is any evidence of compulsion, so as to enable the plaintiff to recover the money back. The judge negatived any sort of compulsion, except a kind of constructive compulsion, which a person would be under who is liable to have legal process issued against him. The judge says the corporation have the power to stop the water supply, and therefore he held that the payment was not a voluntary one. The bare point of law is whether the power to initiate legal proceedings renders the payment a compulsory one. There was no compulsion here of such a kind as to entitle the plaintiff to recover this sum back.

Philbrick, Q.C., for the respondent.—This case falls within the principle of money demanded as being due under an Act of Parliament. The doctrine was discussed in the cases of *Hooper* v. *Mayor, &c., of Exeter*, 56 L. J. Q. B. 457, 35 W. R. Dig. 134, and *Steele* v. *Williams*, 8 Ex. 625. In the former case, where the corporation had exacted harbour dues from the plaintiff under their local Act in respect of exempted articles, and the plaintiff had paid in ignorance of the exemption, it was held that the plaintiff was entitled to recover the money so paid. The same principle was laid down in the latter case. So that when the charge is regulated by Act of Parliament these cases show that the payment cannot be voluntary. There was a power to distrain if the rate was under 20s. a quarter, if the rate were above that amount the corporation could summon the person before justices when execution could be issued.

(a.) Reported by Sir Sherston Baker, Barrister-at-Law.

CAVE, J.—This is an appeal from Burnley County Court, in an action which the plaintiff brought to recover an overpayment made by him, and on the appeal before us two points have been taken—first, that the plaintiff could not recover, as he had not complied with a condition precedent of having the dispute as to the "annual value" determined by two justices, and, secondly, that the payment was a voluntary payment, and could not be recovered back.

The learned county court judge held that the payment was not a voluntary one, on the ground that the corporation had power to stop the water supply for non-payment of the rent. There is no case cited which lays it down that a payment made under these circumstances is a compulsory one; if it were otherwise, no payment of rent to a landlord would be a voluntary payment. The plaintiff, in the court below, elected not to give evidence, but relied on the power of the corporation to stop the water supply. In that point he was wrong, and he is not at liberty to come here and take a point not taken below. I think, therefore, that this payment was a voluntary payment, and that it cannot be recovered back, so that on this point this appeal must be allowed. [The learned judge then dealt with the second point, and held that section 68 of the Waterworks Clauses Act was not incorporated with the special Acts, on this point upholding the county court judge.]

WILLS, J.—I am of the same opinion. In my opinion this was a voluntary payment. The respondent gave way, and paid the larger sum claimed. It appears to me that it is idle to say that there was anything like duress, or even a threat. It is simply the ordinary case of a man raising a contention when a demand is made on him. This is not sufficient to constitute duress so as to prevent the payment being a voluntary payment. It seems to me, therefore, that the contention of the appellants on this ground is well founded, and that on that point this appeal must succeed. [The learned judge then held that as to the second point the county court judge was right.]

Appeal allowed, without costs. Judgment for the defendants.

Solicitors, *Sharpe, Parkers, Pritchard, & Sharpe*, for *Southern*, Burnley; *A. B. Creek, jun.*, for *A. B. Creek*, Burnley.

Q. B. Div. (Manisty and Stephen, JJ.) June 8.

WINDHAM v. BAINTON. (*a*.)

Costs—Evidence—Preparation for trial—Discontinuance before notice of trial—Ord. 65, *r.* 27 (9).

Rule 9 *of the "Special Allowances" in the scale of* 1875 *enables the master, in his discretion, to allow the costs of evidence obtained by a defendant, though the plaintiff discontinues his action before notice of trial.*

This was an application by the defendants in the action for an order for a review of taxation referred to the court by Cave, J.

The costs in question had been incurred by the defendants before a notice of trial had been served on them by the plaintiff. The action had been brought by the plaintiff against the defendants, who were drainage commissioners, to recover damages for injury to his banks, alleged to have been caused by their drainage operations. The plaintiff discontinued the action before notice of trial had been served on the defendants. The expenses of ascertaining the state of the banks were the costs now sought to be recovered.

By ord. 65, r. 27 (9), it is ordered: "As to evidence, such reasonable charges and expenses as appear to have been properly incurred in procuring evidence and the attendance of witnesses are to be allowed."

Sutton, for the defendants.—The evidence was prudently procured, and the master has discretion, under ord. 65, r. 27 (9), though it was not the practice formerly, to allow costs of such evidence. Sub-rules 3 and 38 show that a wide discretion was intended to be given to the taxing master. Such costs are allowed in the Chancery Division.

He referred to *Harrison* v. *Leutner*, 29 W. R. 393, 16 Ch. D. 559; *Mackley* v. *Chillingworth*, 25 W. R. 650, 1 C. P. D. 273; *Turnbull* v. *Jansen*, 26 W. R. 815, 3 C. P. D. 264.

Acland, for the plaintiff.—The old practice was founded on the reasonable ground that costs were only payable to indemnify the successful party for his expenses reasonably incurred. *Curtis* v. *Platt*, 16 C. B. N. S. 465, 12 W. R. C. L. Dig. 134, is an authority for the proposition that such costs as these cannot be considered to have been reasonably incurred. Sub-rule 37 of rule 27 reserves the old practice where not inconsistent with the new. In sub-rule 9 evidence must be taken to mean evidence used at the trial. In the cases cited in the Common Pleas the causes went to trial.

MANISTY, J.—This was an application to us to order the master to review his taxation of a bill of costs. The question raised is whether the master has, since the new rules have come into force, a discretion to allow costs in respect of matters which, in the result, are matters of evidence. The costs in question were, no doubt, not allowed under the old practice. The intention of the framers of these new rules was to give a wide discretionary power to the taxing masters, so as to enable them to give costs for expenses reasonably incurred which were formerly withheld. The question turns on sub-rule 9 of rule 27. Is Mr. Acland right in giving a narrow construction to the word "evidence" there used, so as to make it applicable only to evidence actually given? It is certainly not so limited in words, and there is no limitation in terms as to expenses incurred after notice of trial has been given in an action. It seems to me to be the fair and reasonable interpretation of the rule that the master had discretion to allow these costs if they were necessarily incurred for the purpose of ascertaining what was to be set up by way of defence. I think it is good to encourage parties to incur a reasonable expense in order to arrive at a conclusion as to what their statement of defence should allege. No doubt the cases decided in the Court of Common Pleas did go to trial, but I do not think that fact material.

STEPHEN, J.—I am of the same opinion. Before 1875 no costs were allowed for expenses incurred before notice of trial. There is nothing said in the new rule as to such a limitation of the word "evidence" as is now contended for, which seems to me to involve the introduction of words not found in the rule. The word "evidence" is used in many senses, and I do not see why we should take the narrowest construction here, nor why this case differs from cases where evidence is procured but not tendered owing to the settlement of the action. The matter must go back to the master.

Application granted.

Solicitors for the plaintiff, *Lawrence Graham & Co.*

Solicitor for the defendant, *A. B. Oldman*, for *Bainton*, Beverley.

(*a*.) Reported by A. H. TODD, Esq., Barrister-at-Law.

Court of Appeal.

From Q. B. Div. July 24.

MORTGAGE INSURANCE CORPORATION *v.* COMMISSIONERS OF INLAND REVENUE. (*a.*)

Revenue—Stamp—Promissory note—Agreement—Stamp Act, 1870 (33 & 34 *Vict. c.* 97), *s.* 49.

An instrument which was called a policy of insurance and which guaranteed to the assured the payment of £100 on the 18th of May, 1967, provided that, if the assured should be desirous at any time of surrendering the policy, he should be allowed the surrender value thereof as on the 18th day of May last preceding the date of his notice to surrender, such value to be fixed according to certain tables for the time being in force with reference to surrenders.

Held (affirming the decision of the Divisional Court, *ante, p.* 474, 20 *Q. B. D.* 645), *that the instrument was not chargeable with stamp duty as a promissory note.*

Appeal from the decision of a divisional court (*ante*, p. 474, 20 Q. B. D. 645) on a special case stated by the commissioners.

On June 7, 1887, an unstamped instrument was presented to the commissioners under section 18 of the Stamp Act, 1870. The material part of the instrument was as follows:—

"The Mortgage Insurance Corporation (Limited). Amount insured £100.

"This policy of insurance witnesseth that whereas W. Elkin (who, with his executors, administrators, and assigns, is hereinafter called the assured) is desirous of being insured by the corporation, as hereinafter appearing, and there has been paid to the corporation the sum of £9 17s. 4d., being the agreed premium for such assurance, now these presents witness that the corporation do hereby guarantee to the assured payment of the sum of £100 on the 18th day of May, 1967. Provided that if the assured shall be desirous at any time of surrendering this policy the corporation will allow to the assured the surrender value thereof as on the 18th day of May last preceding the date of his notice to surrender, such value to be fixed according to the tables of the corporation for the time being in force with reference to surrenders."

The commissioners considered that this instrument was chargeable with stamp duty as a promissory note, but the Divisional Court held that it required to be stamped as an agreement and not as a promissory note.

The commissioners appealed.

Sir E. Clarke, S.G., and *A. V. Dicey* (*Sir R. E. Webster, A.G.*, with them), for the appellants.

Sir Henry James, Q.C. (*Moulton, Q.C.*, and *Reginald Brown* with him), for the respondent.

The arguments were the same as in the court below. The following additional case was cited:—*Crouch* v. *Credit Foncier*, 21 W. R. 946, L. R. 8 Q. B. 374.

Lord ESHER, M.R.—I should be sorry to be supposed to interfere with any of the cases which have been cited. All that I meant to say in the case of *Yeo* v. *Dawe*, 33 W. R. 739, was that the intention of the parties was an element in considering whether a document was a promissory note or not. I do not think I am differing in any way from *The British India Steam Navigation Co.* v. *Commissioners of Inland Revenue*, 29 W. R. 610, 7 Q. B. D. 165, because I do not think that case governs this. I am clearly of opinion that this instrument is not a promissory note within the meaning of section 49 of the Stamp Act, 1870. By that section the term promissory note includes any document except a bank note containing a promise to pay any sum of money, and although by the latter part of the section, notes promising the payment of any sum of money out of a particular fund, or upon any condition or contingency, and which would therefore not be promissory notes in the ordinary sense of the term, are to be deemed, for the purposes of the Act, to be promissory notes, yet I think the section contemplates a promise to pay a certain and defined sum of money. I think no case would come within the section in which, although a defined sum or sums is or are promised to be paid, yet the instrument contains stipulations which may have this result: that under certain conditions an undefined and unascertained sum may become payable instead of the defined sum originally promised. I do not think that such a document is a promissory note within the section. In order to satisfy the section the main object and purpose of the document must be a promise to pay an ascertained sum. The case of *Crouch* v. *Credit Foncier* is a strong authority to show that such a document as that before us is not a promissory note within the ordinary meaning of the term. I think it is not within the meaning of the Act either. The decision of the Divisional Court must therefore be affirmed.

LINDLEY, L.J.—I am of the same opinion. Section 49 is one of a group of sections dealing with generically described documents. It is quite obvious that certain documents which are not negotiable instruments come within the Act and have to be stamped. The second part of section 49 distinctly makes instruments which would not be promissory notes, in the ordinary sense of the term, promissory notes for the purpose of the Act. But what is meant by the earlier part of the section, that a promissory note is to include any document except a bank note containing a promise to pay any sum of money? It is clear that those words must not be taken literally, or many things would be included and become liable to be stamped which were never intended to be included. The words must be limited in some way. I think that there must be a promise to pay a definite and ascertained sum, and not an unascertained and fluctuating sum, and the instrument must contain no more than this. It must be the substance and the whole contents of the document. It must be an obligation to pay a certain sum, and that must be the only obligation. If there is not such a limitation almost every document will be a promissory note within the meaning of the Act. The instrument before us contains a great deal more than a mere promise to pay a fixed sum. There is an obligation to pay an unascertained sum whenever the assured wishes it. In my opinion, therefore, the document, although it contains a promise to pay a fixed sum, contains so much more that it is not a promissory note within the meaning of section 49.

BOWEN, L.J.—I am of the same opinion. The question to be decided is whether this particular instrument is a promissory note within section 49 of the Stamp Act, 1870. It is beyond question that it is not a promissory note at common law. I do not think that it can be contended that section 49 is to be construed as including in the term promissory note every document of whatever description in which a promise to pay a sum of money appears. That would be to sweep in thousands of documents containing elements altogether foreign to the idea of a promissory note. In my opinion the proper interpretation of the section is that the words mean to deal with and include documents whose contents consist substantially of a promise to pay a definite sum of money and of nothing else. Although the second part of the section brings within the term "promissory note" documents which would not be

(*a.*) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law

promissory notes in the ordinary signification of the expression, yet I think that the section only contemplates documents containing nothing but a promise to pay a definite sum of money. The document before us, it is true, contains a promise to pay £100 in 1967, but it also contains an obligation to pay, at any time that the assured may demand, a fluctuating sum in respect of the surrender value of the policy, to be ascertained according to certain tables which the corporation impliedly undertake to keep. That fluctuating sum may thus take the place of the definite fixed sum, and, therefore, I think this document is not a promissory note. I do not think any of the cases that have been cited to us conflict with this decision.

Appeal dismissed.

Solicitor for the appellants, *Solicitor of Inland Revenue.*

Solicitors for the respondents, *Linklater & Co.*

From Q. B. Div. July 19.

Henderson v. Preston. (a.)

False imprisonment—Action against gaoler—Act done in obedience to valid warrant.

No action will lie against the governor of a gaol for acts done in obedience to a valid warrant properly issued.

Appeal from the decision of a divisional court (Manisty and Stephen, JJ.)

The action was brought against the governor of the Strangeways Gaol at Manchester for false imprisonment. On August 24, 1887, the plaintiff, who was a member of the Salvation Army, was convicted before the magistrates in petty session at Rochdale of obstructing a certain highway, and was sentenced to a fine of 5s. and costs or, in default, to seven days' imprisonment.

The fine and costs not having been paid, and there being insufficient goods to satisfy distress, the plaintiff was locked up in the police cell at Rochdale until the 25th, when he was taken, under a warrant, to the Strangeways Gaol, from which he was released on August 31. The plaintiff then brought this action, contending that the period of imprisonment ought to have expired on August 30.

The Divisional Court entered judgment for the defendant on the points of law raised by the pleadings, on the ground that the governor was protected by the warrant. The plaintiff appealed.

The material part of the warrant was as follows:—"It is ordered that the defendant be imprisoned in her Majesty's prison aforesaid, and there kept for the space of seven days, unless the said sum and all costs and charges of his commitment and of his conveyance to the said prison be sooner paid, and you, the said constables, are hereby commanded to take the defendant and convey him to the said prison and there deliver him to the governor thereof, together with this warrant, and you, the governor of the said prison, to receive the defendant into your custody and keep him for the space of seven days."

Percy Gye and *Waghorn*, for the appellant, cited *In re Fletcher*, 1 Dowl. & Low. 726; *Ex parte Foulkes*, 15 M. & W. 612; *In re Bowdler*, 12 Q. B. 612; *Braham* v. *Joyce*, 4 Ex. 487; *Migotti* v. *Colvill*, 27 W. R. 744, 4 C. P. D. 233; *Moone* v. *Rose*, 17 W. R. 729, L. R. 4 Q. B. 486; *R.* v. *Cutbush*, 36 L. J. M. C. 70, 15 W. R. C. L. Dig. 37.

R. S. Wright, for the respondent, referred to *Olliet* v. *Bessey*, Sir T. Jones' Rep, 214; *Tarlton* v. *Fisher*, 2 Doug. 671.

Lord Esher, M.R.—It is impossible to deny that this warrant is a warrant which is justified by the Act of Parliament, and is issued by a court having jurisdiction to issue it. In its terms it is as clear as it is possible for a warrant to be. It orders the Governor of Strangeways Gaol to receive this man into his custody and to keep him in that gaol for seven days. What can be more plain than that? I am inclined to think that the best judgment is that given by Stephen, J., in the court below—"The warrant protects the gaoler, and no more need be said." In the case in Sir Thomas Jones's Reports that was so held, and from that date down to the present time no such action has been brought, or at any rate no such action appears in the books. No action can be entertained against a gaoler when all that he does is to obey the warrant that has been issued. That is enough to settle this case. Whether this person could have been released after a certain time upon a *habeas corpus* is a question which we need not now answer, for even if he could it is plain that this action would not lie.

Lindley, L.J.—I am of the same opinion. It appears to me that one has only to read the warrant to decide this case. The governor of the gaol receiving such warrant has no choice but to obey it. The warrant is perfectly valid and perfectly correct, and it is authorised by the Act of Parliament, and is issued by persons having authority to issue it. The governor, in obeying that warrant, did that which it was his duty to do. The warrant protects him, and is an answer to the action. The case of *Moone* v. *Rose* is distinguishable, since the gaoler in that case had not obeyed the warrant. The case of *Olliet* v. *Bessey*, and that of *Butt* v. *Newnes*, Gow, 97, against the gaoler of Newgate, show that a gaoler who has obeyed a warrant is protected by it. That is an answer to this case.

Bowen, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors for the appellants, *Ranger & Burton.*

Solicitor for the respondents, *Solicitor to the Treasury.*

From Q. B. Div. July 5.

Massey v. Heynes & Co. and Schenker & Co. (a.)

Practice—Service out of the jurisdiction—Notice of concurrent writ — Alternative remedies against two defendants—One defendant out of the jurisdiction—"Necessary or proper party"—Ord. 11, r. 1 (g).

H. & Co., brokers in London, acting as agents for S. & Co., an Austrian firm, entered into a contract with the plaintiffs. S. & Co. afterwards repudiated the contract, on the ground that the agents had inserted a certain term without their authority. The plaintiffs brought an action against H. & Co. and S. & Co., claiming alternatively against H. & Co. for breach of implied warranty of authority, and against S. & Co. for breach of contract.

Held, that an order giving leave to the plaintiffs to serve notice of a concurrent writ out of the jurisdiction on S. & Co., under ord. 11, r. 1 (g), was rightly made.

Appeal from the decision of a divisional court (Wills and Grantham, JJ.) refusing to set aside an order for service of notice of a writ of summons out of the jurisdiction, and a judgment by default obtained thereon.

The plaintiffs were owners of a steamer lying at Venice.

(a.) Reported by A. P. Percival Kerr, Esq., Barrister-at-Law.

(a.) Reported by F. G. Rucker, Esq., Barrister-at-Law.

On the 29th of July, 1887, the defendants Heynes & Co., shipbrokers in London, having received instructions from the defendants Schenker & Co., an Austrian firm carrying on business at Fiume, entered into a charter-party, as agents for Schenker & Co., with the plaintiffs.

According to the terms of the charter-party the steamer was chartered for a voyage to Bordeaux, and was to call at three ports in the Adriatic, to be named by the charterers, in geographical order from Venice, and load therefrom a cargo of wines. A dispute arose as to the order in which the ports of loading were to be taken, and ultimately Schenker & Co. repudiated the contract on the ground that the words "in geographical order" had been inserted in the charter-party by the shipbrokers without their authority.

The plaintiffs commenced an action by issuing a writ against Heynes & Co. and Schenker & Co., claiming against the former for a breach of implied warranty of authority, and against the latter for a breach of the charter-party. They then made an application under ord. 11, r. 1 (*g*), and obtained an order giving them leave to issue a concurrent writ for service out of the jurisdiction, and to serve notice thereof on Schenker & Co. in Austria. This notice was served on Schenker & Co. on the 2nd of January, 1888, but no appearance was entered on their behalf, and on the 9th of March judgment was signed against them in default of appearance. Damages having been assessed, final judgment was signed on the 7th of April. Garnishee proceedings were commenced, and then for the first time Schenker & Co. heard of the judgment against them. They alleged that they had not understood that the notice served on them on the 2nd of January was a notice of an action requiring them to appear and defend. Accordingly an application was made at chambers on their behalf to set aside the order obtained under ord. 11, r. 1 (*g*), and the judgment against them and all proceedings thereon.

This application was refused by Denman, J., and his decision was affirmed by the Divisional Court.

Schenker & Co. appealed.

J. G. Barnes, Q.C. (*Hollams* with him), for the appellants.—In the first place, there was no power to allow service of this notice on the appellants under ord. 11, r. 1 (*g*). That rule says that a writ or notice of a writ may be served out of the jurisdiction when "any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction." The appellants are not necessary or proper parties to any such action. If, on the one hand, there has been a breach of an implied warranty of authority—that is to say, if the action is rightly brought against Heynes & Co.—then Schenker & Co. cannot be necessary or proper parties. If, on the other hand, Schenker & Co. are liable to the plaintiffs for a breach of the charter-party, then the action is not properly brought against Heynes & Co. In either alternative the order was wrongly made.

He cited *Yorkshire Tannery Co.* v. *Eglinton Chemical Co.*, 33 W. R. 162, and *Speller* v. *Bristol Steam Navigation Co.*, 32 W. R. 670.

French, Q.C., and *English Harrison*, for the plaintiffs, were not called upon to argue this point.

Lord ESHER, M.R.—We will give judgment on this point at once. The question is whether this rule of order 11 was intended to apply to such a case as the present. By our course of procedure a plaintiff who is in a position to claim relief against either one or the other of two persons in respect of one transaction is entitled to make them defendants in the same action, and to say in that action, that they were both concerned in the one transaction in such a way that he must have relief against one or the other. Then the rules providing for service out of the jurisdiction say that a writ may be served on any person out of the jurisdiction who is "a necessary or proper party to an action properly brought against some other person" within the jurisdiction. To what period of time does this rule apply? When is it to be determined whether the person proposed to be served is a necessary or proper party to an action properly brought against some other person? Certainly the rule must apply to the time of issuing the writ. The court cannot judge of the matter by reference to the result of the action, which has not yet been arrived at. The meaning of the rule must be that where a plaintiff is in a position to claim alternative relief against two defendants, then, if one of them is abroad, he may be brought in as if he were in this country—even although relief can be obtained against him only in the alternative of its being decided at the trial that the other defendant is not liable to the plaintiff. Therefore I think the order giving leave to serve notice out of the jurisdiction was rightly made.

LINDLEY, L.J.—I am of the same opinion. I cannot doubt that this rule applies to this case.

LOPES, L.J.—I am also of the same opinion. The words of the rule, "an action properly brought," clearly point to the time of issuing the writ.

On the following day the Court heard arguments on other points, and came to the conclusion that the Divisional Court were right in refusing to set aside the judgment by default.

Appeal dismissed.

Solicitors for the plaintiffs, *Botterell & Roche.*

Solicitors for Schenker & Co., *Waltons, Bubb, & Johnson.*

From Q. B. Div. May 7, 8.

NEWLOVE AND OTHERS v. SHREWSBURY. (*a.*)

Bill of sale—"Receipt"—Oral agreement—Document not representing contract—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 4—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43).

By an oral agreement the title to a personal chattel was given as security for an advance. The grantor afterwards signed a receipt, which was not intended to embody, and did not embody, such agreement. The receipt was not registered under the Bills of Sale Acts.

Held, that the Bills of Sale Acts did not apply, since the title of the grantee to the chattel depended, not on the receipt, but on the oral agreement.

Appeal from the decision of DAY, J.

The action was brought to recover a lace machine or its value, and was referred to a special referee.

It appeared from his report that, on November 2, 1881, a firm of Smith & Hancock agreed with one Atkinson to manufacture for him a lace machine for the price of £681, to be paid in specified instalments—the machine to remain the property of Smith & Hancock until the whole amount was paid. A sum of £100 was paid by Atkinson, and the machine was delivered to him, but the balance had not been paid.

In March, 1883, Smith & Hancock being in difficulties, the defendant guaranteed their account at their bankers to the extent of £600, and in consideration of this they made over to him their property in the machine in question. It was agreed that, if within four months Smith & Hancock were in credit with their bankers and the defendant became entitled to revoke

(*a.*) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

his guarantee, the machine and the benefit of the agreement were to revert to Smith & Hancock, otherwise the defendant was to be at liberty to sell the machine, and discharge the guarantee with the proceeds. An indorsement was made upon the agreement of November 2, 1881, in the following terms:—"Received of Mr. William Shrewsbury the sum of £580 for and in satisfaction of all our interest and property in the lace machine within described and the within written agreement. (Signed) SMITH & HANCOCK."

This document was not registered, and the referee reported that it did not represent the real transaction between the parties, since the transfer was not absolute but by way of security only. The defendant had his name painted on the machine, and in July, 1885, he bought Atkinson's interest therein and sold the machine for £400. The defendant had had to pay the whole amount of his guarantee to the bank.

The plaintiffs claimed as assignees under a deed of assignment for the benefit of creditors made by Smith & Hancock on December 31, 1884.

Day, J., gave judgment for the defendant, and the plaintiffs appealed.

Jelf, Q.C., and *Hextall*, for the appellants, contended that the receipt indorsed on the agreement was, in effect, a bill of sale, and was void for want of registration.

They cited *Ex parte Parsons*, 34 W. R. 329, 16 Q. B. D. 532; *Ex parte Hubbard*, 35 W. R. 12, 17 Q. B. D. 690; *North Central Wagon Co.* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, 35 W. R. 447, 35 Ch. D. 191; *Ex parte Stooke*, 20 W. R. 925.

Stanger, for the respondents, was not called upon to argue.

Lord ESHER, M.R.—Agreeing, as I do, with the view of the facts taken by Day, J., all the difficulties as to the doctrine relating to bills of sale disappear. The question is whether there was not here an oral transaction entirely independent of this receipt which would entitle the defendant to hold this machine against the plaintiffs. That depends on whether it can be said that the receipt operated as a reduction into writing of the agreement between the parties relating to the giving of this security. I think that, if the agreement was reduced into writing and was void under the Bills of Sale Act, no subsequent possession of the goods would give the grantee any right to them. That is the effect of *Ex parte Parsons*. But where the receipt is not an assurance of title at all, and the agreement as to the chattels is independent of any writing, then the receipt is not a bill of sale and the Acts do not apply. That is, in my opinion, the case here. There was an oral contract, which was complete before the receipt was given, and the receipt did not purport, when it was given, to reduce that contract into writing. There was, I think, an oral agreement to give a security on this machine which is not affected by the Bills of Sale Acts, and which entitles the defendant to retain it against the plaintiffs.

The appeal must therefore be dismissed.

LINDLEY, L.J.—I am of the same opinion. The question turns on the general principles of the law of evidence rather than on the Bills of Sale Acts. I do not think the real agreement between the parties was ever reduced into writing. The receipt does not seem to have been intended to express it. To be a bill of sale a receipt must be a document necessary to the defendant's title, as was decided in *Ex parte Hubbard*, and in *North Central Wagon Co.* v. *Manchester, Sheffield, and Lincolnshire Railway Co.* Here the defendant's right to possess the machine does not depend upon the receipt, but upon an agreement not reduced into writing at all. The right to possession conferred by such an agreement cannot be upset by reference to the receipt. Where a person can only prove his right to the possession of goods by an unregistered document which is a bill of sale within the meaning of section 4 of the Act of 1878, he cannot retain them against the person entitled to them subject to his claim, but if his right can be proved by parol without reference to any document, the Bills of Sale Acts do not apply. Of course, if the document expresses the agreement between the parties, parol evidence is inadmissible, but if the agreement is independent of the document it may be proved by parol.

BOWEN, L.J.—I agree, and I think the case adds nothing to the general law of bills of sale. It depends on the true effect of statements in the report of the referee. It is suggested that because, subsequently to the oral agreement between the parties, a receipt was given, the receipt must be taken to be a bill of sale. Such a view would be inconsistent with the facts. The cases show that such a document is not a bill of sale unless it is an assurance of the goods. It must be shown that the transaction depends on the document, and if the document be void, then the transaction will fail on the ground because oral evidence will be inadmissible. But here it seems plain that the transaction depended, not on this receipt, but on an oral agreement between the parties which was entirely independent of the receipt, and which the receipt was never intended to embody. That agreement could be proved by oral evidence, and not by the production of the receipt. I therefore think the decision of Day, J., was correct and must be affirmed.

Appeal dismissed.

Solicitors for the plaintiffs, *Clinton & Buckley, for Stevenson*, Nottingham.

Solicitors for the defendants, *Goldring, Mitchell, & Philips*, for *Brittle*, Nottingham.

Bankruptcy. July 13.

Ex parte ARNAUD.

In re BULLEN. (*a.*)

Bankruptcy—Debtor's petition—Single creditor—Conditional discharge—Entering up judgment—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 28, *sub-section* 6.

The court will not require a bankrupt, as a condition of his discharge, to consent to judgment being entered against him for the balance of his debts, unless there is some evidence that he is likely to acquire property sufficient to satisfy such judgment.

Quære, *whether a man who has one creditor only can present a debtor's petition and obtain a complete discharge.*

This was an appeal by a creditor against an order of Mr. Registrar Giffard granting the bankrupt a discharge subject to three months' suspension.

The debtor was lessee of a public-house, his interest in which was subject to two mortgages. In 1887 Arnaud, the creditor, recovered judgment against the debtor for £600, and took as security a third mortgage of the public-house. The amount of Arnaud's debt uncovered by that security (after the first and second mortgages had been satisfied) was £442.

On the 13th of December, 1887, Arnaud put in an execution, and on the 17th the debtor filed his petition in bankruptcy, and was thereon adjudicated a bankrupt.

(*a.*) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

His statement of affairs showed no unsecured creditors except (1) Arnaud, (2) a water company to whom £3 water rate was due, and who did not prove in the bankruptcy, and (3) his landlord, whose rent (£12 10s.) was due in priority to the other claims. His assets exclusive of the mortgaged property were £57 10s. The official receiver reported that the bankrupt had not kept proper books of account, and that he had continued to trade when he knew that he was insolvent, and the registrar upon consideration of this report made the order of discharge, but suspended it for three months. Arnaud appealed.

Cooper Willis, Q.C., and *F. C. Willis*, for the appellant, contended that it was an abuse of the process of the court for a debtor to present a petition against himself, where (as in this case) there was practically only one creditor, the object of bankruptcy being to obtain an equal distribution of the assets amongst several creditors. This was "whitewashing" pure and simple, and the adjudication should never have been made. The filing of the petition was itself an act of misconduct on the part of the debtor, and his discharge should not be granted except upon the condition of the bankrupt's consenting to judgment being entered up against him for the balance of his debts under section 28, sub-section 6, of the Act of 1883.

They cited *Ex parte Gaitskell*, 3 Deac. 635; *In re Staff*, 23 W. R. 950, L. R. 20 Eq. 775; *In re Aaronson*, 26 W. R. 470, 7 Ch. D. 713.

A. a'B. Terrell, for the bankrupt, was not called on.

LORD ESHER, M.R.—A great deal of time has been taken up in argument as to whether the adjudication under these circumstances could be set aside. I do not express the opinion which I have upon that point, for upon this application the adjudication cannot be challenged, and we have only to decide whether the learned registrar has used his discretion properly in making this order. The learned registrar has found that the bankrupt has done wrong in not keeping proper books and in trading after he knew that he was insolvent, and for these two offences he has awarded the punishment which he thought proper—suspension of the discharge for three months. No complaint is made in respect of that punishment, and this court would not, unless in a very strong case, increase a punishment which seemed to the learned registrar the proper one to inflict. But the complaint is that the registrar ought to have made an order under section 28, sub-section 6. I see no reason why he ought to have done so, or why I would have done so if I had been in his place. The argument for the appellant was a great deal too large, and would deprive debtors of the benefit of the bankrupt laws, putting them in the position of having no discharge at all. For the offences which the debtor committed the punishment which has been inflicted is sufficient.

LINDLEY, L.J.—I see no reason for differing from the learned registrar. The question which was raised as to the power of the debtor to file his petition and obtain his discharge where there is only one creditor will require careful consideration when it arises, which it does not in this case; here there are secured creditors, and they cannot go for nothing; they have a right to sue the debtor as well as the unsecured creditors. In this case the registrar, upon the application for discharge, had to consider the conduct of the bankrupt, and when asked to annex some term to the discharge, he suspended it for three months, but declined to make an order under sub-section 6. There is no evidence that the debtor will acquire any further property from any source but his trade; he is not entitled to any reversionary interest. An order under sub-section 6 would be certain to make controversy between the judgment creditor and any future creditors, and where there is no evidence of the probability of after-acquired property, it certainly would *primâ facie* be wrong to make such an order; there is nothing to show that the debtor will have any property beyond what he will want to keep body and soul together.

BOWEN, L.J., concurred.

Appeal dismissed.

Solicitor for the appellant, *E. J. Stannard.*

Solicitor for the bankrupt, *E. W. Reeves.*

High Court of Justice.

Chan. Div. Kay, J. — June 27, 28; July 4.

In re ST. STEPHEN, COLEMAN-STREET.
In re ST. MARY, ALDERMANBURY. (*a.*)

Advowson—Charity—City of London Parochial Charities Act, 1883 (46 & 47 *Vict.* c. 36), *ss.* 5, 10.

An impropriate rectory was granted by the Crown in 1589 to trustees for a parish, the purchase-money being paid by the parish. The property was conveyed from time to time to new trustees for the benefit of the said parish, and the vicar was chosen by the parishioners. The Charity Commissioners recently included the advowson in the schedule of ecclesiastical charity property under the City of London Parochial Charities Act, 1883, *and the parishioners presented a petition asking that it might be removed from the schedule, on the ground that it was not "charity property."*

Held, that an advowson is not an exception to the general law as to charitable trusts, and that the advowson was "charity property."

Petitions.

These were two petitions under the City of London Parochial Charities Act, 1883, presented by parishioners, and the questions were whether a vicarage-house and two advowsons, the presentations to which had been hitherto made by the parishioners, were charity property or not. The Charity Commissioners had included the house and advowsons in the schedule of ecclesiastical charity property.

The facts, as stated by Kay, J., were as follows:—The statute 46 & 47 Vict. c. 36 (the City of London Parochial Charities Act, 1883) was passed to make provision for the better application and management of the parochial charities of the City of London, and it confers certain powers for those purposes upon the Charity Commissioners. Section 10 provides that any persons alleging that property which the commissioners have determined to be charity property within the meaning of the Act is not charitable property, but that they are entitled to the same free from any charitable trust, may apply to the High Court by petition asking for a declaration accordingly. Two such petitions are now before me, which have been argued together as they raise substantially the same question—namely, whether certain advowsons, the presentation to which has hitherto been made by the parishioners of two City parishes respectively, are charity property; and in the case of St. Stephen's Parish, whether a vicarage-house also is charity property? In St. Stephen's Parish an impropriate rectory was granted by the Crown in 1589, together with the Church of St. Stephen, Coleman-street, and all tenements, tithes, and other hereditaments to the same belonging, subject to a lease for twenty-one years, which has long since expired, to four persons named,

(*a.*) Reported by H. C. ROPER, Esq., Barrister-at-Law.

their heirs and assigns for ever. The purchase-money of £899, expressed to be the consideration for such grant, was provided out of funds belonging to the parish, and the property has been conveyed from time to time to new trustees "for the benefit of the said parish," and the choice of the vicar has been made by the parishioners. The vicarage-house was provided by a benefaction under the will of one John Rice in 1722, and was conveyed in 1755 to the then vicar and six vestrymen, and has since been held upon like trusts for the benefit of the parish, and has been used by the vicar for the time being. The facts as to the presentation in the parish of St. Mary, Aldermanbury, are substantially the same, the living there being called "a perpetual curacy," and no house being in question. In neither case is the advowson strictly in gross, but it is a part of the rectory, and is, properly speaking, an obligation imposed upon the lay rector to provide for the service of the church.

Everitt, Q.C., and *E. Ford*, for the parishioners of St. Stephen's.—The house and advowsons are not charity property, and ought to be removed from the schedule. An advowson is in an anomalous position; it is not void as a perpetuity, and yet it is not a charity. A right of presentation gives no personal benefit to any parishioner. It is a trust, not a charity. It is not "property or income . . . applicable or applied" within section 5: *Attorney-General* v. *Webster*, L. R. 20 Eq. 483, 24 W. R. Dig. 48; *Edenborough* v. *Archbishop of Canterbury*, 2 Russ. 93; *Attorney-General* v. *Parker*, 1 Ves. sen. 43, 3 Atk. 576; *Attorney-General* v. *Forster*, 10 Ves. 335; *Attorney-General* v. *Newcombe*, 14 Ves. 1; City of London Parochial Charities Act, 1883, ss. 5, 10, 11, 14. [KAY, J., referred to *Fearon* v. *Webb*, 14 Ves. 13.]

Jeune, Q.C., and *Stuart Moore*, for the parishioners of St. Mary's, supported the same contention.

They referred to *Attorney-General* v. *Rutter*, 2 Russ. 101n; *In re the Christchurch Inclosure Act*, 35 W. R. 538, 35 Ch. D. 355; Lewin on Trusts, 5th ed., p. 68.

Sir H. Davey, Q.C., and *V. Hawkins*, for the Charity Commissioners.—These advowsons are appendant to impropriate rectories, and are only incidents of property which is undoubtedly charitable. The doubt said by Lord Eldon to have been expressed by Lord Hardwicke in *Attorney-General* v. *Parker* is the only authority for saying that an advowson is not a charity. We submit that these advowsons are charity property: *Attorney-General* v. *Scott*, 1 Ves. sen. 412; *Foley* v. *Attorney-General*, 7 Bro. P. C. 249; *In re St. Botolph Parish Estates*, 35 W. R. 688, 35 Ch. D. 142; *Wilson* v. *Dennison*, 1 Amb. 82; *Attorney-General* v. *Hewer*, 2 Vern. 386; *Goodman* v. *Mayor of Saltash*, 31 W. R. 293, 7 App. Cas. 633; *Attorney-General* v. *Bishop of Lichfield*, 5 Ves. 825; *Thomson* v. *Shakespear*, 8 W. R. 265, 1 De G. F. & J. 399. An advowson is within the words of section 5, "applied for the benefit of any spiritual person."

Everitt, Q.C., replied.

Cur. adv. vult.

July 4.—KAY, J., stated the facts as above, and proceeded:—In *Goodman* v. *The Mayor of Saltash* the Corporation of Saltash were the owners in fee simple of a several oyster fishery in the creek of the Tamar. The free inhabitants of ancient tenements in the borough from time immemorial as of right exercised the privilege of dredging for oysters there. The House of Lords inferred that the corporation held the fishery in trust for these inhabitants, referring their enjoyment to a supposed grant by the Crown upon such trust before legal memory. Lord Selborne said: "A gift, subject to a condition or a trust, for the benefit of the inhabitants of a parish or town of any particular class of such inhabitants is, as I understand the law, a charitable trust, and no charitable trust can be void on the ground of perpetuity," and his lordship referred to the well-known cases which have established this law. Lord Cairns said: "A grant of that kind, it appears to me, would be perfectly legal and perfectly intelligible, and there would be nothing in it which would infringe any principle of law—such a condition would create that which, in the very wide language of our courts, is called a charitable—that is to say, a public—trust or interest for the benefit of free inhabitants of ancient tenements. A trust of that kind would not in any way infringe the law or rule against perpetuities, because we know very well that where you have a trust which, if it were for the benefit of private individuals or a fluctuating body of private individuals, would be void on the ground of perpetuity, yet if it creates a charitable—that is to say, a public—interest, it will be free from any obnoxiousness to the rule with regard to perpetuities. That is a principle of the courts which was very well explained in a well-known case in the Court of Chancery which was decided when Lord Campbell was Lord Chancellor, a case with regard to Shakespeare's house—*Thomson* v. *Shakespear*. Indeed it is a principle which has been established in many cases." In *Thomson* v. *Shakespear* the testator left a sum of money to form a museum at Shakespeare's house and a rent-charge to pay the wages of a keeper or guardian. Lord Campbell said it was quite clear that it was the intention of the testator that it should exist for ever, that the money should be laid out upon a building that was to stand and be perpetual in memory of Shakespeare, "that is a perpetuity, and, not being a charity, it is void."

On the principle stated in these decisions I should think no lawyer would hesitate to say that the trusts in question are charitable trusts, and, therefore, not open to the objection that they are void as perpetuities. But it is said that Lord Hardwicke decided that such a trust of an advowson is not charitable, and that this decision has been recognized by Lord Eldon and applied in the case of the parish of St. Stephen to this very trust by Sir George Jessel, the late Master of the Rolls.

The cases referred to are *Attorney-General* v. *Parker*, which related to the impropriate rectory of St. James's, Clerkenwell, in which the service of the church was provided for by a perpetual curate with a pension. The suit was by information, seeking to set aside the election of the curate and to establish and settle the right of election. Lord Hardwicke refused to set the election aside, and according to the report in Vesey senior, which contains only a short note of the judgment he refused to make a decree to settle the right. His words, as given in the report, are these:—"As to the question whether the court ought not to make a decree to settle the right for that being a charitable use, the information should not be dismissed, the general rule is so, but does not hold here, for nothing is a charitable use here but the pension, which is not in question. But there is no ground to establish this right, as there is no proof or examination entered into of it, nor will the court, at the suit of a few of the parishioners, put the parish to the expense of an issue to settle a right which may not come in question in several years. The whole of this information must be dismissed with costs." A longer report of this judgment is given in 3 Atk. There is not a word in that version as to its not being a charity. The only ground there stated for not settling the right of election is that there was no general allegation what was the right of election, nor so much as an interrogatory framed for this purpose, and the Lord Chancellor refused to direct an issue, because the right might not come in question again in forty years, or the curate might continue to hold it so long. But in *Attorney-General* v. *Forster*, which was again an

information relating to Clerkenwell, upon a motion for an injunction to restrain the carrying out of a particular election, Lord Eldon referred to the previous decision, and also to some notes which he seems to have had of that case by Lord Hardwicke, but he said he had not been able to find any note of his judgment in detail. Lord Hardwicke had said only that he dismissed the information with costs. Lord Eldon continued: "But the passages appearing to be his notes of the argument, particularly at its close, show his opinion that it was difficult, if not impossible, to hold that the information was a due proceeding, for he thought the only object of an information by the Attorney-General was to secure the revenue of the curate who was to do the duty—viz., the stipend, between £3 and £4—and as to the nomination by the trustees to the bishop, &c., it was all a private suit, as if there had been trustees of an advowson or any other preferment, the *cestuis que trust* calling upon them to exercise the legal right in them according to the trust, and I doubt whether the information was not dismissed upon that principle as much as upon any other when it was found that the election could not be disturbed."

Attorney-General v. *Newcombe* is the report of the hearing of this suit, and in giving judgment Lord Eldon said: "There is an intimation in Vesey, and the fact is unquestionable upon Lord Hardwicke's note (speaking of it from recollection), that his lordship had considerable doubt whether, regarding the parishioners and inhabitants, whoever answer that description, as *cestuis que trust* of this rectory having the right to nominate the curate, that is a title so much in the nature of a charity that the party would have a right to sue in the name of the Attorney-General. Upon the same principle, I presume, as the opinion expressed in the *Attorney-General* v. *Hewer*, where the court said that, not being a free school, it was not a charity." Later on, in the same judgment, his lordship refers again to Lord Hardwicke's "doubt whether it is a charity or a beneficial interest in the ordinary nature of a right to present." *Attorney-General* v. *Hewer* was a case in which a school-house had been erected on the waste. The lord of the manor conveyed it to about eighteen of the principal inhabitants in trust, and to the intent that the inhabitants of Clapham might for ever have a school as of his gift. This was held not to be a charity. A decision which shows that the doctrine of trusts for a public varying body, being either charitable or void for perpetuity, cannot have been settled at that time. In the case before Lord Eldon reference is made to a decision of the Court of Exchequer with regard to Clerkenwell, which is reported in a note 2 Russ. 101 *sub nom. Attorney-General* v. *Rutter*. It was an information and bill, the plaintiff seeking a declaration that the election of the plaintiff might be established, the Attorney-General by the information asking to have it declared void and to have the future right of election settled. Both information and bill were dismissed as to the election actually made, but directions were given for the manner in which the parish should proceed to make a new election, which could hardly have been proper upon a bill without an information.

Attorney-General v. *Webster* was an information to have it declared that certain property of the parish of St. Stephen's, Coleman-street, was held upon charitable trusts, it having been conveyed from time to time to trustees for the use and benefit of the parish, and the income applied in repairs of the church, maintenance of the poor, and other parochial purposes in aid of the rates. Sir George Jessel, M.R., referred to *Attorney-General* v. *Lord Hotham*, T. & R. 209, as an express authority that this was a charitable trust, but, he continued, no authority was wanting, because "it is impossible for the defendants to make out how you could have a valid trust for the benefit of the parish, or for the parishioners for ever, without it being charitable, and no suggestion has been made except with reference to that anomalous line of cases in which it has been said that an advowson can be so held." Then his lordship endeavours to explain the supposed anomaly by saying that in the case of an advowson the parishioners get no individual profit, only a right to nominate their own vicar; "and I think it is possible," he says, "to reconcile that line of cases on this theory—that it is a mere mode of selecting the charity trustee, because the man who performs Divine service and administers to the spiritual wants of the parish is, in a sense, trustee for the parish." This far-fetched theory reads rather like the desperate attempts of a lawyer to reconcile the doubt of Lord Hardwicke with the law as it is understood at this day. There is no decision that an advowson is exempt from the general law in this respect. Lord Hardwicke, if he ever used the words attributed to him in 1 Ves. sen., did but express a doubt. The fuller report in 3 Atk. makes it extremely probable that the report in Ves. is in this respect erroneous; and that probability is greatly increased by the following cases:—

In *Foley* v. *Attorney-General* the curates of a parish had for a long time past been appointed by the parishioners. An information and bill was filed to establish their right to make the appointment, and a suit so constituted was entertained, and provisions for the future regulation of the trust were embodied in the order of the House of Lords in the nature of a scheme for the regulation of a charity. Again, in *Attorney-General* v. *Scott*, also reported under the name of *Wilson* v. *Dennison*, Lord Hardwicke himself entertained an information to establish the election by the parishioners of a minister for the parish of Leeds. In his judgment Lord Hardwicke treated it expressly as a charity, and said in so many words that the information was not to be dismissed if the charity wanted any direction, and he referred to the case in the House of Lords which I have just mentioned, in which he said he had himself been counsel.

This was two years after the case of *Attorney-General* v. *Parker*, and it is hardly conceivable that he could have intimated that it was not a charity in the one case, and held that it was in the other. These authorities are consistent with the law laid down in such cases as *Attorney-General* v. *Hotham* and the other cases referred to by Lord Selborne, and with the judgment of the House of Lords in *Goodman* v. *Mayor of Saltash*. No decision to the contrary has been cited, nor has my research enabled me to find any; and in spite of the great weight to be attributed to a supposed doubt of Lord Hardwicke, which has been treated with respectful consideration by Lord Eldon, I consider myself bound, by the authorities to which I have referred, to follow my own opinion by holding that an advowson is no exception from the general law as to charitable trusts, and that both these advowsons are held in trust for charity. As to the vicarage-house, the case is quite clear. There is no authority whatever for treating this as anything but a charitable trust. Then various questions have been raised upon the statute 46 & 47 Vict. c. 36. It is argued that it only refers to property producing income. But the words in section 5 are "property or income," which are certainly large enough to include property which does not produce income as well as that which does. It is argued that the words in that section, "Applicable or applied to or for the benefit of any parish," cannot refer to an advowson held in trust for the parishioners. I confess I do not see why not. These words would not be inapt to describe almshouses so held, or a recreation ground, or a well or pump. An advowson held by A. in trust for B. surely would be applicable for the benefit of B. in case he were a private individual; and when B. is not a private

individual, but the inhabitants of a parish, why it is less for their benefit I am totally unable to understand. The further part of section 5 shows that the commissioners are to deal with "ecclesiastical charity property . . . originally given to . . . or for any spiritual purpose which is now a legal purpose, or for the benefit of any spiritual person as such"—words which seem intended to include such charitable trusts as these with which I have now to deal. The object of the statute, as appears from the preamble, is to make provision, not merely for the better application, but also for the better management of the parochial charities of the City of London. The cases which I have mentioned show the necessity for this. Applications have been made to the Court of Chancery to direct schemes of management in the case of trusts of these City parochial advowsons. The court has, as I have pointed out, in some cases entertained such suits and directed schemes. A proceeding of that kind is very costly, which seems to have been one principal reason for Lord Hardwicke's refusal so to interfere. It is plain that it was the object of this statute to provide a simpler and less expensive mode of doing this. For these reasons I am of opinion that the trusts in question are charitable trusts within the meaning of this Act of Parliament, and that these petitions must accordingly be dismissed.

The Charity Commissioners did not ask for costs, but his lordship, to discourage petitions of this kind, dismissed the petitions, with costs, and refused leave to appeal under section 10.

Solicitors, *Roche & Son; Wilson & Son; Clabon.*

Chan. Div.
Chitty, J. } May 29.

Baker v. Hedgecock. (a.)

Agreement in restraint of trade—"Any engagement"—"Any business"—Invalid.

A foreman tailor covenanted with his employer not to leave his service or enter the service or employ of any other persons, or enter into any engagement or be concerned or interested in carrying on, either on his own account or otherwise, any business whatsoever within the distance of one mile of No. 61, High Holborn, or any other place of business of the said employer which he then or thereafter might have during the continuance of the term of three years, or afterwards during the further period of two years.

Held, that the restraint imposed by such covenant was unreasonable, and that the covenant was not divisible into two parts, and could not be enforced.

This was a motion to restrain the defendant from being concerned in or carrying on, either on his own account or otherwise, the business of a tailor within the distance of one mile of No. 61, High Holborn, until the trial of the action or further notice.

The question was whether the court would enforce an agreement between the parties by an order in terms of the notice of motion, it being admitted that the agreement was void as in restraint of trade.

The plaintiff was a tailor, and the defendant became his foreman and superintendent under an agreement of the 23rd of January, 1886, whereby the defendant agreed to serve the plaintiff at a salary of £5 per week for three years from the 25th of January, 1886, if the plaintiff should so long require him, and in the agreement was the following clause: and also not to leave the service of plaintiff "or enter the service or employ of any other persons, or enter into any engagement or be concerned or interested in carrying on, either on his own account or otherwise, any business whatsoever within the distance of one mile of No. 61, High Holborn, or any other place of business of the said employer which he now or hereafter may have during the continuance of the said term or afterwards during the further period of two years" without the plaintiff's written consent first had and obtained.

On the 20th of April, 1888, the plaintiff, pursuant to the terms of the agreement, gave the defendant notice in writing determining the employment, and since that date the defendant had commenced business as a tailor within 100 yards of No. 61, High Holborn.

The plaintiff then commenced the present action to restrain the defendant from committing a breach of his agreement, and now moved as above mentioned.

Stokes, for the motion, referred to *Baines* v. *Geary*, 35 Ch. D. 154, 35 W. R. Dig. 64; *Price* v. *Green*, 16 M. & W. 346; *Nicholls* v. *Stretton*, 7 Beav. 42; *Pickering* v. *Ilfracombe Railway Co.*, 16 W. R. 458, L. R. 3 C. P. 235.

Vernon Smith, for the defendant.

Chitty, J.—There can be no doubt that the terms of this agreement are in general restraint of trade, and the agreement is therefore invalid. But I am asked by the plaintiff to break up the agreement and read it as if the words of the agreement were not to carry on the business of a tailor or any other business, and then to give effect to the words "the business of a tailor," and to reject the words "any other business." But the rule to be applied is that laid down by Willes, J., in *Pickering* v. *Ilfracombe Railway Co.*:—"The general rule is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but, where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good." This being the rule, it is impossible to accede to the plaintiff's contention, for that would be, in fact, to create a new covenant altogether instead of explaining the existing covenant. The case of *Baines* v. *Geary* has been also pressed upon me by the plaintiff; but there the covenant was divisible into two parts, which fact distinguishes that case from the present case. The motion must, therefore, be dismissed.

Solicitors, *Woodward, Hood, & Wells; J. B. Hartley.*

Chan. Div.
North, J. } April 26.

In re Frewen.
Frewen v. James. (a.)

Settled land—Application of capital money—Incumbrance affecting the inheritance—Mortgage for long term—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 21 (*ii.*).

A mortgage for a long term of years is an incumbrance affecting the inheritance of settled land, in the discharge of which capital money arising from the sale of part of the settled land may be applied under section 21 (*ii.*) *of the Settled Land Act*, 1882.

Adjourned summons.

The question to be decided was, whether a mortgage of settled land for a long term of years was an incumbrance affecting the inheritance of the settled land within the meaning of section 21 (ii.) of the Settled Land Act, 1882.

The mortgage was made by trustees of a term of 1,000

(a.) Reported by A. D. Maclaren, Esq., Barrister-at-Law.

(a.) Reported by J. Trustram, Esq., Barrister-at-Law.

years created by the will of T. Frewen, deceased, for the purpose of securing portions out of the land settled by the will. It comprised part only of the settled land.

A part of the settled land not comprised in the mortgage had been sold by the tenant for life, and the proceeds of sale were in the hands of trustees.

The mortgagee required repayment of a sum of £500, part of the mortgage debt; and a sale of a portion of the land comprised in the mortgage was unadvisable.

This was a summons by the tenant for life for an order directing the trustees to apply part of the proceeds of sale in their hands in repayment of the sum of £500, part of the mortgage debt, together with the mortgagee's costs and the costs of the summons.

The Settled Land Act, 1882, s. 21, provides that capital money arising under the Act shall be invested or otherwise applied (*inter alia*) "(ii.) In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlements."

Dauney, for the tenant for life.—The mortgage for 2,000 years is an incumbrance affecting the inheritance within the meaning of section 21 (ii.) of the Settled Land Act, 1882, which is designed to enable a tenant for life to convey the land free from incumbrances. Also if the mortgagee foreclosed, he would acquire a fee free from the equity of redemption, which he could convert into a fee under the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 65.

J. M. Lloyd, for the trustees, referred to the wording of section 21 (ii.) of the Settled Land Act, 1882.

North, J.—I think that the construction suggested by Mr. Dauney is the correct one, although I cannot say that the point is free from difficulty. The difficulty is twofold: first, section 21 (ii.) of the Settled Land Act, 1882, provides that the incumbrance to be discharged by the capital money must be an incumbrance affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, and a mortgage for a term of years is not on the whole estate; secondly, because, if a mortgage for a term affects the inheritance, it must do so whether the term be long or short, and whether made for securing portions, or jointure, or pin money, and it is hard to see how an incumbrance for pin money or a jointure secured by a term of years can properly be discharged out of capital money arising under the Act. But I have come to the conclusion that the mortgage in the present case is a mortgage affecting the inheritance for two reasons. In the first place, because the mortgagee might foreclose, and if he did this he would be entitled, under section 65 of the Conveyancing Act, 1881, to acquire the fee as being possessed of a long term not subject to any equity of redemption; and if he did acquire the fee it could hardly be said that the incumbrance did not affect the inheritance. In the second place, the tenant for life has power under the Settled Land Act, 1882, to sell the land in fee free from incumbrances, and unless this incumbrance can be paid off that cannot be done. The object of the Act is that, as between the persons interested in the estate and the purchaser, the tenant for life is to have power to bind everybody interested in the estate and to convey the estate to the purchaser in fee free from incumbrances. On these grounds, though I do not think the point clear, I come to the conclusion that the mortgage is a mortgage affecting the inheritance within the meaning of section 21 (ii.) of the Settled Land Act, 1882.

Solicitors, *Collisson, Pritchard, & Green; T. W. & J. B. Nelson.*

Chan. Div. North, J. — April 13.

In re Fletcher.

Gillings *v.* Fletcher. (*a.*)

Legacy—Debt—Satisfaction—Ademption.

A testator, being indebted to his wife in the sum of £625, bequeathed to her a legacy of that amount, but without any reference to the debt. He afterwards repaid the debt in his lifetime.

Held, that the legacy must be taken to have been given in satisfaction of the debt, and that the payment of the debt was an ademption of the legacy.

Adjourned summons.

A. Fletcher having made his will in 1876, became subsequently indebted to his wife in the sum of £625, for which he paid interest; and in August, 1883, he made a codicil by which he bequeathed to her the sum of £625 for her absolute use in addition to any bequests to her in his will.

In 1883, at his wife's request, he discharged the debt by investing the sum of £625 in her name; and he also drew a pen through the bequest of that sum in the codicil, but did not otherwise revoke the gift.

In 1884 he died, and his will and codicil were duly proved by his executors.

This was an originating summons by the testator's widow, who had married again, for, among other things, a declaration that she was entitled to the legacy of £625 bequeathed to her by the codicil. The defendants were the executors of the testator, and his children who were infants.

Cozens-Hardy, Q.C., and *Ashton Cross*, for the plaintiff.—In this case the legacy must not be taken as given in satisfaction of the debt, because no such purpose was mentioned in the codicil; and the debt was not in existence at the testator's death, so that there was then no claim which could be satisfied. The doctrine of ademption is not applicable to the present case, and the legacy, not being expressly given for the purpose of paying the debt, is not adeemed by the payment. This is not a case of double portions: *Pankhurst* v. *Howell*, 19 W. R. 312, L. R. 6 Ch. 136; *In re Pollock*, 28 Ch. D. 552, 33 W. R. Dig. 242; *Atkinson* v. *Littlewood*, L. R. 18 Eq. 595.

Cookson-Crackanthorpe, Q.C., and *F. Thompson*, for the executors.—Where a testator leaves to a creditor a legacy of at least an equal amount with the debt, the presumption of law is that the testator leaves the legacy in satisfaction of the debt. The fact that the legacy in this case is the exact amount of the debt is an indication of the testator's intention: *Talbot* v. *Earl of Shrewsbury*, Prec. Ch. 394; *Rawlins* v. *Powel*, 1 P. Wms. 297. When the purpose of the legacy was satisfied by payment of the debt, the legacy was adeemed: *Fowler* v. *Fowler*, 3 P. Wms. 353; *Monck* v. *Monck*, 1 Ball. & B. 298; *Wetherby* v. *Dixson*, 19 Ves. 407; *Pankhurst* v. *Howell*.

W. F. Hamilton, for the infant defendants.

North, J.—The conclusion I come to is based simply on the legal effect of the acts done in the testator's lifetime. At the date of the codicil he owed his wife the sum of £625, and by his codicil he gave her a legacy of that amount. I cannot imagine any reason for his giving that exact sum except to provide for the payment of the debt. The debt was afterwards paid off, and the purpose for which the legacy was given was satisfied. But it has been argued that in order to treat the legacy as adeemed by such means it is necessary that the purpose should appear on the face of the will. It is clear

(*a.*) Reported by J. Trustram, Esq., Barrister-at-Law.

that if the codicil had said in so many words that the legacy of £625 was given in satisfaction or payment of the debt, and the testator had afterwards paid the debt, she could not have obtained the legacy. But it is said that because there is no reference to the debt in the bequest the payment of it cannot have that effect, and the legacy must not be treated as having been given for that purpose only. If the debt had not been paid, could the widow have taken the debt as well as the legacy? I think not. The court is not disposed to hold that there is satisfaction if it can help it, and has taken hold of slight circumstances to rebut the presumption against double portions, yet it is clearly established that if there is a legacy of equal amount with a debt, the creditor cannot take both the legacy and the debt unless there is something to take the case out of the general rule. There is nothing to do so here, and it seems to me that the legacy must be taken to have been given in satisfaction of the debt; and the presumption of law, in the absence of any evidence to rebut it, seems to me to put the matter in precisely the same position as if it had been stated in the codicil that the legacy was to pay the debt. That being so, and the testator having paid off the debt in his lifetime, his estate is relieved from the legacy. Mr. Cozens-Hardy says there is no case in the books where a legacy has been treated as satisfaction of a debt except where either the debt has been in existence at the death of the testator or the especial purpose for which the legacy was given has been mentioned in the will. In my opinion, where the existence of the purpose is founded on a presumption of law, which there is no evidence to rebut, the case is in the same position as the latter case he mentioned. Lord Selborne, in *In re Pollock*, refers to the case where there is a reference to the purpose in the will. Such reference may be, and is, a very material circumstance; but I do not understand that Lord Selborne was exhaustively laying down the law as if he were writing a book, and no such presumption arose in that case.

If the presumption of law has the same effect as if the purpose had been expressed, there are numerous authorities to show that the legacy has been adeemed. I need only refer to *Pankhurst* v. *Howell*, where a legacy was given to the testator's wife to be paid within ten days after his death. That did not make it incumbent to pay the legacy in the ten days, because the state of the estate might be such that it would be improper to pay it within that time. During his last illness the testator, at the request of his wife, who did not know the contents of the will, gave her £200 that she might have a sum of money which she could control immediately on his death without the interference of his executors. It was held that the providing the wife with money immediately after the testator's decease was not a satisfaction of the particular purpose of the legacy. But James, L.J., says:—"The rule on this subject as stated by Mr. Justice Williams is, that where the testator stands neither in the natural or assumed relation of a parent to the legatee, the legacy will be considered as a bounty, and will not be adeemed by a subsequent advancement, unless the legacy is given for a particular purpose, and the testator advances money for the same purpose, or unless the intention otherwise legally appear of making the advancement with a view to ademption. I think this refers to a legacy given for a particular specific purpose, as, for instance, a legacy given to purchase an advowson for a son, which would be adeemed, or perhaps it would be more correct to say satisfied, by the father afterwards purchasing the advowson for him. Here the legacy does not appear to me to have been given for a particular purpose within the meaning of the rule." In the present case it seems to me that the legacy was given for a particular purpose within the meaning of the rule, because there is the presumption of law that the legacy of exactly the same amount is given in satisfaction of the debt. Under the circumstances the payment of the debt must be taken to be an ademption of the legacy, and I cannot make an order in favour of the widow. I think the costs should come out of the estate.

Solicitors, *Speechly, Mumford, & Landon*; *Elder & Roberts*.

Chan. Div. } Stirling, J. } May 8, 9; June 11.

In re Scanlan (Infants). (a.)

Infant—Guardianship—Religious education of infant—Rights of mother as statutory guardian—Guardianship of Infants Act, 1886 (49 & 50 *Vict.* c. 27).

The right of a father to decide what religious education his children shall receive has not been affected by the passing of the Guardianship of Infants Act, 1886.

Under that Act a mother, as guardian of an infant, has no greater powers, in deciding upon its religious education, than were possessed, at the passing of the Act, by any guardian appointed by will or otherwise under 12 *Car.* 1, c. 24.

Adjourned summons.

This was a summons taken out by the next friend of three infants asking that their mother, Mrs. Scanlan, might be removed from their guardianship, and that two other persons might be appointed guardians in her stead.

Michael Scanlan, the father of the infants, was a boot-maker occupying a humble position in life. He was born at Kilkee, in the county of Clare, in Ireland, in 1845, his father being a Roman Catholic and his mother a Protestant, and he was baptized as a Roman Catholic. He appeared, however, to have become a Protestant previously to 1862, and to have connected himself with Trinity Church, Limerick. On the 27th of July, 1872, he married Margaret Oakley at the Roman Catholic Church of St. Michael, Limerick. Mrs. Scanlan was at the time of her marriage, and had continued to be, a Roman Catholic. As regards her husband she stated in her deposition that "he turned Catholic when he married her"; but there was nothing to show that he was ever in the habit of attending any of the services of that Church, or that he discharged any of the religious duties which the profession of that faith would impose upon him.

Of this marriage there were three children born in Ireland—viz., Mary, born on the 25th of April, 1873; Ann Olivia, born on the 25th of October, 1874; and Alexander James, born on the 3rd of July, 1876. All three were proved to have been baptized in the Protestant Trinity Church at Limerick. Mary was also proved to have been baptized in the Roman Catholic Church of St. Michael, Limerick, and it was stated by Mrs. Scanlan that Ann Olivia was also baptized there; although up to the time of the present application the certificate had not been found.

About the year 1879 Mr. and Mrs. Scanlan, with the three children, came to London and thenceforth resided in the neighbourhood of Soho. A fourth child, Margaret, was born to them there in June, 1880. She was baptized at the Roman Catholic Church of St. Mary, Warwick-street, on the 29th of July, 1880, and at the district church of St. Peter's, Great Windmill-street, on the 9th of July, 1882.

The son, Alexander James, died in England and appeared to have been buried at Finchley Cemetery, in

(a.) Reported by W. Ivimey Cook, Esq., Barrister-at-Law.

the Protestant part of the burial-ground, the service being read by a clergyman of the Established Church.

The present application related to the three remaining children—Mary, now aged fifteen; Ann Olivia, now aged thirteen and a half; and Margaret, nearly eight years old.

In October, 1879, Mary and Ann Olivia seem to have been placed at the schools in connection with the district church of St. Peter's, Great Windmill-street. How long they remained there did not appear; but there was an entry of what seemed to be an admission of Mary to the same school on the 31st of May, 1880. On the 18th of September, 1882, these two children were admitted to the Board Schools at Hart-street, Covent-garden, and both attended there until June, 1883. About the last-mentioned date Mary appeared to have entered the Board School, Peter-street, Soho, and to have left it in a week.

From the 9th of September, 1883, until February, 1884, these two children attended the girls' school attached to the Roman Catholic church in Warwick-street. From February to October, 1884, they attended the girls' school in connection with the Roman Catholic schools in Ogle-street, and continued there until the 3rd of May, 1886. While attending these schools they were taught the doctrines of the Roman Catholic faith, and were, for the first time, admitted to the Holy Communion according to the rites of that faith. The evidence apparently showed that all this took place with the knowledge and consent of Michael Scanlan.

The third infant, Margaret, appeared to have been admitted into the infant school in connection with the Roman Catholic church in Warwick-street in October, 1884, and to have remained there until March, 1885. She was re-admitted in February, 1886, and remained there until June following.

In 1886 Mr. and Mrs. Scanlan ceased to live together. The causes of the separation were not perfectly clear. On the one hand it was attributed to the intemperate habits of the wife, and on the other to violence and ill-treatment on the part of the husband. Notwithstanding the separation, Mrs. Scanlan, as she stated, except during one week, went to her husband's rooms every day.

About the end of 1885 or beginning of 1886 Michael Scanlan began to be visited, first by some of the district visitors, and afterwards by some of the clergy of the parish church of St. Anne's, Soho. They found him advanced in consumption and in a state of poverty, and thenceforth to the time of his death they relieved his wants.

Through the intervention of the Rev. Keevil Davis, curate of St. Anne's, he was admitted, in March, 1887, to the North London Consumption Hospital, where he died on the 21st of April, 1887.

Mr. Davis stated that he was acquainted with Scanlan for six months previous to his death; that he was a member of the Church of England, and received the Communion from him. The Rev. Mr. Gordon, the chaplain of the hospital, stated that, so long as he was able to do so, Scanlan regularly attended the Church of England services at the hospital, and professed himself to be a member of that church.

In May, 1886, Miss Wade, one of the visitors of the parish of St. Anne, at the request of Scanlan, procured Mary, the eldest child, to be admitted into the Church of England Home for Girls, Notting-hill. She proved to be somewhat unmanageable, and was taken away from that home by Mr. Keevil Davis, and after a short time admitted to Lord Shaftesbury's Home at Sudbury, near Harrow, where she still remained.

Miss Fanny Shea, the mistress of the infant school, St. Anne's, stated that on the 6th of June, 1886, Michael Scanlan brought his daughter Margaret to the school and stated to her that the girl's mother wished her to be educated as a Roman Catholic, but that he did not; and if the mother came to take the child away he begged her not to allow her to go. From June, 1886, to March, 1887, she appeared to have attended Sunday-school in connection with St. Anne's. The evidence as to the education of Ann Olivia between May, 1886, and March, 1887, was less distinct, but Mrs. Scanlan, in her evidence, stated that "Mary Ann and Maggie" were all at Warwick-street school when she left her husband, and he took them away, and that they never went to any Catholic school after that. When Scanlan entered the hospital in March, 1887, he handed over the children—Ann Olivia and Margaret—to Mr. Keevil Davis, and asked him to take care of them. He accordingly caused Ann Olivia to be placed in the Marylebone Home for Children, and obtained her father's written consent to her going to Canada, where she was sent after his death and still remained. Margaret had been boarded out in the village of Moreton-in-the-Marsh, under the supervision of Lady Mitford.

Buckley, Q.C., and *Kirby*, for the next friend of the infants.

Graham Hastings, Q.C., P. S. Stokes, and *St. John Clerke*, for the respondent, Mrs. Scanlan.

The arguments will appear sufficiently from the judgment.

At the conclusion of the arguments Stirling, J., decided that no sufficient grounds had been shewn for the removal of the mother from the guardianship; but that someone ought to be appointed to act jointly with her. He, however, reserved for further consideration the question in what religious faith the infants ought to be brought up, the decision of that question being necessary in order to ascertain who should be appointed such co-guardian.

June 12.—Stirling, J.—In this case, for the reasons given by me at the close of the argument, I have held that the mother of the infants ought not to be removed from the office of guardian, which she holds by virtue of the provisions of the Guardianship of Infants Act, 1886, but that someone ought to be appointed (under the powers conferred by the same Act) to be a guardian to act jointly with her. In deciding who shall be chosen as such guardian, one main element to be regarded is the religion in which the infants are to be brought up. The material facts bearing on this question are as follows:—[His lordship then stated them as set forth above, and continued:—] An examination of the evidence has convinced me that Michael Scanlan, although he assented to his children being brought up as Roman Catholics from 1883 to 1886, and to his two elder children receiving the Communion according to the rites of that faith, nevertheless during the last year of his life caused all three children to be brought up as Protestants, and distinctly expressed his wish to be that they should be brought up as members of the Church of England. It is said, and with truth, that during this period he was separated from his wife, and was under the influence of the St. Anne's clergy, on whom he was dependent for support; but, giving all due weight to these circumstances, I am unable to arrive at the conclusion that his acts and expressed wishes were inconsistent with a genuine desire for the welfare of his children or with an honest intention to perform faithfully the duties he owed to them as their father.

Now, the absolute right of a father in his lifetime to decide what religious education his children should receive has been laid down in the most pointed terms in a way well calculated to test the rule of the court.

In *In re Agar-Ellis, Agar-Ellis* v. *Lascelles*, 27 W. R. 117, 10 Ch. D. 49, James, L.J., in delivering the judgment of the court, said: [His lordship read the passage commencing with the words, "If a good and

honest father," at p. 74, and ending with the words, "which the law has confided to him," at p. 75.]

Further, the law (down to the passing of the Guardianship of Infants Act, 1886) was clear that after the death of the father those who have the guardianship of the child are bound to see that the child is brought up in the religious faith of the father. Thus in *Hawksworth* v. *Hawksworth*, 19 W. R. 735, L. R. 6 Ch. 539) James, L.J. (at p. 542), said: "The rule of the court is, that the court, or any persons who have the guardianship of a child after the father's death, should have sacred regard to the religion of the father in dealing with the child; and, unless under very special circumstances, to see that the child is brought up in the religious faith of the father, whatever that religious faith may have been." There are, however, cases in which the father may, even in his lifetime, lose the right to have his child educated in his own religion. This was clearly laid down, and was given effect to, in *Andrews* v. *Salt*, 21 W. R. 616, L. R. 8 Ch. 622. Mellish, L.J. (at p. 638), said: [His lordship read the passage beginning with the words, "Then what difference does it make," at p. 638, and ending with the words, "possibly her health," at p. 639.] He afterwards refers to *Lyons* v. *Blenkin*, Jac. 245, and reads the passage from that case commencing with the words, "The view I have taken," at p. 255, and ending with the words, "as dangerous to society," at p. 256; and to *Hill* v. *Hill*, 10 W. R. 400, with which I shall hereafter deal. The law is similarly stated in *In re Agar-Ellis*, *Agar-Ellis* v. *Lascelles*, 27 W. R. 117, 10 Ch. D., at p. 72, 32 W. R. 1, 24 Ch. D., at pp. 328, 333, 338.

The case of *Hill* v. *Hill* appears to be the case in which this portion of the law has been carried to the furthest extent. It is, perhaps, best reported in 31 L. J. Ch. N. S., at p. 505. In that case the father was a Roman Catholic and the mother a Protestant. One of the two children of the marriage was baptized first as a Roman Catholic, but afterwards as a Protestant; the other was baptized as a Protestant only. Under the mother's influence the children were educated as Protestants, and nothing was ever done by the father to instruct them or to cause them to be instructed in the Roman Catholic faith. He made a will by which he appointed the mother of the children guardian, but directed the children to be brought up as Roman Catholics. He was held to have abdicated his right to direct the religious education of his children.

Now if Michael Scanlan had died early in 1886 this case would have been a clear authority for disregarding any wish or directions on his part that his children should be brought up as Protestants; but it seems to me that what took place in and subsequently to 1886 could not be left out of consideration. Not only did Michael Scanlan remove his children from the Roman Catholic schools, but he took active steps to cause them to be brought up as Protestants. He asserted his right to direct the religious education of his children, and (whatever may have been the reason) Mrs. Scanlan, though (as she says) she went to his rooms every day, did not think fit to offer any opposition to his acts, and I am unable to come to the conclusion that those acts of Michael Scanlan were done out of mere caprice, so that the court would have interfered with them in his lifetime, and, that being so, I come to the conclusion that under the law as it stood prior to the passing of the Guardianship of Infants Act, 1886, the court would have been bound to give effect to the wishes and directions of the father as to the religious education of these infants. It remains to be considered whether that Act has in this respect made any change in the law. Certainly in express terms it has not. There is not a word in the statute from beginning to end on the subject of the religious education of children. The enactments are these:—[His lordship read the preamble and sections 2—5, and continued:—] Now prior to the passing of the Act the position of the mother was this: after the father's death, and in the absence of the appointment by the father of any testamentary guardian, she was at law guardian by nurture—that is, she was entitled to the custody and government of her sons until fourteen, and of her daughters until sixteen. Her position was, further, such that under the like circumstances it was almost of course on the part of the courts of equity to appoint her guardian of her infant children, whether sons or daughters, during their minorities. But she could not herself appoint guardians either by deed or will, nor, if the father appointed guardians, could she interfere with them: *Talbot* v. *Earl of Shrewsbury*, 4 My. & Cr. 672.

It was laid down in *Reg.* v. *Clarke*, 5 W. R. 222, 7 E. & B. 186, the well-known case of Alicia Race, that where the mother was guardian by nurture, she had (unless provision to the contrary had been made by the will of the father) in all respects the same authority which might have been exercised by the father had he survived the mother, and the court directed the child of a Protestant father to be handed over to a surviving Roman Catholic mother, although she intended to educate it in accordance with her own religious views. In that same case, however, the child was afterwards made a ward of court, and directions were given by Kindersley, V.C., that she should be brought up as a Protestant (see 26 L. J. Q. B. 176n, 3 Jur. N. S. 339n). The strength of the rule of courts of equity imposing on a surviving mother the obligation to educate her children in accordance with the religion of their father clearly appears from the cases of *Austin* v. *Austin*, 13 W. R. 761, 4 De G. J. & S. 716, where the father died intestate, and the mother was consequently guardian by nurture, and of *In re Newbery*, 14 W. R. 173, 360, L. R. 1 Ch. 263, where the mother had (along with another) been appointed testamentary guardian. All conflict between the rules of law and equity on the subject ceased upon the coming into operation of the Judicature Act, 1873, s. 25, sub-section 10, which provides that "in questions relating to the custody and education of infants the rules of equity shall prevail."

Under the statute the mother who survives the father of her children is now by law their guardian, either alone where no guardian has been appointed by the father, or jointly with any guardian appointed by the father. As regards her powers as such guardian, they are to be those which any guardian appointed by will or otherwise at the passing of the Act had under the Act 12 Car. 2, c. 24. What, then, was the position of such a guardian as regards the religious education of the children committed to his charge? The answer is to be found in the passage I have already cited from *Hawksworth* v. *Hawksworth*. The guardian was to "have sacred regard to the religion of the father in dealing with the child; and, unless under very special circumstances, to see that the child was brought up in the religious faith of the father, whatever that religion may have been." And the rule applied none the less that the guardian appointed by the father was the mother. Under the statute it seems to me, upon the express terms of section 4, the mother is bound to observe this rule. It was contended, however, that the natural rights of the mother were totally different from those of any guardian, however appointed, and that the remarks made by the present Master of the Rolls in *In re Agar-Ellis*, *Agar-Ellis* v. *Lascelles*, 24 Ch. D. 317, at p. 332, as to the natural rights of a father applied *mutandis* to the case of a mother. The answer to this appears to me to be that down to the passing of the Act the law recognized the natural rights of the mother only to the extent to which I have mentioned; it was for the Legislature to consider and determine what further recognition should be given to these natural

rights, and the legal position of the mother must now be ascertained, not from the consideration of those natural rights themselves, but by the true construction to be placed upon the language of the Act of Parliament which expresses the determination arrived at by the Legislature on the subject.

It was further said that the rule of law had its origin in the statutory power of the father to appoint guardians to the children; and that, inasmuch as the mother has now co-ordinate power in this respect with the father, she ought now to have co-ordinate power with him in directing the religion and education of the children. No doubt the power of the father to appoint guardians of his children afforded the means by which he was enabled to give effect to his views on their religious education; but I think that it cannot be said that it has been conclusively decided that the rule originated in the way alleged. The point was argued in the case of *Skinner* v. *Orde*, L. R. 4 P. C. 60, 20 W. R. H. L. Dig. 7, and James, L.J., in delivering judgment, says no more than this (p. 70):—"It was contended with some plausibility before their lordships that this rule had its origin in the statutory power of English fathers to appoint guardians for their children." This appears to me sufficient to show that the rule was not (even in the view of lawyers) so closely connected with the power of appointing guardians that the Legislature ought to be deemed to have abrogated it merely by conferring on the mother the power of appointing guardians; nor can I suppose that, in a matter of so much difficulty and delicacy, the Legislature intended to abolish a well-settled rule by a side wind, without even a suggestion as to the rule to be substituted for it, and without indicating how a court is to act when called upon to decide between co-ordinate authorities unhappily unable to agree on questions affecting the religious welfare of an infant.

I think, therefore, that the Act has not introduced any change in the rule as to the religious education of infants, and I must therefore direct that the children be brought up as members of the Church of England.

Solicitors, *Deacon, Gibson, & Medcalf; Leithley & Phipson.*

IN BANKRUPTCY.

Q. B. Div. (Cave, J.) June 28.

Ex parte ROSS.
In re CRIPPS. (*a.*)

Bankruptcy—Execution—Petition—Notice to sheriff—Retention of proceeds—Time—Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), *s.* 46.

The fourteen days during which the sheriff is required, by section 46, *sub-section* (2), *of the Bankruptcy Act*, 1883, *to retain in his hands the proceeds of goods sold under an execution commence to run from the time of the sale, and not from the time of the receipt of such proceeds by the sheriff.*

Motion calling upon the trustee in the bankruptcy to show cause why the applicant was not entitled to the sum of £343 in the hands of the Sheriff of Surrey.

The case raised the question as to the time from which the fourteen days are to run during which the sheriff is to retain the proceeds of an execution in his hands under section 46, sub-section (2), of the Bankruptcy Act, 1883.

Judgment was obtained by the applicant against the bankrupt in October, 1887, and on January 23, 1888, execution was levied.

(*a.*) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

On the 9th of February, 1888, the sale took place, but part of the proceeds were not paid until the 10th of February.

On the 24th of February, 1888, the bankruptcy petition was presented, and the moneys realized from the sale being claimed by the trustee, the execution creditor now applied to the court for a declaration in his favour.

Herbert Reed, for the execution creditor.—The execution creditor has an absolute right, unless it can be shown that he comes within sections 45 or 46 of the Bankruptcy Act, 1883. The question is, Within what period the notice must be given under section 46, sub-section (2)? I submit it is from the time of the sale. It has never been suggested until now that the time from which the fourteen days are to run is from the time of the receipt by the sheriff. This is not a new section, and the question has always been, When was the completion of the sale? It would be very curious if, from the accident of the purchaser not paying the money for a couple of days, the execution creditor should be deprived of his rights. The words "retain the balance for fourteen days" refer back to the words "where the goods of a debtor are sold." It cannot mean from the date of receipt.

He referred to *Ex parte Villars, In re Rogers*, 22 W. R. 397, 603, L. R. 9 Ch. App. 432, 439; *Jones* v. *Parcell*, 11 Q. B. D. 430, 31 W. R. Dig. 21.

Sidney Woolf, for the trustee.—In both the cases cited the judges were really contemplating the fourteen days running from the time when the sheriff received the proceeds. It is then that the sale is completed. Moreover, in any case this petition was presented within fourteen days. It was taken to the office on February 23, but was refused as not being strictly in form, since it was not accompanied by an affidavit, as required by rule 258 of the Bankruptcy Rules, 1886.

CAVE, J.—My decision must be in favour of the execution creditor. As to the point raised with regard to the presentation of the petition on February 23, *primâ facie*, a petition is presented when it is received and put on the file. It might be a question whether or not a petition might be said to have been presented when, all requirements of the Act and Rules having been complied with, the clerk wrongfully refused to receive it. When that question arises I will deal with it. Here, on the 23rd of February, the petition was not in order. It was not accompanied by an affidavit, as required by rule 258, which provides that a bankruptcy petition against any debtor to any company or co-partnership duly authorized to sue and be sued in the name of a public officer or agent, may be presented by such public officer or agent, as the nominal petitioner, for and on behalf of such company or co-partnership, "on such public officer or agent filing an affidavit stating that he is such public officer or agent, and that he is authorized to present such petition." Consequently the clerk did right in refusing to receive it, as being not in order. The mistake was rectified the following day, and I must hold that the petition was presented on February 24, and not on February 23.

The other point relates to the construction which ought to be put on section 46 of the Bankruptcy Act, 1883. By sub-section (2), "Where the goods of a debtor are sold under an execution in respect of a judgment for a sum exceeding twenty pounds, the sheriff shall deduct the costs of the execution from the proceeds of sale and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and the debtor is adjudged bankrupt thereon, or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the trustee in the bankruptcy, who shall be entitled to retain the same as against the

execution creditor, but otherwise he shall deal with it as if no notice of the presentation of a bankruptcy petition had been served on him." Now nothing is expressly stated as to the time from which the fourteen days are to run. But when we consider the subject-matter dealt with, and the question of convenience, and the reason of the section, it seems clear that the fourteen days were intended to run from the completion of the sale. Section 46 must be read in the light of section 45, and for the purposes of section 45 the date to be looked at is the date of the completion of the sale. So in section 46, sub-section (2), it is convenient that the same date should apply. Fourteen days *primâ facie* means fourteen days from the sale, which is the occasion or occurrence on which the duty of the sheriff under the section arises. But it is said that the words of the section are better satisfied if the fourteen days are held to run from the receipt of the proceeds by the sheriff. The sheriff is to "retain the balance for fourteen days," and it is said, How can a man retain that which he has not got? But the words that the sheriff shall retain the balance are not used with reference to the proceeds in his hands. The contrast is between the sheriff retaining it and the sheriff paying it over to a creditor. It is not a question as to having the money in his hands, but it really means that the sheriff shall not pay over until fourteen days have elapsed. It is also said that by the section "the sheriff shall deduct the costs of the execution from the proceeds of sale," and that that points to the fact that the fourteen days run from the receipt of the last shilling. But there is really no force in that argument. The deduction may take place at any time, and all that is meant is that, whether the money is the trustee's or the creditor's, the costs of the execution are to be paid. This is what the Legislature had in view, and public convenience clearly lies in the view I take. The completion of the sale is a matter which is generally known, but with regard to the receipt of the money it is very different. It is quite possible that a purchaser might get hold of some article without paying for it, and even necessitate his being sued, which would give rise to great difficulty. The general notion of the Act seems to be that a creditor shall not have any benefit of his execution if, before the sale is completed, a receiving order is made, and, further, he shall not have the money where the goods are sold if, within fourteen days, a petition in bankruptcy is presented. My judgment is, therefore, that the fourteen days must run from the completion of the sale, and not from the time of the receipt of the money.

Application allowed.

Solicitors for the execution creditor, *Barton & Pearman.*

Solicitor for the trustee, *W. B. Slyer.*

Q. B. Div. (Cave and A. L. Smith, JJ.) May 8.

Ex parte Maughan.

In re Maughan. (*a.*)

Bankruptcy—Petition dismissed—Substitution of other creditors as petitioning creditors — Jurisdiction — Practice—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 104, 107.

On October 11, 1887, *a bankruptcy petition was dismissed by the county court registrar, on the ground that the petitioning creditor, by assenting to a deed of assignment previously executed by the debtor, was prevented from alleging such deed as an act of bankruptcy, but the order of the registrar was subsequently rescinded by the county court judge, who made an order substituting other creditors, who had not assented to the deed as petitioning creditors, the three months during which the deed could be relied upon as an act of bankruptcy having then expired.*

Held, that the county court judge had no authority to rescind the order made by the registrar; that the order made by him substituting other petitioning creditors was not warranted by any section of the Bankruptcy Act; and that, even if the county court judge had power to make the order, he ought not, on the facts, to have exercised it.

Appeal against an order of his Honour Judge Bedwell, in the county court at Hull, by which he rescinded an order made by the registrar of the said county court, dismissing a bankruptcy petition against the debtor, and substituted the present respondents as petitioning creditors in lieu of the original petitioning creditor under section 107 of the Bankruptcy Act, 1883.

On the 7th of July, 1887, the debtor executed a deed of assignment for the benefit of his creditors generally, which was assented to by a large number of the creditors, and on the 17th of September, 1887, in order to prevent proceedings from being taken by a creditor who dissented, a bankruptcy petition was filed against the debtor by an assenting creditor, the solicitor acting in the matter having overlooked the fact that by assenting to the deed such creditor had precluded himself from relying upon it as an act of bankruptcy.

On the 11th of October, 1887, this petition was dismissed by the county court registrar, the three months during which the deed could be relied upon as an act of bankruptcy having expired on the 7th of October, but on the 5th of December, 1887, motion was made by Messrs. Walker and Hall, the present respondents, to the county court judge to rescind the order of the registrar dismissing the petition, and to substitute them as petitioning creditors. The application having been granted, the debtor now appealed.

Sir R. E. Webster, Q.C., A.G., and *Yate Lee,* for the debtor.—The county court judge had no power to make the order after the petition had been dismissed, and there are no facts to justify the substitution even if there was jurisdiction. The present respondents knew of the deed the whole time, and with full knowledge of it they allowed the three months to go by. The county court judge could only act under section 107 if the petitioner did not proceed with due diligence. There was no want of diligence here, and there is no power to make a bad petition good.

Herbert Reed, for the respondents.—The respondents were led to believe that the petition of the 17th of September, 1887, was presented by the debtor against himself, and they were thus dishonestly prevented from taking advantage of the deed as an act of bankruptcy. They are fully justified in obtaining the order which has been made: *Ex parte Harris, In re Ash,* 14 W. R. 738, L. R. 1 Ch. App. 469; *In re Bristow,* 16 W. R. 385, L. R. 3 Ch. App. 247. The county court judge had a right to rescind the order of the registrar under section 104 of the Bankruptcy Act, 1883.

Cave, J.—This appeal must be allowed. On the 17th of September, 1887, a petition was presented against the debtor, which was dismissed on the 11th of October by the registrar, and on the 5th of December an application was made to the county court judge to rescind the order of the registrar, and to substitute the respondents as petitioners, which was allowed. Now in the first place I am of opinion that the judge had no authority at all to make the order which he did, and, in the second place, that if he had authority he ought not to have exercised it. The order was made by the registrar, and there was

(*a.*) Reported by C. F. Morrell, Esq., Barrister-at-Law.

no right to apply to the judge to rescind that order of the registrar any more than there would be a right to apply to the registrar to rescind an order of the judge. The judge and the registrar have each certain duties to perform, and the person who makes an order has power, under the Bankruptcy Act, to rehear and rescind it. The duties are in great measure distinct, and to allow one to rehear and rescind the order of another, as, for example, the judge to rehear the order of the registrar, would be to give a right of appeal which does not exist. Further than this, the order made is not warranted by any section in the Bankruptcy Act. Under section 107, where the petitioner does not proceed with due diligence on his petition, the court may substitute as petitioner any other creditor to whom the debtor may be indebted in the required amount. In this case the petition had actually been dismissed on the 11th of October, and at that time no one could present a petition founded on the deed as an act of bankruptcy. The effect of what has been done is to extend the time for filing a petition on such an act of bankruptcy as that. Moreover, from the facts it is clear that the respondents acted throughout in all they did solely for their own individual interests, and even if the power existed to make the order the county court judge ought not, in my opinion, to have exercised it.

A. L. SMITH, J.—I am of the same opinion, and I only wish to add a word as to the right of the county court judge to rescind this order of the registrar. Section 104 says that "every court having jurisdiction in bankruptcy under this Act may review, rescind, or vary any order made by it under its bankruptcy jurisdiction." The meaning, as I take it, is that the court which makes the order, the same court can rehear and vary it. Then turn to section 168, which defines "the court" as meaning the court having jurisdiction in bankruptcy under this Act, and by rule 3 of the Bankruptcy Rules, 1886, "the court" includes a registrar when exercising the powers of the court pursuant to the Act or Rules. In my opinion, therefore, the county court judge had no right to make the order.

Appeal allowed, with costs.

Solicitors for the debtor, *Collyer-Bristow & Co.*, for *Leak, Till, & Stephenson*, Hull.

Solicitors for the respondents, *Steadman & Co.*, for *Muir Wilson*, Sheffield.

Prob. Div. & Adm. Div. Probate. } March 6.

In the Goods of WEBB. (*a.*)

Administration—Grant to guardian for use and benefit of minor—No notice to relatives.

A testator by his will devised his property to children who at his death were minors, and directed that a trustee should be appointed by the court under the statutory powers in that behalf, and such trustee should also be executor, but that no relation of his should be so appointed.

The minors' relatives having been shown by affidavit to be undesirable persons to receive the grant, being persons unknown to the children, and living at a distance, or whose whereabouts were in some cases unknown, the court granted letters of administration, with the will annexed, for the use and benefit of the minors until one of them should attain the age of twenty-one, to a guardian elected by them without requiring notice of the motion to be served on their relatives.

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

Motion for grant of letters of administration with the will annexed of the testator, G. H. Webb, deceased, to E. A. Rich as the guardian duly elected by the testator's children, for their use and benefit until one of them should attain the age of twenty-one years.

The testator died on the 28th of January, 1888, a widower, leaving three children, aged eighteen, sixteen, and thirteen respectively, surviving him.

By his will, dated the 1st of July, 1887, he devised his whole property, consisting of leasehold and freehold property and household effects of the value of £2,637, for the benefit of his children, but refrained from appointing a trustee or executor, stating that he was unable at that time to name a suitable person, and he directed that the statutory powers of appointing trustees should be incorporated in his will, and he directed that if he did not by any codicil appoint any person as trustee or executor until his son or daughters attained the age of twenty-one, then the person appointed by the court exercising jurisdiction under the statute should have all the powers of an executor; but in no case should any relative of his be so appointed by the court as trustee or executor of the will. He never executed any codicil to the will.

The affidavits showed that the relatives on the paternal side were a half-brother, William, believed to have been unfortunate in business, and unknown to the children; an aunt by marriage, who had renounced any right to the grant or guardianship; an uncle, for many years resident in New Zealand, whose whereabouts were unknown; another uncle, residing in Suffolk, nearly eighty years of age, and unknown to the children. And on the maternal side an unmarried sister, residing in Paris, and a half-brother, believed to be in reduced circumstances, but whose whereabouts were unknown.

The children had, on the 28th of February, elected E. A. Rich to act as their curator and guardian and to apply for the grant. No notice had been given of this application to any of the relatives except to the aunt who had renounced.

Middleton, in support of the motion, referred to *In the Goods of Gardiner*, 32 W. R. 756, 9 P. D. 66, where the court made a similar grant.

BUTT, J.—I am disposed to make the grant without notice to these parties, although the right to a grant is like every other right, and a man ought not to be deprived of it without being heard. On the whole, however, in this case I think it may be made, but the practice should not be carried any further.

Grant allowed.

Solicitors, *Lambert, Petch, & Shakespear*, for *T. White*, Ryde.

Prob. Div. & Adm. Div. Probate. } Dec. 6.

In the Goods of LUSH. (*a.*)

Will and codicil—Executor trustees—Trustee substituted—Not named as executor—Executor according to the tenor.

A testator appointed the trustees of his will executors thereof, and on the death of one of them he substituted another person as trustee, and made certain alterations in the division of his property, whereby his trustees were required to get in all his estate and invest and distribute it, after the payment of funeral and other expenses.

Held, that such other person was entitled, jointly with

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

the other executors, to probate as executor according to the tenor of the will.

Motion for grant of probate of a will and two codicils, dated January 24, 1882, April 15, 1887, and July 28, 1887, respectively, made and duly executed by Hugh Lush, who died on August 1, 1887, to Kate Lush and Hugh Lush, as executors named in the will, and to George Boyton, as executor according to the tenor of the will and codicils.

By his will the testator appointed his wife, Kate Lush, and her two sons, Uriah Lush and Hugh Lush, his trustees for certain purposes, and he also appointed them his executors.

Uriah Lush died some years after the execution of the will, and subsequently the testator, by his first codicil, after reciting the death of Uriah Lush, mentioned in his will as one of his trustees, thereby appointed "another trustee," and made certain alterations in the division of his property, and thereby directed his trustees thereinafter mentioned to get in all his property and invest the same, and, after paying funeral and other expenses, distribute the residue and remainder as stated in the will, and he thereby appointed Kate Lush, his wife, Hugh Lush, his son, and George Boyton, in place of his son Uriah Lush, deceased, as trustees of his codicil.

Searle, in support of the motion, cited *In re Bell*, 4 P. D. 85, 27 W. R. Dig. 237; *In the Goods of Punchard*, 20 W. R. 446, L. R. 2 P. & D. 369; *In the Goods of Baylis*, L. R. 1 P. & D. 21, 14 W. R. Prob. & Div. Dig. 11; Williams on Executors, 8th ed., p. 248.

HANNEN, P., held that the reasonable construction to be put on the codicil was that the testator intended George Boyton to be substituted as executor. The trustees were to get in the whole estate, to distribute it, and to pay certain expenses. If Mr. Boyton was not intended to be an executor, after getting in the estate the trustees must hand the money over to the executors, only to receive it back again to distribute. He therefore directed a grant of probate to George Boyton as executor according to the tenor in conjunction with the other two surviving executors named in the will.

Motion allowed.

Solicitors, *Gasquet & Metcalf.*

Prob. Div. & Adm. Div. } Nov. 1, 29.
Probate. }

In the Goods of BRADSHAW. (*a.*)

Probate — Practice — Administration to creditor—Absconding administrator—Revocation of grant—New grant to next of kin.

Where a grant of administration had been made to a creditor who, after satisfying his debt, was made bankrupt and absconded, and a personal representative was required, the court revoked the grant to the creditor without citing him, and made a fresh grant to the next of kin of the deceased.

Application for grant of letters of administration of the estate of the late Charles Bradshaw, the original administrator having absconded.

Charles Bradshaw died on the 23rd day of February, 1869, intestate, leaving his widow, Ellen Bradshaw, and his only child, Catherine Macnab Bradshaw, him surviving. On the 15th of August, 1869, letters of administration of the credit and effects of the deceased were granted to Nehemiah Learoyd, of London, solicitor, as a creditor, upon the renunciation of the widow and daughter. On November 14, 1885, a receiving order was made against Mr. Learoyd, upon which he was adjudged bankrupt, and in December, 1885, he absconded, and the affidavits stated various attempts to discover him, but in vain.

On March 7, 1886, Mrs. Bradshaw died, and two policies of insurance on her life for £1,000 each, effected by Charles Bradshaw, fell in, and L. W. Armitage, together with S. Albert Ray Rollit and William Day, claimed to be creditors on the estate of Charles Bradshaw in respect of moneys advanced on the security of these policies, and they had commenced an action, *Rollit* v. *London Assurance Co.*, in the Chancery Division for the administration of the trusts of the will, and a personal representative of Charles Bradshaw was required to represent his estate.

The debt due to Mr. Learoyd had been discharged.

Nov. 1.—*Bayford, Q.C.*, and *Price*, applied for a grant to L. W. Armitage as administrator, during the absence of the administrator, N. Learoyd, from England.

HANNEN, P.—Is there not a difficulty in proving his absence from England if you do not know where he is? Would it not be better to revoke the grant and make it to someone else, as was done in *In re Jenkins*, 3 Phill. Ecc. 33, where the creditor had satisfied his own debt and gone away, and the grant was accordingly revoked. The case had better stand over for the applicants to consider what they will do.

Nov. 29.—*Bayford, Q.C.*, and *Price* now applied that the grant to N. Learoyd might be revoked, and a new grant made to the mortgagees of the policies of insurance or to Miss Bradshaw as the next of kin.

They referred to *In re Jenkins*, 3 Phill. Eccl. Cas. 33, and *In re Hoare*, 2 Sw. & Tr. p. 361 (n.), as precedents for such a course.

BUTT, J.—Excepting the fact that in the cases cited the grant was of administration with the will annexed, and here the grant was of administration only, they are on all fours with the present case, with this further addition, that here the administrator is an absconding bankrupt. On the authority of these cases, therefore, I allow the application. Probably in those cases the creditor was cited, as there is nothing to show the contrary, but it is pretty clear on the affidavits that this man is an absconding bankrupt, and out of the country, and therefore, as it would be more or less of a farce to cite such a man, I dispense with any citation. I revoke the grant to N. Learoyd, and make a new grant to the next of kin.

Grant revoked, and new grant to next of kin.

Solicitors, *Rollit & Sons*, for *Laycock & Co.*, Huddersfield.

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

Court of Appeal.

From Chan. Div. May 9.

In re EAST AND WEST INDIA DOCKS CO. (*a.*)

Railway company—Docks company—Meaning of words "constituted by Act of Parliament for purpose of working, &c., a railway"—Undertaking—Receiver—Railway Companies Act, 1867 (30 & 31 *Vict. c.* 127), *ss.* 3, 4.

By a special Act promoted and obtained by a railway company, certain articles of agreement set forth in a schedule to the Act, and made between the railway company and a docks company, were confirmed. This agreement provided (inter alia) *that the docks company should construct so much of the line as passed through their land; that the docks company should, at their option, have the management of and work that part of the line; and that the management of that part of the line, if worked by the railway company, should be subject to the control of the docks company.*

Prior to and apart from this special Act, the docks company had no power to construct or work a line of railway. After the passing of this special Act the docks company constructed on their land the line of railway mentioned, and worked and managed it themselves.

Held (*affirming* Chitty, J.), *that the docks company came within the interpretation of the term "railway company" in section* 3 *of the Railway Companies Act,* 1867, *and that, therefore, the court had jurisdiction to appoint a receiver and manager of the undertaking under section* 4 *of the Act of* 1867.

Held, also, that the receivership order was not to be limited to the moneys received by the docks company in respect of the railway, but should extend to the whole undertaking of the docks company.

Appeal from a decision of Chitty, J., reported 32 SOLICITORS' JOURNAL, 322.

The East and West India Docks Co. was a company incorporated by Act of Parliament, and was formed by the amalgamation of two formerly existing incorporated companies, the East India Dock Co. and the West India Dock Co. In 1865 a special Act (28 Vict. c. cxvi.) was passed to authorize the construction by the London and Blackwall Co. of certain railways, to be called the London, Blackwall, and Millwall Extension Railway, and to authorize agreements with other companies (including the East and West India Docks Co.), with reference thereto. Section 59 of this Act provided that the Blackwall Co. and the docks company might enter into and carry into effect agreements, for the construction of the extension railway in or through the property of the docks company and for the use and working of that railway in or through the premises of the docks company. Section 60 provided that certain articles of agreement between the Blackwall Co. and the docks company, dated the 25th of March, 1865, and set forth in the schedule to the Act, should be confirmed, but might be altered or modified as those companies should mutually agree. The articles of agreement provided that the docks company should, on receiving three months' notice from the railway company, at their own cost proceed to make so much of the extension railway as passed through any of their lands or property; that so much of the line, when made, should remain the absolute property of the docks company, subject to such rights of user by the railway company as thereinafter provided; that the docks company should, at their option, if they should think fit, have the management of and work so much of the line as should pass through or over their lands and property. The railway company were to pay rent to the docks company for the land of the latter company on which the line should be constructed. Under the provisions of this Act and agreement and some subsequent amending Acts, the extension line had been constructed and was being worked for public traffic, the docks company having constructed, maintained, and worked that portion of the line which was on their own land, and having rolling stock of their own.

Edward Clark, a judgment creditor of the docks company, presented a petition under section 4 of the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), for the appointment of a receiver and manager of the general undertaking of the docks company to receive the tolls and sums of money arising upon or out of that undertaking.

The question raised was whether or not the docks company was a "railway company," within the meaning of section 3 of the Railway Companies Act, 1867, which section provides: "The term 'company' means a railway company—that is to say, a company constituted by Act of Parliament, or by certificate under Act of Parliament, for the purpose of constructing, maintaining, or working a railway (either alone or in conjunction with any other purpose)."

Section 4 of the same Act provides that the rolling stock and plant of a railway company shall not, after their railway is open for public traffic, be liable to be taken in execution after the passing of the Act, under a judgment recovered in an action or a contract entered into after the passing of the Act, or in any action not on a contract commenced after the passing of the Act; but the person who has recovered the judgment "may obtain the appointment of a receiver, and, if necessary, of a manager of the undertaking of the company" on application by petition to the Court of Chancery, and all money received by the receiver or manager shall, after due provision for working expenses, be applied, under the direction of the court, in payment of the debts of the company and otherwise according to the rights and priorities of the persons for the time being interested therein.

On the hearing of the petition Chitty, J., made an order appointing a receiver and manager of the general undertaking of the docks company.

The London and Blackwall Railway Co., and Messrs. Kirk & Randall, contractors for the docks company, who were creditors of the docks company, and had been served with the petition under order 30 of the orders made under the Railway Companies Act, 1867, appealed.

Byrne, Q.C., and *Farwell*, for the appellants.—The powers conferred by the Act of 1865 on the docks company as to this railway were only conferred for the purpose of protecting its own property. The Act of 1865 was not an Act constituting the docks company a railway company. No deposit was required from the docks company, and no obligation as to non-abandonment of the line was imposed by the Legislature as a matter of bargain between them and the docks company. The docks company might at any time, by agreement with the Blackwall Railway Co., rescind the agreement entered into and cease working the railway, and that fact shows that the docks company is not a railway company. If a railway company, they should have held Wharncliffe meetings. The undertaking is the undertaking authorized by the special Act of 1865, and is, therefore, the undertaking of the London and Blackwall Railway Co., and that is the only company liable for penalties. The whole special Act of 1865 is obviously a railway Act for the benefit of the London and Blackwall Co., and not for the docks company; though the docks company had the option of working and managing that part of the line passing through their land, it was as agents for the Blackwall Co. The case of *Great Northern Railway Co.* v. *Tahourdin*, 32 W. R. 559, 13 Q. B. D.

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

320, is distinguishable, because the docks company there was incorporated for the very purpose (*inter alia*) of constructing a railway, and the special Acts were "constituting Acts" of the company, by which a bargain was made with the Legislature in order to get compulsory powers to carry out the purpose of constructing the railway.

Romer, Q.C., and *Kirby*, for the respondent Clark.—There is nothing in the definition of the term "railway company" in the Act of 1867 to confine it to a company whose exclusive purpose is the construction of a railway. "Constituted" means constituted for all or any of its purposes, and cannot be limited to the purposes contained in the original special Act. [COTTON, L.J.—We need not trouble you to argue as to the meaning of the term "undertaking."]

Latham, Q.C., *Buckley, Q.C.*, and *Pollard*, for the docks company.—The purposes for which the docks company are constituted have been increased from time to time, and the constitution of the company cannot be narrowed to the purposes for which it was originally created. If a company is empowered to apply its funds for the construction and working of a railway it is a railway company within the meaning of section 3 of the Act of 1867: *Taylor* v. *Directors of Chichester, &c., Railway Co.*, L. R. 4 H. L. 628, 19 W. R. H. L. Dig. 16.

Latham, Q.C., and *Arbuthnot*, for the Bank of England, who were mortgagees.

Kenyon Parker, for the Guardian Assurance Co., another mortgagee.

Whitehorne, Q.C., and *W. Ford*, for the London, Tilbury, and Southend Railway Co., and

Butcher, for the London and Tilbury Lighterage Co.

Byrne, Q.C., in reply.—The true construction of section 3 cannot depend on whether the power given is exercised or not. The agreement between the docks company and the Blackwall Co. might have been rescinded before anything was done. The argument on the other side is that the words "constituted by Act of Parliament" are equivalent to "authorized or empowered by Act of Parliament," but the word "constituted" is used, and that shows it must be part of the fundamental constitution of the company to construct and work a railway.

COTTON, L.J.—This is an appeal from a decision of Chitty, J., appointing a receiver over the undertaking of the East and West India Docks Co., under section 4 of 30 & 31 Vict. c. 127. Two points have been raised: (1) whether there was jurisdiction to make any order at all; and (2) whether the order made is too extensive as to the property comprised in it. The question whether the court has jurisdiction turns on the language of section 3 of the Act of 1867. The docks company is a company formed by the amalgamation of two older companies incorporated years before, but the amalgamated company is the one dealt with in the Act of 1865. The docks company has made and works under that Act a piece of railway which is not a mere private siding, but forms part of a public railway from the London and Blackwall Railway to the bank of the River Thames, and they did this under the authority conferred by the Act of 1865 and a subsequent Act of 1879. But for the Act of 1865 the docks company could not have made this railway; the making of it was not within the purposes for which up to that time the docks company was constituted. It is true that the Act of 1865 was obtained, not by the docks company, but by the Blackwall Co. But that is immaterial. Section 3 of the Act of 1867 does not say "constituted by its Act of Parliament," but "constituted by Act of Parliament." Even if the Act of 1865 was passed without the shareholders of the dock company being previously consulted, it was for Parliament to see whether they would confer such powers. In my opinion, the Act of 1865 is within the meaning of section 3 of the Act of 1867. Section 60 of the Act of 1865 gives Parliamentary sanction to the proposed agreement between the companies, and the agreement has force only by reason of its confirmation by Parliament. [The Lord Justice read the terms of the agreement above referred to and section 3 of the Act of 1867, and continued:—] Undoubtedly, the Act of 1865 empowered the docks company to make a railway, with all the consequences resulting from it, one of which was that they would become subject to all the general provisions of Acts relating to railway companies. The latter part of section 3 "either alone or in conjunction with any other purpose," is material as showing that the meaning of the term "railway company" is not necessarily limited to a company constituted for the purpose only of constructing, maintaining, or working a railway, and there is nothing in the section as to the comparative magnitude of the railway and the rest of the undertaking of the company. What is the meaning of "constituted by Act of Parliament for the purpose of constructing, &c., a railway"? It was argued that the railway must be one of the "fundamental" purposes of the company. That, if it had any meaning, must mean one of the purposes for which the company was originally formed, and it was admitted that the meaning could not be so restricted. In my opinion, the meaning of the expression is this—if there is a company which depends for its constitution upon an Act of Parliament, and if one of its powers is that of constructing, maintaining, or working a railway, it is a railway company within the Act. It is true that an Act of Parliament does not require or compel a company to make a railway, it only gives the company power to do so. If a company, which had power to make a railway, had not made any, and had no rolling stock, the court might exercise its discretion by declining to appoint a receiver; and in the present case if the agreement were rescinded, though the company would still be within the definition "railway company," it might be that the court, though having jurisdiction, would decline to appoint a receiver; but in the present case the company had made a railway and was working it, and had rolling stock, and, in my opinion, there was power to make the order. Then is the order too extensive in its terms? In my opinion it is not. Section 4 of the Act of 1867 no doubt deprives a judgment creditor of a right he would otherwise have to take the rolling stock in execution, but it gives larger rights in compensation, and there is nothing in it to restrict the words "undertaking of the company" to property connected with the railway. The words, in my opinion, include that which the company is, by its constitution and the effect of all its Acts of Parliament, authorized to undertake and to do, and there is no reason why the appointment of a receiver and manager should be limited to any part of the property of this company. The order is a consequence of the company being within the Act.

As to some of the persons appearing on this appeal, they must be taken to have done so gratis, as they did in the court below.

FRY, L.J.—The judgment appealed from is, in my opinion, plainly right. This company is authorized by the special Act of 1865 to construct and work a railway, and by implication to maintain it. No doubt this authority has not been given in the usual way, for it was given in an Act introduced by the Blackwall Railway Co. But the agreement referred to is sanctioned by statute, and therefore the result is, that authority is given by statute to the docks company to make and work the railway. New powers, which they had not originally, have therefore been given to the docks company. That being the position of the docks company we must look to

the Act of 1867, and see if this is a "company constituted by Act of Parliament . . . for the purpose of constructing, maintaining, or working a railway." There are two possible constructions of this expression. First, it might be urged, though it has not been in fact urged, that the expression has reference to the original constitution of a company. Such an argument could not have prevailed, because the constitution of a company may from time to time vary, like the constitution of a country. How do we find the purposes for which a company is constituted a railway company? All Acts of Parliament have defined the powers of a railway company by giving them powers —by clothing them with power—to construct, work, and maintain a railway; and here the docks company is so empowered.

It was urged that the special Act of 1865 was not promoted by the docks company, and therefore that the docks company was not a railway company within the meaning of the Act of 1867. But why should it be necessary that the special Act should have been promoted by the docks company? In my opinion we are not at liberty to add a qualification to the definition of the term "railway company" given in the statute, which would have the effect of narrowing the statutory definition. The Legislature has not required that the statute giving the powers to construct and work a railway should be a statute promoted by the company to whom the powers are given, or be mainly concerned with the affairs of that company. The same remark applies to the argument as to Wharncliffe meetings.

Then it was said that the purpose of constructing and working a railway must be the primary or fundamental purpose. But the words of the statute itself, "either alone or in conjunction with any other purpose," seem to negative that. In my opinion this case comes within and satisfies all the requirements of the words in section 3 of the Act of 1867.

Furthermore, it appears to me the nature of this company brings it within the mischief which the statute seeks to prevent—viz., the seizure of its rolling stock by a single judgment creditor, which would be a matter of inconvenience to the public and seriously injure the company.

As to the objection that the receiver should be limited to the railway part of the undertaking, the answer to that is that the language of section 4 of the Act of 1867 is plain, and applies to the whole undertaking of the company.

LOPES, L.J.—If the language in section 3 of the Act of 1867 is intended to cover a case like this, all I can say is, that it seems to me very unfortunate language to use for that purpose. However, as the other members of the court agree in considering that this company comes within the definition in section 3, I do not dissent from their opinion.

I am glad that this conclusion has been arrived at, because I think the case of this company is within the mischief intended to be dealt with by the section. I agree with the construction put by the rest of the court on section 4 of the Act, as to the extent of the receivership order.

Appeal dismissed.

Solicitors, *Mackrell, Maton, & Godlee; Irvine & Hodges; Freshfields & Williams; Woodhouse, Trower, & Co.; F. C. Mathews & Browne; W. A. Crump & Son.*

From Q. B. Div. July 5.

GUARDIANS OF MEDWAY UNION *v.* GUARDIANS OF BEDMINSTER UNION: (*a.*)

Poor law—Settlement—Irremovability—Residence for three years by wife with husband—Divided Parishes Act, 1876 (39 *& 40 Vict. c.* 61), *ss.* 34, 35.

Where a woman had resided with her husband for three years in a certain parish, and continued to reside there for three months after his death,

Held (*affirming the decision of the* Divisional Court, *ante, p.* 478, 20 *Q. B. D.* 191) (Lopes L.J., *dissenting*), *that she must be deemed to be settled in that parish under section* 34 *of the Divided Parishes Act*, 1876.

Appeal from the decision of a divisional court (Pollock, B., and Hawkins, J.), reported *ante*, p. 478, 20 Q. B. D. 191.

An order of justices having been made for the removal to the Medway Union as the place of her last legal settlement of Caroline Baker, widow, with her three children, it was confirmed by the Recorder of Bristol, subject to a special case.

It appeared that Caroline Baker had resided in the parish of Gillingham, in the Medway Union, continuously, together with her husband, for upwards of three years immediately before his death, which took place in March, 1886, and that she had continued to reside in that parish as a widow for three months after the death of her husband. The Divisional Court were of opinion that she had thereby acquired a settlement in the Medway Union under section 34 of the Divided Parishes Act, 1876.

The Medway Union appealed.

By section 34 of the Divided Parishes Act, 1876: "Where any person shall have resided for the term of three years in any parish in such manner and under such circumstances in each of such years as would in accordance with the statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise."

By section 35: "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another."

Sir E. Clarke, S.G., and *Kinglake* (*Douglas Metcalfe* with them), for the appellants.—The pauper, while under coverture, was incapable of acquiring any settlement. As a wife, she took the settlement of her husband, and could have none of her own. After her husband's death she could begin to acquire a settlement for herself, but she could not take her late husband's settlement, since "wife" in section 35 does not include widow: *Croydon Union* v. *Reigate Union*, 35 W. R. 824, 19 Q. B. D. 385.

They also cited *R.* v. *Manchester Overseers*, 30 W. R. 247, 8 Q. B. D. 50; *Dorchester Union* v. *Poplar Union*, *ante*, p. 706, 21 Q. B. D. 88; *R.* v. *S. Ebbes*, 12 Q. B. 137; *Highworth Union* v. *Westbury-on-Severn Union*, *ante*, p. 422, 20 Q. B. D. 597.

Poole, Q.C. (*Cresswell Wall* with him), for the respondents.—The case is governed by *R.* v. *Inhabitants of Glossop*, 12 Q. B. 117, which was followed in *R.* v. *St. George's-in-the-East*, 18 W. R. 787, L. R. 5 Q. B. 364. The pauper acquired a settlement while residing

(*a.*) Reported by A. F. PERCIVAL ELLIS, Esq., Barrister-at-Law.

with her husband, and she does not claim a derivative settlement under section 35.

Kinglake replied.

Lord Esher, M.R.—In this case I can see no answer to the reasoning of Pollock, B., in the Divisional Court. In my opinion the question raised is not the same as any question decided hitherto by this court, and does not turn on any of the decisions on section 35. It is not, I think, a case of derivative settlement at all. The only question is whether this pauper was, at the time the order for her removal was made, in such a position that she came within the meaning of section 34. If the conditions set out in that section exist after the passing of that Act of Parliament then the law is that there is a settlement. In my opinion the meaning of section 34 is that if those conditions exist, then any person with regard to whom they exist shall be deemed to have, and shall, in fact, have, a settlement. Now, did those conditions exist in this case. The pauper had resided for three years in this parish with her husband. She had resided there also for three months after his death. Can her residence before her husband's death be taken into account in ascertaining the question of her irremovability? The case of *R.* v. *Glossop* is clearly in point, and it says that such residence must be taken into account. The point to be looked at is whether she was irremovable or not, and for that purpose the period during which she was under coverture may be regarded. Where a woman who is under coverture is not residing with her husband the question whether or not she is capable of acquiring a settlement of her own is a problem which may one day arise, but which is not now before us. In this case she and her husband resided together in the parish for three years. She resided in the parish, therefore, both in law and in fact, and her residence there with her husband can be taken into account in ascertaining her irremovability. During the three years that she resided in the parish with her husband she could not have been removed because he was irremovable. She therefore was irremovable, and in that respect she satisfied the conditions prescribed by section 34. After the death of her husband she continued to reside in the same parish for three months more. During that period she could not be removed, because, by law, she could not be removed for a year after her husband's death. Therefore, up to the time when this question arises the pauper had resided in this parish in the Medway Union, both in fact and in law, for more than three years, "in such manner and under such circumstances in each of such years as would, in accordance with the statutes in that behalf," have rendered her irremovable. She has, therefore, exactly fulfilled the conditions of section 34. Whether she would have acquired a settlement or not under such circumstances before the passing of the Divided Parishes Act, 1876, is immaterial. She is now under that section deemed to be settled, and is, in my opinion, in fact settled in the Medway Union. I have adopted, therefore, the reasoning of Pollock, B., in the court below. I think that reasoning was right, and that the judgment must be affirmed.

Lindley, L.J.—I have felt some doubt during the argument, but I have come to the conclusion that this case is brought within section 34 of the Divided Parishes Act, 1876. In my opinion the removability of a wife depends upon the removability of her husband, but if she resides with him in a parish in which he is irremovable, she also is irremovable, not by reason of her residence in the parish only, but by reason of his irremovability and of her residence with him. I think that is sound law, and is the true construction of the Act. The husband clearly was irremovable within the meaning of section 34, and therefore the pauper, as his wife, actually residing with him, was so also. They were, during the husband's lifetime, both irremovable. Although the section might not apply to a woman living apart from her husband, yet here, where their residence and irremovability was conjoined, it clearly does apply. Her irremovability was consequent on her residence with him in a parish where he was irremovable. She resided with him in that parish for three years before his death, and in my opinion it is immaterial that she continued to reside there for three months after it. Quite apart from section 35, this is, in my opinion, the true construction of section 34.

Lopes, L.J.—I regret to say that I find myself unable to agree with the other members of the court and with the decision in the court below. In consequence of the decision in *Croydon Union* v. *Reigate Union*, as to which I will say a word presently, I have to construe section 34 without paying any regard to section 35. I think that that is to be regretted, for, in my opinion, section 35 is of material assistance in construing section 34. In my opinion the important words of section 34 are "any person." I think those words mean "any person," *sui juris*, who is capable of acquiring a settlement, and do not include either unemancipated children or women who are under coverture. During the lifetime of her husband a woman, in my opinion, cannot acquire in her own right a *status* of irremovability. If he is removable she is also removable, and if she is irremovable it is only because her husband is irremovable. The case is entirely different from that of a widow or a *feme sole*, who is, of course, capable of acquiring a status of irremovability for herself. In my opinion the construction given to the section by the court below is entirely wrong, and is subversive of principles of the law of settlement which have existed for centuries.

With regard to the case of the *Croydon Union* v. *Reigate Union*, which decides that "wife" does not include widow, I loyally bow to that decision, but as I understand that that case is under appeal to the House of Lords, I feel justified in saying that if the matter had been *res integra* I could not have put such a construction upon the words of the section.

Appeal dismissed.

Solicitors for the appellants, *Peall & Son*, Rochester.

Solicitors for the respondents, *O'Donoghue & Anson*, Bristol.

High Court of Justice.

Chan. Div. North, J. — April 20.

Bridgetown Waterworks Co. v. Barbados Water Supply Co. (a.)

Practice — Defence — Further defence — Confession of further defence — Judgment for costs — Rules of Court, 1883, ord. 24, rr. 2, 3.

In an action for an injunction, the defendants, after delivering their statement of defence, delivered a further defence, setting forth a ground of defence arising after the delivery of their statement of defence. The plaintiffs thereupon delivered a confession of the further defence, and signed judgment for costs up to the time of the defendants pleading the further defence.

The defendants did not intend, by pleading the further defence, to waive their first defence, which they alleged included the point raised by their further defence.

Held, on motion by the defendants to set aside the

(a.) Reported by J. Trustram, Esq., Barrister-at-Law.

judgment for costs, that, the defendants consenting that their further defence be struck out, the judgment for costs should be discharged.

Motion.

The plaintiffs were a company incorporated in Barbadoes under a local Act. The defendants were a company incorporated in England under the Companies Acts.

The action was brought in June, 1887, for an injunction to restrain the defendants from carrying on certain works in Barbadoes so as to interfere with the plaintiffs' supply of water.

The defendants, on the 11th of August, 1887, delivered a statement of defence, by which they alleged that they were acting under powers given them by the Barbadoes Water Supply Act, 1886; and, on the 9th of December, 1887, they, by leave of the court, delivered a further statement of defence, setting up a defence which had arisen after the delivery of their statement of defence—viz., that by a local Act, assented to in November, 1887, it was provided that the Barbadoes Water Supply Act, 1886, should apply to them as if they had been duly incorporated before the passing of the Act of 1886.

The plaintiffs then, on the 6th of April, 1888, under ord. 24, r. 3, delivered a confession of the further defence, and signed judgment for costs up to the time of pleading the further defence.

This was a motion by the defendants for an order setting aside the judgment for costs.

The Rules of Court, 1883, ord. 24, provide, by rule 2, "Where any ground of defence arises after the defendant has delivered a statement of defence, or after the time limited for his doing so has expired, the defendant may . . . within eight days after such ground of defence has arisen, or at any subsequent time by leave of the court or a judge, deliver a further defence . . . setting forth the same."

And by rule 3, "Whenever any defendant, in his statement of defence, or in any further statement of defence as in the rule last mentioned, alleges any ground of defence which has arisen after the commencement of the action, the plaintiff may deliver a confession of such defence, and may thereupon sign judgment for his costs up to the time of the pleading of such defence, unless the court or a judge shall, either before or after the delivery of such confession, otherwise order."

Cozens-Hardy, Q.C., and *George Henderson*, for the defendants.—In this case the first statement of defence of the defendants is good, and includes the point raised by the further statement, and they do not intend to waive it. The second defence is simply an additional defence founded on a declaratory statute subsequently passed. The defendants ought not to pay costs simply because, while having a good defence at first, they also set up the additional defence. They are entitled to both defences, but, if necessary, are ready to waive their further defence in order that the judgment for costs may be set aside: ord. 24, r. 3; *Harrison* v. *Marquis of Abergavenny*, W. N., 1887, p. 156.

Christopher James, for the plaintiffs.—As the defendants have set up a ground of defence which has arisen since the delivery of their statement of defence, the plaintiffs, who have delivered a confession of the further defence, are entitled to judgment for their costs according to the terms of the order.

Cozens-Hardy, Q.C., replied.

North, J.—I cannot make the order asked for while the further defence stands, but, if that is withdrawn, I think it is a case in which I can "otherwise order." It is clear that it is not intended by the further statement of defence to waive the defence set forth in the original statement of defence. The defendants do not admit that their first defence was bad, and that they have set up for the first time a good statement of defence. It is clear that order 24 contemplates that there may be circumstances which would make it unfair that the defendant should pay the costs when he puts in a further defence arising after his first defence was delivered.

I do not think that the plaintiffs ought to have the judgment for costs, or, on the other hand, that I ought to take away from them the benefit of having signed judgment for costs, and allow the defendants the benefit of their further defence. The right thing is that neither the judgment for costs nor the further defence should stand. If the first defence raises the point made by the further defence the defendants will have the benefit of the latter at the trial. The order will be that, the defendants consenting that the further defence be struck out, the judgment for costs be discharged. The costs of the further defence, the signing judgment for costs, and this motion will be reserved.

Solicitors, *Foss & Ledsam; Druces & Attlee.*

Chan. Div.
Kekewich, J. } July 7, 14.

In re Norwich Town Close Estate. (*a.*)

Charitable Trusts Act, 1853, *s.* 28—*Summons—Disputed charitable trust—Jurisdiction of court.*

The freemen of the city of Norwich had, at the trial of an action against the corporation of that town, obtained a declaration that the corporation was seised of the Town Close in trust for the freemen; but the judge, though declining to order a scheme to be settled, prefaced the order made at the trial of the action with a declaration that it was "without prejudice to any other proceedings that might be taken by the Attorney-General." On a summons being taken out by the Attorney-General under section 48 *of the Charitable Trusts Act*, 1853, *for a scheme to be settled.*

Held, that the Act only applied where a charitable trust existed, and gave no jurisdiction to decide on summons whether this was so or not.

Adjourned summons.

An action (*Stanley* v. *Mayor, &c., of Norwich and Others*, 31 Solicitors' Journal, 348) was brought by one T. J. Stanley and others, on behalf of themselves and all others the freemen of the city of Norwich, against the corporation of that city and the Attorney-General, claiming (*inter alia*) a declaration that the corporation was seised of the Town Close Estate in the county of the city of Norwich (containing about 100 acres), and the rents and profits thereof, in trust for the freemen of the said city.

Counsel for the Attorney-General contended at the trial that there was a charitable trust, and asked that a scheme might be settled.

Kekewich, J., held that the plaintiffs were entitled to the declaration claimed, but declined to order a scheme to be settled, though he prefaced the judgment by a declaration that it was "without prejudice to any other proceedings that might be taken by the defendant, her Majesty's Attorney-General, in that behalf."

This was a summons issued by the Attorney-General under section 28 of the Charitable Trusts Act, 1853, intituled "In the matter of the Norwich Town Close Estate Charity and in the matter of the Charitable Trusts Acts, 1853 to 1859," asking that a scheme might be settled.

Section 28 of the Act, so far as material, is in these terms:—"Where . . . any . . . order or direction relating to any charity . . . shall be considered desirable, and such . . . order or direction might now be made or given by the Court of Chancery

(*a.*) Reported by J. W. Greig, Esq., Barrister-at-Law.

. . . it shall be lawful for the Attorney-General to make application (without any information, bill, or petition) . . . for such order, direction, or relief as the nature of the case may require, and the Master of the Rolls or the Vice-Chancellor to whom any such application shall be made shall and may proceed upon and dispose of such application, . . . and shall and may have and exercise thereupon all such jurisdiction, power, and authority and make such orders and give such directions . . . as might now be exercised, made, or given by the Court of Chancery . . . in a suit regularly instituted or upon petition as the case may require."

Ingle-Joyce, for the Attorney-General.—This is a case in which the Act applies, and a scheme should be settled.

Warmington, Q.C., and *Swinfen Eady*, for the freemen of the city of Norwich.—In the case of an analagous statute, Lord Romilly's Act, the decisions in *In re Dean Clarke's Charity*, 8 Sim. 34, and *In re Manchester New College*, 1 W. R. 269, 16 Beav. 610, show that there is no jurisdiction under that Act (and the one now under discussion is similar in language and scope) to decide whether there actually is a charity or not. There must, in fact, be a charity existent before this Act applies. The case of *Ex parte Rees*, 3 Ves. & Beames, 10, points in the same direction. Moreover, this is a statutory jurisdiction conferred on the courts, and must be strictly confined within the limits laid down by the Act creating it.

Ingle-Joyce in reply.—The sole question is whether, under the circumstances, the plaintiffs in the original suit (the respondents here) can now say that the trust then established is not a charitable one. The Act gives all the powers to the court that it would have had in a suit: *In re Davenport Charities*, 4 De G. M. & G. 839, 14 W. R. Ch. Dig. 14.

P. H. Lawrance, for the mayor and aldermen, submitted to act as the court should direct.

Cur. adv. vult.

July 14.—Kekewich, J.—The main question is whether the establishment of a charity or of a charitable trust is within the scope of the Act of 1853. It is intituled an Act for Administration of Charitable Trusts, and the preamble adds to that object the more beneficial application of charitable funds. What is charitable is not defined, but it may be treated as equivalent to belonging to a charity, and one finds a definition of charity in section 66, which must be read in connection with section 48 of the Act of 1855. There is no occasion to criticise this definition further than to say that it obviously does not advance the determination of the question before me, while it opens a new one which need not be pursued—namely, whether the property with which this case is concerned falls within the language there employed. Unassisted by definition, I have to consider the language of the Act and its intent and purpose generally.

Respecting by far the larger number of institutions possibly falling within its scope, no doubt exists whether they are charitable or not, and the Act seems drafted on the assumption that this would invariably be the case. And it might well be held that the remedial character and extent of the Act cannot properly be narrowed by an issue whether the particular application refers to charity or not, unless raised on substantial ground. If, however, section 28 applies to a given property or institution, other sections of the same Act are generally applicable to it, and other powers would be exercisable in connection with what never has been, and possibly never may be, determined to be a charity. I observe, also, that by the Act of 1860 the Commissioners have all the powers given to the court by the Act of 1853, and though there are safeguards against such an exercise of jurisdiction, they might be called on to decide whether there is a charity in such a case as the present. The real question between the Attorney-General and the Norwich freemen—viz., whether there is a charity to be administered—is of some difficulty. No one could gainsay that, especially having regard to *Goodman* v. *Mayor of Saltash*, 31 W. R. 293, 7 App. Cas. 633. One would not easily assume that it was the intention of the Legislature that a question like that should be determined on an application for the settlement of a scheme made under an enactment expressly directed to administration only. In my judgment the tenour of the Act is much adverse to such a conclusion. I do not think that much, if any, assistance can be derived from section 41. If the Attorney is right the Norwich freemen are no less *cestuis que trustent* than if he is wrong, and they cannot be treated as persons holding or claiming property adversely to the charity.

The authorities are of little use. Two only were cited by Mr. Warmington, and I need not refer to others which are mentioned in the reports of those two. They all arose under Sir John Romilly's Act, which may fairly be referred to as analogous to that of 1853, and is expressed in language of certainly not less extensive application. In the case of *In re Dean Clarke's Charity* there was no doubt whatever of the existence of a charity, the trustees whereof were petitioners, and the question was whether the conflicting claims of respondents could properly be decided on petition. In the *Manchester New College* case the Master of the Rolls considered a petition proper because there were no conflicting interests. The case was really cited for the remarks on the comparative advantages and disadvantages of summary proceedings, which I do not think it necessary further to discuss. There was cited on the other side the case of *In re Davenport's Charities*, but that only deals with the narrow question whether the provision in the Act of 1853, for the appointment of new trustees, was exercisable in a case of lunacy. To the Trustee Acts, as somewhat analogous, one naturally turns on such a question as this. I humbly venture to think that the jurisdiction conferred by those Acts might probably, and with advantage, have been construed to extend to many cases decided not to fall within it; but the rule has been laid down, and has been strictly followed, that it is necessary first to find a trust declared by will, contract, or judicial decision before the provisions of the Act can be called into operation. *In re Cumming*, 18 W. R. 157, 5 Ch. App. 72, establishes an exception from this rule of executed contracts, but the exception serves to illustrate the extent and rigour of the rule itself. The analogy ought not to be scarcely pressed, but so far as it holds good it is in favour of a liberal construction of the Acts here in question. The result is that I must sustain the objection taken by the respondents to the Attorney-General's application, and hold that before issuing a summons under the Acts for the settlement of a scheme for the regulation and management of the alleged charity he must establish, by independent proceedings, that there is a charity to be regulated. The summons is intituled, and necessarily so intituled, as to assume the existence of a charity and applicability of the Act to the Town Close Estate. It is just that which cannot be assumed, in my judgment, be determined in this proceeding.

Summons dismissed. Costs of all parties, except of the Attorney-General, to come out of the estate.

Solicitors for the Attorney-General, *Hare & Co.*

Solicitors for the respondents the freemen of Norwich, *C. F. Martelli*, for *J. Stanley*, Norwich.

Solicitors for the respondents the Corporation of Norwich, *Sharpe, Parkers, Pritchard, & Sharp*, for *H. B. Miller*, Norwich.

Q. B. Div. (Manisty and Stephen, JJ.) June 13.

REG. v. JUSTICES OF THE WEST RIDING OF YORKSHIRE. (a.)

Local government—Licence—Forfeiture—Transfer—Licensing Act, 1872 (35 & 36 *Vict.* c. 94), *s.* 15—*Wine and Beerhouse Act*, 1869 (32 & 33 *Vict.* c. 27), *ss.* 8, 19.

Where the holder of a licence had been convicted of an offence under section 15 *of the Licensing Act*, 1872, *the justices refused the application of a new tenant for a renewal, and of the landlord for a transfer.*

Held, that the justices were entitled to do so, as the licence had become forfeited, and that section 19 *of the Wine and Beerhouse Act*, 1869, *did not apply.*

Rule calling upon the justices of the West Riding of Yorkshire and the justices of Halifax to show cause why a *certiorari* should not issue to remove into the Queen's Bench Division, for the purpose of quashing, an order made at a special licensing sessions for the borough of Halifax on the 3rd of February, refusing to transfer the licence of a certain beerhouse, and also an order of quarter sessions confirming the same. The facts of the case were as follows:—

On the 13th of December, 1887, the holder of the licence of the beerhouse in question was convicted of using the premises as a brothel. Before the hearing of the case a person whom the landlord had agreed to accept as a new tenant for the premises asked to have his application heard for a transfer of the licence. The justices decided to hear first the case against the then holder of the licence. After the conviction the justices refused the application of the new tenant. On the 16th of December the landlord applied for a transfer of the licence, and the hearing was adjourned till the 3rd of February to the special licensing sessions, when the application of the landlord was also refused, and his refusal was confirmed on appeal to the quarter sessions.

Walton, for the landord, having obtained a rule.

Patterson, for the justices.—The licence was forfeited under the 15th section of the Licensing Act, 1872 (35 & 36 Vict. c. 94). The landlord asked the justices to grant a transfer under the Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 15, but the justices rightly held that this case did not come under that section, and that the landlord could not get a transfer where the tenant had been convicted of the misdemeanour here proved. The Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), s. 19, only applies to a going licence. [He was stopped.]

Walton, in support of the rule.—Sections 8 and 19 of the Act of 1869 were intended to protect the owners of licensed property in possession of such at the time of the passing of the Act. [MANISTY, J., referred to *Reg.* v. *Overton*, 21 W. R. 887; *Hargreaves* v. *Dawson*, 24 L. T. N. S. 428, 19 W. R. C. L. Dig. 11; *Reg.* v. *Liverpool Justices*, 32 W. R. 20, 11 Q. B. D. 638.] The licence was capable of transfer under 9 Geo. 4, c. 61, s. 14.

MANISTY, J.—This is a rule calling on the justices of Halifax to shew cause why a *certiorari* should not issue to remove into this court an order made at a special licensing sessions refusing to transfer the licence of a beerhouse, and an order of quarter sessions made in confirmation of that order. The facts are that this house had been licensed from May, 1869, continuously to some time before the first application was made to the justices in December, 1887, and the question is whether the justices were right in holding that the 19th section of the Act of 1869 is not applicable to the case.

On the 13th of December the person intending to take over the house came before the justices to make an application for the transfer. It was then stated to the magistrates that there was a case in their list with reference to the house, and the justices decided to hear that case first. They proceeded to do so, and convicted the tenant then in occupation of an offence by which his licence was forfeited. The application of the new tenant was refused by the justices, and a special licensing sessions refused an application of the landlord for a transfer of the licence, on the ground that no licence was then in force. I think that the justices were right, and that it was intended by the Legislature that if a licence became forfeited on a conviction for such an offence, the magistrates might refuse a new licence unfettered by section 8 of the Act of 1869. The licence was forfeited on the conviction, and the hearing of the application for a renewal of the licence really came on for hearing for the first time on the 3rd of February.

STEPHEN, J.—I am of the same opinion. As I read the 19th section of the Act of 1869 it is not applicable to this case, because before the application on the 3rd of February to the licensing sessions the original licence had been forfeited.

Rule discharged.

Solicitors for the applicant, *Godfrey, Rhodes, & Co.*, for *G. Rhodes & Evans*, Halifax.

Solicitors for the respondent, *Jacques & Co.*, for *Holroyd*, Halifax.

Q. B. Div. (Pollock, B., and Charles, J.) April 13, 14, 16; June 4.

BLACKBURN, LOW, & CO. v. HASLAM. (a.)

Marine insurance—Concealment of material fact—Principal and agent—Negotiation for effecting policy commenced by agent but completed by principal—Concealment by agent who commenced negotiation.

The plaintiffs, being the insurers of an overdue vessel, instructed Messrs. R. & Co., brokers at Glasgow, to effect a re-insurance. Messrs. R. & Co. accordingly telegraphed to Messrs. T. & Co., brokers in London, to effect such re-insurance at a premium of fifteen guineas. Before any answer from Messrs. T. & Co. arrived, M., one of the partners in the firm of R. & Co., obtained information of a fact material to the risk. On the arrival of an answer from T. & Co., asking for an advance of premium, R. & Co. informed the plaintiffs thereof, but did not disclose to the plaintiffs the information obtained by M. The plaintiffs replied that the premium might be raised to twenty guineas. R. & Co. then telegraphed in the plaintiffs' name to T. & Co. that they might pay twenty guineas. T. & Co. telegraphed in reply direct to the plaintiffs that there was no chance under twenty-five guineas. The plaintiffs then telegraphed to T. & Co. that they might pay twenty-five guineas. Upon this T. & Co., through the agency of another firm of brokers, effected a policy of re-insurance with the defendant.

Held, that, as the policy was the result of one entire negotiation, conducted up to a certain point through the agency of R. & Co., though afterwards carried on by the principals themselves without further intervention on the part of R. & Co., the non-communication of M.'s knowledge vitiated the policy.

Blackburn, Low, & Co. v. Vigors, *ante, p.* 449, 12 *App. Cas.* 531, *distinguished.*

Motion to set aside a verdict and judgment for the defendant and to enter judgment for the plaintiffs, or for a new trial.

(a. Reported by A. H. TODD, Esq., Barrister-at-Law.

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

The plaintiffs sued the defendant on a policy of re-insurance, claiming for a total loss by perils of the sea. The substantial defence was that the defendant was induced to subscribe the policy by the wrongful concealment by the plaintiffs and their agents of certain material facts known to the plaintiffs or their agents and unknown to the defendant.

The following statement of the facts of the case is taken from the written judgment of Pollock, B. :—

This is an action upon a policy on the hull and machinery of the ship *State of Florida*, underwritten by the defendants for £800. At the trial, which took place before Day, J., and a special jury of London, it was proved that Messrs. Blackburn, Low, & Co., who were underwriters and insurance brokers at Glasgow, insured the steamer *State of Florida* for £1,500 from New York to Glasgow. She left New York on the 11th of April, 1884, and was due at Glasgow about the 25th of April. Upon the 1st of May Messrs. Blackburn, Low, & Co., being desirous of covering their liability, instructed Messrs. Rose, Murison, & Thomson, another firm of insurance brokers at Glasgow, to effect a re-insurance upon *The State of Florida* for £1,500. Acting upon these instructions Messrs. Rose & Co., at 11.29 a.m. telegraphed to their agents, Messrs. Rose, Thomson, Young, & Co., who were insurance brokers in London, as follows :—"Blackburn, Low, wish to reduce *Florida* lines; cover for them £1,500 at 15 guineas net." In reply to this they received a telegram, sent at 12.35, and received at 1, from Messrs. Rose, Thomson, Young, & Co. :—"*State Florida* 20 guineas paying freely and market very stiff, likely to advance before day is out." Up to midday nothing was known either by Blackburn, Low, & Co. or Rose, Murison, & Thomson of *The State of Florida* except that she was overdue. About 12.30 Mr. Murison, a partner in the firm of Rose, Murison, & Thomson, had an interview with the manager of the State Line Co., who owned *The State of Florida*, and he informed Mr. Murison in confidence that his directors in London had received intelligence that *The City of Rome* steamer, on her way to Liverpool, had seen a vessel having on board some of the shipwrecked crew of *The State of Florida*. Upon receiving the last telegram, at 1 p.m., Messrs. Rose & Co. communicated its contents to Messrs. Blackburn, Low, & Co., who said they might pay 20 guineas. Mr. Murison considered that, as he had received the intelligence about the shipwrecked crew in confidence, he was not entitled to communicate it to Messrs. Blackburn, Low, & Co.; but afterwards, at 1.19, he telegraphed in Blackburn, Low, & Co.'s name to Rose, Thomson, Young, & Co. :—"*Florida* pay 20 guineas." In reply to this the latter firm, at 2.14, telegraphed direct to Blackburn, Low, & Co. :—"*State Florida* market now worked out at 20 guineas; no chance under 25 guineas, and for to-day only." This was received by Blackburn, Low, & Co. at 2.29, and at 3.2 they replied :—"*State Florida*, if you cannot do better, pay 25 guineas and wire instanter." To this Messrs. Rose, Thomson, Young, & Co. replied, at 4.37 :—"*State Florida* done £800 at 25 guineas; no chance more to-day under 30 guineas." As the negotiations for this insurance were not completed by Messrs. Rose, Murison, & Thomson, they did not charge any commission to the plaintiffs. After the receipt of the last telegram Messrs. Thomson, Young, & Co. communicated with another London broker, who effected the insurance in question with the defendants, and they, upon becoming acquainted with the above facts, declined to pay.

At the conclusion of the case Day, J., after calling the attention of the jury to the material facts, directed them as follows :—"Now the question I leave to you is, first of all, Were Rose, Murison, & Thomson employed to effect an insurance? I do not mean whether their authority was limited to the insurance of fifteen guineas, the first telegram, because they were afterwards, as we know, authorized to go to twenty guineas; but were they generally authorized to act on behalf of the plaintiff? The next question is, Was this insurance effected through their agency? I think it will make it abundantly clear if I substitute for "their" the word "that," and relieve it of all possible ambiguity. Was this particular insurance effected through that agency? Who introduced the London firm? Rose, Thomson, Young, & Co. it is true, are the people who go and see the underwriters in London, it may be still acting as the correspondents and agents of Rose & Co., of Glasgow. Was it effected through that agency? Did Rose & Co. of Glasgow, put the matter in the hands of Rose & Co. of London, for the purpose of carrying out the insurance effected through their agency? Was it all one negotiation, or was it really taken out of the hands of Rose & Co. of Glasgow, and put into the hands of the plaintiffs, irrespective of Rose & Co. of Glasgow? Was it taken out of their hands and, as it were, a new negotiation commenced, or was the policy effected in pursuance of the original agency? Was it all one transaction or not? That is what I substantially mean by the question I put to you. In the second place, Was the insurance effected through that agency?" The jury found a verdict in the affirmative as to both questions, and the learned judge thereupon directed that a verdict and judgment should be entered for the defendant, with costs.

Sir C. Russell, Q.C., Cohen, Q.C., and *Hollams*, for the plaintiffs.—This case cannot be distinguished from *Blackburn, Low, & Co.* v. *Vigors*, *ante*, p. 449, 12 App. Cas. 531, and therefore the plaintiffs are entitled to judgment. The policy here sued upon was not effected through the agency of Rose, Murison, & Thomson, but through the agency of Rose, Thomson, Young, & Co. and neither the plaintiffs nor Rose, Thomson, Young, & Co. had any knowledge of the concealed fact. When *Blackburn, Low, & Co.* v. *Vigors* was before the Court of Appeal, Lord Esher, M.R., said that the authority given by Blackburn, Low, & Co. to Rose, Murison, & Thomson "lasted until the plaintiff was put into direct communication with Rose, Thomson, Young, & Co., when it of course ceased." The last step which Rose, Murison, & Thomson took in the matter was the sending the telegram in the plaintiff's name which authorized the London firm to insure at twenty guineas. But this authority was never acted upon; and in the result the plaintiffs gave the London firm a different authority—viz., to insure at twenty-five guineas; and it was under that authority that the present policy was effected. The summing up of the learned judge was faulty and ambiguous. The view of the ultimate contract being built up on the old negotiation is misleading. It might have been equally so built up if there had been an express revocation of the original authority. There is no evidence of a general authority to Rose, Murison, & Thomson to effect an insurance. The proper question to have left to the jury was, Who effected this insurance? And the only answer was, The London firm. Neither Day, J., in this case nor any of the lords in *Blackburn, Low, & Co.* v. *Vigors* thought there was any obligation on Mr. Murison to communicate his knowledge. The reasoning of the lords in that case applies equally to this case.

Sir R. E. Webster, A.G., and *J. G. Barnes, Q.C.*, for the defendant.—The learned judge properly drew the attention of the jury to the question whether there was a new and independent negotiation, or whether the contract sued on was built on the old negotiation. And the jury rightly found that it was not a new negotiation. This finding establishes the difference between *Blackburn, Low, & Co.* v. *Vigors* and the present case. In that case the policy sued on was effected through the

agency of Roxburgh, Currie, & Co. quite independently of Rose, Murison, & Thomson. Here the policy sued on was effected through the agency of Rose, Murison, & Thomson. It is true they employed sub-agents; but that did not prevent the whole negotiation being one transaction. The mere alteration of the rate of premium did not constitute a new and independent instruction.

Sir C. Russell, Q.C., replied.

Cur. adv. vult.

June 4.—POLLOCK, B., read the judgment of the court (POLLOCK, B., and CHARLES, J.), which, after stating the facts as above, proceeded as follows:—

The plaintiffs moved that this verdict and judgment should be set aside, and that judgment might be entered for the plaintiffs, or a new trial had, on the ground that the verdict was against the weight of evidence, and that the learned judge at the trial ought to have directed the jury that Rose, Murison, & Thomson were not the agents of the plaintiffs to effect the insurance in question, and that the non-communication of material information within the knowledge of Rose, Murison, & Thomson, but not known to the plaintiffs or their brokers, was not a concealment which would affect the policy, and ought to have directed judgment to be entered for the plaintiffs upon the facts proved or admitted at the trial. These questions are so closely connected that the better mode of dealing with them will be to consider whether, taken as a whole, the true conclusion of law and fact has been arrived at. For this purpose it will be convenient to follow the events in order of time. Starting with the telegram of the 1st of May, 11.29 a.m., there can be no doubt that when that was sent Messrs. Rose, Murison, & Thomson were agents for Messrs. Blackburn, Low, & Co. to effect the insurance proposed thereby, and that any knowledge by them of facts material to the risk would be equivalent to a knowledge by their principals, and would vitiate any insurance based upon such proposal. Up to this time, however, both principals and agents were ignorant of any such facts. Before any further step was taken Rose, Murison, & Co. became aware of the report brought by *The City of Rome*. They therefore determined to go no further with the matter in their own names; but, having received the intelligence in confidence, they did not communicate it to Messrs. Blackburn, Low, & Co. What they did was this. Having previously obtained the authority of Blackburn, Low, & Co. to go as far as twenty guineas, they telegraphed in Blackburn, Low, & Co.'s own name to the London brokers, who answered direct to Blackburn, Low, & Co. that there was no chance under twenty-five guineas; upon which Blackburn, Low, & Co. telegraphed back "Pay twenty-five guineas," and upon this the policy in question was effected by the London brokers through the agency of another firm of brokers.

Under these circumstances it is clear that up to the time when Messrs. Rose, Murison, & Co. received the last telegram addressed to themselves they were the agents for the plaintiffs to effect not merely a re-insurance, but the particular re-insurance which the plaintiffs had ordered—viz., upon the ship *State of Florida* for £1,500; and that any knowledge possessed by them which was material to the risk would be equivalent to a knowledge by the plaintiffs themselves. It seems to be equally clear that, the agents being incapacitated from continuing the negotiation, in the sense that no valid policy could be founded upon it, they could not put themselves in a better position by telegraphing in the name of their principals instead of their own name. Having so telegraphed, and the answer having been sent to the principals, what is the position of the latter? That they might have effected a valid policy by a fresh and independent negotiation carried on through another agent is established by the decision of the House of Lords in the case of *Blackburn, Low, & Co.* v. *Vigors*, and for the purposes of this case it may be further conceded that the principals might themselves have opened a new and independent negotiation with the brokers in London by giving a fresh order for the policy. This, however, was not done. Messrs. Blackburn, Low, & Co. merely telegraphed to Rose, Thomson, Young, & Co. — "*State Florida*, if you cannot do better, pay 25 guineas," and upon the basis of this telegram the negotiation continues. The offer is put forward at the increased premium; this is accepted, and the policy in question is signed.

Upon this state of facts the question arises, Was the original negotiation given up and a new and distinct negotiation entered upon, or was it a mere handing over by the agents to their principals of an existing negotiation, in order that the principals might take it up at the point where the agents left off and continue it until it resulted in a contract? This is practically the question which was left by Day, J., to the jury, and they have found that the latter is the true view of what occurred.

In considering their finding it is important to remember that the only instructions as to the name of the ship and the amount to be insured were those contained in the first telegram from the Glasgow agents to the London agents. Without these no proposal could have been forwarded. They are never mentioned again by the plaintiffs, and the effect is the same as if each telegram had reiterated all that had gone before. This also affords an answer to one of the arguments pressed on behalf of the plaintiffs. A merchant, it was said, who sends his agent into a market on Monday with a limited authority as to price, is not prohibited from going into the same market on Tuesday and bidding higher by reason of his agent having acquired some information, such as that the goods were stolen, which would prevent any bargain which he might make resulting in a valid contract. But the reason of this is that the principal in the supposed case only employed the agent *pro hac vice* on the Monday, and when he himself went into the market on Tuesday he commenced independent operations in no way based upon the earlier exertions of his agent. In the present case the name of the vessel, the amount to be insured, and the whole object of the bargaining were the same, and the only change was in the advanced premium; so that the plaintiffs not merely continued a negotiation begun by their agents, but they availed themselves of it by using and adopting what they had done up to a certain point. It is truly said, no doubt, that, when once the agents ceased to negotiate, their authority was at an end; but this leaves untouched the position that the negotiation was handed over to the principals to complete, and that the London brokers were entitled to treat the matter as one entire transaction. It was also urged that the negotiation was not vitiated by the fact that the principals made use of the information as to the name of the ship and the amount of the policy, as this was done merely by way of reference. Had there been no question of agency this would be true. If all that the plaintiffs had done had been to telegraph to the London agents, "Effect for me the same insurance that you have effected for A. B.," with whom the plaintiffs had had no dealings, the reference to A. B. would not vitiate the ultimate policy because A. B. had improperly withheld information which he ought to have communicated. The distinction, however, between this and adopting the previous acts of an agent and carrying out a contract in part based upon them is obvious.

While considering this part of the case with reference to the principles on which the law of concealment is founded, it is a legitimate consideration to look to what would be the probable effect of what passed upon the minds of the London agents as business men. Until

they received the telegram in the plaintiffs' name they must have supposed that they were dealing with Rose, Murison, & Co., and in considering whether they would accept the offer they would be entitled to assume that Rose, Murison, & Co., whose known means of information might be a material ingredient, had received no news of the ship which they ought to have communicated. As was said by Lord Watson in *Blackburn, Low, & Co.* v. *Vigors*, "When an agent to insure is brought into contact with an insurer, the latter transacts on the footing that the agent has disclosed every material circumstance within his personal knowledge, whether it be known to his principal or not." When the matter was taken up by the plaintiffs themselves, and the further negotiations were carried on in their own name, the right of the London agents, founded upon the negotiation as a whole, to act upon the assumption referred to does not seem to have been displaced.

Another argument much urged by the plaintiffs' counsel was rested on the assertion that all that passed before the first telegram by the plaintiffs amounted merely to offers and negotiation, and that, in considering the rights of the defendants, the only question that should have been submitted to the jury was, What ought the London brokers to have communicated to the defendants or to the intermediate broker by whom the policy was ultimately procured? The answer to this is that if the negotiation by the plaintiffs and the Glasgow brokers was one and the same, as the jury have found it to be, the argument fails, because in almost all cases where a policy has been held to be avoided by reason of concealment, the concealment occurs some time before the actual policy is signed. It is the negotiation that is tainted, and the contract is void because it is founded upon the negotiation, and through however many hands the offer of an insurance may pass, if there be a concealment by the assured or his agents the policy is avoided.

If this view which we have taken of the facts and of the law which arises out of them be the true view, this judgment in no way conflicts with the decision in *Blackburn, Low, & Co.* v. *Vigors* in the House of Lords. Although the opinion was expressed in that case that it was not the duty of the agents to communicate to their principals the information which they had received, we take that opinion as applying to the particular facts before the House, which showed that before the negotiation for the policy sued upon had commenced, all connection of the plaintiffs with their former brokers had ceased; and we cannot suppose it would be intended to apply to the facts proved in the present case, which showed that, so far from the connection between the principals and their brokers ceasing, the brokers used the name of the principals to continue the negotiations, and the principals adopted this act, and themselves continued and carried out what their brokers had commenced. It is not for us to enter upon the question whether Messrs. Rose, Murison, & Thomson acted contrary to the rules of morality in failing to communicate to Messrs. Blackburn, Low, & Co. the information which they had received. Whatever may have been their moral duty, the fact that the information was given in confidence could not affect or lessen the legal rights of the defendants, and could not justify Messrs. Rose, Murison, & Thomson in continuing the negotiation in the plaintiffs' name, and enabling the plaintiffs themselves to continue it in innocence of that information. To hold otherwise would be to afford a great temptation to all brokers who may be placed in the same or a similar position, and would cut down to an important extent the rule as to good faith which has hitherto been applied by our courts and by commercial usage to the contract of insurance. We think that the summing up and verdict were correct. Therefore the verdict and judgment for the defendant must stand, and the motion must be dismissed, with costs.

Motion dismissed.

Solicitors for the plaintiffs, *Hollams, Son, & Coward.*

Solicitors for the defendant, *Walton, Bull, & Johnson.*

Q. B. Div. (Cave and A. L. Smith, JJ.) April 23.

FULHAM UNION ASSESSMENT COMMITTEE v. WELLS AND OTHERS. (a.)

Metropolis—Valuation Acts—Provisional list—Special sessions—Appeal—Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 47.

No appeal lies to special sessions from the determination of an assessment committee on an objection to a provisional list made under section 47 of the Valuation (Metropolis) Act, 1869.

Case stated by special sessions.

A provisional list was made under section 47, sub-section (1), of the Valuation (Metropolis) Act, 1869, fixing the gross and rateable value of an advertising hoarding. The assessment committee heard and determined an objection to the provisional list with reference to this hoarding, and the respondents appealed therefrom to the special sessions. Objection was taken to such an appeal, but the special sessions heard the appeal, subject to this case stated upon this objection.

Poland (*A. Glen* with him), for the appellants.—An appeal does not lie to special sessions against a provisional list, but only against the original list under sections 18 and 19, extended by section 46, sub-section 3. Section 47 provides the mode of objection to the provisional list, which is not by way of appeal. The ratepayer should wait for the next revision of the valuation list and apply for repayment or allowance of the excess under sub-section 10 of section 47.

Winch, Q.C., for the respondents.—Section 47, sub-section 10, makes the provisional list part of the valuation list for all purposes, and therefore the provisions of section 19 giving an appeal apply.

CAVE, J.—I am of opinion that Mr. Poland's contention must succeed, on the ground that no appeal lies from the assessment committee to the special sessions. It is undoubted law that an appeal is the creature of statute, and must be expressly given, and cannot be given by inference. The Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), provides for making a valuation list, and section 18, and the following sections, contain provisions as to appeals to special sessions with relation to the list first made. Section 46 provides, however, for the revision of the valuation list, which is to be made yearly and quinquennially: yearly by a supplemental list, and quinquennially by a new list. Section 46, sub-section 3, applies to the cases of a supplemental list and of a new list the regulations and proceedings directed by the Act in the case of the valuation list first made. This is strong to show that sections 18, 19, and 20, in the first instance, would apply only to the valuation list made in the first year after the passing of the Act; but section 46, sub-section 3, applies these provisions to the supplemental and new valuation lists, and this clause clearly gives an appeal to special sessions against a supplemental list and a new list by reference to the provisions of section 19. The proviso to section 47 contains provisions by which every new valuation

(a.) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

matter of taxation is to be drawn in at shorter intervals than a year, so that the owners of buildings built between the times of making the valuation lists may be made to pay an apportioned part of the rates imposed in that interval.

The provisions of this section do not operate, as do those of section 46, sub-section 3, by reference, re-enacting other sections and applying them to new subject-matter, but section 47 is express in its terms, and gives power to go before the assessment committee and object to the provisional list, but it stops there, and contains nothing to enable the occupier to go beyond the assessment committee. It is contended for the respondents that sub-section 10 of section 47, by which the provisional list "shall be deemed to form part of the valuation list," means that for all purposes it shall be so deemed, but I cannot put such a wide interpretation upon the words of that sub-section. On comparing the words of section 46, sub-section 5, we find that it provides that the valuation list which is in force one year, together with, and as altered by, the supplemental list, "shall be the valuation list" for the next year, but in section 47, sub-section 10, the language is changed, and the expression used is "shall be deemed to form part of the valuation list." Wherever the Legislature uses the expression "shall be deemed" that is an indication that it is not intended that the subject-matter to which the expression is applied shall be for all purposes that which by the Act it is to be deemed to be, but only that it shall be so for such purposes as the Legislature has in view at the time. That is, in the present case, with reference to the poor rate in force and to be levied, as if the provisional list formed part of the valuation list.

If there could be any doubt as to this being the true construction, it would be made clear by the concluding part of section 47, sub-section 10. If it be asked whether, where the valuation is manifestly too high, there is not an appeal, the answer is that there is not unless the statute give one, and the concluding part of section 47, sub-section 10, shows that this is so, by providing that if, on the next revision of the valuation list, the revised list shows a value less than that in the provisional list, the amount of rate or tax overpaid shall be repaid or allowed.

This would be unnecessary if an appeal were given against the provisional list, and there is no such provision with regard to the supplemental list.

On both the grounds which I have stated I have come to the conclusion that the Legislature intended that from the provisional list there should be no appeal, but that the right to recover any excess should depend on the final valuation when the list is revised, and, therefore, that no appeal lay from the assessment committee to the special sessions.

A. L. Smith, J., concurred.

Judgment for the appellants.

Solicitors for the appellants, *Nye, Greenwood, & Moreton.*

Solicitors for the respondents, *Bolton & Mote.*

Q. B. Div. (Huddleston, B.) Feb. 10, 22.

Marquis of Abergavenny v. Bishop of Llandaff. (a.)

Ecclesiastical law — Advowson — Refusal of bishop to institute clerk — Discretion — Welsh diocese — Ignorance of Welsh language — 1 & 2 Vict. c. 106, s. 104.

The bishop has a right to refuse to institute a presentee who is not a fit clerk to a vacant benefice.

Where a clerk was presented to a vacant benefice within a Welsh diocese, though situate in England, who was ignorant of, and refused to be examined in, the Welsh language,

Held, that the presentee was not a fit clerk by reason of his ignorance of the Welsh language; that the bishop was the sole judge as to the linguistic requirements of the parish, and was not bound to hold any public or formal inquiry.

This was an action in the nature of a *quare impedit* tried by Huddleston, B. In October, 1886, the Marquis of Abergavenny presented the Rev. R. W. Gosse to the benefice of Goytre, in Monmouthshire, but which, although situate in England, is within the diocese of Llandaff.

The bishop of the diocese had refused to institute Mr. Gosse, on the ground of his inability to speak the Welsh language.

Section 104 of the statute 1 & 2 Vict. c. 106, provides that "Within the several dioceses of St. Asaph, Bangor, Llandaff, and St. David's it shall, and may, be lawful for the bishop, if he shall think fit, to refuse institution or licence to any spiritual person who, after due examination and inquiry, shall be found unable to preach, administer the Sacraments, perform other pastoral duties, and converse in the Welsh language: Provided always that any such spiritual person may, within one month after such refusal, appeal to the Archbishop of Canterbury, who shall either confirm such refusal or direct the bishop to grant institution or licence, as shall seem to the said archbishop just and proper. . . ."

Upon the bishop's refusal the patron brought the present action against him.

The facts, pleadings, gist of the argument, and of the authorities cited, are so fully dealt with in the judgment that it is unnecessary to set them out.

Sir Henry James, Q.C., Jeune, Q.C., and Spofforth, for the plaintiff.

Sir R. E. Webster, A.G., Sir Walter Phillimore, Q.C., B. F. Williams, Q.C., Arthur Lewis, and *W. B. Allen,* for the defendant.

Cur. adv. vult.

On the 22nd of February Huddleston, B., delivered the following written judgment:—

This was an action in the nature of a *quare impedit.* The statement of claim set out the plaintiff's title to the advowson of the church rectory and benefice of Goytre, in the county of Monmouth, in the diocese of Llandaff; that on the 16th of April, 1886, that benefice became vacant; that the plaintiff was entitled to present to the Lord Bishop of Llandaff a fit clerk for admission; and that he accordingly, on the 4th of October, 1886, presented the defendant the Rev. Robert Wilkes Gosse, a fit clerk, and requested the defendant to admit and institute him; and that the defendant, on the 12th of November, 1886, unjustly refused and still refuses to admit or institute the Rev. Robert Wilkes Gosse to the said church rectory and benefice. And the plaintiff claims a declaration that he is entitled to have the Rev. Robert Wilkes Gosse admitted, and a writ directing such admission, damages, costs of the action, and further relief. In the statement of defence the defendant says that he has not and does not claim to have anything in the said church rectory and benefice except the admission, institution, and induction of persons to the said church rectory and benefice; that the Rev. Robert Wilkes Gosse was not a fit clerk, wherefore the defendant thought fit to refuse institution; that the Rev. Robert Wilkes Gosse was so unfit by reason of the church rectory and benefice of Goytre being within the diocese of Llandaff; and that the Rev. Robert Wilkes Gosse was and is unable to preach, administer the Sacraments, and perform other pastoral duties, and converse in the

(a.) Reported by A. H. Tom, Esq., Barrister-at-Law.

Welsh language; and that the Rev. Robert Wilkes Gosse was, after examination and inquiry, found unable to preach, administer the Sacraments, and perform other pastoral duties, and converse in the Welsh language, whereupon the defendant thought fit to refuse institution to him. It alleged also that the defendant refused to admit or institute the Rev. Robert Wilkes Gosse unless and until he should have presented himself for examination in the Welsh language with a view to the defendant's ascertaining whether he should, on such examination, be found able to preach, &c., in the Welsh language, which the Rev. Robert Wilkes Gosse then neglected and declined to do, which is the alleged refusal in the statement of claim mentioned, and, save as aforesaid, the defendant did not refuse as in the statement of claim mentioned; that the defendant always has been and still is ready and willing to examine the Rev. Robert Wilkes Gosse, or to cause him to be duly examined, with the view aforesaid. And the defendant further says that since the action he offered to examine the Rev. Robert Wilkes Gosse, or cause him to be examined, which offer the Rev. Robert Wilkes Gosse refused to accept. The plaintiff, in his reply, admits that the rectory and benefice in question of Goytre are in the diocese of Llandaff, but that the same are in England; that after the presentation of the Rev. Robert Wilkes Gosse to the benefice, the defendant, without notice to the plaintiff or to the Rev. Robert Wilkes Gosse, issued a commission to certain persons to inquire into the necessity or otherwise of appointing as incumbent of the parish of Goytre a clergyman who should be conversant with the Welsh language; that on the 2nd of November, 1886, the commissioners met for the purposes of such inquiry; that the plaintiff and the Rev. Robert Wilkes Gosse were prepared to show that few if any people in Goytre were imperfectly or not at all instructed in the Welsh language, and that there was no ground for requiring a knowledge of Welsh in the incumbent for Goytre; and the solicitor for the plaintiff and the Rev. Robert Wilkes Gosse applied to the commissioners to be allowed to be present at the inquiry and to be heard on their behalf, but the commissioners refused to hear the solicitor, or allow him or any person other than the witness under examination and a newspaper reporter to be present at the inquiry. The commissioners further refused to receive the evidence of any witness not then habitually resident in Goytre, and thus excluded several important witnesses whom the plaintiff and the Rev. Robert Wilkes Gosse desired should be examined. That the commissioners on the 11th of November sent to the defendant a summary of the evidence taken by them and reported; that the defendant without any further or other inquiry, and without notice to the Rev. Robert Wilkes Gosse, or the plaintiff, on the 12th of November refused to institute the Rev. Robert Wilkes Gosse to the benefice of Goytre unless and until he passed an examination in the Welsh language. The plaintiff admits that the Rev. Robert Wilkes Gosse refused to be examined in the Welsh language, submits he had a right so to do, and further admits that the Rev. Robert Wilkes Gosse is ignorant of the Welsh language. The plaintiff also submits that the defendant was, before refusing to institute the Rev. Robert Wilkes Gosse, bound himself duly to inquire whether the circumstances were such as to justify a refusal to institute him on the ground of ignorance of the Welsh language; that the defendant was not entitled to delegate such duty to any other persons; that the inquiry of the commissioners was wholly void; that the refusal of the said Rev. Robert Wilkes Gosse was without legal cause; and that, save as aforesaid, the plaintiff denies the allegations in the defence and each and every of them. The defendant rejoins, alleging that though the church rectory and benefice of Goytre are in England they were in the diocese of Llandaff; he admits that, without notice to the plaintiff or to the Rev. Robert Wilkes Gosse, he issued what was referred to as a commission, and that on the 2nd of November the persons acting thereunder met for the purpose of the inquiry; that the solicitor for the plaintiff and the Rev. Robert Wilkes Gosse applied to the said persons to be allowed to be present at the inquiry; that those persons refused to hear the solicitor, or allow him or any other person other than the witness under examination and a newspaper reporter to be present; that the so-called commission was entirely informal, and was instituted wholly for the purpose of informing the mind of the defendant, and was not properly to be styled a commission, and the defendant never in fact issued any commission. The defendant does not admit that the plaintiff or the Rev. Robert Wilkes Gosse, or either of them, were prepared to show the matters which it is alleged in the third paragraph of the reply that they were prepared to show, or any of such matters. That the defendant, though not bound in law so to do, before refusing to institute the Rev. Robert Wilkes Gosse, duly inquired whether and was satified that the circumstances were such as to necessitate a refusal to institute him on the ground of ignorance of the Welsh language, and, in fact, many of the inhabitants of Goytre spoke Welsh and understood that language better than English, and divers of them were imperfectly or not at all instructed in the English language. He also alleges that after the report of the commissioners, and after the commencement of the action, on the 19th of March, the defendant himself personally held a public inquiry in the parish into the linguistic condition of the parish with a view to satisfy himself, by personal inquiry in the parish, whether it was such as to require that its incumbent should possess a knowledge of the Welsh language. The defendant, after carefully holding the said inquiry and hearing the evidence, was of opinion that the condition of the parish was such as to require that its incumbent should possess a knowledge of the Welsh language, to enable him to preach, administer the Sacraments, perform other pastoral duties, and converse in the Welsh language; that the said last-mentioned inquiry was entirely free from the supposed objections urged against the original inquiry, and the defendant, after holding the same, offered to examine the Rev. Robert Wilkes Gosse, or cause him to be examined, in the Welsh language, which offer the Rev. Robert Wilkes Gosse refused to accept, whereupon the defendant again refused to institute him.

The defendant alleges that, by the true construction of the 1 & 2 Vict. c. 106, s. 104, the words "after due examination and inquiry" therein contained refer to an examination or inquiry into the linguistic powers of the spiritual person in question, and not into the linguistic condition or requirements of the parish, and consequently the defendant was entitled, if he should think fit, to refuse institution to any benefice within the diocese of Llandaff to any spiritual person found unable to preach, administer the Sacraments, perform other pastoral duties, and converse in the Welsh language, without holding any formal or other inquiry into the linguistic condition of the parish, or as to whether the circumstances were such as to justify a refusal to institute on the ground of ignorance of the Welsh language, and that in any case the defendant was the sole judge, in his uncontrolled discretion, as to the linguistic requirements of the parish, and was not bound to hold either a public or formal inquiry.

To this the plaintiff surrejoins that the inquiry by the bishop himself on the 19th of March was invalid, as it was held after the refusal of the defendant to institute the Rev. Robert Wilkes Gosse; that neither the said Rev. Robert Wilkes Gosse nor the plaintiff was required to attend; and that the time within which the defendant was required by law to accept or refuse the said Rev. Robert Wilkes Gosse had elapsed long before the inquiry. The

points on the pleadings would seem, therefore, to raise the issues as to whether the inquiry before what we called the commissioners and the subsequent inquiry by the bishop himself were invalid—while it was admitted that the Rev. Robert Wilkes Gosse was not a person conversant with the Welsh language and refused to be examined in that language—the defendant relying upon the construction which he put upon the statute referred to. The facts proved before me were these. On the 16th of April, 1886, the previous rector of Goytre died, Goytre being in Monmouthshire, but within the diocese of Llandaff. On the 16th of August the bishop, in answer to a letter of the Rev. Robert Wilkes Gosse, no doubt informing him of the intention of the plaintiff to appoint him to the living, wrote to Mr. Gosse, saying, "I think it right to inform you that representations have been made to me that a knowledge of Welsh is required by the incumbent of Goytre. I am not at present prepared to say that such a knowledge is requisite, but the matter has been so strongly urged that I think it will be necessary for me to issue a commission to inquire into the lingual condition of the parish before I can undertake to institute a clergyman ignorant of Welsh. In saying this I am assuming that you are unacquainted with the Welsh language. In reply to your inquiry with regard to a house, I desire to say that if there is no suitable house in the parish I shall be prepared to give you a licence of non-residence for the present, provided you are able to procure a house sufficiently near to the church and parish to enable you to discharge your parochial duties efficiently." On the 4th of October the Rev. Robert Wilkes Gosse was presented by the plaintiff to the benefice of Goytre, and on the 9th of October he wrote to the bishop, saying that he had inquired in different parts of the parish as to whether there were Welsh-speaking people resident there, and that he had been informed that "all were able to speak English well, and that there were only two or three families on the borders of the parish, near Llanover, who were acquainted with Welsh." On the 10th of October the bishop replied that, "In consequence of representations made to me it will be my duty to make formal inquiry into the lingual condition of the parish of Goytre, but should it turn out that the state of things is as represented in your letter, I shall have much pleasure in instituting you to the benefice." On the 15th of October the bishop wrote to Mr. Lewis, who had been high sheriff for the county, saying that he had resolved to appoint a commission as to whether the parish required a pastor who should possess a knowledge of Welsh, and asking Mr. Lewis to act as a commissioner for that purpose in conjunction with the Archdeacon of Monmouth and Canon Evans, the vicar of Rhymney; and it would seem that those two clergymen were also requested by the bishop to undertake that inquiry. No notice of the appointment was given either to the marquis or to Mr. Gosse; but the rumour of the intended appointment seems to have reached Messrs. Gabb & Walford, the plaintiff's solicitors, and on the 23rd of October they wrote, asking when and where the commission would sit, as both the patron and Mr. Gosse should, of course, be represented. The bishop's secretary, on the 25th of October, referred Messrs. Gabb & Walford to the Archdeacon of Monmouth, as chairman of the commission, and on the 29th of October, Messrs. Gabb & Walford applied to the archdeacon, as solicitors for the patron, the Marquis of Abergavenny, and as representing the Rev. Robert Wilkes Gosse, proposing, with his concurrence, being present at the inquiry to conduct the case in support of the view of the patron that there was no necessity to appoint as rector a clergyman conversant with the Welsh language, adding "We have before us a copy of the notice affixed to the church door, and observe that you propose to confine the evidence to that which can be given by persons 'habitually' resident in the parish. May we ask you whether the evidence of any persons who have formerly been resident but who have lately removed would be accepted? We make this inquiry in order to avoid the unpleasantness and inconvenience of possibly getting someone to attend whose evidence, after all, might not be accepted." In answer to that, on the 30th of October, the archdeacon replies that "It will be undesirable to depart from the strict interpretation of the condition affecting the evidence to be offered and laid down in the notice of commission—that the decision of the court of commissioners will probably, if not certainly, be against admitting or hearing counsel on either side." On the 2nd of November the archdeacon, Canon Evans, and Mr. Lewis sat. No summons or notice was given to either the plaintiff or the Rev. Robert Wilkes Gosse. The rumour of the meeting, however, reached Messrs. Gabb & Walford. Mr. Walford attended on behalf of the plaintiff and the Rev. Robert Wilkes Gosse, and applied to be present and to be heard, but was refused by the archdeacon, who informed him that no person would be allowed to be present except those who were about to give evidence, and one newspaper reporter. Mr. Walford had brought with him several witnesses who were conversant with the parish of Goytre, some residents of the parish, and others, though not resident, persons who had served offices in the parish and were well conversant with its requirements. He applied for permission to call those witnesses, but was refused. The Commissioners made their report, and on the 12th of November the bishop, after having received the report, sent this extract from it to the Rev. Robert Wilkes Gosse:—"We are of opinion that a knowledge of Welsh will be not only important but necessary if the incumbent is to keep touch with his parishioners as a whole, and we cannot consistently with duty recommend your lordship to appoint as incumbent a clergyman whose ignorance of Welsh would be an absolute bar to his influence with fifty or sixty of his parishioners, and might easily interfere with his highest influence with a much larger number." The bishop added, "Under these circumstances I regret to say that it will be impossible for me to institute you to the above benefice until you have passed an examination in Welsh by my Welsh examining chaplain." On November 13 the Rev. Robert Wilkes Gosse wrote to the bishop:—"In reply to your lordship's letter, received this morning, I beg to say that, as the appointment to Goytre was entirely unsought by me, the matter rests between your lordship and the Marquis of Abergavenny, and I know he is not satisfied with the way in which the commission was conducted. I have forwarded your lordship's letter to the marquis and a copy of it to his solicitors. I regret for many reasons the decision of the commissioners." On November 19 the bishop wrote to the Marquis of Abergavenny explaining that in consequence of representations made to him he had appointed the commission; that he regretted that the commissioners were unanimously of opinion that a knowledge of Welsh was absolutely necessary in order to enable the incumbent of the parish to minister duly to a considerable section of the parishioners; and that "under these circumstances I have been reluctantly compelled to decline to institute the Rev. Robert Wilkes Gosse. As it is very desirable that the parish should be provided with an incumbent as soon as possible, I trust your lordship will kindly present as soon as may be convenient another clergyman who is conversant with the Welsh language." On the 23rd the marquis replies, alleging that the bishop's refusal to institute Mr. Gosse had been a great surprise to him. "However, and if need be, the presentation of another clergyman in the place of Mr. Gosse will receive my earliest attention," and asking for a copy of the commissioners' report. On December 13 the bishop sends to the Marquis of

Abergavenny a copy of the report, "Being anxious that you, as patron, should be made acquainted with the grounds upon which I have arrived at the decision communicated in my last letter."

In February the Rev. Robert Wilkes Gosse appealed to the Archbishop of Canterbury, and, the appeal being heard on the 17th, the archbishop, assisted by the Vicar-General, Sir James Parker Deane, declared that he was not in a position to decide upon the appeal, inasmuch as the above-named commissioners refused to admit either the appellant or the patron of the benefice to their inquiry. It should be noticed that the appeal to the archbishop was solely on the ground that the bishop had refused to institute the Rev. Robert Wilkes Gosse as he was unable to preach, administer the Sacraments, and perform other pastoral duties, and converse in the Welsh language. On March 9 the bishop wrote to the Rev. Robert Wilkes Gosse:—"Referring to the correspondence that has passed between us relative to your institution to the living of Goytre, I desire to remind you that you have not yet informed me whether or not it is your intention to undergo an examination in Welsh by my Welsh examining chaplain. I shall therefore esteem it a favour if you will let me know at your earliest convenience what your intentions are, in order that I may fix a day and hour which may be convenient for holding such examination. I hope I need not add that if you are able to satisfy me that you are possessed of a sufficient knowledge of Welsh to enable you to discharge adequately your ministerial duties in the above parish it will be a pleasure to me to institute you to the benefice." To that letter Mr. Gosse sent no reply. On March 19 the bishop himself held a personal inquiry at Goytre, as stated in the pleadings. It is obvious, therefore, upon the pleadings and upon the facts, that the question which I have to decide is whether, it being taken as an admitted fact that the Rev. Robert Wilkes Gosse could not speak the Welsh language, and was not in a position to submit to an examination in that language, the proceedings were such as to justify the bishop in refusing to institute him. The point set up in the rejoinder that the time within which the defendant was required by law to accept him had elapsed was not put forward or relied upon. In the time of Queen Elizabeth it was decided, in the case of *Albany* v. *Bishop of St. Asaph*, Croke Eliz. 119, that it was a good ground of refusal by a bishop to institute a clergyman if he could not speak Welsh in a parish where the parishioners did not understand English, for he cannot instruct his flock according to his duty and charge. It was also decided in that case that, the patron having six months to present, the notice should be given within that time. The point on the notice is more fully reported in Leonard's Reports, p. 31. I mention this, as Sir Henry James, in his argument, relied upon the question of notice, but that point does not seem to me to be important in the decision at which I have arrived. The defendant there pleaded that the parishioners were *homines Wallici, Wallicam loquentes linguam et non aliam*, and that the presentee could not speak or understand the Welsh language.

It was argued "that the defect of the Welsh language assigned by the defendant in the presence of the plaintiff is not a sufficient cause of refusal; for notwithstanding that it be convenient that such a presentee have the knowledge of such language, yet, by the law of the land, ignorance of such language, where the party hath more excellent languages, is not any disability; and therefore we see that many bishops in Wales who have the principal cure of souls are Englishmen, and the Welsh language may easily be learned in a short time by converse with Welshmen; and the statute of 1 Elizabeth, which establisheth the Book of Common Prayer, ordaineth that the said Book of Common Prayer shall be put in use in all the parish churches in England and Wales without any provision there for the translation of the said book into the Welsh language. But afterwards by a private Act it was done, by which it is enacted that the Bishop of Wales should procure the Epistles and Gospels to be translated and read in the Welsh language, which matter our presentee might do by a curate well enough. . . . Gawdy, Serjeant, contrary, confessed that at common law the defects aforesaid were not any cause of refusal; but now by reason of a private Act, made 1 Elizabeth, intituled an Act made for the translating of the Bible and of the Divine Service into the Welsh tongue, the same defect is become a good cause of refusal; in which Act the mischief is recited—viz., That the inhabitants of Wales did not understand the language of England, therefore it was enacted that the bishops of Wales should procure so many of the Bibles and Books of Common Prayer to be printed in the Welsh language as there are parishes and cathedral churches in Wales, and so upon this statute this imperfection is become a good cause of refusal. Lord Anderson held that upon the said statute the want of the Welsh language in the presentee is now become a good cause of refusal." He then referred to the matter of the pleading of the private Act, but it was ultimately decided by the whole court that the ground of refusal was a good one.

That case went off upon the question of notice; but it may be, if it had been submitted to a jury, as it should have been (Coke's II. Inst., 631), that two questions might have arisen for their decision, the one as to the linguistic state of the parish requiring a Welsh-speaking parson, and the other as to the knowledge of the presentee of that language, and it may be that the findings upon both those points would be necessary to support the refusal of the bishop, unless the statute I am about to refer to make a difference. It has been held ever since that case that the refusal to induct a person not knowing Welsh to a parish where the Welsh language was necessary has been a good ground of refusal. By 6 & 7 Will. 4, c. 77, commissioners were appointed who, by section 10, were to lay schemes before the council for carrying out certain recommendations, and by section 11 the commissioners were to prepare and lay before his Majesty such scheme as should appear to the said commissioners best adapted for preventing the appointment of any clergyman not fully conversant with the Welsh language to any benefice with cure of souls in Wales in any parish the majority of the inhabitants of which do not understand the English language. This clearly shows the intention of the Legislature in accordance with the decision of *Albany* v. *Bishop of St. Asaph*. The 1 & 2 Vict. c. 106 is the statute upon which the bishop relies. By the 103rd section of that Act it is recited that "Whereas in many benefices in Wales and in the counties adjacent thereto many of the inhabitants are imperfectly or not at all instructed in the English language, and it is expedient that persons to be hereafter instituted or licensed to such benefices should possess an adequate knowledge of the Welsh language." It then recites the statute of the 6 & 7 Will. 4, repeals a portion of that statute, and enacts, by the 104th section, "That within the several dioceses of St. Asaph, Bangor, Llandaff, and St. David's it shall and may be lawful for the bishop, if he shall think fit, to refuse institution or licence to any spiritual person who, after due examination and inquiry, shall be found unable to preach, administer the Sacraments, perform other pastoral duties, or converse in the Welsh language," with a power of appeal to the Archbishop of Canterbury, and "Providing, also, that nothing thereinbefore contained shall be construed to affect or abridge any rights which the inhabitants of any benefice within the said four Welsh dioceses may at present by law possess of entering a *caveat* against or objecting in due course of law to the institution, collation, or licence of any spiritual person, or of proceeding to procure the deprivation of any such person."

I have to consider upon this statute what is the

meaning of the words "if he shall think fit"; whether as contended by the plaintiff, they mean that the bishop must institute something in the nature of a judicial inquiry, or whether, as the defendant contends, they mean it to be a matter entirely in his own discretion. If the former, it is said that natural justice requires that he should be heard, or should have an opportunity of presenting his view to the persons deciding such natural justice as is described in an old law report as having its origin when Adam was not turned out of the Garden of Eden until he had been called upon to show cause and been heard, and the cases of *Capel* v. *Child*, 2 Crompton & Jervis, 558; *Ex parte Ramshay*, 21 L. J. N. S. Q. B. 228, were quoted, to which may be added the cases of *Reg.* v. *Smith*, 5 Q. B. 614; and *Rex* v. *Gaskin*, 8 T. R. 209. In the first of these cases the question involved a judicial inquiry into the discharge of the ecclesiastical duties of the plaintiff as vicar of the parish, and in the judgments the decision went on the ground that this was a judicial proceeding. So in the case of *Ex parte Ramshay*, where the Chancellor of the Duchy had removed a county court judge on the ground of misconduct, where, again, there was an inquiry in the nature of a judicial proceeding; and so in the case of *Reg.* v. *Smith*. If the plaintiff is right, these cases would support his contention; and the objection to the first commission—that neither the plaintiff nor the presentee were summoned or allowed to be heard—would be a good objection. And the same argument would apply with reference to the inquiry held by the bishop himself on the same grounds, although a more fatal objection to that would be, in this suit, that it was after action brought. But I read the section as giving an absolute discretion to the bishop, which he may exercise without any formal inquiry of a judicial character. Four dioceses are mentioned in the section in which this discretion is to be exercised and to which it is to be confined.

I think the Legislature considered that the bishop would or ought to know the wants or requirements of the different parishes within his diocese, or that he could readily obtain such information as would justify him in exercising his discretion: *Reg.* v. *Governors of Darlington Free Grammar School*, 6 Q. B. 682; *Doe d. Childe and others, Trustees of the Ludlow Charities* v. *Willis*, 5 Ex. 894; *Hayman* v. *Governors of Rugby School*, 22 W. R. 587, L. R. 18 Eq. 28. In the case of *Julius* v. *Bishop of Oxford*, 28 W. R. 726, 5 App. Cas. 214, the question was raised under the 3rd section of the Church Discipline Act, which provided "That in any case of every clerk in holy orders who may be charged with any offence against the law ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against the said laws, it shall be lawful for the bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or, if he shall think fit, of his own mere motion, to issue a commission under his hand and seal to certain persons for the purpose of making inquiry as to the grounds of such charge or report"; and it was held there that that section gave the bishop complete discretion to issue, or decline to issue, such commission; and Lord Cairns, at the end of his judgment, referring to these words, says:—"I ought to mention an argument which was much dwelt upon before your lordships and in the courts below—viz., the argument that the words 'if he shall think fit,' in the 3rd section, in the alternative power to the bishop to proceed of his own mere motion, rather imply that, on the application of a third party, he is to proceed, whether he thinks fit or not. I do not think that the words 'if he shall think fit' have any such effect. They appear to me to be, where they occur, mere surplusage, as, indeed, is proved by the circumstance that if they were altogether omitted that clause of the section would mean just exactly what it means with those words inserted. But the words, in fact, appear to me to be introduced merely to mark more clearly that an alternative power is conferred upon the bishop, and that he is left free to proceed without any one to put him in motion, if he chooses to do so." And I think that this was the intention of the Legislature in the present case. The 104th section goes on to show that there must be due examination and inquiry upon the question of the knowledge by the presentee of the Welsh language; and, looking at the allocation of the words, it seems to me that the question of the necessity of the parish for a Welsh-speaking parson is a matter entirely in the discretion of the bishop, but that the linguistic (to use the phrase in the pleadings) knowledge of the parson must be the subject of due examination and inquiry; and that the only appeal given to the archbishop is as to the knowledge by the parson of Welsh, and that no appeal is given with reference to the requirements of the parish. It is remarkable to see that the former ground is the only one taken in the proceedings of appeal before the archbishop. The appointment by the bishop of the commissioners, so-called, may be (as it was) an inquiry to enable him to exercise his own discretion, and not by any means in the nature of a delegation of the authority vested in him, or a judicial inquiry. He might have got his information from any source which he thought reliable, and the fact of having selected three gentlemen whose position could leave no doubt as to the value and integrity of the information they could afford him was, perhaps, more satisfactory to his mind than any other inquiry he might choose to make. With reference to the question as to whether he made due examination and inquiry as to the knowledge of Welsh, it would seem that the allegation to that effect which was in the statement of defence was not substantially denied in the rejoinder; but it is clear beyond all doubt, upon the evidence and upon inquiry, and Mr. Gosse himself admits and confesses on the pleadings, that he is ignorant of the Welsh language and could not submit to the examination which the bishop required him to do in his letter of the 12th of November, and has refused to be so examined. I have stated the pleadings and facts at some length because I think it right that every circumstance connected with the course which the bishop has felt it to be his duty to take should be apparent on the face of my judgment. The bishop had a right to refuse to institute a presentee who was not a fit clerk. The Rev. R. W. Gosse was not a fit clerk, in consequence of his want of knowledge of Welsh, for the parish of Goytre, which the bishop, in his discretion, found to be a parish requiring a Welsh-speaking parson. He has, therefore, established the defence set up in the pleadings. I find my verdict for the defendant, and give judgment accordingly, with costs.

Judgment for defendant.

Solicitors for the plaintiff, *Gabb & Walford.*

Solicitors for the defendant, *Torr, Janeways, & Co.*, for *Griffiths*, Cardiff.

IN BANKRUPTCY.

Q. B. Div. (Cave, J.) July 2.

Ex parte JAYNES.
In re DOWSON. (*a.*)

Bankruptcy—Costs—Review of taxation—Bankruptcy Rules, 1886, *r.* 112 (2).

Rule 112 *of the Bankruptcy Rules*, 1886, *applies to costs which, by the provisions of the Act, are payable out of the estate, and the rule does not apply to costs which are in the discretion of the court, and which, in consequence of the court exercising its discretion in one particular manner, may come to be paid out of the estate.*

Motion to review taxation of costs.

On the 8th of December, 1887, an appeal was brought by the applicant to the Divisional Court in Bankruptcy from an order of the county court at Northallerton directing him to repay to the official receiver, as trustee, the sum of £21 and costs alleged to have been received as a fraudulent preference.

The Divisional Court allowed the appeal, and ordered that the appellant be repaid the £21, with costs here and below; and further ordered that the official receiver, as trustee, be at liberty to take the costs out of the estate.

It was now contended by the official receiver that the costs should be taxed on the lower scale under rule 112 (2) of the Bankruptcy Rules, 1886, the bankruptcy in question being a small bankruptcy.

Ringwood, for the applicant.—Rule 112 (2) says that where the estimated assets of the debtor do not exceed the sum of three hundred pounds, "a lower scale of solicitor's costs shall be allowed in all proceedings under the Act in which costs are payable out of the estate—namely, three-fifths of the charges ordinarily allowed, disbursements being added; and if in error any charges have been allowed or paid on the higher scale, and the gross proceeds of the assets shall be ascertained not to exceed three hundred pounds, the excess shall be disallowed, and, if paid, shall be repaid to the trustee." But the scale applies to the costs of the solicitor to the trustee and the solicitor to the debtor, and it cannot apply to costs to be paid by the trustee to third parties. It was not intended to apply to cases where the trustee, as an ordinary litigant, takes proceedings against some outside person.

He referred to *Ex parte Angerstein, In re Angerstein*, 22 W. R. 581, L. R. 9 Ch. App. 479.

Muir Mackenzie, for the official receiver.

CAVE, J.—I think the master has not put the right construction on rule 112, and that rule 112 was intended to apply to costs which, by the provisions of the Act, are payable out of the estate. There are plenty of cases of that kind of which numerous examples are to be found in the scale of costs itself, and whenever that is so undoubtedly there the costs which, by the Act, are to be paid out of the estate, are to be paid on the lower scale. But I do not think the rule was ever intended to apply to costs which are in the discretion of the court, and which, in consequence of the court exercising its discretion in one particular way, may come to be paid out of the estate. It would involve, as it seems to me, a monstrous piece of injustice that the trustee might initiate legal proceedings against the third party in all these cases under section 121, because it must not only apply to cases where the official receiver is trustee, but where the trustee is appointed by the creditors in place of the official receiver, and may, therefore, commence proceedings if this contention is right, with a comfortable feeling that if he wins he would get full costs, whilst, if he lost, he would only have to pay three-fifths. I cannot conceive that to be the meaning of the Act. There is another, which is a more simple and natural meaning to be attributed to it, and that is the meaning which I think it must bear. The case must go back to the master to review his taxation with my direction that, under the circumstances of this case, he is to allow the appellant his full costs.

Solicitor for the applicant, *H. B. Roberts.*

Solicitor for the official receiver, *The Solicitor to the Board of Trade.*

(*a.*) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

Q. B. Div. (Cave, J.) April 25.

Ex parte ROONEY.
In re TALLERMAN. (*a.*)

Bankruptcy—Proof—Application to reduce or expunge—Application in name of creditor for benefit of bankrupt—Abuse of process—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *schedule* 2, *r.* 25.

At the hearing of an application by one creditor in the bankruptcy to reduce or expunge the proof of another creditor, the preliminary objection was taken that such application, although made in the name of the creditor, was in reality for the benefit and on behalf of the bankrupt.

Held, that the application must be dismissed.

Application under rule 25 of schedule 2 to the Bankruptcy Act, 1883, by one creditor in the bankruptcy to reduce or expunge the proof of another creditor.

The preliminary objection was taken, however, that the application, although made in the name of the creditor, was really for the benefit and on behalf of the bankrupt, who could not make it.

F. C. Willis, in support.—The sole object of the creditor making this application is because the bankrupt could not do so. It is for his benefit, in order that he may make a fresh application for his discharge. The court will not allow a creditor to be put up for a debtor in this way.

Mirams, for the applicant.—Whatever the cause of the motion by the applicant may be he is entitled to make it. Even if his desire was to benefit the bankrupt it does not affect the question.

CAVE, J.—I think that the preliminary objection must prevail. Undoubtedly it is not permissible to attempt to use the process of the court to do indirectly that which the process of the court will not allow to be done directly. So long as a creditor is coming forward *bonâ fide* to challenge the decision of a trustee he may do so, but in a case of this kind, where there is no expectation that the dividend would be increased by excluding the creditor, some other reason must be looked for. Now the solicitor for the applicant admits that the object is to benefit the bankrupt—to get the debts reduced in order that he may make a fresh application for discharge. The bankrupt could not make this application, and the creditor does it for him. A creditor may do so *bonâ fide* for his own purposes, but he may not do so for such a purpose as is attempted here.

Application dismissed.

Solicitor for the applicant, *W. J. Ball.*

Solicitor for the creditor, *R. Furber.*

(*a.*) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

House of Lords.

From C. A. (England). Feb. 27, 28.

Seaton v. Seaton. (a.)

Infant—Ward of court—Married woman—Post-nuptial settlement—Reversionary interest in personal estate—Infants' Settlement Act, 1855 (18 & 19 *Vict. c.* 43).

An infant ward of court, having married without the sanction of the court, afterwards executed a post-nuptial settlement with the approval of the Vice-Chancellor, whereby she settled a reversionary interest in personalty, to which she was entitled under a will made in 1838, *and to which therefore the Act* 20 & 21 *Vict. c.* 57 *did not apply, upon trusts for herself for life, with remainder to her children. A dissolution of the marriage was decreed on the wife's petition, but during coverture she had recognised the settlement in various ways. The reversionary interest fell into possession after the dissolution of the marriage.*

Held, that neither the sanction of the court nor the Infants' Settlement Act, 1855, *could make the post-nuptial settlement of the wife's reversionary interest in personalty binding upon her; that no acts of acquiescence during coverture—and, after the dissolution of the marriage, nothing except the actual disposition by her of the property to the trustees of the settlement—could have that effect, and therefore that she was entitled to a transfer of the property to herself.*

Decision of the Court of Appeal (*reported* 35 *W. R.* 438, 35 *Ch. D.* 21) *affirmed.*

This was an appeal from a decision of the Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.), reported as *Buckmaster* v. *Buckmaster*, 35 W. R. 438, 35 Ch. D. 21, reversing a decision of Bacon, V.C., reported 35 W. R. 25, 33 Ch. D. 482.

The facts and arguments in the case are fully set out in the judgment delivered by Lord Herschell.

Feb. 27, 28.—*A. G. Marten, Q.C.*, and *Wilkinson*, for the appellants.—The settlement was made with the approval of the court, and cannot be set aside: *Earl of Buckinghamshire* v. *Drury*, 3 Bro. P. C. 492; *Harvey* v. *Ashley*, 3 Atk. 607; *In re Murray*, 3 D. & War. 83; *Field* v. *Moore*, 4 W. R. 187, 7 De G. M. & G. 691; *Barrow* v. *Barrow*, 6 W. R. 714, 4 K. & J. 409. The settlement is binding under 18 & 19 Vict. c. 43: *Powell* v. *Oakley*, 34 Beav. 575, 13 W. R. Ch. Dig. 33; *In re Sampson and Wall*, 32 W. R. 617, 25 Ch. D. 482; *In re Phillips*, 35 W. R. 284, 34 Ch. D. 467. The wife is estopped from disputing the settlement, as she has acknowledged it in various ways: *Wigney* v. *Wigney*, 30 W. R. 722, 7 P. D. 177; *Milner* v. *Harewood*, 18 Ves. 259; *Merryweather* v. *Jones*, 12 W. R. 524, 4 Giff. 509; *Ashton* v. *McDougall*, 5 Beav. 56; *Davies* v. *Davies*, 18 W. R. 634, L. R. 9 Eq. 468; *White* v. *Cox*, 2 Ch. D. 387, 24 W. R. Dig. 250; *Wilder* v. *Piggott*, 31 W. R. 377, 22 Ch. D. 263; *Mills* v. *Fox*, *ante*, p. 219, 37 Ch. D. 153.

Fischer, Q.C., and *B. B. Rogers*, for the respondent, were not called upon.

Feb. 28.—Lord Herschell.—This appeal arises upon a petition by Louisa Christian Seaton, praying for payment to her of a sum of about £20,000 Consols, being her share of the residuary estate of her father, William Buckmaster, under his will, made in the year 1838. Down to the month of February, 1886, she was entitled to this share of her father's residuary estate in reversion only, expectant upon the death of her mother.

On the 28th of April, 1862, the petitioner, being then eighteen years of age, married. She was a ward of court, and a suit for the administration of her father's estate was pending. She married without the sanction of the court, and, as it appears, without the knowledge of her mother. On the 15th of May, 1862, very shortly after the marriage, an order was made by the Court of Chancery for an inquiry whether a valid marriage had been had between the ward, Louisa Christian, and Charles Seaton, and, if so, of what the infant's fortune consisted, and what would be a proper settlement to be made of it. On the 27th of June in the following year the chief clerk made his certificate, finding that a valid marriage had been solemnized between Louisa Christian and Charles Seaton, and finding what property she was entitled to, and the terms of the settlement which it was considered would be proper. On the 9th of July, 1863, a marriage settlement was executed by Charles and Louisa Christian Seaton. It is not necessary that I should detain your lordships by a statement of the provisions of that deed of settlement; it was in a form which is very common in the case of settlements made upon marriage. It contained (and I think this is the only matter to which I need allude) a power of appointment over the settled property to be exercised jointly by the husband and wife during their lives, and on the decease of either of them by the survivor. It was a settlement of the entire interest which the wife possessed under the will of her father and under the will of her brother, who had died some years previously.

Upon the death of the tenant for life, in February, 1886, this petition was presented by Mrs. Seaton, praying for the payment to her of her share of the residuary estate. She was at that time divorced from her husband. I shall have occasion hereafter to allude to the divorce proceedings, but for the present it will be sufficient to state that she was in the same position as if she had been a widow as regarded her right to the fund of which she claimed payment.

The only question is whether Louisa Christian Seaton is deprived of the right which she would otherwise possess to the payment out to her of this fund now in court by reason of the settlement to which I have alluded, which was executed in July, 1863. Unless that settlement has effected a valid disposition of the property which came into possession in February, 1886, so as to exclude her present right to claim it, there can be no question as to the validity of her claim. It cannot be doubted, I think, that down to the time of the Act known as Sir Richard Malins' Act (20 & 21 Vict. c. 57), passed in the year 1857, a married woman could not make a valid disposition of a reversionary interest, and that since that Act she can only make a valid disposition of it with the formalities and in the manner provided by the Act.

I shall first of all consider the question raised with regard to the validity of the settlement, quite apart from the circumstances under which it was executed and the interposition of the Court of Chancery with regard to it, leaving those questions to be dealt with subsequently.

It has been argued, but somewhat faintly, that even prior to 1855 it was competent for an infant to execute a valid settlement which should dispose effectually of his or her property. For the purpose of establishing that proposition the case of *Earl of Buckinghamshire* v. *Drury* was relied upon. That case has given rise to a great deal of criticism since the time when the decision in it was pronounced, and much disapproval has been expressed of it. I do not think it necessary to say much with regard to it for this reason—that case decides this, and this alone, that it was competent for an infant, by means of a marriage settlement, to bar her right to obtain, by virtue of the marriage, an interest in her husband's property; and in the opinion expressed by

(a.) Reported by C. G. Napier Trollope, Esq., Barrister-at-Law.

Lord Mansfield he distinctly says:—"I approve the distinction taken by Wilmot, J., between infants contracting for conveying away something of their own, and binding themselves of a right which is a third person's." It is quite unnecessary to inquire whether that distinction is one which can be supported by reasoning or not. It is sufficient to say that, whatever be the validity of the decision in that case, it cannot be relied upon as an authority beyond this, that in certain cases an infant may deprive herself of rights which she would otherwise have possessed in the property of her husband.

I entertain no doubt that it was well settled prior to 1855 that an infant could not, by a marriage settlement, dispose effectually of his or her property. Accordingly the Infants' Settlement Act of 1855 (18 & 19 Vict. c. 43) was passed, which undoubtedly frees that date gave aid of the disability arising from infancy. It is unnecessary tediously the question what power there was prior to that Act in an infant to dispose of his property, because since that Act it is beyond all possibility of question that the disability of infancy is absolutely removed where the sanction of the court is obtained in the manner provided by the Act. Therefore, in the present case, so far as any disability arising from the infancy of Louisa Christian Seaton is concerned, that may be entirely disregarded, inasmuch as the settlement was a settlement made after the date of this statute.

But then it is contended on behalf of the appellants that the statute had an operation more extensive than that to which I have alluded; that it got rid, not only of the disability of infancy, but of the disability of coverture also; because it would not avail the appellants in the present case to get rid of the disability of infancy unless they could get rid of that disability of a married woman to dispose validly of her reversionary interest, which, beyond all possibility of doubt, existed in the year 1855, when this Act was passed.

The first question which arises upon the construction of this enactment is, whether it applies in terms or not to a post-nuptial settlement, the words of the statute being, "It shall be lawful for every infant upon or in contemplation of his or her marriage." In the case of *Ex re Sampson and Wall* the majority of the Court of Appeal came to the conclusion that these words ought to be construed so as to include a post-nuptial as well as an ante-nuptial settlement, if the post-nuptial settlement was made on the occasion of the marriage so as to be connected with that event. I do not propose to express any opinion with regard to that decision in one way or another. It is unnecessary, in the view which I take, to do so. But certainly those who pronounced the decision do not appear to have contemplated as a logical consequence of it that which the learned counsel for the appellants have contended does logically follow—namely, that the statute not only applies to post-nuptial as well as to ante-nuptial settlements, but, because it applies to them, indicates an intention that an infant, though married, should have the full powers which the statute confers.

The reliance of the counsel for the appellants is placed upon the very ample language, as they assert, contained in the earlier part of this section. It appears to me to be impossible to construe an enactment of this description by taking it to pieces and looking at one part of the section alone and shutting your eyes to what is contained in another part closely and immediately connected with it. The first part of the section no doubt provides that "It shall be lawful for every infant upon or in contemplation of his or her marriage, with the sanction of the Court of Chancery, to make a valid and binding settlement or contract for a settlement of all or any part of his or her property, or property over which he or she has any power of appointment, whether real or personal, and whether in possession, reversion, remainder, or expectancy." But after declaring that it shall be lawful for every infant to make a valid and binding settlement under these circumstances, the section proceeds, "and every conveyance, appointment, and assignment of such real or personal estate, or contract to make a conveyance, appointment, or assignment thereof executed by such infant, with the approbation of the said court, for the purpose of giving effect to such settlement, shall be as valid and effectual as if the person executing the same were of the full age of twenty-one years."

If the first part of the section stood alone, I am by no means prepared to say that I should arrive at the conclusion that any disability was intended to be removed except that of infancy, or that it was intended to enable a settlement to be made which should be valid and binding in any other respect than as being the effect of the infancy of the person making the settlement; because one must look at the avowed purpose and object of the Act, at the inconvenience recited in the preamble and which the preamble states the statute is intended to remedy. Infancy is the only matter there pointed to, and one cannot shut one's eyes to the fact that at the time when this legislation was passed it was perfectly well known that there was in certain cases a disability, the disability of coverture, as familiar to the law as the disability of infancy; and if it had been intended to remove that disability as well as the disability of infancy I cannot conceive that the enactment would ever have been framed in the terms which we find in the statute with which we are dealing. I pointed out in the course of the argument that the contention on behalf of the appellants must really go further than its immediate purpose, which was to exclude the disability of coverture; for if the statute makes those dispositions valid and binding notwithstanding coverture, it seems to me that it must be equally read as making them valid and binding notwithstanding any disability of any kind which might otherwise affect their validity. I think it is impossible to put such a construction upon the section. I think, too, that the language to be found at the end of the section to which attention was called during the course of the argument, the proviso "that this enactment shall not extend to powers of which it is expressly declared that they shall not be executed by an infant," points strongly to the fact that it was the disability of infancy, and that alone, with which the Legislature was dealing when this Act was passed.

It is said that the words to be found in the earlier part of the section are general, and apply to interests of every description, including reversionary interests, such as a married woman is unable to deal with. The answer to that contention seems to me to be complete. A male infant might dispose of his reversionary interest; a female infant unmarried might dispose of her reversionary interest; and therefore there is no difficulty in giving effect to the whole of the language to be found in the earlier part of the section. All that is required is that you must read the language used in it as to the disposition of property in relation to other branches of the law regulating such disposition.

Therefore I have arrived, without any hesitation, at the conclusion that the enactment of 1855, though it got rid of the disability of infancy, did not get rid of any other disability or enable a married woman to do that which undoubtedly down to that time she could not—namely, dispose effectually of her reversionary interest during coverture.

That disposes of the main question in the case apart from the effect which is said to be given to the settlement by virtue of the authority of the Court of Chancery. There does not appear to have been any order, strictly speaking, that this settlement should be executed; but there can be no doubt that Charles Seaton, having without the consent of the court married a ward of court, was in contempt, and the court had

power (a power which it constantly exercises) to prevent a person who in contempt had married a ward of court from obtaining a pecuniary benefit through the marital rights which he acquired, owing to the marriage, in the property of his wife. No doubt the power which the court possesses of committing him for contempt gives it an authority which is effectual for the purpose of enabling it to compel him to renounce, by means of a settlement, those marital rights, or, at all events, so far renounce them as the court thinks it proper to call upon him to do so. As regards the ward, I have heard no authority cited supporting the view that the court has any power to order her to execute a settlement; for if it possessed such power it would follow that it would have power to commit her for contempt in not executing the settlement which it had so ordered her to execute. No authority has been produced to your lordship's House supporting any such view, and there are certainly *dicta* of weight to the contrary.

It seems to me to be quite unnecessary to discuss the question, which has been a good deal discussed before us, of what power the court would have over one of its wards in that respect. The court no doubt sanctioned this particular settlement, approved its terms; but what more did the court do than to approve its terms? No doubt the settlement was perfectly valid and effectual and binding so as to prevent Charles Seaton from acquiring the absolute rights which would otherwise have been his owing to the marriage. But what is contended is this, that the settlement had, as regards Louisa Christian Seaton, given her a power of disposing of her property which she could not in point of law have possessed or made effectual but for the fact that the court sanctioned this form of conveyance. I am at a loss to understand what authority the Court of Chancery possesses to make a disposition effectual which in law is not and cannot be made effectual at the time at which the court so sanctions the disposition. And therefore I do not myself suppose—I refuse to suppose—that the Court of Chancery intended to do anything of the kind. This settlement was perfectly effectual, not only as regards Charles Seaton, but as regards Louisa Christian Seaton, to a very considerable extent even as regards what might have taken place with reference to the reversionary property; but I do not myself see any reason for believing that the Court of Chancery ever pronounced or intended to pronounce that it should be effectual to deprive Louisa Christian Seaton of the rights which, according to law, she would have possessed if the court had not given its sanction to the deed. It seems to me that by giving its sanction to the deed it did not cause the deed to be effective or effectual in any other way or to any greater extent than it would have been effectual if it had been executed without the sanction of the court. Of course I am not alluding here to infancy or the question of the disability of infancy.

I therefore think that the Court of Chancery did not by its interposition in this case render this deed more effectual to convey this reversionary interest than it would have been if the Court of Chancery had not intervened at all. No authority has been cited to show that the court would have had such a power if it had purported to exercise it. I do not think that the very general expressions of Lord Hardwicke in *The Earl of Buckinghamshire* v. *Drury* upon which Mr. Marten relied would establish that the court possessed such a power. Quite apart from that I can see no ground for the contention that the court has purported to exercise any such power or authority.

That, as it appears to me, would dispose of the whole of the questions arising upon this appeal with the exception of the allegation that, even if the settlement was not originally operative to pass this reversionary interest, it has nevertheless become so by the subsequent actings of Louisa Christian Seaton.

Three matters are relied on in support of that contention. First it is said that she received the income which was provided for her by a family arrangement made in December of the year 1861, which provision she was only to be entitled to in case she married with consent; that, having received that provision from her mother, the tenant for life, she must be taken to have received it upon the basis of the settlement being a valid and binding one, and one which would cover her reversionary interest. I confess that I am unable to follow the reasoning which would suggest that, as a ground for holding that she is disentitled to the claim which she now makes.

The second point is that on the 19th of July, 1873, £5,000 was advanced for her benefit, part of the reversion to which she was entitled, and that that sum of £5,000 was handed to the trustees and became subject to the trusts of the settlement. No question arises here with regard to that £5,000; she makes no claim to it; she does not insist that that is not a sum of money well settled and subject to the trusts of the settlement. But I do not see how the fact that she and her husband concurred in the vesting of that money in the hands of the trustees affects in the least or invalidates her contention that she is now entitled to the remainder of her interest, which fell into possession only after she became a *feme sole*.

The third matter is that on the 3rd of April, 1875, she concurred in the appointment of new trustees of the settlement and gave a release to the former trustees. That seems to me entirely consistent with her present claim; inasmuch as the £5,000 was well settled new trustees were needed for the £5,000, even if that was the entire amount comprised in the settlement, and the outgoing trustees needed a release in respect of their dealings with the £5,000.

With regard to all those three matters I have this further observation to make, that they occurred during the time when Louisa Christian Seaton was a *feme covert*; and if she could not by deed, however solemnly executed, dispose during her coverture directly of her reversionary interest, I am quite at a loss to understand how, by any estoppel or actings or otherwise, she can indirectly be held to have disposed of it.

One matter only remains. In 1881 Mrs. Seaton petitioned for a divorce from her husband, and on the 14th of November, 1882, a decree was made absolute for a divorce; so that from that date no doubt she must be treated as a single woman, and after that date she unquestionably had power to dispose as fully of her reversionary interest as if she had never been married; and if she has done any act since that date which has validly disposed of that interest, no doubt she has deprived herself of the right to make the claim which she now insists upon. The appellants rely upon the petition which she presented, after her divorce, to the Divorce Court on the 23rd of November, 1882, and on the order which was made upon it on the 1st of May, 1883.

It appears that prior to her petition for a divorce she had obtained a judicial separation from her husband, and in 1879 an order had been made for the payment to him of a sum of £100 a year out of her income. After the divorce had been obtained she filed a petition containing three prayers; the first, that she might no longer be required to make that payment of £100 a year—that the order for it might be discharged; the second, that he might be ordered to contribute towards the support of herself and the children; and the third that his power of appointment, which he possessed jointly with her under the deed of settlement, might be put an end to. The matter was referred to the registrar of the Divorce Court, and he reported that, looking to the income which she possessed, and to the income which the husband possessed, there was no ground for

an order for the payment by him to her for her support, but that he ought to contribute to the maintenance of two of his children. Upon that an order was made by the Divorce Court discharging the order for the payment of £100 a year to him, requiring him to pay £125 a year towards the maintenance of his children, and depriving him of the power which he possessed jointly with her of appointing under the deed of settlement.

That, so far as I know, is the only transaction to which this lady was a party, subsequently to the time when she is to be treated as a *feme sole*, which has been relied upon as showing that she is now bound by the settlement and disposition which she made with regard to this property which came into possession in 1886. It is put first as an acquiescence in, or confirmation of, the settlement. I cannot understand how any acquiescence or confirmation could at that time be effectual which did not amount to an actual disposition of the property. It was property which at that time was hers, and undisposed of; and I do not see how the steps which she then took amounted in any way to a disposition of it by her as effectual as if she had actually assigned it by deed to the trustees under the settlement.

Nor do I think it can be established that there has been any estoppel against her. At that time no doubt, so far as any disability was concerned, it was at an end; and if it could be shown that she had so acted or made such representations with reference to the existence of this settlement and its application to this reversionary interest as to lead other persons to act upon the faith that the settlement then covered it, so that they would be prejudiced in case it did not cover it, she no doubt might be estopped from denying that the settlement covered the reversionary interest. But it is impossible to say that the application to the Divorce Court had any such effect. Whom did it prejudice? Who relied upon the representations? And, further, how can they be construed as representations at all that the reversionary interest was included in, and effectually dealt with, by the settlement which was referred to? The settlement existed, and was effective and operative, even if it did not touch this reversionary interest at all. I cannot see that she did anything more than bring before the court the settlement; and the court must be presumed to have known that the settlement would only be effectual as far as regarded an interest which a married woman was capable of disposing of.

On all these grounds I think that the judgment of the court below was right, and I move your lordships that it be affirmed, and the appeal dismissed, with costs.

Lord WATSON.—I am of the same opinion, and I agree with every one of the observations which have been made upon the details of this case by my noble and learned friend. The respondents do not admit that Mrs. Seaton's marriage settlement is within the provisions of the Act 18 & 19 Vict. c. 43, and, seeing that we have not heard their counsel, I refrain from expressing any opinion on the point decided by the Court of Appeal in *In re Sampson and Wall*. But I am of opinion, with your lordships, that the sole object and effect of the Act of 1855 is to remove disabilities arising from non-age, and that it does not give a minor lady the capacity, during her coverture, to bind her reversionary estate which an adult wife does not possess. In that view the provisions of the Act, assuming that they do apply to the settlement in question, cannot aid the appellants' case.

It was argued, however, by Mr. Marten that the fact of the settlement being executed with the sanction of the Court of Chancery was of itself sufficient to give efficacy to Mrs. Seaton's assignment of her interests in reversion—in other words, that the court meant to give, and actually did give, the minor a power which the law denies to married women. I venture to doubt whether the Court of Chancery is possessed of any such jurisdiction; but it is needless to consider that point, because I am satisfied that in the present case the court merely interfered for the protection of its ward, and intended that the settlement of which it approved should take effect according to its ordinary legal construction, just as if it had been executed by a lady of full age during the subsistence of her marriage.

The appellants lastly contended that Mrs. Seaton has elected to abide by the settlement, or, at least, has estopped herself from claiming against it. It appears to me to be unnecessary to discuss the relevancy of the argument which was addressed to us in support of these pleas, because there are really no facts in the case which can support them.

I have only to add that I entirely concur in the able and exhaustive judgments delivered in this case in the Court of Appeal.

Lord FITZGERALD.—This appeal presents two important questions of construction arising on the 1st section of the Infants' Settlement Act (18 & 19 Vict. c. 43).

The first question is whether the decision in the case of *Sampson and Wall* on the 1st section is correct. It is not necessary for the House to express any opinion on that case so far as relates to that part of the decision which is represented by the judgment of Lord Selborne. It may be a useful decision, and certainly puts a very wide and benevolent construction on the statute; but we leave that case as we find it.

The second question is whether the 1st section went further than to release the infant wife from the disability of infancy.

This question was so fully treated in the judgment of the Court of Appeal, and now by Lord Herschell, that I do not find it necessary to say more than that I adopt the judgment of the Court of Appeal, which has been now accepted and approved of by my noble and learned friend. But that leaves untouched the disability arising from the coverture of Louisa Seaton, which could only be removed, as to the property in question, by a deed executed and acknowledged under the provisions of the Act known as Malins' Act, if that Act applied to this case.

Then comes the question which Lord Cairns thus states in *Codrington* v. *Codrington*, 24 W. R. 648, L. R. 7 H. L. 854. That, it is true, was a case of election, but he puts it thus:—"It is quite true, as far as the appellant" (that is the wife) "was concerned, the settlement was ineffective." I may observe that it was a settlement of two funds, one of which was her reversionary estate, 60,000 rupees, and she had to elect. He says:—"She had it in her power when discovert to repudiate" the settlement of it, "and to stand on her original rights, or she had it in her power to ratify and confirm" the settlement. We must bear in mind that this settlement now before us, so far as it relates to the reversionary interest of the minor wife in her share of the personal estate of her father, to use the words of Lord Mansfield, had no operation. The instrument was not void or inoperative for all purposes. It bound the husband and his marital rights, but as to her it was ineffective. I assume for the present that, though the settlement was unquestionably void as against the infant wife so far as it dealt with her reversionary estate, yet that she might, when she became discovert, adopt and confirm it. I do not assent the proposition, but assume it. But the acts of confirmation relied on must be clear and unequivocal in their character, amounting in some shape to a gift of her right, and have taken place when she had a full knowledge of her position and of her rights.

Mr. Marten urged that she had knowledge of the

settlement and must be taken to have been aware that it was, as to her, inoperative, and that she had a legal right to repudiate and put it aside. That is to say, she must be taken to have had in her mental view the solution of the difficulties which puzzled and misled the Vice-Chancellor, which occupied so much of the time of the Court of Appeal, and are now brought up to this House for final decision. It is true that one of the maxims of the law is *Ignorantia juris non excusat.* Mr. Marten did not so put it in terms, but his argument amounted to and was based on that. The true meaning of that maxim is that parties cannot excuse themselves from liability for all civil or criminal consequences of their acts by alleging ignorance of the law, but there is no presumption that parties must be taken to know all the legal consequences of their acts, and especially where difficult questions of law or of the practice of the court are involved. Lord Westbury, in *Spread* v. *Morgan*, 11 H. L. Cas. 588, 13 W. R. H. L. Dig. 6, dealing with a question of election, thus puts it: "It is true, as a general proposition, that knowledge of the law must be imputed to every person, but it would be too much to impute knowledge of this rule of equity" (the rule which applies to election), "as a question of intention implies knowledge." So here, whether you call it confirmation, ratification, or acquiescence, the act relied on must have taken place with full and complete knowledge. Mrs. Seaton did not become discovert until the judgment of the Divorce Court for the dissolution of the marriage became absolute on the 14th of November, 1882, and her acts of confirmation (if any) must be looked for after that date. Mr. Wilkinson admitted, in answer to a question put to him, that there was but one such act—viz., the petition to the Divorce Court of the 23rd of November, 1882. That petition necessarily recites some of the antecedent matters, including portions of the settlement, and prays for the variation of the settlement by the extinction of certain powers of appointment and interests reserved to the husband, and the rest relates to an order on him to contribute to the support of the children. I entirely concur with my noble and learned friends that there is nothing in that petition or in the report or order on it which can reasonably and fairly be taken as a confirmation by Louisa Seaton of the settlement so far as it related to her reversionary interest in the fund in question.

Lord Macnaghten.—I am surprised that the parties who were unsuccessful in the Court of Appeal should have thought it expedient to come to your lordships' House. To my mind there never was a plainer case or one depending more entirely on elementary principles.

Under her father's will Mrs. Seaton become entitled to a share of personalty, not given for her separate use, and expectant on her mother's death. Her mother is dead, and she now asks for so much of her share as remains unpaid. The answer is, "The fund is no longer hers; it has been assigned to other persons and theirs is the hand to receive it." We turn to the assignment. It is an assignment executed by Mrs. Seaton and by her late husband at a time when the fund was reversionary and the marriage still subsisting. The assignment of the husband is inoperative because he did not reduce the fund into possession during coverture. As the lady was under the disability of coverture, to say nothing of the disability of infancy, the assignment purporting to be made by her is wholly inoperative unless it can be shown that under some statute Mrs. Seaton's assignment had an efficacy which it would not otherwise have possessed. Is there any such statute? The appellants say there is, and they rely on the Infants' Settlements Act. I quite agree with what has been said by my noble and learned friend, that the disability of infancy is the only disability with which that Act deals.

The appellants certainly treat that Act in a very singular manner.

They cut the principal section in two and desire to avail themselves of the first part of the mutilated section which they conceive to be more favourable to them, without waiting for the qualification or explanation which finds its appropriate place at the end of the section. That is a singular way of construing an Act of Parliament.

But the most singular thing about this argument was that the appellants adopt the part of the first section which is not relevant to the present question, and reject that part which is relevant. Mrs. Seaton's application is made in the administration suit. In that suit the court has nothing to do with the trusts of derivative settlements. The only question was, whose is the proper hand to give a receipt? It is on the assignment contained in the settlement, not on the settlement apart from the assignment, that the appellants are compelled to rely; and if there had been any different inference to be drawn from the language of the first part of the section from that to be drawn from the language of the second part (which in my opinion there is not) it is the second part, not the first, which is applicable in the present case.

Then it was said that Mrs. Seaton has confirmed the settlement. The alleged acts of confirmation which are said to have taken place during the coverture may be left out of consideration. It would not have bettered the appellant's case if Mrs. Seaton had re-executed this settlement every day during her coverture. What did Mrs. Seaton do after coverture? She applied to the Divorce Court. In her application she stated the settlement perfectly correctly. The only thing she omitted to do, which it can be suggested she did not do was this: she did not attempt to instruct the Divorce Court on an elementary point of equity law. It would have been irrelevant, if not impertinent, to have done so.

I take leave to say that if this lady had filed a bill to execute the trusts of this settlement it would not have bound her as regards the property not actually paid over to the trustees. There was a settlement. It was a perfectly good settlement so far as related to property reduced into possession during coverture.

It must be borne in mind that there is no question here of election. The husband settled nothing. The wife was entitled to repudiate the settlement which is said to be hers when she became discovert. By so doing she disappointed no one who had contributed to the settlement. She raised no question of election. To confirm the settlement (if that be the proper expression) it would have been necessary for her to have made a new gift. Until a gift be actually perfected, the donor may withdraw.

In the particular circumstances of this case I do not see how the lady could have bound herself unless she had actually assigned her property, or the property had been actually placed by her or with her consent in the hands of the trustees, or she had done some act which would estop her from claiming the fund which was in truth her own.

On these grounds I entirely concur in the motion which has been made.

Order appealed from affirmed and appeal dismissed with costs.

Solicitors for the appellant, *Hadden, Woodward, McLeod, & Blyth.*

Solicitors for the respondent, *Purkis & Co.*

From C. A. (England). Dec. 8, 9; Feb. 24.

MILLS v. ARMSTRONG. (a.)

Negligence—Injury to passenger in public conveyance—Injury due partly to those in charge of the conveyance—Doctrine of identification of passenger with those in charge—Ship—Collision—Actions under Lord Campbell's Act in Admiralty Division—Judicature Act, 1873, *s.* 25, *sub-section* 9.

A passenger in a public conveyance who receives an injury is not deprived of his remedy by reason of the contributory negligence of those in charge of the conveyance. So, where there has been a collision between two ships, contributory negligence on the part of those in charge of the one ship is no defence to an action brought under Lord Campbell's Act by the representatives of one of the passengers against the owners of the other ship.

Thorogood v. Bryan, 8 *C. B.* 115, *and* Armstrong v. Lancashire and Yorkshire Railway Co., 23 *W. R.* 295, *L. R.* 10 *Ex.* 47, *overruled.*

The admiralty rule as to joint liability for joint negligence does not apply to actions brought under Lord Campbell's Act for damages arising out of a collision between two ships.

Division of the Court of Appeal (*reported* 35 *W. R.* 314, 12 *P. D.* 58) *affirmed.*

This was an appeal from a decision of the Court of Appeal (Lord Esher, M.R., Lindley and Lopes, L.JJ.), reported as *The Bernina* (*No.* 2), 35 W. R. 314, 12 P. D. 58, reversing a decision of Butt, J., reported 34 W. R. 595, 11 P. D. 31.

In September, 1884, a collision occurred between *The Bernina* and *The Bushire*, in consequence of which Armstrong and Toeg, of *The Bushire*, were drowned. The accident was caused by the joint fault of the masters and crews of both vessels. Armstrong and Toeg had nothing to do with the navigation of their vessel.

The actions were brought by the personal representatives under Lord Campbell's Act.

Dec. 8, 9.—*Sir W. Phillimore Q.C.*, and *J. G. Barnes*, for the appellants, relied on *Thorogood* v. *Bryan*, 8 C. B. 115, and referred to the following cases:—*Vanderplank* v. *Miller*, Moo. & M. 169; *Bridge* v. *Grand Junction Railway Co.*, 3 M. & W. 244; *Rigby* v. *Hewitt*, 5 Ex. 240; *Greenland* v. *Chaplin*, 5 Ex. 243; *The Milan*, Lush, 388, 10 W. R. Adm. Dig. 26; *Armstrong* v. *Lancashire and Yorkshire Railway Co.*, 23 W. R. 295, L. R. 10 Ex. 47; *Child* v. *Hearn*, 22 W. R. 864, L. R. 9 Ex. 176; *Waite* v. *North-Eastern Railway Co.*, 7 W. R. 311, E. B. & E. 719; *Mooney* v. *Hudson River Railroad Co.*, 28 New York Sup. Court Rep. 548; *Dudman* v. *Dublin Port and Docks Board*, Ir. Rep. 7 C. L. 518; *Lockhart* v. *Lichtenthaler*, 46 Penn. 151; *Little* v. *Hackett*, 9 Davis Sup. Court (U. S.) 366.

Buckmill, Q.C. (*A. C. Nelson* with him), for the respondents, referred to *Adams* v. *Glasgow and South-Western Railway Co.*, 3 Court Sess. Cas., 4th series, 215; *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*, 31 W. R. 445, 10 Q. B. D. 521; *Wabash, St. Louis, and Pacific Railway Co.* v. *Shacklet*, 44 Am. Rep. 792; *Borough of Carlisle* v. *Brisbane*, 57 Am. Rep. 483.

J. G. Barnes replied.

Feb. 24.—Lord HERSCHELL.—This appeal arises upon a special case stated in actions in which the respondents are plaintiffs. They are both actions brought under Lord Campbell's Act to recover damages against the appellants for the loss sustained owing to the deaths of the persons of whom the respondents are the personal representatives; and it is alleged that they lost their lives through the negligence of the appellants.

The appellants are the owners of the steamship *Bernina*, between which vessel and the steamship *Bushire* a collision took place, which led to the loss of fifteen persons who were on board the latter vessel. It is admitted that the collision was caused by the fault or default of the master and crew of both vessels. J. H. Armstrong, whose administratrix one of the respondents is, was a member of the crew of *The Bushire*, but had nothing to do with its careless navigation. M. A. Toeg, of whom the other respondent is administratrix, was a passenger on board *The Bushire*.

The question arises whether, under these circumstances, the appellants are liable. The appellants having, as they admit, been guilty of negligence from which the respondents have suffered loss, a *primâ facie* case of liability is made out against them. How do they defend themselves? They do not allege that those whom the respondents represent were personally guilty of negligence which contributed to the accident. Nor, again, do they allege that there was contributory negligence on the part of any third person standing in such a legal relation towards the deceased men as to cause the acts of that third person, on principles well settled in our law, to be regarded as their acts, as, *e.g.*, the relation of master and servant, or employer and agent acting within the scope of his authority. But they rest their defence solely upon the ground that those who was navigating the vessels in which the deceased men were being carried were guilty of negligence, without which the disaster would not have occurred. In support of the proposition that this establishes a defence they rely upon the case of *Thorogood* v. *Bryan*, which undoubtedly does support their contention. This case was decided as long ago as 1849, and has been followed in some other cases; but though it was early subjected to adverse criticism, it has never come for revision before a Court of Appeal until the present occasion. That action was one brought under Lord Campbell's Act against the owner of an omnibus by which the deceased man was run over and killed. The omnibus in which he had been carried had set him down in the middle of the road instead of drawing up to the kerb, and before he could get out of the way he was run over by the defendant's omnibus, which was coming along at too rapid a pace to be able to pull up. The learned judge directed the jury that "if they were of opinion that want of care on the part of Barber's omnibus in not drawing up to the kerb to put the deceased down, or any want of care on the part of the deceased himself, had been conducive to the injury, in either of these cases, notwithstanding the defendant, by her servant, had been guilty of negligence, their verdict must be for defendant." The jury gave a verdict for the defendant, and the question was then raised, on a rule for a new trial on the ground of misdirection, whether the ruling of the learned judge was right. The court held that it was.

It is necessary to examine carefully the reasoning by which this conclusion was arrived at. Coltman, J., said:—"It appears to me that, having trusted the party by selecting the particular conveyance, the plaintiff has so far identified himself with the owner and his servants that if any injury results from their negligence he must be considered a party to it. In other words, the passenger is so far identified with the carriage in which he is travelling, that want of care of the driver will be a defence of the driver of the carriage which directly caused the accident." Maule and Vaughan Williams, JJ., also dwelt upon this view of the identification of the passenger with the driver of the vehicle in which he is being carried. The former thus expressed himself:—"I incline to think that for this purpose the deceased

(a.) Reported by C. G. NAPIER TROLLOPE, Esq., Barrister-at-Law.

that he considered as identified with the driver of the omnibus in which he voluntarily became a passenger, and that the negligence of the driver was the negligence of the deceased." Vaughan Williams, J., said:—"I think this passenger must for this purpose be considered as identified with the person having the management of the omnibus he was conveyed by."

With the utmost respect for these eminent judges I must say that I am unable to comprehend this doctrine of identification upon which they lay so much stress. In what sense is the passenger by a public stage-coach, because he avails himself of the accommodation afforded by it, identified with the driver? The learned judges manifestly do not mean to suggest (though some of the language used would seem to bear that construction) that the passenger is so far identified with the driver that the negligence of the latter would render the former liable to third persons injured by it. I presume that they did not even mean that the identification is so complete as to prevent the passenger from recovering against the driver's master; though, if "negligence of the owner's servants is to be substituted negligence of the passenger," or if he "must be constituted a party" to their negligence, it is not easy to see why it would not be a bar to such an action. In short, as far as I can see, the identification appears to be effective only to the extent of enabling another person whose servants have been guilty of negligence to defend himself by the allegation of contributory negligence on the part of the person injured. But the very question that had to be determined was, whether the contributory negligence of the driver of the vehicle was a defence as against the passenger when being another wrongdoer. To say that it is a defence because the passenger is identified with the driver appears to me to beg the question, when it is not suggested that this identification results from any recognised principle of law, or has any other effect than to furnish that defence, the validity of which was the very point in dispute. Two persons may no doubt be so bound together by the legal relation in which they stand to each other that the acts of one may be regarded by the law as the acts of the other. But the relation between the passenger in a public vehicle and the driver of it certainly is not such as to fall within any of the recognised categories in which the act of one man is treated in law as the act of another.

I pass now to the other reasons given for the judgment in *Thorogood* v. *Bryan*. Martin, B., says:—"On the part of the plaintiff it is suggested that a passenger in a public conveyance has no control over the driver. But I think that cannot with propriety be said. He enters into a contract with the owner, whom, by his servant, the driver, he employs to drive him. If he is dissatisfied with the mode of conveyance he is not obliged to avail himself of it. But, as regards the present plaintiff, he is not altogether without fault; he chose his own conveyance, and must take the consequences of any default on the part of the driver whom he thought fit to trust."

I confess I cannot concur in this reasoning. I do not think it well founded either in law or in fact. What kind of control has the passenger over the driver which would make it reasonable to hold the former affected by the negligence of the latter? and is it any more reasonable to hold him so affected because he chose the mode of conveyance—that is to say, drove in an omnibus rather than walked, or took the first omnibus that passed him instead of waiting for another? And when it is attempted to apply this reasoning to passengers travelling in steamships or on railways the unreasonableness of such a doctrine is even more glaring.

The only other reason given is contained in the judgment of Cresswell, J., in these words: "If the driver of the omnibus the deceased was in had, by his negligence or want of due care and skill, contributed to an injury from a collision, his master clearly could maintain no action. And I must confess I see no reason why a passenger who employs the driver to convey him stands in any better position." Surely, with deference, the reason for the difference lies on the very surface. If the master in such a case could maintain no action, it is because there existed between him and the driver the relation of master and servant. It is clear that if his driver's negligence alone had caused the collision, he would have been liable to an action for the injury resulting from it to third parties. The learned judge would, I imagine, in that case, have seen a reason why a passenger in the omnibus stood in a better position than the master of the driver. I have now dealt with all the reasons on which the judgment in *Thorogood* v. *Bryan* was founded, and I entirely agree with the learned judges in the court below in thinking them inconclusive and unsatisfactory.

I will not detain your lordships further on this part of the case, beyond saying that I concur with the judgments of the learned judges in the court below, and specially with the very exhaustive judgment of Lord Esher, M.R.

It was suggested in the course of the argument that *Thorogood* v. *Bryan* might be supported on the ground that the allegation that the negligence which caused the injury was the defendant's was not proved, inasmuch as it was the defendant's negligence in conjunction with that of the driver of the other omnibus. It may be that, as a pleading point, this would have been good. It is not necessary to express an opinion whether it would or not. I do not think it would have been a defence on the merits if the facts had been properly averred. If, by a collision between two vehicles, a person unconnected with either vehicle were injured, the owner of neither vehicle, when sued, could maintain as a defence, "I am not guilty, because, but for the negligence of another person, the accident would not have happened." And I do not see how this defence is any more available as against a person being carried in one of the vehicles, unless the reasoning in *Thorogood* v. *Bryan* be well founded.

I have said that the decision in *Thorogood* v. *Bryan* has not been unquestioned. I do not think it necessary to enter upon a minute consideration of the subsequent cases, after the careful and accurate examination to which they have been subjected by the Master of the Rolls. The result may be summarized thus: The learned editors of Smith's Leading Cases, Willes and Keating, JJ., strongly questioned the propriety of the decision (in the notes to *Ashby* v. *White*, 1 Sm. L. C., 8th ed., 316). Parke, B., whose *dictum* in *Bridge* v. *The Grand Junction Railway Co.* Williams, J., followed in directing the jury in *Thorogood* v. *Bryan*, appears to have doubted the soundness of the judgment in that case. Dr. Lushington, in *The Milan*, expressed strong disapproval of it; and though in *Armstrong* v. *The Lancashire and Yorkshire Railway Co.* it was followed, and Bramwell and Pollock, BB., to say the least, did not indicate dissatisfaction with it, I understand that my noble and learned friend, Lord Bramwell, after hearing this case argued, and maturely considering it, agrees with the judgment of the court below. In Scotland the decision in *Thorogood* v. *Bryan* was pronounced unsatisfactory in *Adams* v. *The Glasgow and South-Western Railway Co.* In America it has been followed in the courts of some States, but it has often been departed from, and upon the whole the view taken has been decidedly adverse to it. The latest case that I am aware of in that country is *Little* v. *Hacket*. That was a decision of the Supreme Court of the United States, whose decisions, on account of its high character for learning and ability, are always to be regarded with respect. Field, J., in delivering judgment, examined all the English and American cases, and the conclusion

adopted was the same as that at which your lordships have arrived.

I have only this observation to add. The case of *Waite* v. *The North-Eastern Railway Co.* was much relied on in the argument for the appellants; but the very learned counsel who argued that case for the defendants, and all the judges who took part in the decision, were of opinion that it was clearly distinguishable from *Thorogood* v. *Bryan*, and did not involve a review of that case. I think they were right.

As regards the other questions argued before your lordships, I have only to say that I think they were properly dealt with by the court below.

I am requested by my noble and learned friend Lord Bramwell, who was unable to remain to read the opinion which he had prepared, to state that he concurs in the motion which I am about to make.

I move your lordships that the judgment of the Court of Appeal be affirmed, and the appeal dismissed, with costs.

Lord Watson.—The appellants conceded in argument that, unless it can be shown that *Thorogood* v. *Bryan* is a valid precedent, they cannot succeed in this appeal. Although nearly forty years have elapsed since that case was decided, I think the rule which it established must still be dealt with upon its own merits. The decision has not met with general acceptance, and it cannot be represented as an authority upon which a course of practice has followed, or upon which persons guilty, or intending to be guilty, of contributory negligence are entitled to rely.

When the combined negligence of two or more individuals, who are not acting in concert, results in personal injury to one of them, he cannot recover compensation from the others, for the obvious reason that, but for his own neglect, he would have sustained no harm. Upon the same principle, individuals who are injured, without being personally negligent, are nevertheless disabled from recovering damages if at the time they stood in such a relation to any one of the actual wrongdoers as to imply their responsibility for his act or default. That constructive fault, which implies the liability of those to whom it is imputable to make reparation to an innocent sufferer, must also have the effect of barring all claims at their instance against others who are *in pari delicto* is a proposition at once intelligible and reasonable. If they are within the incidence of the maxim, *Qui facit per alium facit per se*, there can be no reason why it should apply in questions between them and the outside public, and not in questions betweem them and their fellow-wrongdoers. But the facts which were before the court in *Thorogood* v. *Bryan* do not appear to me to bring the case within that principle.

My noble and learned friend Lord Bramwell, who is so conversant with the intricacies of English pleading, suggested, in the course of the argument, a technical ground upon which the decision in *Thorogood* v. *Bryan* might be justified. In that view the case would not be an authority for the appellants, who accordingly supported the *ratio* assigned for the judgment, which was simply this, that the deceased passenger, by taking the seat on the omnibus, became so far identified with its driver that the negligence of its driver was imputable to him in any question with the driver or owner of the other omnibus, which ran over him, and was the immediate cause of his death. Coltman and Cresswell, JJ., express themselves in terms which, if literally understood, would lead to the conclusion that he would also have been responsible for damage solely attributable to the fault of the driver. Coltman, J., said, "Having trusted the party, by selecting the particular conveyance, the plaintiff has so far identified himself with the owner and her servants that, if any injury results from their negligence, he must be considered a party to it." Maule, J., was careful to limit his observations to the case before him. "I incline to think," said the learned judge, "that for this purpose (*i.e.*, recovering damages from the defendant) the deceased must be considered as identified with the owner of the omnibus in which he voluntarily became a passenger, and that the negligence of the driver was the negligence of the deceased."

I do not think the very eminent judges who decided *Thorogood* v. *Bryan* intended to affirm that the deceased, by taking his seat in the omnibus, incurred the same responsibility for the negligent acts of the driver as if the latter had been his servant. If they did mean to do so, their conclusion might be perfectly logical, but their premises would be directly at variance with the principles laid down in *Quarman* v. *Burnett*, 6 M. & W. 499, which I have always regarded, and still regard, as a sound and authoritative precedent. If they did not, then they have affirmed that a passenger, travelling by a public conveyance, may be so unconnected with the driver as to be exempt from liability for his negligence, and yet be so identified with him as to lose all right of action against wrongdoers, whose negligence, in combination with that of the driver, has occasioned personal injury to himself. That is a proposition which it is very difficult to understand. It must be a singular kind of relationship, and created by very exceptional circumstances, which results in the superior being affected by his inferiors' negligence in a question with wrongdoers, and not in a question with persons who are themselves free from blame.

It humbly appears to me that the identification upon which the decision in *Thorogood* v. *Bryan* is based has no foundation in fact. I am of opinion that there is no relation constituted between the driver of an omnibus and its ordinary passengers which can justify the inference that they are identified, to any extent whatever, with his negligence. He is the servant of the owner, not their servant; he does not look to them for orders, and they have no right to interfere with his conduct of the vehicle, except, perhaps, the right of remonstrance when he is doing, or threatens to do, something that is wrong and inconsistent with their safety. Practically they have no greater measure of control over his actions than the passenger in a railway train has over the conduct of the engine-driver. I am, therefore, unable to assent to the principle upon which the case of *Thorogood* v. *Bryan* rests. In my opinion an ordinary passenger by an omnibus or by a ship is not affected, either in a question with contributory wrongdoers or with innocent third parties, by the negligence, in the one case, of the driver, and in the other of the master and crew by whom the ship is navigated, unless he actually assumes control over their actions, and thereby occasions mischief. In that case he must, of course, be responsible for the consequences of his interference.

Counsel for the appellants endeavoured to support *Thorogood* v. *Bryan* upon a totally different principle from that assigned by the learned judges who decided the case. They argued alternatively that the maxim *Respondeat superior* does not apply, and that passengers are affected by the wrongful acts of the driver, not because he is in any sense their servant or subject to their control, but by reason of their being, for the time, under his dominion.

Waite v. *North-Eastern Railway Co.* was the authority relied on in support of this branch of the argument. But there is no analogy between the position of an infant incapable of taking care of itself and that of a passenger *sui juris;* and the theory that an adult passenger places himself under the guardianship of the driver, so as to be affected by his negligence, appears to me to be absolutely without foundation either in fact or law.

I therefore concur in the judgment which has been moved.

Lord MACNAGHTEN.—I concur in the motion which has been proposed and in the reasons upon which it has been founded.

Order appealed from affirmed, and appeal dismissed, with costs.

Solicitors for the appellants, *Pritchard & Sons*, for *Bateson, Bright, & Warr*, Liverpool.

Solicitors for the respondents, *Lowless & Co.*

Court of Appeal.

From Chan. Div. April 27.

ELLINGTON *v.* CLARK, BUNNETT, & Co. (*a.*)

Practice—Evidence—Appeal—Copy of judge's notes—Shorthand notes of evidence taken by solicitor's clerk—R. S. C., 1883, *ord.* 58, *r.* 11.

When any question of fact is involved in an appeal the evidence as to which has been given orally in the court below, it is the duty of the appellant to apply to one of the judges of the Court of Appeal, through his clerk, to ask the judge from whom the appeal comes to send a copy of his notes to the Court of Appeal. If the appellant has not so applied, the appeal will be ordered to stand over at the appellant's expense.

Shorthand notes of evidence in the court below, taken by an independent professional shorthand writer, may be referred to on the hearing of an appeal, but the Court of Appeal will not allow shorthand notes of evidence taken by a clerk of one of the solicitors in the action to be in any way referred to.

Appeal from Kay, J.

This was an action to restrain the infringement of a patent. At the trial of the action in the court below much of the evidence had been given orally. No notes of the evidence so given had been taken by a professional shorthand writer, but shorthand notes of it had been taken by clerks of the solicitors engaged in the action, and these notes were referred to on the appeal.

No application had been made by the appellant for a copy of the judge's notes for the use of the Court of Appeal.

R. S. C., 1883, ord. 58, r. 11, provides that "when any question of fact is involved in an appeal, the evidence taken in the court below bearing on such question shall, subject to any special order, be brought before the Court of Appeal as follows . . . (*b.*) as to any evidence given orally, by the production of a copy of the judge's notes, or such other materials as the court may deem expedient."

Sir R. E. Webster, A.G., Moulton, Q.C., and *Micklem*, for the plaintiffs.

Rigby, Q.C., and *T. Terrell*, for the defendants.

COTTON, L.J.—We wish it to be understood that hereafter we shall not allow shorthand notes of evidence taken by a clerk of either of the solicitors in the action to be in any way referred to. Such notes are not to be relied upon. I do not suppose that the clerk would be guilty of intentional dishonesty, but it is impossible for him to help being unconsciously biassed by his wish that the evidence should turn out in a particular way. A note by a professional shorthand writer, who is independent, stands in a different position. It is the duty of the appellant to apply to one of the judges of the Court of Appeal, through his clerk, to ask the judge from whom the appeal is to send a copy of his notes to the Court of Appeal. It is to be understood that in future when the appellant has not so applied for a copy of the judge's notes we shall order the appeal to stand over to allow of the application being made. Fry, L.J., suggests, and I agree, that this standing over should be at the expense of the appellant if he has not previously made the application.

FRY and LOPES, L.JJ., concurred.

Solicitors, *Leonard & Leonard; Wetherfield, Son, & Baines.*

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

From Q. B. Div. [& Q. B. Div.] July 2, 30.

In re AN ARBITRATION BETWEEN MITCHELL AND THE GOVERNOR OF CEYLON. (*a.*)

Arbitration—Agreement to refer—Power to revoke submission—3 & 4 Will. 4, *c.* 42, *s.* 39—*Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 17.

A contract for the execution of certain works provided that any dispute arising thereunder should be referred to a particular arbitrator; and it also provided that, so far as applicable, the provisions of the Common Law Procedure Act, 1854, *should apply to the arbitration agreed to. By section* 17 *of the Common Law Procedure Act*, 1854, *every agreement or submission to arbitration by consent in writing may be made a rule of court on the application of either party. Disputes arising under the contract were referred to arbitration by one of the parties, and thereupon the other party revoked the submission.*

Held (*affirming the decision of the* Queen's Bench Division), *that the clause in the contract applying the provisions of the Common Law Procedure Act*, 1854, *amounted to an agreement in the submission that the submission should be made a rule of court within* 3 & 4 *Will.* 4, *c.* 42, *s.* 39, *and that therefore the submission was not revocable at the will of either party.*

Motion to set aside an award on the ground that the submission to arbitration was revoked before the award was made.

In May, 1882, Messrs. Mitchell & Izard entered into a contract with the Crown agents for the colonies on behalf of the Governor of Ceylon to construct certain waterworks at Colombo. By the contract any difference or dispute arising thereunder was, on the demand in writing of either party, to be referred to the sole arbitration and award of the consulting engineer appointed by the Governor of Ceylon, whose decision should be final. By clause 85, "'As far as the same are applicable and not hereby varied, the provisions of the Common Law Procedure Act, 1854, or any statutory modification thereof for the time being in force with reference to the settlement of disputes by arbitration, shall apply to the arbitration agreed to by these presents." Disputes having arisen under the contract, they were referred, on the demand in writing of the governor, to the arbitration of the consulting engineer. The contractors protested and refused to appear on the arbitration, and on the 31st of October, 1887, revoked the submission to arbitration. The arbitrator went on with the arbitration in the absence of the contractors, and made his award on the 9th of February, 1888. The contractors thereupon moved to set aside the award.

3 & 4 Will. 4, c. 42, s. 39.—"The power and authority of any arbitrator or umpire appointed

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

. . . by or in pursuance of any submission to arbitration containing an agreement that such submission shall be made a rule of any of His Majesty's courts of record, shall not be revocable by any party to such reference without the leave . . . of a judge, and the arbitrator or umpire shall and may and is hereby required to proceed with the reference, notwithstanding any such revocation, and to make such award. . . ."

17 & 18 Vict. c. 125, s. 17.—"Every agreement or submission to arbitration by consent, whether by deed or instrument in writing not under seal, may be made a rule of any one of the superior courts of law or equity at Westminster on the application of any party thereto, unless such agreement or submission contain words purporting that the parties intend that it should not be made a rule of court. . . ."

Finlay, Q.C., and *Reginald Brown*, for the applicants.

Sir R. E. Webster, A.G., and *J. G. Wood*, for the Governor of Ceylon.

Cur. adv. vult.

July 2.—The judgment of the Court (CAVE and A. L. SMITH, JJ.) was read by

CAVE, J.—This is an application to set aside an award on the ground that the submission to arbitration was revoked before the award was made. At common law the submission could be revoked at any time before the award was made; but 3 & 4 Will. 4, c. 42, s. 39, provides that a submission to arbitration containing an agreement that such submission shall be made a rule of court is not revocable without the leave of the court, and the question for us is whether the submission in this case contains such an agreement. The 17th section of the Common Law Procedure Act, 1854, provides that every submission to arbitration by consent in writing may be made a rule of court, unless the submission contains words purporting that the parties intend that it should not be made a rule of court. The effect of this section was discussed in *Mills* v. *Bayley*, 11 W. R. 593, 2 H. & C. 36, in which it was held that this section had not the effect of inserting in the agreement a clause empowering it to be made a rule of court, or in other words, that this statutory power was not the same thing in effect as an agreement that the submission should be made a rule of court. This decision was followed by the Court of Common Pleas in *In re Rouse and Meier*, 19 W. R. 488, L. R. 6 C. P. 212, and by the Court of Appeal in *Fraser* v. *Ehrensperger*, 32 W. R. 240, 12 Q. B. D. 310. In the case before us, however, the agreement contains a clause that, "as far as the same are applicable and are not hereby varied, the provisions of the Common Law Procedure Act, 1854, shall apply to the arbitration agreed to in these presents." Now it seems to us that the clause has the effect of inserting in the agreement all the provisions of the Common Law Procedure Act, 1854, which are applicable to such a reference, and are not varied by the agreement itself. Among the provisions so applicable is section 17, enabling the agreement to be made a rule of court, unless it contain words purporting that the parties intend it should not be made a rule of court. The parties, therefore, had power to exclude this clause, and as they have not done so, but, on the contrary, have, as we think, expressed their intention that it should apply, there is, in effect, according to our judgment, an agreement in this submission that the document should be made a rule of court within the statute of Will. 4. For these reasons we are of opinion that the application should be refused, with costs.

Application refused.

The contractors appealed.

July 25.—*Finlay, Q.C.*, and *Reginald Brown*, for the appellants.—The provisions of the Common Law Procedure Act, 1854, being part of the general law, apply to references without any incorporating clause. The clause is therefore surplusage, and is useless. It was decided in *Mills* v. *Bayley*, and in *In re Rouse and Meier*, that the statutory power to make the submission a rule of court given by section 17 of the Act of 1854 is not equivalent to the agreement of the parties to that effect so as to bring the case within 3 & 4 Will. 4, c. 42, s. 39, and that the submission was still revocable. Therefore it makes no difference whether section 17 is incorporated or not, and the power of revocation still exists. Secondly, section 39 of the Act of Will. 4 only applies where the parties have agreed that such submission "shall be made" a rule of court. By section 17 of the Act of 1854 every submission "may be made" a rule of court. The two things are not the same, and so the incorporation of section 17 is not equivalent to an agreement that the submission "shall be made" a rule of court, section 17 being merely permissive. They also contended that 3 & 4 Will. 4, c. 42, s. 39, only applied where the parties had agreed to make the submission a rule of a particular court (9 & 10 Will. 3, c. 15, s. 1), and section 17 of the Act of 1854 did not specify any particular court; and that the sections of the Act of 1854 which were incorporated were those relating to procedure in the arbitration, of which section 17 was not one.

Deutsche Springstoff Actien Gesellschaft v. *Brown*, *ante*, p. 557, 20 Q. B. D. 173, was referred to.

J. G. Wood (*Sir R. E. Webster, A.G.*, with him, for the Governor of Ceylon.—The words in section 17 of the Common Law Procedure Act, 1854, "may be made" a rule of court have the same effect as "shall be made" in section 39 of the Act of Will. 4. These latter words only mean "may at the option of either party." One party cannot compel the other to make the submission a rule of court. It is like the case of a lease, where a provision that in certain events the lease shall be void means that one of the parties may treat it as void. Next, the clause incorporating the Common Law Procedure Act, 1854, is not useless. *In re Rouse and Meier* shows that to bring the case within section 39 of the Act of Will. 4 the agreement that the submission shall be made a rule of court must be found within the four corners of the document. In this case that is so by the express incorporation of section 17 of the Act of 1854. The submission, therefore, is not revocable. [He was not called upon to answer the other points.]

Finlay, Q.C., replied.

Cur. adv. vult.

July 30.—LINDLEY, L.J.—This is an appeal from the judgment of the Divisional Court dismissing an application to set aside an award, the ground of the application being that the submission to arbitration had been duly revoked. The question raised is whether there was power to revoke the submission, and that depends upon the conjoined effect of two sections in two Acts of Parliament and clause 85 in the agreement. The two statutory enactments are section 39 of 3 & 4 Will. 4, c. 42, and section 17 of the Common Law Procedure Act, 1854. The Divisional Court held that, by reason of the clause in the agreement, the submission was not capable of revocation at the will of either of the parties. It is clear that under section 39 of 3 & 4 Will. 4, c. 42, if the document upon its true construction does really contain an agreement that the submission shall be made a rule of court, there is no power to revoke the submission; but if that is not its true construction there is power in either party to revoke. It was decided in *In re Rouse and Meier* and in *Thomson* v. *Anderson*, 16 W. R. 48, L. R. 9 Eq. 523, that the mere fact that section 17 of the Act of 1854 enables the submission to be made a rule of court does not affect the power of either party to revoke the submission. It is clear also that if the

parties have expressly agreed that the submission shall be made a rule of court, the submission cannot be revoked. Having made these preliminary observations, it is necessary now to consider clause 35 of the agreement, and what its true meaning is. Mr. Finlay urged that the clause amounted to nothing at all, and that its whole effect was to call the attention of the parties to the fact that there were certain sections of the Common Law Procedure Act, 1854, applicable to arbitrations. He used an argument to this effect, that it was now established that under the Act of 1854 a submission to arbitration was still revocable, and that it would be absurd to say that the submission was rendered irrevocable by simply saying in the agreement that the provisions of the Common Law Procedure Act, 1854, should apply. That argument seems to me more plausible than sound. The true answer to it is that the parties, by agreeing to make the provisions of the Act of 1854 applicable, agree to bring the submission within section 39 of 3 & 4 Will. 4, c. 42, and there seems to me to be no difference between agreeing that the submission "may be made" a rule of court and that it "shall be made" a rule of court. I have taken some pains to look into the precedents of agreements for reference to arbitration, and I have come to the conclusion that the object of inserting this clause in the agreement is to comply with the provisions of section 39 of 3 & 4 Will. 4, c. 42; and unless we held this to be so the clause would be a nullity. I am of opinion, therefore, that the judgment of the Divisional Court was right, and must be affirmed.

BOWEN, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors for the contractors, *Linklater & Co.*

Solicitors for the Governor of Ceylon, *Sutton & Commanney.*

From Q. B. Div. July 24.

KELLARD *v.* BOOKER. (*a.*)

Negligence—Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-section* 2, 3; *s.* 8—*Person intrusted with superintendence—Foreman of gang of labourers.*

The plaintiff was employed by the defendant as one of a gang of labourers, of whom B. was the foreman, in stowing bales of wool in the hold of a ship. B. was himself a labourer, but stood at the top of the hatchway to signal to the men below when a bale was about to be lowered. The plaintiff was injured by a bale being lowered, as he alleged, without warning from B.

Held (affirming the decision of the Queen's Bench Division, ante, p. 335), that there was no evidence that the injury resulted from the negligence of any person having "any superintendence intrusted to him whilst in the exercise of such superintendence," or from "the negligence of any person to whose orders the plaintiff was bound to conform while conforming to the said orders" within the meaning of section 1, *sub-sections* 2 *and* 3, *of the Employers' Liability Act,* 1880.

Appeal from the decision of a divisional court (Hawkins and A. L. Smith, JJ.) reported *ante*, p. 335, 19 Q. B. D. 585.

The action was brought in the county court under the Employers' Liability Act to recover compensation for injuries.

The plaintiff was employed with other workmen by the defendant to assist in stowing bales of wool on board the defendant's ship. The workmen were divided into gangs, with a foreman to each gang. The foreman of the plaintiff's gang was a man named Bodfield. The bales had to be hauled across the deck and dropped down a hatchway for the purpose of being stowed away below. The plaintiff was occupied in stowing the bales away below, while Bodfield, who was assisting to haul the bales across the deck, gave the signals to the men below before the bales were dropped down the hatchway. The plaintiff was injured by a bale which, as he said, was dropped down the hatchway without any warning. The county court judge nonsuited the plaintiff, and his decision was upheld by the Divisional Court on the ground that there was no evidence that Bodfield was a person having superintendence intrusted to him within the meaning of section 1, sub-section 2, of the Employers' Liability Act, 1880.

The plaintiff appealed.

Weddenburn and *C. G. Ellis*, for the appellant.

Tatlock, for the respondent.

The arguments were the same as in the court below.

The following additional case was cited:—*Wright* v. *Wallis*, 3 Times Law Rep. 779.

Lord ESHER, M.R.—It appears to me that this appeal cannot succeed. The case is of no authority, and turns entirely on the evidence. The plaintiff had no case under the 2nd sub-section of section 1, because it is clear from the evidence that Bodfield was not a person intrusted with superintendence within the meaning of that sub-section. Section 8 provides that the superintendence referred to in that section must be that of a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour. The evidence, on the contrary, shows that Bodfield was ordinarily engaged in manual labour, and was actually so engaged when the accident happened. The case, therefore, does not come within section 1, sub-section 3, because the plaintiff was not injured while conforming to the orders of a person to whose orders he was bound to conform. But there again the evidence is all the other way. The plaintiff was never ordered to stand under the bale when it fell. On the contrary, the evidence shows that the orders which were from time to time given were to stand clear of the hatchway. He was, therefore, not conforming to any express or implied order when the accident happened, and he has no more case under sub-section 3 than he has under sub-section 2.

LINDLEY, L.J.—I am entirely of the same opinion. I think all that can be said is exhausted by the elaborate judgment of A. L. Smith, J., in the Divisional Court. It is impossible on the evidence to come to any other conclusion. I will only add that the case of *Wright* v. *Wallis* is no authority, as we there thought the facts had not been sufficiently investigated, and we remitted the case to the county court for that reason only.

BOWEN, L.J.—I am of the same opinion, and I think it is a very plain case.

Appeal dismissed.

Solicitor for the appellant, *R. Chapman.*

Solicitors for the respondent, *Watson, Sons, & Ewen.*

(a.) Reported by A. P. PERCEVAL KEMP, Esq., Barrister-at-Law.

From Q. B. Div. July 19.

WALSH v. WHITELEY. (a.)

Master and servant—Negligence—Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-section* 1; *s.* 2, *sub-section* 1—"*Defect in condition of machinery*"—*Machine dangerous to workman.*

Per Lindley *and* Lopes, L.JJ. (Lord Esher, M.R., *dissenting*).—*The mere fact that a machine is dangerous to the workmen using it does not constitute a "defect in the condition of the machine" within the meaning of section* 1, *sub-section* 1, *of the Employers' Liability Act,* 1880.

The plaintiff was employed at a carding machine at the defendants' mill. In the machine was a vertical wheel which revolved upon a bed-plate, and in the vertical surface of the wheel there were large holes. It was the plaintiff's duty to place a leather band over the wheel while in motion. Upon the occasion in question, while engaged in putting the band on the wheel, the plaintiff's thumb was caught in one of holes and was cut off. There was evidence that the holes were dangerous and of no use except to lessen the weight of the wheel, and the defendants had carding machines both with solid and open wheels. The machine had been in use for many years without any accident happening, and no complaint had been made.

Held, by Lindley *and* Lopes, L.JJ. (Lord Esher, M.R., *dissenting*), *that there was no evidence of any "defect in the condition of the machine" for which the defendants were liable within section* 1, *sub-section* 1, *and section* 2, *sub-section* 1, *of the Employers' Liability Act,* 1880.

Appeal from the judgment of the Queen's Bench Division in an action under section 1, sub-section 1, of the Employers' Liability Act, 1880, brought in the Blackburn County Court.

It appeared that the plaintiff was a grinder employed at a carding machine at the defendants' mill. In the machine there was a vertical wheel which revolved upon a horizontal bed-plate, and in the vertical surface of the wheel there were holes. Part of the plaintiff's duty was to place a leather band over the circumference of the wheel, and this could only be done while the wheel was in motion. While doing this upon the occasion in question the plaintiff's thumb was caught in one of the holes in the surface of the wheel and cut off.

It appeared from the evidence that the machine had been in use for ten years; that the holes were for the purpose of making the wheel light; and that the defendants had carding machines both with open and solid wheels. The plaintiff had been a grinder for thirteen years, and had been in the defendants' employment for eight months, and had never complained, and no complaint had been made, of the open wheels. In his evidence the plaintiff said that the open wheels were never so close to the bed-plate as in this machine, and three witnesses said that the holes in the wheel were dangerous, and were of no use.

The question raised was whether there was a defect in the condition of the machine which rendered the defendants liable, and the county court judge told the jury that to be defective it must be such as a reasonable, careful, experienced man, reasonably careful of the safety of his hands, would not use. The jury found a verdict for the plaintiff, damages £30.

In the Divisional Court Wills, J., was of opinion that there was evidence to go to the jury, Grantham, J., held that there was not. The judgment for the plaintiff therefore stood.

The defendants appealed.

Wheeler, Q.C., and *E. Bray,* for the defendants.—The machine was properly constructed, and it was fit for the purpose for which it was used. These machines are now more frequently made with solid wheels, and they would probably be safer, but it is not evidence of negligence in an employer not to adopt the latest form of machine. The combined effect of section 1, sub-section 1, and section 2, sub-section 1, of the Employers' Liability Act, 1880, is that there must be not only a defect in the condition of the machine, but also negligence in the employer in connection therewith. There was no evidence of that here. There was only evidence that the machine was dangerous, but that is not sufficient, as most machines are dangerous, and this machine had been used for years without accident or complaint. The Act has placed the workman in a position as advantageous, but no better, than that of the rest of the world who use the master's premises at his invitation on business: *per* Bowen, L.J., in *Thomas* v. *Quartermaine,* 35 W. R., at p. 557, 18 Q. B. D., at p. 693. In *Crafter* v. *Metropolitan Railway Co.,* 14 W. R. 334, L. R. 1 C. P. 300, where the plaintiff fell on the stairs, which were edged with brass, the court held that there was no evidence of negligence, though two witnesses said that in their opinion the staircase was dangerous by reason of the brass nosings and the absence of a handrail.

T. W. Chitty (*Bigham, Q.C.,* with him) for the plaintiff.—There was evidence that the machine was defective. A "defect" in the condition of the machine is something producing danger to the workman using it. The machine was not suitable for the purpose for which it was being used at the time of the injury—viz., the putting on the strap—by reason of the holes in the wheel. The case, therefore, comes within the decisions in *Hale* v. *Samuelson,* 32 W. R. 595, 12 Q. B. D. 30; *Cripps* v. *Judge,* 33 W. R. 35, 13 Q. B. D. 583; *Paley* v. *Garnett,* 34 W. R. 295, 16 Q. B. D. 52; and *Weblin* v. *Ballard,* 34 W. R. 455, 17 Q. B. D. 122.

E. Bray replied.

Cur. adv. vult.

July 19.—Lord ESHER, M.R.—Before coming to the facts of this particular case I think it necessary to make one or two preliminary observations which are material to show the grounds of my judgment. There have always been two schools of thought in cases of injury to workmen. Some judges have considered chiefly that injustice might be done to masters in holding them responsible. Others have considered that masters and workmen were not really upon an equal footing, inasmuch as if there was danger in the employment, it did not exist with regard to the masters but only with regard to the workmen, and that consequently the workmen must either give up their employment or take the risk. Those two views were laid before the committee of the House of Commons which sat to inquire into the subject, the one school thinking that the law as laid down by the judges was a just law, the other thinking that it was unfair to the workmen and ought to be altered. It was upon these conflicting views that the Employers' Liability Act, 1880, was passed. That Act, as its title shows, was passed in favour of workmen, and to extend the liability of masters. Since the passing of that statute I cannot help thinking that the same line of thought has been in operation. Some judges have construed the statute strictly so as not to inflict any injustice on masters. Other judges have construed it liberally in favour of the workmen. I myself have always belonged to the latter school. The former school have, in my opinion, been too bold in interfering with verdicts of juries.

Coming to the present case, two questions arise for our decision. The first question is, How far ought the court to interfere with the verdict of the jury? The second question is, What is the true construction of the statute? As to the first, the jury must be taken to have

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

found that the machine was defective in this sense, that it was dangerous to the workmen using it. We are asked to say that their verdict was wrong on the ground that there was no evidence that the machine was dangerous, and dangerous by reason of the negligence of the employer. It was argued that there could not be negligence on the part of the employer, because, as was said, there was no other better known form of machine at the time. That view seems to me to be erroneous. The question seems to me to be whether the machine is dangerous, and whether a careful consideration would show it to be dangerous.

In my opinion it is no answer to say that though the employer used a machine that was dangerous, no better machine had up to that time been invented. I am prepared to say that if a careful consideration would show the employer that the machine was dangerous to the workmen using it, even though the machine could not be improved upon, the employer ought not to use it, or, if he does, he can only do so subject to a liability to pay compensation to the workmen. And if on a careful consideration by the employer or by skilled persons an improvement could be made in the machine, that would be stronger to show that there was negligence in the employer using it. In the present case the machine had been some years in use. An alteration in the machines had been subsequently brought into use. The jury accordingly had to consider whether the machine was defective in the sense of being dangerous to the workmen using it, and whether or not the employer, by the exercise of ordinary care, must have known it to be dangerous. The jury have answered both those questions in favour of the plaintiff. I accept that verdict as not unreasonable, and I am not prepared to set it aside. It seems to me that both the learned judges in the Divisional Court accepted it, but differed upon the construction of the statute.

Upon the question of the construction of the statute, it is said that there is no defect in the condition of the machine if it is fit for the purpose for which it is used, even though it be dangerous to the workmen using it. Remembering that this is a statute passed in favour of workmen and for their greater safety, I do not think that, in considering what is a defective machine, we can confine the consideration to the question of the purpose for which it is used. The defect contemplated by the Act is not in the purpose for which the machine is used. That is not the test. The defect lies solely in there being danger to the workmen using it. The purpose for which a machine is used is wholly immaterial, and, in my opinion, the defect solely pointed at by the Act is a defect which touches the safety of the workmen, and that may either be in the original construction of the machine or in the use to which the machine is put. No question is raised as to misdirection if there was evidence to go to the jury, nor as to negligence on the part of the plaintiff. In my opinion, therefore, the verdict ought to stand, and the appeal should be dismissed.

The judgment of LINDLEY and LOPES, L.JJ., was read by

LOPES, L.J.—This case raises a most important question under the Employers' Liability Act, 1880. In the court below the learned judges differed, Wills, J., holding the decision of the county court judge right, Grantham, J., holding it wrong. We agree with the judgment of Grantham, J., and disagree with the judgment of Wills, J., and the Master of the Rolls.

The question is whether there was any evidence of "any defect in the condition of the machinery" within the meaning of section 1, sub-section 1, of the Employers' Liability Act. We think there was not. To determine the meaning of the words "defect in the condition of the machinery" we must look, not only at section 1, sub-section 1, but also at section 2, sub-section 1. Reading those sections and sub-sections together, we think there must be a defect implying negligence in the employer. The negligence of the employer appears to be a necessary element without which the workman is not to be entitled to any compensation or remedy. It must be a defect in the condition of the machine, having regard to the use to which it is to be applied or to the mode in which it is to be used. It may be a defect either in the original construction of the machine, or a defect arising from its not being kept up to the mark; but it is essential that there should be evidence of negligence of the employer or some person in his service intrusted with the duty of seeing that the machine is in proper condition. It must be a defect in the original construction or subsequent condition of the machine rendering the machine unfit for the purposes to which it is applied when used with reasonable care and caution, and a defect arising from the negligence of the employer. What evidence is there of this? Is there any evidence of the machine being defective, even in the abstract? It was perfect in all respects. It was not impaired by use. It had been properly kept up to the mark. The only suggestion is that the wheel, which might have been solid, had holes in it, and that if the wheel had been solid the plaintiff could not have put his thumb where he did, and the accident would not have happened. It was also suggested that the wheel was too close to the table, and that had the wheel and table been further apart the accident could not have happened. There was, however, no evidence worth mentioning of improper construction in this respect. But the plaintiff had used the same kind of machine for thirteen years and had sustained no injury. It is, to our mind, clear that he would have suffered no injury on the present occasion if he had used proper care and caution.

In these circumstances we can see no evidence of any defect in the condition of the machine, even apart from negligence of the employer. It may be that a solid wheel would have been safer, but it would be placing an intolerable burden on employers to hold that they are to adopt every fresh improvement in machinery. We do not believe that such was the intention of the Legislature, nor do we think it was intended to relieve workmen from the exercise of that care and caution without which most machinery is dangerous.

But in our opinion the defect in the condition of the machinery must be such as to show negligence on the part of the employer. It seems to us that in this case there is not a particle of evidence of any defect arising from the negligence of the employer. It was a machine generally used—used by the plaintiff for thirteen years without any complaint or mischief arising—perfect and unimpaired, and never thought by the plaintiff himself to be unsafe. It is said there is evidence of the machine being dangerous. So are most machines, so is even an ordinary sharp knife unless used with care, but that does not make it defective in its condition, nor does it imply negligence in the employer, if an accident happens, who furnishes it to his workmen for them to use with reasonable care.

The authorities cited in nowise conflict with the conclusion at which we have arrived. They are all cases where there was evidence of a defect showing negligence of the employer. In *Heske* v. *Samuelson* the lift was good, but there was negligence in not providing what was necessary to prevent the coke falling off; the machine was defective as used for coke. In *Cripps* v. *Judge* the ladder was used for a purpose for which it was unfit, and was so used under the personal superintendence of one of the defendants. In *Weblin* v. *Ballard* there was evidence that the ladder was not in a proper condition for the purpose for which it was used, and that the employer knew this. In *Thomas* v. *Quartermaine*, there was no defect, and it was held there must be a

defect showing negligence in the employer in order to bring the case within the Act. In *Yarmouth* v. *France*, *ante*, p. 281, 19 Q. B. D. 647, it was vice in the horse which was complained of, which was known to the defendants' manager.

In this case, then, in our opinion, there was no evidence of negligence to go to the jury. The learned county court judge ought to have nonsuited the plaintiff, or have directed a verdict for the defendants. If our view is wrong it will follow that whenever a workman uses a dangerous machine and is injured by it without any negligence on the part of the employer, the latter is responsible for the injury, unless he can prove negligence on the part of the workman himself. We cannot construe the Act as warranting any such conclusion. The Act is not directed against dangerous machines, but against the negligence of employers. With regard to the general observations of the Master of the Rolls on the Employers' Liability Act, we say that we agree with him that the Act was passed in favour of the workman, and we are ready to give the workman every benefit to which he is entitled under this Act, but we feel bound to construe the Act according to the meaning which we think it bears, and was intended to bear.

We think the appeal must be allowed.

Appeal allowed.

Solicitors, *Pritchard, Englefield, & Co.*, for *R. Biley*, Blackburn; *Merriman, Pike, & Merriman*, for *Partington & Allen*, Manchester.

From Q. B. Div. July 2.

HENNESSY v. WRIGHT (No. 1). (a.)

Practice—Particulars—Libel action.

Defendant published articles alleging that the plaintiff, who was Governor of Mauritius, had been charged by members of the council with sending to the Colonial Office garbled reports of their speeches. The articles were also alleged by the plaintiff to impute that he had in fact transmitted such garbled accounts.

An action for libel having been brought, defendant pleaded that the alleged libels were true in substance and in fact.

Held, that plaintiff was entitled to further and better particulars, it not being clear whether the defence meant that what was charged against the plaintiff had been truly reported or that what was reported to have been charged was in fact true.

Appeal by the defendant from a decision of the Divisional Court ordering the defendant to give particulars of the facts relied upon as justification for the alleged libels.

This was an action for libel brought by Sir John Pope Hennessy, Governor of the Mauritius, against the publisher of the *Times* newspaper.

The alleged libels were contained in certain articles published in the *Times* with reference to a meeting of the Council of the Government of the Mauritius which took place on the 19th of April, 1888. In these articles it was said that certain members of the council had charged the Governor with transmitting to the Colonial Office a report of the speeches delivered at the meeting without having submitted them to the speakers, and also with editing—that is, tampering with—the report. Some of the language used in the articles might also bear the interpretation that the plaintiff had in fact tampered with the report, and that meaning was put upon it by the plaintiff in the innuendoes charged by him in his statement of claim.

The defendant, in his defence, denied that the articles could bear the meaning put upon them, or any meaning defamatory to the plaintiff. He also pleaded as justification that the alleged libels were published *bonâ fide* and without malice, and were parts of fair and accurate accounts and reports of public proceedings in the Council of Government of the colony; that they were fair and reasonable comments upon matters of public interest and notoriety and published *bonâ fide* and without malice and under such circumstances as to render the publication privileged; and, lastly, that the alleged libels "were and are true in substance and in fact."

The defendant had obtained a commission to take evidence in the Island of Mauritius, and in the meantime the plaintiff applied at chambers for an order that the defendant should give particulars of the facts relied upon as justification of the libels complained of. Denman, J., refused the application. The plaintiff then appealed to the Divisional Court, and on May 15 the appeal was allowed, the court holding that the plaintiff was entitled to know before the trial what it was that the defendant meant by pleading that the alleged libels were true in substance and in fact, whether he meant that he had truly reported what was said, or that what he reported to have been said was true, and that the plaintiff was entitled to the particulars for which he asked.

The defendant now appealed from that decision.

Lumley Smith, Q.C., *William Graham*, and *Albert Bower*, in support of the appeal, contended that the pleading was wide enough to cover both the alternative meanings of the defence. The jury would say whether the alleged libel was true and then the defendants would be prepared to justify.

Cagney (with whom was *Lockwood, Q.C.*), contra, cited *Behrens* v. *Allen*, 8 Jur. N. S. 118; *D'Anson* v. *Stuart*, 1 T. R. 752; *Duncan* v. *Thwaites*, 3 B. & C. 556; *Gourley* v. *Plimsell*, 21 W. R. 683, L. R. 8 C. P. 362; and Bullen and Leake's Precedents in Pleading, 2nd ed., p. 612.

COTTON, L.J.—I think the Divisional Court was right. The object of particulars is to enable both parties to go to trial with knowledge of what they have to meet. Here is a plea which, according to the present system of pleading, cannot be said to be a bad plea. "The alleged libels respectively were and are true in substance and in fact." That covers both questions: whether the report of what took place is true, and whether the facts charged against the plaintiff during those debates are true. In my opinion, in order to enable the plaintiff to be prepared with evidence when he goes to trial, he ought to know what the defendant really means by that. Does he mean only that he has given a correct report of what took place? Or does he mean that the facts charged against the plaintiff are, in fact, true? It is said that the defendant intends to justify whatever the jury may find to be the true meaning of the libel. That cannot be ascertained till the time for giving evidence at the trial is passed, and how, in that case, the plaintiff could know what he has to meet I cannot say.

Without going into any technical details about the old and present form of pleading, in my opinion the order was right, because it would enable the plaintiff to go to trial with the knowledge of what he has to defend himself against. Before the court below Mr. Lockwood said: "We are quite content if we know whether they intend to say the report is a true one, or whether they also intend to contend that the facts charged against the plaintiff were true." That, I think, will be a sufficient compliance with the order.

(a.) Reported by L. S. BRISTOWE, Esq., Barrister-at-Law.

Bowen, L.J.—I am of the same opinion, and, speaking broadly, for the reasons given by the Lord Justice. I think it is necessary for the purpose of justice that the plaintiff, some time before the trial, should know whether it is going to be said against him that he did alter these reports or whether it is not. The defendant says he has told him already in his pleadings; but the difficulty is that he has told him in such a way that, although a lawyer might perhaps understand that that was so, yet he has not told him in such a way that when the trial comes on a cloud may not be thrown over it by some ingenious counsel contending that he had never meant to justify the truth of the libels, but only to say that what he had published was a correct report of what took place. Technically, I think, according to the rules, these particulars ought to be given. What was the way in which justification was pleaded under the former system, that is to say, after the year 1852, when the statement of claim set out a libel without an innuendo? The justification generally used to be by pleading justification of the words without colloquium, and then by pleading justification of the words with it. What the defendant has done here is to put the two into one plea. I do not object to that formally, provided it works no injustice; but in this case it might work injustice to have a joinder of the two defences in one form of words (because there are two separate defences), and might, I think, unless you protect the plaintiff by particulars, deprive him of that very right to particulars which the Judicature Act and Rules meant to give him. Ord. 29, r. 7, is as follows:—"Where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct grounds, they shall be stated as far as may be separately and distinctly, and the same rule shall apply where the defendant relies upon several distinct grounds of defence, set off, or counter-claim founded upon separate and distinct facts." Now this is a case in which the two defences, though put together in one plea, really are distinct grounds of defence and founded on separate and distinct facts; and if we were bound by the hard and fast line, this is a case in which the plaintiff would have had a right, it seems to me, to have the grounds of defence stated separately and distinctly. That has not been done. It may be said on behalf of the defendant that that is an objection to the pleading. Yes, but objections to pleadings have always from time immemorial been cured, when the objection was to the generality of the plea, by delivery of particulars. This is an apt way in the common law division of curing the objection caused by the generality of the plea.

It seems to me, therefore, that the order for particulars is based upon good practice, and certainly is required by the justice of the case.

Fry, L.J.—I agree, though not without doubt.

Solicitors, C. & S. Harrison & Co.; Seymour, Edwards, & Jones.

From Q. B. Div. July 6.

Hennessy v. Wright (No. 2). (a.)

Practice—Interrogatories—Action of libel against publisher of newspaper—Report of public proceedings and fair comment—Disclosure of name of newspaper correspondent—Disclosure of original manuscript.

In an action against the publisher of a newspaper for a libel contained in a letter from a correspondent and in a leading article thereon, the defence was that the alleged libel consisted of an accurate report of certain public proceedings and fair comment thereon.

Held, that the plaintiff was not entitled to interrogate the defendant as to the names of the persons on whose information the reports were based, or the name of the correspondent who wrote the letter, or as to the original manuscript of the letter.

Appeal from the refusal of a divisional court to order the defendant to make further answers to certain interrogatories.

The action was for libel, and was brought by Sir John Pope Hennessy, the Governor of Mauritius, against the publisher of the *Times* newspaper. The libel complained of was contained in a letter from a correspondent at Mauritius and in a leading article commenting thereon, which were alleged by the plaintiff to mean that he, as governor, had been charged by members of the council of the colony with having "edited"—that is, tampered with—the reports of certain speeches delivered by them, and with having transmitted reports of such speeches to the Secretary of State for the Colonies in a garbled form. The defendant pleaded that the alleged libels were parts of fair and accurate accounts and reports of public proceedings of the council of the colony, and fair and reasonable comments upon matters of public interest and notoriety, and were published *bonâ fide* and without malice, and under such circumstances as to render the publication privileged; and that the alleged libels were true in substance and in fact.

The plaintiff administered to the defendant interrogatories, the substance of which, so far as it is necessary to state them in this report, was as follows:—(1) Say to the best of your information and belief from what person or persons was the information obtained upon which the alleged fair and accurate accounts and reports were respectively based. (2) Give to the best of your knowledge, information, or belief the name of the person or persons by whom the reports were made, and of the person who sent them to the *Times*. (3) Had the person from whom the reports were obtained any previous connection with the *Times* as correspondent or otherwise? (4) Give the name of the person who wrote or contributed the letter or article headed Port Louis, 3rd of August, published in the *Times* of the 25th of August, 1886. (5) Was or was not the communication in the last interrogatory mentioned the first received from the author or contributor thereof? (6) Did you, or the editor, or anyone on behalf of the *Times* at any time make any inquiry as to the antecedents or reliability of the person who supplied the information? If so, state what was learnt about him. (7) State whether you, or the editor, or any person engaged on the *Times* have at any time received any and what information as to the person who supplied the reports. (8) Have you or any person in your service or under your control possession of the original manuscript from which the matter published on the 25th of August, 1886, was printed? The answer of the defendant to the above interrogatories was as follows:—I object to answer the interrogatories upon the grounds that they are irrelevant and do not relate to any matters in question in this action, and that they are not put *bonâ fide* for the purposes of this action, and that I am advised and believe that I am not bound to disclose the names of persons who will probably be my witnesses on the trial, and as to the eighth interrogatory, that it inquires as to the contents of a written document.

Denman, J., at chambers, thought the above answer was sufficient, and refused to order the defendant to make a further and better answer. The Divisional Court (Manisty and Stephen, JJ.), upheld his decision.

The plaintiff appealed.

Lockwood, Q.C., and *Cagney*, for the plaintiff.—The effect of the interrogatories is to ask the defendant what

(a.) Reported by F. G. Rusden, Esq., Barrister-at-Law.

means be took to ascertain the truth of the libel. The plaintiff is entitled to ask what is the character of the man the defendant relied on. If the writer were actuated by malicious motives, an action would lie, even though the libel were a true report of public proceedings: *Stevens* v. *Sampson*, 28 W. R. 87, 5 Ex. D. 53. [Lord Esher, M.R.—In that case the action was brought against the writer of the report.] The defendant has adopted the report, and would be affected by malice in the writer. It is not a sufficient excuse for refusing to give persons' names that you intend to call them as witnesses: *Marriott* v. *Chamberlain*, 34 W. R. 783, 17 Q. B. D. 154. As to the manuscript of the letter, the plaintiff desires to know what were the materials which the editor had, and whether certain matters were in the manuscript, or were added by the editor.

Lumley Smith, Q.C., and *Graham*, for the defendant.—These interrogatories are irrelevant. The defence is that the reports are true and the comments fair. Fair comment is quite a different defence from privilege, and the question of malice does not arise: *Campbell* v. *Spottiswoode*, 11 W. R. 569, 3 B. & S. 769; *Merivale* v. *Carson*, 36 W. R. 231, 20 Q. B. D. 275. The defendant will have to establish his defence—viz., that the reports are true and the comments fair, and on such issues all question as to malice is irrelevant. Moreover, if malice were shown in the writer, it would be no evidence against the defendant: *Clark* v. *Newsam*, 1 Ex. 131; *Robertson* v. *Wylde*, 2 Moo. & R. 101. The publication being admitted, the name or character of the writer is not material. Neither is it material what is in the manuscript; for the defendant will have to show that the published account is true.

Lord Esher, M.R.—In this case interrogatories have been administered and have been answered. But it is said that the answers are unsatisfactory, and we are requested to direct that further answers should be made. To that the objection is taken that any further answers to these interrogatories cannot disclose anything material to enable the party administering either to maintain his own case or to destroy his adversary's case. If the answers would be material for either of these purposes the interrogatories ought to be answered. Now can they be material for either purpose? It was suggested that the interrogatories were put for the purpose of asking the names of persons who had made certain statements to the defendant; it was said that it might be shown that those persons were actuated by malicious motives, and that, if so, the defendant must be held to be malicious, so that any privilege he might have would be taken away. But to show that the persons who gave the information were actuated by malice does not carry the case forward, for that is consistent with absence of malice in the defendant. I think that the names and the motives of the informing persons are immaterial for the purpose of showing malice.

But the real defence set up in this action is that the reports are correct and the comments fair; and on that defence the question of malice does not arise. As to whether the comments are fair or not, how can that depend on the names of the persons who gave the information, or on whether they were malicious or not, or on whether the defendant's conduct with regard to them was fair or not? And on the question whether the reports are a correct account of what happened, it is clear that the names of the persons who sent them are immaterial. The issue is whether what the defendant has stated is in effect true. Suppose the names are given, that can have no effect on that issue. Again, suppose the manuscript produced, that can have no effect on the issue. The jury will have to compare what the defendant has published with what actually took place in the colony; and for that purpose the contents of the manuscript will be immaterial. Suppose the manuscript was produced and was found to differ from the published report, the question would still be whether the published report truly represented what took place. The only object of getting the names of these persons or production of this document is to enable the plaintiff to go to those persons or to look into that document for the purpose of finding out other evidence than the names or the document to show that the description of what took place is not correct or that the comment is unfair. The plaintiff wants to find something, of which he at present knows nothing, to see if he cannot make out a case. That is, the interrogatories are fishing interrogatories. I am of opinion that we ought not to order further answers to be given.

Lindley, L.J.—I think that these interrogatories have been sufficiently answered. My only doubt is as to the eighth interrogatory. It is important to remember that interrogatories in actions for libel are entirely novel. Courts of equity used never to grant discovery in aid of an action of tort. And consequently equity lawyers never had to consider the limitations of the doctrine of discovery with regard to such actions as libel or slander. Therefore, the courts ought to be very careful in dealing with interrogatories in these actions. As to the manuscript, the defendant has made an affidavit of documents, but he has omitted to mention the manuscript, on the ground that it is not material to the issue in the action. But I think that, *primâ facie*, this manuscript might be material. I am not, however, prepared to carry out this view logically, for it has not been the practice of the courts of law which are familiar with actions of libel to order the production of manuscripts under such circumstances. Therefore I do not dissent from what the Master of the Rolls has said on that matter, and in all the rest I concur.

Lopes, L.J., concurred with the Master of the Rolls.

Appeal dismissed.

Solicitors for the plaintiff, *C. & S. Harrison & Co.*

Solicitors for the defendant, *Soames, Edwards, & Jones.*

From Q. B. Div. Nov. 8.

Mayor, &c., of the Staple of England v. Bank of England. (a.)

Estoppel—Negligence—Custody of seal of corporation—Unauthorized use of seal—Transfer of stock—Proximate cause.

The clerk to a corporation, having sole custody of their corporate seal, affixed it without their authority to a power of attorney, by means of which certain stock, the property of the corporation, was sold by the defendants, and the proceeds were appropriated by the clerk.

Held, on the authority of Bank of Ireland v. Trustees of Evans' Charities, 5 *H. L. Cas.* 389, *that, assuming the corporation to have been negligent, they were not disentitled to recover the stock from the defendants, since their negligence was not the proximate cause of the loss.*

Appeal from a divisional court (Day and Wills, JJ.).

The plaintiffs were an ancient corporation finally incorporated by a charter in 1669, with perpetual succession and a common seal. The objects for which the corporation was originally created had ceased to exist. Their corporate seal and minute-book were kept by one Drew, who was clerk to the corporation, and he also received, under a power of attorney, and accounted to

(a.) Reported by A. P. Percival Keep, Esq., Barrister-at-Law.

the treasurer for, the dividends of £4,250 stock, which constituted the whole of their funds. In May, 1884, an application was made to the defendants by a firm of stockbrokers for a power of attorney to two members of the firm for the sale of this stock. The defendants sent a notice of this application directed to the plaintiffs, which was neither acknowledged nor returned. The stock was sold under the power of attorney, and the proceeds received by Drew. The seal of the corporation was affixed to the power of attorney at Drew's house without any authority from the corporation and before two witnesses who were not corporators. Drew appropriated the proceeds of the sale, and was subsequently tried and convicted for the offence. The plaintiffs then brought this action for the £4,250 stock on the ground that it had been transferred without authority. The action was tried before Pollock, B., when the jury found that the plaintiffs had been guilty of negligence so as to have induced the defendants to act on the power of attorney, but the Divisional Court entered judgment for the plaintiffs on the ground that the negligence of the plaintiffs was not the proximate cause of the loss.

The defendants appealed.

Sir R. E. Webster, A.G., H. D. Greene, Q.C., and *Arbuthnot*, for the appellants.

Finlay, Q.C., and *R. M. Bray*, for the respondents.

The following cases were cited:—*Bank of Ireland* v. *Trustees of Evans' Charity*, 5 H. L. Cas. 389; *Young* v. *Grote*, 4 Bing. 253; *Swan* v. *North British Australasian Co.*, 11 W. R. 862, 2 H. & C. 175; *Arnold* v. *Cheque Bank*, 24 W. R. 759, 1 C. P. D. 578.

Lord Esher, M.R.—The question we have to determine in this case is whether where the defendants have transferred stock belonging to the plaintiffs to a stranger without their authority, they can protect themselves from liability for so doing. *Primâ facie* the presumption is that they cannot, but it is urged that the plaintiffs have so acted as to entitle the bank to be excused from liability. The only points, therefore, are whether there was any evidence of negligence, and whether, if so, it was evidence which ought to have been left to the jury. It appears to me unnecessary to decide the first point. Even assuming that there was negligence on the part of the plaintiffs, the case, as far as the facts go, is indistinguishable from the decision in the House of Lords in *Bank of Ireland* v. *Trustees of Evans' Charities*. We have, therefore, only to consider whether the negligence was such as to exonerate the defendants. The principle which was laid down by Parke, J., in the case I have referred to distinguishes between negligence generally and that species of negligence which would alone warrant the jury in finding that the plaintiffs were not entitled to insist that the transfer was void. "The negligence which would deprive the plaintiff of his right to insist that the transfer was invalid must be negligence in or immediately connected with the transfer itself." The manner in which the learned judge goes on to deal with *Young* v. *Grote*, where the drawer had caused a banker to pay a forged cheque by his neglect in the mode of drawing the cheque itself, shows that he meant that the negligence must be proximately connected with the result. That is the decision of the House of Lords, and is binding on all courts, and that was recognized to be the decision in the case of *Swan* v. *North British Australasian Co.*, where Blackburn, J., says:—"The neglect must be in the transaction itself, and be the proximate cause of leading the party into the mistake."

Assuming, therefore, that there was negligence by the plaintiffs in this case which was calculated to deceive, and did in fact deceive, the bank, nevertheless there was no case to go to the jury because the negligence was not the proximate cause of the bank's transferring the stock.

The plaintiffs' negligence consisted in their implicit trust in Drew, and between that negligence and what the bank did many circumstances existed which prevented that negligence from being the proximate cause of the transfer of the stock by the bank.

I, therefore, think there was no evidence to go to the jury, and that the decision of the Divisional Court was right.

Bowen, L.J.—I am of the same opinion. If the question were simply whether the plaintiffs had departed from the reasonable precautions which might be expected from business men as to the custody of their seal, I should not be inclined to differ from the verdict of the jury. But there is a further question. Even assuming that the plaintiffs were careless and incautious, the bank must show, in order to succeed, that their carelessness directly and proximately led to the transfer of the stock. The case of *Bank of Ireland* v. *Trustees of Evans' Charities* is precisely in point. The language there used by Parke, J., and adopted by the House of Lords is neither difficult nor ambiguous, and it was, as I think, correctly interpreted in *Swan* v. *North British Australasian Co.*, by Blackburn, J., when he said that the negligence, in order to work an estoppel, must be a proximate negligence.

In this case it seems to me clear that there were no grounds on which the jury could find that the negligence of the plaintiffs directly led to the transfer. Drew was, it appears, a man of position and reputation, and even if it was careless of the plaintiffs to leave their seal in his custody, it cannot be said that it was the immediate consequence of that carelessness that he would commit the forgery he committed, and that the bank would be induced by that to transfer the stock. The proximate cause of the transfer was, in my opinion, the crime committed by Drew, and I cannot think that that crime was the natural, necessary, or direct consequence of the carelessness of the plaintiffs. The case is, I think, covered by authority, and the appeal must be dismissed.

Fry, L.J.—I agree, and have very few words to add. I am by no means clear that there was any evidence of negligence at all here, but if there was I think it is abundantly clear, on the authority of *Bank of Ireland* v. *Trustees of Evans' Charities*, that the negligence was not such as to justify the verdict of the jury. It is impossible to distinguish the two cases, and we are bound by the principles there laid down.

Appeal dismissed.

Solicitors for the appellants, *Freshfields*.

Solicitors for the respondents, *Watney, Tilleard, & Freeman*.

High Court of Justice.

Chan. Div. North, J. — July 25.

White v. City of London Brewery Co. (Limited). (a.)

Mortgage — Public-house — Mortgagees in possession — Lease by mortgagees with clause binding tenant to take beer, &c., from them — Account — Interest — Profit derived from sale of beer to tenant.

A leasehold public-house was mortgaged to brewers who entered into possession, and, after carrying on the business for some time, leased the public-house to tenants,

(a.) Reported by J. Trustram, Esq., Barrister-at-Law.

with agreements binding the tenants to take their beer, &c., from them, under which they derived a large profit from the sale of beer, &c. They afterwards sold the public-house under the power of sale in the mortgage.

Held, in an action by the mortgagor for an account, that the mortgagees were not entitled to interest on the cost of beer supplied while they were carrying on the business; that they were not bound to account for the profits derived from the sale of beer, &c., to the tenants of the public-house; but that they were chargeable with the increased rent they might have obtained if the tenants had been under no restrictions as to purchasing their beer.

By an indenture dated the 4th of February, 1868, John White, the holder of a lease for sixty years from the 24th of June, 1861, subject to a rent of £60, of a public-house known as the "Woodstock Arms," Rushing-road, mortgaged his interest in the public-house to the City of London Brewery Co. (Limited) for the sum of £700, with interest at £5 per cent., the mortgage containing a proviso that the total amount to be recovered by the company should not exceed £980.

In September, 1869, the payment of interest being in arrear, the company entered into possession of the public-house, and, having obtained a transfer of the licence, carried on the business of publicans there down to March, 1871, and incurred a loss of £272 12s.

In March, 1871, the company, having furnished the public-house, let it to Moulton at a rent of £15 for the house and £15 for the furniture, the company doing all repairs, and Moulton remained their tenant until 1873, when the company let the public-house, unfurnished, to Hake at a rent of £60, the company doing all repairs, both the tenants being bound by their agreements to purchase their beer from the company.

On the 17th of September, 1879, the company sold the public-house for £2,650, and after deducting the sum of £2,166 8s. 7d. due to them under the mortgage, paid over the balance to R. J. E. Carr, who was second mortgagee of the public-house.

The action was commenced by J. White, the mortgagor, in 1880, against the company and R. J. E. Carr, the second mortgagee, for an account of the proceeds of the sale of the public-house and other moneys received by the company by virtue of their mortgage, and on the 27th of April, 1881, judgment was obtained, by which the following accounts were directed:—

1. An account of what was due to the defendant company under the indenture of mortgage of the 4th of February, 1868.

2. An account of all money laid out by the defendant company in necessary repairs and lasting improvements on the hereditaments comprised in the said mortgage. And it is ordered that interest should be computed on sums which should appear to have been so laid out after the same rate as the mortgage carried.

3. An account of the rents and profits of the mortgaged premises received by the defendant company, or which, without their wilful default, might have been received.

4. An inquiry what profits were made by the defendant company in carrying on the business since they took possession of the mortgaged premises, and what sums ought to be allowed them for skilled labour and expenses out of pocket in carrying on such business.

The chief clerk, by his certificate, allowed to the company the sum of £50 0s. 2d. for interest on the amount of beer supplied while carrying on the business of the public-house from September, 1869, to March, 1871; and also found that the company had made a profit of £1,991 18s. 9d. by selling beer to the tenants of the public-house who were bound by their agreements to purchase their beer from the company.

This was the further consideration of the action, and a summons to vary the chief clerk's certificate.

Cozens-Hardy, Q.C., and A. de B. Terrell, for the plaintiff.—The company, as mortgagees, are bound to account for the profits made by them by the sale of beer to the tenant of the mortgaged premises, under agreements compelling the tenants to take their beer from the company. A mortgagee for possession is accountable for any profits he may make, like a trustee. [They referred to *Gubbins* v. *Creed*, 2 Sch. & Lef. 214; *Gordon* v. *Lord*, 2 Sumner's Circuit Court Reports (1st Circuit), 16, 155; *Warner* v. *Jacob*, 39 W. R. 731, 20 Ch. D. 220; *Chaplin* v. *Young*, 33 Beav. 414, 12 W. R. Ch. Dig. 29.] At any rate, the company would have obtained more rent for the public-house if they had let it to tenants with free agreements, and they ought to be charged with a higher rent than they received.

Higgins, Q.C., and J. D. Fitzgerald, for the defendants.—The company are not bound to account for the profits derived from the sale of beer to the tenants of the public-house, which is a matter quite collateral to the mortgage. [They referred to Fisher on Mortgage, 4th ed., 1454; *Brandon* v. *Brandon*, 10 W. R. 22; *Hughes* v. *Williams*, 12 Ves. 493; *Dunsmuir* v. *Brighton Club Co.*, 23 W. R. 795, L. R. 10 Q. B. 371; *Robertson* v. *Norris*, 1 Giff. 428, 8 W. R. Ch. D. 43; *Dobson* v. *Land*, 8 Hare, 216.] We submit that the evidence shows that the company could not have obtained higher rent from the tenants of the public-house even if they had let it as a free house.

NORTH, J., stated the facts, and proceeded.—No interest is payable on the amount due for beer supplied under or by virtue of the mortgage, which excludes interest on any such sum as that. There may be a claim for such interest under the statute 3 & 4 Will. 4, c. 42, on a sufficient demand being made, but this is a suit to ascertain what is due under and by virtue of the mortgage security. The allowance in respect of that sum ought not to have been made. The company entered into possession of the public-house in September, 1869, put a man in the house, and carried on the business at a considerable loss. They then let it to Moulton for little more than two years, and then to Hake. The fourth inquiry directed by the decree, as to what profits were made by the company in carrying on the business, and what sums ought to be allowed them for skilled labour and expenses out of pocket in carrying on such business, was directed without reference to any question of profits made afterwards, and relates to the time when the company were in possession. The house was unfurnished and the company furnished it and let it to Moulton at a rent of £30, £15 for the house and £15 for the rent of the furniture. There is no complaint now as to that. From the year 1871 the claim is that the company, as mortgagees, should be charged not only with the rent they obtained for the public-house, but also with the profits made by them by supplying the beer. In my opinion it is not so. The mortgagees are not bound to account for any profit derived from a contract or dealing merely collateral, and not arising out of the mortgaged premises.

In the first place this question is one to be determined at the trial of the action, and it is precluded by the judgment at the trial. It is not within the terms of the decree. The fourth inquiry is as to what profits were made by the company during the time that they were in possession of the public-house, and the decree is silent as to profits derived from the sale of beer, and made afterwards. The inquiry respecting the period after 1871 is confined to the rents and profits of the mortgaged premises received by the company, or which, without their wilful default, might have been received. For the purpose of charging the mortgagees, as it was sought to be done, the inquiry should have been different. But if this had been the trial of the action I do

not think that any such inquiry ought to have been ordered. The decree is in the common form for an account of the rents and profits of the mortgaged premises received by the company. The profits made by supplying the beer are not such profits.

But it is said that these are profits made by the company as mortgagees, and that they are not entitled to any such profits. No authority was cited in support of this contention that is in point. The observations of the Lord Chancellor in *Gubbins* v. *Creed*, where he says that, as a trustee cannot be permitted to make any benefit out of the trust fund, so neither shall a mortgagee get any advantage out of the mortgage fund beyond the principal and interest, and that, for that reason, a mortgagee in possession is not at liberty to present to a living, because there is nothing in the presentation for which the mortgagee can account to the mortgagor, and where there is a reference to cases in which it has been held that the right of presentation could not be exercised by a mortgagee because it is not of any value and could not come into account, are not in point. Here the profits sought to be charged are profits made by the sale of beer to tenants of the public-house under agreements binding them to purchase their beer from the mortgagees. The case cited from the American reports does not go farther than the English authorities. There is nothing there that applies specially to the present case. The case of *Robertson* v. *Norris* is very near to the present, but not an authority, because the point to be decided here was not raised. The question was whether a mortgagee ought to be allowed credit prices for printing a newspaper of which he had entered into possession and was receiving the money produced by it. Supposing that a trustee were to let the trust property, reserving the right of shooting, he would be charged with what he might have obtained by letting the shooting to somebody else, and not with the value of the game he obtained. The observations of the Vice-Chancellor in *Dobson* v. *Land* were as follows:—"On the other hand, a trustee can never make a benefit to himself by any dealing with the trust property; but if a second mortgagee should buy in the first mortgage for half its amount, or even obtain an assignment without consideration from the first mortgagee, I can have no doubt he would be entitled to charge the mortgagor with the full amount of the first mortgage in addition to his own, and other cases of a like kind might be put. This destroys the integrity of the proposition contended for by the mortgagee; and I confess I have great difficulty in seeing why a mortgagee should not, as between himself and the mortgagor only, be allowed to make any contract he pleases collateral to and not affecting the mortgaged premises." The Vice-Chancellor would have held that profits derived from the sale of beer were not sums for which the mortgagee was bound to account.

But that does not dispose of the whole case. It was contended, in the alternative, on behalf of the plaintiff, that by reason of the public-house being let by the company with a condition that the tenant should purchase his beer only from the company a smaller rent was obtained than might have been obtained by letting the house "free" as it was called. I think that the plaintiff is right in that contention. The evidence shows without doubt that a lease of a public-house subject to a condition binding the tenant to take his beer from the lessor is less advantageous than a lease under which the tenant can purchase his beer from anyone he likes. The fact that such an obligation is insisted on by lessors of public-houses is strong corroboration of the opinion that such a lease is less valuable. And the case is the same with a short tenancy. The company, being mortgagees, granted a lease subject to a condition in their own favour which was less beneficial to the mortgagor than if that condition had not been imposed. The property was subject to a ground-rent of £60, and the rent ultimately obtained by the company was £80, so the company in reality got nothing by the rent. Notwithstanding this the public-house fetched the sum of £2,650 in 1879. I am satisfied that a free tenancy is more valuable, and would have fetched a higher rent, and that the mortgagees are not charged with as high a rent as they ought to have been charged with during, at any rate, the period when Hake was tenant. During the first part of the time when Moulton was in the house as manager the business was worked at a loss. The public-house was afterwards let to him at a total rent of £30 a year, of which £15 was for the house and £15 for the furniture; and during that period the business was being built up and the house could not at first be let for more than £15 a year. The conclusion I come to is that the rent should have been £30 from August, 1874, down to the sale of the property. Perhaps I ought to have made a slight increase before that time, and not quite so much afterwards, but I think I shall be doing substantial justice by saying that the rent should be £80 a year—that is £20 more than the rent obtained—from August, 1874, to the time of the sale, and allowing nothing for the other part of the time. The mortgagees must have the costs of the action and the summons, to be set off against the allowances made to the mortgagor, without prejudice to any question between the first and second mortgagees, because, although the mortgagor has succeeded to some extent he has failed to a considerable extent, considering the way in which the points have been raised.

Solicitors, *Carr & Co.*; *Western & Sons.*

Chan. Div. Stirling, J. } May 17; July 8.

In re Onslow.

Plowden v. Gayford. (*a.*)

Married woman—Separate use—Property comprised in marriage settlement—Married Women's Property Act, 1882 (45 & 46 *Vict.* c. 75), *ss.* 2, 19.

Under a marriage settlement property was vested in trustees upon trust (in the events which had happened) for such persons as the widow (the husband being dead) should by deed or will appoint, and, in default of appointment, for her absolutely. The power was not exercised during the widowhood. In 1887 *the widow married again.*

Held, that, prior to her second marriage, she would have been entitled to have the fund paid to her absolutely; and that the effect of the Married Women's Property Act, 1882, *was to add the incident of separate use to whatever interest she had in the property comprised in the settlement. She and her husband were therefore entitled to have the fund paid to them discharged from the settlement.*

By a settlement dated the 7th of June, 1878, made on the occasion of the marriage of Mrs. Plowden with her previous husband, George Stoate, certain stocks and securities were settled upon trust for Mrs. Plowden (by her then name of Onslow) during her life and during the then intended coverture for her separate use without power of anticipation, and upon trust, after the death of the survivor of the intended husband and wife, for the children and issue of the said intended marriage, and if there should be no child of the said marriage upon trust for such person or persons as Mrs. Plowden should, during coverture, by will, and when not under coverture by deed or will, appoint, and in default of appointment, if Mrs. Plowden should survive her then intended hus-

(*a.*) Reported by L. S. Benrows, Esq., Barrister-at-Law.

band, then upon trust for her executors, administrators, and assigns.

George Stoate died on the 3rd of April, 1880, and there were no children of the marriage.

Mrs. Plowden did not exercise her power of appointment during her widowhood.

On the 5th of February, 1887, she married her present husband, Col. Frederick Plowden. No settlement was executed upon that marriage.

Mrs. Plowden, being desirous of releasing the power of appointment by will given to her by her marriage settlement, and of having the funds taken out of settlement, the present summons was taken out for the purpose of determining whether that could be done.

Lawson, for the applicants. — Mrs. Plowden is in the position of an absolute owner: *Holloway* v. *Clarkson*, 2 Hare, 521; *Devall* v. *Dickens*, 9 Jur. 550; *Kirkpatrick* v. *Capel*, Sugden on Powers, 8th ed., p. 75; *Page* v. *Soper*, 1 W. R. 518, 11 Hare, 321; *Anderson* v. *Dawson*, 15 Ves. 532; *Morris* v. *Howes*, 4 Hare, 599; *Horseman* v. *Abbey*, 1 J. & W. 381. [He also referred to the Married Women's Property Act, 1882, s. 19.] She could release her power of appointment under section 52 of the Conveyancing Act, 1881, and section 6 of the Conveyancing Act, 1882.

Curtis Price, for the respondent.

Stirling, J., stated the facts, and proceeded.—If Mrs. Plowden had come immediately before her second marriage and asked for payment to her of the funds comprised in the settlement she would have been entitled to it. That is shown by the cases of *Holloway* v. *Clarkson* and *Devall* v. *Dickens*. What then is her position after the marriage? That depends upon the effect of the Married Women's Property Act, 1882. The sections of that Act which are important to be considered are the 2nd and the 19th. The 19th section provides that "Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman." In the case of *In re Armstrong*, recently decided by the Court of Appeal (*ante*, p. 772), the words "interfere with or affect any settlement" were interpreted to mean invalidate or render inoperative any settlement, but it was held that the effect of the section was not to take property subject to a marriage settlement entirely out of the Act.

Applying that to the present case, I say that the Act applies so far as to add the incident of separate use to whatever interest Mrs. Plowden has in the property comprised in her settlement. Whatever estate she now has is hers for her separate use, and she may dispose of it accordingly. If Col. Plowdon has any interest, he is *sui juris* and can dispose of it. I will accordingly make an order that Col. and Mrs. Plowden are entitled to have the fund paid over to them, and that the trustees do pay the same accordingly.

Solicitors, *J. H. & Y. Johnson*; *Frederick Taylor*.

Chan. Div. Kekewich, J. } July 24.

Lee v. Soames. (*a*.)

Vendor and purchaser—Sale by bare trustee of legal estate—No power of sale—Ratification—Time not of the essence of the contract—Notice—Rescission—Time—Reasonableness — Non-mutuality — Specific performance.

A., who was trustee of the bare legal estate is contracted, on the 8th of July, to sell it to B. As soon as B. discovered, by the answers to his requisitions, the true state of the title, he, by further requisition, about the middle of August, required that the beneficiaries should sign or ratify the contract. A. at first refused, and proposed that they should merely join in the conveyance; but upon B. insisting on his requisition A. promised, "without prejudice," that it should be done. The original contract was to have been completed on the 4th of August, but time was not made of the essence. On the 11th of October B. wrote that, unless he received the ratification "within the present week," he should "ask to rescind." Four weeks later, not having received it, he wrote, "The contract is now rescinded." A. had obtained all the necessary signatures within a day or two afterwards.

Held, that B. might have rescinded immediately his further requisition (as to the beneficiaries signing the contract) was refected, and that, at any time after that—the rule as to fixing a reasonable time not being applicable, A. not being able to make a good title himself, nor having power to compel a conveyance by those who could — B. might have declined to wait any longer; and, further, that even if that rule had been applicable, the time allowed was, under the circumstances, reasonable.

Forrer *v.* Nash, 14 *W. R.* 8, 35 *Beav.* 167, *and* Brewer *v.* Broadwood, 31 *W. R.* 115, 22 *Ch. D.* 105, *followed.*

Salisbury *v.* Hatcher, 2 *Yo. & Coll.* 54, *distinguished.*

Trial of action.

This action was brought by a purchaser against his vendor for a declaration that the contract had been validly rescinded, and for the return of the deposit money with interest.

The defendant counter-claimed for specific performance and payment of balance of the purchase-money.

The sale was advertised as to be made by direction of the trustee of the will of Daniel Willshin, deceased, and in the form of contract annexed to the conditions of sale the defendant was named as the vendor.

The plaintiff was declared the purchaser of the property, which is known as Beltring Farm, in Kent.

The auctioneers signed the memorandum in this form:—"As agents for the vendor, Miss Emily Soames, we confirm this contract."

The contract was dated the 8th of July, 1887, the price was £2,610, and the purchase was to be completed on the 4th of August. The title disclosed by the abstract showed no power in the defendant to sell the property. The purchaser thereupon made a requisition asking that the will should be abstracted, to show the vendor's power of sale. The answer was that the persons interested would join in the conveyance. In answer to another requisition it was stated that Miss Soames was only a bare trustee of the legal estate, and it appeared that she was entitled beneficially to one-fourth only of the farm, the other three-fourths belonging respectively to her two brothers and the trustees of her sister's marriage settlement.

The remaining facts sufficiently appear from the judgment.

Warmington, Q.C., and *Ribton*, for the plaintiff.—If a person sells property without having any power to sell it, the purchaser can either insist on ratification or rescind the contract. We decline to play a game of "heads you win, tails we lose." There must be mutuality—a contract that can be enforced both ways. The authorities we rely on are:—*Hoggart* v. *Cutts*, 1 Russ. & My. 293; *Forrer* v. *Nash*, 14 W. R. 8, 35 Beav. 167; *Brewer* v. *Broadwood*, 31 W. R. 115, 22 Ch. D. 105; and *Wylson* v. *Dunn*, 35 W. R. 405, 34 Ch. D. 569.

Cuther, Q.C., and *Gatey*, for the defendant.—The [illegible] beneficial owners, who had been

(*a*.) Reported by R. H. Deane, Esq., Barrister

consulted beforehand. Another question is whether the plaintiff gave sufficient time for performance of the contract. There was no substance in the purchaser's objection, because the execution by the beneficiaries of the conveyance would have answered every purpose. Where time is not of the essence of the contract the right of a purchaser to rescind only arises where there has been gross delay or default by the vendor, and then only after giving a reasonable time: *Green* v. *Sevin*, 13 Ch. D. 589, 28 W. R. Dig. 172; Here all the beneficiaries were from the first willing to concur. The notice is not to rescind, but that he will seek to rescind: *Reynolds* v. *Nelson*, 6 Madd. 18; *Salisbury* v. *Hatcher*, 2 Yo. & Coll. 54; *Wylson* v. *Dunn*; *Hatten* v. *Russell*, *ante*, p. 317, 38 Ch. D. 334. The plaintiff did not at once decline to go on as soon as he found that Miss Soames had only a fourth of the property.

Warmington, Q.C., in reply.—What the plaintiff said in effect as soon as he discovered the real position of the vendor was, "This contract is off—if you can make another in a reasonable time I will accept it."

Kekewich, J.—This case is one of some difficulty, which is really occasioned by the proper conduct of the solicitors on both sides, neither of whom thought it right to express himself with brusqueness. It is conceded that it was a mistake to advertise this property as to be sold by the devisee of Mr. Willshin, but that is not very material, except as having been the commencement of the difficulty in the case. The plaintiff, having purchased on that footing, finds that the abstract discloses no title whatever in that person. It is not a question of parties concurring in the conveyance—the question is whether the trustee had any power to sell at all, and it turns out that she was not intended to be the vendor, except as having the legal estate. But having that, the purchaser is not in a position to say, you have no title, and I am "off" the bargain. The purchaser assumes that somehow the title will be made out, and that the defect is only an omission from the abstract. He says, you have sold to me as trustee of the will, and there is no power of sale shown.

The blot is hit precisely—that the vendor was a bare trustee of the legal estate with no power of sale. The answer is, "The beneficiaries will concur in the conveyance." Mr. Soames had taken care to assure himself that they would concur, and Miss Soames was really selling on their behalf, not as their agent, for one of them was not present when the matter was discussed. The purchaser then says, "The answer to the third requisition states that the beneficiaries will concur, they must send a written ratification before I can go on." That is a distinct intimation, and says, in effect your sale is naught, unless you can show the consent of the beneficiaries. To that Mr. Soames's answer is somewhat unfortunate, "The vendor cannot undertake to obtain this, the parties referred to will join in the conveyance, and more than this the purchaser cannot require." That was wrong in law, and the purchaser might at once have rescinded on it. That was on the 19th of August, 1887.

In a short time came the purchaser's *ultimatum*, which was to this effect: "Before I proceed further the beneficiaries must sign a contract," that was perfectly right, "and I shall be obliged if you will get the enclosed document signed by the beneficiaries." If the vendor had assented to that, and carried it out within a reasonable time, there would have been no further trouble. But the purchaser, not getting what he wanted by the 11th of October, then writes: "I shall be glad to receive the ratification signed by the beneficiaries, . . . unless I receive it within the present week I shall seek to rescind the contract, and get return of my deposit." That is not a happy phrase, "seek to rescind," but I think what he meant was, "I shall do what is necessary to rescind." Mr. Soames writes back denying the purchaser's right to rescind, but that "without prejudice" he would endeavour to obtain the ratification. Mr. Lee waited till the 8th of November, but then wrote in effect: "As you have not sent me the ratification of the contract it is now rescinded." On that very day, or within twenty-four hours afterwards, Mr. Soames got it signed. But if the decision come to by the purchaser on the 8th of November was good in law, it is quite immaterial whether the signatures were got within twenty-four hours or any other time. On the 26th of September the purchaser gave fair notice of his position, and again on the 11th of October, and I think that on the 8th of November he was entitled to say, "The contract is at an end." The question raised by Mr. Barber's argument is whether the ordinary rule as to fixing a reasonable time by notice applies, as, if so, it is a question whether a week was sufficient. I think that in this case a week was sufficient, having regard to the previous notices. The rule as stated in Lord St. Leonards' book on Vendors and Purchasers, 13th ed., at p. 227, and referred to and followed by Fry, J., in *Green* v. *Sevin*, is as follows: "Where time is not made of the essence of a contract by the contract itself, although a day for performing it is named, of course neither party can strictly make it so after the contract; but if either party is guilty of delay, a distinct written notice by the other that he shall consider the contract at an end if it be not completed within a reasonable time to be named, would be treated in equity as binding on the party to whom it is given." The rule is also stated to the same effect in Fry, L.J.'s 2nd edition of his work on Specific Performance, at p. 471: "Where time was not originally of the essence of the contract, but one party has been guilty of gross, vexatious, unreasonable, or unnecessary delay or default in relation to it, the other party becomes entitled to limit a reasonable time within which the contract shall be perfected by the other." Both those statements of the law, and others in numerous cases where the point has been discussed, assume that there is a contract. But where is the contract in this case between the real vendor and the purchaser? There is nothing but a contract between Miss Soames and the purchaser.

I, therefore, hold that the rule does not apply at all to the present case. In *Forrer* v. *Nash*, 35 Beav., at p. 171, Lord Romilly said, "When a person sells property which he is neither able to convey himself, nor has the power to compel a conveyance of it from any other person, the purchaser, as soon as he finds that to be the case, may say, 'I will have nothing to do with it.'" That was upheld again by Fry, J., in *Brewer* v. *Broadwood*, 31 W. R., at p. 116, 22 Ch. D., at p. 109. From the first Mr. Lee said he would have nothing to do with the contract, "but if you can get me a proper contract, I don't want to be 'off' my purchase; you have got to prove that there is a contract, you have not done it, and until you do it I decline to go on." I do not think the question of time applies at all to such a case. The defendant says, "Because you have not been so strict in standing on your exact rights as you might have been, you are bound." I think that the plaintiff on the 8th of November said, and was entitled to say, "This contract is at an end." That is quite consistent with the cases cited for the vendor, especially *Salisbury* v. *Hatcher*. In this case the purchaser did reject the contract as soon as he had ascertained the real interest of the vendor, and he maintained that position throughout. I must, therefore, give him the relief he asks, and I think practically in the way he asks it. I hold that the contract was rescinded on the 8th of November. The claim asks for a declaration of the validity of the rescission of the contract, and for repayment of the deposit with interest. Anything more comes by way of

damages. The case of *Bain* v. *Fothergill*, 23 W. R. 261, L. R. 7 H. L. 158, lays down exactly how the damages are to be arrived at. The counter-claim must be dismissed, with costs.

Judgment for the plaintiff on the claim; counter-claim dismissed.

Solicitor for the plaintiff, *Graham James Davis.*

Solicitors for the defendant, *Gordon & Dalbiac.*

Chan. Div. }
Kekewich, J. } July 18, 19, 20.

TUDBALL v. MEDLICOTT. (*a.*)

Will—Construction—Devise to trustees, their "heirs and assigns"—Mixed gift of freeholds and chattels—Attraction—Trust for tenant for life subject to condition to repair and insure—Receipt clause—Estate of trustees—Trust property sold under deed alleged to be forged—Duty and liability of trustees as to recovering the property—Indemnity against costs.

A condition in a gift to a tenant for life that the premises are to be kept in repair and insured does not indicate an intention to give the trustees the legal estate (for the purpose of enabling them to enforce the condition) if they would not take it otherwise, as the condition can be enforced against the tenant for life by the remainderman without the intervention of the trustees.

The rule that trustees take only so much of the legal estate as is sufficient to enable them to perform the duties imposed on them does not apply where the gifts of the life interest and the remainder are made without any change of words, as where there is a devise to trustees, their heirs and assigns, "in trust for A. for life," and, after his death, "in trust for his children."

A testator gave and devised a freehold property and flour-mill, together with the millstones, &c., grates, and other fixtures "now thereon or therein," to trustees, their heirs and assigns, upon trust for A. for life, but subject to a condition to keep the premises, fixtures, &c., in repair, and insure the buildings in the names of the trustees; and from and after A.'s decease in trust for his children. Mortgage and trust estates were devised "unto and to the use of" the trustees, their heirs and assigns. There was a declaration that the receipt of the trustees should be a sufficient discharge, and a power to appoint new trustees, with a direction that the estate should, upon any such appointment, be "vested" in the new and continuing trustees "upon and for the trusts and purposes aforesaid."

Held, that the trustees took no estate in the freehold mill, &c., so given and devised.

Trustees are not bound at their own expense to take proceedings for the recovery of trust property not lost by their own default.

A person claiming to be transferee of a mortgage of trust property gave notice of the mortgage to the trustees, who were convinced that the deed was a forgery. The property was afterwards sold under the power of sale in the mortgage at an auction, of which the trustees also had notice, but they took no steps, and accepted the balance of the purchase-money remaining after the claim under the mortgage had been satisfied, and acknowledged the receipt in their accounts.

Held, that the trustees were justified in declining to take any proceedings at their own risk and without an indemnity from their cestui que trusts, and that they had done nothing for which they could be held liable to make good the loss of the property, even if it were proved that it had been lost, which was not proved.

(*a.*) Reported by R. H. DRAKE, Esq., Barrister-at-Law.

Trial of action.

This action was brought by Adelaide Ethel Mary Tudball, the infant daughter of A. J. Tudball (by her next friend) against the Rev. Samuel Medlicott and Thomas Ponsford, as the trustees of the will of her father's great uncle, the late Amos Tudball, of Vis House, Roadwater, Somerset.

The said testator, by his will dated the 4th of June, 1870, gave and devised to the defendants, their heirs and assigns, his freehold messuage, with the flour-mills, dwelling-houses, closes of land, &c., called the mill tenement, and also three several closes of land, parcels of Cape's tenement, respectively situate near Roadwater, together with the millstones, mill machinery, threshing-machine, chaff-cutter, malt-mill, apple-mill, grates, and other fixtures then thereon or therein, upon trust for his great nephew A. J. Tudball (in the will called "Amos Tudball") for his life, but upon the express condition that the said premises respectively should be kept in good tenantable repair, and the buildings thereon insured against fire in a competent sum in the names of his said trustees, and also that the said machinery and fixtures should be kept in good repair, and renewed from time to time as occasion should require, and from and after the decease of the said A. J. Tudball in trust for all and every the children and child of the said A. J. Tudball who, being a son or sons, should respectively attain twenty-one, or, being a daughter or daughters, should respectively attain that age or marry, in such shares and proportions, or wholly in favour of any one such child, as the said A. J. Tudball should by deed or will appoint, or in case there should be no such child, then in trust for the testator's own right heirs for ever. The leaseholds and personalty were left to A. J. Tudball subject to payment of debts and legacies.

The trust and mortgage estates were devised "unto and to the use of" the two trustees, their heirs and assigns, subject to the trusts and equities affecting the same.

The will contained also a power to appoint a new trustee or new trustees, with a direction that the trust estate was, upon such appointment, to be transferred and vested in the new and continuing trustees "upon and for the trusts and purposes aforesaid." A. J. Tudball and the defendants were appointed executors. The testator died on the 20th of April, 1871, and his will was proved by the three executors. Upon the testator's death A. J. Tudball took possession of the property, but in 1876 he set out for Australia, being then in difficulties, and was soon afterwards made a bankrupt. The same year a Mr. Cook brought Mr. Ponsford a document purporting to be a mortgage to secure £1,100, executed by the testator on the 30th of August, 1870, less than three months after the date of the will. Mr. Cook himself was a transferee of the mortgage. Mr. Ponsford had no doubt that the document was a forgery by A. J. Tudball, and expressed himself to that effect both orally and by letter.

The property was subsequently sold by auction for £1,250, and, after the transferee's claims had been satisfied, the surplus, amounting to £69 9s. 10d., was received by the trustees, and the receipt acknowledged in the residuary accounts. A. J. Tudball underwent a term of penal servitude in Australia for a forgery committed there, and Mr. Ponsford's attention was called to the importance of getting evidence from him before he was released. He and his co-trustee, however, declined to take any proceedings without an indemnity.

The plaintiff, who was now in her seventeenth year, was the only surviving child of A. J. Tudball and his wife, who were both living, and she claimed to have the defendants ordered, at their own expense, to take all necessary and proper proceedings for establishing her title to, and recovering possession of, the property, and

in default, to have them declared jointly and severally liable to make good the value of it.

Warmington, Q.C., and *Hastie*, for the plaintiff.—The mortgage of August, 1870, was a forgery by A. J. Tudball. But our case does not rest on that, as the admitted fact that Ponsford had no doubt that it was a forgery is sufficient for our purpose. Though fully convinced as to the forgery, he stood by and allowed the transferee to sell the property at an auction, of which he had had notice. He and his co-trustee approved the title of the transferee by accepting the balance of the proceeds of sale and acknowledging the receipt in their accounts; and they took no steps to recover the trust property or assert their title. The legal estate was in the trustees: *Collier* v. *Walters*, 22 W. R. 209, L. R. 17 Eq. 252; *Doe* v. *Willan*, 2 Barn. & Ald. 84. Subject to no violence being done to the words of the will, the court is astute to give the trustees the legal estate where necessary to protect the children's interests. Here the trustees had something to do—viz., to see that the condition to repair and insure was observed: *Houston* v. *Hughes*, 6 Barn. & Cress. 405. [Kekewich, J., referred to *Cunliffe* v. *Brancker*, 3 Ch. D. 393, 25 W. R. Dig. 338.] In that case it was necessary, in order to give effect to the limitations of the will, to hold that the trustees did not take the legal estate in fee. Chattels were here included with the freeholds in the gift to the trustees, which is a further reason for holding that they took the legal estate. [They also referred to *Baker* v. *White*, 23 W. R. 670, L. R. 20 Eq. 166, and *Marshall* v. *Gingell*, 31 W. R. 63, 21 Ch. D. 790.] Besides, the trustees are not in the position of having done nothing. They went to the court for directions as trustees. They put themselves in the position of trustees. They gave a receipt to the transferee of the forged mortgage. They are, therefore, estopped from saying that they have no estate.

Neville, Q.C., and *Chubb*, for the defendant Medlicott.—Trustees take the legal estate only so far as is necessary to enable them to perform their duties: Jarman on Wills, 4th ed., vol. 2, pp. 290, 291; *Doe* v. *Nicholls*, 1 Barn. & Cress. 336. As to the chattels given with the freeholds, see *Baker* v. *White*. Besides, these chattels were fixtures, and are so treated by the testator; and those claiming under the will cannot be heard to say they are not. [Kekewich, J.—How can the trustees see that the condition to repair and insure is observed if they have not the legal estate?] The remainderman can enforce the condition: *Woodhouse* v. *Walker*, 28 W. R. 765, 5 Q. B. D. 404; *In re Williamson*, 54 L. T. N. S. 105. Besides, trustees can have powers without any estate. (1) This is not a duty imposed on the trustees at all. (2) They can perform it without having the legal estate. The testator gives trust and mortgage estates "unto and to the use of" the trustees. The condition to repair and insure being only during the tenancy for life, the trustees at most only take the legal estate for the life. [They also referred on this point to *Cunliffe* v. *Brancker*; *Richardson* v. *Harrison*, 38 Q. B. D. 85, 34 W. R. Dig. 224; and *Marshall* v. *Gingell*.] Then, if we had no legal estate, we could not maintain ejectment. If we took it for the life of the tenant for life, no right of action on behalf of the remainderman arises in anyone till the death of the tenant for life. We could not recover on behalf of the man who forged the deed, he being estopped. It is for the plaintiff to show that we had the means to bring an action. If the estate can be recovered, there is no loss; if it cannot, *cadet quæstio*. Mr. Medlicott's position was perfectly correct. He said, "If you will indemnify me, I will sue; if not, I won't."

H. Hall, Q.C., and *Ingle Joyce*, for the defendant Ponsford.—There is no duty in a dry trustee except to convey to the person beneficially entitled. He cannot be bound to bring an action at his own risk as to costs. The beneficiaries ought to ask permission to use his name: *Annesley* v. *Simeon*, 4 Madd. 390; *Fletcher* v. *Fletcher*, 4 Hare, 67. Even where a trustee is the proper person to sue he is not bound to do so without an indemnity. Mr. Ponsford actually signed an authority to the beneficiaries to use his name, though the other trustee refused. The estate is still there; it is not lost; the tenant for life is still alive.

Warmington in reply.—The insurance was to be in the names of the trustees. In the clause giving power to appoint new trustees the estate is directed to be transferred and vested in the new trustees, which shows there must be something to vest. *Richardson* v. *Harrison* is in my favour. No excuse or justification has been offered for these trustees, after notice and full warning of the circumstances, having admitted the title of a stranger. It is treason to their trust. Where a trustee is asked to undo the harm he has done he is not entitled to an indemnity.

Kekewich, J.—This case has raised questions of novelty and difficulty and of considerable interest to anyone who has made a study of the law; and it raises a question of vast importance to trustees—a large body of men who are sometimes disposed to think themselves hardly treated. The question I have to decide is whether the defendants, Mr. Medlicott and Mr. Ponsford, are responsible by reason of this property not being now available for the purposes of the will. The first point I have to consider, and, as far as possible, independently of the facts, is the construction of the will, which is obviously drawn by a lawyer. It seems the testator had some real property—not very much—and also, in connection with it, some chattels, which he describes as fixtures, and that he carried on business as a farmer or miller. He had also some leasehold property, some cottages, and some personal estate, and he made his will with reference to all these different kinds of property. He was minded to enrich, so far as he could, his great-nephew, A. J. Tudball, whom he describes as Amos Tudball. His general notion was to make him tenant for life of the real estate and give him all the personal estate, subject to a few legacies. That being so, he made his will in a form that has given rise to considerable discussion, and I have to decide whether, by that will, he gave the legal estate in the real property to the defendants, the two trustees, whom he also appointed executors in conjunction with his great-nephew.

It is not necessary to refer to any of the cases on the question of construction, for though the rules laid down by those cases cannot, even in 1888, be disregarded, the tendency of the court of late has been to hold that the real question is what was the testator's intention, which is to be gathered from the language employed, and that the language is to be looked at from the testator's point of view. Accordingly I approach this will with a desire to find out, as far as I can, this testator's intention. He gives his whole real estate, "together with the millstones, mill machinery, threshing-machine, chaff-cutter, malt-mill, apple-mill, grates, and other fixtures now thereon or therein," to his friends, Samuel Medlicott and Thomas Ponsford, their heirs and assigns, and I am asked to hold that the fact of these chattels or fixtures being added shows that he meant to give the legal estate to the persons whom I call the trustees, to whom he has given it in words. He gives the property with the words of limitation "their heirs and assigns," but, considering the date of the will, that is immaterial. To my mind the addition of those chattels or fixtures does not imply any other gift than could be gathered from the gift of the real estate by itself. They were all things

which might fairly be understood to be attached to the real estate devised, and the testator himself classifies them as fixtures by the words "and other fixtures" which follow. Then he goes on "upon trust for my great-nephew, Amos Tudball, for life"—if he stopped there, there is no doubt that Amos Tudball would take the legal estate and the trustees nothing, but he goes on "upon the express condition that the said premises respectively shall be kept in good tenantable repair, and the buildings insured against fire, in the names of my said trustees," "and the machinery and fixtures kept in good order and repair, and renewed from time to time."

This condition was much relied on as showing an intention to vest the legal estate in the trustees so as to enable them to enforce it. One answer that was given to that was that it might imply a power which would enable them to discharge the duty. I cannot see any way to imply that, but, on the other hand, I do not consider that that clause can be read as showing any intention to give the trustees anything that is not otherwise given to them. There is no reason, according to the cases, why that should not be a good condition enforceable as against the tenant for life by those entitled in remainder, and I can see no reason why the intervention of the trustees should be required in order to enforce it. It is true the insurance was to be in the names of the trustees, and Mr. Warmington relied upon that in connection with the fixtures. But it was only the buildings that were to be insured, the fixtures were not to be insured in the names of the trustees, or at all.

He goes on, "and from and after the decease of Amos Tudball in trust for all and every the children and child of the said Amos Tudball." Observe, there is no change of phrase between the gift to Amos Tudball and the gift to Amos Tudball's children. So if I held the legal estate was in the trustees for the life of Amos Tudball, I must also hold that they had it during the children's interest—that is to say, that they had it in fee. Of course there is the rule of construction that only a *quantum* of the legal estate, sufficient to perform the duties imposed, will be held to be given, but it would be straining that rule to apply it where there is no change of words, and where the legal estate must depend only on the first words of the gift. Then he gives all his personal estate to his nephew. Then there is a gift, "unto and to the use of" Mr. Medlicott and Mr. Ponsford, of mortgage and trust estates. That is a small point, but a fair one; that where he is bound to pass the legal estate he uses the words "unto and to the use of," which undoubtedly pass it. That is followed by a declaration that the receipt of the trustees shall be a sufficient discharge, which is adapted to the duties of the devisees of trust and mortgage estates. Then there is a power for the appointment of new trustees, which is capable of application to the legal estate in the property devised by the will, if such estate passed by the devise, but will also answer to the other property given to the trustees. But then it is said that when the new trustees are appointed the estate is to be vested in them "upon and for the trusts and purposes aforesaid," and that the last words do not exactly hit the case of the trust and mortgage estates. That is a small point, but as far as it goes it is in favour of the legal estate vesting in the trustees. I do not think it is sufficient to counterbalance the intention of the testator as gathered from the whole will. The conclusion I have arrived at is that the legal estate is not vested by this will in the trustees at all, not even during the life of the nephew. And if the trustees have no legal estate they certainly could not recover this property, and if they did attempt it there would be a complete answer to them. But though this decision makes it unnecessary to decide the great question in this case, I think it would be wholly unsatisfactory to deal with the case in that way, and that I should be shirking my duty, which I have no desire to do. I therefore propose to decide the greater question whether, assuming that the trustees had some such estate, as is alleged, either the whole or a part, they did discharge their duty to their *cestui que trust*, or whether they ought to have taken proceedings to recover this property. That depends, in a great measure, on a particular deed—the mortgage of the 30th of August, 1870.

The will was made on the 4th of June, 1870, and it devised the estate in the manner we have seen. The mortgage, dated the 30th of August of the same year, is produced to Mr. Ponsford, one of the two trustees, after the testator's death. It would be strange that a man who executed that will should have executed such a mortgage so shortly after the date of his will. Mr. Ponsford might very well be astonished. He at once suggested that it was a forgery, and I was asked to say that it was a forgery. The plaintiff was not content to rest on Mr. Ponsford's admission that he had no doubt it was a forgery, or on Mr. Medlicott's assertion that he knew no more than Mr. Ponsford; but he endeavoured to prove that it was a forgery to my satisfaction. However, I declined to decide that question. Nothing could have been more improper than for me to have expressed a judicial opinion in the absence of A. J. Tudball—whose forgery it almost must have been if it was a forgery at all—that he had been guilty of a felony. If it was a forgery, the mortgagee who advanced money on the security of the deed took no estate whatever and had no security, and the purchaser has no estate whatever. It would therefore be entirely wrong for me to hold that it was a forgery in their absence and without their having an opportunity of sifting and contradicting the evidence. Perhaps it was in consequence of my declining to decide that question that the evidence given on it was so thin. It would surprise me extremely to hear that a man had been convicted and another ejected on such evidence. For my purpose I may take it as admitted by Mr. Ponsford that he did not think the testator had executed the mortgage, and that Mr. Medlicott is contented to "run with him." Mr. Ponsford certainly knew about the matter very shortly after the testator's death, though Mr. Medlicott did not know as soon. Yet Mr. Ponsford did nothing. He knew where A. J. Tudball was from time to time. His attention was called from time to time to the difficulty of the infant remainderman's position with reference to this property. He seems to have acted the part of the kind friend. He could not act as solicitor himself, having retired from practice, but he introduced Mrs. Tudball to another gentlemen, who took up the matter energetically, and seems to have done his best. Beyond that Mr. Ponsford did nothing. I am not sure that he and Mr. Medlicott were not a little careless as trustees; perhaps they did not trouble themselves quite so much as the friends of a man who was gone might have been expected to do. But they had an extremely difficult office—they had no money in hand, and no sufficient evidence of the forgery to establish a case against the gentleman who had advanced money on the security of the estate. They would have had to succeed on the strength of their own title, not on the weakness of his. Supposing they were a little wanting in energetic carefulness, and even supposing that they received the £60 odd as the balance of the purchase-money when the property was sold, and thereby approved or adopted, as it is said, the ownership of the trust estate by a stranger, those are only observations on their conduct, and do not go to the root of the matter.

The real question is, Were these trustees bound to commence an action—assuming they had the legal estate in fee vested in them? If they had only the legal estate for the life of A. J. Tudball they could not have done it, because the property would have belonged to A. J. Tudball, whose trustees they were. There was some little property outside this estate, but it was only worth

a small sum, and an action must have involved considerable expense as well as trouble. Mr. Warmington put the case against the trustees as strongly as it could be put—"Ought they not to have had this property in hand?" I think trustees have no right to be content with information that their property has been mortgaged, or given away, or lost; they are bound to see where it is. But suppose that, on further inquiry, they find that a title is set up in someone else, are they bound to commence proceedings at their own expense? If they do not, can you fix them with the loss, or punish them for not having done their duty, without being satisfied that if they had done it they would have succeeded in recovering the estate? I know of no rule, and I am satisfied there is no case, which establishes that a trustee is bound to bring an action to recover trust property at his own expense. I can quite understand that if they have let the estate go by their default they should bear the costs of an action to recover it. But that is not the case made here, which is that they ought to have done it long ago when they had no funds, but must have done it, if at all, at their own expense. Besides, how can I make the trustees liable for the loss when I am not satisfied that the property is lost? I am not satisfied that the deed was a forgery. It might be very difficult to get a verdict from a jury that it was so. It may be that the estate will be recovered, and that the remainderman will lose nothing. Why should I say that the trustees, who will in that event have caused no loss, should pay the expense? What ought to have been done? No doubt they might, and I am disposed to think they ought to have come to the court for directions, which it would certainly have given, and thus have saved this litigation. But I am not prepared to hold that trustees, directly a difficulty arises as to their property, are bound to take proceedings and risk getting their costs out of the estate, which may be nothing. They might fairly say they were not paid and that they would not do anything. Be that as it may, I cannot blame them on that account. I think that this is an attempt to establish a new rule, and to make trustees liable beyond their previous liability. I will not be the first judge to establish such a rule. I think that the case fails, and that the trustees, who come here to contest their liability, are entitled to their costs, which must be paid by the next friend.

Action dismissed.

Solicitors, *Bolton, Robbins, & Co.*, for *S. Hobbs, jun.*, Wells; *Johnston, Harrison, & Powell*, for *Little & Lamonby*, Penrith; *Rowcliffes & Co.*, for *Ponsford, Joyce, & Davis*, Bardon, Somerset.

Q. B. Div. (Manisty and Stephen, JJ.) June 7.

Bowden *v.* Besley (*a.*)

Municipal election—Signatures of burgesses to nomination paper—Sufficient description—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *s.* 241, *schedule* 3, *part* 2, *rr.* 2, 5, *and Form T., schedule* 7.

The ordinary signatures of burgesses, together with their number on the burgess roll, as proposers on the nomination paper of a candidate at a municipal election are sufficient, provided they can be commonly understood to refer to the corresponding names on the burgess roll.

Special case stated by petitioners in the matter of a municipal election.

The short point in this petition was whether three proposers of a candidate at a ward election in Exeter had been sufficiently described on the nomination paper within the requirements of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), schedule 3, part 2, r. 2.

A candidate, one Tuckwell, had been duly nominated in writing. Among his proposers were three names, as follows, with their numbers on the burgess roll duly filled in—viz.: "Edwin J. Hooper (No. —)," in lieu of "Edwin John Hooper," as on the burgess roll; "W. E. Waller (No. —)," in lieu of "William E—— Waller" on burgess roll; and "R. Turner (No. —)," in lieu of "Robert Turner," on the same roll. The mayor held that the nomination paper had not been sufficiently subscribed by the said three proposers within the requirements of the Act.

Asquith, for the petitioners.—The candidate only is required by rule 5 of schedule 3, part 2, to have his surname and other names stated in the nomination paper. By Form T. space is only given for the signatures of the proposers, and they are sufficiently identified by their number corresponding with that on the roll.

Alderson Foote, for the Mayor of Exeter, was called upon by the court.—The proposers are required to subscribe the nomination paper, not merely to sign it, and they must subscribe their names as on the burgess roll so as to insure identification. The mayor cannot receive evidence of identity if any objection is taken. The only question for him to decide is whether the subscriptions sufficiently identify the proposers with the parties on the burgess roll. These, he held, did not; they could not be cured by further evidence or alteration: *Moorhouse* v. *Linney*, 33 W. R. 704, 15 Q. B. D. 273; *Gothard* v. *Clarke*, 5 C. P. D. 253, 28 W. R. Dig. 84; *Mather* v. *Brown*, 24 W. R. 756, 1 C. P. D. 596; Parliamentary Registration Act, 1878 (41 & 42 Vict. c. 26), s. 15 (3). Section 241 of the Municipal Corporations Act, 1882, only gives relief to misnomers on the roll.

Manisty, J.—The question for us is whether the Mayor of Exeter was right in holding that this nomination paper was invalid by reason of these particular signatures. We have come to the conclusion that he was not right. By the Municipal Corporations Act, 1882, s. 241, "No misnomer or inaccurate description of any person . . . in any roll, list, notice, or voting paper required by this Act shall hinder the full operation of this Act with respect to that person, . . . provided the description of that person . . . be such as to be commonly understood." There is no such specific enactment in regard to the burgesses who nominate the candidate as there is in regard to the candidate, requiring "his surname and other names" to be stated in writing (rule 5 of schedule 3, part 2). Therefore the names of the proposers must be such as, looking to the burgess roll, may be "commonly understood."

It is said that it is excessively important for all authorized objectors to see distinctly whether the proposers of a candidate are the same persons as those on the roll. That is so; but there must be some reasonable doubt shown as to the identity of the proposer with the name on the roll. Can anyone doubt that "Edwin J. Hooper," with the number on the roll following it, is not the same man as "Edwin John Hooper," at the identical number on the roll? But the Form T. given in schedule 8 for a nomination paper seems to me clearly to contemplate the mere signatures of the proposers. Two spaces are left for "the surname" and "other names" of the candidate, the surname coming first; while for the proposers one space only is left, with "A. B.," "C. D.," as specimen signatures. Those signatures are evidently meant to be such as will be "commonly understood" as applicable to the corre-

(*a.*) Reported by Spencer L. Holland, Esq., Barrister-at-Law.

spending names on the roll. I think these signatures were not so insufficient as to invalidate the nomination paper, and the petition must be granted.

Smirnur, J.—I am of the same opinion. Looking at Form C., though only one space is given, the surname and other names of each burgess as an elector are specifically put in full; again, in Form E., specimen names are given in full for elective auditors; but under Form T., for burgesses nominating a candidate, the heading given is "signature" and then "A. B.," "C. D.," simply. Such a form seems to me clearly to contemplate an ordinary signature sufficient to identify the signature with the name on the roll. That, in a general way, is the ground of my judgment, and I do not think section 241 need be referred to at all for this decision. I was for some time impressed by Mr. Foote's ingenious argument founded on *Moorhouse* v. *Linney*—namely, that the signature, being once defective, could not be cured by subsequent evidence—but the whole case there really turns upon the error of the description on the burgess-roll. The correct signature on the nomination paper could not, it was held, repair the error on the roll, and thus the party signing could not identify himself with the name on the roll because that name did not identify him. The case of a cheque made out to one's self in a form different to one's ordinary signature is analogous. One's ordinary signature would not be held sufficient by the bankers to identify one's self with the party named in the cheque, though I have often wondered whether one could legally insist upon their cashing the cheque on proof of the identity of the party, signing his ordinary signature, with the party otherwise described in the cheque. However, that is clearly all the effect of *Moorhouse* v. *Linney* in regard to a person wrongly described on the burgess-roll—viz., that his correct signature, during another event under the Act, will not be sufficient to cure the error on the roll. That does not apply here, and the parties attesting were clearly sufficiently described under the statutory forms given by the Act.

Petition granted.

Solicitor for the petitioners, *Farman*, for *Drew*, Exeter.

Solicitors for the respondent, *Geare, Son, & Penn*, for *Gidley*, Exeter.

Q. B. Div. (Field and Wills, JJ.) May 21.

Clark v. Somersetshire Drainage Commissioners. (a.)

Watercourse—Right to pollute—Prescription—Change in manufacture—Land Drainage Act, 1861 (24 & 25 *Vict.* c. 133)—*Prescription Act* (2 & 3 *Will.* 4, c. 71).

The appellants began business on certain premises as fellmongers in 1832, and in 1852 added the business of a tannery, discharging the refuse into a stream within the jurisdiction of the respondents. In 1877 the appellants set up a manufactory of leathern boards on the same premises, and discharged refuse of a different character through the old and also through additional outlets into the same stream. The respondents convicted and fined the appellants for pollution of the stream under powers conferred by a local Act, which followed the terms of section 58 of the Land Drainage Act in saving existing legal rights. The quarter sessions upheld the conviction.

Held, that the rights of the appellants must be determined at the time of the passing of the Land Drainage Act, 1861; *that, if they had gained at that time any legal right by prescription (as to which, quære), it was only the right to discharge the refuse of the fellmongery business; that that right was now being exercised, whether or not the burden on the servient tenement had been increased; and that the conviction was right.*

Special case.

This was an appeal against an order made by the Somersetshire Drainage Commissioners on the 9th of March, 1887, whereby it was adjudged that the appellants, being owners and occupiers of a certain factory called the Bowling Green Factory, situate at Street, in the county of Somerset, did, on certain days in the said order mentioned—to wit, on the 10th of February and the 5th of March and the 24th of August, 1886—cause or permit certain foul or unwholesome washings of manufactories to flow from their said factory into a certain statutory drain or watercourse called the South Drain, being an arterial drainage work within the jurisdiction of the respondents, and whereby the appellants were ordered to pay to the clerk of the respondents the sum of one shilling for each of their said offences. The appellants appeared in person before the respondents and claimed a prescriptive right to cause such washings to flow from their said factory, but the respondents found that no such right had been proved. The appellants appealed against the said order, and the appeal was tried at the Midsummer Quarter Sessions for the county of Somerset, when the said order was confirmed, subject to the following case stated for the opinion of the Queen's Bench Division.

1. The said order purported to be made under the powers contained in the Somersetshire Drainage Act, 1877, and especially under the 134th section thereof [which is similar to the 53th section of the Land Drainage Act, 1861], which is in the following words:—"No person shall cause any filthy or unwholesome water or washings of manufactories or mines or other foul or poisonous liquid to flow into any watercourse within the jurisdiction of the commissioners or their board, and any person offending against this enactment shall incur a penalty not exceeding five pounds, and a further penalty of forty shillings for every day during which the offence is continued, but this section shall not apply to any person having a legal right to cause such water, washing, or liquid aforesaid to flow into any existing river, stream, or watercourse."

2. The watercourse called South Drain is within the jurisdiction of the respondents, and was formed between 1801 and 1806 by the Brue Commissioners under the powers of their special Act dated the 20th of June, 1801, a copy whereof is made part of this case. By virtue of section 42 of the last-mentioned Act, and of section 31 of the Somersetshire Drainage Act, 1877, all the rights, powers, privileges, duties, and liabilities of the said Brue Commissioners and of the Commissioners of Sewers for the County of Somerset or any commissioners appointed under the first part of the Land Drainage Act, 1861, or by virtue of any Act or Acts for the exchange, inclosure, and improvement of lands devolved upon the respondents.

3. The respondents proved that the appellants were the owners and occupiers of the Avalne leather board factory, and that on certain days in the said order mentioned they had discharged into the said watercourse called South Drain certain washings of their said factory from the dyes used by them to colour the leather boards they manufactured, and we held that such washings so discharged amounted to filthy and unwholesome water and washings of their manufactories within the meaning of section 134 of the Somersetshire Drainage Act, 1877.

4. We, therefore, held that the appellants had committed an offence against the 134th section of the said Somersetshire Drainage Act, 1877, and were rightly

(a.) Reported by A. H. Todd, Esq., Barrister-at-Law.

convicted, unless they could prove that at the time of discharging the said washings from their factory into the South Drain watercourse they had a legal right to cause said washings or liquid to flow into it.

5. The appellants then proved the following facts:—(1) In the year 1832 they came into possession of, and commenced at the said factory, which was then known as the Bowling Green Factory, the business of fellmongers and manufacturers of sheep-skin rugs, which they carried on down to the year 1852, the sheep-skins for the most part being dyed and dressed at other premises, but being washed and scoured, both before and after dyeing, and in some cases also being dyed, at the said Bowling Green Factory, and during this period the refuse and off-scourings of the sheep-skin factory and fellmongers'-yard, of a very filthy character, were discharged into the South Drain, together with the washings of the dyes. (2) In 1852 the business of tanners was added to the other business so carried on as aforesaid, and the premises were enlarged by the construction of three tan-pits, and, in addition to the before-mentioned off-scourings and washings, they discharged therein the refuse, the washings, and spent liquors of the tan-yard and fellmongers'-yard. (3) In 1872 the appellants moved both premises to Northover, taking their workmen with them, and soon after let the premises to another fellmonger named W. Squire, for a term of seven years; Squire, however, failed to carry on that business, and during a part of his tenancy the appellants, with his consent, again made use of the premises during alterations at their new works, but for a short time, and as a temporary measure only. (4) Squire's lease having been cancelled by arrangement in 1877, the appellants altered, and partly rebuilt, their said factory, in order to begin the manufacture of leather boards, and the rateable value of the factory and new machinery was increased in 1878 from £13 10s. to £30, and in 1882 to £90; in 1878 they began the manufacture of leather boards, and procured from America a manager and new machinery, no such factory having hitherto existed in England. (5) The washings from such new factory, which were different in character from those previously discharged, were, from 1878 to the commencement of these proceedings, allowed to flow into the said watercourse in consequence, as well of the alterations made in 1877 and in 1878, as of new precipitating tanks made in 1882; some new and additional outlets were made into the said watercourse, but such outlets were close to the old ones and within the part of the premises abutting on the said watercourse; no refuse of fellmongery or tannery, however, was poured into the said watercourse, but only the washings from the dyes used by the appellants to colour the leather boards; it was of these washings from the factory that complaints were made which led the respondents to take proceedings.

6. Such washings it was proved were not so foul in degree as the dyes and washings from the said factory prior to 1878.

7. At the close of the appellants' case, counsel for the respondents submitted that there was no evidence before the court on which we could find that the appellants had any legal right to pour into the stream the washings and liquids in respect of which the fine had been imposed.

8. The appellants' counsel contended that they had proved a legal prescriptive right to cause such washings to flow into the South Drain watercourse, and that the order appealed against should be quashed.

The quarter sessions confirmed the order of the commissioners.

The question for the opinion of the court was whether the appellants, as representing the leather board factory, had, on the days mentioned in the said order, or on either of those days, any legal right to cause such water, washing, or liquid, as aforesaid, to flow from their premises into the said drain or watercourse.

Channell, Q.C., and *Austen*, for the appellants.—The appellants enjoyed the right to foul the water to the same extent as they are now doing for twenty years before the Act of 1861, and continuously from then up to the present proceedings. The case is within the Prescription Act (2 & 3 Will. 4, c. 71): *Rolle* v. *Whyte*, 16 W. R. 593, L. R. 3 Q. B. 286; *Leconfield* v. *Lonsdale*, 18 W. R. 1165, L. R. 5 C. P. 657. In the next place no additional burden has been cast on the servient tenements by change in the process of manufacture; mere change of process does not destroy such a right: *Bawendale* v. *McMurray*, 16 W. R. 32, L. R. 2 Ch. App. 790; *Harvey* v. *Walters*, L. R. 8 C. P. 162, 21 W. R. Dig. 96. [Field, J.—State what the grant you claim is, as was done in *Moore* v. *Webb*, 1 C. B. N. S. 673, 5 W. R. Dig. 221; *Wright* v. *Williams*, 1 M. & W. 77; *Murgatroyd* v. *Robinson*, 5 W. R. 375, 7 El. & Bl. 391.] The plea would be that the defendants had enjoyed the right of pouring out animal, vegetable, organic, and metallic substances, being the washings and refuse from such a factory for such a time.

Blake Odgers and *Leonard* were not called upon.

Field, J.—It seems to me that there is no need to call on the counsel for the other side to reply in this case. The intention of the Legislature in passing this general drainage Act was to purify the streams of the county and to prevent the acquisition by anybody of any further right of pollution. The appellants say that they had already acquired a right to pollute this stream. The question is whether they had the right in 1861, when the Legislature determined the rights of all persons in this connection, to pour this foul liquid in the same quantity and by the same means as they are now pouring into the stream. If that were so they are not liable to any penalty. The liquid in question is refuse from the manufacture of leathern boards, described by the justices as a foul and filthy liquid. They justify their action by reason of an alleged user for twenty years before the 4th of August, 1861. But I do not think that the periods of twenty and forty years mentioned in the Prescription Act of Will. 4, which are periods to be measured up to the time before action brought, apply to a case like this, and I think Mr. Channell would have had some difficulty in proving that they do so apply. There is no immemorial prescription here, because the finding is that, at one time, no business was carried on in the place. The appellants got possession in 1832, and carried on the business of fellmongers up to 1852, during which period they discharged into the stream the refuse of their washings and dyes. In 1852 the business of a tannery was also carried on for nine years. In 1861 the easement which the defendants are said to have been in a position to claim was that for twenty years before the commencement of the Act they had carried on the business of fellmongers and manufacturers of sheep-skin rugs, and poured out the washings and scourings properly used for carrying on such a business into this stream. That would seem to be the proper form of the plea to be set up. The justices have found that, by their action in 1872 and 1877, the defendants did not abandon any prior right which they may have had. In 1878 the present business was established. The defendants now seek to justify their proceedings by referring to their old user of the stream prior to 1861, and rely on *Bawendale's case*. They say that they are entitled to set up any business and pour any refuse into this stream so long as they do not cause any further damage to the servient tenements than that which they had to endure at the time of the passing of the general drainage Act. But all the pleading forms which have been used hitherto are framed on the principle that the person claiming

such an easement has, either as occupier or freeholder carried on a certain business and acquired a certain right. It is not a principle known to the law that a claim can be maintained to the carrying on of any business of any kind so long as no further damage accrues to the servient tenements. The justices were right.

WILLS, J.—I am of the same opinion. The line is to be drawn in 1861, when the Act was passed. After that period no evidence of other Acts can be added to the series of previous Acts to legalize conduct which the Legislature then declared to be illegal. It is said that the appellants had the right to pollute this stream in 1861. I have doubts as to this, because they cannot rely on immemorial prescription. The case is not within *Rolle* v. *Whyte*. I doubt whether the claim by prescription is not strictly limited to cases where the user is brought down to the time of action brought, and the case of *Leconfield* v. *Lonsdale* seems to be an excuse for such a doubt. The judges there refused to consider the question, and said that it was unnecessary to do so, because the evidence pointed to immemorial user. But for the purposes of the present case it is unnecessary to say more than that the practice to foul this stream by the refuse of a fellmonger's business existed in 1861, but that that practice has been changed. It is said that because the defendants carried on a fellmonger's business so as to foul the stream we ought to infer that the presumed grant under which they acted was to do something more, that is to say, to foul *quâ cunque viâ* and not by the felling business. It seems to me that where a grant is to be established, it cannot be established by evidence merely of the right to a part. The privilege of fouling a stream in one way cannot supply a right to foul in an altogether different way by new processes never contemplated at the time of the original grant. It has been argued that a mere change of process casting no additional burden ought not to destroy such a right. But no such inference can be drawn from *Baxendale* v. *McMurray*, which was relied on for that purpose. It was there decided by a court of equity adjudicating on the law and the facts of the case that the reasonable inference was that the grant to be presumed was to foul the river by way of a paper-mill, and that it was unreasonable to suppose that such a grant, if so to be presumed, was limited to any particular process. The defendant in that case might have had a case made against him either that there had been a change in the enjoyment or an excess of burden imposed on the servient tenement, and although the plaintiff might have failed to prove the first, he would have succeeded if he had proved the second contention.

Conviction and order affirmed.

Solicitors for the appellants, *Crowder & Vizard*, for *Bullard*, Glastonbury.

Solicitors for the respondents, *Lambert, Patch, & Co.*, for *Lovibond*, Bridgwater.

Q. B. Div. (Cave and A. L. Smith, JJ.) May 11.

In re HALL AND OTHERS. (*a*.)

Patent—Action for injunction against threats—Cross-action for infringement—Liberty to apply for disclaimer in action for infringement—Application for writ of prohibition against Comptroller—Patents Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 18, *sub-section* 10; *s.* 19.

An action for an injunction against threats of legal proceedings and a cross-action for infringement having been commenced between two parties in relation to a patent, the plaintiffs in the cross-action for infringement obtained leave from the judge before whom the action was entered to apply to the Comptroller-General to amend their specification by way of disclaimer, whereupon the plaintiffs in the first action for the injunction applied for a writ of prohibition against the hearing by the Comptroller of the application to disclaim, on the ground that "legal proceedings in relation to the patent were pending" under section 18, *sub-section* 10, *of the Patents Act*, 1883.

Held, that no prohibition would lie, and that, when liberty to apply to disclaim under section 19 *of the Patents Act*, 1883, *had been given, the proceedings detailed in section* 18 *of that Act are available, notwithstanding that other legal proceedings in relation to the patent are pending.*

Appeal from Denman, J.'s refusal at chambers to grant a writ of prohibition.

The following are the material facts in this case. The Haslam Foundry and Engineering Co., as owners of a patent refrigerative system, had brought an action against Messrs. Hall & Co. for an infringement of their patent. This action was tried on August 1, 1887, before Stephen, J., and judgment was entered for the defendants, Messrs. Hall, on the ground that the second claim of the plaintiffs had been anticipated, but he further held that the residue of their claim was new, and had been infringed. On the 22nd of March, 1887, Messrs. Goodfellow & Matthews had commenced an action an injunction against the Haslam Foundry Co. for threats issued by them within the meaning of section 32 of the Patents Act, 1883, and asked for an injunction. On the 28th of March the Haslam Foundry Co. commenced a cross-action for alleged infringement of their patent against Messrs. Goodfellow & Matthews. On the 5th of April, by consent, an order was made that all proceedings in this action should be stayed until further order, including in the stay the application by Messrs. Goodfellow & Matthews for an injunction. On the 2nd of December, 1887, the Haslam Foundry Co., after the judgment in their action against Messrs. Hall, applied to Kay, J., for leave to apply to the Patent Office to enter a disclaimer in respect of their second claim, and to amend their specification. Kay, J., gave them leave to apply (see *ante*, p. 391), and they accordingly proceeded to apply for leave before the Comptroller-General so to amend.

Their action against Messrs. Goodfellow & Matthews was, subject to the above order, still pending before Kay, J. Upon the Haslam Foundry Co. obtaining leave to apply to amend their specification, Messrs. Goodfellow & Matthews applied to Denman, J., for a writ of prohibition to prevent the Comptroller-General from hearing the application of the Haslam Foundry Co., on the ground that an action for infringement and legal proceedings in relation to the same patent were pending, and that the Comptroller had, under such circumstances, no jurisdiction to entertain the application.

Denman, J., refused the application, and against this refusal Messrs. Goodfellow & Matthews now appealed.

Moulton, Q.C., and *Bousfield*, for the appellants.—The action for threats brought by the appellants is a pending legal proceeding in relation to the patent within section 18, sub-section 10, of the Patents Act, 1883, and ousts the Comptroller's jurisdiction under sub-section 19 to hear applications for disclaimer. Their application to disclaim is an admission by the Haslam Foundry Co. that their cross-action on this patent against the appellants cannot be sustained: *Fusee Vesta Co.* v. *Bryant & May*, 35 W. R. 267, 34 Ch. D. 458. The patentee must get leave to apply to disclaim in all actions if more than one are pending. Here they have only got leave in the one. Each legal proceeding is a bar to the Comptroller's jurisdiction. "Legal proceedings" are used in

(*a*.) Reported by SPENCER L. HOLLAND, Esq., Barrister-at-Law.

section 28 in a wider sense than in sections 18 and 19, and the judgment of Chitty, J., in *Cropper* v. *Smith*, 33 W. R. 338, 28 Ch. D. 149, does not apply. Excepting an action for threats there could not be an action in relation to a patent which is neither an action for infringement or petition for revocation: *Kurtz* v. *Spence*, *ante*, p. 438, 36 Ch. D. 770.

Sir R. E. Webster, *A.G.*, *Aston*, *Q.C.*, and *Carpmael*, for the respondents, the Haslam Foundry Co., were not called upon.

Ingle Joyce appeared for the Comptroller-General.

CAYE, J.—I think the order of Denman, J., was right, and that this appeal must be dismissed. The case turns upon the construction of sections 18 and 19 of the Patents Act, 1883. Up to that Act patents had constantly been evaded or infringed by technicalities, and because something or other had been omitted in the specification, which was of no really substantial value to the thing patented, the patentee lost his right to protection and his costs in actions in which he ought to have succeeded, so far as his patent had been substantially infringed. Section 18 was, I presume, an attempt to prevent such occurrences by giving patentees power to apply to the Patent Office to amend their specifications by disclaimer, correction, or explanation. As a consequence of this power being given parties could not be allowed to go as a matter of course to the office whenever legal proceedings in reference to the patent or an action for its infringement were pending, but by section 19, "in an action for infringement of a patent, and in a proceeding for revocation of a patent, the court or judge may at any time order that the patentee shall," subject to certain conditions, "be at liberty to apply to the Patent Office for leave to amend his specification by way of disclaimer." Nothing is said as to the process to be followed upon such an application to amend, but I think that it is quite clear that the proceedings detailed in section 18 are meant to apply in every case in which an application to amend is made to the Patent Office, and I am satisfied that the leave given by Kay, J., in the action for infringement between the present parties was within the section, although nothing was actually said as to there being more actions than this one pending between the parties. It is said that the consequences of amendment being allowed under these circumstances works such injustice that the section must be meant to be read differently. I am not at all convinced that any injustice results from this plain construction of the section. I am not satisfied that the object of this leave being given to apply to amend was intended solely for the benefit of the persons engaged in the different actions.

It might very well be intended that the judge should be able to see for himself the sort of amendment which it was desired to make, and the kind of disadvantage in which the patentee was placed for want of it, and should not allow any amendment to be made in cases where some substantial alteration in the patent would ensue, but that where it was manifest that the patentee's rights might be endangered for want of some technical amendments in his specification leave should be given for disclaimer or correction, so that all pending litigation might be equitably disposed of. After such leave has been given by a judge all parties who like are at liberty to come in and be heard by the Comptroller, who has discretion to amend subject to such conditions as he may think proper and just to impose upon the parties applying. In what way does this work injustice? I cannot see that any such injustice is involved as ought to make the reading of an Act of Parliament contrary to its natural meaning. I do not think the fact that a person will be deprived of raising certain technical defences in relation to a patent any ground for relief. The only ground alleged is that in some other action a judge may construe another section of the Act in a non-natural way and thereby bring about an unjust result. That is not sufficient reason for departing from the language of the Act. The respondents were clearly within the statute in making their application, and Denman, J., was right in refusing to prohibit such an application.

A. L. SMITH, J.—This is certainly a most novel application. Some months ago, in March, 1887, I think, a Messrs. Goodfellow & Mathews bring an action against the Haslam Foundry Co. under section 32 of the Patents Act as persons aggrieved by threats of the foundry company, issued in relation to their patent. The foundry company thereupon commence an action for infringement against Messrs. Goodfellow & Mathews. Subsequently an injunction is drawn up by consent staying proceedings till further order. Pending this, the action of the *Foundry Company* v. *Hall* is adjudicated upon by Stephen, J., and the plaintiff's specification is held to be insufficient on one point claimed, and is thereby rendered invalid. The plaintiffs did not apply to disclaim at the trial in the infringement action against Goodfellow & Mathews, but they apply to Kay, J., for leave to disclaim that part of the specification which Stephen, J., had held to be wrong in the first action, and Kay, J., ordered that the plaintiffs be at liberty to apply to the office for that purpose. That order is not appealed against, but it is said now that the proceeding was altogether wrong, and that a prohibition must issue against the Comptroller for obeying an order of the Superior Court made under section 19. I will not say here what the words "legal proceedings" are intended to include under sub-section 10 of section 18, because it is immaterial so to decide, nor whether the action for threats is a "legal proceeding in relation to a patent," nor what are the limits of "due diligence" in prosecuting infringement actions. All these points are immaterial to the present issue.

Amendment of specifications is allowed by disclaimer, correction, or explanation under section 18. Sub-section 10 is enacted to prevent a person going behind the back of other legal proceedings in reference to the patent, and getting his specification amended. Section 19 is for the purpose of preventing a patentee being defeated by merely technical blunders in his specification. Kay, J., had full jurisdiction to make the order under section 19, and the Comptroller cannot be restrained from obeying that order.

Appeal dismissed.

Solicitors for the appellants, *J. H. & J. Y. Johnson.*

Solicitors for the respondents, *Wilson, Bristow, & Carpmael.*

Q. B. Div. (Field and Wills, JJ.) April 30.

EGG *v.* BLAYNEY. (*a*.)

Metropolis Managements Acts—Apportionment of paving expenses—Payment by instalments—Sale of premises while instalments unpaid—Implied covenant against incumbrances—Metropolis Management Act, 1862 (25 & 26 *Vict. c.* 102), *s.* 77—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 7, *sub-section* 1 (A).

Section 77 *of the Metropolis Management Act*, 1862, *does not make the liability to pay paving expenses a charge on land so as to be an incumbrance, claim, or demand within the implied covenant for freedom from incumbrance given by the Conveyancing Act*, 1881, *s.* 7, *sub-section* 1 (A). *The effect of the section is to impose successive personal liabilities on successive owners.*

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

Appeal from a judgment of the judge of the county court at Bow.

In January, 1885, the Hackney Board of Works, having paved a new street under section 105 of the Metropolis Management Act, 1855, made an apportionment of the expenses so incurred under section 77 of the Metropolis Management Act, 1862, in which they apportioned a certain sum to the defendant as the owner of three houses in the said street.

In June an order was made for the payment of the expenses so apportioned by instalments, and one such instalment was paid by the defendant.

On the 30th of July the defendant contracted to sell the three houses to the plaintiff, and in September he duly executed a conveyance thereof to the plaintiff, conveying as beneficial owner.

The plaintiff, having paid the balance of the apportionment to the board of works, brought this action to recover the amount so paid from the defendant.

By section 77 of the Metropolis Management Act, 1862, the vestry or district board is empowered to apportion the expenses of paving a new street on the frontagers, and to accept payment thereof by instalments, "and any such amount shall be recoverable from the present or any future owner of the premises."

By section 7, sub-section 1 (*A*), of the Conveyancing and Law of Property Act, 1881, when a vendor conveys as beneficial owner, there is an implied covenant that the property is conveyed freed and discharged from all "estates, incumbrances, claims, and demands . . . made, occasioned, or suffered" by the vendor.

The county court judge gave judgment for the defendant.

Spokes, for the plaintiff.—The defendant is liable to indemnify the plaintiff by virtue of the implied covenant given by section 7 of the Conveyancing Act. These expenses come within the meaning of the words "incumbrance, claim, or demand." Section 77 of the Metropolis Management Act, 1862, in order to secure the payment of these expenses, imposes a kind of indirect charge on the land: *Vestry of Bermondsey* v. *Ramsey*, 19 W. R. 774, L. R. 6 C. P. 247; *In re Bettesworth and Richer*, *ante*, p. 544, 37 Ch. D. 535.

C. E. Jones, for the defendant, was not called upon.

Field, J.—The plaintiff must show a covenant on the part of the defendant to indemnify him against the payment of these expenses. The defendant conveyed as beneficial owner, and such conveyance carries the implied covenant for freedom from incumbrance set forth in section 7 of the Conveyancing Act. Does this claim come within that covenant? I am of opinion that it does not. It would have been different if it had been a claim under the Public Health Act, 1875; for the words of that Act are different, and expressly make paving expenses a charge on the land, as was held in *In re Bettesworth and Richer*. But in this Metropolis Management Act there are no such words; and I think that these expenses were merely a claim or demand on the defendant personally up to the time of the sale, and did not affect the land. I think that this appeal must be dismissed.

Wills, J.—I am of the same opinion. I think that the effect of section 77 of the Metropolis Management Act is to impose successive personal liabilities on successive owners, which is a very different thing from a charge on land.

Appeal dismissed.

Solicitor for the plaintiff, *Rust*.

Solicitor for the defendant, *Sydney C. Hadley*.

Q. B. Div. (Coleridge, C. J., and A. L. Smith, JJ.) April 19.

British Empire Mutual Life Assurance Co., *Appellants*; Southwark and Vauxhall Water Co., *Respondents*. (*a*.)

Water rate—Unoccupied house under £10—Liability of owner—Waterworks Clauses Act, 1847 (10 *Vict. c.* 17), *s.* 72—*Southwark and Vauxhall Water Co.'s Act*, 1852 (15 *& 16 Vict. c. clviii.*), *s.* 58.

The owner of a house not exceeding the annual value of £10, who is liable for the payment of water rate instead of the occupier thereof, is not liable for the said rates while the house remains unoccupied, although water is supplied to the pipes on the premises.

This was a special case stated by one of the metropolitan magistrates for the opinion of this court.

A complaint was preferred by the respondents against the appellants, on the ground that they had been supplied with water by the respondent company at Nos. 221, 231, 226, and 222, Crystal Palace-road, Nos. 32 and 30, Heber-road, Nos. 3, 5, 7, 9, 4, and 14, Silvester-road, Nos. 23, 25, and 27, Landcroft-road, for which they had not paid, and were then liable to pay, the respondents' charges, amounting to £7 1s., for two quarters' water supply up to Midsummer, 1887.

The material facts were as follows:—

(1.) The houses Nos. 221, 231, 226, Crystal Palace-road were occupied during both quarters to Midsummer, 1887.

The house No. 4, Silvester-road was occupied during the quarter from Christmas, 1886, to Lady-day, 1887, only.

The remaining houses were unoccupied during the two quarters in respect of which the rates were claimed, and had previously been unoccupied for and during various periods, as the respondents were aware, but no claim for payment of rates in respect thereof had been made upon the owner until the present time.

(2.) During the said two quarters each of the said houses was under the annual value of £20, and the appellants were the owners thereof, for which, according to the company's Act, the owner was to be liable instead of the occupier.

(3.) Communication pipes connecting the said houses respectively with the pipes of the respondents were laid before the commencement of the said two quarters, and the same had not been cut off by the respondents, nor had the water been stopped from flowing into the said houses, nor had any notice to discontinue the supply to any of the said houses been given to the respondents by the appellants or by anyone else.

(4.) None of the water so supplied had been used by the appellants, nor, so far as their knowledge extended, by any other person.

The appellants did not dispute their liability to pay the respondents' charges in respect of the houses occupied during the aforesaid periods, and the question for the court was whether they were also liable to pay the rates in respect of the houses unoccupied during those periods.

Bompas, Q.C. (*R. Burnet Morris* with him), for the appellants.—The general law as to water rates is contained in the Waterworks Clauses Act, 1847 (10 Vict. c. 17). Sections 68—74 provide for the payment and recovery of the rates. By section 68 the rate is made payable by the person using the water. By section 70 the rates are made payable in advance, so that the company can always have notice when the house becomes unoccupied, and can cut off the supply. By section 71 the occupier of any dwelling-house who shall

(*a*.) Reported by Owen Cunningham, Esq., Barrister-at-law.

give notice of his intention to discontinue the use of the water supplied, or who shall remove from his dwelling between any two quarterly days of payment, shall pay the water rate for the quarter ending on the quarterly day of payment next after his quitting or giving such notice. Then section 12 enacts that "The owners of all dwelling-houses or parts of dwelling-houses occupied as separate tenements, the annual value of which houses or tenements shall not exceed the sum of £10, shall be liable to the payment of the rates instead of the occupiers thereof; and the powers and provisions herein, or in the special Act, contained for the recovery of rates from occupiers shall be construed to apply to the owners of such houses and tenements; and the person receiving the rents of any such house or tenement as aforesaid from the occupier thereof, on his own account, or as agent or receiver for any person interested therein, shall be deemed the owner of such house or tenement." This is merely a provision that in such cases the rate shall be collected by the landlord and paid over by him to the company. Section 58 of the respondents' private Act (15 & 16 Vict. c. clviii.) provides that "the owners of all houses or parts of houses occupied as separate tenements, not respectively exceeding the annual value of £20, shall, during such time as the same shall be supplied with water by the company, be liable to the payment of the rates chargeable in respect thereof under the authority of this Act instead of the occupiers thereof." And the "owner" is defined in similar words to those in the principal Act. This section merely changes the limit from £10 to £20. Section 74 of the principal Act gives the company power to stop the supply of water. The owner is therefore liable "instead of the occupier," and in the same way. By section 71, in the case of unoccupied houses exceeding the annual value of £10, neither the owner nor last occupier is liable for water rate except as in manner therein provided—that is, so long as he remains in possession, but no longer. [He was stopped by the court.]

R. A. McCall (*Pyland* with him), for the respondents.—Payment of the rates might have been demanded in advance, and, if paid, the mere fact that the houses became unoccupied afterwards would have been no ground for claiming a return of them. An occupier may put an end to his liability in two ways. He may give notice to discontinue or he may cease to be an occupier. The owner of these houses is placed in the same position as the occupier, and in order to rid himself of liability he must either discontinue or cease to be an owner. The owner or occupier, on giving notice to the company to connect his house with the main, thereupon becomes liable for the rate, and as long as the supply is within the communication pipe the occupier or owner remains liable. If the water escapes it does so at the risk of the occupier or owner, not of the company. It is true that in the case of houses over £20 the company can cut off the water; but here they have got the owner to look to instead. The owner knows when his house becomes unoccupied, and ought to give notice. If it is the company's business to cut off the supply, they will be put to expense and inconvenience in finding out which houses are occupied and which not.

Cleasby, J.—It is clear that in this case the magistrate came to a wrong conclusion, and that the owners of these houses are not liable for the water rates after quarter day next after the time when the houses became unoccupied has arrived. Section 58 of the company's private Act, which is the same as section 72 of the Waterworks Clauses Act, 1847, with the exception that it raises the annual value from £10 to £20, provides that "the owners of houses under the annual value of £20 shall be liable to pay the water rates "instead of the occupiers thereof." It has been contended that the words in section 58, "during such time as the same shall be supplied with water by the company," renders the owner liable so long as water is in the pipes. I am of opinion that no such meaning was intended to be put upon those words, and that they were merely inserted "*ex majore cautela*." These words cannot control the language of the Act. If it was intended to make the owner pay when the occupier was not liable, or when there was no occupier to be liable, the Legislature have not expressed that intention plainly. In my opinion, therefore, the appellants are not liable to pay this rate.

A. L. Smith, J.—The meaning of section 72 of the Waterworks Clauses Act clearly is that where the occupier would be liable were the houses over £10 the owner is to be liable, and where he would not be so liable the owner is not. The magistrate has decided this case, in construing section 58 of the company's private Act, to mean that the owner is liable so long as water is in the communication pipes of the houses. But when we see that these words in section 58 also apply to parts of houses occupied as separate tenements, it seems clear that such a construction could not have been intended by the Legislature. In my opinion the decision of the magistrate must be reversed.

Solicitors for the appellants, *Watson, Sons, & Room.*

Solicitors for the respondents, *Lanfear & Stewart.*

Q. B. Div. (Manisty and Hawkins, JJ.) March 22.

Cowan *v.* O'Connor. (*a.*)

Prohibition—Mayor's Court—Telegram—Order sent to City by telegraph.

An order sent from without the City by telegraph to an agent within the City, and accepted by the agent in a reply sent from within the City through the same medium, is a contract made within the City.

This was an application for a writ of prohibition to the Mayor's Court and to the plaintiff in the action. The matter had been referred from chambers to this court.

The plaintiff claimed £256 from the defendant on accounts stated. The plaintiff had telegraphed from a post-office in Regent-street, without the City, to the defendant at Ludgate-circus, within the City, directing him to put certain moneys as bets on racehorses, and gave an address at a club without the City. The defendant replied by telegram within the City to the said club. The plaintiff alleged that the defendant had, in consequence of the above directions, received the above amount for him as his agent.

Danckwerts, in support of the application for a prohibition.—Assuming that the contract between the plaintiff and the defendant is one of agency, even then the cause of action did not arise within the City, and therefore the Mayor's Court had no jurisdiction. The whole cause must arise within the City: *Cooke* v. *Gill*, 21 W. R. 334, L. R. 8, C. P. 107. Here the post-office was the agent of the parties, as explained in *Byrne* v. *Van Tienhoven*, 5 C. P. D. 344, 28 W. R. Dig. 55, and the authority was given, if given at all, to the agent without the City.

F. Watt, against the prohibition.—The whole transaction took place in the City. The telegram was a mere medium of communication, as a conduit pipe or tube.

Manisty, J.—As the amount sued for exceeds £50, it is necessary that the whole cause of action should arise within the City in order to give jurisdiction to the

(*a.*) Reported by Sir Sherston Baker, Barrister-at-Law.

Mayor's Court. The plaintiff sent his order to the defendant by telegram, and that is exactly the same as if he had sent a letter through the post-office to the defendant. Until the telegram reached the defendant he had no authority. But he received the communication—the telegram—in the City, and answered it in the City. It has been argued that the authority, if given, was given outside the City, and therefore the authority to the telegraph office to send the telegram must be proved. That is not so; it is only necessary to prove the receipt of the order by the defendant direct from the plaintiff, and the receipt of the answer direct. It is not necessary to prove that the post-office had authority to send the telegram; it is a mere channel of communication between the parties, and they are in the same position as if they had met together to contract their bargain. We cannot grant a prohibition in this case.

HAWKINS, J., concurred.

Application refused.

Solicitor for the plaintiff, *G. C. Scoles.*

Solicitor for the defendant, *C. Butcher.*

IN BANKRUPTCY.

Q. B. Div. (Cave and A. L. Smith, JJ.) May 15.

Ex parte WOOD.
In re BURDEN. (*a.*)

Bankruptcy—Debtor's petition—Punishment of fraudulent debtors—Practice—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 11, *sub-sections* 13—15; *s.* 16—*Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *ss.* 149, 163.

The court cannot order the prosecution of a bankrupt under section 16 *of the Debtors Act,* 1869, *in respect of offences alleged to have been committed under section* 11, *sub-sections* 13, 14, *and* 15 *of the said Act within four months next before the presentation of the bankruptcy petition, where such petition has been presented by the bankrupt himself.*

Appeal from an order of his Honour Judge Selfe in the county court at Canterbury, refusing an application made by William Wood, a creditor of the bankrupt, for an order under section 16 of the Debtors Act, 1869, for the prosecution of the bankrupt, for offences committed by him within the meaning of section 11, sub-sections 13, 14, and 15 of the said Act.

In the present case the bankrupt had filed his own petition, and the application for his prosecution was refused by the county court judge on the ground that the case was not brought within sub-sections 13, 14, and 15 of section 11 of the Debtors Act, 1869, as those sub-sections only make the acts therein specified criminal offences if done by the debtor "within four months next before the presentation of a bankruptcy petition against him," whereas here the petition was not presented "against" him, but "by" him; and that these sub-sections were not extended by section 163 of the Bankruptcy Act, 1883, to the case of a bankrupt presenting a petition against himself, inasmuch as sub-section (1) of section 163 only substitutes the words "after the presentation of a bankruptcy petition by or against him" for the words "after the presentation of a bankruptcy petition against him," and does not alter the words in sub-sections 13, 14, and 15, "before the presentation of a bankruptcy petition against him" to "before the presentation of a bankruptcy petition by or against him."

The court being of opinion that a sufficient primâ *facie* case might otherwise be shown for directing a prosecution, the creditor now appealed.

Morton Smith, for the appellant.—This case is really covered by the decision in *Ex parte Gould, In re Walker,* 13 Q. B. D. 454, 32 W. R. Dig. 167. The effect of the refusal to order a prosecution must be to allow a fraudulent bankrupt to escape the consequences of his conduct where the offences are committed previous to the presentation of the petition. The court had power to direct a prosecution notwithstanding the manner in which section 163 of the Bankruptcy Act has been drawn.

CAVE, J.—The question is one of some little difficulty, but I have come to the conclusion that the county court judge was right in refusing this application, and that what the debtor has done here is not an offence within the Act. By section 11 of the Debtors Act, 1869, any person adjudged bankrupt, and any person whose affairs are liquidated by arrangement in pursuance of the Bankruptcy Act, 1869, shall, in each of the cases following, be deemed guilty of a misdemeanour, and, on conviction, be liable to imprisonment, that is to say (sub-section 13):—"If within four months next before the presentation of a bankruptcy petition against him, or the commencement of the liquidation, he, by any false representation or other fraud, has obtained any property on credit, and has not paid for the same." Now under the Act then in force—viz., the Bankruptcy Act, 1869—a bankruptcy petition could only be presented by a creditor and not by a debtor, and if a debtor wished to take advantage of the Act he presented a liquidation petition. Then we come to the statute of 1883, which made large alterations in bankruptcy proceedings, and swept away liquidations and made a petition the starting point in the case both of the creditor and of the debtor. The result of that is that the words of sub-section 13 no longer expressly apply. The petition is presented by the debtor, and there is no longer any liquidation. Section 149 of the Bankruptcy Act, 1883, has been relied upon to get over that difficulty, which provides, by sub-section (2), that "where by any Act or instrument reference is made to the Bankruptcy Act, 1869, the Act or instrument shall be construed and have effect as if reference were made therein to the corresponding provisions of this Act." That section received an interpretation in the case of *Ex parte Gould, In re Walker,* and I adhere to the view I expressed in that case, that where there is a reference in a lease to the Act of 1869 the lease is to be construed as if the reference was to the corresponding provisions of the Act of 1883. But there would arise a difficulty in this case if matters stood there from the well-known maxim that a man cannot be made a criminal except by direct expression of the Act of Parliament; he cannot be made a criminal merely by inference. That would cause me to hesitate whether the Legislature intended section 149 to apply to the Debtors Act, 1869, which creates offences, and when I come to section 163 of the Bankruptcy Act, 1883, my ground for hesitation is confirmed. Section 163 provides, by sub-section (1), that "sections eleven and twelve of the Debtors Act, 1869, relating to the punishment of fraudulent debtors, and imposing a penalty for absconding with property, shall have effect as if there were substituted therein for the words, 'if after the presentation of a bankruptcy petition against him,' the words 'if after the presentation of a bankruptcy petition by or against him.'"

It follows from that section that the Legislature had before it sections 11 and 12 of the Debtors Act, 1869, and I cannot suppose that it was ignorant that, under section 11, there were certain acts which were offences if done "before" the presentation of a bankruptcy petition against him, and yet, having the whole section before their eyes, the Legislature restricted itself to

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(*a.*) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

offences "after" the presentation of a bankruptcy petition by or against him. So, whatever I might have been inclined to decide if section 149 stood alone, when I find that section 163 omits those very important words, and that the Legislature expressly confined itself to acts after the presentation of a bankruptcy petition by or against him, I must take it that it did not intend to extend to acts before the presentation of a petition by him. It may be a *casus omissus*, but I must conclude that, where the offences are those before the presentation of the petition, and the petition is by the debtor himself, the case is not provided for by the Act, and a prosecution cannot be directed.

A. L. SMITH, J.—I must confess that at one time I was in some little doubt, but I have arrived at the same conclusion. We are dealing with a criminal case, and we must see that the case comes within the words of the statute. This debtor is clearly not within the words "if within four months next before the presentation of a bankruptcy petition against him," neither is he within the words "or the commencement of the liquidation." But it is said that, by section 149 of the Bankruptcy Act, 1883, the commencement of a liquidation means the same thing as a petition of a bankrupt by himself, and according to the decision in *Ex parte Gould, In re Walker*, that would seem to be so. But as my brother Cave has pointed out, I am met by section 163 of the Bankruptcy Act, 1883. The Legislature was there dealing with two sections of the Debtors Act, it had the Debtors Act before it, and yet the Legislature takes care to say that the sections shall have effect as if there were substituted therein for the words "if after the presentation of a bankruptcy petition against him" the words "if after a presentation of a bankruptcy petition by or against him"—that is, they amend all the clauses down to sub-section 12, and purposely leave unamended sub-sections 13, 14, and 15. It is argued that that is a blunder, but I do not feel myself entitled to say that, and the decision of the county court judge must be upheld.

Appeal dismissed.

Solicitors for the appellant, *Smith & Hayward*, Rochester.

Privy Council.

Feb. 20; March 24.

SLATTERY *v.* NAYLOR. (*a.*)

(*On appeal from the Supreme Court of New South Wales.*)

Municipalities Act (New South Wales), 1867—Bye-law—Regulation and prohibition—Unreasonableness.

A bye-law framed under the Municipalities Act (New South Wales), 1867, s. 153, which authorizes regulation of interments within the municipality, held not to be ultrà vires *in that it practically prohibited interments in a certain cemetery, and thus interfered with the private rights of owners of ground therein.*

As to whether, and in what circumstances, a bye-law may be set aside for unreasonableness, quære.

This was an appeal from a judgment of the Supreme Court of New South Wales, dated the 23rd of November, 1885, affirming a conviction before a justice of the peace for the infringement of a bye-law of the council of the borough of Petersham.

The question raised was as to the validity of the said bye-law, which purported to regulate interments within the said borough.

The facts appear at length in their lordships' judgment.

Sir H. Davey, Q.C., and *Leverson*, for the appellant.—The court below was wrong in considering themselves bound by the decisions in *Ex parte Flack*, 1 N. S. Wales L. R. 27, and *Brooks* v. *Selwyn*, 3 N. S. Wales L. R. 256. The power of regulation given by the Municipalities Act (31 Vict. No. 2), s. 153, related only to public cemeteries. To prohibit burials altogether in this cemetery is *ultrà vires: Western Railway Co.* v. *Windsor and Annapolis Railway Co.*, 7 App. Cas. 178, 30 W. R. Dig. 31; *Wortley* v. *Nottingham Local Board*, 21 L. T. N. S. 582, 18 W. R. C. L. Dig. 67; *Heap* v. *Burnley Union*, 32 W. R. 661, 12 Q. B. D. 617; *Wansted Local Board of Health* v. *Wooster*, 38 J. P. 21. The bye-law was unreasonable: *Quin* v. *Wood*, 5 E. & B. 49; *Master and Company of Framework Knitters* v. *Green*, 1 Lord Raym. 113.

Jeune, Q.C., and *C. E. Jones*, for the respondent.—The conviction was right. Regulation includes prohibition where the circumstances justify it. The prohibition is not unreasonable if compared with those of the English Burial Acts from 1850 to 1854.

Sir H. Davey in reply.

Cur. adv. vult.

March 24.—The judgment of their lordships (Lord HOBHOUSE, Lord HERSCHELL, Lord MACNAGHTEN, Sir BARNES PEACOCK, and Sir RICHARD COUCH) was delivered by

Lord HOBHOUSE.—The sole question in this case is whether a bye-law, under which the appellant has been convicted and fined, is valid or invalid. The bye-law was passed by the Municipal Council of the borough of Petersham on the 2nd of December, 1884, under the provisions of the Municipalities Act, 1867. The respondent is the inspector of nuisances for the borough. The appellant appealed to the Supreme Court, and the convicting magistrate stated a case, which contains the facts on which the decision of that court was passed. It affirmed the decision of the magistrate, and their lordships are now asked to decide that the affirmance was wrong.

The material portion of the bye-law is in the following terms:—"No corpse shall be interred in any existing cemetery now open for burials within the distance of one hundred yards from any public building, place of worship, schoolroom, dwelling-house, public pathway, street, road, or place whatsoever within the borough." A similar provision was made with respect to cemeteries afterwards opened.

Section 153 of the Municipalities Act provides that the council may from time to time make bye-laws for (among other things) regulating the interment of the dead. The bye-law was published in the *New South Wales Government Gazette* on the 19th of January, 1885, where it is stated to have been confirmed by his Excellency the Governor, with the advice of the Executive Council.

On the 27th of June, 1885, the appellant interred the corpse of his wife in his own family burial-place in the Roman Catholic cemetery in Petersham. This cemetery had, from the year 1862 onwards, been used for the interment of members of the Roman Catholic faith; and in the year 1879 the appellant purchased a portion of it as a permanent burial-place for members of his family. No part of the cemetery is distant more than 100 yards from a place of worship, schoolroom, dwelling-house, public street, road, or place within the borough. It is admitted that the place is not a populous one.

The Supreme Court was unanimous in its decision. But of the three judges, only the Chief Justice, Sir James

(*a.*) Reported by J. M. COLLYER, Esq., Barrister-at-Law.

Martin, agreed with the decision on principle. The other two, Fancett and Innes, JJ., would have decided the other way if they had not thought themselves bound by two previous decisions on similar bye-laws of other municipalities under the same statute. Under these circumstances the case was a proper one for appeal to her Majesty in Council.

The appellant takes three objections to the validity of the bye-law; first, that it is *ultrà vires* because it destroys private property; secondly, that it is *ultrà vires* because the council have only power of regulating interments, whereas in the cemetery in question they have wholly prohibited them; and, thirdly, that it is unreasonable. These objections must be judged by reference to the provisions of the Municipalities Act, the material sections being those numbered 153 and 158. The former gives to the council the power of making bye-laws to provide for the health of the municipality, as well as to regulate the interment of the dead.

In support of the first objection, their lordships have been referred to cases in which Acts of the Legislature would, according to their full literal meaning, operate to take away private property without compensation; and in which courts of justice have, on account of the extreme improbability that the Legislature should have intended such a thing, sought for some secondary meaning to satisfy its expressions; such as was the case of *Western Railway Co.* v. *Windsor and Annapolis Railway Co.* before this board. But a statute cannot be so construed if it shows an intention to override the private rights in question. The object of the present statute is to establish regulations for the common advantage of persons who have come to live in the same community, in a great number of matters affecting their daily life, and that cannot be done except by interference with many actions and many modes of enjoying property, which, but for such regulations, would be lawful and innocent. It is difficult to see how the council can make efficient bye-laws for such objects as preventing fires, preventing and regulating places of amusement, regulating the killing of cattle and sale of butcher's meat, preventing bathing, providing for the general health, not to mention others, unless they have substantial powers of restraining people, both in their freedom of action and in their enjoyment of property.

The interment of the dead is just one of those affairs in which it would be likely to occur that no regulation would meet the case except one which wholly prevented the desired or accustomed use of the property. It may well be that a plot of ground, having been originally far from habitations, and suitably used as the burying place of a family or a religious society, has been reached by the growing town, and has so become unsuitable for the purpose. In such a case a power to regulate would be nugatory unless it involved a power to stop the burials altogether. Their lordships hold that the bye-law in question is not *ultrà vires* because in certain circumstances it may have, as in Mr. Slattery's case it unfortunately has, the effect of taking away an enjoyment of property for which alone that property was acquired and has been used.

The considerations applicable to the second objection have, to a great extent, been anticipated by the answer to the first. It is true that, in regulating the interment of the dead, the bye-law makes the cemetery useless for its former purpose. This, it is argued, is not regulation but prohibition, and it is pointed out that, with regard to several objects of the bye-laws, prevention and suppression are expressly allowed by the Act, whereas in the case of interment only regulation is allowed. One illustration of regulation proper, as distinct from prohibition, was found in another bye-law laying down rules as to the number of corpses in a grave and their depth below the surface. Now if, at the passing of the bye-law, a grave was already so full that it could not, consistently with the bye-law, receive another corpse, the bye-law would amount to a complete prohibition of burial, although the owner of the grave may have contemplated that in death he should be laid by those whom he loved best in life.

To regulate the place of burial is certainly one of the most important points in regulating burials for the health of a community, perhaps the most important of all. It is indeed a serious thing to prevent people from indulging their affections in a matter which they justly consider so sacred as the disposal of their dead. Such prohibitions should be well considered before they are passed. But they are undoubtedly necessary in large and growing communities. And their lordships cannot hold that a bye-law is *ultrà vires* because, in laying down a general regulation for the borough of Petersham, it has the effect of closing a particular cemetery.

It is contended that the bye-law is unreasonable on three grounds. First, that it is not wanted, the place not being populous. Secondly, that it does not, as is usually done in England, make any provision for the case of a person who may have a special claim to use the prohibited burying place. Thirdly, that a belt of 100 yards must be kept vacant all round a cemetery, which will be onerous for all, and probably impossible for some; otherwise any private owner of land may, without regard for any interest but his own, or even from malice, place a dwelling-house in such a position as to prevent future burials.

As regards the necessity for the bye-law, there is no evidence whatever on which their lordships can form an opinion. It is merely said that the place is not a populous one. Even supposing that the place mentioned means the borough of Petersham, and not merely the neighbourhood of the cemetery, which is not clear, the statement is far too vague to be of any use. It may be quite populous enough to require such a bye-law. The matter is one on which the judgment of the local authorities should not be lightly superseded.

The other two grounds are more substantial. It is possible that if we were now discussing how the bye-law should be framed, it might seem more wise and prudent to make it less absolute. It might be wiser, even at the expense of some inconvenience to the community, to make some concession to one of the most softening and refining of human feelings, the reverence and love that is felt for the dead, and the desire of resting in the same spot with them. It might be more prudent not to give any person the means of disturbing a cemetery by the mere building of a house. But supposing that to be so, it is quite a different question whether a bye-law like the present one is to be held unreasonable because such considerations have been overlooked or rejected by its framers.

The jurisdiction of testing bye-laws by their reasonableness was originally applied in such cases as those of manorial bodies, towns, or corporations having inherent powers or general powers conferred by charter of making such laws. As new corporations or local administrative bodies have arisen, the same jurisdiction has been exercised over them. But in determining whether or no a bye-law is reasonable, it is material to consider the relation of its framers to the locality affected by it, and the authority by which it is sanctioned.

We are dealing with the proceedings of a local authority in a colony, where the extent of area is large and population grows fast. The Act of 1867 provides methods for the more effectual establishment of local institutions. It creates a representative council, elected annually by the constituency, and gives to it jurisdiction over the large range of affairs enumerated in section 153 and some other sections. By section 158 it is enacted that all bye-laws "consistent with the provisions of this Act, and not repugnant to any other

Act or law in force in the colony of New South Wales, shall have the force of law when confirmed by the governor and published in the *Government Gazette*, but not sooner or otherwise." And provision is made for laying copies of such bye-laws before both Houses of Parliament.

It is certainly not clear that courts of law are not precluded by section 158 from inquiry whether or no a bye-law is reasonable. Sir Horace Davey argued on this point that it is a necessary condition of every bye-law that it shall be reasonable, that a power to make bye-laws means a power to make reasonable bye-laws, and that no bye-law can acquire the force of law under section 158 except such as is consistent with the implied as well as the express provisions of the Act. According to this argument, the question whether a bye-law is reasonable is only one branch of the question whether it is *ultrà vires*.

If it were possible to conceive that a council such as that of Petersham could frame, and that the Governor of New South Wales could confirm and publish, a merely fantastic and capricious bye-law, such as reasonable men could not make in good faith, such, for instance, as a bye-law providing that the Roman Catholic cemetery should be closed to the Roman Catholic community, but remain available for others, it would raise in a very crucial shape the question whether a court of law could set it aside as unreasonable. Let it be assumed, notwithstanding section 158 of the Act, that such a jurisdiction exists. It is quite a different question whether a bye-law can be treated as unreasonable merely because it does not contain qualifications which commend themselves to the minds of judges.

Every precaution has been taken by the Legislature to ensure, first, that the council shall represent the feelings and interests of the community for which it makes laws; secondly, that, if it is mistaken, its composition may promptly be altered; thirdly, that its bye-laws shall be under the control of the supreme executive authority; and, fourthly, that ample opportunity shall be given to criticize them in either House of Parliament. Their lordships feel strong reluctance to question the reasonable character of bye-laws made under such circumstances, and doubt whether they ought to be set aside as unreasonable by a court of law, unless it be in some very extreme case, such as has been indicated.

In the present case, so far from there being ground for thinking the bye-law to be capricious or oppressive, there is good evidence that the communities of New South Wales consider that bye-laws of this nature are reasonable and suitable to their circumstances. In the case of *Ex parte Flack*, which was decided in 1880, it appeared that a bye-law had been passed by the municipality of Leichardt and gazetted on the 8th of April, 1875, to the same effect with the Petersham bye-law, except that the prescribed distance was 100 feet instead of 100 yards. A conviction for infraction of that bye-law was upheld by the Supreme Court. The same view was taken in *Brooks* v. *Selwyn*, decided in 1882, when a bye-law identical with the Petersham bye-law was passed by the borough of Newcastle, and gazetted on the 27th of August, 1881. In this case the justices refused to convict, on the ground that the bye-law was *ultrà vires*, and the Supreme Court reversed their decision. It is clear then that, at least from the year 1875, municipal councils in New South Wales have been passing, and governors in council confirming, bye-laws of this kind; and it does not appear that the Houses of Parliament, on whose tables the bye-laws are placed, have thought it necessary to modify the powers conferred in 1867, or to interfere with their exercise.

The result is that in their lordships' opinion the two prior decisions are right in law; that the court below did right to follow them in this case; that its judgment should be affirmed, and this appeal dismissed. The appellant must pay the costs. They will humbly advise her Majesty in accordance with this opinion.

Solicitors for the appellant, *Want & Harston*.

Solicitors for the respondent, *Phelps, Sidgwick, & Biddle*.

Court of Appeal.

From Chan. Div. Nov. 14, 15, 17, 19, 21.

PEEK v. DERBY. (a.)

Company—Misrepresentation in prospectus—Liability of directors—Action of deceit—Measure of damages.

An action for damages for deceit will lie against a person who makes an untrue statement as to a fact without any reasonable ground for believing it to be true when the statement is made with a view to its being acted upon by others.

The expression "fraud" considered and explained.

Edgington v. Fitzmaurice, 33 *W. R.* 911, 29 *Ch. D.* 459, *and* Weir v. Bell, 26 *W. R.* 746, 3 *Ex. D.* 238, *considered.*

A tramway company, by its special Act, was authorized, with the consent of the Board of Trade, to use steam or any other mechanical motive power instead of horse power. The directors of the company issued a prospectus which contained a statement that the company, by its special Act, "has the right to use steam or mechanical motive power instead of horses." The plaintiff took shares on the faith of the statement in the prospectus. The Board of Trade refused their consent to the use of steam power, and the company was subsequently wound up.

Held (*reversing* Stirling, J.), *that the directors were liable to the plaintiff in damages in an action of deceit on the ground that the statement in the prospectus was made without any reasonable ground for believing it to be true.*

Held, also, that the measure of damages was the difference between the price which the plaintiff paid for the shares and the real value of the shares—as distinguished from their market value—at the time of their allotment to the plaintiff.

This was an appeal by the plaintiff from a decision of Stirling, J.

The Plymouth, Devonport, and District Tramways Co. was incorporated by special Act of Parliament in 1882, and on the 1st of February, 1883, the directors of the company issued a prospectus dated the 29th of January, 1883, inviting subscriptions for ordinary share capital. This prospectus was headed in large type "Incorporated by special Act of Parliament 45 & 46 Vict., authorizing the use of steam or other mechanical motive power," and it contained the following statement, also in large type:—"One great feature of this undertaking, to which considerable importance should be attached, is that, by the special Act of Parliament, this company has the right to use steam or mechanical motive power instead of horses, and it is fully expected that by the means of this a considerable saving will result in the working expenses of the line as compared with other tramways worked by horses"; and it also stated: "Looking at the exceptional advantages offered by this undertaking from the dense population of the towns it traverses, the unusually favourable conditions as to motive power open to the company, and the annual dividends earned by other tramways which do not enjoy such special privileges, the directors have reason to believe that the enterprize will prove highly remunera-

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

tive, and the shares now for subscription offer a very favourable opportunity for a sound and progressive investment." The plaintiff was sent a copy of this prospectus, and on the 7th of February, 1883, he applied for 400 shares of £10 each, which were allotted to him, and for which he paid £4,000. The only provisions contained in the special Act with regard to steam or other mechanical motive power were in the 35th section of the Act, which provided that the carriages used on the tramways might, with the consent of the Board of Trade, during a period of seven years after the opening of the same for public traffic, and with the like consent during such further periods, not exceeding seven years, as the board might from time to time specify in any order to be signed by the secretary or assistant-secretary of the board, be moved by steam power or any mechanical power; and by the same section it was provided that the exercise of the power thereby conferred with respect to the use of steam or any mechanical power should be subject as thereby particularly provided, and that the company should not use any steam power or other mechanical power on the said tramway unless and until they should have obtained the provisional consent in writing of the Corporations of Plymouth and Devonport therefor, and for such terms only and subject to such conditions and regulations as the corporations should think fit.

At the time when the prospectus was issued the company had not obtained, and they never did obtain, the consent either of the Board of Trade or of the corporations to the use of steam or other mechanical power on the tramways.

The plaintiff did not immediately commence proceedings against the directors after discovering that the company had not the right to use steam or other mechanical motive power on the tramway, and at a meeting in November, 1884, he expressed himself favourably towards the company and as having confidence in the directors. In February, 1885, the plaintiff commenced this action against the directors for damages in respect of the misstatements in the prospectus by which he had been induced to take the shares. Two days before the commencement of this action a petition had been presented for winding up the company, upon which an order for its winding up had been subsequently made.

The arguments appear sufficiently from the judgments.

Bompas, Q.C., and *E. W. Byrne*, for the appellant, cited *Polhill* v. *Walter*, 3 B. & Ad. 114; *Redgrave* v. *Hurd*, 30 W. R. 251, 20 Ch. D. 1; *Hallows* v. *Fernie*, 16 W. R. 873, L. R. 3 Ch. App. 467; *Twycross* v. *Grant*, 25 W. R. 701, 2 C. P. D. 469; *Arkwright* v. *Newbold*, 29 W. R. 455, 17 Ch. D. 301; *Peek* v. *Gurney*, 22 W. R. 29, L. R. 6 H. L. 377; *Weir* v. *Bell*, 26 W. R. 746, 3 Ex. D. 238; *Smith* v. *Chadwick*, 30 W. R. 661, 32 W. R. 687, 20 Ch. D. 27, 9 App. Cas. 193; *Western Bank of Scotland* v. *Addie*, L. R. 1 H. L. Sc. 145, 15 W. R. H. L. Dig. 14; *Edgington* v. *Fitzmaurice*, 33 W. R. 911, 29 Ch. D. 459; *Cargill* v. *Bower*, 26 W. R. 716, 10 Ch. D. 502; *In re Denham & Co.*, 32 W. R. 487, 25 Ch. D. 752.

W. Pearson, Q.C., and *Seward Brice, Q.C.*, for the respondent Derry.

Finlay, Q.C., and *Muir Mackenzie*, for the respondent Pethick.

Graham Hastings, Q.C., and *Phipson Beale; H. B. Buckley, Q.C.*, and *Woodfall;* and *Moulton, Q.C.*, and *Levett*, for the other respondents.

COTTON, L.J.—This is an appeal from a decision of Stirling, J., dismissing the plaintiff's action. The action is one which is commonly called an action of deceit, a mere common law action. It is brought against all the persons who were directors of the tramway company at the time when the prospectus was issued. The plaintiff contends that he is entitled to damages on the grounds that there were misstatements in the prospectus by which he was induced to act to his prejudice by taking shares for which he paid £4,000, but which are now much less valuable because the company is wound up.

Before going into the facts of the case I think it best to state what, in my opinion, is the law with reference to such actions, and when it is that a defendant in such an action will be made liable. In my opinion the law may be correctly stated to be this: Where a man makes a statement, to be acted upon by others, which is false, and which is known to him to be false, or which is made by him recklessly or without caring whether it is true or false—that is, without any reasonable ground for believing it to be true—he is liable in an action for deceit at the suit of anyone to whom it was addressed, or of anyone of the class to whom it was addressed, and who was materially induced by the misstatement to do an act to his prejudice. This view of the law is in accordance with what I have stated in several of the cases referred to, and I do not think that Stirling, J., expressed an opinion in any way dissenting from it.

But I do not forget the argument, and I cannot omit referring to the authorities which were much relied on by the respondents in support of that argument—viz., that in order to make a man liable in an action of deceit—that is, on the ground of fraud—it must be made out that the person making the statement acted fraudulently in making it. In *Edgington* v. *Fitzmaurice* Bowen, L.J., no doubt said:—"Secondly, it is said that the prospectus contains an implied allegation that there was no other mortgage affecting the property, except the mortgage stated therein. I think there was such an implied allegation, but I think it is not brought home to the defendants that it was made dishonestly; accordingly, although the plaintiff may have been damnified by the weight which he gave to the allegation, he cannot rely on it in this action, for in an action for deceit the plaintiff must prove dishonesty."

That statement taken alone no doubt strongly supports the contention on behalf of the respondents that there must be actual fraud and dishonesty; but one must look and see what Bowen, L.J., stated in the previous part of his judgment would in his opinion be dishonest, and we find that he said this:—"The loss which the plaintiff sustained is not disputed. In order to sustain his action he must first prove that there was a statement as to facts which was false; secondly, that it was false to the knowledge of the defendants, or that they made it not caring whether it was true or false. For it is immaterial whether they made the statement knowing it to be untrue, or recklessly without caring whether it was true or not; because to make a statement recklessly for the purpose of influencing another person is dishonest." So that when he says there must be dishonesty one must look back to the former part of his judgment to see what, in his opinion, would be dishonesty.

Then there is the passage in the judgment of Bramwell, L.J., in *Weir* v. *Bell*, which I think Stirling, J., considered as rather opposed to the view of the law I have already expressed in this case and in several of the cases referred to. Bramwell, L.J., said:—"I am of opinion that, with an exception I will presently advert to, to make a man liable for a fraud, moral fraud must be proved against him. I do not understand legal fraud. To my mind it has no more meaning than legal heat or legal cold, legal light or legal shade. There never can be a well-founded complaint of legal fraud or of anything else, except where some duty is shown, and correlative right, and some violation of that duty and right. Now I do not propose to discuss the question whether

legal fraud is a happy expression. It is not one which I should adopt.

But the question is whether there is not a duty on the part of those who make statements to be acted upon by others, and whether there is not a right in those other persons to whom the statements are made. In my opinion, when a man makes a statement which he desires that others who receive it should act upon, there is a duty thrown upon the person making the statement—especially when it is made in a prospectus like the present, to be circulated amongst persons in order to induce them to take shares—to take care that there are no statements in the prospectus and no expression in it which are in fact false, and to take care that he has reasonable ground for the material statements which are contained in that document which he intends to be acted on by others, and which he has prepared and circulated for the very purpose of its being acted on by others. And although, in my opinion, it is not necessary hat there should be what I should call fraud, yet in these actions, in my opinion, there must be a departure from duty—that is to say, an untrue statement must have been made without any reasonable ground for believing the statement to be true; and if a person makes a statement to be acted upon by others and has no reasonable ground for believing his statement to be true, then, in my opinion, he has made default in a duty which was thrown upon him from the position he has taken upon himself, and he has violated the right which those who receive the statement have, to have only true statements made to them when they are asked to take shares in a company or to do any other act.

Now, that being so, of course, where a man makes a false statement, knowing it to be untrue, with a view of inducing persons to act upon it, no one would doubt that that is fraud, and I should say further that where a man makes a false statement to induce others to act upon it, without reasonable ground for supposing it to be true, and without taking care to ascertain whether it is true, he is as much liable civilly as the person who commits what is usually called fraud, and makes a misstatement knowing it to be an untruth. And although the expressions of opinion by Bowen, L.J., and by Lord Bramwell in the cases to which I have referred *primâ facie* support the argument on the part of the respondents here, yet, in my opinion, they are not inconsistent with what I have stated to be the law applicable to cases like the present.

Having stated the law, let us go to the facts of the case. The first point which was argued by Mr. Pearson, and which, I think, it may be convenient to consider, is this, Who were responsible for issuing the prospectus? Now there was only one defendant who contended that he was not answerable. I am not speaking of the liability to the plaintiff in this action, but as not being answerable generally for the statements in the prospectus with the consequences, whatever they may be. Mr. Derry was the only one who contended that he was not answerable for issuing this prospectus. Now as far as I understand the point of Mr. Pearson's argument, which was pressed upon us very ably, it was this, that Derry never saw the draft of this prospectus before it was issued, that he did not attend when it was approved, and that he was not ordinarily at the meetings of the directors. The prospectus in question was dated the 29th of January, 1883. Derry was present at a meeting of directors on the 23rd or 24th of January, 1883, and he then authorized the issue of a prospectus on the basis of a former prospectus, which did not contain the statements contained in the present prospectus. He then went home to Plymouth, and what happened? On the Tuesday, the 6th of February, he received a bundle of a hundred of these prospectuses. It is true that the prospectuses on which the plaintiff acted had been issued before that date. That is the conclusion I come to, as his application for shares was made on the 7th. But what is the course adopted by Mr. Derry? He does not suggest that he did not see the prospectus, and he must be taken to have seen it. He does not in any way object to it. He does not in any way write to say, "This prospectus is not what I authorized, and I cannot adopt it as my prospectus." But he circulates and hands over some of the prospectuses which were sent down to him to other persons. From his never objecting to this prospectus, and from the conduct he adopted as regards the copies of the prospectus sent to him, I come to the conclusion that, even if this prospectus was not in accordance with the authority given by him on the basis of the former prospectus, yet he adopted it, and by his act showed that he recognized it as a prospectus duly in accordance with his directions given at the meeting at which he was present, and he must be answerable for the consequences of this prospectus, just as if he had been present and seen this prospectus when it was finally prepared and before it was issued at all. It is very true, as was urged upon us, that the prospectus upon which the plaintiff acted must have been issued before Mr. Derry actually saw the prospectus; but, in my opinion, as, when he received it, he recognized it as his and adopted it as his, he must be as much liable as any of the other directors, who do not urge that they did not recognize or issue this prospectus.

The next point we have to consider is, What, in fact, is the statement which was relied upon by the plaintiff? I think there were two statements relied upon. First, the heading of this prospectus of the 29th of January, 1883, "Incorporated by special Act of Parliament 45 & 46 Vict., authorizing the use of steam or other mechanical motive power." That heading was relied upon, but I do not think it was what was principally relied upon, and I think it might have been explained away. The statement principally relied on was this, "One great feature of this undertaking, to which considerable importance should be attached, is that, by special Act of Parliament obtained, the company has the right to use steam or mechanical motive power instead of horses, and it is fully expected that by means of this a considerable saving will result in the working expenses of the line as compared with other tramways worked by horses."

Now what was the position of things at this time? By the general Act, unless the special Act authorized it, no motive power could be used except horses. In the 35th section of the special Act there was a provision that "carriages used on the tramways may, subject to the provisions of this Act, be moved by animal power; and, with the consent of the Board of Trade, during a period of seven years after the opening of the same for public traffic, and with the like consent during such further period not exceeding seven years, as the said board may from time to time specify, in any order signed by the assistant-secretary or secretary, by steam power or any mechanical power." It was said in argument that tramway companies were generally divided into two classes—viz., those which could only use horse power and those which could also use steam power; and that the prospectus ought to be read as bringing this company within the division of companies which are freed from the restrictions in the general Act of 1870 and are placed by their special Act in the position of being able to use, not only horse power, but also steam power. Can that be said to be the meaning of the statement in the prospectus? In my opinion it cannot, because it does not speak of the special Act of Parliament as removing the restriction of the general Act, and as giving them power, probably, to obtain authority to use steam power, but it speaks of the company having the right, which must, in my opinion, be the present right at the time when the prospectus was issued, to use steam

power. It does not state that if the company obtained authority from the Board of Trade to use steam power the probable result would be that the working expenses would be greatly diminished, but it speaks of the right to use something within the power of the directors, and that by that means the company will as a fact, and not as a mere prospective probable advantage, be enabled to considerably save and reduce the working expenses. That is consistent with the heading of the prospectus, and, in my opinion, the real meaning and the fair construction of the statements contained in the prospectus is that the company at that time had actually and in fact power to do that which would be considerable saving of expense, and would enable the tramways to be worked at a much larger profit than they otherwise could be. But, as I understand it, the great contention on behalf of the directors was that the mere approval by the Board of Trade of the plans which were submitted to them was equivalent to their giving the consent required by the 35th section. I think the view adopted by Stirling, J., was this—viz., that it was probable that the Board of Trade would give the consent and that the directors were justified in making this statement. But I do not think the probability that they would obtain the authority from the Board of Trade is equivalent to the statement which was made. If the statement had been that the consent would probably be obtained, no question could have arisen. Of course the directors would not be liable for merely an expression of opinion which they might well and honestly entertain, and I think probably did entertain, that the Board of Trade would grant their consent. But the statement is not to that effect, but is, in my opinion, a statement that they have, as a positive fact, at the present moment power to use steam.

That being so, I think that the plaintiff has a right to insist that the defendants are liable for the ordinary meaning of the words used by them, because, however much people in their own minds may mean to qualify their statements, if a man makes a statement which, according to its ordinary meaning, bears a particular construction, he is, in my opinion, liable to those who, reading it and construing it reasonably, do give to that statement a construction which is the primary meaning and the fair construction of the words used. And the plaintiff here in his evidence stated that he did treat this as a statement that the company had the absolute right to use steam power for the purposes of locomotion.

Then it has been said that, as the plans of the tramway had been approved by the Board of Trade, they had practically given their consent, and that prevented the statement complained of from being a misstatement, and that the plaintiff must have known that their approval of the line must be obtained. The approval of plans by the board, in my opinion, really goes for nothing, because that only amounts to this, that they approve of the course shown by the plans which were deposited with them, that consent—or approval rather—of the board being necessary before the line could be opened for use, but that is an entirely different matter from the consent which was required by the 35th section. What the officers of the Board of Trade have to do before the line can be opened is to see that the powers given by the Act of Parliament have been properly exercised, and that the line has been properly constructed with due regard to the safety of the public; but the 35th section requires something more; it requires that the board should be satisfied that it is right and proper, having regard to the cases which have come before them, that the company should have the right to use steam; and that is an entirely different thing from seeing whether the company have duly exercised the powers given them: they must see whether, in addition to those powers which are given and which they are to see have been duly exercised, they are willing (for on them is cast the responsibility) that the company should have additional powers to those which a company of this kind generally have. It is true that the special Act gives the board power of considering whether the company is to be taken out of the class prohibited by statute from exercising the right of using steam power; but they have to determine that question independently of the question whether the line is properly constructed.

I have come to the conclusion (I think not differing from Stirling, J., in that) that the statement in the prospectus was that the company had at that moment the absolute power, without any restriction, to use steam for the purpose of propelling their carriages, and that that statement was false.

Then we must consider whether the defendants had reasonable ground for believing the statement to be true. Some of the defendants say that they knew that no consent had been given by the Board of Trade. One gentleman, Mr. Moore, says that he acted on the statements of, and trusted to the solicitors who seem to have prepared the prospectus. As regards the defendants, who admit that they actually knew the facts, if the statement bears the construction I have put upon it, it cannot be said they did not know that the statement they were making was untrue. As regards Mr. Moore, had he reasonable ground for believing it to be true? If this had been a clause which he had said he had read and did not understand, and asked the solicitors to explain it, the case would have stood very differently. But I think this is what his meaning must be, that he accepted this prospectus prepared by the solicitors without investigation, but trusted that they would not state anything which was not right. I do not think that is a reasonable ground for making a statement which, if he had inquired into it, he would have found not to be a correct and true statement, and if he had looked at the Act (and he must be taken to have known the provisions of the Act) he would have found a section which would not have required the legal advice of the solicitors as to what its true construction was, but clearly stating that the company had only the right at the present moment to use horse power or animal power, and that they would not get the right to use steam power unless something further was obtained—namely, the consent of the Board of Trade.

Some of the defendants do not appear to have troubled themselves about the matter, but they cannot be in a better position than Mr. Moore, and one of them who does say that he thought the consent had been obtained, does not state any sufficient reason for believing that, when he was going to make such a statement as this to the public to take shares.

I have already referred to the view which I understand to have been taken by Stirling, J., with regard to the reasonable ground for the directors supposing the statement to be true. It was that they had reasonable ground, as men of business, for believing that in fact this consent of the Board of Trade would be obtained. I think if it turned upon that alone I should agree with him. Probably they did expect it, although some of them afterwards thought it would not be desirable that steam power should be employed upon the line. I do not rely upon that. But although I think that the directors believed that the Board of Trade would probably give their consent, that does not make true the statement which, in fact, they made. A very little alteration in the statement—one feels that—would have made it true in fact; for instance, if they had only said, "Subject to the consent of the Board of Trade," and then it could not have been said that by any misstatement on their part the plaintiff had been induced to take the shares.

The next point we have to consider is whether the plaintiff was induced by this statement to take the shares. I think it is necessary here to state a further

point of law. As I understand the law, it is not necessary that the misstatement should be the motive, in the sense of the only motive, the only inducement, to the party who has acted to his prejudice so to act. It is quite sufficient if the statement is a material inducement to the party to act upon it. Of course it would be almost impossible to say it was the only inducement. There must be so many matters which enter into a man's mind in considering whether or no he shall take shares or whether he shall do any similar act. But in my opinion (and I do not refer to the *dicta* of various judges which have been to the same effect) it is quite sufficient if it was a material inducement to the party who has suffered loss to take the shares. I think Stirling, J., came to the conclusion that the misstatement was a material inducement to the plaintiff to take the shares, because he says in his judgment that the plaintiff saw this and was of opinion that having steam power would add very materially to the profits of the company. But I think the conclusion he came to was this—that the statement was made an untrue one by the non-statement that the consent of the Board of Trade was necessary before the power could be acquired. I think he came to the conclusion that if that had been mentioned it would not have affected the plaintiff or prevented him taking the shares. Why does he do that? The plaintiff stated that if that clause had been recited in the prospectus and given *in extenso* in the prospectus he would not have read it.

The question for our consideration in that event would be totally different from what we have to consider now, and that would be a very different prospectus from the prospectus which we have before us, where there is no statement at all of the clause of the Act, and nothing but this statement, which anyone to whom the prospectus was shown was at liberty to take and read in that which, in my opinion, is its proper meaning construed fairly.

I think Stirling, J., also considered that the plaintiff was to some extent careless in reading the prospectus, but he says that he relies on the evidence given by the plaintiff, and that he gave his evidence with great fairness, not wishing or intending or trying to exaggerate matters. I cannot, on this point, agree with the inference the learned judge drew from the facts stated by the plaintiff. [His lordship then referred further to the evidence, and continued.]

There is only one other point which we ought to refer to in differing from Stirling, J—that is, his reliance on the conduct of the plaintiff at the meeting in November, 1884. No doubt that was a material point, and it struck me as one to some extent in favour of the defendants. They say "How was it, if the plaintiff thought he had been deceived by a misstatement made by these defendants, that at that meeting, when he knew that they had not the sanction of the Board of Trade, that he expressed himself as he did as having full confidence in the directors?" Undoubtedly he could not after his action at that meeting have set aside the contract to take the shares. But it is a different question here. It is a question as to whether he has precluded himself from bringing this action against the directors. He has not precluded himself, but his conduct there was fairly used as an argument that that would show that he had not considered himself in any way deceived. But we must remember that at that time there was a prospect that the directors would get the sanction of the Board of Trade, and I think the plaintiff might reasonably, even if he considered himself deceived, express his confidence in the management of the directors, and that they were going to do their best for the company and to get this power from the Board of Trade, and he might wish to support them so as to give them a better chance of enabling them to get that. I do not think that Stirling, J., relied upon the plaintiff's conduct at that meeting as showing that the statement of the plaintiff, that he relied on the statement in the sense in which I think it ought to be read, could not be believed. And I think his conduct at that meeting may well be explained, and probably is attributable to the circumstances to which I have referred, and that it did not show that he did not believe or rely upon the statement or at that time think that he had been deceived by the directors. In my opinion, therefore, the plaintiff here has made out his case. There is one other matter which was pressed upon us to which I ought to refer—that the collapse of the company was not in any way caused by the want of a right to use steam power. But the question we have to consider is not the cause of the failure of the company, but whether, in reliance on the statements made by the defendants which were incorrect, the plaintiff has done an act to his prejudice.

That being so, the defendants must be held liable. It is not that I attribute to them any intention to commit fraud, but they have made a statement which was incorrect to induce the plaintiff to act upon it without any sufficient reason for making that statement, without any sufficient reason for believing it to be true. Therefore they are liable. Then what ought the judgment to be?

It is said on the part of the defendants that the plaintiff has not made out what the loss is. Well, he has made out a *primâ facie* case—that is to say, he has shown I think, on the evidence, that the shares are of very much less value than the sum which he gave for them. He gave £4,000, and on the evidence the company is being wound up. I think the proper course will be to declare that the plaintiff was induced by a misstatement in the prospectus to take the shares, and that the defendants are liable, under the circumstances, for any loss which he has sustained by taking the shares, and that there must be an inquiry as to what that is.

Sir JAMES HANNEN.—I entirely agree in the judgment which has been delivered by Cotton, L.J., and particularly with his statement of the law with which he commenced that judgment; but I will add my own statement to the principle, which, I believe, does not materially differ from his. I take the law to be that if a man takes upon himself to assert a thing to be true which he does not know to be true, and has no reasonable ground to believe to be true, in order to induce another to act upon the assertion, who does so act, and is thereby damnified, the person so damnified is entitled to maintain an action for deceit.

Having so stated the principle, I will proceed to consider the various questions which arise in this case, and it will be convenient to do so in the order Stirling, J., has dealt with them.

The first question is, supposing that the plaintiff is entitled to recover at all, who are the persons responsible? Well, no serious question has been raised with regard to anyone but the defendant Derry, and with regard to him it has been said that this prospectus which is complained of was, in the first place, issued without his having seen it, and therefore he cannot be responsible for it. But it appears that it was prepared in consequence of an authority given by him that a prospectus should be prepared upon the basis of the former; and it appears to be the fact that before the plaintiff did anything in consequence of his having received this prospectus it was communicated to Mr. Derry, and of course the question would be whether or not he sanctioned and approved that prospectus. It appears to me the evidence is quite conclusive that he did. In order to judge of that we may look at his subsequent conduct. He made no objection to this prospectus, and he made use of it by circulating it amongst his friends. I think, therefore, that he adopted it, and is therefore responsible for any mischief which may have arisen from its circulation; and, in fact, that was the conclusion which Stirling, J., arrived at, and our judgment, therefore, is in accordance with the opinion of Stirling, J.

Now the next question is whether the statement contained in that prospectus was true. It has been contended on behalf of some of the defendants boldly that it is; but I confess I am quite unable to understand how that can be successfully maintained. I must read again the passage which is chiefly relied on. [His lordship read it, and continued:—] It is to be noted that so much importance is attached to this that it is printed in capitals to attract the attention of readers, and obviously to influence their minds by this positive statement.

Now it has not been, and cannot be, contended that there was any such absolute right. It was only a right in the event of the Board of Trade approving of the use of steam upon the line. If it had been truly stated it would have been only that they had an expectation of obtaining the power to use steam or other mechanical motive power. But upon this point the judgment of Stirling, J., is against the defendants, (I am now only upon the question whether or not it is a true statement), for he says:—"First of all, is this statement in the prospectus true or untrue? To my mind it is perfectly clear that it is not an accurate statement of the legal position of the company," and in that I entirely concur, and I am unable to see how it was possible to argue that it was a correct statement.

Then arises that which is the main question in this cause, Whether or not this statement, which Stirling, J., calls inaccurate, is one made under such circumstances as to make the defendants responsible for the consequences of other persons having acted upon it? Now Stirling, J., says that perhaps the law on this point is not quite settled yet, and he refers, as well illustrating the point upon which differences have arisen, and may remain to be settled, to two judgments, the one of Lord Chelmsford and the other of Lord Cranworth, in the *Western Bank of Scotland* v. *Addie*. I will not read the judgment of Lord Chelmsford, because it appears to me that that supports the principle which I have ventured to say appears to me to be the correct one. I only wish to call attention to the language of Lord Cranworth, which is supposed to indicate a different opinion on his part. He says: "If persons in the situation of directors of a bank make statements as to the condition of its affairs which they *bonâ fide* believe to be true, I cannot think they can be guilty of fraud because other persons think, or the court thinks, or your lordships think, that there was no sufficient ground to warrant the opinion which they have formed." Now I think that if it is a matter of opinion, then there is of course ample room for the question whether or not that opinion was reasonably formed. But if it is a question of fact very different considerations arise. It appears to me that this is a question of fact. Can anybody reading this section come to any other conclusion than that which Stirling, J., himself has come to, that the prospectus does not correctly set forth the substance of the Act? Now there have been numerous authorities which have been referred to in which, as I conceive, the principle which I have stated has been enunciated by judges of great eminence. There is the statement of the law by Lord Cairns in the *Reese River Silver Mining Co.* v. *Smith*, 17 W. R. 1046, L. R. 4 H. L. 64, in which he says, at p. 79, "When I say a 'fraud,' I do not enter into any question with regard to the imputation of what may be called fraud in the more invidious sense against the directors. I think it may be quite possible, as has been alleged, that they were ignorant of the untruth of the statements made in their prospectus. But I apprehend it to be the rule of law that, if persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue." And Lord Cairns expresses himself to a similar effect in the case of *Peek* v. *Gurney*. But it has been said that these passages relate to actions for the rescission of contracts, and not to actions for deceit. But I will first add to this opinion of Lord Cairns the statement of the law by Maule, J., in the case of *Evans* v. *Edmunds*, 1 W. R. 412, 13 C. B. 787: "If a man having no knowledge whatever on the subject takes upon himself to represent a certain state of facts to exist, he does so at his own peril, and if it is done either with a view to secure some benefit to himself or to deceive a third person, he is guilty of fraud, for he takes upon himself to warrant his own belief of the truth of that which he asserts." I agree with what is said in these two opinions, the one of Maule, J., and the other of Lord Cairns, and also with what is said by Mr. Pollock in his valuable work on Torts, at p. 245, "that these *dicta*, one of an eminent common law judge, the other of an eminent Chancellor, are now both classical," and that their application extends to actions for deceit as well as to actions for the rescission of contracts. I may add the very clear opinion of the late Master of the Rolls in an action for deceit—namely, that of *Smith* v. *Chadwick*—in which he laid down the law, as I think, precisely as it has been laid down by Cotton, L.J.: "Now without repeating at full length what I have said in the recent case, I think the law on this subject is clear. A man may issue a prospectus or make any other statement to induce another to enter into a contract believing that his statement is true and not intending to deceive, but he may, through carelessness, have made statements which are not true, and if he does so he is liable in an action of deceit; he cannot be allowed to escape merely because he had good intentions and did not intend to defraud."

But reliance has been placed upon some observations of Lord Bramwell, expressed in his usual striking manner, and certainly I am very unwilling to enter into any discussion with so great a master of language as Lord Bramwell. But I must venture to express my opinion that the expression "legal fraud" which has been in constant use by judges for very many years is, to say the least, an exceedingly convenient expression—that is to say, it is an expression which very clearly conveys an idea which is the object of language, and it appears to me to mean this, that degree of moral culpability in the statement of an untruth to induce another to alter his position to which the law attaches responsibility. And that is, as I think, where a man makes an untrue statement for the purpose mentioned without reasonable cause for believing it to be true. No doubt the word "fraud" is, in common parlance, reserved for actions of great turpitude, but the law applies it to lesser breaches of moral duty; and it appears to me that the making of any statement from which others are intended to act without reasonable ground for stating it, and without reasonable ground for believing it to be true, is a breach of moral duty, though it may not be one of such dark complexion as to blast for ever the character of the man who does it. It is not necessary that there should be that amount of wrong in order to give a legal remedy. And I think the same observations apply to Bowen, L.J.'s use of the word "dishonesty," though, as Cotton, L.J., has pointed out, when we come to read the whole of his judgment we see in what sense he uses the word "dishonesty," as something implying moral culpability.

Applying these principles to the present case, I confess I cannot bring myself to think that any man reading this section of the Act of Parliament would believe that the prospectus correctly or truly set forth the powers of the company in respect of the right to use steam; in other words, I am unable to see that the directors had any reasonable ground for believing that statement to be true.

But Stirling, J., has considered the case from this point of view: of whether they had reasonable ground for believing that which they said. He does not put it upon the point of whether or not they were guilty of this grosser kind of fraud, but he considers the case upon the basis of its being actionable to make a statement without reasonable ground for believing it to be true; and he comes to the conclusion that in this case they had such reasonable grounds. And now we must consider upon what he bases his judgment. After making some severe comments upon four of the defendants for taking the money to qualify them, in considering whether these defendants are guilty of anything blameworthy, he says that if it had been said to them, "You have told a thing in the prospectus which you have no right to tell; you have said you have a right to use mechanical power when you have not; each and every one of them would have stood aghast." It is very likely that they did stand aghast when they heard their conduct with regard to accepting the money so described by Stirling, J. But that does not affect the justice of his remarks with regard to their conduct; and their liability at law is not to be measured by the surprise that they would feel when it is pointed out to them that they are liable to an action. That would lead to very dangerous consequences, for then persons in the position of the defendants would be at liberty to deceive others to the extent that they could succeed in deceiving themselves.

But Stirling, J., then proceeds to deal with the facts. His judgment seem to amount to this, that because there was a possibility of the sanction of the Board of Trade being obtained, and the defendants believed it would be obtained as a matter of course, and that therefore they should obtain that sanction in the future, that that constituted reasonable ground for stating that they have it in the present. I can only say with great regret that I entirely differ from that view. It appears to me that nothing can morally justify a man in stating a thing as a fact as existing at present because he expects that it will exist in the future. And when Stirling, J., says that mercantile men dealing with matters of business would be the first to cry out if the notion of deceit were extended to what is honestly done in the belief that these things would come about, I can only say that there are two classes of mercantile men. There are those who have lax notions of the duty of taking care to be accurate, and those who are scrupulously careful to observe this duty; and it is the opinion of the latter class to which I attach most importance.

The next question is whether or not this statement, untrue in fact, and, as I think, made without reasonable ground for believing it to be true, by the defendants influenced the plaintiff in taking these shares. Now upon this point we do not differ from the opinion expressed by Stirling, J., for he says that his conclusion upon the evidence is: "I think that the existence of this paragraph had a material influence upon the mind of Sir Henry Peek when he applied for the shares." In my judgment, so far as this part of the case is concerned, that carries the case for the plaintiff. That which materially influences a man in taking a step, subject to the observations as to the breach of moral duty on the part of those who make it, gives a cause of action. It is not necessary that it should be the sole influencing motive. If it was a motive materially influencing, then, unless it had been present, the conduct of the plaintiff might have been different, which is sufficient. But Stirling, J., seems to think that though the existence of the paragraph had a material influence upon the mind of Sir Henry Peek when he applied for the shares, that that is in a degree modified by the circumstance that Sir Henry Peek does not state that had he known the contents of the Act he would not have applied for the shares. I am of opinion that a hypothetical question of that kind is not material in considering this question. No one could tell what he would have done under other circumstances. The ground of complaint is: "I had not the opportunity of exercising my judgment." And therefore it seems to me that the case is made out that Sir Henry Peek was materially influenced so that for this purpose he was induced to take the shares by reason of this false statement.

Then there remains only the question of damages. Upon that I have nothing to add to what has been said by Cotton, L.J.

LOPES, L.J.—This case is a case of such importance that I desire to state my view of the law, although I in no way differ from the law as it has been stated, nor from the result arrived at. Now this is an action of deceit. It is true that there are different degrees of moral delinquency, but I know of no fraud which will support an action of deceit to which some moral delinquency does not belong. An action for deceit would not lie for an innocent misrepresentation, for such misrepresentation is not fraudulent. On the other hand, a slight degree of what I will call moral obliquity will suffice to render a misrepresentation fraudulent in contemplation of law. And let me say this is what I understand by the expression which is so often used in the authorities, and which has been referred to by Sir James Hannen, I mean the expression "legal fraud." Now I will endeavour shortly to state what I believe the result of the cases. The law, I venture to say, is well settled and well understood. I think the result of the cases amounts to this. If a person makes to another a material and definite statement of fact which is false, intending that person to rely upon it, and he does rely upon it and is thereby damaged, then the person making the statement is liable to make compensation to the person to whom it is made—first, if it is false to the knowledge of the persom making it; secondly, if it is untrue in fact, and not believed to be true by the person making it; thirdly, if it is untrue in fact, and is made recklessly, for instance, without any knowledge on the subject and without taking the trouble to ascertain if it is true or false; fourthly, if it is untrue in fact but believed to be true, but without any reasonable grounds for such belief. I believe that to be a fair statement of what the result of the cases is.

I will now proceed to deal with this case, and to apply those principles to this case, and I shall endeavour to do that very shortly.

First, with regard to the responsibility of the defendants, I will deal with that matter first. I think they are all responsible for this prospectus. A distinction has been endeavoured to be made in the case of Mr. Derry. I think there is no distinction that can be relied upon. When it is recollected that 100 of the prospectuses were sent to him and that he issued them, and it must be assumed read them, I think the fair conclusion is that he adopted that prospectus. Passing from that, the question arises, which, to my mind, is a most material one, as to what is the meaning of that statement in the prospectus. Now there are three passages in the prospectus (I think only two have been mentioned hitherto, but I think there are three) which are important. On the first page there are the words "Incorporated by special Act of Parliament 45 & 46 Vict., authorizing the use of steam or other mechanical motive power." Then there is the passage in the middle of the prospectus, portions of which are in capital letters and intended to be emphatic, in these words. [His lordship read it, and continued:—] And then there is a further passage which I think is not unimportant lower down in the prospectus, which is in these words: "Looking at the exceptional advantages offered

by this undertaking from the dense population of the towns it traverses, the unusually favourable conditions as to motive power open to the company, and the annual dividends earned by other tramways which do not enjoy such special privileges"—I presume referring to the steam power—"the directors have reason to believe that the enterprize will prove highly remunerative, and the shares now for subscription offer a very favourable opportunity for a sound and progressive investment." Now those are the words in the prospectus which are relied upon by the plaintiff. Now what is the test we ought to apply in order to ascertain the meaning of those words? I think the proper test is to determine as far as we can how a reader of ordinary intelligence reading that prospectus would understand those statements. I come to the conclusion that a reader of ordinary intelligence would understand that in that prospectus was contained a definite assertion of a then existing fact—that is, a right to use steam power. I cannot think that any reader of ordinary intelligence reading those passages would come to the conclusion that it meant only an assertion of what I will call a violent probability that a consent to use steam power would be obtained.

If that is the meaning, then the question arises, Was it a false statement? It seems to me that that is a matter which cannot be contested, and which, in point of fact, was not contested. It is perfectly clear, by reference to the special Act, that no steam power could be used without the consent of the Board of Trade and the two corporations of Plymouth and Devonport.

Now, passing from that, did the defendants intend the plaintiff to act upon that statement? That, again, I say, is too clear for argument, and Stirling, J., did not doubt it; I think he could hardly doubt it.

But now I come to one of the two most important matters in this case. Was that statement, having the meaning which I think belongs to it, fraudulent? If the law is correct as I have stated it, it would be fraudulent if it was made recklessly, or if it was made without any knowledge of the subject one way or another, or if it was believed in by those who made it but without any reasonable grounds for such belief. The defendants, then, appear to me to be in this dilemma. If they say they had no knowledge of the subject, whether it was accurate or not, then surely it must be a reckless statement on their part. If, on the other hand, they say, "We believed in it," they must go further, and they must say, "We had reasonable grounds for believing it," because, if it was believed in, but without reasonable grounds, then it would be fraudulent. Now how could they possibly say they had reasonable grounds for believing that that statement was accurate? They had their own Act of Parliament. If they had referred to it they would at once have seen that the statement was absolutely incorrect. Therefore it appears to me that they must either have been reckless, and this was a statement recklessly made, or, if it was a statement believed in, that it was a statement made without any reasonable ground for believing it. It will not do for them to say, as I rather think Stirling, J., if I understand his judgment correctly, thought it would do, "We had reasonable grounds for saying that we expected that the power should be given us."

Now, with regard to this part of the case, it appears to me that that passage which was read by Sir J. Hannen from the judgment of Sir George Jessel, late Master of the Rolls, in *Smith* v. *Chadwick* is very applicable. [His lordship read it, and continued:—] It appears to me that these words cover this portion of the case.

Now, passing from that, I come to the next question, Did the plaintiff rely on that statement? or, in other words, Was he induced to take shares by means of that statement? Now the statement need not be the only motive which induced him to take the shares. It would be quite sufficient if that statement materially influenced his mind in taking those shares; and Stirling, J., seems to have come to the conclusion that it did, because he says, "I think the statement materially influenced the plaintiff's mind." I quite agree with what was said by Sir J. Hannen, that, so far as this portion of the case is concerned, I think that concluded it. But that was not the view of Stirling, J. There was a portion of the judgment in *Smith* v. *Chadwick* which here again becomes valuable. The Master of the Rolls again goes on to say, "Again, on the question of the materiality of the statement, if the court sees, on the face of it, that it is of such a nature as would induce a person to enter into the contract, or would tend to induce him to do so, or that it would be a part of the inducement to enter into the contract, the inference is if he entered into the contract that he acted on the inducement so held out, and you want no evidence that he did so act; but even then you may show" (he goes on to say) "other circumstances which rebut that." Therefore, assuming the conclusions to which I have arrived with regard to the rest of the case are correct, there is here an inference that he did act upon the statement. Now Stirling, J.'s judgment seems to have been influenced by several matters to which he alludes. It is to be recollected that he gives Sir H. Peek, the plaintiff, every credit for candour and truthfulness. In one part of his judgment he speaks with regard to a defect in his memory—that is, with regard to the signature to a certain application for shares. I cannot think that that was very material, and I think an explanation was given of it which is satisfactory. But what we have to look at is what the result of the whole of the evidence given by him is. He need not have been called at all. The inference, I take it, would have been sufficient if it had been left there. But he is called and a certain question is put to him by Mr. Bompas which, I am rather inclined to think, Sir Henry Peek somewhat misunderstood, and the answer to which, I think, Stirling, J., attached too much importance to. When that question was put to Sir H. Peek his mind was directed to that portion of it which related to the seven years, and, as I observed in the course of the argument, if the question had been put in a different form—namely, in this form, "If there had appeared, on that statement and assertion, that this right to use steam motive power was subject to the consent of the Board of Trade," I do not hesitate to say, having regard to the rest of his evidence and the general result of his evidence, that I believe he would have unreservedly have said, "I should not, in those circumstances, have taken the shares."

Then, again, there is another matter which I will only shortly allude to, and that is this. Stirling, J.'s mind seems to have been affected by what took place at the meeting in November, 1884, when I think Sir Henry Peek says he had confidence in the direction, or used some words to that effect, but then, as Mr. Bompas has reminded us, it must be borne in mind that at that time there was a prospect still existing of getting this consent from the board. I think the explanation of what Sir Henry Peek said at that meeting is this: "Well, I do not desire, by anything I may say, in any way to embarrass or hamper the directors. It is possible they may get this consent in the future, and I will do nothing which shall in any way prejudice their so doing."

I think that disposes of all the matters in the case except the question of damages. I quite agree with what has been said in respect to damages.

The appeal stood over for argument upon the question of the measure of damages.

The following cases were referred to on this point:—*Twycross* v. *Grant*, 25 W. R. 701, 2 C. P. D. 469, 568; *Davidson* v. *Tulloch*, 8 W. R. 309, 3 Macq. 783; *Brown* v. *Muller*, 21 W. R. 18, L. R. 7 Ex. 319; *Arkwright* v.

Newbold, 29 W. R. 455, 17 Ch. D. 301; *Waddell* v. *Blockey*, 27 W. R. 931, 4 Q. B. D. 678; *Hamer* v. *James*, 2 Times Law Rep. 852.

COTTON, L.J.—One rather difficult point has been omitted in the argument, and naturally, because neither party knew what would be the result of our opinion on the question whether the defendants had made any representation which entitled the plaintiff to relief; and we have had a long and exhaustive argument to-day on the question. It is one of considerable difficulty. The question which arose was this—there being no evidence which would really fix the loss, we thought there ought to be an inquiry, but the question was from what period ought that inquiry to be directed, whether the value of the shares ought to be estimated at the time when the action was brought or at the present time? But I think, on the whole, after the discussion we have had, that on principle and in accordance with the cases neither of those periods can be fixed.

The damage to be recovered by the plaintiff is the loss which he sustained by acting on the representations of the defendants. That acting was taking the shares. Before he was induced to buy the shares he had the £4,000 in his pocket. The day when the shares were allotted to him, which was the consequence of his acting, he paid over that £4,000 and he got the shares; and the loss sustained by him in consequence of his acting on the representations of the defendants was having the shares instead of having in his pocket the £4,000. The loss, therefore, must be the difference between his £4,000 and the then value of the shares.

Now it must not be taken that the value of the shares was what they would have sold for in the market, because that might not show the real value at all. I do not know whether there was any market in the case, but the market might have been affected by the representations which were made by the defendants which induced the plaintiff to act and which might have induced others to act. Neither can the plaintiff get the benefit of any loss or depreciation in the shares which was occasioned by subsequent acts. If the company at the time was a good company, and one which was of intrinsic value, then no fact which subsequently occurred—as, for instance, some Act of Parliament being passed entirely to prevent such tramways from having steam used upon them or anything else—ought to add to the damages to be paid by the defendants, because the value of the shares at the time, under the circumstances then existing, is that which must be taken into account in considering what the plaintiff lost by handing over his £4,000 and getting his shares. Of course a plaintiff cannot aggravate the damages he is to get by acting unreasonably; and if here the plaintiff had in any way acted unreasonably then any loss which was the consequence of that would not be added to the damages which were to be paid by the defendants. But I cannot think that he acted unreasonably. The only time when it could be said he acted unreasonably was when he discovered the fraud. The point which occurred to me was whether he ought not then to have at once repudiated the shares, to have brought an action against the company to compel them to take back the shares and get back his £4,000; but I cannot think that he can be considered as having acted unreasonably in that matter. He did commence an action in order to set aside the purchase from the company, but that was prevented from being effectual because the winding-up petition was presented two days before. I do not think we can say that his conduct was so unreasonable as to deprive him of any action against the defendants here, or from taking into account the subsequent events. Although the value is not to be ascertained at the subsequent period so as to take into account for the benefit of the plaintiff events subsequent, which depreciated the value of this company, yet those events, if they show that the company was originally, with the capital which it had got, a company which was worthless, may, in my opinion, be taken into account as evidence of what was the value immediately after the shares were allotted to the plaintiff. So that it may be that, useful as this discussion has been in order to elucidate what ought to be the proper time for ascertaining the value, it may ultimately produce no good result to the defendant. But I think it is in accordance with the cases, and in accordance with principle, that the real value, and not the market value, is to be ascertained immediately after the day when the shares were allotted to the plaintiff. That is the rule laid down by Lord Cranworth in *Davidson* v. *Tulloch*. That was a case of suing for deceit in which the person whose personal representatives the plaintiffs were was induced to take shares by misrepresentation. Lord Cranworth says: "The proper mode of measuring the damages is to ascertain the difference between the purchase-money and what would have been a fair price to be paid for the shares in the circumstances of the company at the time of the purchase, and that may be made the measure of damages if a trial should take place." There was a future trial to be held, because I think nothing was really decided there except laying down what the principle was. That is in accordance with what was laid down by Fry, L.J., in *Arkwright* v. *Newbold*, and I think is really in accordance with the decision of the majority of the judges in *Twycross* v. *Grant*, because all their judgments proceeded on the footing that at the time the shares were bought the company was utterly worthless. What was said by Lord Bramwell is very important, because he states his opinion that it cannot be unreasonable for a purchaser not to sell. Of course, if he sells, whatever he gets he must bring into account; but he does lay down in various ways that it is not unreasonable for a purchaser not to sell so as to preclude him from getting as damages the difference between the price that he paid and what was in fact the actual value of the shares at the time when he was induced to purchase.

In my opinion, therefore, although events injurious to the company which occurred, not from intrinsic defects in it, but from causes arising after the purchase, cannot be taken into account if there is no better evidence of the result of the winding up of the company—the sum which can be returned to the shareholders may be taken into account. In my opinion the way of fixing the loss is to take the real value of the shares the day after they were allotted to the plaintiff.

SIR JAMES HANNEN.—I will only add a few words. I will endeavour to put the case in my own words, though I believe I do not differ in the slightest degree from what Cotton, L.J., has said. The question is, How much worse off is the plaintiff than if he had not bought the shares? If he had not bought the shares he would have had his £4,000 in his pocket. To ascertain his loss we must deduct from that amount the real value of the things he got. That must be ascertained by the light of the events which have happened down to the time of the inquiry. It is not what the shares might have been sold for, because he was not bound to sell them, and subsequent events may show that what the shares might have been sold for was not their true value, but a mistaken estimate of their value; and to follow up the simile of the horse which has been introduced into this case, as it has so often been introduced into these cases, it may be said that, if a man by means of a misrepresentation, bought a horse which had the seeds of mortal disease in it, it was of no value except the hide; but if it perished from a subsequent accident, then the plaintiff would not be entitled to recover the value.

LOPES, L.J.—The question in this case is, What is

the loss the plaintiff has sustained by acting on the misrepresentation of the defendants, and what is the true measure of his damage? In my opinion it is the difference between the £4,000 he paid and the real value of the shares immediately after the shares were allotted. Any damage occurring after the discovery of the fraud when the plaintiff might have rescinded the contract, and which would not be attributable to his acting on the misrepresentation, but to other causes, in my opinion, would not be recoverable.

Solicitors for the plaintiff, *Tamplin, Tayler, & Joseph.*

Solicitors for the defendants, *Surr, Gribble, & Co.*, for *J. W. Wilson*, Plymouth; *Linklaters & Co.; Quick & Co.; Haines & Clutton.*

From Q. B. Div. April 10; Aug. 9.

CREW *v.* CUMMINGS.

WOOD, *Claimant.* (*a.*)

Bill of sale—Affidavit—Omission of residence and occupation of attesting witness—Register—Power to order rectification—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *ss.* 10, 12, 14.

Under section 14 *of the Bills of Sale Act,* 1878, *a judge has power to rectify accidental omissions in the register of bills of sale.*

Held, affirming the decision of the Queen's Bench Division (ante, *p.* 669, 20 *Q. B. D.* 535), *that he has no power under this section to order an affidavit to be filed to supply particulars inadvertently omitted in the affidavit filed with the registrar.*

The power given by section 14 *of extending the time for registration will not be exercised after the title to the goods has actually vested in an execution creditor who has seized them.*

Appeal from the decision of a divisional court (Mathew and A. L. Smith, JJ.), reported *ante*, p. 669, 20 Q. B. D. 535.

Section 10 of the Bills of Sale Act, 1878, provides that a bill of sale shall be attested and registered by the bill of sale and a true copy thereof, together with an affidavit of the time of its being made, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the bill, and of every attesting witness to it, being duly filed with the registrar within seven days of the making of the bill of sale.

By section 12, "The registrar shall keep a book—in this Act called 'the register'—for the purposes of this Act, and shall, upon the filing of any bill of sale or copy under this Act, enter therein . . . the name, residence, and occupation of the person by whom the bill was made or given, and the other particulars . . . . prescribed under this Act.

By section 14, "Any judge of the High Court, on being satisfied that the omission to register a bill of sale or an affidavit of the renewal thereof within the time prescribed by the Act, or the omission or misstatement of the name, residence, or occupation of any person was accidental or due to inadvertence, may, in his discretion, order such omission or misstatement to be rectified by the insertion in the register of the true name, residence, or occupation, or by extending the time for such registration upon such terms and conditions (if any) as to security . . . or otherwise . . . as he thinks fit to direct."

At the trial of an interpleader issue at chambers to try the right to goods taken in execution by the plaintiff under a judgment and claimed by the claimant under a bill of sale, Field, J., being of opinion that the residence and occupation of one of the attesting witnesses to the bill of sale had been inadvertently omitted from the affidavit filed with the registrar, ordered a supplemental affidavit to be filed setting out these particulars.

The Divisional Court set this order aside as being made without jurisdiction, and the claimant appealed.

Bassett Hopkins, for the claimant.—The order of Field, J., was right. Mere inadvertence will not be allowed to invalidate a bill of sale. Even if there is no power to rectify the affidavit, the court has power, under section 14, to extend the time for registration.

Kisch, for the execution creditor.—The judge has power to rectify the register as defined by section 12, but has no power to order a supplemental affidavit to be filed. It is too late now to extend the time for registration.

Cur. adv. vult.

Aug. 9.—BOWEN, L.J.—By the Bills of Sale Act, 1878, it is provided that, for the purpose of the registration of every bill of sale, an affidavit must be filed describing the residence and occupation of each of the attesting witnesses to the bill of sale. In the affidavit which was filed in this case the residence and occupation of one of the witnesses were inadvertently omitted. To cure what was an evident slip Field, J., ordered a supplemental affidavit to be filed under section 14 of the Bills of Sale Act, 1878. From this order there was an appeal to the Divisional Court, who have set it aside, on the ground that section 14 only refers to the rectification of the register, and does not give power to order such a supplementary affidavit to be filed. The register is defined in section 12, and I am clearly of opinion that the view taken by the Divisional Court was the correct one, and that the order of Field, J., was without authority. On the appeal to us, however, a further point was raised—namely, that we had power, under the latter part of section 14, to extend, even at the eleventh hour, the time for registration. I think it is a hard case, and that if we could accede to this suggestion we would do so. But the Act of Parliament which enables an extension of time to be granted never intended, as I think, that it should be granted after the title to the goods seized had actually vested in the execution creditor. Under section 8, the execution creditor having seized, the title to the goods vested in him, and the Legislature could not, I think, have intended that we should so extend the time as to defeat a title which had actually vested in a *bonâ fide* person. Such an exercise of our discretion could not be justified. Therefore we are reluctantly compelled to come to the same conclusion as the Divisional Court, that the order of Field, J., was not justified, and must be set aside.

Lord ESHER, M.R.—I am of the same opinion.

Appeal dismissed.

Solicitor for the appellant, *Buckler.*

Solicitor for the respondent, *J. S. Rubinstein.*

(*a.*) Reported by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law.

High Court of Justice.

[Chan. Div. North, J.] March 24.

In re NEW CHILE GOLD MINING CO. (*a.*)

Company—Reduction of capital—Confirmation by the court—Capital lost or unrepresented by available assets—Issue of shares at a discount—Voluntary liquidation—Sale of property of old company in consideration of shares in new company—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 161—*Companies Act,* 1877 (40 & 41 *Vict. c.* 26), *ss.* 3, 4.

In pursuance of a special resolution passed by a company in liquidation the liquidator agreed to sell the property of the company to a new company, part of the consideration being the issue to each shareholder of the old company of one share of £1 in the new company, with 15s. credited as paid up thereon, in exchange for each fully paid-up share of £1 in the old company held by such shareholder, and that the remaining 5s. per share should be payable by the allottee in the manner provided by the agreement. The whole of the shares in the new company were issued to shareholders in the old company as provided by the agreement, prior to which a contract providing for their being issued in that manner was filed with the Registrar of Joint-Stock Companies. The remaining 5s. per share was afterwards paid up on all the shares. The capital of the company was afterwards increased by a sum of £500,000, divided into 500,000 shares of £1 each, of which 50,000 were issued as fully paid up as the consideration for the purchase of other property by the company.

The company afterwards passed a special resolution for reducing the capital by cancelling paid-up capital to the extent of 15s. per share, as having been lost or being unrepresented by available assets.

Upon a petition for the confirmation of the resolution by the court,

Held, that the issue of the shares at a discount was illegal, and that the shareholders were still liable to the extent of 15s. per share; consequently the proposed reduction could not be confirmed by the court.

Petition.

The New Chile Gold Mining Co. (Limited) was incorporated on the 20th of November, 1884, under the Companies Act, 1862, for the purpose of acquiring the property of a company called the Chile Gold Mining Co. (Limited) (hereafter referred to as the old company), which was then in voluntary liquidation under an extraordinary resolution passed on the 18th of November, 1884, and other mining property in Venezuela, and working the same. The capital of the new company was £500,000, divided into 500,000 shares of £1 each. By the articles of association the company was authorized at any time to reduce its capital. Special resolutions were passed by the old company, under the provisions of section 161 of the Companies Act, 1862, authorizing the liquidator to transfer or sell all or any of the assets of the company to any other company formed or to be formed, and to receive in compensation or part compensation for such transfer or sale, shares or other interests in any such other company.

By a deed dated the 3rd of December, 1884, and made between the old company and their liquidator of the one part, and the new company of the other part, the old company agreed, as beneficial owners, to sell and convey to the new company, and the new company agreed to purchase and accept as from the 3rd of December, 1884, the undertaking, mines, and property of the old company, free from incumbrances, save and except the charges created by the indentures of mortgage executed to secure certain debentures which had been issued by the old company, and it was agreed that the new company should, on or before the 1st of March, 1885, pay to the old company a sum sufficient to enable the liquidator to pay and discharge all the debts and liabilities thereof, including any liability to dissentient members under section 161 of the Companies Act, 1862, but not including the debentures, or should otherwise satisfy and discharge all such debts and liabilities, and should further pay and discharge all the costs, charges, and expenses of and incident to the winding up of the old company; that the new company should take over and indemnify the old company against all liability in respect of the debentures and mortgage deeds, and that the new company should, if and when required to do so by the liquidator of the old company, allot and issue to each shareholder of the old company one share of £1 in the new company, with 15s. credited as paid up thereon, in exchange for each fully paid-up share of £1 in the old company held by such shareholder, and that the remaining 5s. per share upon each of such shares in the new company should be payable by the allottee or transferee thereof as to 1s. per share on the 6th of December, 1884, and as to the remaining 4s. per share as and when called up by the board of directors of the new company.

The whole of the 500,000 shares in the new company were issued to shareholders in the old company as provided by the agreement, with 15s. per share credited as paid up thereon, and the remaining 5s. per share was afterwards paid up on all the shares.

Prior to the issue of these shares a contract dated the 3rd of December, 1884, between the old company and their liquidator of the one part, and the new company of the other part, providing for the issue of the shares with 15s. per share credited as paid up thereon in the manner above mentioned, was filed with the Registrar of Joint-Stock Companies in accordance with the provisions of section 25 of the Companies Act, 1867.

In 1885 a special resolution was passed increasing the capital of the new company by a sum of £100,000 divided into 100,000 shares of £1 each. Of these shares 50,000 were issued as fully paid up in respect of the purchase by the company of certain mining property, under a contract dated the 28th of July, 1885, which, before the issue of shares, was filed with the Registrar of Joint-Stock Companies. These 50,000 fully paid-up shares were originally represented by share warrants to bearer, 17,500 of these warrants were afterwards redelivered to the company, and the remaining 32,500 were still outstanding. The remaining 50,000 shares of the 100,000 were issued as paid up to the extent of 19s. per share, in pursuance of two contracts dated the 11th of November and the 13th of December, 1886, in consideration of a sum of £12,500, being 4s. per share, paid by the allottees to the company in respect of those shares. Both these contracts were filed with the Registrar of Joint-Stock Companies prior to the issue of the shares. The remaining 1s. per share was afterwards paid up on the 50,000 shares.

In 1887 a special resolution was passed increasing the capital by £400,000 in 400,000 shares of £1 each. Of these shares 190,000 were issued at a discount of 15s. per share, in pursuance of contracts filed with the Registrar of Joint-Stock Companies prior to the issue of the shares. The remaining 5s. per share were afterwards paid up on all these shares. The remaining 210,000 shares had not been issued. By a special resolution of the company, passed in March, 1888, it was resolved "that the capital of the company be reduced by £750,000 by cancelling paid-up capital which has been lost, or is unrepresented by available assets, to the extent

(*a.*) Reported by G. E. JEFFERY, Esq., Barrister-at-Law.

of 15s. per share upon each of the 1,000,000 shares which have been issued or authorized to be issued."

The company presented this petition asking that the special resolution for the reduction of capital might be confirmed by the court.

It appeared from the statements in the petition that previously to the passing of the special resolution paid-up capital to the extent of £592,500 had been lost or was unrepresented by available assets, and that the proposed reduction of capital did not involve either the diminution of any liability in respect of unpaid capital, or the payment to any shareholder of any paid-up capital.

The petition was not served on anyone.

Cookson-Crackanthorpe, Q.C., and *A. Young*, for the company, referred to *In re Plaskynaston Tube Co.*, 23 Ch. D. 542, 32 W. R. Dig. 41; *In re Ince Hall Rolling Mills Co.*, 30 W. R. 945, 23 Ch. D. 545n; *In re Addlestone Linoleum Co.*, *ante*, p. 227, 37 Ch. D. 191.

North, J.—I cannot make any order on the petition, and I must dismiss it. It is based on this, that the shares were issued to the shareholders with 15s. per share paid up thereon, and 5s. per share which remained to be paid. The real transaction was this, that the shares were to have 5s. per share paid in cash, and 15s. per share additional was to be credited as paid up, not because it was in fact paid or because it represented actual value, but merely as representing nothing. The case is not put on the ground that, at the time when the shares were issued, this 15s. per share represented assets which have been lost since; but it is admitted that there was nothing then in existence to represent it. It seems to me that there is a dilemma out of which there is no way of escape. Either the transaction was that which it is stated to be in the petition; or the new company bought the property of the old company on the terms of discharging all the liabilities of the old company and the costs of the winding up and agreeing to give to all the shareholders in the old company in lieu of their shares in the old company a similar number of shares in the new company credited with 15s. per share paid up. If all the old shareholders had taken shares in the new company there would have been 15s. all round. But it was contemplated that there might be some shareholders in the old company who would not or could not take shares in the new company, and those persons would be entitled to received compensation under the provisions of section 161 of the Companies Act, 1862, for their interests in the old company, and the agreement provided, amongst other things, for the taking over by the new company of all liability to dissentient members of the old company. The transaction really contemplated was that the shareholders who should take shares in the new company would receive value to the amount of 15s. per share and would incur a liability of 5s. per share only; and if that is the true basis there is nothing to show that the value which they got has ceased to be available assets of the new company. But the petition is addressed to the case, that in point of fact that 15s. per share represented nothing; or, in other words, that the £1 shares were issued at a discount of 15s. per share. In my opinion such a transaction is not legal, and has not the effect of relieving the shareholders from liability to pay up 15s. per share beyond the 5s. per share. *In re Addlestone Linoleum Co.* applies exactly to the present case. Having regard to the way in which the matter is brought before me, I can only say that no case has been shown which can justify me in confirming the proposed reduction of capital.

Solicitors, *Kearsey, Hawes, & Walsh.*

Q. B. Div. (Wills and Grantham, JJ.) May 19.

Robson v. The Owner of "The Kate" (a.)

County court—Jurisdiction—"Damage by collision"—County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *s.* 3, *sub-section* 3—*County Courts Admiralty Jurisdiction Amendment Act*, 1869 (32 & 33 *Vict. c.* 51), *s.* 4.

Damage occasioned by the gear of a sailing ship coming into contact with an object on land is not "damage by collision" within section 3, *sub-section* 3, *of the County Courts Admiralty Jurisdiction Act*, 1868, *so as to give jurisdiction to the county court.*

This was an application, under the County Courts Act of 1856, for a rule calling upon the judge of the City of London Court to show cause why he should not try a case which arose under the following circumstances.

The defendant was the owner of the sailing barge *Kate*, and while the barge was sailing in the Blackwall reach of the Thames its sailing gear came into contact with and injured a pile-driving machine belonging to the plaintiff. The plaintiff thereupon sued the defendant in the London County Court for "damage by collision." The county court judge held that the damage was not damage by collision within the Admiralty Jurisdiction Acts, and therefore that he had no jurisdiction.

Edward Pollock, in support of the application.—The damage caused in this case was clearly the result of collision, and should therefore fall within the admiralty jurisdiction of the county court. The violent contact of a vessel in the water with a pier or other object on shore constitutes "collision" within section 3, sub-section 3, of the County Courts Admiralty Jurisdiction Act, 1868. The jurisdiction conferred by that Act is extended by the Act of 1869 to "all claims for damage to ships, whether by collision or otherwise." It may reasonably be inferred that the section was intended to give jurisdiction in the converse case of damage done by ships.

He cited *The Malvina*, 31 L. J. Adm. 113, 10 W. R. Adm. Dig. 28.

Wills, J.—I am of opinion that this rule should be refused. The extended jurisdiction conferred on certain county courts by the County Courts Jurisdiction Act, 1868, is essentially an admiralty jurisdiction, limited as regards amount. It is not necessary to define the word "collision." The words "damage by collision," used, as here, in an Act the object of which is to confer an "admiralty" jurisdiction, cannot be construed as including damage which has taken place on land outside the ebb and flow of the tide, and which would certainly not have fallen within the original jurisdiction of the Court of Admiralty in respect to collision. The statute does not, as it appears to me, either in terms or by inference, extend the jurisdiction of a county court to the damage of which the applicant complains.

The rule must therefore be refused.

Grantham, J.—I am of the same opinion. In *Everard v. Kendall*, 18 W. R. 892, L. R. 5 C. P. 428, which was a proceeding by way of prohibition under this Act, Montague Smith, J., is reported to have said:—"What is the meaning of 'damage by collision?' We have nothing to guide us as to what damage by collision is within the Act, except the general scope and object of the Act. In common understanding, and as understood in the Court of Admiralty, damage by collision is damage sustained by a ship from another ship coming in contact with it." This explanation seems to me well founded, and I think the preceding words, "damage to cargo," which obviously refer to damage to cargo while on board a ship, tend to

(a.) Reported by Cecil Chapman, Esq., Barrister-at-Law.

show that the intention of the Legislature was to confine the newly-conferred jurisdiction to cases of collision between ships.

Rule refused.

Solicitors for the plaintiff, *Keene, Marsland, & Bryden.*

Q. B. Div. (Cave and A. L. Smith, JJ.) April 18.

REG. v. MAYOR OF WAKEFIELD. (a.)

Highway and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict.* c. 77), s. 10—*Indictment for non-repair—County authority—Highway authority.*

An indictment will lie, under section 10 *of the* 41 & 42 *Vict.* c. 77, *against the highway authority of a district for non-repair of a highway.*

Quære, *whether such indictment, being entirely of a statutable character, should not show on its face that all the steps enacted by section* 10 *had been previously taken.*

This was a rule obtained by the mayor, aldermen, and the burgesses of the borough of Wakefield, as highway authority, calling upon the county authority of the West Riding to show cause why an indictment found against the highway authority should not be quashed.

The facts were as follows:—

A complaint had been made to the county authority that the highway authority of Wakefield had made default in repairing a highway within their jurisdiction, and the county authority had, after due investigation, ordered the highway authority to repair the same. The highway authority gave formal notice to the county authority that they declined to comply with the order until their liability to repair should be determined by a judge and jury.

The county authority thereupon directed that an indictment should be preferred against the highway authority to test their liability to repair. A true bill was found against the highway authority at the assizes, but the indictment contained no allegation that the provisions of section 10 of the Highways and Locomotives Amendment Act, 1878 (41 & 42 Vict. c. 77) had been complied with.

Forbes, Q.C. (*Atkinson* with him), showed cause.—All the steps ordered to be taken by section 10 of 41 & 42 Vict. c. 77 have been taken. [He was stopped.]

Tindal Atkinson, Q.C., and *Asquith,* in support of the rule.—An indictment was not known against a sanitary authority for non-repair of a highway prior to 1878. The 10th section of the 41 & 42 Vict. c. 77, passed in that year, only directs that the liability of the sanitary authority to repair shall be tried by indictment, but this does not intend that the old procedure shall be departed from. The indictment should still be preferred against the inhabitants: *Reg.* v. *Mayor of Poole,* 19 Q. B. D. 602. Further, if the statute means that the highway or sanitary authority should be indicted, the indictment, being statutory, should show on its face that all the earlier steps required by section 10 have been complied with. [The COURT held that the further point was not arguable under the terms of the rule.]

CAVE, J.—We have to construe the meaning of section 10 of the Highways and Locomotives (Amendment) Act, 1878, and to my mind it is very clear. This section, first of all, points out how a county authority may compel a highway authority to maintain or repair a highway. It says, "Where complaint is made to the highway authority . . . the county authority, if satisfied, after due inquiry and report by their surveyor, that the authority has been guilty of the alleged default, shall make an order limiting a time for the performance of the duty of the highway authority in the matter of such complaint. If such duty is not performed by the time limited in the order, and the highway authority fail to show to the county authority sufficient cause why the order has not been complied with, the county authority may appoint some person to perform such duty, and shall, by order, direct that the expenses of performing the same . . . shall be paid by the authority in default." This is followed by provisions for enforcing the order. Up to this point there is no suggestion of any indictment or otherwise against the highway authority, other than the order directing them to repair, and the power to do the work and to charge them with the expense in case of disobedience to the order. The section next deals with cases in which the highway authority do not admit their liability to do the work. It provides that "where an order has been made by a county authority for the repair of a highway on a highway authority alleged to be in default, if such authority within ten days . . . give notice to the clerk of the peace that they decline to comply with the requisitions of such order until their liability to repair the highway . . . has been determined by a jury, it shall be the duty of the county authority either to satisfy the defaulting authority by cancelling or modifying in such way as the authority may desire the order of the county authority, or else to submit to a jury the question of the liability of the defaulting authority to repair the highway. If the county authority decide to submit the question to a jury they shall direct a bill of indictment to be prepared to the next practicable assizes to be holden in and for their county, with a view to try the liability of the defaulting authority to repair the highway." This, then, is a special mode of indictment provided by statute and quite distinct from the old indictment against a parish for the non-repair of a highway. The statute provides a particular way for enabling a highway authority to test the question of its liability. Then see what follows: If a jury find them guilty, or, in other words, come to the conclusion that they have no good cause for disobeying the order, the defaulting authority is not visited with the ordinary consequences of a verdict of guilty on an ordinary indictment for non-repair, but simply this—viz., the suspended order regains its force, and they must either repair themselves or the county authority appoints someone else to do the work, and the costs are paid out of the funds applicable to the maintenance of the roads within the district of the defaulting authority. In the absence of the special machinery of the indictment provided by this statute a defaulting authority would be compelled to do the work without a specific mode of bringing their objections before a judge and a jury, and on their success in substantiating their objections before that court depends whether the order of the county authority shall come into force or become void. The section further enacts that "the costs of the indictment and of the proceedings consequent thereon shall be paid by such parties to the proceedings as the court before whom the case is tried may direct." The costs directed to be paid by the highway authority are to be deemed to be expenses properly incurred by such authority. But how can costs be directed to be paid by a highway authority unless they are parties to the proceedings? It is absolutely clear that the statute intends the indictment to lie against the highway authority. If it did not it would lie against the inhabitants, and then the inhabitants indicted would have to pay the costs.

A. L. SMITH, J., concurred.

Solicitors for the county authority, *Badham & Williams,* for *W. L. Williams,* Wakefield.

Solicitors for the highway authority, *Sharpe, Pritchard, & Sharpe,* for *The Town Clerk,* Wakefield.

(a.) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

Prob. Div. & Adm. Div. Divorce. } April 13.

SKINNER v. SKINNER. (a.)

Practice—Divorce—Guardianship of Infants Act, 1886 (49 & 50 *Vict. c.* 27), *s.* 7—*Declaration that guilty party unfit to have the custody of children.*

On the hearing of a wife's petition for dissolution on the ground of adultery and cruelty of a gross character, which was undefended, the court made a decree nisi *for dissolution, giving the wife the custody of the children, and in terms of section* 7 *of the Guardianship of Infants Act*, 1886, *declared the husband, who had received notice of the application, "unfit to have the custody of the children of the marriage."*

Hearing before the court itself of the wife's petition for dissolution of her marriage on the ground of her husband's adultery and cruelty. The cruelty consisted in the communication of disease on four separate occasions.

The case was undefended, and the court, having found the charges proved, pronounced a decree *nisi*, and gave the custody of the children to the petitioner.

Notice had been served on the respondent that the petitioner would also apply, under section 7 of the Guardianship of Infants Act, 1886, for a declaration "that the respondent is a person unfit to have the custody of the children of the marriage."

Section 7 provides that "the parent so declared to be unfit shall not, upon the death of the other parent, be entitled as of right to the custody or guardianship of such children."

Bargrave Deane, for the petitioner, made the application in terms of the notice.

HANNEN, P.—As no cause is shown I shall make the order, which, however, will have no operation till after the death of the petitioner, as I have just made an order for her to have the custody of the children, which operates till then. Serious questions, however, may arise under this section, as there are cases in which, though a husband is guilty, he has been allowed to have the custody of the children of the marriage.

Decree nisi *and application granted.*

Solicitors, *Kingsford, Dorman, & Co.*

Prob. Div. & Adm. Div. Divorce. } March 6.

BOSVILE v. BOSVILE AND CRAVEN. (a.)

Practice—Variation of settlements—Matrimonial Causes Act, 1859 (22 & 23 *Vict. c.* 61), *s.* 5—"*Application of the property*"—*Powers of appointment.*

Per Butt, J.—*Under section* 5 *of the Matrimonial Causes Act*, 1859, *the court has power to deprive one of the parties to the marriage settlement of the powers of appointment amongst the children of the marriage, but* quære *as to the power of appointment of new trustees.*

The court deprived a guilty wife of the power of appointment amongst the children of the marriage, but where the wife was allowed to retain an income of £100 a year under the settlement the court refused to exercise its power, assuming that it existed, of depriving her of the right to appoint or join in the appointment of new trustees of the settlement.

Motion to confirm the registrar's report on the husband's petition for variation of settlements.

On February 11, 1886, the court made absolute a decree *nisi* for dissolution of the marriage obtained by the husband on the ground of his wife's adultery with the co-respondents.

By the marriage settlement £25,000 was settled upon trust to pay £150 a year to the wife during the joint lives of the husband and wife, and the residue of the income to the husband.

In case the respondent survived her husband the whole income of the fund was to be paid to her for life, but in the event of her re-marriage her income was to be reduced to £500 a year.

After the death of the petitioner and the death or re-marriage of the respondent the fund (subject in the last event to payment of the annuity of £500) was to be held in trust for all or such one or more of the issue of the marriage as the petitioner and respondent might jointly appoint, or in default of such appointment as the petitioner, if he survived the respondent, might appoint, or in default of any appointment in trust equally among all the children of the marriage, and the settlement contained all usual clauses.

There was one child of the marriage.

The registrar recommended (1) that the respondent should be deprived of a portion of the £150 per annum payable to her under the settlement; (2) that the trustees of the settlement should apply the money settled and deal with it without the respondent having any control over it, and that she should be deprived of her power of appointment to a share in the trust moneys; (3) that the consent or written consent of the respondent should not hereafter be necessary for the exercise of any of the powers conferred by the said indenture upon the trustees, and that the trustees should hereafter exercise all such powers upon and with such consent only as would be necessary in case the respondent were now dead; and (4) that the respondent should be deprived of the power of appointing or joining in the appointment of new trustees, and that such powers should hereafter be exercised by such person or persons as would be entitled to exercise the same in case she were dead.

Inderwick, Q.C. (*Middleton* with him), for the petitioner, in moving to affirm the report, stated that the petitioner was willing that £100 per annum should be the amount to be secured to the respondent by the orders.

Ram, for the respondent.—A wife or other party to a settlement cannot be deprived of her powers of appointment under it unless she consents: *Oppenheim* v. *Oppenheim*, 32 W. R. 723, 9 P. D. 60; *Noel* v. *Noel*, 33 W. R. 552, 10 P. D. 179. Section 5 of the Matrimonial Causes Act, 1859, refers only to the application of the property included in the settlement, and the power of the court is limited to that: *Davies* v. *Davies*, 37 L. J. P. & M. 17, 16 W. R. Prob. Dig. 12; *Hope* v. *Hope*, 23 W. R. 110, L. R. 3 P. & D. 226. The power of appointment amongst children may arise if the child of the marriage marries and has children.

Inderwick, Q.C., in reply, referred to *Maudsley* v. *Maudsley*, 2 P. D. 256, 26 W. R. Dig. 80.

BUTT, J.—This case is brought before me in a not very regular way, for it is an application to confirm the registrar's report, and if I were simply to affirm that report I should, as to the first paragraph, make no order at all. In the first paragraph the registrar recommends that the respondent should be deprived of a portion of the £150 per annum payable to her under the settlement. I have to make up my mind as to what portion she should be deprived of. At the outset I was inclined to think that the wife should have the whole £150, but on consideration, having regard to the facts of the case—that the lady left her husband's home with the adulterer under

(a.) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

circumstances offering no palliation or excuse, and that her husband had throughout behaved exceedingly well to her, I am not disposed to give her more than the £100 which he has offered. That sum must remain to her and be secured under the settlement. That disposes of the first question.

With regard to the other matters, the report suggests that the trustees of the settlement should apply the property settled and deal with the same without the respondent having any control over it, and that she should be deprived of her power of appointment. First of all, ought I to revoke her power of appointment as to the money mentioned in the deed? It has been argued that I have no power, that my powers, under section 5 of the Matrimonial Causes Act, 1859, are limited to making an order "with reference to the application of the whole or a portion of the property settled." It is said that if I take away the wife's power of appointment I am making an order which has no reference to the "application" of the property settled. I do not agree with that contention. I think I have the power under the words of the section. Then, having the power, ought I to exercise it? I see no reason why I should not, and therefore I shall adopt the suggestion of the report, and direct that the trustees of the indenture shall pay and apply the property thereby settled upon such and the same trusts as would be applicable thereto in case the respondent were now dead and had died in the lifetime of the petitioner. That is, of course, subject to the reservation as to the application of the £100 a year which I have already dealt with.

I adopt the third recommendation of the report, and make it part of my order.

Then comes the fourth recommendation, that the respondent should be deprived of any power of appointment or of joining in the appointment of new trustees. It having been argued that I had no power, under section 5, to interfere with the wife's power of appointment over the money, it was put as an *à fortiori* argument that I have no power to deprive her of the right of appointment of new trustees. I am by no means clear whether I have that power, but it is not necessary to decide it, for, inasmuch as the wife is to continue to receive part of the income of the trust funds, I do not think that, even if I had the power, it would be right that I should deprive her of her voice in the vote on the appointment of trustees. That part, therefore, of the recommendation I refuse to adopt.

My order is that the wife be deprived of £50 out of the £150 per annum; that the second and third recommendations of the report be adopted and the fourth disallowed. The husband, I understand, abandons any claim to after-acquired property.

Solicitors for the petitioner, *Collyer-Bristow & Co.*

Solicitors for the respondent, *Gedge, Kirby, & Millett.*

Court of Appeal.

From Chan. Div. April 18.

Union Electrical Power and Light Co. v. Electrical Power Storage Co. (a.)

Patent—Practice—Discovery—Particulars of objection—Patents, &c., Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 32.

In an action to restrain threats of legal proceedings for infringements of patents, the plaintiffs alleged that the patents upon which the defendants relied in making threats were invalid. The defendants applied that the plaintiffs should give particulars of their objections to the patents.

Held (affirming the decision of North, J., ante, *p.* 263), *that before the plaintiffs could be required to give such particulars the defendants should give to the plaintiffs a list of the patents on which, and on which only, the defendants relied, and that the plaintiffs should undertake to amend their statement of claim so as to put in issue the validity of those patents only.*

Appeal from the decision of North, J. (reported *ante*, p. 263).

The action was brought under section 32 of the Patents, &c., Act, 1883, for an injunction to restrain the defendants threatening legal proceedings against customers of the plaintiffs in respect of electrical batteries manufactured and sold by the plaintiffs. The defendants had, in the threats which they published, claimed to be owners of patent rights in respect of the batteries in question, and had based their threats of legal proceedings on such patents, but the plaintiffs, in their statement of claim, alleged that the patents on which the defendants relied were invalid. The defendants took out a summons that the plaintiffs should give particulars of their objections to the validity of the patents.

North, J., held that the defendants ought to give to the plaintiffs a list of the patents on which the defendants relied before the plaintiffs were bound to give the particulars of objection asked for.

The defendants appealed, claiming to be entitled to have the particulars of objection delivered to them without their being first obliged to give to the plaintiffs the list of patents on which the defendants relied.

Moulton, Q.C., and *J. C. Graham*, for the appellants.

R. W. Wallace, for the respondents.

The nature of the arguments appears sufficiently from the judgment of Cotton, L.J.

Cotton, L.J.—This is an action brought under section 32 of the Patents, Designs, and Trade-Marks Act, 1883, to restrain the defendants from threatening with legal proceedings customers of the plaintiffs in respect of certain electrical batteries manufactured by the plaintiffs, and which the defendants allege are infringements of their patents. The plaintiffs allege that the defendants have no rights under those patents, as the patents are invalid. The defendants applied for particulars of objections to the patents. North, J., ordered the plaintiffs to give particulars, but required the defendants first to give to the plaintiffs a list of the patents on which the defendants relied before the plaintiffs should give the particulars asked for. That seems to me to be right. The defendants should say by what patents they justify their threats, and the plaintiffs then must confine their objections to those patents or some of them. Mr. Moulton said that such an order would put him in this difficulty, that if the plaintiffs' objections applied to all the defendants' patents he would have to put in a defence putting in issue the validity of all the patents. The plaintiffs, however, state they are willing, when the defendants have stated on what patents they rely, to alter the statement of claim so as to put in issue the validity of those patents only. The defendants ought to state, not only on which patents they rely, but that they rely on no others. The appeal will therefore be dismissed, the plaintiffs giving an undertaking to amend in the way I have mentioned.

Fry and Lopes, L.JJ., concurred.

Solicitors for the plaintiffs, *Linklater, Hackwood, Addison, & Brown.*

Solicitor for the defendants, *Renshaws.*

(a.) Reported by M. J. Blake, Esq., Barrister-at-Law.

From Chan. Div. March 20, 21, 22, 27.

BIRMINGHAM, DUDLEY, AND DISTRICT BANKING CO. v. ROSS. (a.)

Easement—Light—Building scheme—Lease—Implied grant—Derogation—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 6, *sub-section* (2).

In September, 1882, *the corporation of a town demised to the plaintiff, in pursuance of a previous building agreement, a piece of land with the house newly built thereon, "together with the rights, members, and appurtenances to the said premises belonging," but no express mention was made of "lights." The plaintiff's house faced a new street made by the corporation, and which the corporation agreed should be twenty feet in width. At the date of the plaintiff's lease there was a low building on a piece of land on the side of this new street facing the plaintiff's premises, and in* 1886 *the corporation demised for building purposes this piece of land to the defendant, who built a high hotel thereon. The tract of land on which both the plaintiff's and the defendant's houses were built had been acquired by the corporation under an improvement scheme for building purposes, and this fact was known to the plaintiff when he entered into his agreement with the corporation.*

In an action by the plaintiff for a mandatory injunction against the defendant to restrain interference with the light which, but for the defendant's building, would have access to the plaintiff's house,

Held (*affirming* Kekewich, J.), *that there was no express grant of such light by the corporation to the plaintiff, and that it was not implied under section* 6, *sub-section* (2), *of the Conveyancing Act*, 1881; *and, further, that any implied obligation on the part of the corporation was to be measured by the circumstances which existed at the time when the agreement was entered into between the plaintiff and the corporation, and that, having regard to these circumstances, there was no implied obligation on the corporation not to let the land fronting the new street and opposite to the plaintiff's premises for the erection of a building higher than that which existed thereon at the time, and therefore that the action should be dismissed.*

The maxim that a "grantor shall not derogate from his own grant" considered.

Rigby *v.* Bennett, 31 *W. R.* 222, 21 *Ch. D.* 559, *approved.*

Wheeldon *v.* Burrows, 28 *W. R.* 196, 12 *Ch. D.* 31, *distinguished.*

Appeal from Kekewich, J.

In August, 1880, the Corporation of Birmingham agreed with one Daniell, the predecessor in title of the plaintiffs, to grant him a lease of a certain piece of land and of a house to be built thereon. The lease was granted when the house was built in 1882, and the lease contained these general words, "together with the shops, messuages, or dwelling-houses, auction room, store rooms, and buildings erected thereon, . . . and together with the rights, members, and appurtenances to the said premises belonging." The piece of land demised to Daniell by the corporation had been purchased by the corporation together with the surrounding land for improvement purposes, and the house in question, when built, faced on one side Corporation-street, and on the other side a new street called Warwick-passage, the latter being a narrow street, only twenty feet wide. The defendant had obtained a lease from the corporation of the premises on the opposite side of Warwick-passage, which in the year 1882 was only occupied by a low building or shed, used as a stable, and built thereon a high building for the purpose of an hotel. This building materially interfered with light which would otherwise have access to the windows in the plaintiffs' house.

The plaintiffs, who were assignees of Daniell, brought an action against the defendant for a mandatory injunction to compel the defendant to pull down so much of his building as interfered with the access of light as enjoyed by the plaintiffs at the time when the lease was granted to their predecessor in title.

Kekewich, J., refused the injunction.

The plaintiffs appealed.

Sir Horace Davey, Q.C., Warmington, Q.C., and *Phipson Beale, Q.C.*, for the appellants, cited the following cases:—*Allen* v. *Taylor*, 16 Ch. D. 355, 29 W. R. Dig. 120; *Leech* v. *Schweder*, 22 W. R. 633, L. R. 9 Ch. App. 463; *Wheeldon* v. *Burrows*, 28 W. R. 196, 12 Ch. D. 31; *Russell* v. *Watts*, 34 W. R. 277, 10 App. Cas. 590; *Rigby* v. *Bennett*, 31 W. R. 222, 21 Ch. D. 539.

Barber, Q.C., and *Methold*, for the respondent.

COTTON, L.J.—This is an appeal by the plaintiffs against a decision of Kekewich, J., who dismissed the action with costs, and the object of the action is to restrain an interference by the defendant with the light which but for the building of the defendant would have access to the windows of the house belonging to the plaintiffs. It is not a case of ancient lights. It is a question depending on the grant from the Corporation of Birmingham to the predecessor in title of the plaintiffs, the defendant being also a lessee under that corporation. [The Lord Justice then stated the facts, and continued:—] On what grounds do the plaintiffs contend that they have a right to interfere with the building and to have an injunction to compel the defendant to pull down a considerable portion of that building? It was put by Sir Horace Davey on this ground, that they had an express grant of light which entitled them to all the light which would come to their windows if there was no building erected on the other side of Warwick-passage higher than the building which there was at the time when the lease was granted to their predecessor in title, and the plaintiffs by their action did not seek to have the entire building pulled down, or to have it pulled down to the level of the old building which was then existing, but they were content to say: "Well, we will not require more of the defendant's building to be pulled down than will bring it to the same height as the house which we have." That was a little misleading, but that ought not to be used to the prejudice of the case of the plaintiffs. They put their case on the ground that by the lease there is an express grant to Daniell, their predecessor in title, of such light as could then have access to his windows. Now that is a most material question to be considered in the present case. We do not find any mention of lights in the lease. It is a demise on the 28th of September, 1882, of the piece of ground and the house upon it, and it is not perhaps immaterial to read some words which follow, "together with the shops, messuages, or dwelling-houses, auction rooms, store rooms, and buildings erected thereon, together with full and free right and liberty to construct, maintain, and use a vault or vaults under the footway." Then there are a good many more words: "And also together with the rights, members, and appurtenances to the said premises belonging." There is no express grant of light there. Of course a conveyance of a house would carry whatever right there was to any light which came to the house. But that is not the contention. The contention is that there is an express grant by the landlord of a new easement over the landlord's land which was on the other side of Warwick-passage. But in my opinion that is not the proper construction or meaning of these words. It is very true that when a man grants a house he grants that which is necessary for the existence of that house, and it might have been a serious

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

question here if it had been shown that the interference of the light was of such a character as entirely to prevent the house of the plaintiffs being used as a house. But that was not the case made. It was only admitted by the defendant that there was such an interference as would justify the court in granting an injunction if there had been ancient windows, or if the grant was such as Sir Henry Davey contended for. Section 6, sub-section (2), of the Conveyancing Act, 1881, was not, I think, referred to in the arguments by either side, but we ought to mention it to show that it has not been overlooked, because it provides that "a conveyance of land having houses or other buildings thereon shall be deemed to include, and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all outhouses, &c., and all passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever appertaining or reputed to appertain to the lands and houses, or other buildings conveyed or any of them or any part thereof at the time of conveyance demised, occupied, or enjoyed, with or reputed or known as part or parcel of or appurtenant to the land, houses, or other buildings conveyed or any of them or any part thereof."

Then there is a proviso that the section applies if and so far as a contrary intention is not expressed in the document. Well, in my opinion, even with the assistance afforded us by the language of this deed, this could not be said to be a light, within the meaning of this section, enjoyed with the house. The house had only recently been erected, and at the time when this lease was granted it was obvious to both parties that this was a large tract of land bought by the Corporation of Birmingham for the purpose of effecting an improvement, and for the purpose of being laid out so as to have buildings upon it, and at the time when the lease was granted Corporation-street had only just been formed, and there was no plan of the buildings upon it, but it was the duty of the corporation, as of course it would be their interest, to lay the land out in such a way as to make it available for recouping the expenses, and also to be an improvement to this portion of Birmingham. Therefore I think it could not be said that the light coming over that low building to the plaintiffs' windows could be considered as enjoyed with the plaintiffs' houses or buildings within the meaning of this section. The light at the time did in fact come over the low building, but it came over it under such circumstances as to show that there could be no expectation of the continuance of it. It had not been enjoyed in fact for any long period, and it was enjoyed under such circumstances, known to both parties, as could not make it light enjoyed within the meaning of that section, which, in my opinion, means not light which a person has a right to under the statute, but that which he has enjoyed under circumstances which would lead to an expectation that the enjoyment of that light would be continued, and that it would not be simply precarious.

Then as to the words of the lease, "and also together with all rights, members, and appurtenances to the said premises belonging." The case under the Conveyancing Act would have been stronger if it had not been for them, they point to a conveyance of all such rights, if any, as belong to the premises, and the introduction of those general words, in my opinion, points to this, that the light which in fact came at the time of the lease to the house and buildings could not be considered as being expressly granted by any words of this lease.

Now, if that is so, we have to consider what the rights of the plaintiffs are, and in my opinion such rights as they have must be implied rights. I think myself that it is a question whether there is any implied obligation on the corporation, which of course the defendant would be subject to, not to interfere with these lights. I say that because that was the view which not only I, but the Master of the Rolls, took in a previous case of *Rigby* v. *Bennett*, but also the view of Lord Cranworth when Lord Chancellor in the *Caledonian Railway Co.* v. *Sprot*, 4 W. R. 659, 2 Macq. 449. By obligation by implication I mean this, an obligation arising not from the express words of an instrument nor from that which, having regard to the circumstances, must be considered the true meaning and effect of the words in the instrument, but an obligation which results, not from the terms of the contract, but from the position in which the parties have placed themselves by the contract. For instance, where one man grants to another a house, then, *primâ facie*, he cannot interfere with that which he has granted; there is an implied obligation on him not to interfere with that which he has granted—the house and enjoyment of the house. That obligation arises, as I say, not from any express covenant, not from any interpretation of the words of the conveyance, but from the duty which is imposed on the grantor in consequence of the relation which he has taken upon himself towards the grantee.

But, then, when there is an implied obligation we must have regard to all the circumstances and facts which existed at the time when the conveyance was executed which brought the parties into that relation from which the implied obligation results. I quite agree that we ought not to have regard to any agreement during the negotiations entered into between the plaintiffs and the corporation, except in this way, if we find that any particular space in fact was left open at the time when the lease was granted, and that open space was contracted to be left open during the negotiation which took place, and is not referred to in the lease, we must have regard to the fact of that open space being left, and we must have regard to the fact that by agreement between the parties the lessor had bound himself not to build upon that space, and also we must, in my opinion, in determining what obligation results from the position in which the parties have put themselves, have regard to all the facts existing at the time when the conveyance was made or when the lease was granted, and which were known to both parties. Of course we must be satisfied that they were known to both parties.

Now what was the existing state of things here? There was the new street—Corporation-street—of very great size; there was the open passage—Warwick-passage—stipulated to be 20ft. in width, and which was then existing, and it was obvious to Daniell, as well as to the corporation, that the adjoining land would be utilized for the purpose of the corporation making money out of it, and although I was at first startled by the great height of the defendant's house, yet in my opinion Daniell, when the lease was granted, knew that the lease was being granted of a piece of land in a new street for the purpose of having a building put upon it, and was acquainted with the obvious fact that the corporation were going to lay out the remainder of the street for building houses suitable for the locality. But if the contention of Sir H. Davey were the true one, that he has a right to such light as then came, it would entirely prevent the corporation from utilizing the land in any way except by putting up a low building like the stables or one-storied building then existing upon the land on the other side of Warwick-passage. In my opinion it is impossible to imply an obligation on the corporation not to let their land in any way for building otherwise than for erecting such building as was on it at that time, and if we cannot do that I cannot see how any line can be drawn as to the obligation they undertook as regards building; because, unless we are to say that they undertook an obligation not to put up any building higher than that which then existed, I cannot see where we can impose any obligation or fix any line as to the height to which buildings might be put. The

plaintiffs say reasonably, "We do not want all the defendant's building pulled down," but I feel a difficulty in saying that they have any right as regards the height of buildings erected unless they can establish their right that there should be no building put up so as to interfere with the light which, at the time when the lease was granted, passed to this house. If there had been an express grant, then it would have been the duty of the grantor or of the lessor to expressly state what right he reserved to himself. A reservation of right to a grantor is a very different thing from an obligation impliedly undertaken by a grantor, because when there is a reservation to himself, that is a reservation from that which he has in terms granted, and if a lessor or other grantor wants to make any reservation in his own favour, then in my opinion that stands on a very different footing from any implied obligation contracted by him in consequence of the position in which he places himself. *Wheeldon* v. *Burrows* is a case which, on that point, would be a strong authority, and which I, of course, agree with. But, in my opinion, when we come to the question which arises here of implied obligation and implied grant, we may have regard to all the circumstances existing at the time when the parties undertook the position from which the implied obligation arises, and, looking at the circumstances existing at the time when the lease was made, I am of opinion that here the plaintiffs cannot assert any implied obligation on the part of the corporation which will enable the plaintiffs to say that there is an interference with any implied obligation on the part of the defendant.

I think I had better mention that it was argued by Mr. Barber that there could be no implied obligation where the land granted was not immediately connected with land retained by the grantor. That question does not arise for decision, but I do not in any way express any opinion favourable to that contention. On the grounds which I have already stated I think the appeal ought to be dismissed.

LINDLEY, L.J.—In order to decide this case properly it appears to me that there are two preliminary points for investigation. First of all, what are the terms of the lease to Daniell—that is the first thing, and the second thing is, under what circumstances was that lease granted?

Now if we look at Daniell's lease, which is the important document in this case, we do not find in it any express words creating any new easement over the land retained by the corporation. There is nothing express about that; it is a grant of a house and so on, as Cotton, L.J., has mentioned more in detail, but we do not find any express words creating any new easement.

Now, that being so, we must proceed to consider what was the state of things existing at the time that lease was granted. I think Sir Horace Davey was right in saying that we are not to go into the preliminary negotiations which resulted in the final lease. They might be important, and perhaps would be necessarily important, if we were considering whether the lease should be rectified or not. But for the purpose of construing the lease all such considerations as those ought to be disregarded. But the state of the property is all important, and what was being done with it was all important.

Now what we know about that is this. That this large area, the area on which the plaintiffs' house and the area on which the defendant's house was built, was recently created by the destruction of a mass of houses by the corporation, and the whole area was intended to be relaid out and built upon by the corporation. One part of the area was to be traversed by that large street called Corporation-street, and Daniell's house was to face Corporation-street. On the side of Daniell's house, where there is now a narrow street called Warwick-passage, there had been no such street; it was, as I understand, a mass of houses—that street did not exist at all. That street was created at the time that Daniell's house was agreed to be let, and before or at the time when it was begun to be built, and it appears to me that the history of that street is the key to the situation here. Having regard to the creation of that street and the facts to which I have alluded, it appears to me that it is impossible fairly and properly to imply such an easement as Sir H. Davey is driven to contend for. It appears to me that the true construction of Daniell's lease, coupled with the circumstances to which I have alluded, is this—that in talking of these easements as newly created, what was newly created was a right to such an amount of light as would come over the corporation land to Daniell's house after the corporation had built what they liked upon it, upon the other side of that twenty feet street. That is the only implied grant which I can imply or infer or arrive at from the terms of the deed and the circumstances to which I have alluded.

Now if that be true of course there is no deception from the grant at all, and we are clear of *Wheeldon* v. *Burrows* and every other case. It appears to me that when we bear in mind what the grant of an easement of this kind is, it is really, more properly speaking, perhaps, an implied covenant by the grantor not to use his own land in some definite way so as to injure the rights of Daniell and those claiming under him. If we look at it in that point of view the very same result is arrived at. What sort of obligation was the corporation laying itself under as regards the obstruction of Daniell's lights? I can come to no other conclusion than this, that it was perfectly understood and known to all that the land was to be built upon in any way the corporation liked, subject only to this, that there was to be a distance of twenty feet of land, which was the measure of Daniel's protection.

Upon the other point which was raised by Mr. Barber—namely, that there is no case which goes to show that there is an easement granted or implied in a case of this description when there is a piece of vacant land left between what is granted and what is retained—I am not prepared to assent to that. He has not cited any authority for it, and his argument on principle did not satisfy me about it at all; and I do not think myself that there is any sound distinction. The case which arose in the *Curriers' Co.* v. *Corbett*, 13 W. R. 538, 2 Dr. & Sm. 355, was the converse, and I cannot see any rational foundation for the distinction. I do not assent to that part of his argument, but the other, I think, is well founded, and therefore I am of opinion that the appeal must be dismissed.

BOWEN, L.J.—The real question which we have to consider here is the application which has been attempted to be made by Sir Horace Davey of the maxim that a grantor shall not derogate from his own grant, a maxim which really is as old, I will not say as the hills, but as old as the year books, and a great deal older. We have to apply it to the question of a house and of lights. I pause for a moment, for the sake of perspicuity, to observe that it is incorrect to speak of the right to light as an ordinary easement. The distinction between an affirmative easement, such as a right of way, and what be may be called a *quasi*-easement or negative easement, such as a right to light or a right to support, is well known; but still, with regard to all these easements, or *quasi*-easements, the principle will be applied in case of necessity by the law that a grantor is not, having given a thing with one hand, to take away the means of enjoying it with the other. And this principle will be carried out by a necessary implication of whatever fiction is required to support the

origin of the right not to be interfered with by the grantor. The case of an affirmative easement may well be different from the case of a negative easement like light. Window light is not like a right of way; it does not begin in acts of enjoyment which are *primâ facie* an encroachment upon a neighbour's soil; it is acquired by occupancy upon one's own soil, and, therefore, there is no necessity to suppose that, in its origin, it originates from what is, strictly speaking, called a grant. But it originates no doubt (when it is acquired by user) in some consent on the part of the person who has the right to obstruct the light. Some consensual origin it must have, but I agree with what has been said in the terms which have been employed by Cotton, L.J., that a right not to have your windows obstructed, if it exists, is rather in the nature of a right that arises from an implied obligation or an implied covenant than from what is, strictly speaking, called a grant.

But, coming down to the amount of enjoyment of light that is supposed by the law to accompany, in an ordinary case, the lease or the gift of a house which is erected with window lights, where the grantor of the house is also the owner of premises adjoining or neighbouring premises, then this presumption arises, that the grantor intends the grantee to enjoy so much light unobstructed as is reasonably necessary for the fair and comfortable use of the premises which are the subject of the grant. That seems to me to be the real definition and measure of the ordinary implication that arises. Sir H. Davey asked us to consider that the measure of the right which, in ordinary cases of a grant, arose was the same as the measure of enjoyment of ancient lights. I confess I do not at the present moment assent to that view. The extent of the right in the case of ancient lights is measured, not by what is reasonably necessary, but by what has been in fact enjoyed, and although it is perfectly true that a court of equity will not interfere by injunction and the common law will not interfere by damages to give relief for a nominal interruption of light which is not attended with a material diminution of convenience, still, the measure of the light in the case of ancient lights seems to me to be different from the measure of the right which accompanies in ordinary cases a grant by a grantor.

I pause for another moment to say a word about Mr. Barber's argument. Mr. Barber argued, I think with some courage, that this doctrine that the grantor granted so much as was reasonably necessary for the complete enjoyment of the premises did not arise, except where the tenement granted really adjoined physically the tenement which was left in the hands of the grantor. I do not believe there is any authority for that proposition. I do not think it is founded in reason any more than upon authority, and it seems to me that it is only necessary to evoke the doctrine to which I have alluded to show that the premises shall be so adjacent as that the enjoyment of the one should be evidently connected with and dependent upon the state of the other premises. But though this is in the ordinary case the character, it seems to me, of the grant which arises or the right to light which is created in the case of the grant or demise of a house, what is the nature of this obligation? Sir Horace Davey, with a stroke of what I call brilliant advocacy, endeavoured to escape from, I think, the logic of the case by saying that it was an express grant after all. If he could have made that out, of course he would have landed his client, at least, I think, very nearly landed his client. But the obligation which is created under such circumstances is not, to my mind, an express obligation at all, it is not an obligation which arises on reading the terms of the deed. It is not an obligation which arises simply from the interpretation of that deed. It is really an obligation which arises from the relation which the deed creates, from the circumstances outside the deed, and the deed taken together. The deed places the parties in a relation in which it is necessary that the law should imply an obligation to protect the grantee against subsequent encroachments by the grantor. What seems to me to show that, is, amongst other things, the following consideration. Supposing the deed is taken alone, no amount of construction could evolve from the deed itself the protection which the grantee of the deed desires. The grantor may not have had the power of giving the protection which is necessary for the enjoyment of that which he grants, and it is only by going outside the deed, and looking outside it, that it can be seen that such a power of protection on the part of the grantor in favour of the grantee exists. It is only by looking to the title outside the deed that the implication of a duty arises. I think that is the effect of the language and view of the House of Lords in *The Caledonian Railway Co.* v. *Sprot*. I think it is what was meant by the Master of the Rolls and Cotton, L.J., in the case of *Rigby* v. *Bennett*, and it is that view which has received additional weight from the judgment of Chitty, J., in the case of *Beddington* v. *Atlee*, 35 W. R. 799, 35 Ch. D. 317.

Now if it is an obligation which arises from an implication, it must be measured by all the surrounding circumstances. Whatever presumption arises in favour of the ordinary implication can be rebutted in exactly the same way as every other presumption can be rebutted. I do not think any hard and fast line can be laid down beyond which evidence is not to be admitted to rebut it, or rather to measure the implication itself. Here we have some salient facts which seem to me to prove, as far as my mind goes, that the plaintiffs are not entitled to the right which they claim. At the time when Daniell took his lease or bargained for his lease, and erected the house, he knew perfectly well that houses were to be built on the opposite side of Warwick-passage. He confesses it. It did not cross his mind before, as I read the evidence, that there would be any limitation upon the legal power of the corporation to build houses upon the opposite side of Warwick-passage. He knew they were going to build there. He knew perfectly well that if they once built houses above the level of the house that was then in existence or above the level of his own lights there must be some interference with his lights; there was no stipulation as to how high they were to run up the houses, and therefore either they were not to build at all or there was to be some danger of his lights being interfered with.

What was the protection under such circumstances to which he looked? I think he looked to the protection of the width of the passage. That there was a negotiation about the width of the passage we know, and ultimately the width of the passage was fixed at twenty feet. There was the protection which he got, there was the measure of the right to light, which went as a necessary concomitant of the position of the parties under the grant. If we do not draw the line there I do not know where to draw it. Sir Horace Davey felt, I am satisfied, that difficulty himself, and fell back upon the position that he was entitled to all the lights that ancient windows would be entitled to. As I said a few minutes ago, I do not think in any view that is a true measure of what a house would be entitled to under the doctrine that a vendor must not derogate from his own grant; but, whether it is or not, it is inconsistent with the conclusion that all the parties here knew and intended that there should be buildings on the opposite side of Warwick-passage, and that the parties, when they negotiated for this grant, left the height of the buildings undefined. If Daniell had desired to protect himself further than by the width of the passage, in my opinion he ought to have done so expressly, because no implication in his favour beyond that which arises from the width of the passage seems to me to arise in this case.

I will not say what would be the case if the light had been absolutely destroyed. As Cotton, L.J., has reserved that point for consideration, I do not desire to express any opinion definitely one way or the other upon it. But that is not the case here, and in the present case I think the measure of the rights is that which I have stated.

Appeal dismissed.

Solicitors for the appellants, *Field, Roscoe, & Co.*, for *Barlow, Smith, & Pinsent*, Birmingham.

Solicitors for the respondent, *Burton, Yeates, & Hart*, for *Allen & Edge*, Birmingham.

High Court of Justice.

Chan. Div. } Stirling, J. } July 20, 24.

WOOD v. ANDERSTON FOUNDRY CO. (a.)

Practice—Service—Company out of the jurisdiction but having branch works in England—Companies Act, 1862, s. 62—R. S. C., 1883, ord. 9, r. 8.

A company had their registered office in Scotland, but carried on branch works in England. The writ in the present action had been served on the manager of the branch works, and a copy had also been sent by post to the registered office.

Held, that the service was bad and must be set aside.

Watson v. Sheather, 2 *Times L. R.* 473, *explained.*

Motion.

This was an action to restrain the defendants from infringing the plaintiff's patent. The defendants were a company formed under the Joint-Stock Companies Acts, and having their registered office at 100, Cheapside-street, Glasgow. Their works were in that town and their business was carried on there. The company had also extensive branch works at Middlesborough, in Yorkshire. In an action previously commenced by the company against the present plaintiff they had described themselves as of Middlesborough and Glasgow. The writ in the present action was served within the jurisdiction, the plaintiff describing the defendants as of Middlesborough-upon-Tees, in the county of York. It was served in the first place by leaving it with a director of the company at Middlesborough, who appeared, upon the evidence, to be the manager of the company's business at that place. A copy of the writ was also posted to the office of the company at Glasgow.

The defendants now moved that the writ of summons and the service thereof and all subsequent proceedings, if any, might be set aside, on the ground that the defendants were domiciled in Scotland, and that this action ought to be tried there, and that the plaintiff might be ordered to pay to the defendants the costs of the action and of this motion.

Aston, Q.C., and *Lawson*, for the motion, argued that service had not been properly effected.—Section 62 of the Companies Act, 1862, as to service upon companies, had not been effected by ord. 9, r. 8, of the Rules of 1883.

They cited *Newby* v. *Van Oppen*, 20 W. R. 383, L. R. 7 Q. B. 293; *Lhoneux, Limon, & Co.* v. *Hong Kong Bank*, 34 W. R. 753, 33 Ch. D. 446; *Baillie* v. *Goodwin & Co.*, 34 W. R. 787, 33 Ch. D. 604; *Jones* v. *Scottish Accident Insurance Co.*, 17 Q. B. D. 421, 34 W. R. Dig. 150; *Ex parte McPhail*, 27 W. R. 525, 12 Ch. D. 632; *Speckhardt* v. *Campbell*, W. N., 1884, p. 249, and Ann. Prac., for 1887, p. 175.

Chadwyck Healey, contrd, referred to *Watson* v. *Sheather*, 2 Times L. R. 473; *Carron Iron Co.* v. *Maclaren*, 3 W. R. 597, 5 H. L. Cas. 416; *Taylor* v. *Crowland Gas and Coke Co.*, 3 W. R. 368, 11 Ex. 1; *Keynsham Blue Lias Lime Co.* v. *Baker*, 12 W. R. 154, 2 H. & C. 729.

STIRLING, J., stated the facts, and proceeded:—The question is whether the plaintiff was at liberty to serve the writ as he has done. As a general rule a foreigner, whatever his nationality or domicile, is liable to be sued in this country if found within the jurisdiction. When a foreigner is a person, personal service may be effected upon him. But when a foreigner is a mere legal entity, such as a corporation, two questions arise. First, when can a foreign corporation be said to be within the jurisdiction; and secondly, if present, how can it be served? Both those questions were considered in *Newby* v. *Van Oppen*. Upon the first point the conclusion at which the court arrived was that, if you found a foreign corporation carrying on business within the jurisdiction, then they could be treated as resident there. Upon the second point Blackburn, J., delivering the judgment of the court, said:—"At common law the service of a writ on a corporation aggregate, which from the nature of the body could not be personal, was by serving it on a proper officer, so as to secure that it came to the knowledge of the corporation, and then proceeding by distress: see 1 Tidd's Practice, p. 131, ed. of 1828; the 2 Will. 4, c. 39, s. 13, and 15 & 16 Vict. c. 76, s. 16, in fact, only re-enact the old law as to what should be service on a corporation. The clerk or officer must be in the nature of a head officer, whose knowledge would be that of the corporation. We think that, when once it is established that the corporation is to be treated as resident in England, the proper officer is the officer at the English branch, and that it is not necessary to serve the process on the officer at the head office abroad." Now, with reference to the first point—viz., that a foreign corporation, if found carrying on business within the jurisdiction, may be treated as resident in England, there is nothing in the Judicature Acts or rules to alter that. As to the second point, as to how service is to be effected, the rules now in force have, I think, made a very great change. That is evident by comparing the Common Law Procedure Act of 1852 with the present rules. Section 16 of that Act provided as follows:—"Every writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary of such corporation. . . ." And it was decided that sections 18 and 19, which related to actions against British subjects and foreigners residing out of the jurisdiction, did not apply to corporations.

Now, under the present rules, ord. 72, r. 2, must first be considered. That rule provides that where no other provision is made by the Acts or rules the existing procedure and practice is to remain in force. We have, therefore, to see whether any provision is made by the rules with reference to service upon corporations. The material rule is ord. 9, r. 8, which provides that "in the absence of any statutory provision regulating service of process, every writ of summons issued against a corporation aggregate may be served on the mayor or other head officer . . .; and where by any statute provision is made for service of any writ of summons . . . or other process upon any corporation . . . every writ of summons may be served in the manner so provided." So that the words, which in the Common Law Procedure Act, s. 16, stood unqualified and absolute, are now governed by these words—"In the absence of any statutory provision regulating service of process." It seems to me that these

(a.) Reported by L. S. BRISTOWE, Esq., Barrister-at-Law.

two clauses provide for different cases, and that the mode of service provided by the last clause is not cumulative or additional to that by the first clause. Service upon foreign corporations is, therefore, divided into two heads—(1) where there is no statutory provision regulating service of process; (2) where such statutory provision does exist. We have, therefore, to consider whether the present case is governed by any statutory provision within the rule.

The company was registered under the Companies Act of 1862, and section 62 of that Act provides that any summons or other document required to be served upon a company may be served by leaving the same or sending it through the post in a prepaid letter addressed to the company at their registered office. The words of the concluding clause of the rule are very remarkable, and bear evidence that it was framed to meet this case, and that view is confirmed by looking at the previous set of rules, which were rather differently worded, and the word "summons" seems to be introduced here for the purpose of introducing the provision contained in section 62 of the Companies Act, 1862. Therefore the writ of summons in this case must be served in manner provided by that section, and no choice is given to the plaintiff. I have now to consider the authorities to see if there is anything to conflict with that view. I was referred to the cases of *Lhoneux, Limon, & Co.* v. *Hong Kong Bank* and *Baillie* v. *Goodwin & Co.*, but in my opinion neither of those cases conflict with the view I have expressed. The language of the report, however, in the case of *Watson* v. *Sheather* gives some colour to the view that the rule allows an alternative mode of service. However, I have had the opportunity of consulting Wills, J., who was a member of the court, and he has informed me that they simply held that there had been good service under the Act of 1862, and that they never indicated that a limited company could be served otherwise than as directed by that Act. It appears to me, therefore, that the service at Middlesborough was bad, and that the proceedings must be set aside as irregular. As to the service by letter to Glasgow, that was a service out of the jurisdiction for which leave ought to have been obtained. But the plaintiff has been almost invited to adopt the course he has taken by the defendants, who described themselves as of Middlesborough. Therefore, although I set aside the proceedings, it must be without costs. I have decided the question purely as a matter of right, and if the plaintiff should desire to make any application for leave to serve the writ out of the jurisdiction, that question will be quite unaffected by the present decision.

Solicitors, *Faithfull & Owen*, for *Belk & Cochrane*, Middlesborough; *Johnson, Son, & Ellis.*

Chan. Div. } Kekewich, J. } July 27, 30.

Tyars v. Alsop. (*a*.)

Solicitor and client—Confidential relation—Undue influence—Voluntary gift—Setting aside—Relation existing at time of gift—Election to abide by gift—Delay—Action by personal representative.

If a person, who has made a gift to a solicitor while the relation of solicitor and client subsisted between them, is entitled at the time of his death to have the gift set aside, the personal representative of the deceased, upon his death, succeeds to the right, although the deceased had no intention of exercising it, and had even expressed a determination not to do so—for he might have changed that determination the next day, and would have had a perfect right to do so.

A solicitor cannot take a gift from his client while the relation of solicitor and client subsists, and, in order to sustain such a gift, if made, something must be done, after the confidential relation has ceased, amounting to a release of the client's right to set aside the gift; but the subsequent settlement by the client of a bill of costs does not amount to such a release.

A., acting as solicitor for G. in an action, in June, 1880, *recovered, by a compromise,* £5,000 *for her, which he received, and out of it, by her desire, retained* £1,000 *as a gift to himself. The relation of solicitor and client terminated shortly afterwards. In his evidence A. swore that in April,* 1883, *G. had told him that she had determined to adhere to what she had done. Since the severance of the relation G. had also settled a bill of costs, and had never done any act indicating an intention to recede from her gift. She died in June,* 1883. *Her administratrix commenced this action within six months, but died in October,* 1884. *In June,* 1886, *T. took out administration to G.'s effects, and in the following August he got an order of revivor in this action. Poverty was the excuse given for the delay.*

Held, that the gift was bad at the time it was made; that G. had never effectually released her right to set it aside, and at the time of her death was entitled to exercise that right; that on her death her personal representative succeeded to the right; that it had been kept alive by the action notwithstanding the delay; and that the gift must consequently be now set aside.

Morgan *v.* Minett, 25 *W. R.* 744, 6 *Ch. D.* 638, *approved and followed.*

Mitchell *v.* Homfray, 29 *W. R.* 558, 8 *Q. B. D.* 587, *explained and distinguished.*

Trial of action.

This action was brought against Messrs. John Alfred Alsop and John Pidsley Mann (who were the partners in the firm of Alsop, Mann, & Co. at the time the cause of action arose) by Mrs. Sarah Emily Tyars, as the legal personal representative of her late daughter Amy Graham, to set aside a gift of £1,000 alleged to have been made to the defendants by Miss Graham in June, 1880.

The action was commenced by Mrs. Tyars in December, 1883, Miss Graham having died in June of that year. Mrs. Tyars died in October, 1884, but in August, 1886, an order of revivor was made in favour of her husband, the present plaintiff, James Tyars, who had taken out administration to the unadministered assets of Miss Graham on the 30th of June, 1886.

It appeared that the defendants had acted as solicitors for Miss Graham (who was then about twenty-three years of age and unmarried) in an action of a delicate character brought by her against a gentleman, but which was compromised in June, 1880, upon the terms of the gentleman paying her a sum of £5,000 (subsequently reduced by agreement to £4,450) and paying her solicitors, the present defendants, a sum of £100 as agreed costs of that action. Out of the money, which was paid, in the first instance, to Messrs. Alsop & Mann, on the 5th of June, 1880, they retained a sum of £1,000, which they alleged to have been given them "as a special gift" by Miss Graham in recognition of their successful exertions on her behalf. The date of the transaction was fixed as being the 7th of June, 1880, and the relation of solicitor and client continued for some little time afterwards. It also appeared that some further proceedings were taken against the gentleman on behalf of Miss Graham by Messrs. Alsop & Mann, but these came to an end in March, 1882, when they finally ceased to act for her. Mr. Alsop stated in the witness-box that when Miss Graham came, in April, 1883, to ask him for a loan of £10, she told him that Mr. Tyars had been trying to persuade her to claim the £1,000 back, but she had refused, and always meant to

(*a*.) Reported by R. H. Deane, Esq., Barrister-at-Law.

abide by her gift. She died on the 8th of June, 1883. Shortly before her death Mr. Samuel Tilley, a solicitor, had written to the defendants on her behalf asking for some account of the cash transactions between them and Miss Graham, and on the 5th of June they sent such an account, and an explanation, in which they stated that the lady had made them a voluntary gift of £1,000 for the great and successful exertions they had made on her behalf. The plaintiff claimed repayment of the £1,000, with interest at five per cent. from the date of the gift.

Oswald, for the plaintiff.—There was no gift, as the money never came into Miss Graham's hands. A gift can only be supported by a deed of gift, or by actual delivery. The defendants say that, having the money in their own pockets, they retained part of it as a gift: *Irons* v. *Smallpiece*, 2 Barn. & Ald. 551; Broom's Commentaries on the Common Law, 8th ed., pp. 420—1. The delay has arisen through the death of the original sole plaintiff, and through poverty. Assuming there was a gift, the relation of solicitor and client existed at the time, and the gift was, therefore, *ipso facto* void. Miss Graham had no independent advice. As to the defendants' allegation, that on the 7th of June, 1880, Miss Graham signed or settled an account dealing with the application of the £5,000; the final arrangement as to the £1,000 kept in suspense was not made till July 23. The cases I rely on as showing that the gift, as a gift, cannot stand are the following:—*Wright* v. *Proud*, 13 Ves. 136; *Tomson* v. *Judge*, 3 W. R. 561, 3 Drew. 306 (where Kinderaley, V.C., held, though the circumstances were there particularly strong in favour of the solicitor, that the rule is absolute that a solicitor cannot take a gift from his client); *Holman* v. *Loynes*, 2 W. R. 205, 4 De G. M. & G. 270; *Welles* v. *Middleton*, 1 Cox, 112; *Hatch* v. *Hatch*, 9 Ves. 292; *Morgan* v. *Minett*, 25 W. R. 744, 6 Ch. D. 638. As to acquiescence, it must be pleaded, and is not. The relation, moreover, only ceased on March 15, 1882, and fourteen months later Mr. Tilley asserted Miss Graham's rights. In *Allcard* v. *Skinner*, 35 W. R. 424, *ante*, p. 251, 36 Ch. D. 145, there had been acquiescence for four or five years. In *Mitchell* v. *Homfray*, 29 W. R. 558, 8 Q. B. D. 587, the relation, which was that of doctor and patient, had ceased, and, moreover, the patient had received an annuity by way of consideration for the gifts.

He also referred to *O'Brien* v. *Lewis*, 11 W. R. 318.

Warmington, Q.C., and *Chadwyck Healey*, for the defendants.—There is no absolute prohibition of a gift from a client to a solicitor, nor does that relation differ from any other. This gift could be maintained even against the donor's wish, but in fact she did not wish, or attempt, to upset it. There was an election to abide by the gift: *Mitchell* v. *Homfray*; *Cooke* v. *Lamotte*, 15 Beav. 234; *Rhodes* v. *Bate*, 14 W. R. 292, L. R. 1 Ch. 252; *Allcard* v. *Skinner*. It would be absurd to say that you could make a gift after the relation had ceased, but could not confirm, after it had ceased, a gift made while it continued. Here, though the relation was severed shortly after the gift, the donor made no attempt during the remainder of her life to claim it back, but showed a contrary intention: *Allcard* v. *Skinner*.

Oswald, was not called upon to reply.

Kekewich, J.—My judgment is for the plaintiff. The case raises a question of considerable importance, but it is a question of law, not of fact. As regards the really material facts, with one exception there is no doubt at all. [His lordship stated the preliminary facts, and proceeded.] They were her solicitors, she paid them £1,000. Mr. Alsop knew perfectly well that the relation of solicitor and client existed at the time, that it continued to exist for some little time afterwards, and that he could not take, or keep, the money. It was kept. By his own evidence it appeared that the lady urged him to take it, and that he only consented to take it after being so urged. The relation of solicitor and client was closed shortly after the date of the gift. It was renewed afterwards for a time, and some further business seems to have been done between them, but that could not affect the question whether the gift was sound, or tenable, at the time it was made. At last the relation was finally severed. From the bill of costs I find that the last date was the 15th of March, 1882.

Between that date and the time of her death there was one very important interview between Mr. Alsop and Miss Graham, in April, 1883, and what took place at that interview was the only fact of importance as to which any doubt existed. She was then ill and in distress, and went to Mr. Alsop, not as a client, but to ask for a loan of £10. In the witness box Mr. Alsop and Mr. Paton, the cashier, were very reluctant to admit that Miss Graham was then ill, or that she was more so than usual, but the letter of the 5th of June, 1883, written to Mr. Tilley, makes it quite clear. She asked for a loan and it was granted. What more passed it is difficult to say. I do not doubt that Mr. Alsop and Mr. Paton, in their evidence, endeavoured to reproduce what really occurred, but Mr. Paton only tells us what Mr. Alsop told him in her presence what she had said. What it comes to is this—that the lady was aware that she might set up a claim for the £1,000, but that she said she did not intend to claim it, and that she intended to "adhere to" or "abide by" what she had done. It is impossible to rely satisfactorily on either of these expressions having been actually used, but I conclude the effect of what she said was of this kind—that she did not intend to yield to the advice that had been given her, to claim back the money. She had the loan of £10, and it does not seem to have been made conditional upon her not claiming the £1,000 back.

Shortly after this Amy Graham died.

To my mind the question I have to decide is whether, at the moment of her death, she was entitled to recover the money she had given. If she was, I think that her legal personal representative is entitled to do the same, and that the right has been kept alive by this action, notwithstanding the delay that has occurred. If, on the other hand, she was not so entitled, her personal representative cannot be in a better position. I know my decision may seem at first sight somewhat inconsistent with the language of Lord Selborne in *Mitchell* v. *Homfray*. But if his words are looked at carefully, and compared with the comments on that case of Lindley, L.J., in *Allcard* v. *Skinner*, I think it will be seen that the inconsistency is merely verbal and superficial. At any rate, I still think that this case depends upon the question whether Miss Graham could have claimed the money at her death or not.

The case of *Mitchell* v. *Homfray* came before the court under very special circumstances. It had been twice before a jury, and the facts had been found by the jury. The court was not well satisfied that the matter had been properly threshed out, but, rather than send the case back to a jury again, they accepted the findings of the jury, and the judgments proceeded entirely on those findings, which were that the relationship had come to an end long before the death of the testatrix, and that she had elected to abide by her gift. That was a case of physician and patient.

It is there stated (8 Q. B. D., at p. 588) that "in 1873 Mrs. Geldard ceased to live at Gainford and went to reside at Barnard Castle, about eight miles distant, where she continued to reside until her death, which happened in July, 1876. From the time that Mrs. Geldard went to reside at Barnard Castle the defendant ceased to act as her medical attendant," and between that time and her death, a period of more than three years, it was found

by the jury that "she intentionally abode by what she had done," and the judgments went upon that ground. Lord Selborne said, at p. 591 (8 Q. B. D.):—"It must be held that, whether she knew or not that she had power to retract the gift, she was determined to abide by her acts; this is not a case of mere acquiescence; she determined that she would not undo what she had done. This being the state of facts, I do not think that any authority goes the length of saying that her representatives, after her death, can do that which, if she had lived, she herself would not have done." Baggallay, L.J., adopts the same principle, but puts it into his own language, and says nothing that assists me in understanding Lord Selborne's language. If I am to construe that language strictly, I might be forced here to say that Miss Graham would not, if she had lived, have tried to recover the money she gave to the defendants, and therefore that her personal representative cannot recover it. But I do not think Lord Selborne meant to say what his language, strictly construed, would imply, and Lindley, L.J., in *Allcard* v. *Skinner*, seems to have understood him in the same way as I do. Referring to *Mitchell* v. *Homfray* and other cases, he says:—"It is true that in those cases the donors had died; but it is clear, I think, that the decisions proceeded upon the ground that the donors, if alive, could not have obtained relief." He does not say "would," like Lord Selborne, but "could." As to *Mitchell* v. *Homfray*, he says:—"If the donor had been entitled when he died to have his gift set aside, his executors would have succeeded to his rights, and would have obtained the relief they sought." He puts it on the legal right, not on the intention.

Taking that view of Lord Selborne's meaning, which agrees with what I certainly understand the law to be, I have to decide whether Miss Graham could, if she had wished, have recovered this money at the time of her death. I think the law is stated accurately in *Morgan* v. *Minett* by Bacon, V.C., at the commencement of his judgment, where he says, 25 W. R., at p. 744, 6 Ch. D., at p. 645: "The law I take to be as plainly settled on the subject as any law existing in this country, that while the relation of solicitor and client subsists the solicitor cannot take a gift from his client." In order to sustain such a gift you must have something, after the confidential relation has ceased, amounting to a release of the client's right to set aside the gift. Now in this case nothing was done to release the claim, except the settlement or acceptance by Miss Graham of the bill of costs without insisting on her claim to the £1,000, and what passed at the interview on the 27th of April, 1883. As regards the first event, the fact of her not having put forward her claim has nothing of an active character about it, and is quite insufficient to release her rights, and, moreover, only a very short time had then elapsed since the gift was made. What took place at the interview of the 27th of April was much more important. She did then refer to the gift as something she meant to abide by; but supposing she had changed her mind the next day, would there have been any defence possible against a claim by her? All that the defendants could have said would have been, "You told us you were determined to adhere to your gift." I cannot doubt that such a defence could not be supported. There was nothing to prevent her changing her mind. What she had said was a mere declaration of what her intention was at the time, which it was quite open to her to change—it was no release, and it would have been impossible to set it up as a defence. It follows, if I am right in law, that the legal personal representative succeeded to her right of action, and that right having been kept alive by this action, he is entitled to succeed.

There must be judgment for payment of £1,000 within one month, with interest at not more than four per cent. from the date of the gift to the present time.

Oswald asked for costs on the higher scale, and referred to *Davies* v. *Davies*, 35 W. R. 697, *ante*, p. 86, 36 Ch. D. 359.

KEKEWICH, J.—Certainly not.

Judgment for plaintiff.

Solicitors for the plaintiff, *Oehme, Summerhays, & Co.*

Solicitors for the defendants, *Alsop & Co.*

Chan. Div. Kekewich, J. July 13, 14, 16.

BLANK v. FOOTMAN, PRETTY, & Co. (*a.*)

Patent, Designs, and Trade-Marks Act, 1883—Prior publication—Section 51—Marking articles sold.

B. invented a trimming for corsets, which he showed to H., a commission agent employed by him on terms which gave H. an interest in the articles sold, to obtain his opinion as to whether the article would "take." H. showed the trimming to S., one of his largest customers, who suggested certain alterations; he also showed it to other customers, who ordered a certain quantity. This took place before the 23rd of November, 1885, when B. registered the article under the Act. The orders given were not executed until after registration.

Held, that, though there had not been previous publication of the design by showing the article to H., the communication of the design by H. to S. might amount—and the communication to the other customers certainly did amount—to previous publication.

A trimming was made up into packets containing each a large number of yards, and surrounded with a paper band having thereon "Rd." and the registered number of the pattern.

Held, that the article was properly marked within rule 32 issued under the Act.

Trial of action.

This was an action brought by the plaintiff, the registered proprietor of a design for corset trimming, registered by him under the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), on the 23rd of November, 1885, and numbered 38521, for an injunction to restrain the defendants, their servants and agents, from infringing the plaintiff's registered design, and in particular from imitating the same or causing the same to be imitated, and from selling or offering for sale such imitations as aforesaid; an account of profits or an inquiry as to damages.

The plaintiff complained that between the months of April, 1886, and July, 1887, at various times not known to him, the defendant had imitated his design and sold trimmings in accordance with it.

The defendants by their defence denied (1) that they had, knowingly or otherwise, infringed any legal right of the plaintiff; alleged (2) that the design in question had not been duly registered in accordance with the Act and the rules; (3) that the provisions of the Act and the rules with regard to the marking of each article to which a registered design has been applied before delivery on sale of such articles had not been duly complied with; (4) that the design was not, at the date of registration thereof, a new or original design not previously published in the United Kingdom; (5) that the design was not one capable of being registered within the meaning of the Act, and that the plaintiff was not the proprietor of the design within the meaning of the Act.

(*a.*) Reported by J. W. GREIG, Esq., Barrister-at-Law.

With regard to prior publication, it appeared that previous to November 23, 1885, the plaintiff had shown samples of the design in question to one Hummel, a commission agent, who had some interest in the design, for the purpose of obtaining his opinion as to whether the design would "catch on." Hummel took portions of the samples and showed them, in the manner stated in the judgment, to customers of his, and actually obtained orders from some of them for considerable quantities of the material, and they kept small portions of the samples, though it was not clear from the evidence whether the orders were given for immediate execution or not. The orders, in fact, were not executed until after the date of registration, when the trimming was sent to the customers in parcels of some dozens of yards each, each parcel having a paper band round it marked with the word "Rd." and the registered number of the pattern on it. The cardboard box containing these parcels was marked in a similar way.

Section 51 of the Patents, Designs, and Trade-Marks Act, 1883, is as follows: "Before delivery on sale of any articles to which a registered design has been applied, the proprietor of the design shall cause each such article to be marked with the prescribed mark, or with the prescribed word or words, or figures, denoting that the design is registered; and if he fails to do so the copyright in the design shall cease, unless the proprietor shows that he took all proper steps to insure the marking of the article. Rule 32 issued under this Act is in the following terms: "Before the delivery on sale of any article to which a registered design has been applied, the proprietor of such design shall, if such article is included in any of the classes one to twelve in the third schedule hereto, cause each such article to be marked with the abbreviation 'Rd.' and the number appearing on the certificate of registration. . . ."

Aston, Q.C., Kennedy, Q.C., and *Ashton Cross.*— The point is whether there has been prior publication. The publication, such as it was, was accompanied by such circumstances of "confidentiality" as to prevent the protection afforded by the Act being lost.

Warmington, Q.C., and *Carpmael*, for the defendants. —The giving of a single order will constitute publication. In fact as long as the article gets into the possession for a beneficial purpose of another person that is publication. There was no "confidentiality" about the communication of these samples to customers of Hummel: *The Germ Milling Co.* v. *Robinson*, 3 Pat. Rep. 399. Then as to the marking, the mere marking of a piece of trimming is not sufficient, each article must be marked.

Aston, Q.C., in reply.—The question here is to what extent a confidential character can govern a publication. On this point *Humpherson* v. *Syer*, 4 Pat. Rep., pp. 184 and 407, is a useful guide. As to the point of marking, which is a subsidiary one, the marking need only be done in such a way as to guide the purchaser to the fact that the design has been so registered, and every separate inch of the trimming need not be marked. As to the main point, whether the design is new and original. To consult an expert in taste as to whether a design will "catch on," to use a trade term, is not publication.

KEKEWICH, J.—There is no occasion for me to decide, and I do not intend to decide, any question of morals; and fortunately, according to the view which I take of the case, there is no occasion for me to decide, and I do not intend to decide, any question of conflict of evidence. The plaintiff, through his agent in this country, Rudolph Blank, registered the design in question. The defendant has infringed that design—that is to say, he has made, manufactured, or sold an imitation of that design. He insists that he is entitled to do so, and that is the legal question which I have to decide on the facts. He is not so entitled if, as a matter of fact, this design was registered by Mr. Blank when it had not been previously published in the United Kingdom. So the question for decision resolves itself into this, Was the design previously published in the United Kingdom —previously, that is, to the 23rd of November, 1885, when it was registered?

Mr. Blank may be treated as a manufacturer in this country, though he is the agent of manufacturers in Germany. Mr. Hummel, the only representative, as I understand, of the firm, is a commission agent. He sells these goods and goods of this kind, and he has a bargain the terms of which have not been produced. I do not know whether it is in writing or whether it really rests on anything more than an understanding, but he has a bargain or understanding with Mr. Blank that he shall have the sole and exclusive right of selling goods of this class in the United Kingdom. Therefore Mr. Hummel has an interest in any design of Mr. Blank's in goods of this class, and though he is not a partner or in any way a partner he has that interest which makes him a person whom Mr. Blank would naturally consult before endeavouring to put any of that class of goods on the market. Mr. Blank, therefore, having sketched this design, shows it to Mr. Hummel. I cannot conceive that in doing so he would be publishing the design in any sense which could be placed on that word. Eventually, if that relation had not existed between the two parties, I see no reason why a designer should not call in an expert, a gentleman whom he knows to be experienced in the trade, likely to advise him well and whom he can trust, for the purpose of advising him before incurring further expense and trouble. I consider that Mr. Blank was only doing that which he was fairly entitled to do, the confidential character of the communication being a necessary incident of the relation between the two parties.

If it had stopped there one might have disposed of the case easily enough. But Mr. Blank was not content to stop there. Mr. Blank not only desired to get the full advice of Mr. Hummel, but he very naturally wished to ascertain, before he went any further, whether this was likely to take—that is to say, to find a market—and he certainly did intrust Mr. Hummel with the duty of soliciting orders and ascertaining from likely purchasers whether orders could be got for this design when it had been registered. Mr. Hummel accordingly consulted three different gentlemen, and I must deal with those three gentlemen in two classes. First there is Mr. Sewell. Mr. Sewell was Mr. Hummel's largest customer. He was a manufacturer who apparently purchased a large quantity of trimming of this kind and was well known to Mr. Hummel and was in constant communication with him. On the facts before me it appears Mr. Hummel showed this design to Mr. Sewell to get his advice and to ask him whether he would be prepared to give orders to be executed at a later period. He ascertained Mr. Sewell's views that the price, at that early date, was excessive, and no doubt there were other criticisms. Now Mr. Aston has cited to me, and I am content to take, the statement of Bowen, L.J., in *Humpherson* v. *Syer* as to what must be established in order to take a case of disclosure (I avoid the word publication) out of that publication which will destroy a patent or a design; Bowen, L.J., says: "I think when a man sends a patent to be made to a shop you must take what passes orally; you must take all the circumstances of the case and ask yourself whether there was any confidential relation established between the two parties—whether it was an implied term of the employment that the information should be kept by the shopman to himself, or whether he might afterwards, without any breach of good faith, use the matter, and use it as he chose." It is to be observed that that is applied by the Lord Justice, with reference to the facts of the

particular case before him, to information given to a shopman who is going to manufacture. That is to say, the Lord Justice is dealing with a case where, from the very necessity of the thing, some other person must be employed. The patentee, whether it be a chemical patent or a scientific patent or a machinery patent, frequently (generally, I might say) is unable to carry out the manufacture of the patented article in all its details himself personally. He must employ others, and for that purpose the Lord Justice says he is entitled to do so without in the slightest degree damaging his patented rights to claim protection, provided it is done confidentially. It is a step further to say that a man like Mr. Blank is entitled to take into his confidence a man like Mr. Hummel, who is only a commission agent —a man through whom the profits are to be made. He does not occupy, to my mind, a position at all similar to that of the shopman. But I think it is only a fair stretch of the same principle to say, as I have already said, that I think a man in Mr. Blank's position might consult with those through whom he would put goods on the market, particularly, as I say, having regard to the relation existing between them, and, doing it confidentially, without avoiding his rights to be obtained by registration. But is Mr. Hummel, when consulted in that way, to be entitled to go on to Mr. Sewell, or any other person or number of persons, and still use the same confidence, a delegated confidence placed in him by Mr. Blank? I do not know where it is to stop. If Mr. Hummel may consult Mr. Sewell in confidence, Mr. Sewell, who is a very large manufacturer I am told, may consult many of the persons for whom he works, and so on to the end of the chapter. I see no limit to the confidence which might be thus placed in one person after another. However, nothing was done, as I understand the evidence, by Mr. Sewell in the way of actually giving an order until very much later, when the thing had been completed, and I do not think it necessary to decide this case, I will not say on the mere exhibition, but on the mere disclosure of these sample patterns by Mr. Hummel to Mr. Sewell.

The other cases go a step further still. Here again we have another delegation of confidence illustrating what I said just now—namely, that I really do not know where this confidence is to stop. Mr. Hummell, in the course of his business, goes down to Portsmouth, and out of five gentlemen whom he visits in the course of business he selects two to whom he may disclose this novelty which is to take so well with the public in the ensuing spring. He does not put it into his bundle of patterns, but keeps it in an envelope in his pocket, but with the intention of disclosing it to these two selected customers, and he does show it to them and they are taken by it. This is some time before the registration. These two selected customers were pleased with the article, and they at once ordered a considerable quantity. It is said on the one hand that the order was to be executed immediately; that it was an order, the execution of which was only delayed by the period necessary for the manufacture of the article. I do not think that is to be relied on very much. It was said on the other hand that it was not to be executed until the design had been registered. Without weighing the testimony as regards that, I am not disposed to make much of that point either. The fact remains that the order was given and the order was accepted and the order was in due course executed. These two gentleman had samples shown to them, and, more than that, they had samples handed to them and samples were kept by them, and though they, wishing to play an honest part and knowing that it was only given to them as selected customers, did not exhibit those samples in the meantime, but kept them in their drawer or in a book or pocket, yet I see no reason whatever if they had been disposed, I will not say to be dishonest, but to act badly towards Mr. Hummel, why they should not thereupon have registered the design themselves, or had, at any rate, some stuff manufactured according to the design. Upon what ground Mr. Blank, in such a case, could have come here for an injunction to prevent their action I fail to see. The answer to him would have been (and as far as I can at present see it would have been a conclusive answer), "You have put it into their power to do so by trusting Mr. Hummel. It is Mr. Hummel you must go against if he has committed a breach of confidence," and Mr. Hummel would have said, "By no means; I was told to get orders, and I have done it." They had these samples there, and how much they had remains a mystery and I suppose will.

I cannot understand myself what meaning to give to the words "previously published" if that is not publication. In truth, the only ground on which the want of publication has been argued is the question of confidence. The confidence I have already dealt with, and I need say no more about it. To my mind, even if there were no publication to Mr. Sewell, which I do not think it necessary to decide, though I am disposed to think there was, I think there was certainly a publication in Portsmouth, not once but twice, and from that time forward it was impossible for Mr. Blank to register this design. That seems to me to be entirely conformable to the policy of the Act. The Act is intended, as I understand it, to protect those clever and industrious people who spend their time and their brains and money on designing a pattern which may or may not prove successful, but, as a work of art, is entitled to protection in order that it may also become a work of profitable commerce. But I see no reason for applying that to the case of a man who prefers to take his chance with the public, and who says "I will design and I will spend time about it and money too when I am quite satisfied that I shall find a market." That is not, to my mind, at all within the policy of the Act. I think Mr. Blank, not unnaturally at all, has been attempting to avail himself of the provisions of the Act in order to get protection of that which the Act never intended to be protected. I think there was no novelty in the design at the time when he registered it—that is to say, that it had been then previously published in the United Kingdom.

That being my opinion I may deal shortly with the rest of the case. As regards the marking the real point is under section 51, whether Mr. Blank loses the benefit of his registration—that is to say, whether the copyright in his design has ceased because the different articles which have been sold in the market have not been marked with the prescribed mark; or, rather, it is pressed further than that—namely, whether the articles sold in the market to which the designed article is affixed have not been marked, because it has not been argued that the trimming itself ought to be marked, and it would be impossible, and it is admitted that it would be impossible, to say where and how often it should be marked. It is obvious you could not mark every quarter of an inch, and that even if you could do it you could not, in lace work like this, preserve the thing as a useful thing if you were to stamp it with marks. Therefore it is not suggested that ought to be done. It is said that every article to which it is affixed, however small the piece, ought in some way or other to show that it is a registered design. That, to my mind, is entirely a misconstruction of the 51st section. The Act may or may not go far enough, but the Act says that a mark is to be placed before delivery on sale of any articles to which a registered design is to be applied. The marking is to be caused to be done by the proprietor of the design. If the proprietor of the design does not sell these articles of dress to which the trimmings are affixed the section lays no liability upon him to mark those articles of dress. What is to be marked by him is the article to which a registered design has

been applied—that is, the trimming. If he sells it in pieces of 144 yards he must mark the pieces of 144 yards. If, on the other hand, he sells small pieces—whether for patterns or for use—he must mark each small pattern, and mark in a way in which those things can be conveniently marked, by the tying on a label or by printing something on the packet in which it is. But he is not bound to mark anything but that which he sells.

I thought it right to express my opinion upon that, but on the greater question of publication or want of novelty I am in the defendants' favour, and there will be judgment for them and consequential relief.

Judgment for defendants, with costs, except that plaintiff has his costs on issue No. 3.

Solicitors for the plaintiff, *Wilson, Bristowe, & Carpmael.*

Solicitors for the defendants, *Vallance & Vallance.*

Q. B. Div. (Manisty and Stephen, JJ.) June 20.

THE GUARDIANS OF THE POOR OF SOUTHAMPTON v. BELL & TAYLOR. (*a.*)

Practice—Solicitor—Costs—Poor rate—Solicitor and client—Taxation by clerk of the peace—Poor Law Amendment Act, 1844 (7 & 8 *Vict.* c. 101), *s.* 39—*Attorneys and Solicitors Act,* 1843 (6 & 7 *Vict.* c. 73), *s.* 37.

Section 39 *of the Poor Law Amendment Act,* 1844, *which provides for taxation in certain cases by the clerk of the peace of the costs of a solicitor employed by a board of guardians, does not disentitle a solicitor to an order for taxation, as between solicitor and client, under section* 37 *of the Attorneys and Solicitors Act,* 1843.

Point of law raised by the pleadings.

Action for money had and received.

The plaintiffs, the guardians of the poor of Southampton, had advanced a sum of £600 to the defendants, their solicitors, for the purposes of an action. The latter delivered their bill of costs, and the plaintiffs applied to the clerk of the peace of Hampshire for taxation under section 39 of the Poor Law Amendment Act, 1844. The allocatur of the clerk of the peace taxed the bill down to £549 17s., and the costs of taxation amounted to £14 13s. 6d.

The plaintiffs now sought to recover the balance, after deducting the above amounts from the fund. In their statement of defence the defendants pleaded that they were not bound by a transaction under the Poor Law Amendment Act; that the alleged taxation was unreasonable and unfair; and that they were entitled to have their bill of costs taxed by a master of the High Court under section 37 of the Attorneys and Solicitors Act, 1843.

P. Gye, for the plaintiffs.—The defendants are bound by the taxation under section 39 of the Poor Law Amendment Act, which supersedes section 37 of the Attorneys and Solicitors Act, 1843: *Reg.* v. *Hunt,* 6 E. & B. 408.

J. Alderson Foote, for the defendants.—Section 39 does not affect the defendants' right, as between solicitor and client, to have their costs taxed by a master of the High Court. It merely provides that the allowance by the clerk of the peace is "*primâ facie* evidence of the reasonableness of the charge, and is not evidence of its legality." The jurisdiction to tax conferred on the High Court by the Attorneys and Solicitors Act, 1843, and the Judicature Act, 1873, can only be taken away by plain words: *In re Worth,* 29 W. R. 371.

P. Gye replied.

MANISTY, J.—I am of opinion that the provisions of the 39th section of the Poor Law Amendment Act, 1844, have not the effect of disentitling the solicitor to taxation as between solicitor and client under the 37th section of the Attorneys and Solicitors Act, 1843. The disallowance made by the allocatur could not, I think, be disputed between the guardians and the ratepayers, notwithstanding some expressions in *Reg.* v. *Hunt* to the contrary; but as between the guardians and their solicitors the question would remain open, and the action could be maintained. The other construction involves the strange result that the solicitor to the board, and, I presume, also all other persons with whom the board deals, must wait for payment till after the audit has taken place. It is to be remembered, too, that the auditor cannot be supposed to have any knowledge of the principles on which the taxation of a solicitor's bill proceeds. The defendants are entitled to an order for taxation of their costs by a master under section 37 of the Attorneys and Solicitors Act, 1843.

STEPHEN, J.—I agree. The object of section 39 is to prevent waste of the rates in useless expenditure, and is not intended to affect the liability of the guardians to their solicitors.

Order for taxation under the Attorneys and Solicitors Act, 1843; *the costs of the application to be the defendants' in any event, and the costs of the summons to be to be costs in the taxation.*

Solicitor for the plaintiffs, *Braikenridge,* for *Harfield,* Southampton.

Solicitors for the defendants, *Emanuel, Rowe, & Nathan,* for *Bell & Taylor,* Southampton.

Q. B. Div. (Field and Wills, JJ.) April 24.

STEVENS v. BARNET DISTRICT GAS AND WATER CO. (*a.*)

Water rate—"Annual value"—"Annual rack rent or value"—Waterworks Clauses Act, 1847 (10 *Vict.* c. 17), *s.* 68—*Barnet Gas and Water Act,* 1872 (35 & 36 *Vict.* c. *clxxxix.*), *s.* 56.

The Barnet Gas and Water Act, 1872 (*with which is incorporated the Waterworks Clauses Act,* 1847), *provides* (inter alia), *section* 56, "*the company . . . shall furnish . . . a sufficient supply of water . . . at any rate, on the annual rack rental of the house or part of a house or premises supplied if the same be let at rack rent, and on the annual value if and while the same is not let at rack rent, not exceeding* [so much].

Held, that "the annual rack rent" means the same as "the annual value," and does not mean "net annual value."

Case stated by justices under 20 & 21 Vict. c. 43 and 42 & 43 Vict. c. 49.

The appellant (Stevens) is the owner and occupier of a house and premises, Glebe House, Finchley, in the county of Middlesex.

The said house and premises are supplied with water by the Barnet District Gas and Water Co. (the respondents), who are a company incorporated under the provisions of the Barnet District Gas and Water Acts, 1872, 1883, and 1887.

By one of such special Acts, the Barnet Gas and

(*a.*) Reported by G. K. PALEY, Esq., Barrister-at-Law.

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

Water Act, 1872 (35 & 36 Vict. c. clxxxix.), it is provided as follows :—

Section 56.—The company shall, at the request of the owner or occupier of any house or part of a house in any street in which any pipe of the company is or shall be laid, or on the application of any person who, under the provisions of this Act, is entitled to demand a supply of water for domestic purposes, furnish to such owner or occupier or other person a sufficient supply of water for domestic use at any rate, on the annual rack rent of the house or part of a house or premises supplied if the same be let at rack rent, and on the annual value if and while the same is not let at rack rent, not exceeding the following (that is to say) :—If the annual rack rent or value does not exceed £20, £6 per centum per annum on such annual rack rent or value; if the annual rack rent or value exceed £20 and do not exceed £30, £5 10s. per centum per annum on such annual rack rent or value; and if the annual rack rent or value exceed £30, £5 per centum per annum on such annual rack rent or value. Provided always that the company shall not be bound to supply any house, part of a house, or premises for any less sum than 5s. per annum. Provided also, that in the case of any house or part of a house or premises used in part as retail or wholesale shops or warerooms the said rates shall be charged (if the annual rack rental shall amount to more than £20 and shall not exceed £50) on three-fourths only of such annual rack rental (and if the annual rack rental shall amount to more than £50), upon two-thirds only of such annual rack rental.

By the Waterworks Clauses Act, 1847 (10 Vict. c. 17), it is provided as follows :—

Section 68.—The water rates, except as hereinafter and in the special Act mentioned, shall be paid by and be recoverable from the person requiring, receiving, or using the supply of water, and shall be payable according to the annual value of the tenement supplied with water, and if any dispute arise as to such value the same shall be determined by two justices.

In December last the appellant preferred a complaint against the respondents, alleging that a dispute had arisen between him and the respondents, he being a person requiring, receiving, or using a supply of water from the respondents, as to the value of the premises so supplied with water, and that he required the annual value of the premises to be determined by two justices. The complaint was heard at petty sessions by the justices, and they fixed the annual value of the premises at £185.

The appellant was dissatisfied with this determination, and appealed.

Macmorran, for the appellant.—The premises are not let at an annual rack rent; therefore the water rate payable by the appellant ought to be assessed according to the "annual value" of the premises. The annual value mentioned in the special Act, the Barnet Gas and Water Act, 1872 (35 & 36 Vict. c. clxxxix.) and in the Waterworks Clauses Act, 1847 (10 Vict. c. 17) is the "net annual value" as distinguished from the gross value or gross estimated rental. Such annual value should be determined upon principles similar to those adopted in fixing the rateable or net annual value for the purposes of the poor rate.

He cited *Sheffield Waterworks Co.* v. *Bennett*, 21 W. R. 74, L. R. 7 Ex. 409; *Warrington Waterworks Co.* v. *Longshaw*, 9 Q. B. D. 145, 30 W. R. Dig. 220; *Bristol Waterworks Co.* v. *Wren*, 15 Q. B. D. 637, 33 W. R. Dig. 239; and *Dobbs* v. *Grand Junction Waterworks Co.*, 32 W. R. 433, 9 App. Cas. 55.

Finlay, Q.C., for the respondents.—The cases cited do not apply. The "annual value" mentioned in the statutes which have been referred to is the same as the annual rack rent—that is to say, the amount at which the premises may reasonably be expected to let from year to year, the tenant paying the usual tenant's rates and taxes and tithe commutation rent-charge (if any) and the landlord bearing the cost of repairs and insurance. The statute 5 & 6 Vict. c. 35, s. 60, (Income Tax Act) illustrates my meaning.

Macmorran replied.

Field, J.—This is a question of very great difficulty, for the Legislature, in a number of private Acts, has used in almost every case different words. Here we have a company or companies who undertake to supply the most necessary article of life, water, and they are confessedly industrial and commercial companies who only undertake to do the duty in consideration of a reasonable price for their article. Under ordinary commercial principles the price for the article would be that sum which, leaving a reasonable profit to the supplier, would be the market value of the article according to the quantity that is sold. A short three weeks ago every northern water company was in a state of terror as to what their condition would be in the month of August next, because it might turn out that they might have no water whatever to supply to their enormous number of customers. If it had been an ordinary commercial undertaking there can be no doubt whatever that the companies would have proceeded to raise their price at once. It is very difficult I quite agree, except you can proceed to charge by way of meter, to measure the amount used and charge for it accurately. If you charge by way of meter you measure your price according to the quantity of the article sold, but with a large population like that of London or Sheffield there are great difficulties in applying the principle of making the price according to the quantity. Therefore in lieu of that the Legislature has thought it right to regulate the prices according to the supposed wants of a house; and they estimate the supposed wants of a house by the rental which that house will fetch. They assume that a house with one room at a rental of one shilling a week will not consume so much water as a house with fifteen rooms let at £300 per annum. That is the theory. But it is absolutely unsound, because the quantity of water is by no means whatever in relation to the rental of a house. A house may command £1,000 a year in Grosvenor-square which would not command £300 a year in St. Giles's in the Fields, and therefore the thing is purely artificial; but it is convenient for the Legislature, and as the easiest means of ascertaining the rate a man ought to pay for his water they say, "we will take a graduated scale of a percentage upon" what? Now comes the difficulty. "Upon the annual value?" The words that we have to deal with here are, first of all, the language of the special Act, and, next, the language of the general Act. If we had only to look to the words of the general Act the words would be simply "annual value" and no more, but the general Act is not an effective Act of Parliament. Consolidation Acts have no force by themselves whatever, they apply to nobody and to nothing until the Legislature thinks it right to incorporate them in some special Act, and therefore in discussing the question we must look more to the special Act as governing the use of the words "annual value" in the general Act.

In discussing this question I shall take my last touch of the ground and I shall spring from the ground at *Dobbs' case*. I have had occasion to argue questions under these water company Acts and I have had occasion to decide them, but I really will not go back beyond the last point at which I am bound to acquire fresh force. I therefore spring from *Dobbs' case*. Starting from that point, it seems to me that the effect of the decision of the House of Lords is that, without anything more to qualify it, "annual value" means "net annual value," or in other words "rateable value," under the Parochial Assessments Act. If that is the effect of the judgment of the House of Lords, let us discuss

it. It is quite true, as urged by the appellant, that two of the learned lords at least—Lord Bramwell and Lord Selborne—do say that they would have arrived at the same conclusion even if the first Act had not been repealed. I was of opinion that the first Act had not been repealed, and the Court of Appeal were of that opinion I believe, but the House of Lords, or some members of it, thought it was. Although we pay the greatest possible respect to the learned lords, their opinions are not binding unless they are the *ratio decidendi* of the decision. But if they are not we must use our own judgments with reference to them. Therefore I disseverate the opinions expressed by Lord Bramwell and Lord Selborne, and say that, as I understand it, the decision of the House of Lords is that the words "annual value" taken by themselves mean "net annual value." But then Lord Blackburn, Lord Watson, and I think Lord Bramwell, agree that in construing any Act of Parliament you must give effect to every word of it if you can. Therefore, if a private Act of Parliament said no more than this, "the Consolidation Act shall apply to this undertaking," then I should be bound to hold that "the annual value" meant what the House of Lords said it meant, but if I am to apply a private Act of Parliament which contains, as it does in this case, a particular section, I must give effect to that section.

Now section 56 of the private Act says that the rate shall be "at any rate on the annual rack rent of the house or part of a house supplied if the house be let at rack rent," and if that be not so, "on the annual value." Now the argument of the appellant of necessity involves that two different meanings must be put on two different branches—that in the one case the annual rack rent would mean A., and in the second case the annual value would mean B. I cannot think that such was the intention of the Legislature. What possible reason could there be for supplying water to A. at a certain rate because he had actually let the house to somebody else, and at a different rate because he is the owner and occupier of the house? I find from the context a reason for coming to the conclusion that in this case the annual rack rent is the same as "the annual value."

WILLS, J.—I am of the same opinion. It is of very little use to look into the decisions on other Acts of Parliament, the words of which are not the same, or which are substantially different to the present one. In every case to which our attention has been called the words upon which the proceedings have gone have been so substantially different from what they are in the present case that no light is thrown upon the proper interpretation of the section of the private Act of Parliament by the interpretation that has been put on other Acts of Parliament in the several cases cited. Taking section 56 of the private Act in this case, which is the governing enactment, we find that the water rate is fixed at so much on the annual rack rent of a house if let at a rack rent, and on the annual value if not so let. It is impossible to suppose that a different measure of charge is to be put on the same house depending on whether or not it is let to a tenant. I think that the owner occupying himself must have been intended to be charged just the same as his tenant would have been, neither more nor less, and, inasmuch as where it is let there is no escaping from the test that is laid down by the Act—viz., that of the actual rack rent paid—it follows that you must put the same equivalent where the house is not let—that is to say, that you must read "annual value," not in its strict sense of "net annual value," but the kind of formal value which is equivalent in the case of a house not let to the annual rack rent of the house that is let. It is true that the 68th section of the Waterworks Clauses Act of 1847 is incorporated, and by that Act the water rates are to be payable according to the annual value simply; but then that is qualified that the water rates, "except as hereinafter and by the special Act mentioned, shall be paid" so-and-so. It is therefore clear that if there is an inconsistency between the two enactments that the general words were not meant to be of universal application, but give way to the special enactments which are directed to the particular case.

The decision of the House of Lords in *Dobbs* case really does not compel us to hold otherwise. The substance of that decision is that "annual value," when that expression is unqualified by anything else, means "net annual value." It that case it was a question whether it was qualified by anything else or not. The court said, *quacunque via*, the actual and formal meaning must be given to that expression, because, if there was any difference between the later Acts and the older Act, that older Act must give way, and if there was not they both meant the same thing. It is true there is an expression of opinion on the part of the court that they would have come to the same conclusion had the words in the former Act stood alone, but I must point out that these very words in the former Act are materially different from those in the present case. The order of the justices, therefore, will stand, and the costs of this appeal will be the respondents.

Appeal dismissed, with costs.

Solicitor for the appellant, *C. H. Roberts.*

Solicitor for the respondents, *C. A. Bannister.*

Prob. Div. & Adm. Div.
Divorce. } May 1.

BLACKHALL *v.* BLACKHALL AND CLARKE (*the Queen's Proctor intervening*). (*a.*)

Divorce—Costs to be paid by co-respondent—Queen's Proctor intervening—Failure of intervention—Petitioner's costs of intervention—Liability of co-respondent—Matrimonial Causes Act, 1857 (20 & 21 *Vict.* c. 85), *s.* 34—*Matrimonial Causes Act*, 1860 (23 & 24 *Vict.* c. 144), *s.* 7.

In a suit where the petitioner proved charges of adultery against his wife, and the court pronounced a decree nisi for dissolution and condemned the co-respondent in costs, and the Queen's Proctor subsequently intervened but failed to establish his charges, the court, on a separate application, refused to condemn the co-respondent in the petitioner's costs of the Queen's Proctor's intervention.

Application to condemn the co-respondent to pay the petitioner's costs of an unsuccessful intervention by the Queen's Proctor.

In the suit by the husband, the wife and co-respondent pleaded connivance and conduct conducing to the adultery, but at the hearing before Butt, J., they offered no evidence in support of these issues, and the court pronounced a decree *nisi* with costs against the co-respondent.

The Queen's Proctor obtained leave to intervene, alleging connivance and suppression of material facts, but the intervention was dismissed by Butt, J., who heard the case, but he refused to condemn the Queen's Proctor in costs.

Deane, for the petitioner, in support of the application.—These are "costs of the proceedings" which by section 34 of the Matrimonial Causes Act, 1857, the court has power to order the co-respondent to pay. The costs of an application to vary settlements has been held to be within those words: *Gill v.*

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

Gill and Hogg, 12 W. R. 808, 3 Sw. & Tr. 359. In *Crawford* v. *Crawford and Dilke*, 34 W. R. 677, the co-respondent had been dismissed from the suit, and therefore no analogy can be drawn from the refusal of the court to allow him to appear at the hearing of the intervention.

Clay, for the co-respondent.—The court has no power to award these costs. Section 34 cannot include costs of proceedings which could not have been taken at the date of that Act. The power of the Queen's Proctor to intervene is given by section 7 of the Matrimonial Causes Act, 1860, three years after the former Act.

Deane, in reply.—The same objection would apply to the costs incurred in an application for variation of settlement: see also 41 Vict. c. 19, s. 2.

BUTT, J.—In dismissing the Queen's Proctor's intervention in this case I observed that as it had been brought about mainly by the co-respondent he ought to pay the costs. The question now is, Have I the power to compel him to do so? I have only the power conferred by section 34 of the Matrimonial Causes Act, 1857, which enables the court "to order the adulterer to pay the whole or any part of the costs of the proceedings." The penalty of paying the costs of an intervention by the Queen's Proctor could not then have been in the contemplation of the Legislature, for the power of the Queen's Proctor to intervene in the manner in which he now does was not then given. Ought I, then, to say that, although not given in the original Act, the effect of incorporating that Act in subsequent Acts is to give the court that power? I do not think I ought. The co-respondent does not appear in the proceedings arising out of the Queen's Proctor's intervention, and I infer that he has not the right to appear. I therefore think it would be unjust to condemn him in the costs of a proceeding over which he has and can have no control, although I regret it in this case. The application must be refused, but without costs.

Solicitor for the petitioner, *Hardingham*.

Solicitor for the co-respondent, *Vanderpump*.

Prob. Div. & Adm. Div. Divorce. } April 17; May 8.

DREW v. DREW. (a.)

Divorce—Desertion—Intention at time of leaving—Subsequent inability to return—Imprisonment.

Where a man leaves his wife under circumstances which would make his absence amount to desertion if continued for two years, the fact that he is subsequently arrested and imprisoned will not prevent the two years running.

A man who had been guilty of embezzlement left his wife in January, 1886, with the statement that he was going to Ireland for a week to shoot. He had been committing adultery with a woman and had arranged to take her to Constantinople. He, however, left for New South Wales, and when arrested was living with another woman. He was brought back in custody, tried, and sentenced to ten years' penal servitude.

Held, that he had been guilty of desertion.

Hearing before Hannen, P., of an undefended cause on the wife's petition for dissolution of the marriage on the ground of adultery and desertion.

The marriage took place in 1870, and the parties cohabited together in London and the neighbourhood till January 16, 1886, when the respondent left his wife, telling her he was going to Ireland for a week's shooting.

He had been guilty of embezzlement, and instead of going to Ireland he absconded to New South Wales, where he was subsequently arrested at Sydney by a detective officer and brought back to this country, where he was tried, found guilty, and sentenced to ten years' penal servitude.

Prior to January, 1886, he had been in the habit of visiting and committing adultery with a woman, Theresa Schroeder, telling his wife that he had business out of town.

Before his flight he had proposed to Theresa Schroeder to go with him to Constantinople, and had provided her with an outfit which she marked with the name Adair, under which the respondent passed when he visited her, and he had also taken return tickets for the trip.

His wife received no communication from him after he left, and her letters to the address he had given in Ireland were returned, and she only learnt the truth as to his defalcations, &c., when she subsequently made inquiries from his father.

April 17.—*Inderwick, Q.C.*, and *Searle*, for the petitioner.

HANNEN, P., directed that the case should stand over for the evidence of the respondent's father.

May 8.—The father was called, and stated that he had no knowledge of his son's intention to leave the country, and only heard of the offence and that he had left some days after he had gone.

HANNEN, P.—On the former occasion I stated that I had determined to act on the consideration of what were the circumstances at the time this man left his wife, and if these led me to the conclusion that he intended to desert her the fact that he was afterwards brought back to this country in the custody of the police and then committed to prison, and so unable to return to his wife, would make no difference, but desertion so begun would continue, notwithstanding the fact that his imprisonment would have prevented his return to her.

I have now to consider whether, when he parted with his wife on January 16, 1886, he intended to desert her, and in order to come to a conclusion on that point I must consider the whole of his conduct. Frequently we come to such a conclusion when we find that a man has cohabited with some other woman. In this case I must confess that when I adjourned the case the effect of the woman Theresa Schroeder's evidence was not present to my mind.

It is proved that the respondent told his wife a false story, that he was going to Ireland for a week to shoot. No doubt those whom he expected to be in pursuit of him would thus not be put on his track. But there is this fact also, that he proposed taking this woman away with him. The fact that he was fleeing from the pursuit of justice does not exclude the idea that he intended to desert his wife, and the fact that he made arrangements with this other woman to go with him moreover shows that he had that intention. He seems to have broken his promise with this woman, although she had made preparations for accompanying him. There is also the further evidence of the detective officer who arrested him in Australia, and who found him living with another woman there on affectionate terms. I, therefore, come to the conclusion that at the time he made preparations for flight he also intended to and did desert his wife. I therefore pronounce a decree *nisi* on the wife's petition, and give her the custody of the children.

Solicitors, *Morice, Toller, & Blakesley*.

(a.) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

Prob. Div. & Adm. Div. } April 13.
Divorce. }

BIGWOOD v. BIGWOOD. (a.)

Divorce—Matrimonial Causes Act, 1884 (47 & 48 *Vict. c.* 68), *s.* 5—*Non-compliance with decree for restitution of conjugal rights—Adultery before decree—Desertion.*

The effect of section 5 *of the Matrimonial Causes Act*, 1884, *is to render the effect of non-compliance with an order for restitution of conjugal rights in all respects the same as desertion for two years, and therefore, where a husband had not complied with such order, and had committed adultery before the date of the petition on which such order was made, the court held that the wife was entitled to a decree* nisi *for dissolution.*

Hearing before the court of the wife's petition for dissolution of the marriage on the ground of adultery and desertion.

On the 28th of October, 1887, the court had, on the wife's petition, filed on the 15th of July, 1887, pronounced a decree for restitution of conjugal rights, ordering the husband to comply with it within fourteen days from the service of the order. The order was served on the 2nd of November, but the husband never complied with it. The husband had committed adultery on the 7th and 8th of May, 1887.

The cause was undefended.

Middleton, for the petitioner.

HANNEN, P.—Section 5 of the Matrimonial Causes Act, 1884, places non-compliance with an order for restitution of conjugal rights on the same footing as desertion for two years. I therefore pronounce a decree *nisi*.

Solicitors, *Piesse & Sons.*

Prob. Div. & Adm. Div. } Feb. 20.
Admiralty. }

"THE PATROCLUS." (b.)

Damage—Regulations for Preventing Collisions at Sea, art. 11—*Stern light.*

The white light required by art. 11 *of the Regulations for Preventing Collisions at Sea to be shown from the stern of a vessel overtaken by another vessel must be such as will secure the object of that article*—i.e., *as will indicate to the overtaking vessel the position of the overtaken vessel on which it is exhibited.*

This was an action of damage instituted on behalf of the ship *Cromartyshire* against the steamship *Patroclus*, and against the owners intervening as defendants.

Feb. 20.—The action was now heard before the President, assisted by two of the Elder Brethren of the Trinity House.

Hall, Q.C., and *A. Thomas*, for the plaintiffs.

Sir W. Phillimore, Q.C., and *J. P. Aspinall*, for the defendants.

HANNEN, P.—I agree with Mr. Hall that article 11 does not prescribe any particular light to be shown by the overtaken ship to the overtaking vessel. It only requires that the former vessel shall show a white light or a flare-up light. But it is obvious that the light must be a sufficient light for the purposes of the article in question—viz., that it shall indicate to the overtaking vessel the position of the vessel on which it is exhibited. As to the light shown in this present case from the stern of *The Cromartyshire*—one of the binnacle lamps of that ship—I am of opinion that the lamp is capable of being made to give a light which might be sufficient, if all circumstances happened to concur favourably.

At the same time I must say that the Trinity brethren are of opinion that this is not in itself a proper light. The lamp is made for a purpose totally different to that for which it was used on the instant in this case, for it is constructed to throw the light down, and not forward. It is made to hang in a particular position, and not to be carried in the hand. If anyone holds it its tendency is to point downwards, and so the light might well not be seen at all, except for a few yards distance. If, on the other hand, it is held up so as to make the light show, then there is a tendency for the chimney to be out of the perpendicular and the glass to get smoked. Further, there is the small scope of light which is visible from it.

I have therefore to consider whether, on the present occasion, it was a sufficient light. I do not think from its unfavourable construction this lamp was burning sufficiently on this night and giving the warning which was required of it. On behalf of *The Cromartyshire* it is said they had seen the steamer approaching them, and that they had shown the light for a considerable time—as much as ten minutes. On the other hand, on the part of *The Patroclus*, it is said that this light, such as it was, was never seen until just before the collision, and I have therefore to consider whether or not it was not seen sooner on board *The Patroclus* by reason of their being a bad look out on that vessel, or whether it was not seen sooner owing to it not being shown or it not being a proper light. With regard to *The Patroclus*, the evidence of those on board her has not been shaken as to there having been a good look out on *The Patroclus*. I think Mr. Aspinall's argument is entitled to great attention when he suggests that the stern light of *The Cromartyshire* was not shown for ten minutes or any such long period, but that it was only shown, as those from on board *The Patroclus* say, at a very late period of the transaction. [His lordship stated his reasons for holding that this suggestion was borne out by the evidence, and proceeded:—] I consequently come to the conclusion that the stern light of *The Cromartyshire* was exhibited at too late a time, and was seen as soon as it could be by those on board *The Patroclus*.

As regards the light itself, I find that it might, in some circumstances, be an efficient light, but that it would be so by accident only. I hold *The Cromartyshire* alone to blame for this collision.

Solicitors for the plaintiffs, *Ingledew, Ince, & Vachell.*

Solicitors for the defendants, *Thornely & Cameron.*

(a.) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

(b.) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

[THE END.]

THE

WEEKLY REPORTER

DIGEST

OF ALL THE

CASES DECIDED IN THE SUPREME COURT OF JUDICATURE;

WITH

APPEALS TO THE HOUSE OF LORDS AND PRIVY COUNCIL;

ALSO OF

CASES DECIDED IN THE SUPREME COURT OF JUDICATURE AND COURT OF BANKRUPTCY IN IRELAND;

FROM THE 24TH OF OCTOBER, 1887, TO THE 11TH OF AUGUST, 1888.

VOL. XXXVI.

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1888.

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TOGETHER ALSO WITH CERTAIN OTHER CASES REPORTED THEREIN DURING THE SAME PERIOD, BUT DECIDED PREVIOUSLY THERETO.

*** In the following Digest the letters H.L. after a case indicate the HOUSE OF LORDS; P.C., the PRIVY COUNCIL; C.A., the COURT OF APPEAL; CH.D., the CHANCERY DIVISION; KAY, J., MR. JUSTICE KAY; CHI., J., MR. JUSTICE CHITTY; NOR., J., MR. JUSTICE NORTH; STI., J., MR. JUSTICE STIRLING; KEK., J., MR. JUSTICE KEKEWICH; Q.B.D., the QUEEN'S BENCH DIVISION; Q.B.D., BANKY., the QUEEN'S BENCH DIVISION sitting in BANKRUPTCY; P.D. & A.D., the PROBATE, DIVORCE, AND ADMIRALTY DIVISION; C.C.R., the COURT FOR CROWN CASES RESERVED; CONS., the CONSISTORY COURT OF LONDON; L.C. (IR.), the LORD CHANCELLOR OF IRELAND; C.A. (IR.), the COURT OF APPEAL IN IRELAND; M.R. (IR.), the MASTER OF THE ROLLS IN IRELAND; V.C. (IR.), the VICE-CHANCELLOR OF IRELAND; L.J. (IR.), the LAND JUDGE, IRELAND; Q.B.D. (IR.), the QUEEN'S BENCH DIVISION, IRELAND; C.P.D. (IR.), the COMMON PLEAS DIVISION, IRELAND; EX.D. (IR.), the EXCHEQUER DIVISION, IRELAND; P. & D.D. (IR.), the PROBATE AND DIVORCE DIVISION, IRELAND; BANKY. (IR.), the COURT OF BANKRUPTCY, IRELAND.

*** THIS DIGEST CONTAINS THE NAMES OF ALL CASES REPORTED UP TO THE 1ST OF SEPTEMBER, 1888.

ABANDONMENT.—See DOMICILE, 1; MARINE INSURANCE, 6.

ACCEPTANCE.—See JURISDICTION, 14.

ACCORD and SATISFACTION.—See CONTRACT, 1.

ACCOUNT:—

Acquiescence — Ratification. — Acquiescence and ratification must be founded on a full knowledge of all facts, and must relate to a transaction to which effect can be given by acquiescence and ratification.

The accounts on a bank in liquidation had been changed so as to represent the bank as a debtor in respect of a sum borrowed by the manager for his own purposes.

Held, that the doctrine of acquiescence and ratification by the liquidator could not render the bank liable for the debt.—*Banque Jacques Cartier* v. *Banque De Montreal*, P.C.—13 App. 111.

See also DISCOVERY, 10; INJUNCTION, 10; JURISDICTION, 12; MORTGAGE, 1, 15, 17; PRACTICE, 31, 38; PRINCIPAL AND AGENT, 1.

ACKNOWLEDGMENT.—See HUSBAND AND WIFE, 3; LIMITATIONS, STATUTE OF, 1; MORTGAGE, 5; WILL, 54.

ACT of BANKRUPTCY.—See BANKRUPTCY, 1, 2.

ADEMPTION.—See ADMINISTRATION, 1; WILL, 1—3.

ADMINISTRATION:—

1. *Ademption—Life insurance policy—Lunacy—Payment of debt by committee.*—A. bequeathed to his executors and trustees a policy of insurance on his own life in trust to pay two debts, and to pay the balance, if any, to B. A. paid one debt and became a lunatic. His committee paid the other debt.

Held, that B. was entitled to the proceeds of the policy after deducting the debt paid by the committee.—*Larking* v. *Larking*, CH.D. NOR., J.—37 Ch. D. 310; 57 L. J. Ch. 282.

2. *Creditor—Pauper lunatic—Maintenance—Grant to guardians.*—A. for six years preceding her death was supported as a pauper lunatic by the guardians of the L. Union. After her death it was discovered that she was entitled to an annuity from the National Debt Commissioners.

Held, that the guardians of the union were entitled to a grant of administration as creditors.—*Lambeth Guardians* v. *Next of kin of Bradshaw*, P.D. & A.D.—57 L. T. 86.

3. *Deficient estate—Charge on real estate—Back rents.*—A. devised real estate to B., charged with the payment of a life annuity and of various legacies, to be paid, as to one moiety, at the expiration of six months after his decease, and, as to the other moiety, at the expiration of six months after the decease of the annuitant. B. became bankrupt, and the trustee of his estate entered into possession of the land. Arrears of the annuity and parts of the legacies remained unpaid. The land was sold, and the proceeds were insufficient to satisfy the arrears of the annuity and legacies.

Held, upon a motion by persons entitled to the arrears of the annuity and the legacies, that they were not entitled to have the back rents of the land applied in satisfaction of such arrears.—*Allen* v. *Longstaffe*, CH.D. NOR., J. 413—37 Ch. D. 48; 57 L. J. Ch. 420; 57 L. T. 848.

4. *Discretion of court—Ord.* 55, *r.* 10.—A testator's direction to his executors to have his estate administered by the court does not exclude the discretion of the court to refuse to make an order for administration; but the court will give weight to such a direction when considering whether an administration order should be made.—*Jones* v. *Hawkins*, C.A.—38 Ch. D. 319.

5. *Intestacy — Distribution — Next of kin* — Per stirpes *or* per capita—*Statute of Distributions* (22 & 23 *Car.* 2, *c.* 10), *ss.* 3, 5—7.—The testatrix, a widow, died intestate as to a share of her residuary personal estate, owing to the death of a legatee in her lifetime. She had only two children, a son and a daughter, both of whom died before her. Three children of the son and one child of the daughter survived the testatrix.

Held, that, under the Statute of Distributions, the grandchildren took the share *per stirpes* and not *per capita*.

In re Ross's Trusts, 20 W. R. 231, L. R. 13 Eq. 286, approved.—*Walker* v. *Gammage*, CH.D. NOR., J. 548—37 Ch. D. 517; 58 L. T. 722.

6. *Intestacy—Marriage in Ireland—Divorce in India—Grant to next of kin.*—Where a British subject married in the United Kingdom obtained a divorce from his wife in India, the court granted administration to his next of kin to the exclusion of the divorced wife.—*In the Goods of Naves*, P.D. & A.D. 528—57 L. J. P. D. & A. 19; 58 L. T. 529.

7. *Mortgage — Trade debts — Locke King's Act Amendment Act*, 1867 (30 & 31 *Vict. c.* 69), *s.* 1.—A. by his will directed his executors to appropriate the moneys to arise from certain policies on his life, in payment of his private debts, not being trade debts, and funeral and testamentary expenses, and bequeathed his residuary personalty, subject to the payment of his trade debts, which he declared should be a charge on his personal estate, to his son, and devised his real estate to his daughter. At the date of his death he owed a debt admitted to be a trade debt to his bankers, to secure which he had deposited the title deeds of his real estate.

Held, that the provision in the will as to the payment of trade debts amounted to a declaration of intention contrary to the rule established by Locke King's Act, and that the trade debt was payable out of the testator's personal estate, and not out of the real estate, the title deeds of which were deposited with the bankers to secure the debt.—*Colston* v. *Roberts*, CH.D. NOR., J. 663—37 Ch. D. 677.

8. *Priority—Costs—Administration action—Probate action.*—If the costs of a probate action are ordered to be paid out of the estate, and an administration action is afterwards instituted, and the estate is deficient, the costs of the probate action have priority next after the costs of the administration action and before any debts.—*Kelly* v. *Kelly*, M.R. (Ir.)—21 L. R. Ir. 243.

9. *Priority—Crown debt—Principal and surety—Mercantile Law Amendment Act*, 1856 (19 & 20 *Vict. c.* 97), *s.* 5.—A surety who has paid a debt due to the Crown from his deceased principal debtor is entitled to stand in the place of the Crown, and to be admitted as a creditor of the estate of the principal debtor in priority to all other creditors.—*Maxsidy* v. *Churchill*, CH.D. NOR., J. 805.

10. *Priority—Marshalling—Mortgage—Annuity—Exoneration of real estate—Will—Construction—Uncertainty—Locke King's Act* (17 & 18 *Vict. c.* 113), *s.* 1.—A., by his will, after bequeathing £250 to his son B. and other legacies, directed that his trustees should, in the first place, pay out of his personal estate all his debts, including specialty debts, in full exoneration of the real estate. He gave to his wife an annuity for life, and six perpetual annuities to his daughter and five sons, to be first, second, third, fourth, fifth, and sixth charges on the real estate, as well as two smaller annuities. He also bequeathed to his son H., if "by legislation or otherwise he shall lose his appointment, without any adequate retiring allowance," a perpetual annuity of £100, to be charged on the residuary estate. He gave his real and personal estate to the trustees, and directed it, within legal limits, to accumulate, and declared that it should, so far as might be necessary, with the consent in writing of his wife, or, after her death, at the discretion of the trustees, be applied "to meet contingencies which may be caused by vacancies, repairs, or casualties in my family." B. and M. were appointed executors and trustees. The real estate produced £660 a year, but was subject to two mortgages. It was more than enough to pay the annuities, if the mortgages were paid out of the personal estate, which was sufficient for the mortgages and other debts.

Held, (1) that the mortgages were payable primarily out of the mortgaged land; (2) that the annuities were charged on the real estate; (3) that the residuary gift was void for uncertainty, but the gift to H. was not void; (4) that Locke King's Act did not preclude the annuitant's right to have the assets marshalled. — *Buckley* v. *Buckley*, M.R. (Ir.)—19 L. R. Ir. 544.

11. *Priority—Savings bank—Transfer to Bankruptcy Court—Savings Bank Act*, 1863 (26 & 27 *Vict. c.* 87), *s.* 14—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 40, 125.—The provision of section 14 of the Savings Bank Act, 1863, by which a savings bank is enabled to obtain payment of a debt due to it from an officer of the bank in preference to the other creditors of the officer, is repealed by section 40 of the Bankruptcy Act, 1883, so far as regards administration in bankruptcy, but not as regards the administration of an estate in the Chancery Division; and section 10 of the Judicature Act, 1875, does not incorporate the provisions of section 40 of the Bankruptcy Act, 1883, into the rules of administration of an estate in the Chancery Division so as to take away such right of preference of a savings bank; and therefore, in the administration in the Chancery Division of the insolvent estate of an officer of a savings bank, the bank is entitled to payment of a debt in preference to the other creditors; but the court may, under section

125 of the Bankruptcy Act, 1883, on the application of a creditor, order a transfer of the proceedings to the Court of Bankruptcy.—*Jones* v. *Williams*, CH.D. NOR., J. 34—36 Ch. D. 573; 57 L. J. Ch. 264; 57 L. T. 756.

12. *Priority — Specialty creditor — Preference by executor.*—An executor may pay a simple contract creditor in preference to a specialty creditor.—*Drury* v. *Ormond*, Q.B.D.—58 L. T. 24.

13. *Receiver—Originating summons.*—In a creditor's administration action, commenced by originating summons, a receiver may be appointed immediately after service of the summons and before the order for administration.—*Drake* v. *Franche*, CH.D. NOR., J.—37 L. J. Ch. 437.

14. *Revocation—Grant to creditor—Bankruptcy of administrator—Grant to next of kin.*—Where a grant of administration had been made to a creditor, who, after satisfying his debt, became a bankrupt and absconded, the court revoked the grant without citing him, and made a fresh grant to the next of kin.—*In the Goods of Bradshaw*, P.D. & A.D. 848—57 L. J. P. D. & A. 36.

15. *Will — Mortmain — Charity — Residue — Marshalling assets.*—T. gave all her real and personal estate to trustees upon trust to convert and pay debts and legacies; she gave several legacies, and directed that they should, in the first instance, be payable out of her real and leasehold estate. She then directed her trustees to divide the residue into three equal parts between three charities, and provided "that the foregoing charitable legacies shall be paid exclusively out of such part of my pure personal estate as is legally applicable for that purpose." The testatrix left pure and impure personalty. The only real or leasehold estate she possessed was at Cape Town, and not subject to the Mortmain Acts.

Held, that the provision for payment of the charitable legacies was equivalent to a direction that the residue should consist of pure personalty; that it was a direction to marshal the assets in favour of the charities; and that the legacies must be paid out of the real estate at Cape Town, and the balance of the legacies and the debts and administration expenses must be paid out of the impure personalty, leaving the pure personalty for the charities.—*Ravenscroft* v. *Workman*, CH.D. KAY, J. 424—37 Ch. D. 637; 57 L. J. Ch. 682; 58 L. T. 469.

16. *Will—Tenancy for life—Apportionment—Interest — Capital — Company — Shares — Bonus.*—A. bequeathed the residue of his personal estate to B. upon trust to permit his wife to receive the interest, dividends, and annual income during her life, and subject thereto to B. absolutely. Part of the residuary estate consisted of shares in a company. The articles of association of the company provided that the directors might set aside out of the profits such sum as they thought proper as a reserved fund. After the death of the testator the directors distributed this reserved fund and certain other undivided profits to the shareholders as a bonus dividend, allotted at the same time new partly paid-up shares, and applied the bonus to the part payment of the new shares

Held, that the company did not pay or intend to pay any sum as dividend, but intended to and did appropriate the undivided profits dealt with as an increase of the capital stock in the concern; and that the bonus dividend was part of the capital of the testator's estate, and the tenant for life was not entitled thereto as being interest, dividend, or annual income.

Decision of the Court of Appeal (33 W. R. 621, 29 Ch. D. 635) reversed.—*Bouch* v. *Sproule*, H.L. 193—36 Ch. D. 385; 56 L. J. Ch. 1037; 57 L. T. 345.

17. *Will annexed—Colonial law—British Guiana —Admistrator-General—Grant to attorney.*—A., who was domiciled in British Guiana, and had property there and in England, by his will appointed two executors. By the law of British Guiana an executor is allowed a period of six months, which may be extended, from the death of his testator in which to deliberate whether he will act as executor or not, and during that period he may do certain acts and things necessary to protect the estate. One executor was resident in England, the other in the colony. The latter administered the estate on his own behalf and as attorney of the executor resident in England. Under the provisions of the law in force prior to the 1st of July, 1887, he ultimately nominated the Administrator-General of the colony to act as executor on his behalf, but did not affect the rights of the other executor.

The court made a grant of letters of administration, with the will annexed, to the attorneys in this country of the Administrator-General, until such time as he or the executor resident here should apply.—*In the Goods of Black*, P.D. & A.D. 400—13 P. D. 5; 57 L. J. P. D. & A. 20.

18. *Will annexed—Infant—No executor appointed —Grant to guardian.*—A. by his will devised his property to his children, who at his death were minors, and directed that a trustee should be appointed by the court under the statutory powers in that behalf, and such trustee should also be executor, but that no relation of his should be so appointed.

The minors' relatives having been shown by affidavit to be undesirable persons to receive the grant, being persons unknown to the children, or living at a distance, or whose whereabouts were unknown, the court granted letters of administration, with the will annexed, for the use and benefit of the minors until one of them should attain the age of twenty-one, to a guardian elected by them without requiring notice of the motion to be served on their relatives.—*In the Goods of Webb*, P.D. & A.D. 847—13 P. D. 71; 57 L. J. P. D. & A. 36; 58 L. T. 683.

See also COSTS, 1—6, 8, 31, 41; JURISDICTION, 1 LANDLORD AND TENANT, 9; SOLICITOR, 13; WILL, 61.

ADMIRALTY.—See COUNTY COURT, 10, 11; DAMAGES, 5—8; EVIDENCE, 4; PRACTICE, 24.

ADMISSION.—See ESTOPPEL, 7; EVIDENCE, 1.

ADULTERATION:—

1. *Drug—Opium—British* Pharmacopœia—*Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 6—*Pharmacy Act*, 1867 (30 & 31 *Vict. c.* 121), *s.* 15—A man who sells tincture of opium which is not up to the standard laid down in the British *Pharmacopœia* is liable to be convicted of selling "a drug which is not of the nature, substance, and quality demanded" under section 6 of the Sale of Food and Drugs Act, 1875, although the purchaser did not specify any particular standard.—*White* v. *Bywater*, Q.B.D. 280—20 Q. B. D. 582.

2. *Knowledge of seller—Sale of Food and Drugs Act*, 1875, *s.* 6.—Absence of knowledge in the defendant that the article sold was adulterated is no defence to a prosecution under section 6 of the Sale of Food and Drugs Act, 1875.—*Betts* v. *Armistead*, Q.B.D. 720—20 Q. B. D. 740; 58 L. T. 811.

ADVANCEMENT.—See WILL, 4.

ADVOWSON.—See CHARITY, 1

AFFIDAVIT.—See ATTACHMENT, 1; BILL OF SALE, 11, 12; DISCOVERY, 1, 2, 4; EVIDENCE, 2—6; PARTITION, 2; PRACTICE, 1; TRUSTEE, 4.

AFTER-ACQUIRED PROPERTY.—See BILL OF SALE, 1; MORTGAGE, 2; POWER OF APPOINTMENT, 3; SETTLEMENT, 1, 2; WILL, 5, 6.

AGRICULTURAL HOLDINGS ACTS. — See COUNTY COURT, 1; LANDLORD AND TENANT, 1.

ALIMONY.—See BANKRUPTCY, 19, 32; DIVORCE, 3, 4; HUSBAND AND WIFE, 4; SOLICITOR, 2.

AMBIGUITY.—See EVIDENCE, 16.

AMENDMENT.—See CORONER, 1; ELECTION LAW, 5, 6, 11; HIGHWAY, 5; PATENT, 1, 2, 6, 10; PRACTICE, 21, 22; WILL, 63.

ANNUITY.—See ADMINISTRATION, 10; POWER OF APPOINTMENT, 4; WILL, 7—10.

APOTHECARIES ACT.—See MEDICAL ACT.

APPEAL.—See ATTACHMENT, 8; BANKRUPTCY, 3, 4, 16; BUILDING SOCIETY, 5; COSTS, 7, 8, 32, 42, 47; COUNTY COURT, 1—4, 13; DIVORCE, 3, 12; FRIENDLY SOCIETY; JUSTICE OF THE PEACE, 2, 11; POOR RATE, 1, 2; PRACTICE, 1—12, 57; PRIVY COUNCIL, 1, 2; SHIPPING, 30.

APPOINTMENT, POWER of.—See POWER OF APPOINTMENT, 1—6.

APPORTIONMENT.—See ADMINISTRATION, 16; LOCAL GOVERNMENT, 8, 9, 11; METROPOLIS MANAGEMENT ACTS, 3; VENDOR AND PURCHASER, 4.

ARBITRATION:—

1. *Submission—Revocation—Misreception of evidence—3 & 4 Will. 4, c. 42, s. 39.*—Certain matters in dispute were referred to an arbitrator under a provision in a written contract. The arbitrator received evidence which was objected to as varying the written contract.

Held, that the court had power to give leave to revoke the submission to arbitration if the arbitrator had decided wrongly on a question of law which was within his jurisdiction.

Judgment of the Court of Appeal reversed.—*East and West India Dock Co.* v. *Kirk*, H.L.—12 App. 738; 57 L. J. Q. B. 295.

2. *Submission—Revocation—Stay of proceedings—Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 11.—An arbitration clause provided that any disputes which should arise between the parties should be referred to two arbitrators, who were named. A dispute having arisen, the defendant desired to proceed to arbitration; the plaintiffs nevertheless commenced an action against the defendant, and revoked their submission.

Held, that the defendant was not entitled to have the action stayed under section 11 of the Common Law Procedure Act, 1854, because, the submission having been revoked, there was no subsisting agreement to refer capable of being carried into effect.—*Deutsche Springstoff Actien Gesellschaft* v. *Briscoe*, Q.B.D. 557—20 Q. B. D. 177; 57 L. J. Q. B. 4.

3. *Submission—Rule of court—Revocation—3 & 4 Will. 4, c. 42, s. 39—Common Law Procedure Act*, 1854, *s.* 17.—A contract for the execution of certain works provided that any dispute arising thereunder should be referred to a particular arbitrator, and also that, so far as applicable, the provisions of the Common Law Procedure Act, 1854, should apply to the arbitration. Disputes arising under the contract were referred to arbitration by one of the parties, and thereupon the other party revoked the submission.

Held (affirming the decision of the Queen's Bench Division), that the clause in the contract applying the provisions of the Common Law Procedure Act, 1854, amounted to an agreement in the submission that the submission should be made a rule of court within 3 & 4 Will. 4, c. 42, s. 39, and that the submission was not revocable at the will of either party.—*In re Mitchell*, C.A. 873.

4. *Umpire — Appointment by arbitrators.*—An arbitrator intrusted with the duty of appointing an umpire is not entitled to leave the appointment to chance.—*Pescod* v. *Pescod*, CH.D. KAY, J.—58 L. T. 76.

5. *Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 6, 22, 25, 27—*Minerals—Compensation—Costs—Special case — Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 34.—The plaintiffs were lessees of a coal mine underlying land which the defendants had acquired for the construction of a reservoir under a special Act incorporating the Waterworks Clauses Act, 1847. The plaintiffs were working three seams of coal, and were preparing to work another, called the C. seam, and they gave notice to work the C. seam under, and within the limits of, the land of the defendants, who gave notice to treat for the purchase of one of the other seams. An arbitrator found that the working of the coal was not yet near enough to the reservoir for the mines to be exposed to risk from it, but that, assuming the defendants to purchase and retain only the working as to which they had given notice, the defendants would not get more than fifty per cent. of the C. coal, if they worked prudently without right of compensation.

Held (Lord Esher, M.R., dissenting), that the arbitrator could not award compensation for the fifty per cent of C. coal which could not be obtained; and that the costs of a special case stated by the arbitrator were not costs incidental to the arbitration within section 34 of the Lands Clauses Consolidation Act, 1845.—*Holliday* v. *Mayor, &c., of Wakefield*, C.A.—20 Q. B. D. 699.

See also BUILDING SOCIETY, 1, 1a; CONTRACT, 1; COSTS, 28, 39; FIRE INSURANCE; LOCAL GOVERNMENT, 1; NATAL, LAW OF; RAILWAY, 1.

ARTISANS' DWELLINGS ACT:—

Charging order—Notice — "Owner" —Artisans' Dwellings Act, 1868 (31 & 32 *Vict. c.* 130), *ss.* 3, 5, 7, 25.—In July, 1886, a notice was served by the M. Vestry, under sections 5 and 7 of the Artisans' Dwellings Act, 1868, upon H., notifying the report of the surveyor that certain houses were unfit for human habitation. H. at that date was lessee of the houses for a term which expired on the following Michaelmas Day, and was also assignee of a reversionary interest in the same for a lease of twenty-one years, to begin on the said Michaelmas Day. An order made on the report in October, 1886, was subsequently varied on appeal in January, 1887. Upon completion by H. of the works ordered, a charging order was made, on his application, upon the premises.

Held, that H. was, at the time when the notice was served, an "owner" within section 3 of the Act of 1868, as having a possessory interest in the premises for a term of more than twenty-one years; that the notice was properly served on him; and that the liability or benefits under the further proceedings accrued from the date of the notice, and not from the date of the order for the works.—*Reg.* v. *Marylebone Vestry*, Q.B.D. 271—20 Q. B. D. 415; 57 L. J. M. C. 9; 58 L. T. 180.

ASSAULT. — See EVIDENCE, 9, 11; JUSTICE OF THE PEACE, 1, 11; RAILWAY, 10.

ASSIGNMENT.—See BANKRUPTCY, 1, 29; BILL OF SALE,

2; Bond; Building Society, 4; Company, 10; Copyright, 3; Covenant, 1; Deed, 1; Gift, 1; Landlord and Tenant, 5.

ATTACHMENT:—

1. *Contempt of court—Barrister—False affidavits.*—A., a barrister, who had been joined as a defendant, appeared as counsel for the defendants, and knowingly permitted false affidavits to be used.

Held, that A. was liable to attachment for contempt of court.—*Linwood* v. *Andrews*, ch.d. kay, j.—58 L. T. 612.

2. *Contempt of court—Divorce suit—Advertisement—Evidence of adultery—Offer of reward.*—A husband against whom a petition had been filed for a dissolution of marriage on the ground of adultery and cruelty, and who had not made any counter-charge of adultery in his answer, printed and circulated in the neighbourhood where his wife was residing handbills offering in his own name a reward of £25 for "full particulars and legal evidence of the confinement of a certain young woman of a female child, supposed not registered," on or just before a certain date.

The court issued an attachment against the respondent for contempt of court.—*Butler* v. *Butler*—13 P. D. 73; 57 L. J. P. D. & A. 42; 58 L. T. 563.

3. *Contempt of court—Imprisonment—Terms of discharge.*—In 1877 D. brought an action to recover certain houses, but it was decided that she had no title. She continued to assert her claim by legal proceedings; and an injunction was granted restraining her and her agents from further molesting the owner and tenants of the property. She made another attempt to take possession and was imprisoned for contempt of court. She refused to undertake to abandon her claim or to abstain from further efforts to take possession.

The court afterwards discharged her on the following terms:—The injunction was to last for the term held by the plaintiff; in case of a breach of the injunction the Official Solicitor, on the plaintiff's application, was to bring the offenders before the court and to enforce performance of the order, and the defendant was not to be allowed to issue any writ or make any application without leave of a judge at chambers.—*In re Davies*, q.b.d.—21 Q. B. D. 236.

4. *Contempt of court—Solicitor—Judge's chambers.*—After the hearing of an application before the judge in chambers, a solicitor who was engaged in the case, after the parties had left the judge's chambers and gone into the adjoining hall, began to call the solicitor for the other side foul and offensive names in connection with the proceedings before the judge, and continued doing so while going downstairs until they reached the entrance to the building, when he shook his fist in the other solicitor's face, though he did not actually strike him.

Held, that such conduct was an interference with the administration of justice in connection with the proceedings at chambers, and, as the judge in chambers was engaged in the exercise of his judicial functions as a judge of the High Court, was a contempt of the court of which the judge was the representative, and the court had power to commit for contempt.—*In re Johnson*, c.a. 51—20 Q. B. D. 68; 57 L. J. Q. B. 1; 58 L. T. 160.

5. *County court—Contempt of court—Form of order—Uncertainty—County Court Act*, 1846 (9 & 10 *Vict. c.* 95), *s.* 113—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 4—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 89.—An order was made in an action in a county court upon H., as acting manager of a partnership fund, to pay into court within fourteen days the sum of £65 odd, and to deliver up certain documents. H. did deliver up the documents, but failed to pay in the money, whereupon an order of committal was made out by the county court judge, on the ground that H., in his fiduciary position, had been guilty of contempt of court by neglecting to obey the previous order. The committal order recited the terms of the original order, but did not specify any particular breach.

Held, that it was immaterial whether the process of committal was by an order of committal or a writ of attachment, since the distinction no longer exists in chancery practice, according to *Harvey* v. *Harvey*, 33 W. R. 76, 26 Ch. D. 644; but that the order was bad for uncertainty, since it did not specify in what particular H. was guilty of contempt, so as to enable him to purge his contempt.—*Reg.* v. *Judge of Lambeth County Court*, q.b.d. 475.

6. *Garnishee order—Poor rates—Guardians—Discretion of judge.*—An order will not be made against a board of guardians attaching poor rates due to them to satisfy a judgment for goods supplied to such guardians.—*Murphy* v. *Belmullet Guardians*, q.b.d. (Ir.)—22 L. R. Ir. 215.

7. *Injunction—Service of order—Disobedience.*—An attachment may be issued for breach of an injunction after service of the order, even if no writ of injunction has been actually issued.—*Mining Co. of Ireland* v. *Delany*, v.c. (Ir.)—21 L. R. Ir. 8.

8. *Solicitor—Default—Receiving order—Discretion—Appeal—Debtors Act* (32 & 33 *Vict. c.* 62), *s.* 4, *sub-section* 4—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 9, 10.—On an application for liberty to attach a solicitor for contempt in not paying a sum of money ordered to be paid by him where a receiving order in bankruptcy subsequently to such order had been made, North, J., held that he had jurisdiction to order such attachment to issue, but, in the exercise of his discretion under section 10 of the Bankruptcy Act, 1883, he refused the application, on the ground that no benefit could therefrom accrue to the applicants, and that the bankruptcy proceedings might be thereby embarrassed.

Held, that the Court of Appeal would not interfere with the discretion so exercised.—*In re Wray*, c.a. 67—36 Ch. D. 138; 56 L. J. Ch. 737; 56 L. J. Ch. 1106; 57 L. T. 605.

9. *Solicitor — London agent — Debtors Act*, 1869 *s.* 4, *sub-sections* 3, 4.—The defendant, who was a London agent for a country solicitor, made default in payment of a sum ordered to be paid by him in an action for an account by the country solicitor.

Held, that A. was liable to imprisonment under section 4, sub-section 3, of the Debtors Act, 1869, as a person acting in a fiduciary capacity, but not under section 4, sub-section 3, as a solicitor ordered to pay in his capacity of an officer of the court.—*Litchfield* v. *Jones*, ch.d. nor., j. 397—36 Ch. D. 530; 57 L. J. Ch. 100; 58 L. T. 20.

10. *Trustee—Debtors Act*, 1869, *s.* 4.—The remedy afforded by the Debtors Act, 1869, in respect of default by a trustee, is intended to be given only as between trustee and *cestui que trust*, and not for a creditor, where the person against whom the remedy is sought is not a trustee for the creditor.—*London and County Banking Co.* v. *Firmin*, ch.d. kay, j.—57 L. T. 45.

11. *Trustee—Default—Discretion of judge—Ord.* 42, *r.* 3—*Ord.* 44, *r.* 2—*Debtors Act*, 1869, *s.* 4, *sub-section* 3—*Debtors Act*, 1878 (41 & 42 *Vict. c.* 54), *s.* 1.—Section 4, sub-section 3, of the Debtors Act, 1869, only applies when default is made in payment, not of a mere ordinary debt but of a trust sum.

On an application, under ord. 44, r. 2, for leave to issue a writ of attachment against a trustee, to enforce a judgment for the payment of money, it is not necessary, in order to bring the case within section 4, sub-section 3, of the Debtors Act, 1869, to show that the trustee has been guilty of any fraud. Any default, even without fraud, made by a trustee in payment of any sum in his possession or under his control, which he has been ordered to pay, is sufficient to justify the court in making an order for attachment.

When a judge, on an application for leave to issue a writ of attachment against a trustee, makes an order for attachment in the exercise of the discretion given to him by the Debtors Act, 1878, the Court of Appeal will not interfere on the merits.

Crowther v. *Elgood*, 35 W. R. 369, 34 Ch. D. 691, followed.

Order of Kekewich, J., affirmed.—*Preston* v. *Etherington*, C.A. 49—37 Ch. D. 104; 57 L. J. Ch. 176; 58 L. T. 318.

See also BANKRUPTCY, 36; COSTS, 3, 9; SOLICITOR, 4.

ATTESTATION.—See DEED, 5; WILL, 54—58.

ATTORNMENT.—See COMPANY, 41; MORTGAGE, 3.

AWARD.—See INCLOSURE; LOCAL GOVERNMENT, 1.

BALLOT ACT.—See ELECTION LAW, 4, 21.

BANKER:—

1. *Pledge—Negotiable instrument—Share certificates—Blank indorsement—Estoppel.*—The executors of a holder of shares in an American railway company signed blank transfers indorsed on the share certificates, and handed them to their brokers, in order that the shares might be registered in the names of the executors. The brokers fraudulently deposited the certificates with their bankers as security for advances, and afterwards became bankrupt. According to American law the holder of certificates with transfers properly indorsed has a good legal title to the shares; and, according to mercantile usage in London, such certificates were treated as securities to bearer. The indorsement was not attested in the manner required by the railway company for registration.

Held, that the plaintiffs were entitled to a declaration that the shares in question formed part of the testator's estate, and to delivery of the certificates by the bankers accordingly.

Judgment of Kekewich, J., reversed.—*Williams* v. *Colonial Bank; Williams* v. *London Chartered Bank of Australia*, C.A. 625—38 Ch. D. 388.

2. *Pledge—Negotiable instrument—Transfer of stock.*—A stockbroker obtained a loan from a bank of which he was a customer, on the security of a transfer of stock which was vested in himself and two other persons upon certain trusts, he being the acting trustee. He procured his co-trustee's execution of the deed of transfer by proposing to sell the stock and buy certain other stock instead. The transfer was expressed to be for a nominal consideration, and in favour of two persons named, who were trustees for the bank, and the bank believed that their customer was authorised by the transfer to pledge the stock to them. The customer subsequently paid off the loan, when the bank, instead of re-transferring the stock to the three former holders, without notice to them caused it to be transferred to buyers from their customer, and he received the price. He then bought therewith the other stock, as proposed to his co-trustees, but in his sole name. This he afterwards sold, and appropriated the proceeds to his own use. In an account which he delivered later to his co-trustees, he included this stock as part of the trust fund, and went on accounting to his *cestui que trust* for the dividends. He absconded and became bankrupt, and the co-trustees sought to make the bank liable for the original stock.

Held, that the bank, by allowing the purchase-money of the stock to get into the hands of the customer without the consent of his co-trustees, had occasioned the loss to the trust estate, and was liable to make it good.

Decision of Kay, J. (35 W. R. 752, 36 Ch. D. 25), affirmed.—*Magnus* v. *Queensland National Bank*, 577—37 Ch. D. 466; 57 L. J. Ch. 413; 58 L. T. 258.

3. *Pledge—Re-pledge—Notice of title—Negotiable securities—Blank transfer.*—S. gave to E., for the purpose of raising £26,000, certificates of railway stock, and bonds of foreign company, which were alleged to be negotiable securities. Blank transfers were executed by S. on all the documents, which E. handed to M., to secure £26,000 advanced by M. to E. M. deposited the documents, with other securities, with various bankers as security for current loans, the blanks in the transfers having been filled in with the names of nominees of the bank. The banks had notice that the documents might not belong to M. M. became bankrupt.

Held, that the banks were not holders for value without notice, and that S. was entitled to redeem all securities by repaying to the banks the amount advanced by M. to E.

Judgment of the Court of Appeal (reported 35 W. R. 220, 34 Ch. D. 95) reversed.—*Earl of Sheffield* v. *London Joint Stock Bank*, H.L.—13 App. 333; 58 L. T. 735.

See CANADA, LAW OF, 6; CAPE OF GOOD HOPE, LAW OF, 1; DISCOVERY, 2; GIFT, 3.

BANKRUPTCY:—

ACT OF BANKRUPTCY—

1. *Deed of assignment—Costs—Receiving order—Repayment—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (a).—On the 20th of August, 1885, in pursuance of a resolution passed at a meeting of creditors, the debtor executed a deed of assignment vesting the estate in a trustee for their benefit. On the 28th of October, 1885, a petition was presented against the debtor, the act of bankruptcy alleged being the execution of the deed; and on the 31st of October the trustee under the deed paid out of moneys collected by him from the assets the sum of £20 7*s.* 8*d.* to a firm of solicitors, being the amount of their bill of costs incurred in connection with the meeting of creditors, and collecting certain book debts, and in preparing the deed of assignment. On the 20th of January, 1886, a receiving order was made against the debtor, and subsequently the trustee under the deed sent to the official receiver a cheque for the balance in his hands after deducting the amount paid to the solicitors, together with an account of receipts and payments in connection with the estate.

Held, that the trustee under the deed must refund the money so paid to the solicitors.—*Ex parte Rawlings, In re Forster*, Q.B.D., BANKY. 144.

2. *Delivery of property—Fraud on creditor—Landlord and tenant—Rent—Bankruptcy (Ireland) Act*, 1872 (35 & 36 *Vict. c.* 58), *s.* 21.—In December, 1886, A., a farmer, was served with a writ for one year's rent due in the preceding September. His cattle were then sold by public auction for £117. Before being served with the writ he had paid £25 10*s.*, being six months' rent, less an abatement of forty per cent. which he claimed, to the trustee of an organisation called the "Plan of Campaign." On a bankruptcy petition by his landlord, A. was examined in the Court of Bankruptcy, when he ad-

mitted that he had put all his property out of reach of his landlord, and that he was unable to pay his creditors in full. He refused to state what he had done with the proceeds of the sale of his cattle.

Held, that A. had committed an act of bankruptcy within section 21 of the Bankruptcy (Ireland) Act, 1872—*In re Moroney*, C.A. (Ir.)—21 L. R. Ir. 27.

APPEAL—

3. *Discharge—Refusal—Bankruptcy Act*, 1883, *ss.* 28, 104, 121—*Bankruptcy Rules*, 1886, *r.* 273.—Rule 273 of the Bankruptcy Rules, 1886, by which it is provided that, in a small bankruptcy, no appeal shall lie from any order of the court except by leave of the court, does not apply in the case of an order made upon application by a bankrupt for his discharge.—*Ex parte Rankin, In re Rankin*, Q.B.D., BANKY. 526—20 Q. B. D. 341; 58 L. T. 120.

4. *Examination of witness—Refusal to answer questions — Cross-examination — Bankruptcy Act*, 1883, *s.* 27.—A witness who, on being examined under section 27 of the Bankruptcy Act, 1883, is held by the registrar to be justified in refusing to answer questions put to him, cannot be made a respondent to an appeal by the trustee against such ruling of the registrar.

The answers of a witness examined under section 27 of the Bankruptcy Act, 1883, must in the end be accepted by the trustee, but he is not bound to accept the first answer, and may cross-examine the witness thereon.

Ex parte Rooke, 56 L. T. N. S. 579, 35 W. R. Dig. 18, explained.—*Ex parte Tilly, In re Schraber*, C.A. 388—20 Q. B. D. 518.

COMPOSITION—

5. *Scheme—Approval—Discretion of court—Sale of assets—Assets abroad—Bankruptcy Act*, 1883, *s.* 18, *sub-section* 6.—A proposed scheme of arrangement between creditors and debtors who had assets in America, without the jurisdiction, provided, *inter alia*, that the American assets should be sold at rather more than their estimated value to one of the American partners, the only provision as to security being that the trustee in bankruptcy should insure the purchaser's life for about one-sixth of the purchase-money. The scheme was approved by the trustee, by the committee of inspection, consisting of creditors to a large amount, by the accountant employed by them to examine into the Chilian affairs, and by the official receiver.

Held, that the scheme ought to be approved as being reasonable and for the benefit of the general body of the creditors within the meaning of the Bankruptcy Act, 1883, s. 18, sub-section 6.—*Ex parte Smith, In re Staniar*, Q.B.D., BANKY. 608—20 Q. B. D. 544; 58 L. T. 884.

6. *Scheme — Approval — Judgment by consent — Bankruptcy Act*, 1883, *ss.* 18, 28, *sub-section* 6.—A scheme of arrangement providing that, "by consent of the debtor the trustee shall enter judgment against him for full amount of the debts, and that such judgment should have effect in like manner and to a like extent as though the debtor had been adjudged bankrupt," is to be disapproved, on the ground that such a provision is an attempt to incorporate the powers given to the court in the case of a judgment by consent under section 28, sub-section 6, of the Bankruptcy Act, 1883, and that the powers given to the court under such section are not authorised to be incorporated into schemes of arrangement under section 18.—*Ex parte Bischoffsheim, In re Aylmer*, C.A. 231—20 Q. B. D. 258; 57 L. J. Q. B. 168.

7. *Scheme—Approval—Sale of assets—Specific performance—Bankruptcy Act*, 1883, *s.* 23, *sub-section* 2.—A trustee in bankruptcy entered into a written agreement with the defendants whereby it was agreed that the defendants should purchase from the trustee the estate of the bankrupt for such a sum as would pay the costs and expenses of the proceedings and the preferential debts, and a certain composition to the unsecured creditors, and that, upon the approval of the scheme by the court, the bankruptcy should be annulled.

At a first meeting of the creditors a resolution was passed, which was subsequently confirmed at the second meeting by the statutory majority, to accept the offer of the defendants to purchase the estate on the terms of the agreement, provided that the defendants gave a bond to the trustee to secure the payment of the purchase-money. The court afterwards made an order approving of the purchase upon the terms contained in the agreement between the trustee and the defendants, and annulled the bankruptcy. The trustee sued for specific performance of the agreement.

Held, that the agreement could not be specifically enforced against the defendants, they never having consented to the provision relating to the bond, and the agreement which they had entered into with the trustee never having been accepted by the creditors.

Decision of North, J., affirmed.—*Lucas* v. *Martin*, C.A. 627—37 Ch. D. 595; 57 L. J. Ch. 261; 58 L. T. 889.

DISCHARGE—

8. *Condition — Entering judgment — Bankruptcy Act*, 1883, *s.* 28, *sub-section* 6.—The court will not require a bankrupt, as a condition of his discharge, to consent to judgment being entered against him for the balance of his debts, unless there is some evidence that he is likely to acquire property sufficient to satisfy such judgment.

Quære, whether a man who has one creditor only can present a debtor's petition and obtain a complete discharge.—*Ex parte Arnaud, In re Bullen*, C.A. 886.

9. *Disqualification — Certificate — Conviction for libel—Bankruptcy Act*, 1883, *s.* 32.—A. was convicted of libel, and sentenced to three months' imprisonment, with hard labour, and ordered to pay the costs of the prosecution. A. borrowed on a bill of sale to pay the costs of his defence, and on conviction borrowed on a second bill of sale to pay off the former one, and to meet further costs. The prosecution caused his bankruptcy, and he was disqualified from exercising the office of vestryman.

Held, that the bankruptcy was not caused by misfortune without any misconduct within section 32 of the Bankruptcy Act, 1883.—*Ex parte Burgess, In re Burgess*, Q.B.D., BANKY.—57 L. T. 200.

10. *Disqualification— Certificate— Costs— Divorce suit—Bankruptcy Act*, 1883, *s.* 32, *sub-section* 2 (b).—In a suit for dissolution of marriage on the ground of the wife's alleged adultery, the jury found that the wife had not committed adultery, and the petition was dismissed. In consequence of the costs incurred in these proceedings the petitioner was adjudicated bankrupt. The bankrupt, having obtained an immediate unconditional order of discharge, applied, under section 32, sub-section 2 (*b*), for a certificate that "his bankruptcy was caused by misfortune, without any misconduct on his part."

Held, that the certificate must be refused, as the bankruptcy was not caused by "misfortune," the bankruptcy being solely caused by the costs incurred in the divorce proceedings which the bankrupt had commenced of his own free will, and which were under his complete control.—*In re Campbell*, C.A. 582—20 Q. B. D. 816.

EXECUTION—

11. *Interpleader—Petition—Notice to sheriff—Bankruptcy Act*, 1883, *s.* 45, *sub-sections* 1, 2; *s.* 46, *sub-section* 2.—On an application for trial of an interpleader issue respecting goods taken in execution under a judgment for a sum not exceeding £20, an order was made directing that, in the event of the non-compliance of the claimant with certain provisions, the goods should be sold by the sheriff and the proceeds paid into court pending the result of the trial. The claimant made default, and the goods were accordingly sold and the proceeds paid into court. Notice of a bankruptcy petition having been presented against the debtor was served on the sheriff within fourteen days of the sale, and the debtor was adjudged bankrupt on that petition.

Held, that, under sections 45 and 46 of the Bankruptcy Act, 1883, the trustee in bankruptcy was entitled, as against the execution creditor, to the money in court.—*Heathcote* v. *Livesley*, Q.B.D. 127—19 Q. B. D. 485; 56 L. J. Q. B. 645.

12. *Petition—Notice to sheriff—Retention of proceeds—Time—Bankruptcy Act*, 1883, *s.* 46, *sub-section* 2.—The fourteen days during which the sheriff is required, by section 46, sub-section 2, of the Bankruptcy Act, 1883, to retain in his hands the proceeds of goods sold under an execution commence to run from the time of the sale, and not from the time of the receipt of such proceeds by the sheriff.—*Ex parte Ross, In re Cripps*, Q.B.D., BANKY. 845.

13. *Sheriff—Costs of execution—Cutting and threshing corn—Bankruptcy Act*, 1883, *s.* 46, *sub-section* 1.—After goods of a debtor had been taken in execution, a receiving order was made against him, and the sheriff delivered the goods to the official receiver under section 46, sub-section 1, of the Bankruptcy Act, 1883. On taxing the costs of the execution, certain expenses incurred whilst the sheriff was in possession for cutting, carrying, and threshing corn were disallowed by the county court registrar, but were allowed by the judge.

Held, that the expenses in question were not costs of the execution within the meaning of section 46, sub-section 1, and were properly disallowed on taxation.—*Ex parte Condor, In re Woodham*, Q.B.D., BANKY. 526—20 Q. B. D. 40; 57 L. J. Q. B. 46; 58 L. T. 116.

FRAUDULENT PREFERENCE—

14. *Composition deed—Secret agreement.*—By a composition deed the creditors of H., in consideration of the payment of the composition, agreed to release to H. all debts owing from him to them respectively, on condition that, if H. made default in payment of the composition, the deed should be void. P., one of the creditors, at the time of executing the deed, made a secret bargain with H., by which he was to receive from H. a larger proportion of his debt than any of the other creditors. H. having made default in paying the composition, P. presented a bankruptcy petition against him. The registrar refused to make a receiving order.

Held, that the effect of the secret bargain was that the release of P.'s debt was absolute and the condition void, and that the refusal of the registrar to make a receiving order was right.—*Ex parte Phillips, In re Harvey*, C.A. 567.

15 *Payment for benefit of surety—Bankruptcy Act*, 1883, *s.* 48.—A payment to a creditor by a debtor immediately before his bankruptcy, not with the object of preferring the creditor, but with the object of benefiting the debtor's surety, is not void against the debtor's trustee in bankruptcy.—*Ex parte Official Receiver, In re Mills*, C.A.—58 L. T. 871.

JURISDICTION—

16. *Costs—Security—Appeal—Proof—Rejection—Bankruptcy Rules*, 1880, *rr.* 131, 143.—Where the proof of a creditor resident abroad is rejected by the trustee in bankruptcy, and such creditor appeals from the rejection, the court have no jurisdiction to order him to give security for the costs of such appeal.—*Ex parte Izard, In re Vanderhaage*, Q.B.D., BANKY. 525—20 Q. B. D. 148; 58 L. T. 236.

NOTICE IN BANKRUPTCY—

17. *Judgment—Company—Liquidator—Calls—Bankruptcy Act*, 1883, *s.* 4, *sub-section* 1.—The official liquidator of a company obtained judgment against A. for calls, and issued a notice in bankruptcy against A. in his own name as liquidator.

Held, that the notice in bankruptcy was irregular.—*Ex parte Mackay, In re Shirley*, Q.B.D., BANKY.—58 L. T. 237.

18. *Judgment—Costs—Chancery Division—Dismissal of action—Bankruptcy Act*, 1883, *s.* 4, *sub-section* 1.—An order had been obtained by the defendant for the dismissal of an action for the recovery of land, a declaration of title, and mesne profits for want of prosecution and for the payment of costs.

Held, that the order was not a "final judgment" within the meaning of section 4, sub-section 1 (*g*), of the Bankruptcy Act, 1883, upon which the defendant was entitled to serve the plaintiff with a bankruptcy notice.

Judgment of the Queen's Bench Division (reported 36 W. R. 304, 20 Q. B. D. 318) affirmed.—*Ex parte Earl of Strathmore, In re Riddell*, C.A. 532—20 Q. B. D. 512; 57 L. J. Q. B. 259; 58 L. T. 838.

19. *Judgment—Divorce—Alimony* pendente lite—*Bankruptcy Act*, 1883, *s.* 4, *sub-section* 1 (*g*).—An order against a husband for the payment of alimony *pendente lite* is not a "final judgment" within sub-section 1 (*g*) of section 4 of the Bankruptcy Act, 1883, upon which a bankruptcy notice can be founded in respect of arrears payable thereunder.—*Ex parte Henderson, In re Henderson*, C.A. 567—20 Q. B. D. 509; 57 L. J. Q. B. 258; 58 L. T. 835.

20. *Judgment—Garnishee order—Stay of execution—Bankruptcy Act*, 1883, *s.* 4, *sub-section* 1—*Ord.* 42, *rr.* 22, 23.—If a creditor has obtained final judgment, and a garnishee order absolute has been made against the judgment debtor, execution on the judgment must be stayed so long as the garnishee order is undischarged, and the creditor is not entitled to serve a notice in bankruptcy on the garnishee, even if the debt in respect of which the garnishee order was made has been paid.—*Ex parte Hyde, In re Connan*, C.A.—20 Q. B. D. 690; 57 L. J. Q. B. 472.

21. *Judgment—Mortgage—Foreclosure—Bankruptcy Act*, 1883, *s.* 4, *sub-section* 1 (*g*)—*Bankruptcy Rules*, 1886, *r.* 139.—A creditor who, as equitable mortgagee, has obtained a foreclosure decree and an order for sale of the property of the debtor is still, if no such sale is found to be possible, at liberty to serve a bankruptcy notice on the debtor, and to take further proceedings; and the fact of such an order for sale not having been carried out is not sufficient ground for an adjournment by the registrar of further proceedings on the notice on the application of the debtor under rule 139 of the Bankruptcy Rules, 1886.—*Ex parte Meston, In re Kelday*, C.A. 585.

22. *Married woman—Married Women's Property Act*, 1882 (45 & 46 *Vict.* c. 75), *s.* 1, *sub-section* 5—*Bankruptcy Act*, 1883, *s.* 4, *sub-section* 1 (*g*).—A married woman who does not carry on a separate trade is not subject to the bankruptcy laws, and a bankruptcy notice under section 4, sub-section 1 (*g*),

of the Bankruptcy Act, 1883, cannot be served upon her.—*Ex parte Coulson, In re Gardiner*, Q.B.D., BANKY. 142—20 Q. B. D. 249; 57 L. J. Q. B. 149; 58 L. T. 119.

OFFICIAL RECEIVER—

23. *Fees—Disclaimer—Joinder of respondents.*—Where an application is made to the court by the official receiver as trustee in a bankruptcy, he is not exempt from the payment of the fee of five shillings prescribed by the scale of fees and percentages.

In an application to disclaim property against a landlord, any number of mortgagees or sub-lessees who are interested in parts only of the property sought to be disclaimed may be joined, but different landlords of separate and distinct estates cannot be joined as respondents to one application for leave to disclaim the aggregate property.—*Ex parte Official Receiver, In re Whitaker*, Q.B.D., BANKY. 736 — 21 Q. B. D. 261.

ORDER AND DISPOSITION—

24. *Reputed ownership—Custom—Agistment.*—The custom of agistment is notorious, and therefore no reputation of ownership can arise in respect of horses or cattle grazing, by agreement, upon the land of a farmer.—*In re Burke*, BANKY. (Ir.)—19 L. R. Ir. 564.

PETITION—

25. *Abuse of process—Purchase of debt—Bankruptcy Act*, 1883, *ss.* 4, 6.—It is not an abuse of the process of the Bankruptcy Court for one creditor, whose debt may be insufficient to found bankruptcy proceedings, to purchase the debt of another creditor in order to found such proceedings *bonâ fide* for the purpose of preserving the estate of the debtor and of having it administered according to the bankruptcy laws.—*Ex parte Baker, In re Baker*, Q.B.D., BANKY. 553—58 L. T. 233.

26. *Costs—Abortive execution—Bankruptcy Act*, 1883, *s.* 6.—The costs of an abortive execution cannot be added to a judgment debt so as to make up the amount necessary to enable a creditor to petition under section 6 of the Bankruptcy Act, 1883.—*Ex parte Cuddiford, In re Long*, C.A. 346—57 L. J. Q. B. 560; 58 L. T. 664.

27. *Dismissal—Substitution of petitioning creditors—Jurisdiction—Practice—Bankruptcy Act*, 1883, *ss.* 104, 107.—A bankruptcy petition was dismissed by a county court registrar, on the ground that the petitioning creditor, by assenting to a deed of assignment previously executed by the debtor, was prevented from alleging the deed as an act of bankruptcy, but the order of the registrar was rescinded by the county court judge, who made an order substituting other creditors, who had not assented to the deed as petitioning creditors, the three months during which the deed could be relied upon as an act of bankruptcy having then expired.

Held, that the county court judge had no authority to rescind the order made by the registrar; that the order made by him substituting other petitioning creditors was not warranted by any section of the Bankruptcy Act, 1883, and that, even if the county court judge had power to make the order, he ought not to have exercised it.—*Ex parte Maughan, In re Maughan*, Q.B.D., BANKY. 846—21 Q. B. D. 21.

PROOF—

28. *Composition deed—Covenant—Release—Bankruptcy Act*, 1883, *ss.* 4, 43.—A composition deed executed by a debtor for the benefit of his creditors provided that "in consideration of the premises," the creditors parties to the deed would "release the debtor from all claims and demands against him." The debtor was adjudicated bankrupt on the petition of a creditor who had not been a party to the deed.

Held, that a creditor who was a party to the deed was entitled to prove in the bankruptcy, as the deed was only a release conditional upon its remaining valid.—*Ex parte Official Receiver, In re Stephenson*, Q.B.D., BANKY. 624—20 Q. B. D. 540; 57 L. J. Q. B. 451; 58 L. T. 589.

29. *Contingent liability — Lease — Covenant — Repairs—Assignment—Indemnity—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 31, 49.—The assignee of a lease for a term of years covenanted to indemnify the lessees against damages for breach of their covenants to repair. Eight years before the term expired the assignee filed a liquidation petition under the Bankruptcy Act, 1869, and obtained an order of discharge. The lessees were not included in the debtor's statement, and they received no notice of liquidation, and did not prove as creditors. After the term expired the lessors recovered damages from the lessees upon the covenants to repair.

Held, that the lessees' right of action against the assignee was barred by the order of discharge.

Judgment of the Court of Appeal (35 W. R. 588, 18 Q. B. D. 646) affirmed.—*Hardy v. Fothergill*, H.L.—13 App. 351.

30. *Priority—Local board—District rate—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 211, *sub-section* (3)—*Bankruptcy Act*, 1883, *s.* 40, *sub-section* 1 (a).—On the 12th of January, 1887, at the time of filing his petition, the bankrupt was tenant of a house under a lease for twenty-one years. The trustee in the bankruptcy did not disclaim, but on the 1st of February, 1887, he sold his interest in the lease, the bankrupt remaining in occupation as tenant under the purchaser. There was due from the bankrupt at the date of the receiving order a local board rate made on the 8th of October, 1886, for the half-year from the 30th of September, 1886, to the 25th of March, 1887, and payable in advance.

Held, that the estate of the bankrupt was liable to pay the rate for the half-year.—*Ex parte Ystradfodwg Local Board, In re Thomas*, Q.B.D., BANKY. 143—57 L. J. Q. B. 39.

31. *Reduction—Application for benefit of bankrupt—Abuse of process—Bankruptcy Act*, 1883, *schedule* 2, *r.* 25.—At the hearing of an application by one creditor in the bankruptcy to reduce or expunge the proof of another creditor, the preliminary objection was taken that such application, although made in the name of the creditor, was in reality for the benefit and on behalf of the bankrupt.

Held, that the application must be dismissed.—*Ex parte Rooney, In re Tallerman*, Q.B.D., BANKY. 864.

RECEIVING ORDER—

32. *Divorce suit — Alimony — Judgment summons—Committal—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5—*Bankruptcy Act*, 1883, *s.* 103, *sub-section* 5.—An order for alimony *pendente lite*, and a subsequent order for permanent alimony, were made in the Probate, Divorce, and Admiralty Division. The sum of £130 being due under the orders, a judgment summons in respect thereof was issued by the wife.

Held, that a receiving order in lieu of a committal could not be made by the court against the husband under section 103, sub-section 5, of the Bankruptcy Act, 1883, but that the wife was entitled to come to the court under section 5 of the Debtors Act, 1869, and that an order directing payment by monthly instalments of £10 should be made.—*Ex parte Otway, In re Otway*, Q.B.D., BANKY. 698—58 L. T. 885.

33. *Husband and wife—Joint petition—Separate receiving orders—Rescission—Bankruptcy Act*, 1883, *s.* 8.—A receiving order was made against a husband

and wife upon their joint petition, but, the official receiver having discovered that they had not traded jointly or in partnership, the petition was subsequently amended to that effect, and a separate receiving order was made against each of the debtors. Objection was taken by the Board of Trade to the two receiving orders being made upon a joint petition, it being shown that the husband had no assets, and had acted only as manager in the wife's business.

Held, that the official receiver had a *locus standi* to apply to the court to rescind the receiving order against the husband, and that it was the duty of the court to rescind the order.— *Ex parte Official Receiver, In re Bond*, Q.B.D., BANKY. 700.—21 Q. B. D. 17; 58 L. T. 887.

34. *Stay of proceedings—Action after receiving order—Bankruptcy Act*, 1883, *ss.* 9, 10.—On the 24th of October, 1885, a receiving order was made against A. on his own petition. B. afterwards commenced an action against A. on the balance of an account.

Held, that the action must be stayed.—*Brownscombe* v. *Fair*, Q.B.D.—58 L. T. 85.

TRUSTEE—

35. *Appointment—Objection—Board of Trade—Bankruptcy Act*, 1883, *s.* 21.—A deed of assignment was executed by a debtor for the benefit of his creditors, under which a trustee was appointed, who dealt with the estate. A bankruptcy petition was afterwards presented against the debtor, the act of bankruptcy alleged being the execution of the deed, and the debtor was adjudicated bankrupt. The trustee under the deed was appointed by the creditors the trustee in the bankruptcy, but the appointment was objected to by the Board of Trade, on the ground that his connection with the bankrupt's estate made it difficult for him to act with impartiality in the interest of the creditors generally.

Held, that the objection was right, and must be sustained.—*Ex parte Board of Trade, In re Martin*, Q.B.D., BANKY. 698.—21 Q. B. D. 29; 57 L. J. Q. B. 384; 58 L. T. 889.

36. *Assets—Garnishee—Judge's order by consent—Debtors Act*, 1869, *s.* 27.—S. having given a consent to judgment being signed against him by C. & H., judgment was signed by them, but the consent was not filed as required by section 27 of the Debtors Act, 1869. Y., who was a debtor of S., paid money to C. & H., under a garnishee order obtained under the judgment. S. subsequently became bankrupt, and his trustee in bankruptcy applied to the court for an order that C. & H. should pay to him the sum of money so received from Y.

Held, that the effect of non-compliance with the requirements of the section was that the money was paid by Y. to C. & H. to the use of the trustee, who was entitled to recover it from them.—*Ex parte Brown, In re Smith*, C.A. 403—20 Q. B. D. 321; 57 L. J. Q. B. 212.

37. *Assets—Married woman—Separate estate—Separate trading—Settlement—Life interest—Married Women's Property Act*, 1882, *s.* 1, *sub-section* 5; *s.* 19.—A married woman who traded separately from her husband was adjudicated bankrupt in respect of her separate property pursuant to section 1, sub-section 5, of the Married Women's Property Act, 1882. Under her marriage settlement she was entitled to a life estate in certain property for her separate use, but without any restraint on anticipation.

Held (Lord Esher, M.R., dissenting), that the life estate vested in the trustee in bankruptcy, as the claim of the trustee did not "interfere with or affect the settlement" within the meaning of section 19 of the Married Women's Property Act, 1882, the trustee claiming under and not against the settlement.—*Ex parte Boyd, In re Armstrong*, C.A. 772—21 Q. B. D. 264.

38. *Disclaimer — Crown property — Bankruptcy Act*, 1883, *ss.* 55, 150.—The provisions of section 55 of the Bankruptcy Act, 1883, are binding upon the Crown, and a trustee in bankruptcy is entitled under that section to disclaim a bankrupt's interest in property held by him from the Crown.—*Ex parte Commissioners of Woods and Forests, In re Thomas*, Q.B.D., BANKY. 735.

39. *Disclaimer—Lease—Mortgage—Vesting order—Bankruptcy Act*, 1883, *s.* 55.—Leave having been given to a trustee in bankruptcy to disclaim the bankrupt's interest in certain leases, it was ordered, on the application of the landlord, that, unless the executor of a mortgagee by sub-demise of the bankrupt's interest should, within seven days, elect to accept an order vesting in him the disclaimed property, subject to the same liabilities and obligations as the bankrupt was subject to under the leases, he should be excluded from all interest in and security upon the property.

Held, that the court had power to make the order on the application of the landlord, and that, subject to a formal amendment, the order made was right.—*Ex parte Shilson, In re Cock*, Q.B.D., BANKY. 187—20 Q. B. D. 343; 57 L. J. Q. B. 169; 58 L. T. 566.

40. *Prosecution of debtor—Debtor's petition—Debtors Act*, 1869, *s.* 11, *sub-sections* 13—15; *s.* 16—*Bankruptcy Act*, 1883, *ss.* 149, 163.—The court cannot order the prosecution of a bankrupt under section 16 of the Debtors Act, 1869, in respect of offences alleged to have been committed under section 11, sub-sections 13, 14, and 15, of the said Act within four months next before the presentation of the bankruptcy petition, where such petition has been presented by the bankrupt himself.—*Ex parte Wood, In re Burden*, Q.B.D., BANKY. 896—21 Q. B. D 24.

41. *Removal—Meeting—Injunction—Jurisdiction—Bankruptcy Act*, 1883, *ss.* 65, 72, 83.—Sections 65 and 72 of the Bankruptcy Act, 1883, empower the court to restrain the creditors from holding a meeting called to consider the removal of the trustee of a liquidating debtor till after the decision of a question as to expunging a creditor's proof.—*Ex parte Sayer, In re Mansel*, C.A.—19 Q. B. D. 679; 56 L. J. Q. B. 605.

42. *Title—Relation back—Composition—Adjudication—Bankruptcy Act*, 1869, *s.* 126.—Where the creditors of a debtor have resolved to accept a composition under section 126 of the Bankruptcy Act, 1869, and the debtor is subsequently adjudicated a bankrupt under the last clause of that section, there is no relation back of the trustee's title to the act of bankruptcy committed by the debtor in filing his petition, so as to invalidate a payment made by him between the filing of the petition and the adjudication of bankruptcy.—*Ex parte McDermott, In re McHenry*, C.A. 725.

See also ADMINISTRATION, 11, 14; ATTACHMENT, 8; COMPANY, 7, 13; COSTS, 40; COUNTY COURT, 6, 13; INSOLVENCY; JURISDICTION, 4, 4a; MORTGAGE, 3; SETTLEMENT, 20, 21; SOLICITOR, 1—7; WILL, 24.

BASTARDY:—

Affiliation order—Summons—Service—Last place of abode—Bastardy Law Amendment Act, 1873 (35 & 36 *Vict. c.* 65), *s.* 4.—L. resided at Sunbury from September, 1886, until the 20th of April, 1887, when he went to Southampton. He returned to Sunbury on the 14th of May, and on the 19th of May he sailed from Southampton to the West Indies. On the 19th

of May a bastardy summons was left for him at the house where he had resided at Sunbury.

Held, that there had been a good service at L.'s "last place of abode" within section 4 of the Bastardy Law Amendment Act, 1872.—*Reg.* v. *Lee*, Q.B.D. 415—58 L. T. 384.

See also POOR LAW, 1.

BEERHOUSE.—See LICENSED HOUSE, 8.

BETTING.—See CRIMINAL LAW, 4.

BILL of EXCHANGE:

Dishonour abroad — Damages — Interest — Re-exchange—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 57.—A bill of exchange drawn in South Australia, by a banking company carrying on business in South Australia and in England, for acceptance in England by their English branch bank, was dishonoured when presented in England.

Held, on a claim by the holder to prove in the winding up of the company in England for interest on the amount of the bill, at the rate of ten per cent. (the Australian rate of interest), that the claim for interest was wrong, and that the only remedy of the holder was by way of damages for the amount payable for re-exchange.

Ex parte Roberts, 35 W. R. 128, 18 Q. B. D. 286, followed.—*In re Commercial Bank of South Australia*, CH.D. NOR., J. 550—36 Ch. D. 523; 57 L. J. Ch. 131; 57 L. T. 395.

See also PARTNERSHIP, 2; PRINCIPAL AND SURETY, 2.

BILL of LADING.—See SHIPPING, 1—5, 26.

BILL of SALE:—

1. *After-acquired property — Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 4, 5, 9.—By a bill of sale the grantor assigned as security for the payment of money the chattels specifically described in the schedule thereto annexed, "together with all other chattels and things the property of the mortgagor now in and about the said premises, and also all chattels and things which may, at any time during the continuance of the security, be in or about the same or any other premises of the mortgagor to which the said chattels or things or any part thereof may have been removed, whether brought there in substitution for, or renewal of, or in addition to, the chattels and things hereby assigned."

Held, that the bill of sale was void under section 9 of the Bills of Sale Act, 1882, as not being in accordance with the form in the schedule.

The rule of construction laid down in *Ex parte Stanford*, 34 W. R. 507, 17 Q. B. D. 257, is the test of what constitutes substantial divergence from the statutory form.

Roberts v. *Roberts*, 32 W. R. 605, 13 Q. B. D. 794, discussed.

Judgment of the Queen's Bench Division affirmed.—*Kelly* v. *Kellond*, C.A. 363—20 Q. B. D. 579; 57 L. J. Q. B. 330; 58 L. T. 263.

2. *Assignment of other than personal chattels—Partial invalidity—Divisibility—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *ss.* 4, 5—*Bills of Sale Act*, 1882, *s.* 9.—A bill of sale not made in accordance with the statutory form purported to assign, along with personal chattels, certain machinery, being property other than personal chattels.

Held, that, as the legal part of the security could be severed from the illegal, the security was good as to the machinery.

Davies v. *Rees*, 34 W. R. 573, 17 Q. B. D. 408, distinguished.—*Ex parte Byrne, In re Burdett*, C.A. 345—20 Q. B. D. 310; 57 L. J. Q. B. 263; 58 L. T. 710.

3. *Covenant—Bills of Sale Act*, 1882, *s.* 7.—A bill of sale contained a covenant that the grantor would keep insured and in repair the chattels assigned, provided that, if default were made by the grantor, the grantee might insure and repair and enter for that purpose on the premises where the chattels were stored, the expenses so incurred, with interest at five per cent., to be a charge on the chattels; and it was further agreed that it should be lawful for the grantee to seize upon the happening of any of the events mentioned in the Bills of Sale Act, 1882, s. 7.

Held, that the bill of sale was good.—*Topley* v. *Crosbie*, Q.B.D. 352—20 Q. B. D. 350; 57 L. J. Q. B. 271; 58 L. T. 342.

4. *Covenant—Rates and taxes—Bills of Sale Act*, 1882, *ss.* 7, 9.—A bill of sale contained a covenant for payment by the grantor of all rates, taxes, and outgoings in respect of the premises, in default of which the grantor should pay the same and charge the amount to the grantor, and all expenses to which he might be put, which sums should be "added to and form part of" the security. The bill contained a power to seize for the causes mentioned in section 7 of the Bills of Sale Act, 1882.

Held, that the bill of sale was invalid.—*Macey* v. *Gilbert*, Q.B.D.—57 L. J. Q. B. 461.

5. *Covenant — Rents, rates, and taxes—Bills of Sale Act*, 1882, *s.* 7.—By a bill of sale the mortgagor undertook to pay all rent and other outgoings of the premises on which the goods assigned might be. It was further provided that, in default of such payment within seven days after it became due, the mortgagees might pay any rent, rates, taxes, and outgoings then due, and that all sums so paid by the mortgagees, with interest thereon, should be charged upon the goods assigned, and be recoverable in the same manner as the principal moneys and interest secured by the bill of sale.

Held, that the bill of sale was void, as not being in accordance with the form in the schedule to the Bills of Sale Act, 1882.

Bianchi v. *Offord*, 17 Q. B. D. 484, 35 W. R. Dig. 27, approved.

Goldstrom v. *Tallerman*, 35 W. R. 68, 18 Q. B. D. 1, distinguished.—*Real and Personal Advance Co.* v. *Clears*, C.A. 256—20 Q. B. D. 304; 57 L. J. Q. B. 164; 58 L. T. 610.

6. *Inventory—Schedule—Pictures—Bills of Sale Act*, 1882, *s.* 4.—A bill of sale which purported to assign pictures described them in the schedule as so many oil paintings and so many water-colours in gilt frames.

Held, that the bill of sale was void in respect of the pictures for non-compliance with section 4 of the Bills of Sale Act, 1882, which requires that the schedule shall contain "an inventory," and that the chattels comprised in it shall be "specifically described."

Decision of the Queen's Bench Division (35 W. R. 761, 19 Q. B. D. 276) affirmed.—*Witt* v. *Banner*, C.A. 115—20 Q. B. D. 114; 57 L. J. Q. B. 141; 58 L. T. 34.

7. *Pledge—Constructive delivery—Bills of Sale Act*, 1878, *ss.* 3, 4—*Bills of Sale Act*, 1882, *ss.* 8, 9.—In order to make a valid pledge, it is not necessary for delivery of possession to be contemporaneous with the advance of the money, but it is sufficient if the money is advanced on a contract that the goods shall be delivered and the goods are in fact afterwards handed over under the contract. Until the goods are so handed over there is no valid pledge, delivery being an essential part of a pledge.

Reeves v. *Capper*, 5 Bing. N. C. 136, followed.

Where there is a valid pledge, the Bills of Sale Acts,

1878 and 1882, have no application, although a document regulating the rights of the parties may have been subsequently executed.

The handing over of the key of a warehouse or room must, in order to amount to constructive delivery of goods stored in the warehouse or room, be made under such circumstances that it in fact passes full control over the goods.

A. agreed to advance money to B. on the security of goods to be deposited in a room of which A. was to have control. B. hired a room, deposited the goods in it, and placed a key of it at the disposal of C., who was also employed by B. to make a list of the goods in the room, which list was apparently to some extent intended for the convenience or benefit of A. On the day the goods were deposited B. wrote to A. to inform him of the deposit and the proposed list, and added that C. "has the key, which I place entirely at your disposal."

Held, that there was a good constructive delivery of possession of the goods to A., notwithstanding the fact that B. subsequently continued to have access to the room, and exercised various acts of control over the goods. — *Hilton* v. *Tucker*, CH.D. KEK., J. 762.

8. *Promissory note—Collateral security—Bills of Sale Act*, 1882, *s.* 9.— The defendant gave the plaintiffs a bill of sale to secure the repayment of a loan, with interest, and at the same time signed a promissory note for payment of the same sum and interest by similar instalments payable at the same dates. The note provided that, if any instalment was unpaid, the whole amount should be payable.

Held, that, though the bill of sale was void, the plaintiffs could recover on the promissory note.—*Monetary Advance Co.* v. *Cater*, Q.B.D.—20 Q. B. D. 785; 57 L. J. Q. B. 463.

9. *Promissory note—Defeasance—Bills of Sale Act*, 1878, *s.* 10, *sub-section* 3—*Bills of Sale Act*, 1882, *s.* 8.—By a bill of sale given as security for an advance the grantor covenanted to repay the principal sum with interest by equal monthly instalments until the whole sum advanced, together with the interest thereon, should be fully paid. The bill of sale was drawn in accordance with the form in the schedule to the Bills of Sale Act, 1882, and was duly registered. At the same time, and as part of the same transaction, the grantor gave to the grantee a separate promissory note for the same amount as that in respect of which the bill of sale was given, payable by the same instalments at the same dates, with a stipulation that in case of default in payment of any one instalment the whole sum remaining unpaid should become due and payable.

Held, that the promissory note operated as a defeasance of the bill of sale, as, in the event of the full amount of the promissory note becoming payable and being paid, the bill of sale would be defeated; and that the registration of the bill of sale was void under section 10, sub-section 3, of the Bills of Sale Act, 1878, and the bill of sale was also void.—*Counsell* v. *London and Westminster Loan and Discount Co.*, C.A. 53—56 L. J. Q. B. 622.

10. *Receipt—Oral agreement—Bills of Sale Act*, 1878, *s.* 4.—By an oral agreement the title to a personal chattel was given as security for an advance. The grantor afterwards signed a receipt, which was not intended to embody, and did not embody, such agreement. The receipt was not registered under the Bills of Sale Acts.

Held, that the Bills of Sale Acts did not apply, since the title of the grantee to the chattel depended, not on the receipt, but on the oral agreement.—*Newlove* v. *Shrewsbury*, C.A. 835—21 Q. B. D. 41.

11. *Registration—Affidavit—Covenant—Bills of Sale Act*, 1878, *s.* 10—*Bills of Sale Act*, 1882, *s.* 7, *sub-section* 4.—The production, at the hearing of an interpleader issue, of a bill of sale, together with a certificate of registration, is no evidence that the proper affidavit was also filed in accordance with the Bills of Sale Act, 1878, *s.* 10, but the proper course is to adjourn the hearing for the production of evidence, and not hold the bill of sale void merely on this ground.

A bill of sale contained an unqualified covenant by the grantor to produce receipts for rent, without the addition of words corresponding to the words "without reasonable excuse" in section 7 of the Bills of Sale Act, 1882; but contained a proviso that the chattels assigned should not be liable to seizure by the grantee for any cause other than those specified in section 7.

Held, that the insertion of the covenant did not render the bill of sale void as not being in accordance with the form in the schedule to the Bills of Sale Act, 1882.—*Turner* v. *Culpan*, Q.B.D. 278—58 L. T. 340.

12. *Registration—Affidavit—Omission—Rectification of register—Bills of Sale Act*, 1878, *s.* 14.—Under section 14 of the Bills of Sale Act, 1878, a judge has no power to order an affidavit to be filed to supply particulars inadvertently omitted when the affidavit was filed, and the power given by section 14 of extending the time for registration will not be exercised after the title to the goods has actually vested in an execution creditor who has seized them.

Judgment of the Queen's Bench Division (reported 36 W. R. 669, 20 Q. B. D. 535) affirmed.—*Crow* v. *Cummings*, C.A. 808.

13. *Registration — Company—Debentures—Agreement to issue—Bills of Sale Act*, 1882, *s.* 17.—A "debenture" is a document which either creates or acknowledges a debt.

By a memorandum of agreement a company agreed to pay to a person who had advanced money to the company the sum of £600, with interest, and charged certain hereditaments with the repayment of the £600 and interest, and further agreed with the lender that the company would, at any time during the continuance of the security, at the request of the lender, execute a legal mortgage, and, further, to issue debentures of the company to the extent of £600, secured over the capital, stock, goods, chattels, and effects of the company, including uncalled capital present and future.

Held, that the agreement was a debenture and within section 17 of the Bills of Sale Act of 1882.

Edmonds v. Blaina Furnaces Co., 35 W. R. 798, 36 Ch. D. 215, followed.—*Levy* v. *Abermorris Slate and Slab Co.*, CH.D. CHI., J. 411—37 Ch. D. 260; 57 L. J. Ch. 202; 58 L. T. 218.

14. *Registration—Company—Debentures—Mortgage—Fixtures—Bills of Sale Act*, 1878, *ss.* 4, 5, 8—*Bills of Sale Act*, 1882, *s.* 17.—The effect of section 5 of the Bills of Sale Act, 1878, is to prevent the articles which by it are excluded from the definition of "trade machinery" from being "personal chattels" for any of the purposes of the Act, and therefore a mortgage of them does not require registration.

A coal and brickmaking company deposited title deeds to certain beds of coal and fireclay with bankers, together with a memorandum, which stated that the deposit was made to secure to the bankers "payment of all sums of money which we are now, or at any time hereafter may be, indebted to you, whether on current account for principal, interest, commission, and charges, or on any other account whatsoever." The memorandum contained an agreement to execute a legal mortgage of the property

when required, but it did not contain any acknowledgment of a debt, or any covenant or agreement by the company for payment.

Semble, that the memorandum was not a "debenture" within the meaning of section 17 of the Bills of Sale Act, 1882.—*Topham* v. *Greenside Glazed Fire Brick Co.*, CH.D. NOR., J., 464—37 Ch. D. 283; 57 L. J. Ch. 583; 58 L. T. 274.

15. *Registration—Description of grantor—Bills of Sale Act*, 1878, *s.* 10.—The Christian name of the grantor of a bill of sale was wrongly described for the purpose of concealing the fact that he had given a bill of sale.

Held, that the misdescription did not render the registration of the bill invalid.—*Downs* v. *Salmon*, Q.B.D. 810—20 Q. B. D. 775; 57 L. J. Q. B. 454.

16. *Registration—Description of grantor—Bills of Sale Act*, 1878, *s.* 10.—The grantor of a bill of sale was described in the bill of sale and in the affidavit filed on registration as "Kendrick Turner, tutor." His real name was Frederick Henry Turner, and he was a schoolmaster.

Held, that the bill of sale was void.—*Lee* v. *Tyler*, Q.B.D.—20 Q. B. D. 773.

17. *Registration—Mortgage—Lien—Bills of Sale Act*, 1878, *ss.* 4, 5—*Bills of Sale Act*, 1882, *ss.* 8, 9.—A banking company agreed to sell a paper mill and machinery to the L. Co. for £20,000, payable by instalments. The premises were to be conveyed on payment of the two first instalments, the L. Co. executing a mortgage for the balance, with power to the mortgagees, if the business of the L. Co. should be suspended, to re-enter and take possession of the premises, and everything built or placed thereon, and not requiring registration under the Bills of Sale Act, 1878, and to hold the same for their own use and benefit, without prejudice to the L. Co.'s liability for the balance of the purchase-money. The agreement was not registered as a bill of sale. Two instalments were paid, but no conveyance or mortgage was executed. The L. Co. took possession till it was wound up, when the mortgagees re-entered.

Held, (1) that the mortgagees had no lien for the balance of the purchase-money; (2) that the agreement to mortgage did not affect any property requiring registration under the Bills of Sale Acts.—*In re London and Lancashire Paper Mills Co.*, CH.D. NOR., J.—58 L. T. 798.

18. *Registration—Mortgage—Machinery—Power of sale—Bills of Sale Act*, 1878, *ss.* 3, 5, 7—*Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 6, *sub-section* 2; *s.* 19.—A mortgagor by deed conveyed, "as beneficial owner," by way of mortgage, a piece of land, "with the dwelling-house and buildings thereon erected," to the mortgagee in fee. The mortgage deed provided that the power of sale given by section 19 of the Conveyancing Act, 1881, was to apply, but otherwise contained no express power of sale. The buildings in part consisted of a workshop, in which was affixed "trade machinery" of the kind declared by the Bills of Sale Act, 1878, to be "personal chattels," but this trade machinery was not separately assigned or specially mentioned at all in the mortgage.

Held, that the mortgagee was, by the instrument of mortgage, entitled to the possession of the trade machinery merely as part of the freehold, and that he was not entitled—either by the terms of the instrument itself or by the power to sell "the mortgaged property or any part thereof, either together or in lots," conferred by section 19 of the Conveyancing Act, 1881—to seize, sever, or sell the trade machinery apart from the land, and therefore that the instrument was not, within the meaning of the Bills of Sale Act, 1878, a bill of sale as regards the trade machinery, and did not require to be registered.

Ex parte Daglish, 21 W. R. 893, L. R. 8 Ch. App. 1072, distinguished.

Ex parte Barclay, 22 W. R. 608, L. R. 9 Ch. App. 576, and *Mather* v. *Fraser*, 4 W. R. 387, 2 K. & J., 536, approved.

Decision of Bristowe, V.C., affirmed.—*Batchelor* v. *Yates*, C.A. 563—38 Ch. D. 112; 57 L. J. Ch. 697.

19. *Registration—Sale of goods—Entry in auctioneer's book—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 17—*Bills of Sale Act*, 1878, *ss.* 4, 8.—If a contract for sale of goods within the Statute of Frauds is valid only by a memorandum in writing, such memorandum is an assurance of personal chattels within the Bills of Sale Act, 1878.

W. bought a stack of hay at a sale by auction. The auctioneer's clerk signed A.'s name as purchaser in the auctioneer's book, which was signed by the auctioneer, and specified the lot and the price, with a copy of the conditions of sale. No part of the price was paid, one of the conditions of sale giving the purchaser six months' credit, and the hay remained in the apparent possession of the vendor. The entry in the auctioneer's book was not registered as a bill of sale, and the hay was seized in execution by a judgment creditor of the vendor.

Held, that the memorandum in the auctioneer's book was within the Bills of Sale Act, 1878, and was void for want of registration.—*Evans* v. *Roberts*, CH.D. KAY, J.—36 Ch. D. 196; 56 L. J. Ch. 952.

See also SHIPPING, 22; TRINIDAD, LAW OF.

BOND:—

Assignment—Will—Equitable lien.—A bond by A. in favour of B. was, by a settlement of the same date, settled by B. upon certain trusts. A., by his will, charged his real and personal estate with the bond.

Held, that an assignee of the bond was entitled to an equitable lien on A.'s real estate for the debt and interest.—*Justice* v. *Fooks*, CH.D. CHI., J.—57 L. T. 868.

See also INJUNCTION, 1.

BRIDGE:—See HIGHWAY, 1; RAILWAY, 2.

BUILDING SOCIETY:—

1. *Arbitration—Stay of proceedings—Dispute—Building Societies Act*, 1884 (47 & 48 *Vict. c.* 41), *s.* 2.—A building society sued the directors and secretary to recover money received by them in their fiduciary capacity. The rules of the society provided for reference to arbitration of any "dispute arising between the society and any members."

Held, that the plaintiffs were not bound to proceed to arbitration, and that the action ought not to be stayed.—*Municipal Permanent Building Society* v. *Richards*, CH.D. STI., J.—53 L. T. 931.

1a. *Arbitration—Dispute—Withdrawing member—Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *s.* 34—*Building Societies Act*, 1884, *s.* 2.—The rules of a building society provided that a member might, by notice in writing, withdraw, and be entitled, "provided there shall be sufficient funds available," to receive within the month after the notice, or earlier if the directors should think fit, the subscriptions paid on his shares, also that the directors should have power to determine all matters of dispute between the society and any member, and that, if the member should be dissatisfied with their decision, the matter should be referred to arbitration. W., a member of the society, gave notice of withdrawal. The society declined to pay back his subscriptions on the ground that they had not enough funds in hands, which W. denied.

Held, that the dispute must be referred to arbitration.

Decision of North, J., affirmed.—*Walker* v. *General Mutual Building Society*, C.A.—36 Ch. D. 777; 57 L. T. 574.

2. Ultrà vires—*Borrowing—Compromise—Estoppel.*—W. lent money to a building society, which had no borrowing powers, on the promissory notes of the directors. His representative demanded repayment of the amount, but eventually agreed to refrain from proceedings, the directors giving him a loan certificate under seal of the society for the sum advanced. After the loan and before the demand for repayment the society obtained borrowing powers. The society was wound up, and the representative of W. claimed to rank as a creditor against the assets of the society.

Held, that the society was not estopped from disputing the claim; that no compromise had been established; that the transaction with the representative of W., being in fact an advance to pay off an invalid claim, was illegal; and that W.'s claim must be disallowed.—*In re Sheffield Permanent Building Society, Ex parte Watson*, Q.B.D. 829—21 Q. B. D. 301.

3. Ultrà vires—*Borrowing—Repayment to trustees.*—The rules of a building society provided that when £100 for every share, with all costs and other expenses, should have been fully paid, the society was to be terminated, and the trustees were to indorse a receipt on the mortgage deeds, and deliver them to the members. Certain advanced members sued the trustees, to redeem their mortgages, on the ground that their monthly instalments had all been paid, all unadvanced members had been paid, there was no valid subsisting debt or liability, and the society had terminated. There was no power for the trustees to borrow, but the defendants, with the assent of the plaintiffs and other members of the society, borrowed money for the purposes of the society.

Held, that if any officer of the society had made any payments for which the society was liable, there not being any money of the society out of which the payments could be made, he was entitled to stand in the place of the payee, and to make a claim on the society in respect of his payments.—*Owen* v. *Roberts*, CH.D. KAY, J.—57 L. T. 81.

4. Ultrà vires—*Mortgage—Assignment to third parties—Building Societies Act*, 1874, *s.* 13.—It is not *ultrà vires* for a building society to assign a mortgage to a person other than the mortgagor.—*Ulster Building Society* v. *Glenton*, L.J. (Ir.)—21 L. R. Ir. 124.

5. *Winding up—Appeal—Incorporation after order—Building Societies Act*, 1874, *ss.* 4, 32.—An order was made in the Lancaster Palatine Court for the compulsory winding up of an unincorporated building society, and notice of appeal was given. After the notice of appeal the society was incorporated.

Held, that the Court of Appeal had no jurisdiction to hear the appeal.—*In re Old Swan and West Derby Benefit Building Society, Ex parte Evatt*, C.A.—57 L. T. 381.

6. *Withdrawal of deposit—Dividend.*—The plaintiff was the holder of £250 paid-up shares in a building society, and in March, 1887, he withdrew half that amount. On the 15th of July, 1887, the directors apportioned to the paid-up shares an *interim* dividend of five per cent. per annum for the half-year ending on the 30th of June, but refused to pay any interest on the amount withdrawn by the plaintiff.

Held, that the defendant was entitled to a dividend on the £125 withdrawn from the date of the last dividend to the date of the withdrawal.—*Perratt* v. *London Scottish Permanent Building Society*, Q.B.D.—59 L. T. 31.

BURIAL ACTS:—

Burial board—Rules—Grant of grave—Burial Act, 1852 (15 & 16 *Vict. c.* 85), *ss.* 33, 38—*Burial Act*, 1853 (16 & 17 *Vict. c.* 134), *s.* 7.—A burial board granted to the plaintiff "the exclusive right of burial in perpetuity" in a certain grave in their cemetery, and permitted him to erect a gravestone thereon. The plaintiff having placed on the grave a small stand with flowers on it, covered by a glass shade and wire frame,

Held, that, under section 33 of the Burial Act, 1852, the plaintiff was not entitled to place these things upon the grave, and that the burial board could remove them under the general power of control over the cemetery vested in them by section 38.

Judgment of the Queen's Bench Division (reported 36 W. R. 159) affirmed.—*Lancaster Burial Board* v. *McGough*, C.A. 822—21 Q. B. D. 323.

BYE-LAW.—See CANADA, LAW OF, 2; LOCAL GOVERNMENT, 2—4; NEW SOUTH WALES, LAW OF, 3.

CALLS.—See BANKRUPTCY, 17; COMPANY, 1, 2.

CANADA, LAW of:—

1. *Quebec Civil Code of Procedure—Article* 19—*Trustee—Right of action—Sale of Land.*—Article 19 of the Quebec Civil Code of Procedure, which provides that no person can use the name of another to plead except the Crown through its recognised officers, is applicable to agents who are authorised to act for others, and have no estate in the subject of the trust, and not to trustees in whom property is vested for the benefit of third parties.

Upon a composition under the Canadian Insolvent Act real estate was vested in trustees, with a power of sale in certain contingencies which happened. The trustees sold part of the estate to A., who failed to pay the purchase-money.

Held, that the trustees could sue in their own names for the unpaid purchase-money.—*Portous* v. *Reynar*, P.C.—13 App. 120; 57 L. J. P. C. 28.

2. *Railway company—Bye-law—Ontario Railway Acts* (34 *Vict. c.* 48, *ss.* 2—6; 37 *Vict. c.* 43, *ss.* 4, 5, 16).—A bye-law providing a *bonus* for a railway company incorporated under the Ontario Railway Acts is valid.—*Grand Junction and Midland Railway Co. of Canada* v. *Peterborough Corporation*, P.C.—13 App. 136.

3. *Railway company—Commencement of work—Deposit of plans—Compensation.*—A railway company in Canada cannot commence its works without first depositing a plan or book of reference relating to any alterations required by the Railway Commission; and the payment of compensation by the company is a condition precedent to their interruption of the possession of land.—*Parkdale Corporation* v. *West*, P.C.—12 App. 602; 56 L. J. P. C. 66; 57 L. T. 632.

4. *Railway company—Judgment—Execution—Sale.*—By the law of Canada a railway, or part of a railway, may be sold at the suit of a judgment creditor.—*Redfield* v. *Wickham Corporation*, P.C.—13 App. 467; 58 L. T. 455.

5. *Trustee—Company—Shares—Notice of trust—Liability of transferee.*—A holder of shares in a company in trust is not a *mandataire prête-nom*, but holds subject to a prior title, and a transferee from such a holder is bound to inquire whether the transfer is authorised by the trust.—*Bank of Montreal* v. *Sweeney*, P.C.—12 App. 617; 56 L. J. P. C. 79.

6. Ultrà vires—*Revenue—Tax on banks and insur-*

ance companies—British North America Act, 1867 (30 & 31 *Vict. c.* 3), *ss.* 91, 92.—A provincial statute imposing direct taxes on banks and insurance companies, varying in proportion to their paid-up capital and their number of offices in the province, is not *ultra vires*. — *Bank of Toronto* v. *Lambe*, *North British Mercantile Insurance Co.* v. *Lambe*, P.C.—12 App. 575; 56 L. J. P. C. 87.

CANAL.—See HIGHWAY, 2; MINING; WATER, 1.

CAPE of GOOD HOPE, LAW of:—

1. *Banker—Return of notes—Act* 6 *of* 1864, *ss.* 6, 9.—Under section 6 of Act 6 of 1864 a return of the notes of a bank in circulation or outstanding need not include bank notes in the possession of the head office or the branch offices of the bank.—*Bank of Africa* v. *Cape Colonial Government*, P.C.—13 App. 215; 57 L. J. P. C. 66; 58 L. T. 427.

2. *Roman-Dutch law—Fidei-commissum—Compromise by heir—Infant.*—A., under her father's will on attaining the age of twenty-five, took the residue of his estate subject to a conditional *fidei-commissum*. There was no bequest to the executors, and A. was not debarred from inheritance as heir by birth, and at twenty-five as heir burdened with a *fidei-commissum* A. compromised with the executors all her claims arising out of the administration of the estate, but the compromise did not involve any alienation of property.

Held, that A.'s infant children were bound by the compromise.—*De Montfort* v. *Broers*, P.C.—13 App. 149; 57 L. J. P. C. 47.

CARGO.—See DAMAGES, 6, 7; ESTOPPEL, 7; MARINE INSURANCE, 6; SHIPPING, 6.

CERTIORARI:—

Mayor's Court—Removal of action—Mayor's Court Act, 1857 (20 & 21 *Vict. c. clvii.*) *s.* 17.—By section 17 of the Mayor's Court Act, 1857, no cause depending in the Mayor's Court shall be removed before judgment therein into any superior court unless the writ removing such cause shall have been lodged with the proper officer of the court within one month after the service of the plaint, or unless such writ shall have been lodged with such officer before such action shall have been entered for trial.

More than a month after the service of the plaint, but before the action was entered for trial, application was made for a writ of *certiorari* to remove an action from the Mayor's Court to the High Court.

Held, that the application was in time.—*Prim* v. *Smith*, C.A. 530—20 Q. B. D. 643; 57 L. J. Q. B. 336; 58 L. T. 601.

See also CORONER, 2; COUNTY COURT, 15; CRIMINAL LAW, 5.

CHARGING ORDER.—See PRACTICE, 13, 47; SOLICITOR, 1—3.

CHARITY:—

1. *Advowson—City of London Parochial Charities Act*, 1883 (46 & 47 *Vict. c.* 36), *ss.* 5, 10.—An impropriate rectory was granted by the Crown in 1589 to trustees for a parish, the purchase-money being paid by the parish. The property was conveyed from time to time to new trustees for the benefit of the said parish, and the vicar was chosen by the parishioners. The Charity Commissioners included the advowson in the schedule of ecclesiastical charity property under the City of London Parochial Charities Act, 1883, and the parishioners presented a petition asking that it might be removed from the schedule, on the ground that it was not "charity property."

Held, that an advowson is not an exception to the general law as to charitable trusts, and that the advowson was "charity property."—*In re St. Stephen, Coleman-street, In re St. Mary, Aldermanbury*, CH.D. KAY, J. 837.

2. *Church* — "*Reparations and ornaments*" — *Spire.*—The objects to which the funds of a charity were applicable were "the reparations, ornaments, and other necessary occasions of the parish church of Stoke Newington." A new parish church had been erected by voluntary contributions and substituted for the old one, under 8 & 9 Vict. c. 70, s. 1, and the funds were insufficient for the erection of a spire which formed part of the design.

Held, that the erection of the spire fell within the objects of the charity; and that the salaries of persons employed in the church, except such as were concerned with the maintenance of the fabric of the church, could not be paid out of the charitable funds. —*In re Palatine Estate Charity*, CH.D. STI, J. 732—58 L. T. 925.

See also ADMINISTRATION, 15; COMMON; INCOME TAX, 5a; JURISDICTION, 2; LANDS CLAUSES CONSOLIDATION ACT, 4; WILL, 27, 40.

CHARTER-PARTY.—See SHIPPING, 20, 23.

CHOSE IN ACTION.—See GIFT, 1; HUSBAND AND WIFE, 2, 3.

CITY of LONDON PAROCHIAL CHARITIES ACT.—See CHARITY, 1.

COAL MINES REGULATION ACT.—See MASTER AND SERVANT, 5, 7.

CODICIL.—See WILL, 5, 44, 60.

COLLISION.—See COSTS, 35; COUNTY COURT, 10, 11; DAMAGES, 5—8; ESTOPPEL, 7; SHIPPING, 4, 7—19, 33.

COMMISSION.—See EVIDENCE, 7, 8; MORTGAGE, 13.

COMMON:—

Inclosure—Allotments—Turf common—Private Act—Charitable trust.—By a local Inclosure Act commissioners were required to allot to the lords of the manors, "in trust for the occupiers for the time being of all such cottages and tenements containing less than one acre each as were erected on ancient sites or have now been erected more than fourteen years, in lieu of their rights or pretended rights of cutting turves," so much of the waste grounds as the commissioners should think proper for a turf common, to be managed and the turf arising therefrom to be taken and used by the occupiers of such cottages in such manner as the lords of the manors and the churchwardens and overseers of the poor acting within each manor should appoint. In pursuance of the Act the commissioners allotted land for a turf common. A portion of the land was taken by a railway company, and the purchase-money was paid into court.

Held, (1) that the lord of the manor was entitled to so much of the fund in court as represented the value of the soil of the land taken by the railway company; (2) that the trust was for the benefit of the occupiers for the time being of the cottages, and not a trust for the owners, who were only entitled to the addition to the value of the occupation caused by the gift of the right to the occupiers; (3) that the trust in favour of the occupiers was a charitable and not a private trust.

Decision of Stirling, J. (35 W. R. 583, 35 Ch. D. 355), reversed.—*In re Christchurch Inclosure Act*, C.A.—57 L. J. Ch. 564; 58 L. T. 827.

COMPANY:—

CALLS—

1. *Forfeiture—Director—Estoppel—Interest.*—The articles of association of a company provided that there

should be not less than three directors nor more than seven, who were to have power to make calls. Any casual vacancy on the board was to be filled up by the directors, and any member whose shares had been declared forfeited was to be liable for all calls previously owing, with interest. A. was a shareholder and director. On the 7th of November, 1882, the directors made a call of £1 per share, payable on the 1st of December. Some of the directors resigned, and on the 19th of December only A. and one other director were left. On that day the directors elected three more directors, and the five directors passed a resolution that all shareholders who did not pay the call by the 31st of December should forfeit their shares. The board made a second call, payable on the 20th of January, 1883. At a meeting of the five directors, A. being in the chair, it was resolved that the shares on which the first call had not been paid should be forfeited. The defendant had not paid the call.

Held, that, though the resolution declaring a forfeiture of shares was invalid, A. was estopped from disputing his liability; and that he was liable for the first call with interest, and for the second call without interest.—*Faure Electric Accumulator Co* v. *Phillipps*, C.A.D.—58 L. T. 525.

2. *Forfeiture — Misrepresentation — Injunction.* — A shareholder having commenced an action against a company for rescission of his share contract, on the ground of misrepresentation, paid into court the sum demanded for unpaid calls, and moved to restrain the company from declaring the shares forfeited.

The court dismissed the motion with costs, holding that the proper course was for the plaintiff to pay the money to the company without prejudice to any question.—*Ripley* v. *Paper Bottle Co.*, CH.D. CHI., J.—57 L. J. Ch. 327.

CAPITAL—

3. *Distribution — Paid-up stock — Partly-paid shares.*—The capital of a railway company comprised stock consisting of £20 shares which had been fully paid up, and of £20 shares upon which £5 only had been paid. The company had, under the Act incorporating it, power to call up the amount unpaid on the shares, but had never done so. The Government of India purchased the undertaking of the company under statutory provisions, and an action was brought to determine the manner in which the purchase-money was to be distributed amongst the stockholders and shareholders respectively. Dividends were payable to the shareholders in accordance with the provisions of the 120th section of the Companies Clauses Consolidation Act, 1845, which was incorporated in the Acts governing the company.

Held, that the holders of partly-paid shares and holders of stock were entitled to have the purchase-money divided between them rateably in proportion to the amounts paid by them respectively, so that each holder of £20 stock would receive four times as much as each holder of a £20 share on which £5 had been paid.

Somes v. *Currie*, 1 K. & J. 605, considered.

Decision of Kekewich, J. (35 W. R. 516), affirmed. —*Sheppard* v. *Scinde, Punjaub, and Delhi Railway Co.*, C.A. 1—56 L. J. Ch. 866; 57 L. T. 585.

4. *Distribution — Surplus — Preference shares — Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 109, 133, *sub-sections* 1, 9.—Section 133, sub-section 1, of the Companies Act, 1862, must be construed together with section 109, and therefore the meaning to be attributed to section 133, sub-section 1, is not that the surplus assets are divisible per share, but that the liquidator under that section, or the court under section 109, is to divide the surplus assets among the parties entitled thereto.

The articles of a company incorporated under the Act of 1862 provided that new capital might be created by the issue of new shares carrying such preferential right to dividend, or such priority in the distribution of assets, or subject to such postponement of dividend, or in the distribution of assets, as the company might by special resolution direct, but "save as specified in any such resolution, all new capital shall be subject to the same provisions in all respects as if it had been part of the original capital"; and that the net profits of each year should belong to the holders of shares, and be divided *pro ratâ* upon the whole paid-up share capital of the company, and that a dividend might be declared payable thereout on the shares in proportion to the amounts paid up thereon. New capital was created by the company by the issue of new preference shares, entitling the holders thereof "to a dividend after the rate of five per cent. per annum upon the amount for the time being called up thereon, and taking precedence of . . . . all dividends and claims of the holders of ordinary shares in the company," but the company did not exercise, in respect of the new shares, any of the other powers given to it by the articles. Each preference share so issued was of £10, and the whole amount on each preference share had been paid up; each ordinary share was also of £10, but only £3 10*s.* thereon had been paid up when the company was wound up. The whole undertaking of the company was sold under the provisions of an Act of Parliament, and the company was wound up voluntarily. The purchase-money paid for the undertaking of the company gave a large surplus after payment of all liabilities of the company, and after the return of their capital to the shareholders.

Held, on a summons taken out by the liquidator, that this surplus was to be divided among all the preference and ordinary shareholders in proportion to the sums paid up on their shares, and not according to profits.

Sheppard v. *Scinde, Punjaub, and Delhi Railway Co.*, 36 W. R. 1, discussed.

Decision of North, J., affirmed.—*In re Bridgewater Navigation Co.*, C.A. 769—58 L. T. 866.

5. *Reduction*—Ultrà vires—*Issue of shares at discount* —*Companies Act*, 1862, *s.* 161—*Companies Act*, 1877 (40 & 41 *Vict. c.* 26), *ss.* 3, 4.—In pursuance of a special resolution passed by a company in liquidation the liquidator agreed to sell the property of the company to a new company, part of the consideration being the issue to each shareholder of the old company of one share of £1 in the new company, with 15*s.* credited as paid up thereon, in exchange for each fully paid-up share of £1 in the old company held by such shareholder, and that the remaining 5*s.* per share should be payable by the allottee in the manner provided by the agreement. The whole of the shares in the new company were issued to shareholders in the old company as provided by the agreement, prior to which a contract providing for their being issued in that manner was filed with the Registrar of Joint-Stock Companies. The remaining 5*s.* per share was afterwards paid up on all the shares. The capital of the company was afterwards increased by a sum of £500,000, divided in 500,000 shares of £1 each, of which 50,000 were issued as fully paid up as the consideration for the purchase of other property by the company. The company afterwards passed a special resolution for reducing the capital by cancelling paid-up capital to the extent of 15*s.* per share, as having been lost or being unrepresented by available assets.

Held, that the issue of the shares at a discount was illegal; that the shareholders were still liable to the extent of 15*s.* per share; and that the proposed reduction

could not be confirmed by the court.—*In re New Chile Gold Mining Co.*, CH.D. NOR., J. 909 — 38 Ch. D. 475.

CONTRIBUTORY—

6. *Application for shares—Condition.*—M., in answer to an advertisement, applied for the appointment of district manager to a provident association, and was informed that the elected candidate must take seven fully paid £5 shares. He applied for seven shares, the application not stating any condition, and sent a cheque for £35. He afterwards received a form of official appointment, with conditions different from those previously mentioned. He declined the appointment, and stopped the cheque.

Held, that M's. application for shares was conditional, and that he was not liable as a contributory in the winding up of the association.—*In re London and Provincial Provident Association, Megridge's case*, CH.D. STI., J.—58 L. T. 801.

7. *Bankruptcy—Set-off—Lien on shares—Bankruptcy (Ireland) Act*, 1857 (20 & 21 *Vict. c.* 60) *s.* 251.—A company has, in the absence of any special provisions in its articles of association, no lien on the shares of a bankrupt member for a debt due to the company, and cannot set off such debt against his shares.—*In re Kingstown Yacht Club*, M.R. (Ir.)—21 L. R. Ir. 199.

8. *Director—Qualification.*—A person by becoming a director of a company and acting as such does not, *ipso facto*, agree with the company to take the requisite qualification shares.

A. was duly elected as a director of a company, and for some time acted in that capacity, but he never applied for or agreed to take the qualification shares prescribed by the articles of association of the company.

Held, that A. was not liable to be placed on the list of contributories on the winding up of the company.—*In re Wheal Buller Consols Co., Ex parte Jobling*, C.A. 723—38 Ch. D. 42; 57 L. J. Ch. 833; 58 L. T. 823.

9. *Infant—Acquiescence—Companies Act*, 1862, *s.* 35.—In 1882 600 shares in a company were registered in the name of A., an infant, by his employer with his knowledge, but A. never received a letter of allotment. In 1883 A. executed a transfer of the shares, which the company refused to register. A. afterwards repudiated the shares. After A. came of age, the company was wound up.

Held, that A. was liable as a contributory.—*In re Yeoland Consols Co.*, CH.D. STI., J.—58 L. T. 922.

10. *Paid-up shares—Contract—Registration—Assignment of shares—Burden of proof—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.—In 1881 a company was formed with the object, according to the prospectus, of purchasing the business of H. & Co., the purchase-money to include certain fully paid-up shares. N., who was H.'s solicitor, prepared the memorandum and articles of association. Shares were allotted, and certificates were issued to H., stating that the full amount of the shares had been paid, but the contract was not registered. In 1882 H. gave to the trustees of the marriage settlement of B. a bond to secure a debt. The bond formed part of the settled property, and H. deposited, as collateral security, some of the paid-up shares. N. was one of the trustees of the settlement, and he prepared the bond and memorandum of deposit. In 1885 the deposited shares were transferred to the trustees, fresh certificates being issued. The company was wound up. N. alleged that he did not know that the deposited shares were vendor's shares, and other trustees relied on N.'s statement that the shares were paid up.

Held, that the burden of proving that the trustees had notice that the shares were not fully paid up was on the liquidator; and that the trustees were not liable for calls on the shares.

Burkinshaw v. *Nicholls*, 26 W. R. 819, 3 App. 1004, followed.—*In re Hall & Co.*, CH.D. STI., J.—37 Ch. D. 718; 57 L. J. Ch. 288; 58 L. T. 156.

11. *Paid-up shares—Contract—Registration—Specific performance—Companies Act*, 1867, *s.* 25.—Subject to confirmation by a meeting of shareholders, the directors of a company agreed with A. that he should accept fully paid-up shares in satisfaction of an admitted claim for services rendered. At a subsequent shareholders' meeting it was agreed that a sum of money should be voted to A., and that he should take it in fully paid-up shares. The agreement was not registered, and there was no satisfactory evidence of any allotment or acceptance of shares thereunder. The company was wound up, and the liquidator applied to place A. on the list of contributories as a holder of unpaid shares.

Held that, as between A. and the company, the duty of registering the agreement was not thrown upon A., but on the party seeking to enforce it; that a contract to take unpaid shares could not be enforced; and that A. was not liable as a contributory.—*In re Barangah Oil Refining Co., Arnot's case*, C.A.—30 Ch. D. 702; 57 L. J. Ch. 195; 57 L. T. 358.

12. *Paid-up shares—Contract—Registration—Transfer with notice—Estoppel—Companies Act*, 1867, *s.* 25.—A company incorporated as a company limited by shares contracted with a French association to issue and allot to the French association, or its nominee, shares in the company, such shares to be credited as fully paid up, in consideration of services to be rendered by the French association to the company; and the contract contained a clause that the company should procure registration of the contract before issuing the shares. Two hundred shares were, in pursuance of this contract, issued and allotted to S., the nominee of the French association, as fully paid-up shares, but no money was paid for them by S., nor was any sum of money at the time due by the company to S. and set off against the amount of the shares. S. transferred the shares to H., a director of the company, and H. transferred 100 of them to B., another director. Certificates were issued stating these shares to be fully paid up. The contract with the French association was never registered. The company went into liquidation, and the liquidator put H. and B. on the list of contributories as liable for the full amount of these 100 shares respectively held by them. H. and B. applied to have the certificate of contributories varied by having their names expunged therefrom. The evidence showed that S. and H. and B., when they respectively took the shares in question were aware of the fact that nothing had been paid on them, but that both H. and B. believed that the contract with the French association had been registered. There was no evidence to show that either H. or B. had given any value for the respective transfers of the shares to them.

Held, on the facts of the case as appearing from the evidence, that neither the company nor the liquidator were estopped from saying either that no payment had been made in respect of the shares, or that the contract had not been registered, and that H. and B. were liable for the full amount of the shares.

Burkinshaw v. *Nicholls*, 26 W. R. 819, 3 App. 1004, and *Waterhouse* v. *Jamieson*, L. R. 2 S. & D. 29, 18 W. R. H. L. Dig. 8, explained and distinguished.

The meaning of the maxim, "No man can take advantage of his own wrong," explained.

Decision of Kay, J., affirmed.—*In re London Celluloid Co., Bagley's case*, C.A. 673.

13. *Paid-up shares—Fraudulent preference—Companies Act*, 1862, *s.* 164—*Companies Act*, 1867, *s.* 25—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 38, 48.—K., a shareholder in a company, whose directors were authorised to receive from shareholders payments in respect of future calls, took an assignment from a creditor of the company of a debt due by the company, and, on the 2nd of April, 1886, the directors resolved that the seal of the company be affixed to this assignment, and that a sufficient part of the debt so assigned be applied in paying up in full the shares held by K., in accordance with K.'s request to that effect. No part of the debt so assigned to K. was payable by the company till the 30th of June, 1886, nor had any call been made on the 2nd of April in respect of K.'s shares. Beyond the minutes of the above resolutions, the books of the company contained no entry as to the above transaction, and no contract as to the mode of payment for the shares was registered under section 25 of the Companies Act, 1867. On the 26th of April, 1886, a winding-up order was made, on a creditor's petition, presented on the 5th of April.

Held (affirming the decision of Kay, J., 36 W. R. 570, 37 Ch. D. 566), that the transaction was not equivalent to, and could not support a plea of, payment in cash within the principle laid down in Sharpe's case, 21 W. R. 396, L. R. 8 Ch. App. 407, and White's case, 27 W. R. 895, 12 Ch. D. 511; and that K. was liable for calls made in the winding up in respect of the shares.

Ferron's case, 22 W. R. 396, L. R. 9 Ch. App. 355, distinguished.

Held, also, on the evidence, that, on the 2nd of April, 1886, the company was, to the knowledge of the directors, in an insolvent state, and that the transaction of that date was invalid, as a fraudulent preference, within section 164 of the Companies Act, 1862.—*In re Land Development Association, Kent's case*, C.A. 515.

14. *Servant of company—Surrender of shares—Winding up.*—The articles of association of a company provided that all employés of the company [illegible] managing directors should, on the termination of their service, surrender their shares to the company. The company was being wound up, and a [illegible], discharged in 1882, applied for the removal of his name from the list of contributories, and for repayment of the value in 1882 of his shares, and for [illegible] against subsequent calls.

[illegible] that the applicant's name could not be [illegible] from the list of contributories.—*In re* [illegible] & Co., CH.D. KEKEWICH, J.—57 L. T. [illegible]

[illegible]—*Paid up shares—Proof—* [illegible] 38, sub-section 7—*Companies* [illegible] the principle of the decision in [illegible] *Bank*, 28 W. R. [illegible] and a person who has pur- [illegible] thereby contracted to [illegible] the shares, to [illegible] of the company, [illegible] voluntarily or [illegible] in any way [illegible] the company [illegible] of the shares, [illegible] *ford's case*, 28 [illegible] *Applegard*, [illegible] to that [illegible] a dividend, [illegible] must be [illegible]

shares fully paid up. It was doubtful whether there was a contract to issue the shares as fully paid-up shares or only a contract to issue the shares at a discount, but no contract was registered under section 25 of the Companies Act, 1867. The shares issued were not in fact fully paid up. The company went into liquidation, and a holder of some of the shares in question was placed on the list of contributories, and paid the liquidator the amount remaining unpaid thereon. The holder claimed to prove against the company in the winding up in damages, to the amount of the call paid by him, "for breach of contract or otherwise in relation to the issue of the shares."

Held, that, even assuming that there was a contract to issue the shares as fully paid up, the holder of the shares was precluded, by the principle of the decision in *Houldsworth* v. *City of Glasgow Bank*, from putting in any proof in the winding up in respect of damages for breach of contract.

Decision of Kay, J. (36 W. R. 57), affirmed.

Semble, that, even if the holder of the shares had been entitled to prove, he could not, having regard to section 38, sub-section 7, of the Companies Act, 1862, have proved in competition with outside creditors of the company.—*In re Addlestone Linoleum Co., Benson's case*, C.A. 227—37 Ch. D. 191; 57 L. J. Ch. 249; 58 L. T. 28.

DEBENTURE—

16. *Priority—Shipping—Freight—Hypothecation—Winding up.*—The directors of a shipping company, by resolution, authorised the company's brokers to hypothecate the freight of two ships, to secure an advance of not less than £5,000. The brokers afterwards transferred the freight of one ship to A. to secure an advance of £3,000, the brokers undertaking to collect the freight as A.'s agents. The company was wound up.

Held, that the hypothecation to A. had priority over the claims of the holders of debentures in the company.—*Ward* v. *Royal Exchange Shipping Co.*, CH.D. KAY, J.—58 L. T. 174.

17. *Railway company—Priority—Lien—Surplus lands—Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127), *s.* 23.—The debenture-holders of a railway company have no lien on the surplus lands of a railway company under section 23 of the Railway Companies Act, 1867, and have no priority in respect thereof over other creditors.—*In re Hull, Barnsley, and West Riding Railway Co.* (2), CH.D. CH., J. 827.

18. *Registration—Mortgage to director—Companies Act*, 1862, *s.* 43.—Debentures in a company incorporated under the Companies Act were issued to a director. The debentures were not registered within the meaning of section 43 of the Companies Act, 1862. Upon the company going into liquidation the validity of the debentures was contested both by unsecured creditors and by other debenture-holders.

Held, that the omission to register did not invalidate the debentures.

Quære, whether a creditor who had been induced to give credit by the concealment, through non-registration, of debentures held by directors was entitled to plead their personal disability in competition with himself.

Decision of the Court of Appeal reversed.

In re Native Iron Ore Co., 24 W. R. 503, 2 Ch. D. 345, and cases prior to it overruled.

Reasoning of Jessel, M.R., in *In re Globe New Patent Iron Co.*, 27 W. R. 424, approved.—*Wright* v. *He*[illegible] 12 App. 371; 56 L. J. Ch. [illegible] 56 L [illegible]

DIRECTOR—

19. *Contract with company—Ratification—Vote at meeting.*—A director, holding a majority of shares in a company, entered into a voidable contract with a company, being himself the vendor.

Held, that the fact of being a director did not incapacitate the vendor from voting as a shareholder in a general meeting to ratify the contract.—*North-West Transportation Co.* v. *Beatty*, P.C. 647—12 App. 589; 56 L. J. P. C. 102; 57 L. T. 426.

20. *Misfeasance—Sale to company—Non-disclosure of interest—Companies Act*, 1862, *s.* 165.—The directors of a company were empowered to purchase, and did purchase, certain properties. One of the directors had, previously to his becoming a director, acquired an interest in the properties. The company went into liquidation, and a shareholder, whose shares were fully paid up, took out a summons under section 165 of the Companies Act, 1862, as a contributory, asking for a declaration that the director had been guilty of misfeasance or breach of trust in not disclosing his interest, and that the properties had been purchased at a price above their proper value, and asking also that he might be ordered to refund the loss which had accrued.

Held, that the evidence was not sufficient to prove either that the director had not disclosed his interest or that the price was excessive.

Decision of the Court of Appeal (reported 33 W. R. 788, 29 Ch. D. 795) affirmed on the ground of insufficient evidence.

Semble, that a person who is merely a contributory in respect of shares fully paid up has no *locus standi* to apply under section 165 unless he can show that he might derive some benefit thereby.—*Cavendish-Bentinck* v. *Fenn*, C.A. 641—12 App. 652; 57 L. J. Ch. 552; 57 L. T. 773.

21. *Removal — Resolution — Meeting — Irregular notice.*—Mere irregularity in summoning directors to a board meeting—such as the mere non-issue of a notice to a particular director, or not giving him sufficient notice—though it may entitle that director to object and require another board meeting to be held, is not such an irregularity as to render the meeting, when held—of persons who are in fact directors and intend to act as a board—incompetent to authorise the calling of a special general meeting of shareholders, and cannot deprive the general meeting called in consequence—when, in all other respects, regularly summoned—from exercising the powers which are given it by the articles.

Harben v. *Phillips*, 31 W. R. 173, 23 Ch. D. 14, explained.

Before the incorporation of a company an agreement was entered into between the plaintiff and a trustee for the intended company, stipulating (*inter alia*) that the plaintiff should be a director and should not be removable till after 1888. This agreement was set out and adopted in the articles of association, but there was no other evidence of any contract being entered into between the plaintiff and the company adopting the agreement. After the formation of the company the plaintiff was appointed a director, and shares were allotted to him. In October, 1887, at a special general meeting, a resolution was passed that the plaintiff should be removed from the directorate. The plaintiff brought an action to restrain the company and the other directors from acting on or confirming the resolution.

Held, that the agreement as to the non-removal of the plaintiff from the directorate was not an agreement entered into with the company, and that, though the agreement was embodied in the articles, it did not thereby—in the absence of any other evidence to show that the company had entered into the agreement—become a contract between the plaintiff and the company, and that the plaintiff was not entitled to an injunction.

Eley v. *Positive Life Assurance Co.*, 24 W. R. 252, 338, 1 Ex, D. 88, followed.—*Browne* v. *La Trinidad*, C.A. 289—57 L. J. Ch. 292; 58 L. T. 137.

22. Ultrà vires—*Dividend—Payment out of capital—Repayment.*—The directors of a company lent money on mortgage, on the terms that the money lent, together with an addition representing interest, should be repaid by equal monthly instalments extending over a period of years. The directors delegated the preparation of the balance-sheets to the manager. The articles prohibited the payment of dividends out of capital, and enjoined their payment out of profits arrived at upon estimates of account. The manager, in preparing the balance-sheets, omitted to prepare, as prescribed by the articles, a statement of the income and expenditure of the company. He fixed the amount of dividend to be paid, and justified its payment on the accounts in which it was provided for by estimating future instalments as presently repayable, without proper discount. The valuation of certain freehold property, part of which was used as the company's offices, was increased. The auditor of the company, who stated that he did not look at the articles, although he knew of their existence, approved the accounts and dividends. The directors relied upon the manager and auditor, and declared dividends in accordance with the accounts. Large sums were expended in dividend under the above state of things which were attributable to capital.

Held, that the manager, auditor, and directors were liable for the sums so expended in dividend from time to time while they respectively held their offices.

In re Oxford Building and Investment Society (35 W. R. 116, 35 Ch. D. 502) followed.—*Leeds Estate, Building, and Investment Co.* v. *Shepherd*, CH.D. STI., J. 322—36 Ch. D. 787; 57 L. J. Ch. 46; 57 L. T. 684.

DIVIDEND—

23. *Injunction — Payment out of capital.* — The court will not restrain the payment of a dividend by a company unless it is intended to be paid out of capital and not out of profits, and a dividend will not be held to be paid out of capital unless it is shown that the dividend will diminish the capital of the company.—*Lee* v. *Neuchatel Asphalte Co.*, CH.D. STI., J.—57 L. J. Ch. 622; 58 L. T. 553.

LIQUIDATOR—

24. *Removal—Jurisdiction—Discretion of court—Companies Act*, 1862, *s.* 93—*Judicature Act*, 1873 (36 & 37 *Vict.* c. 66), *s.* 50.—The power of the court under section 93 of the Companies Act, 1862, to remove a liquidator on "due cause shown" is not confined to cases in which personal unfitness in the liquidator is shown, but extends to cases in which the court is satisfied on the evidence that it is desirable, in the interests of all those interested in the assets, that the liquidator should be removed and another person substituted.

In re Sir John Moore Gold Mining Co. (28 W. R. 203, 12 Ch. D. 325) explained.

Decision of North, J., affirmed.—*In re Adam Eyton & Co., Ex parte Charlesworth*, C.A. 275—36 Ch. D. 299; 57 L. J. Ch. 127; 57 L. T. 899.

25. *Unregistered company—Action against official liquidator in personal capacity—Stay of proceedings—Companies Act*, 1862, *ss.* 87, 92, 199, 203.—The plaintiffs sued the defendants personally to recover rent charged on property which had vested in them

under section 203 of the Companies Act, 1862, as official liquidators of an unregistered company in process of winding up.

Held, that an action in such a form was not maintainable, and ought to be stayed.—*Graham* v. *Edge*, C.A. 529—20 Q. B. D. 683; 57 L. J. Q. B. 406; 58 L. T. 860.

RECTIFICATION OF REGISTER—

26. *Equitable mortgage — Blank transfer —Companies Act*, 1862, *s.* 35.—On the 4th of May, 1887, A. deposited shares in a company with B., a stockbroker, and signed a blank transfer. B. signed a receipt stating that the shares were deposited to secure a balance due from A., without whose sanction he was not to realise them. On the 23rd of July A. wrote a letter to B. authorising him to sell the shares at a specified price. On the 27th of August B. sold the shares to D. at a higher price than A. had named. B. sent the transfer with D.'s name inserted to the company, but registration of the transfer was refused, at A.'s request.

Held, that B. was an equitable mortgagee with a power of sale; and that the register of shareholders must be rectified by inserting D.'s name as holder of the shares.—*In re Kimberley Diamond Mines Co., Ex parte Wernher*, CH.D. NOR., J.—58 L. T. 305.

ULTRA VIRES—

27. *Debenture—Mortgage—Uncalled capital—Contract—Ratification.*—The directors of a company, in accordance with the provisions of its memorandum and articles of association, adopted an agreement entered into before its formation by a trustee for the company for the purchase of certain leasehold premises and other property, the vendor of which was one of the directors, the price having been previously varied with his consent by substituting debentures for cash payment. The leasehold premises were accordingly assigned to the company, who sealed the deed of assignment and took possession of the premises, and carried on their business there; and the debentures were issued to the vendor and his nominees. The company was afterwards wound up, and the liquidator obtained from the vendor an assignment of the other property comprised in the agreement.

Held, that there existed a contract between the company and the vendor to the effect of the previous agreement, with the variation as to payment, and that the debentures were issued for the purpose of such payment, and were valid.

In re Northumberland Avenue Hotel Co., 33 Ch. D. 16, 35 W. R. Dig. 38, considered and distinguished.

A power to mortgage a company's "properties and rights" includes a power to mortgage the uncalled capital of the company.

Bank of South Australia v. *Abrahams*, 23 W. R. 658, L. R. 6 P. C. 266, distinguished.—*Howard* v. *Patent Ivory Manufacturing Co.*, CH.D. KAY, J. 801—58 L. T. 395.

28. *Dividend—Payment out of capital—Discretion of directors — Railway company — Injunction.*—The payment by directors of a dividend out of capital is *ultrâ vires* and illegal, and the rolling stock of a railway company forms part of its capital.

The court will not restrain, as *ultrâ vires*, acts done by directors in the exercise of their discretion, unless such acts are illegal. — *Kehoe* v. *Waterford and Limerick Railway Co.*, M.R. (Ir.)—21 L. R. Ir. 221.

29. *Fire insurance—Guarantee business—Partnership — Agency.*—An unincorporated fire insurance company having powers of giving to, or taking from, other offices policies, by way of guarantee to divide the risk of insurance, agreed with other companies to appoint them their agents abroad, and to accept the risk of one-eighth of every fire insurance policy of such companies then in force or effected or renewed after that date, and to bear all risks with the other companies, which agreed to pay a proportion of the premiums, 20 per cent. commission to be allowed to the agents for expenses. The fire assurance company was wound up.

Held, (1) that guarantee business was insurance business contemplated by the deed of settlement, and within the powers of the society; (2) that the agreements did not constitute an amalgamation between the companies nor a partnership, but were agreements of agency, and that, the company having had the benefit of the agreements, the burden of proof was upon it to show that they were invalid.—*In re Norwich Equitable Fire Assurance Society, Ex parte Royal Insurance Co.*, CH.D. KAY, J.—57 L. T. 241.

30. *Mortgage.*—A company was empowered by its memorandum of association to raise money by issuing bonds, debentures, bills of exchange, promissory notes, or other securities of the company, or by mortgages or charges on the whole, or a part of, the company's property or its unpaid capital, or in such manner as the company should think fit. The articles of association provided that the directors might from time to time, at their discretion, borrow from the directors, members, or other persons any sums for the purposes of the company, but such sums were not to exceed, without the sanction of a general meeting, one-fifth of the nominal capital, nor, with such sanction, one-third of the general capital. The directors issued debentures to the amount of £3,050, of which A. held £1,650, the nominal capital being £10,000. They also mortgaged, with the sanction of a general meeting, land and other property to secure £3,950 advanced by A.

Held, that the mortgage was *ultrâ vires*.—*In re Bansha Woollen Mills Co.*, M.R. (Ir.)—21 L. R. Ir. 181.

31. *Reduction of capital—Purchase of company's shares—Companies Act*, 1862, *ss.* 8, 12, 20—*Companies Act*, 1867, *ss.* 9—20—*Companies Act*, 1877, *s.* 3.—A power given to a limited company by its articles of association to purchase its own shares is void.

Per Lord Macnaghten.—Such a power given by the memorandum would be void also.

The memorandum of association of a limited company, incorporated under the Companies Acts, stated that the objects of the company were the acquiring of certain manufacturing businesses, and the undertaking and carrying on of the businesses so acquired, and any other business and transaction which the company might consider to be in any way auxiliary thereto. The articles empowered the company to purchase its own shares. On the company being wound up, a shareholder claimed the balance of the price of shares sold by him to the company before the winding up and not wholly paid for.

Held, that the company was not entitled by its memorandum of association to purchase its own shares; and that the purchase was *ultrâ vires*, and the claim must fail.

Decision of the Court of Appeal reversed.

In re Dronfield Silkstone Coal Co., 29 W. R. 768, 17 Ch. D. 76, disapproved.—*Trevor* v. *Whitworth*, H.L. 145—12 App. 409; 57 L. J. Ch. 28; 57 L. T. 457.

32. *Shares—Issue at discount—Contract—Registration—Companies Act*, 1862, *ss.* 7, 8, 12—*Companies Act*, 1867, *s.* 25.—A company incorporated under the Companies Act, 1862, as a company limited by shares cannot, either by means of a stipulation for that purpose contained in its articles of association or by special resolution, issue shares on such a footing as to render the shareholder only liable to pay, in the

event of a winding up, a sum less than the amount unpaid on each share having regard to the amount—*i.e.*, the money value—of each share as fixed by the memorandum of association under the requirements of section 8, sub-section 5, of the Companies Act, 1862; and therefore an issue of shares on such terms, even though made under a contract in that behalf which has been duly registered under section 25 of the Companies Act, 1867, is *ultrà vires*.

In re Plaskynaston Tube Co., 23 Ch. D. 542, 32 W. R. Dig. 41, and *In re Ince Hall Rolling Mills Co.*, 23 Ch. D. 545n, overruled.

The memorandum of association of a company incorporated under the Companies Acts as a company limited by shares stated its capital to be £210,000, divided into 210,000 shares of £1 each, and that, on any increase of capital by special resolution, the company might attach to shares any preferential rights as to dividend or capital or any other special incidents or restrictions. By a special resolution duly passed and confirmed, it was declared that the capital of the company should be increased to 420,000 shares by the issue of 210,000 shares of £1 each, credited with 18s. per share paid. By a contract in writing made between the company and certain applicants for shares whose names were subscribed to the contract, it was agreed that the company should allot and issue to each subscriber the number of shares specified opposite their respective names, and that the shares should be issued and held as shares of £1 each, with 18s. per share credited as paid up thereon, making, with a deposit of 1s. per share, the sum of 19s. paid up on each share. This contract was duly registered under section 25 of the Companies Act, 1867, and each subscriber received notice of the issue and of the allotment, but no certificate of these shares had been given. One of the allottees, while the company was still a going concern and solvent, applied, under section 35 of the Companies Act, 1862, to have his name taken off the register.

Held, that the issue of the shares on such a footing, and notwithstanding the registered contract, was *ultrà vires*, and that the application should be granted.

Judgment of Chitty, J., reversed.—*In re Almada and Tirito Co., Allen's case*, C.A. 593—57 L. J. Ch. 706; 38 Ch. D. 415.

WINDING UP—

33. *Balance order—Action against contributory—Companies Act*, 1862, *s.* 75.—By a balance order made in the winding up of a company a contributory was ordered to pay a certain sum to the liquidator of the company. The sum was not paid, and the liquidator commenced an action in the name of the company against the contributory to enforce the balance order.

Held, that an action could not be brought to enforce a balance order.—*Chalk, Webb, & Co.* v. *Tennent*, CH.D. NOR., J. 263—57 L. T. 598.

34. *Compulsory order — Costs — Companies Act*, 1862, *s.* 149.—A creditor's petition was presented for the compulsory winding up of a company. After the presentation of the petition the company went into voluntary liquidation. At the hearing of the petition the petitioner asked for a supervision order, while a majority of the creditors of the company pressed for a compulsory order.

Held, that the court had no jurisdiction under section 149 of the Companies Act, 1862, to force a compulsory order on the petitioner at the instance of a majority of the creditors.

A supervision order was made, and the creditors asking for a compulsory order were treated as supporting the petition, and were allowed to share in the costs.—*In re Chepstow Bobbin Mills Co.*, CH.D. NOR., J. 180—36 Ch. D. 563; 57 L. J. Ch. 168; 57 L. T. 752.

35. *Compulsory order—Discretion of court—Companies Act*, 1862, *ss.* 86, 145, 151.—A petition by a creditor of a company for a compulsory winding up stood over for the petitioner to bring an action for his debt, which was disputed. The company afterwards passed a petition for a voluntary winding up, a liquidator was appointed, and the petitioner's debt was admitted.

Held, that the court was not bound to make a compulsory order.—*In re New York Exchange Co.*, CH.D. KAY, J.—58 L. T. 915.

36. *Contract after winding up—Benefit of company—Evidence—Burden of proof—Companies Act*, 1862, *s.* 131.—In an action by a company in voluntary liquidation upon a contract made after the commencement of the winding up, and which, but for the winding up, would have been in the ordinary course of its business, the *onus* of proving that the contract was not for the beneficial winding up of the company within section 131 of the Companies Act, 1862, lies upon the defendant.—*Hire-Purchase Furnishing Co.* v. *Richens*, C.A. 365—20 Q. B. D. 387; 58 L. T. 460.

37. *Discovery—Inspection—Companies Act*, 1862, *s.* 156.—The power of ordering inspection under section 156 of the Companies Act, 1862, of the books and property of a company which is being wound up ought to be exercised only for the purposes of the winding up and for the benefit of those interested in the winding up, and will not, as a rule, be exercised in order to enable a shareholder to establish a claim against the directors or promoter.

Section 156 of the Companies Act, 1862, gives the court no jurisdiction over third persons who have in their possession books or papers of a company and who claim to be entitled to such possession.—*In re North Brasilian Sugar Factories Co.*, C.A.—37 Ch. D. 83; 57 L. J. Ch. 110; 58 L. T. 4.

38. *Payment after winding-up order—Pre-existing debt—Discretion of court—Companies Act*, 1862, *s.* 153.—Payment by a company, after the commencement of the winding up, of a *bonâ fide* debt previously due is not a transaction to which the court will, in the exercise of its discretion, give validity.—*In re Civil Service and General Stores Co.*, CH.D. CHI., J.—57 L. J. Ch. 119.

39. *Petition—District Registry—Transfer to High Court—Ord.* 35, *r.* 16.—The court will not order the removal of a proceeding from a district registry to the High Court, unless the balance of convenience is in favour of the transfer, or business has been taken to the district registry which ought not to be there.—*In re Neath and Bristol Steamship Co.*, CH.D. KEK., J.—58 L. T. 180.

40. *Priority—Crown debt—Postmaster-General.*—With the sanction of the Postmaster-General, certain Post Office officials made arrangements with a bank to place to their private account money received on account of the Post Office, as well as money of their own, drawing cheques both on their own account and for payment to the Post Office. The bank was wound up.

Held, that the Postmaster-General had priority over all other creditors in respect of money due to the Post Office.—*In re West London Commercial Bank*, CH.D. CHI., J.—38 Ch. D. 364.

41. *Rent—Mortgage—Attornment clause—Distress—Companies Act*, 1862, *ss.* 87, 163.—The L. Co. mortgaged certain cotton mills and the machinery therein to W. The deed contained a clause by which the L. Co. attorned tenants to W. at an annual rent

A winding-up order was subsequently made against the company, and the official liquidator remained in possession of the mills with a view to selling them as a going concern. He expended money in keeping up the mills and machinery, but he did not actually work them. The mortgagees, who were the executors of C., to whom W. had transferred the mortgage, acquiesced in this arrangement, believing it to be for the benefit of all parties interested. The mortgagees applied to the court for leave to distrain for one year's rent due under the attornment clause which had accrued since the winding-up order.

Held, that leave must be refused, as no special equity in favour of the mortgagees had been proved, and that, on the evidence, it was shown that the premises remained in the occupation of the liquidator for the joint benefit of the company and the mortgagees.

A mortgagee with an attornment clause does not stand in so favourable a position as an ordinary landlord.

In re Exhall Coal Mining Co., 13 W. R. 219, 4 De G. J. & S. 377, followed.

Decision of North, J., affirmed.—*In re Lancashire Cotton Spinning Co., Ex parte Carnelly*, C.A. 305—36 Ch. D. 656; 56 L. J. Ch. 761; 57 L. T. 511.

42. *Repayment to shareholders—Surplus assets—Paid-up shares—Interest.*—Certain shares in a company were allotted as fully paid up, and the articles of association provided that the holders of such shares should be entitled to interest upon such amount of the nominal value of these shares as should be equal to the amount for the time being not called up on the ordinary shares. The amount due on the latter shares was not called up in full. The company went into liquidation, and, after paying its debts and liabilities and repaying to the above-mentioned shareholders the excess in value of their shares over the ordinary shares, there remained a surplus distributable among the shareholders.

Held, that the holders of the fully paid-up shares were entitled to interest on the amount repaid to them, to be calculated from the date of the commencement of the winding up to the date of the repayment.—*In re Exchange Drapery Co.*, CH.D. KAY, J. 444—38 Ch. D. 171; 58 L. T. 544.

43. *Stay of proceedings—Scotch action—Companies Act*, 1862, *ss.* 85, 87.—A Scotch company having its registered office at Edinburgh sued an Australian company having its registered office at Brisbane for money sent out for investment, and lost by fraudulent or improper investment. An order was made in Queensland to wind up the defendant company, and afterwards a winding-up order was made in England, and was directed to be ancillary to the order of the colonial court.

Held, that the proceedings in the Scotch action ought to be stayed.—*In re Queensland Mercantile Agency Co.*, CH.D. NOR., J.—58 L. T. 876.

44. *Vesting order—Ex parte order—Companies Act*, 1867, *s.* 203.—A vesting order under section 203 of the Companies Act, 1867, cannot, except under special circumstances, be obtained *ex parte*.—*In re Albion Mutual Permanent Building Society*, CH.D. CHL., J.—57 L. J. Ch. 248.

See also ADMINISTRATION, 16; BANKER, 1; BANKRUPTCY, 17; BILL OF SALE, 13, 14; CANADA, LAW OF, 5; CONTRACT, 4; COSTS, 9, 10, 33; DEED, 7; DISCOVERY, 3, 5; ESTOPPEL, 1, 8; EVIDENCE, 5; INJUNCTION, 2—5; JURISDICTION, 3; LIMITATIONS, STATUTE OF, 4; MANDAMUS, 1; MISREPRESENTATION, 1, 2; PRACTICE, 12, 54a.

COMPOSITION.—See BANKRUPTCY, 5—7, 14, 28, 42.

COMPULSORY PILOTAGE.—See SHIPPING, 7—9.

CONSIDERATION.—See CONTRACT, 4; COVENANT, 1; DEED, 2; HUSBAND AND WIFE, 9; MORTGAGE, 2, 15; SETTLEMENT, 21; STAMP, 1.

CONSPIRACY and PROTECTION of PROPERTY ACT.—See CRIMINAL LAW, 3.

CONTEMPT of COURT.—See ATTACHMENT, 1—4; COSTS, 37; COUNTY COURT, 13.

CONTRACT:—

1. *Accord and satisfaction—Cheque—Costs—Interest.*—An action was dismissed, with costs. The defendant's solicitor had the costs taxed, and took the taxing master's certificate to the plaintiff's solicitor, who gave him a cheque for the amount, and received from him the certificate with a receipt endorsed on it. After payment of the cheque, the defendant's solicitor discovered that the defendant was entitled to interest on the costs from the date of the judgment, but the plaintiff refused to pay such interest

Held (affirming the decision of Stirling, J.), that the defendant, by his solicitor, had accepted the cheque in accord and satisfaction, and that the plaintiff could not be directed to produce the certificate in order that execution might be issued for the interest.—*Bidder* v. *Bridges*, C.A.—37 Ch. D. 406; 57 L. J. Ch. 300; 58 L. T. 656.

2. *Arbitration—Fees of arbitrator and umpire.*—Where parties in a mercantile dispute agree to refer the matters in difference to arbitration, an implied contract is thereby created to pay the arbitrator and umpire who acted in the reference reasonable remuneration for their services.

Virany v. *Warne*, 4 Esp. 47, and *Burroughes* v. *Clarke*, 1 Dowl. 48, distinguished.—*Crampton* v. *Ridley*, Q.B.D. 554—20 Q. B. D. 40; 57 L. T. 88.

3. *Condition—Schoolmaster.*—The defendant's son was a pupil at the plaintiff's school, and the defendant had notice of a rule that no pupil was allowed to be absent for a night during Easter Term. The plaintiff allowed the defendant's son to go to the defendant's house during Easter Term, on condition of his returning the same evening. The defendant sent the plaintiff a telegram, stating that it was not convenient for his son to return before the next morning, and the plaintiff telegraphed, in reply, that, if the defendant's son did not return that night he would not receive him back at all. The defendant did not send his son back.

Held, that the plaintiff was entitled to fees for the whole of Easter Term, and that the defendant could not recover damages for breach of contract.—*Price* v. *Wilkins*, Q.B.D.—58 L. T. 680.

4. *Consideration—Failure—Company—Sale of shares—Registration.*—The defendant sold shares in a company through a broker on the London Stock Exchange. The plaintiff purchased the shares through a broker. The transfer was executed, and the price of the shares was paid upon the delivery of the transfer in accordance with the rules and usages of the Stock Exchange; and this was done before any application could be made by the transferee to the company to register him in respect of the shares. The plaintiff applied to the company to have his name entered upon the register as the transferee of the shares, but the company declined to register him. The plaintiff brought an action against the defendant to recover back the price paid for the shares, on upon a total failure of consideration.

Held (affirming the judgment of Stephen, J.), that the defendant was not liable, as the contract of sale

did not impose upon him the obligation of procuring the registration of the transferee by the company.

Stray v. *Russell*, 7 W. R. 641, 1 E. & E. 888, followed.—*London Founders' Association* v. *Clarke*, C.A. 489—20 Q. B. D. 576; 57 L. J. Q. B. 291.

5. *Death of promisor—Promise of marriage—Action against executor—Special damage.*—An action for breach of promise of marriage, where no special damage is alleged, does not survive against the personal representatives of the deceased promisor.

Special damage must consist in some loss to the property of the promisee flowing directly from the breach, or within the contemplation of both parties at the date of the promise as the probable result of the breach, according to the rule laid down in *Hadley* v. *Baxendale*, 2 W. R. 302, 9 Ex. 341; and such special damage alone can be recovered.

Chamberlain v. *Williamson*, 2 M. & S. 408, approved and followed.—*Finlay* v. *Chirney*, C.A. 534—20 Q. B. D. 494; 57 L. J. Q. B. 247; 58 L. T. 664.

6. *Foreign Government—De facto Government—Ratification.*—The defendants, who were French subjects, contracted with the Peruvian Government for the purchase of guano, and agreed to be bound by the tribunals of Peru. Disputes arose on matters of account, and the matter was compromised between the defendants, who assented to this course, and the *de facto* Government of the Dictator, which had been recognised by the French Government. After many years' litigation against other parties in other English courts, the defendants recovered a large sum to which they were entitled under the compromise, and this sum was still in court. The plaintiffs, who were the *de jure* Government of Peru, reconstituted in 1886, did not interfere in the proceedings, but moved to restrain the defendants from taking the money out of court, on the ground that the compromise was void unless ratified by the *de jure* Government when restored.

Held, that the question was one of international law; that the acts of the *de facto* Government towards foreigners by whose Government it had been recognised did not require ratification and could not be repudiated by the *de jure* Government; that the compromise was valid; and that, taking into consideration the balance of convenience and the attitude of the Peruvian Government during the litigation, and the fact that the Dictator's Government could not have recovered the money, the motion must be dismissed, with costs.—*Republic of Peru* v. *Dreyfus*, CH.D. KAY, J. 492—38 Ch. D. 348; 57 L. J. Ch. 536; 58 L. T. 433.

7. *Rescission—Notice—Reasonable time—Specific performance.*—A., who was trustee of the bare legal estate in a farm, contracted, on the 8th of July, to sell it to B. As soon as B. discovered, by the answers to his requisitions, the true state of the title, he, by further requisitions, about the middle of August, required that the beneficiaries should sign or ratify the contract. A. at first refused, and proposed that they should merely join in the conveyance; but upon B. insisting on his requisition A. promised, "without prejudice," that it should be done. The original contract was to have been completed on the 4th of August, but time was not made of the essence. On the 11th of October B. wrote that, unless he received the ratification "within the present week," he should "seek to rescind." Four weeks later, not having received it, he wrote, "The contract is now rescinded." A. had obtained all the necessary signatures within a day or two afterwards.

Held, that B. might have rescinded immediately his requisition as to the beneficiaries signing the contract was rejected, and that, at any time after that—the rule as to fixing a reasonable time not being applicable, A. not being able to make a good title himself, nor having power to compel a conveyance by those who could—B. might have declined to wait any longer; and that, even if the rule had been applicable, the time allowed was, under the circumstances, reasonable.

Forrer v. *Nash*, 14 W. R. 8, 35 Beav. 167, and *Brewer* v. *Broadwood*, 31 W. R. 115, 22 Ch. D. 105, followed.

Salisbury v. *Hatcher*, 2 Yo. & Coll, 54, distinguished.—*Lee* v. *Soames*, CH.D. KEK., J. 884.

8. *Set-off—Counter-claim—Unliquidated damages.*—A company contracted to complete a railway in five years, and to maintain and work it, in consideration of which the Government of Newfoundland covenanted to pay to the company an annual subsidy for thirty-five years, to attach proportionately and form part of the company's assets on the completion and working of each section of five miles, and to grant to the company in fee simple 5,000 acres of land for each completed mile of railway on completion of each section. The company made part of the line, and, on completion of each section, received proportionate grants of land and half-yearly payments on account of the subsidy. The company afterwards committed a breach of the contract.

Held, (1) that each claim to a grant of land was complete on the completion of each section; (2) that, on the completion of each section, a proportionate subsidy became payable, subject to the condition of continuous working; (3) that the Government could counter-claim for damages for non-completion of the railway against the company's assignees.—*Newfoundland Government* v. *Newfoundland Railway Co.*, P.C. —13 App. 199; 57 L. J. P. C. 35; 58 L. T. 285.

9. *Specific performance—Written contract—Parol evidence.*—By the terms of a written agreement, J. agreed to lease to W. "a shop and premises . . . which are to be built at a cost not to exceed £400, . . . at the annual rental of £75. . . ." J. expended £750 in building the premises, and refused to grant a lease to W. at the annual rent of £75. In an action by W. for specific performance of the written agreement, J. set up as a defence a contemporaneous parol proviso to the agreement, to the effect that, if the outlay exceeded £400, the rent was to be raised in proportion.

Held, that, as the parol proviso did not contradict, but merely explained, the terms of the written instrument, evidence of it was admissible; and that, as the evidence proved that the plaintiff had agreed to such parol proviso, the action must be dismissed.

Lord Townshend v. *Stangroom*, 6 Ves. 328, followed.—*Williams* v. *Jones*, CH.D. KEK., J. 573.

See also COMPANY, 10—12, 27, 32, 36; COVENANT, 3, 4; FRAUDS, STATUTE OF; HUSBAND AND WIFE, 14; INFANT, 1, 2; INJUNCTION, 9; JURISDICTION, 14, 19; LOCAL GOVERNMENT, 5; MANDAMUS, 1; MISREPRESENTATION, 2, 3; MORTGAGE, 2; PRACTICE, 49, 50; SPECIFIC PERFORMANCE, 1—5; TRUSTEE, 1.

CONTRIBUTORY.—See COMPANY, 6—15, 33.

CONTRIBUTORY NEGLIGENCE.—See MASTER AND SERVANT, 5; NEGLIGENCE, 1, 2; RAILWAY, 7, 8.

CONVERSION.—See EXECUTOR, 1; PROBATE DUTY; WILL, 17.

CONVEYANCING ACTS.—See COPYHOLD; HUSBAND AND WIFE, 15; LANDLORD AND TENANT, 3; SETTLEMENT, 9; SCOTLAND, LAW OF, 4; TRUSTEE, 2, 3, 5, 9, 10; VENDOR AND PURCHASER, 4.

CONVOCATION.—See ECCLESIASTICAL LAW, 5.

COPYHOLD:—

Devolution—Death of sole trustee—Conveyancing

Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 30—*Copyhold Act*, 1887 (50 & 51 *Vict. c.* 73), *s.* 45.—A sole surviving trustee of copyholds, who was tenant on the court rolls, died in 1884. His executors had not been admitted tenants to the property before the passing of the Copyhold Act, 1887.

Held, that, on the passing of the Copyhold Act, 1887, the Conveyancing Act, 1881, ceased to have any application to copyholds, and that the copyholds were vested in and could be dealt with by the persons in whom they would have been vested if the Act of 1881 had never been passed.

Semble, if, before the passing of the Copyhold Act, the executors had been admitted to the copyholds, and had made a disposition of them, they would have been able to make a good title.—*In re Mills's Trusts*, CH.D. NOR., J. 393—37 Ch. D. 316; 57 L. J. Ch. 466; 58 L. T. 620.

See also DEED, 3.

COPYRIGHT:—

1. *Drama — Infringement — Dramatised novel—Multiplying copies—Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *ss.* 2, 3.—Although the mere dramatisation of a novel and the representation of the play upon the stage are not infringements of the copyright of the novel, the making copies not in print of a play in which numerous passages from the novel have been inserted is "multiplying copies" of the novel within section 2 of the Copyright Act, and is an infringement of the copyright.—*Warne* v. *Seebohm*, CH.D. STI., J. 686—57 L. J. Ch. 689; 58 L. T. 928.

2. *Lecture—Publication—University professor.*—A professor in Glasgow University delivered lectures to a class of students, who paid fees for the right to attend.

Held (Lord Fitzgerald dissenting), that the professor did not thereby publish the lectures to the whole world, so as to entitle anyone who heard them to republish them without the permission of the authr.—*Caird* v. *Sime*, H.L. 199—12 App. 326; 57 L. T. 634.

3. *Music—Assignment*—3 & 4 *Will.* 4, *c.* 15, *s.* 2—*Copyright Act*, 1842, *s.* 20.—An assignment of copyright in a musical composition must be in writing.

The plaintiff had for some years acted as musical conductor at defendant's music-hall, and had composed pieces for performance which had been performed there, and for which he had been paid.

Held, that the relations existing between the parties were no bar to an action by the plaintiff for infringement of copyright.—*Eaton* v. *Lake*, Q.A. 277—20 Q. B. D. 378; 57 L. J. Q. B. 227.

4. *Newspaper—Infringement—Registration—Copyright Act*, 1842, *ss.* 3, 13, 18, 24.—To entitle the proprietor of a periodical to bring an action for infringement of a copyright the entry on the register at Stationers' Hall must state the exact day of the first time of publication of the work, as well as the title; and the proprietor must prove that he has actually paid for the contributions of the infringement of which he complains.—*Collingridge* v. *Emmott*, CH.D. KAY, J.—57 L. T. 864.

5. *Picture—Infringement—Sale after registration — Damages — Injunction — Penalty — Copyright Act*, 1862 (25 & 26 *Vict. c.* 68), *ss.* 1, 4, 6, 11.—The defendant, at the request of the plaintiffs, executed numerous copies abroad of a picture, the property of the plaintiffs, before registration of the copyright. Some of the copies were sent to the defendant's agents in England before, and sold by them after, registration of the copyright.

Held, that the plaintiffs were entitled to an injunction and damages for breach of contract, and (*dissentiente* Lopes, L.J.) to an injunction, damages, and an order for delivery of pirated copies; but that they were not entitled to penalties.

Judgment of the Queen's Bench Division reversed. —*Tuck* v. *Priester*, C.A. 93—19 Q. B. D. 629; 56 L. J. Q. B. 533; 57 L. T. 110.

See also INJUNCTION, 12.

CORONER:—

1. *Inquisition—Irregularity—Amendment*—Certiorari—*Coroners Act*, 1887 (50 & 51 *Vict. c.* 71), *s.* 20.—A coroner's inquisition stated that the jury "say upon their oaths that the directors of the Great Western Railway Co. did feloniously kill and slay" the deceased.

Held, that the jurisdiction of the High Court to quash irregular inquisitions has not been affected by section 20 of the Coroners Act, 1887, which gives power to "the court having cognisance of the case" to amend defects in inquisitions; and that, on an application for a writ of *certiorari*, the inquisition could not be amended, but must be quashed.—*Reg.* v. *Great Western Railway Co.*, Q.B.D. 506—20 Q. B. D. 410; 57 L. J. M. C. 31; 58 L. T. 765.

2. *Misconduct — Inquisition—Verdict—Depositions*—Certiorari.—On an application for a *certiorari* to quash a coroner's inquisition, the court will not examine the depositions returned by the coroner in order to ascertain whether there was sufficient evidence to support the verdict.

A. was killed, and B. and C. were wounded, by police-constables, who fired rifles during an affray. An inquest was held on A., and was adjourned after the jury had viewed A.'s body. B. died the day before the adjourned inquest, and the same jurors were, by the coroner's direction, summoned to hold an inquest on B. C. died two days afterwards, and the same jury investigated the death of all three parties. The jury had retired, and the coroner took their verdict in a private room, and not in court.

Held, that the coroner had been guilty of misconduct, and that the proceedings were irregular.—*In re Mitchelstown Inquisition*, Q.B.D. (Ir.)—22 L. R. Ir. 279.

CORPORATION:—

Removal of officer—Eleemosynary corporation—Injunction—Visitation.—A member or an officer of an eleemosynary corporation may be removed for sufficient cause. The corporation will not be restrained by injunction from inquiring into the conduct of an officer, but the only remedy is by visitation.—*O'Grady* v. *Mercer's Hospital*, V.C. (Ir.)—19 L. R. Ir. 356.

See also ELECTION LAW, 1—4; INCOME TAX, 6; MUNICIPAL CORPORATION, 1, 2; QUO WARRANTO, 1.

COSTS:—

1. *Administration—Next of kin.*—In a contest for the right to letters of administration among the next of kin *primâ facie* equally entitled, the administrator should be selected by the registrar on summons, and persons improperly brought into court by a motion will be entitled to their costs.—*In the Goods of John*, P.D. & A.D.—58 L. T. 683.

2. *Administration—Payment into court.*—Executors cannot, by payment into court or any other conveyance of a legacy, relieve the residue from bearing the costs of an inquiry for the purpose of ascertaining who are the persons entitled to take.—*In re Gibbon*, C.A. CHI., J. 180—36 Ch. D. 486; 56 L. J. Ch. 811; 57 L. T. 8.

3. *Administration action—Benefit of estate—Defaulting solicitor—Attachment.*—The solicitor for the administrator of an intestate retained in his hands a portion of

the estate and failed to account for it. The administrator obtained in 1876, in the Queen's Bench Division, a rule that the solicitor should be struck off the rolls, or answer an affidavit relating to the retention of the money. A writ of attachment was issued against the solicitor, who absconded. The writ was renewed in each term down to 1887. In that year, upon further consideration of an action to administer the estate, the taxing master was directed to tax the costs, charges, and expenses of the administrator properly incurred. He disallowed the costs of the proceedings against the solicitor, on the ground that they were not the ordinary proceedings, but were in the nature of punishment to the solicitor.

Held, that the object of the proceedings against the solicitor was to obtain the money due to the estate; that some of the costs ought to be allowed; and that it must be referred to the taxing master to consider what part of the disallowed costs had been incurred for the benefit of the estate.—*Muckalt* v. *Davis*, CH.D. NOR., J.—57 L. J. Ch. 3; 57 L. T. 755.

4. *Administration action—Delay—Ord.* 65, *r.* 11.—An action for administration of the estate of a testatrix was instituted in 1876. In August, 1882, Bacon, V.C., made an order in the action on further consideration declaring that the costs of the action were chargeable on the real estate of the testatrix in exoneration of her personalty, and directing taxation of the costs of all parties to the action as between solicitor and client. In May, 1883, Bacon, V.C., made a further order to the same effect with reference to the costs of all parties incurred since August, 1882, but neither of the orders expressly directed payment of the costs when so taxed. In November, 1887, the action came on, on second further consideration, before Kay, J., who directed, under order 65, a reference to the taxing officer for inquiry and report as to the cause of the delay in the proceedings, and as to who was responsible therefor.

Held, on appeal, (1) That, whether on principle or on the authorities, the orders made by Bacon, V.C., did not amount to an allowance of the costs so as to prevent the judge before whom the matter afterwards came exercising any power given him by ord. 65, r. 11; (2) that the power given by ord. 65, r. 11, was not confined to the case where costs had been incurred on behalf of, and were payable by, a party to the action, but applied also to a case where costs were payable out of a fund; (3) that the power given by the rule was not limited in its operation to costs incurred on or after the date when the new rules came into operation, but was applicable to all costs, at whatever time incurred, in any actions then pending; and that Kay, J., had jurisdiction to direct a reference with respect to costs incurred prior to October, 1883.—*Brown* v. *Burdett*, C.A. 225—37 Ch. D. 207; 58 L. T. 571.

5. *Administration action—No personal estate—Costs out of real estate.*—If in a creditor's action to administer real and personal estate the accounts show that there is no personal estate, the costs of the plaintiff and of the administration are payable out of the real estate.—*Barry* v. *Quinlan*, V.C. (IR.)—21 L. R. Ir. 11.

6. *Administration action—Vexatious proceedings—Delay—Ord.* 65, *rr.* 1, 11.—An administration action was brought by a person whose only interest in the estate consisted of a share of the residue, which he had bought for £55. The writ was issued in 1862, judgment was given for administration and accounts and inquiries were ordered in 1863, and the certificate was made in 1887, when it appeared that the action had been unnecessary and of no benefit to the estate.

Held, that the plaintiff must pay all the costs of the action incurred since ord. 65, r. 1, came into operation, and that the costs up to that time must be taxed, having regard to the delay which had occurred, with liberty for all parties to apply in respect of such costs.—*Goldring* v. *Lancaster*, CH.D KAY, J. 216—58 L. T. 74.

7. *Appeal—Separate defendants—Discretion of taxing master—Ord.* 65, *r.* 27.—The House of Lords, on dismissing an appeal, directed that the plaintiffs should pay the defendants' costs in all three courts, and that in taxing the costs in the High Court and in the Court of Appeal the taxing master should consider whether any of the defendants who had appeared separately had any sufficient reason for severing in their defences, and if, and in so far as, it should appear that they had not, the taxing master was to allow only one set of costs, as he should think right. The taxing master allowed each of the defendants separate costs.

Held, that the House of Lords had delegated to the taxing master the duty of deciding whether the defendants were entitled to separate costs, and that, as it had not been shown either that he had not exercised his discretion, or that he had done so on a wrong principle, an appeal from his decision could not be entertained.

Decision of North, J., affirmed.—*Boswell* v. *Coaks* (2), C.A. 209—58 L. T. 97.

8. *Appeal for costs—Executor—Administration action—Ord.* 65, *r.* 1.—An appeal lies against the decision of a judge in chambers ordering an executor who is the defendant in an administration action to pay the costs of such action on the ground of his refusal to furnish accounts.—*Lewis* v. *Pritchard*, C.A.—57 L. T. 858.

9. *Attachment—Garnishee order—Company—Transfer of shares—Common Law Procedure (Ireland) Act*, 1853 (16 & 17 *Vict. c.* 113), *ss.* 132, 133.—Costs will be allowed of an application under sections 132 and 133 of the Common Law Procedure Act (Ireland), 1853, to attach and transfer shares in a company, and will be payable out of the proceeds of shares in the hands of the sheriff.—*Viscount Massereene* v. *Brannigun*, Q.B.D. (IR.)—22 L. R. Ir. 65.

10. *Company—Winding up—Petition—Separate creditors.*—A creditor's winding-up petition stood over, and it was, at the request of the petitioner, dismissed with costs, the company having paid the petitioner's debt and costs. One of two creditors who appeared to support the winding up had, since the petition stood over, been paid part of his debt, but the other had not received anything.

Held, that the proper order was to give one set of costs to the creditor who had gained nothing by the proceedings.—*In re Peckham and East Dulwich Tramways Co.*, CH.D. CHI., J.—57 L. J. Ch. 462; 58 L. T. 876.

11. *County court—Counter-claim—Third party—County Courts Act*, 1867 (30 & 31 *Vict. c.* 142), *s.* 5—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-section* 3—*Ord.* 21, *rr.* 11—14—*Ord* 65, *r.* 1.—In an action by a landlord for three years' rent the defendant counter-claimed against the plaintiff and third parties for an illegal distress. The county court judge gave judgment for the plaintiff on the claim and counter-claim, but for the defendant against the third parties for £2 5s., and such costs as the defendant would have been entitled to at law.

Held, that the costs were in the judge's discretion, and that, there having been no exercise of his discretion against the third parties, the defendant was not entitled to any costs.—*Lewin* v. *Trimming*, Q.B.D.—21 Q. B. D. 230.

12. *Discretion of judge—Special cause—Seduction*

—*Judicature (Ireland) Act*, 1877 (40 & 41 *Vict. c.* 57), *s.* 53.—In an action for the seduction of a woman thirty-five years old, all the parties being in poor circumstances, the jury found a verdict for the plaintiff, with £10 damages.

Held, that there was not "special cause" to justify the judge in depriving the plaintiff of costs.—*Wilson* v. *McMaine*, C.A. (IR.)—19 L. R. Ir. 582.

13. *Divorce—Adultery of wife—Separate estate.*—When a wife, who has had a decree *nisi* pronounced against her on the ground of adultery, is possessed of separate property, the court will refuse the usual order for the wife's costs, and will order her to pay the costs of the suit.—*Millward* v. *Millward and Andrews*, P.D. & A.D.—57 L. T. 569.

14. *Divorce—Adultery of wife—Separate estate—Undefended suit—Notice to wife.*—In a suit for dissolution of marriage by a husband, costs may be given against the wife where she has separate estate, but she must have notice of the application.—*Field* v. *Field and Denton*, P.D. & A.D. 720—13 P. D. 23; 58 L. T. 90.

15. *Divorce — Co-respondent — Queen's Proctor — Costs of intervention—Divorce Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 34—*Matrimonial Causes Act*, 1860 (23 & 24 *Vict. c.* 144), *s.* 7—*Matrimonial Causes Act*, 1878 (41 & 42 *Vict. c.* 19), *s.* 2.—Where the petitioner proved charges of adultery against his wife, and the court pronounced a decree *nisi* for dissolution and condemned the co-respondent in costs, and the Queen's Proctor subsequently intervened but failed to establish his charges, the court, on a separate application, refused to condemn the co-respondent in the petitioner's costs of the Queen's Proctor's intervention.—*Blackhall* v. *Blackhall and Clarke*, P.D. & A.D. 926—13 P. D. 94; 57 L. J. P. D. & A. 60.

16. *Divorce — Wife's costs.*—At the trial of a wife's suit for a divorce the charges of cruelty were withdrawn, and the court held that the charges of adultery had not been proved. There had been no order for the respondent to secure the petitioner's costs.

The court refused to order the respondent to pay the petitioner's costs.—*Thompson* v. *Thompson*, P.D. & A.D.—57 L. T. 374.

17. *Event—Counter-claim.*—Where, in a trial by jury, there is a claim and a counter-claim, which is not a set-off, but is in the nature of a cross-action, and the plaintiff succeeds on the claim and the defendant on the counter-claim, the plaintiff should have the general costs of the claim, to be taxed as though it were an independent section, and the defendant the general costs of the counter-claim, to be taxed as though it were another independent action, and the *allocatur* for costs should be given for the balance due to the party in whose favour such balance is.—*Shrapnel* v. *Laing*, C.A. 297—20 Q. B. D. 334; 57 L. J. Q. B. 195; 58 L. T. 705.

18. *Event—Counter-claim—Ord.* 65, *r.* 1.—The defendant admitted the plaintiff's claim for £78, and obtained a verdict for £17 on a counter-claim. The judge gave judgment for the plaintiff for his claim, with costs to the date of the counter-claim, and for the defendant for his counter-claim, with costs thereof and subsequently, including the costs of the trial.

Held, that, no "good cause" having been shown, the judge had not jurisdiction to prevent the costs from following the "event."—*Wight* v. *Shaw*, C.A. 408—19 Q. B. D. 396.

19. *Infant defendant—Appearance by solicitor—Personal liability for costs.*—A writ was served on an infant, for whom a solicitor entered an appearance *bonâ fide*, and without knowledge of the defendant's infancy. The action was afterwards discontinued on account of the defendant's infancy.

Held, that the solicitor was not personally liable for the plaintiff's costs.—*Ward* v. *Keefe*, Q.B.D. (IR.)—22 L. R. Ir. 154.

20. *Injunction — Interlocutory order — Trial.*—Where upon an interlocutory motion the plaintiff obtains the relief which he seeks, he is bound to apply to the defendant to have the costs disposed of on motion, and unless he does so is precluded from having the extra costs of going to trial, but if the defendant refuses to allow the matter to be disposed of on motion, or if any question remains open to be decided, the case cannot be so dealt with.—*Sonneschein* v. *Barnard*, CH.D. STI., *J.*—57 L. T. 712.

21. *Interest—Dismissal of action — Judgment—Certificate — Ord.* 42, *r.* 14. — By a judgment delivered before the Rules of Court, 1883, came into operation, an action was dismissed and the plaintiff was ordered to pay the costs, but the judgment contained no direction as to the date from which interest on the costs was to run. Taxation proceedings were carried on, and the taxing master's certificate was made after the rules had come into operation.

Held, affirming the decision of North, J., that the Rules of 1883 applied to the taxation proceedings, and that interest on the costs ran, not from the date of the taxing master's certificate, but from the date of the judgment.

Held, also, that the true interpretation of the words in ord. 42, r. 14: "The forms used in Appendix H. shall be followed with such variations as circumstances may require"—is, that the forms in Appendix H. can only be varied for the purpose of making them to be in accordance with the terms of the judgment or order.—*Boswell* v. *Coaks*, C.A. 65—36 Ch. D. 441; 57 L. J. Ch. 101; 57 L. T. 742.

22. *Judgment—Summons—Ord.* 32, *r.* 6—*Ord.* 40, *r.* 1.—In an action to restrain the publication of a trade circular, the defendants, by their statement of defence, offered to submit to a perpetual injunction in the terms of an *interim* injunction which had been previously granted, "to be obtained on a summons to be issued for that purpose." The plaintiffs set the action down on notice of motion for judgment on the admissions in the pleadings, and delivered to the defendants a copy of the minutes of the proposed judgment, which was identical with that to which the defendants had offered to submit.

Held, that the plaintiffs ought to have proceeded by summons in chambers, and would only be allowed such costs as would have been properly incurred if they had proceeded by summons.—*London Sanitary Dyeing Co.* v. *Digby*, CH.D. NOR., *J.* 497—57 L. J. Ch. 505.

23. *Mortgage — Foreclosure action — Mortgagee in possession—Claim for personal payment—Summons—Ord.* 55, *r.* 5*a*.—A mortgagee in possession brought an action for foreclosure, and asked on motion for judgment for (*inter alia*) an order for personal payment by the mortgagor of the amount due, but this part of the order was refused.

Held, that the plaintiff was entitled to the costs of the action, and not simply to such costs as he would have received if he had proceeded by summons.—*Brooking* v. *Skewis*, CH.D. KAY, *J.* 215—58 L. T. 73.

24. *Mortgage—Foreclosure action—Receiver—Summons—Ord.* 55, *r.* 5*a*.—A mortgagee brought a foreclosure action, the facts being complicated, and the speedy appointment of a receiver being of importance

The receiver was duly appointed, and the defendant did not appear in the action.

Held, on motion for judgment, that the plaintiff was only entitled to such costs as he would have been entitled to if he had proceeded by summons.

Semble, that a receiver can be appointed on a summons under ord. 55, r. 5a.—*Barr* v. *Harding*, CH.D. KAY, J. 216.

25. *Motion — Interlocutory injunction — Postponement till trial.*—In a patent action a motion was made on behalf of the plaintiff for an *interim* injunction, but was not heard on the merits, the order made being "motion to stand to trial." No order was made as to costs. On the trial judgment was given for the defendant, with costs; but nothing was said as to the costs of the motion, and the taxing master, in drawing up the judgment, refused to include them.

Held, that, where a motion is adjourned or stands over to the trial, and no mention is made as to the costs of it either then or at the trial, the judgment carries the costs of the motion.—*Gosnell* v. *Bishop*, CH.D. KEK., J. 505—38 Ch. D. 385; 57 L. J. Ch. 642.

26. *Partition—Trustees—Deceased trustees.*—In a partition action an order was made directing taxation of costs, including in the costs of the trustees one moiety of any costs and expenses properly incurred by them beyond their costs of the action.

Held, that the trustees were bound to pay all costs of former deceased trustees properly incurred; and that the burden of proof that any payments were wrongly made was on the objectors.—*Harvey* v. *Oliver*, CH.D. KAY, J.—57 L. T. 239.

27. *Payment into court—Discontinuance—Ord.* 26, *r.* 1; *ord.* 65, *r.* 1.—On a summons, under order 14, for the payment of a sum of money, the master ordered the defendant to pay money into court as to part of the claim, and gave leave to defend as to the remainder. After issue joined, the plaintiff discontinued the action. The master gave the defendant the whole costs of the action from the beginning.

Held, that the costs were not governed by ord. 26, r. 1, but were in the discretion of the court, under ord. 65, r. 1, and that the plaintiff was entitled to his costs up to the time of payment into court.

Langridge v. *Campbell*, 25 W. R. 351, 2 Ex. D. 281, distinguished.—*Suckling* v. *Gabb*, Q.B.D. 175.

28. *Scale—Arbitration—Ord.* 65, *r.* 12.—An action on a partnership account was by consent referred to an arbitrator. The terms of reference were that "all matters in difference between the parties in the action" should be referred, and that "the costs of the action" should abide the award. After the order of reference the parties agreed to submit to the arbitrator a further matter of account outside the action. The arbitrator awarded £40 to the plaintiff on his claim, and found that a further sum of £14 2s. was due to him on the subsequent account.

Held, that the plaintiff had recovered "in the action" less than £50, and therefore came under the provisions of ord. 65, r. 12, whereby the costs recoverable are limited to county court costs in actions of contract where less than £50 is recovered, unless by leave of the court the High Court scale is allowed.—*Emmett* v. *Heyes*, Q.B.D. 237.

29. *Scale—County Courts Act*, 1867, *s.* 5—*Ord.* 65, *rr.* 1, 12.—Where the plaintiff in an action founded on contract within the meaning of section 5 of the County Courts Act, 1867, recovers less than £20, the court can, under ord. 65, r. 1, allow him costs upon the county court scale.

Judgment of the Queen's Bench Division (36 W. R. 62) reversed.—*Neaves* v. *Spooner*, C.A. 257—58 L. T. 164.

30. *Security—Absence of plaintiff.*—A plaintiff who is a seafaring man, but whose family reside permanently within the jurisdiction, and who resides with his family when not on a voyage, will be ordered to give security for the costs of an action.—*Martin* v. *Russell*, V.C. (Ir.)—21 L. R. Ir. 196.

31. *Security—Administration action—Executor—Set-off.*—In an administration action A. appealed against a finding that B. was the heir-at-law. B. died, and A. revived the proceedings against D., B.'s executor and devisee in trust. D. was insolvent, but A. had been ordered to pay to D. the costs of a previous appeal.

Held, that A. must give security for costs.—*Knight* v. *Gardner*, C.A.—38 Ch. D. 168; 58 L. T. 699.

32. *Security — Appeal — Special circumstances — Abuse of process of court—Ord.* 58, *r.* 15.—An appellant may be ordered to give security for the costs of an appeal where a *primâ facie* case of abuse of the process of the court has been made out.—*Weldon* v. *Maples*, C.A. 154—20 Q. B. D. 331; 57 L. J. Q. B. 224; 57 L. T. 672.

33. *Security—Company—Winding up—Petitioner abroad — Judgment against company.*—A company against which a winding-up petition had been presented applied that the petitioner, who was resident abroad, might be ordered to give security for costs. The petitioner had obtained judgment in an undefended action against the company.

Held, that no security need be given.—*In re Contract and Agency Corporation*, CH.D. STL., J.—57 L. J. Ch. 3.

34. *Security—Married woman—Next friend.*—A married woman suing by her next friend may be ordered to find security for costs.—*Stevens* v. *Thompson*, C.A.—38 Ch. D. 317; 57 L. J. Ch. 748.

35. *Shipping—Collision—Action—Towing—Co-defendants.*—The barge *E.*, while being towed by the *S.*, was damaged by a collision with the steamship *R.* The owners of the *E.* commenced an action, joining the owners of both vessels as defendants. At the trial the *R.* alone was found to be to blame.

Held, that the owners of the *R.* must pay the costs of the owners of the *S.*, as well as those of the plaintiffs.—*The River Lagan*, P.D. & A.D.—57 L. J. P. D. & A. 28.

36. *Slander—Payment into court—Acceptance—Common Law Procedure (Ireland) Act*, 1853, *s.* 126—*Judicature (Ireland) Act*, 1877, *s.* 53.—The defendant in an action for slander paid into court sixpence, which was accepted by the plaintiff in full satisfaction.

Held, that the plaintiff was entitled to his costs necessarily and properly incurred in the action.—*McSheffrey* v. *Lanagan*, Q.B.D. (Ir.)—20 L. R. Ir. 528.

37. *Solicitor—Contempt of court—Probate proceedings*—Subpœna *to bring in script.*—A *subpœna* was issued in a non-contentious matter directing R., a solicitor, to bring into the registry a script which was stated to be, but which was not, in his possession or control.

Held, that non-compliance with the *subpœna* was not a contempt; that the fact that R. had not followed the practice of filing an affidavit explaining the reason for his non-compliance was not a contempt; and that the court had no jurisdiction to order him to pay the costs of an application for an order to attend for examination before the judge. — *Rawlings* v. *Emmerson*, C.A.—57 L. J. P. D. & A. 1.

38. *Solicitor—Privilege—County Courts Act*, 1849 (12 & 13 *Vict.* c. 101), *s.* 18—*County Courts Act*, 1867,

ss. 5, 34.—Where a solicitor, as plaintiff in an action upon a bill of costs commenced in the High Court, recovers less than £20, he becomes subject to the provisions of section 5 of the County Courts Act, 1867, as to costs, and any privilege which he may have had of bringing the action in the High Court is taken away by section 18 of the County Courts Act, 1849, which is incorporated into the County Courts Act, 1867, by section 34.—*Blair* v. *Eisler*, Q.B.D. 767—21 Q. B. D. 185; 57 L. J. Q. B. 512.

39. *Taxation—Arbitration—Submission—Costs of reference.*—If on a reference to arbitration by consent, but not in a cause, the costs of the reference were left in the arbitrator's discretion, the costs of negotiating and settling the terms of submission may be allowed on taxation as costs of the reference.—*In re Autothreptic Boiler Co.*, Q.B.D.—21 Q. B. D. 182; 57 L. J. Q. B. 486.

40. *Taxation—Bankruptcy—Review—Bankruptcy Rules*, 1886, *r.* 112.—Rule 112 of the Bankruptcy Rules, 1886, applies to costs which, by the provisions of the Act, are payable out of the estate, and not to costs which are in the discretion of the court, and which, in consequence of the court exercising its discretion in a particular manner, may come to be paid out of the estate.—*Ex parte Jaynes, In re Dowson*, Q.B.D., BANKY. 864.

41. *Taxation—Counsel—Administration action—Inquiry by chief clerk—Adjournment into court.*—If an inquiry in chambers is adjourned into court, the costs of three counsel will not be allowed as between party and party.—*Maciver* v. *Harbison*, M.R. (Ir.)—21 L. R. Ir. 241.

42. *Taxation—Counsel—Refresher—Appeal—Ord.* 65, *r.* 27.—On taxation an addition may, in the discretion of the taxing master, be made to the fees marked on the briefs of counsel, on appeals from the Chancery Division to the Court of Appeal, even if no *vivâ voce* evidence has been taken. Such addition may, if the taxing master thinks proper, be in the shape of a daily allowance.

Svendsen v. *Wallace*, 34 W. R. 151, 16 Q. B. D. 27, explained and held to be applicable to appeals from the Chancery Division.—*Easton* v. *London Joint-Stock Bank*, C.A. 375—38 Ch. D. 25; 57 L. J. Ch. 329; 58 L. T. 364.

43. *Taxation—County court.*—The plaintiff commenced a county court action for less than £10, and consulted solicitors with reference to it. The solicitors investigated the case and recommended a settlement, which the plaintiff would not accept. The solicitors returned the papers to the plaintiff, who proceeded with the action in person.

Held, that, on the taxation of the solicitors' costs for services rendered, it was a question for the taxing master whether the solicitors had, in fact, acted in the action.—*In re Dod*, Q.B.D.—21 Q. B. D. 242.

44. *Taxation—Discontinuance before notice of trial—Discretion of master—Ord.* 65, *r.* 27 (6).—Rule 9 of the "Special Allowances" in the scale of 1875 enables the master, in his discretion, to allow the costs of evidence obtained by a defendant, though the plaintiff discontinues his action before notice of trial.—*Windham* v. *Bainton*, Q.B.D. 832—21 Q. B. D. 199.

44a. *Taxation — London agent — Solicitors Act*, 1843 (6 & 7 *Vict.* c. 73), *s.* 37.—The Solicitors Act, 1843, gives the court no jurisdiction to order the taxation of part of an agent's bill of costs.

The court has, under its general jurisdiction, power to order the taxation to a bill relating to court business, whether the bill be an agent's bill or a bill delivered by a solicitor to his client; and to refer any part of a bill to taxation.—*In re Johnson* (2), C.A. 374—37 Ch. D. 433; 57 L. J. Ch. 306; 58 L. T. 692.

45. *Taxation—Poor law—Solicitor to guardians—Taxation by clerk of peace—Solicitors Act*, 1843, *s.* 37—*Poor Law Amendment Act*, 1844 (7 & 8 *Vict.* c. 101), *s.* 39.—Section 39 of the Poor Law Amendment Act, 1844, which provides for taxation in certain cases by the clerk of the peace of the costs of a solicitor employed by a board of guardians, does not disentitle a solicitor to an order for taxation, as between solicitor and client, under section 37 of the Solicitors Act, 1843.—*Southampton Guardians* v. *Bell*, Q.B.D. 924—21 Q. B. D. 297.

46. *Taxation—Reduction by one-sixth—Solicitors Act*, 1843, *s.* 37.—Solicitors paid themselves £20 in full discharge of their costs out of a client's money in their hands. The client changed his solicitors, and obtained an order to tax the costs of the former solicitors, and the amount was reduced on taxation by more than one-sixth.

Held, that the solicitors were not entitled to the costs of taxation.—*In re Elwes*, CH.D. KAY, J.—58 L. T. 580.

47. *Taxation — Shorthand notes — Appeal.*—The disallowance of the costs of shorthand notes by a taxing master, when taxing the costs of the trial in the court below, does not affect the question of their allowance in taxing the costs of an appeal.

The use of shorthand notes by the appellant at the hearing of the appeal is conclusive that the notes are required on the appeal.—*Nation* v. *Hamilton*, CH.D. KAY, J.—57 L. T. 648.

48. *Taxation—Solicitor and client—Jurisdiction—Judicature Act*, 1873 (36 & 37 *Vict.* c. 66), *s.* 25—*Ord.* 65, *r.* 1.—The Court of Chancery formerly had, and the High Court in matters of equitable jurisdiction now has, a general discretionary power to award costs as between solicitor and client.

Quære, whether such power exists in matters of common law jurisdiction.

Mordue v. *Palmer*, 19 W. R. 86, L. R. 6 Ch. App. 22, approved.

Cockburn v. *Edwards*, 38 W. R. 446, 18 Ch. D. 449, disapproved.

Decision of Kay, J., affirmed.—*Andrews* v. *Barns*, C.A. 705—57 L. J. Ch. 694; 58 L. T. 748.

49. *Taxation—Third party—Solicitors Act*, 1843, *s.* 38.—A local board bought land at a price to be fixed by arbitration, it being agreed that the board should pay the costs of the arbitration and reference. An arbitration was held, and the purchase was completed. The board obtained an order to tax the vendor's costs, the order reciting that the board submitted to pay what should be found due on taxation.

Held, that the board, having obtained a third-party order for taxation under section 38 of the Solicitors Act, 1843, could not take any objections to the items of the bill of costs which could not have been taken by the vendors.—*In re Holliday*, CH.D. NOR., J.—58 L. T. 301.

50. *Tender—Issue of writ.*—A defendant cannot avoid paying the costs of a writ of summons by tendering the amount sued for after issue, but before service, of the writ.—*O'Malley* v. *Kilmallock Guardians*, EX.D. (Ir.)—22 L. R. Ir. 327.

See also ADMINISTRATION, 8; ARBITRATION, 5; BANKRUPTCY, 1, 10, 13, 16, 18, 26; CONTRACT, 1; DAMAGES, 9; DISCOVERY, 4; ELECTION LAW, 21; GAS COMPANY, 2; INFANT, 9; JURISDICTION, 16; LAND CLAUSES CONSOLIDATION ACT, 4, 5; MORTGAGE, 15;

PATENT, 1, 6; SETTLEMENT, 20; SPECIFIC PERFORMANCE, 4; TRUSTEE, 14.

COUNTER-CLAIM.—See CONTRACT, 8; COSTS, 11, 17, 18; COUNTY COURT, 22; PRACTICE, 23, 25; PRINCIPAL AND AGENT, 3.

COUNTY COURT:—

1. *Appeal—Agricultural Holdings Act*, 1883 (46 & 47 *Vict. c.* 61), *s.* 46—*County Courts Act*, 1867 (30 & 31 *Vict. c.* 142), *s.* 13.—An appeal lies from the decision of a county court judge in a dispute determined by him under section 46 of the Agricultural Holdings Act, 1883.—*Hammer* v. *King*, Q.B.D.—57 L. T. 367.

2. *Appeal—Interlocutory order—Equitable jurisdiction—County Courts Equitable Jurisdiction Act*, 1865 (28 & 29 *Vict. c.* 99), *s.* 18.—An appeal upon a question of law lies under section 18 of the County Courts Equitable Jurisdiction Act, 1865, from an interlocutory order of a county court in a proceeding within its equitable jurisdiction.—*Jonas* v. *Long*, C.A. 315—20 Q. B. D. 564; 57 L. J. Q. B. 298; 58 L. T. 787.

3. *Appeal — Interpleader — County Courts Act*, 1856 (19 & 20 *Vict. c.* 108), *s.* 68 — *County Courts Act*, 1867, *s.* 13.—In an interpleader issue where neither the money claimed nor the value of the goods nor the proceeds of them exceed £20, no appeal will lie from the county court either with or without leave. Section 13 of the County Courts Act, 1867, enacting that, "with the leave of the judge, an appeal shall be allowed in actions in which an appeal does not now lie," only applies to actions, and not to interpleader issues.—*Collis* v. *Lewis*, Q.B.D. 472—20 Q. B. D. 202; 57 L. J. Q. B. 167; 57 L. T. 716.

4. *Appeal—Interpleader—Deposit—County Courts Act*, 1856, *ss.* 68, 72.—If the claimant in an interpleader proceeding in a county court deposits the appraised value of the goods deposited, such amount being under £20, he has no right of appeal.—*White* v. *Milne*, Q.B.D.—58 L. T. 225.

5. *Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5—*Committal order—"Open court."*—A county court judge sat for the purpose of hearing summonses for committal under section 5 of the Debtors Act, 1869, in a small room used at other times as his private room; it communicated with a larger room by a door which was kept open during the hearing of the summonses, and the names of the parties were, if necessary, called in the larger room. The public had access to the smaller room as well as the larger.

Held, that the orders for committal were not made "in open court," and could not be enforced.—*Kenyon* v. *Eastwood*, Q.B.D.—57 L. J. Q. B. 455.

6. *Evidence—Bankruptcy—vivâ voce evidence.*—The rule that leave to use *vivâ voce* evidence at the hearing of a motion in bankruptcy must be obtained on a separate application before the motion be heard does not apply to county courts.—*Ex parte Watkins, In re Wilson*, Q.B.D., BANKY.—57 L. T. 201.

7. *Execution—High bailiff—Wrongful execution—Recovery of fees—County Courts Act*, 1856, *s.* 88—*County Courts Act*, 1867, *s.* 31—*County Court Rules*, 1886, *ord.* 27, *r.* 1—*Ultrâ vires.*—A high bailiff of a county court sued an execution creditor for four days' possession-money on a wrongful execution levied upon goods other than those of the judgment debtor, and therefore ineffective.

Held, that, under section 83 of the County Courts Act, 1856, taken with section 31 of the County Courts Act, 1867, it is within the discretion of the county court judge to award such fee to the high bailiff as is allowed by schedule C. of the County Courts Act, 1856, taken with schedule B., parts 1 and 3 of the County Court Rules, 1886, subject only to the limitations laid down in ord. 27, r. 1.

Ord. 27, r. 1, *is intrâ vires*, and does not allow a new fee, but only limits such award up to the date on which the execution creditor admits the title of the claimant to the goods so wrongfully levied upon.

A high bailiff, being a creation of statute, is not in an analogous position to a sheriff.—*Thomas* v. *Peck*, Q.B.D. 606—20 Q. B. D. 732.

8. *Execution—Neglect of bailiff—Compensation—Prohibition—Estoppel—County Courts Act*, 1846, *ss.* 104, 115.—The county court judge of one court has no power to order the bailiff of a court in a different district who has not levied execution in pursuance of the warrant of the first court to pay compensation under section 115 of the County Courts Act, 1846, or otherwise, to the party injured.

The bailiff of the S. county court appeared before the county court judge of N. to justify his conduct in not making a levy, but was nevertheless ordered by the judge of N. to pay compensation.

Held, that there had not been such an acquiescence in the jurisdiction of the court of N. as would estop the bailiff from obtaining a prohibition against the order of the judge of N.—*Ashley* v. *Norris*, Q.B.D. 476—20 Q. B. D. 242; 57 L. J. Q. B. 143; 58 L. T. 86.

9. *Jurisdiction — Adding defendant — Remitted action—County Courts Act*, 1867, *s.* 10—*Prohibition.*—An action in which the plaintiff claimed £150 damages for illegal distress was, on the application of the defendant, remitted to a county court under section 10 of the County Courts Act, 1867. The plaintiff then obtained an order from the judge of the county court, under which a new defendant was, against his will, added to the record.

Held, that the county court judge had no power to make such an order.—*Mullenelsen* v. *Coulson*, Q.B.D. 524—20 Q. B. D. 667; 57 L. J. Q. B. 334; 58 L. T. 562.

10. *Jurisdiction—Admiralty action—Collision—County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *ss.* 3, 5.—By the County Courts Admiralty Jurisdiction Act, 1868, *s.* 3, county courts having admiralty jurisdiction were empowered to try (*inter alia*) actions for damage by collision where the amount claimed did not exceed £300. By section 5, courts appointed by Order in Council are alone to have jurisdiction in each district in any admiralty cause.

Held, that the statute did not take away from county courts not having admiralty jurisdiction the power to try actions for damages for collision between vessels where the amount claimed was under £50.—*Scovell* v. *Beavan*, Q.B.D. 301—19 Q. B. D. 428; 56 L. J. Q. B. 604.

11. *Jurisdiction—Admiralty action—Collision—County Courts Admiralty Jurisdiction Act*, 1868, *s.* 3, *sub-section* 3—*County Courts Admiralty Jurisdiction Act*, 1869 (32 & 33 *Vict. c.* 51), *s.* 4.—Damage occasioned by the gear of a sailing ship coming in contact with an object on land does not give a county court jurisdiction within section 3, sub-section 3, of the County Courts Admiralty Jurisdiction Act, 1869.—*Robson* v. *The Kate*, Q.B.D. 910—21 Q. B. D. 13.

12. *Jurisdiction—Bankruptcy—Disputed claim—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 102.—A. held a mining lease from B., to whom he afterwards mortgaged the lease. A. was adjudicated a bankrupt, and his trustee sought to set aside as fraudulent certain transactions with B., about £13,000 being in dispute.

Held, that the county court judge could not, in the

absence of special circumstances, exercise jurisdiction in the case.—*Ex parte Haselhurst, In re Beswick*, Q.B.D., BANKY.—58 L. T. 591.

13. *Jurisdiction—Contempt of court—Fine—Imprisonment—Appeal—Criminal proceedings—County Courts Act*, 1856, *s.* 113. The jurisdiction of the High Court, in reviewing committals for contempt by an inferior court, is limited to the consideration whether there were materials upon which the judge ordering the committal could have reasonably inferred contempt, and whether the form of committal is in accordance with one or other of the forms laid down in section 113 of the County Courts Act, 1846.

Quære, whether a committal for contempt is a criminal matter on which no appeal from the Queen's Bench should have been heard.

Decision of the Queen's Bench Division (reported 26 W. R. 589) affirmed.—*Reg.* v. *Jordan*, C.A. 797; 57 L. J. Q. B. 483.

14. *Jurisdiction—Equitable execution—Receiver—Prohibition.*—H., by his will, authorised his trustees, at their absolute discretion, at such time or times as they should think proper, to pay and apply the income of a certain sum of money to or for the benefit of G. An action having been brought in the county court against G., in which the plaintiff recovered judgment, the county court judge made an order, by way of equitable execution, appointing a receiver to receive the interest of the said sum, and ordering the trustees to make certain periodical payments until the judgment should be satisfied.

Held, that the county court judge had no jurisdiction to make such order, and that a writ of prohibition must go.—*Reg.* v. *Judge of Lincoln County Court*, Q.B.D. 174—20 Q. B. D. 167; 57 L. J. Q. B. 136; 58 L. T. 54.

15. *Jurisdiction—Friendly society*—Certiorari—*Friendly Societies Act*, 1875 (38 & 39 *Vict. c.* 60) *ss.* 22, 30, *sub-section* 10.—Under sections 22 and 30, sub-section 10, of the Friendly Societies Act, 1875, the jurisdiction conferred on the county court is permissive only, and not exclusive.—*In re Royal Liver Friendly Society*, CH.D. CHI., J. 7—35 Ch. D. 332; 56 L. J. Ch. 821; 56 L. T. 817.

16. *Jurisdiction—Landlord and tenant—Notice to quit—County Courts Act*, 1856, *s.* 50—1 *Geo.* 4, *c.* 87, *s.* 1.—A landlord having given a tenant notice to quit for forfeiture by reason of breach of covenants under a lease, brought an action for ejectment in the county court, the rent under the lease being for less than £50.

Held, that, under section 50 of the County Courts Act, 1856, the term or interest of the tenant must be determined by efflux of time or by a legal notice to quit, and that a "legal notice to quit" implied a necessary determination of the lease by law, and not under any private contract.

Held, further, that the construction of the words "legal notice to quit" was analogous to that of the words "regular notice to quit," under 1 Geo. 4, c. 87, and that the old cases decided under that statute applied.—*Friend* v. *Shaw*, Q.B.D. 236—20 Q. B. D. 374; 57 L. J. Q. B. 225; 58 L. T. 89.

17. *Jurisdiction—New trial—Prohibition.*—On an application to a county court judge for a new trial, he refused the application on the two grounds then urged, but intimated that the applicant migght apply on a fresh ground if affidavits could be produced in support of such fresh ground. On the second application, upon fresh grounds, the judge granted the new trial.

Held, that the judge had not "finally determined" the application for a new trial, and that no writ of prohibition could issue to prevent the new trial, as the judge had not exercised his full discretion on the first application, but had only disposed of the two specific grounds on which that application had been based.

Great Northern Railway Co. v. *Mossop*, 4 W. R. 118, 17 C. B. 130, distinguished.

Per Wills, J.—The High Court has only power to look into the grounds of such applications for new trials to see whether they are such that a judge could have reasonably exercised his discretion upon them, and they cannot interfere with his discretion beyond that limit.—*Reg.* v. *Judge of Greenwich County Court*, Q.B.D. 668.

18. *Jurisdiction—Specific performance—County Courts Act*, 1867, *s.* 9—*Prohibition—Divisible claim.*—The county court has no jurisdiction, under the County Courts Act, 1867, s. 9, to entertain a suit for specific performance of a parol agreement to grant a right of way.

Where a plaint contains two claims, one of which is within and the other without the jurisdiction of the county court, a prohibition may be granted as to one only.—*Ingleton* v. *Maudsley*, Q.B.D. 477.

19. *New trial—Refusal—Second application—Prohibition.*—A county court judge who, on the verdict of a jury being given at the trial of an action, hears an application for a new trial and refuses it on grounds then assigned, but gives leave to the applicant to make another application at a later date on fresh materials, is not *functus officio*, so as to have no jurisdiction to entertain the second application and grant a new trial.—*Moxon* v. *London Tramways Co.*, Q.B.D.—57 L. J. Q. B. 446.

20. *Payment into court—Admission of liability—County Courts Act*, 1846, *s.* 82—*County Court Rules*, 1886, *ord.* 4, *rr.* 11, 12; *ord.* 51, *r.* 37.—A defendant in a county court action paid money into court, but stated at the same time in a memorandum addressed to the registrar that the payment was made "without prejudice to the defendant's defence to this action, and while denying the plaintiff's cause of action."

Held, that the payment into court was not an admission of liability, and the defendant was entitled to dispute his liability at the hearing.

Per Wills, J.—Apart from the notice, the defendant was entitled to pay money into court and afterwards to dispute his liability at the hearing, according to the decision in *Berdan* v. *Greenwood*, 26 W. R. 902, 1 Ex. D. 251.—*Harper* v. *Davis*, Q.B.D. 77—19 Q. B. D. 170; 56 L. J. Q. B. 444.

21. *Remitting action—Reduction of claim—Judgment for part—County Courts Act*, 1856, *s.* 26.—By section 26 of the County Courts Act, 1856, where in an action of contract, the claim indorsed on the suit exceeds £50, but "is reduced by payment into court, payment, or admitted set off, or otherwise, to a sum not exceeding £50," a judge may order the case to be tried in a county court.

Held, that the words "or otherwise" include the reduction of a claim after action brought; and that, if the claim is reduced to a sum not exceeding £50 by judgment under order 14 for a portion thereof, there is jurisdiction to order trial in a county court.

Judgment of the Queen's Bench Division (reported 36 W. R. 716, 21 Q. B. D. 15) affirmed.—*Gray* v. *Hopper*, C.A. 746—21 Q. B. D. 246; 57 L. J. Q. B. 505.

22. *Remitting action—Set-off—Counter-claim—County Courts Act*, 1856, *s.* 26.—The plaintiff claimed for £220. The defendant denied the claim, and counter-claimed for £203. The plaintiff admitted the counter-claim, and applied to a judge at chambers for the remittal of the cause to the county court under section 26 of the County Courts Act, 1856, as for a claim not exceeding £17.

Held, that the judge was right in remitting the action, as the amount in dispute did not exceed £50, and that the fact that the defendant counterclaimed for the amount due to him did not prevent the amount being treated as a set-off against the plaintiff's claim under section 18 of the Judicature Act, 1884.—*Lewis* v. *Lewis*, Q.B.D. 63—20 Q. B. D. 56; 57 L. J. Q. B. 38; 57 L. T. 715.

23. *Remitting action — Slander—County Courts Act*, 1867, *s.* 10—*Judicature Act*, 1873, *s.* 67.—Section 67 of the Judicature Act, 1873, does not limit section 10 of the County Courts Act, 1867, and the High Court has power to send down an action of slander to be tried in the county court.

Decision of the Queen's Bench Division (35 W. R. 613, 19 Q. B. D. 62) affirmed.—*Stokes* v. *Stokes*, C.A. 28—19 Q. B. D. 419; 56 L. J. Q. B. 494.

See also ATTACHMENT, 5; COSTS, 11, 29, 38, 43; FRIENDLY SOCIETY; HUSBAND AND WIFE, 9; JURISDICTION, 4, 4a.

COUNTY RATE.—See RAILWAY, 12.

COVENANT:—

1. *Deed—Assignment of patent—Consideration—Payment of stamp duty.*—By an indenture which recited an agreement to sell a patent for £250 "and for the other considerations herein appearing," the patentees, "in consideration of the premises and of the sum of £250," assigned their rights to a company, and covenanted that the patent might be held and enjoyed by the company "during all the term subsisting therein." The company covenanted to pay royalties on articles manufactured under the patent "while subsisting." The deed contained no covenant to keep on foot the patent or manufacture or sell any articles under the patent. The company omitted to pay stamp duty, and the patent lapsed. The patentees claimed damages against the company, which was in course of voluntary liquidation.

Held, that the omission to pay duty was a *bonâ fide* mistake, and that there was nothing to show that it was a wilful act on the part of the company; and that, both for that reason and because the assignment was by deed, and the deed contained no covenant to manufacture or sell, a covenant to keep the patent on foot could not be implied. — *In re Railway and Electric Appliances Co.*, CH.D. KAY, J. 730—38 Ch. D. 597; 59 L. T. 22.

2. *Restraint of trade—Medical practice—Competition.* — An agreement for the sale of a practice between two medical practitioners contained a covenant by the vendor not to solicit any patient within a certain radius, or otherwise directly or indirectly to enter into competition with the purchaser.

Held, that, the object of the covenant being to protect the business bought and paid for, the covenant was not confined to active competition, but prohibited the vendor coming into the defined area, and thereby diminishing the purchaser's fair chance of obtaining a business.—*Rogers* v. *Drury*, CH.D. CHI., J. 496—57 L. J. Ch. 504.

3. *Restraint of trade—Reasonableness—Divisibility—Injunction.*—An agreement for the employment of a servant contained an undertaking that he would not, after leaving the employment, serve or interfere with "any of the customers served or belonging at any time to" the master.

Held, that, whether or not the agreement might be construed so as to extend to persons who became customers of the master after the servant left his employment, it was at any rate good as to persons who were customers of the master during the employment of the servant, and that it was severable and enforceable as to such last-mentioned persons; and that an injunction must be granted to restrain the servant from serving or interfering with such last-mentioned persons.—*Baines* v. *Geary*, CH.D. NOR., J. 98—35 Ch. D. 154; 56 L. J. Ch. 935; 56 L. T. 567.

4. *Restraint of trade—Reasonableness—Divisibility—Injunction.*—A foreman tailor covenanted with his employer not to leave his service or enter the service or employ of any other persons, or enter into any engagement or be concerned or interested in carrying on, either on his own account or otherwise, any business whatsoever within the distance of one mile of No. 61, High Holborn, or any other place of business of the said employer which he then or thereafter might have during the continuance of the term of three years, or afterwards during the further period of two years.

Held, that the restraint imposed by the covenant was unreasonable, and that the covenant was not divisible into two parts, and could not be enforced.—*Baker* v. *Hedgecock*, CH.D. CHI., J. 840.

5. *Restraint of trade—Reasonableness—Retiring partner.*—A deed executed on the dissolution of a partnership between E. D., E. A. D., and J. D., contained the following covenant by J. D.:—"The said J. D. (1) to retire wholly and absolutely from the partnership; and, (2) so far as the law allows, from the trade or business thereof in all its branches; and (3) not to trade, act, or deal in any way so as to either directly or indirectly affect E. D. and E. A. D."

Held, as to (2) and (3), that they were too vague to be enforced, and were, therefore, void.

Held, also, as to (3), that it was a covenant entered into for the protection of E. D. and E. A. D. personally, and that it therefore did not pass to their assignees with the goodwill of the business.

Per Cotton, L.J.—It is still the law that a covenant in general restraint of trade, unlimited both as to time and space, is void.

Quære.—Whether, having regard to altered circumstances which now exist in England, the old rule still prevails.

Decision of Kekewich, J., reversed.—*Davies* v. *Davies*, C.A. 86—36 Ch. D. 359; 56 L. J. Ch. 962; 58 L. T. 205.

See also BANKRUPTCY, 28, 29; BILL OF SALE, 3—5, 11; EVIDENCE, 14; LANDLORD AND TENANT, 2—8; MORTGAGE, 5; PARTNERSHIP, 1; POWER OF APPOINTMENT, 3; SETTLEMENT, 1, 2; TRUSTEE, 1; VENDOR AND PURCHASER, 4—6, 8—10; WILL, 34.

CRIMINAL LAW:—

1. *Embezzlement—Indictment—Evidence—Separate counts.*—A. was indicted on three counts for having embezzled money on three occasions. In support of the first count it was proved that A., who was employed by shipowners, received money for carrying animals, which money he ought to have paid to the prosecutors' cashier. In support of the second count it was proved that he was supplied with tickets for issue to passengers, purporting to be numbered consecutively, and that certain tickets had been clipped as if used, but that he had not paid to the cashier any money in respect of them. The jury found a verdict of guilty on the first and second counts, and of not guilty on the third count.

Held, that the jury were entitled, in considering one charge, to take into account the evidence on the other charges.—*Reg.* v. *Stephens*, C.C.R.—58 L. T. 776.

2. *False pretences—Word competition—Promise of prizes.*—The prisoner inserted advertisements in newspapers offering prizes for word competitions, the entrance fees to be sent to the "Rev. A. B., Trowbridge." There was no such person at Trowbridge.

Money sent in consequence of the advertisements was received by the prisoner.

Held, that the prisoner had been guilty of obtaining money by false pretences.—*Reg.* v. *Randell*, C.C.R. —57 L. T. 718.

3. *Intimidation—Picketing—Conspiracy and Protection of Property Act*, 1875 (38 & 39 *Vict.* c. 86), *s.* 7.—An intimation conveyed in a letter to an employer that his shop would be picketed, in language so threatening as "to make such employer afraid," amounts to "intimidation" within the meaning of section 7, sub-section 1, of the Conspiracy and Protection of Property Act, 1875, whether the picketing amounts to an unlawful "watching or besetting" within sub-section 4 or not.—*Judge* v. *Bennett*, Q.B.D. 103.

4. *Larceny—Trick—Betting.*—The prosecutor deposited money with the prisoner, who appeared to be a bookmaker, to abide the result of a race. During the race the prisoner went away.

Held, that there was evidence to go to the jury of larceny at common law.—*Reg.* v. *Buckmaster*, C.C.R. 701—20 Q. B. D. 182; 57 L. J. M. C. 25; 57 L. T. 720.

5. *Nuisance—Fine*—Certiorari.—When a corporation is convicted on an indictment for a nuisance removed into the Queen's Bench Division by *certiorari*, the court, in imposing a fine, will not take into consideration the costs incurred by the prosecutors.—*Reg.* v. *London and North-Western Railway Co.*, Q.B.D.—58 L. T. 771.

6. *Restitution of property—False pretences—Purchase in market overt—Larceny Act*, 1861 (24 & 25 *Vict.* c. 96), *s.* 100.—A *bonâ fide* purchaser for value in market overt of goods obtained by his vendor under a contract of sale induced by fraud, even if he purchased before any avoidance of the contract, is liable, under section 100 of the Larceny Act, 1861, when the person obtaining the goods by false pretences has been convicted, to have an order of restitution of the goods to the original owner made against him if he has possession of the goods at the time of the conviction.

Decision of the Court of Appeal (reported 35 W. R. 238, 18 Q. B. D. 322) affirmed.

Moyce v. *Newington*, 27 W. R. 319, 4 Q. B. D. 32, overruled.—*Bentley* v. *Vilmont*, H.L. 481—12 App. 471; 57 L. J. Q. B. 18; 57 L. T. 854.

See also Coroner, 1, 2; Evidence, 1, 9, 11; False Imprisonment, 3; Highway, 3, 5; Justice of the Peace, 1, 6, 10; Libel, 1; Practice, 2, 4; Privy Council, 1; Slander, 1; Will, 25.

CROSS-EXAMINATION.—See Bankruptcy, 4; Evidence, 4—6.

CY-PRES.—See Will, 18.

DAMAGES:—

1. *Patent—Infringement.*—In an action by assignees of a patent for making horseshoe nails for damages for infringement, the assignors not having granted licences, but having manufactured and sold the nails themselves, the defendants are liable for substantial damages, the measure of damages being the profit which would have been made if the assignees had effected the sales made by the defendants.—*United Horseshoe Nail Co.* v. *Stewart*, H.L.—13 App. 401.

2. *Principal and agent—Warranty of authority.*—In an action against a marine insurance company carrying on business in the United States the plaintiff obtained judgment for £1,000 in default of appearance. Negotiations for a settlement afterwards took place between the plaintiff and the defendants' agents in England, and the agents, by mistake and in good faith, told the plaintiff that they were authorised to offer £300 in settlement of his claim. It afterwards appeared that this was not the case, and the plaintiff was unable to enforce the agreement. The plaintiff then sued the agents for damages for breach of their warranty of authority.

Held, that the measure of damages was the plaintiff's loss of the gain which he would have derived from the contract which the defendants had warranted themselves to be authorised to make, and that, the judgment being of no value against the insurance company, the plaintiff was entitled to £300 in addition to the expenses of negotiating the compromise.—*Meek* v. *Wendt*, Q.B.D.—21 Q. B. D. 126.

3. *Railway—Negligence—Personal injury—Nervous shock.*—A servant of a railway company negligently permitted a carriage in which the plaintiff was riding to cross the railway by a level crossing when it was not necessary to do so. The plaintiff narrowly escaped personal injury from a passing train, but sustained a nervous shock and mental injury through fright.

Held, that the damage sustained by the plaintiff through the negligence of the defendants' servant was too remote, and that a verdict for the plaintiff could not be sustained.—*Victorian Railway Co.* v. *Coultas*, P.C.—13 App. 222; 57 L. J. P. C. 69; 58 L. T. 390.

4. *Sheriff—Execution—Rent*—8 *Anne*, c. 14, *s.* 1.—In an action brought by a landlord against a sheriff, under 8 Anne, c. 14, *s.* 1, for the removal and sale of goods taken in execution, without paying a year's rent, it is not sufficient for the defendant to show, in mitigation of damages, that the goods realised less than the amount of the rent, but he must prove that their actual value to the landlord at the time of removal was less.—*Thomas* v. *Mirehouse*, Q.B.D. 104—19 Q. B. D. 563; 56 L. J. Q. B. 653.

5. *Shipping — Collision — Abandonment.*—In a collision action the court found that the defendants were to blame, but that the plaintiffs had improperly abandoned their ship after the collision, in consequence of which abandonment it sank, but was afterwards raised by the plaintiffs, when it might have been beached.

The court directed the registrar, in assessing the damages, to disallow the cost of raising the plaintiffs' ship.—*The Hansa*, P.D. & A.D.—58 L. T. 530.

6. *Shipping — Collision — Damage to cargo—Interest.*—The practice of the Admiralty Court to allow interest upon the damages awarded is a long-established and sound practice, and cannot be overruled.

In an action to recover damages for injury to a ship, tried in the Queen's Bench Division, and transferred by consent to the Probate, Divorce, and Admiralty Division for the purpose of having the damages assessed, interest was allowed upon the amount of the damages awarded from the date of the loss until payment.

Held, that the defendant had, by his consent to the transfer, agreed that the admiralty practice should be applied.

In an action in the Probate, Divorce, and Admiralty Division, in respect of which, before the Judicature Acts, the Admiralty Court would have had no jurisdiction, interest was allowed upon the amount of the damages awarded from the date of the loss until payment.

Held, that the defendant, by not applying to have the action transferred to the Queen's Bench Division, had agreed to the damages being assessed according to the admiralty practice.

Judgment of the Queen's Bench Division (36 W. R. 191, 12 P. D. 204) affirmed.—*The Baron Aberdour, The Gertrude*, C.A. 616—13 P. D. 105.

7. *Shipping—Collision—Loss of cargo.*—Where a ship is prevented by a collision from fulfilling a beneficial agreement to collect cargo and carry it on a specified voyage, the loss of any definite advantage which, but for the collision, would have arisen from such agreement is to be taken into account in estimating the damages sustained by the shipowner in consequence of the collision.—*The Argentino*, P.D. & A.D. 814—13 P. D. 61; 57 L. J. P. D. & A. 25; 58 L. T. 643.

8. *Shipping—Collision—Loss of life—Both ships to blame—Lord Campbell's Act* (9 & 10 *Vict. c.* 93), *s.* 1—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-section* 9.—A passenger in a public conveyance who receives an injury is not deprived of his remedy by reason of the contributory negligence of those in charge of the conveyance; and therefore, where there has been a collision between two ships, contributory negligence on the part of those in charge of the one ship is no defence to an action brought under Lord Campbell's Act by the representatives of one of its passengers against the owners of the other ship.

Thorogood v. *Bryan*, 8 C. B. 115, and *Armstrong* v. *Lancashire and Yorkshire Railway Co.*, 23 W. R. 295, L. R. 10 Ex. 47, overruled.

The admiralty rule as to joint liability for joint negligence does not apply to actions brought under Lord Campbell's Act for damages arising out of a collision between two ships.

Decision of the Court of Appeal (reported 35 W. R. 314, 12 P. D. 58) affirmed.—*Mills* v. *Armstrong*, H.L. 870—13 App. 1; 57 L. J. P. D. & A. 65; 58 L. T. 423.

9. *Warranty—Re-sale—Costs of action by sub-purchaser.*—The defendant agreed to sell to the plaintiffs coal of a particular description, knowing that it was to be resold under the same description. The coal delivered by the defendant and resold by the plaintiffs did not answer the description, but this difference could not have been ascertained by inspection. The purchasers sued the plaintiffs for breach of contract, and the plaintiffs informed the defendant of the action, but the defendant repudiated liability. A verdict was found against the plaintiffs, who then sued the defendants for breach of contract.

Held, that the costs of defending the former action could be recovered against the defendant.—*Hammond* v. *Bussey*, C.A.—20 Q. B. D. 79; 57 L. J. Q. B. 58.

See also Bill of Exchange; Company, 15; Contract, 5, 8; Copyright, 5; Divorce, 2; Injunction, 1; Landlord and Tenant, 11; Libel, 2, 4; Misrepresentation, 1; Practice, 24; Settlement, 13; Specific Performance, 1, 2; Vendor and Purchaser, 6.

DEBENTURE.—See Bill of Sale, 13, 14; Company, 16—18, 27; Discovery, 3.

DEBTORS ACTS.—See Attachment, 5, 8—11; Bankruptcy, 32, 40; County Court, 5; Husband and Wife, 5; Jurisdiction, 8.

DEDICATION.—See Highway, 1, 2; Practice, 33.

DEED:—

1. *Assignment for benefit of creditors—Execution creditor—Burden of proof.*—Where a trustee, under a deed of assignment for the benefit of creditors, sets up the deed against an execution creditor, the burden of proving that the deed is irrevocably binding on the execution creditor is on the trustee.—*Adnitt* v. *Hands*, Q.B.D.—57 L. T. 370.

2. *Consideration—Illegality—Fraud on creditors—Voluntary conveyance*—13 *Eliz. c.* 5—27 *Eliz. c.* 4.—A. conveyed all his real estate upon trust to sell and pay his debts, and to pay any ultimate surplus to trustees for the separate use of his wife for life, and after her death upon trust for their children in equal shares as tenants in common.

Held, in a suit by a purchaser for value at a sale in execution of A.'s interest in part of the land conveyed, that the conveyance was neither revocable nor a fraud on creditors, nor void under 13 Eliz. c. 5.—*Godfrey* v. *Poole*, P.C.—13 App. 497; 58 L. T. 685.

3. *General words — Mortgage — Freeholds—Copyholds.*—By a mortgage deed the mortgagor conveyed to the mortgagee in fee simple "all and every the estate, right, title, property, and interest of the mortgagor of and in all and every those two fields or parcels of land, containing together about twenty-two acres, . . . situate, and abutting upon the main road, at H., . . . and all and every other, if any, the land, hereditaments, and premises at H. aforesaid, of, in, or to which the mortgagor hath any estate, right, title, property, or interest." The two fields were freehold, but a small strip of adjacent plantation, in which the mortgagor was entitled to two undivided thirds, and which, with the fields, nearly made up twenty-two acres, was copyhold.

Held, that the copyhold land passed under the general words.—*Early* v. *Rathbone*, CH.D. KEK., J.—57 L. J. Ch. 652; 58 L. T. 517.

4. *Recital — Operative part — Inconsistency.* — A marriage settlement contained a recital that land was subject to a charge, and to a term of 1,500 years. The operative part of the deed referred to a schedule in which lands situate in four townships, and subject to the charge, were particularly described, and there were general words referring to all other lands belonging to the settlor in those townships. The settlor at the time of the settlement was entitled to other lands in two of the townships of about the same value as the scheduled property, but subject to different charges.

Held, that the operation of the general words was confined to the lands subject to the charges mentioned in the recitals.—*Earl Grey* v. *Earl of Durham*, CH.D. STI., J.—57 L. T. 164.

5. *Registration—Middlesex—Memorial—Attestation—Copyhold — Enfranchisement — Affidavit — Commission*—7 *Anne, c.* 20, *ss.* 1, 5, 17—*Oaths in Chancery Act*, 1853 (16 & 17 *Vict. c.* 78,) *s.* 2.—An enfranchisement deed is not a deed merely conveying copyhold estates, but one conveying the freehold, and is not within the exception of 7 Anne, c. 20, s. 17, excluding from registration copyhold estates.

It is not necessary that one of the witnesses attesting the memorial of a deed to be enrolled in the registry under 7 Anne, c. 20, s. 5, shall be a witness to the execution of the deed by a grantor, and it is sufficient if he be a witness to the execution of the deed by a grantee.

A London Commissioner to administer oaths in chancery appointed under section 2 of the Oaths in Chancery Act, 1853, has power to administer the oath required by 7 Anne, c. 20, s. 5.

Judgment of the Queen's Bench Division (reported 35 W. R. 808) affirmed.—*Reg.* v. *Lord Truro*, C.A. 775—58 L. T. 77.

6. *Registration—Middlesex—Priority—Mortgage—Will—Notice to agent*—7 *Anne, c.* 20, *ss.* 1, 5, 17.—A., who died in 1871, by her will devised real estate in Middlesex to trustees upon trust for sale. The will was not registered in Middlesex. The heir-at-law of the testatrix afterwards mortgaged the property to different mortgagees, and registered the mortgages, having prepared the deeds himself. The surviving trustee received the rents of the property till 1878, when he died; and in 1879 a receiver was appointed in an action to administer the estate. The property was sold in 1882 under an order of the court, notice of

the mortgages was given to the purchasers, and the purchase-moneys were paid into court, subject to the claims of the mortgagees. The heir-at-law died in 1885. As the mortgages were for previous debts, the heir-at-law had acted as agent of all the mortgagees.

Held, that persons claiming under 7 Anne, c. 20 with notice of the will could not set up the title of the heir-at-law, and that the mortgagees were affected by the notice which the heir-at-law possessed.—*In re Edwards and Green*, CH.D. KAY, J.—58 L. T. 792.

7. *Seal—Company—Transfer of shares.*—By the articles of association of a company, transfers of its shares were to be made by deed. A., a shareholder, deposited certificates of certain of its shares with B., to secure a loan, and also signed and handed over to B. a blank transfer of the shares. There was no seal or wafer on the transfer opposite to A.'s signature, but only a circle printed on the paper inclosing the words, "Place for a seal." The document purported to be attested by a witness as having been "signed, sealed, and delivered" in his presence, but there was no evidence proving that the document was signed, sealed, and delivered as a deed.

Held, that, in the absence of such evidence, the printed circle inclosing the words "Place for a seal" did not supply the place of a seal so as to make the document a deed effectual to pass the shares.—*In re Balkis Consolidated Co.*, CH.D. NOR., J. 392—58 L. T. 300.

See also BANKRUPTCY, 1; HUSBAND AND WIFE, 3, 4, 7, 26; INFANT, 4; POWER OF APPOINTMENT; WATER, 3.

DEMURRAGE.—See SHIPPING, 23.

DENTIST:—

Registration—Removal from register—Dentists Act, 1878 (41 & 42 *Vict.* c. 32), *ss.* 11, 13.—If a person has been placed upon the dentists' register kept under the provisions of the Dentists Act, 1878, in respect of a qualification which has since been taken away, his name cannot be erased from the register simply upon proof of the loss of such qualification; and therefore, where a person has obtained a licence from a medical authority, and his name is placed upon the dentists' register in respect of such qualification, his name is not liable to be erased from the register simply upon proof that his licence has been cancelled by the medical authority.—*In re Partridge*, C.A. 442—19 Q. B. D. 467; 56 L. J. Q. B. 609.

DEPOSITIONS.—See CORONER, 2; JUSTICE OF THE PEACE, 4.

DESERTION.—See DIVORCE, 1, 8—10; HUSBAND AND WIFE, 4; JUSTICE OF THE PEACE, 12; NAVY.

DIRECTOR.—See COMPANY, 1, 8, 19—22; INJUNCTION, 2; MISREPRESENTATION, 1; PRACTICE, 12.

DISCLAIMER.—See BANKRUPTCY, 23, 38, 39; ESTOPPEL, 8; PATENT, 1, 2, 6.

DISCOVERY:—

1. *Affidavit of documents—Statement of defence—Ord.* 19, *r.* 6—*Ord.* 31, *rr.* 1, 12.—There is no absolute rule against ordering the defendant to make an affidavit of documents before delivering a statement of defence, but the court has a discretion in the matter.—*Edelston* v. *Russell*, CH.D. KEK., J.—57 L. T. 927.

2. *Inspection—Bankers' Books Inspection Act*, 1879 (42 & 43 *Vict.* c. 11), *s.* 7—Ex parte *application—Affidavit.*—Section 7 of the Bankers' Books Evidence Act, 1879, gives to a litigant party a certain extended right of inspection by enabling him before trial to inspect, and take copies of entries in, banker's books; but such right exists only for, and must be strictly limited to, the purposes of the proceedings.

Section 7 gives the court jurisdiction—to be exercised with caution—to make an order for inspection on an application made without notice to "the bank or any other party," and the words "any other party" include any party to the action.

Affidavit evidence in support of the application for liberty to inspect may be dispensed with if it is obvious from the issues raised by the pleadings that the entries in the banker's books must be material.

Quære, whether section 7 can be used for the purposes of obtaining "discovery" in the strict sense of the term.

Order of Kekewich, J., affirmed—*Arnott* v. *Hayes*, C.A. 246—36 Ch. D. 731; 56 L. J. Ch. 844; 57 L. T. 399.

3. *Inspection—Company—Register of mortgages—Register of debentures—Companies Clauses Consolidation Act*, 1845 (8 *Vict.* c. 16), *s.* 45—*Companies Clauses Act*, 1863 (26 & 27 *Vict.* c. 118), *s.* 28.—The statutory right of a shareholder in a railway company to inspect the register of mortgages under section 45 of the Companies Clauses Consolidation Act, 1845, and to inspect the debenture stockholders' register under section 28 of the Companies Clauses Act, 1863, includes a right to take copies of, or extracts from, such registers.

Decision of Chitty, J., affirmed.—*Mutter* v. *Eastern and Midlands Railway Co.*, C.A. 401—38 Ch. D. 92; 57 L. J. Ch. 615.

4. *Inspection—Discretion of judge—Affidavit—Costs—Ord.* 31, *r.* 12.—On an application for discovery of documents under ord. 31, r. 12, the court has discretion to refuse discovery which it considers cannot be reasonably expected to be of any use to the applicant. On such an application it is not the practice of the court to require or allow affidavits to be made in order to enable the court to decide whether there ought to be discovery; but the court, in order to come to a conclusion, must look at the pleadings, and may also look at any affidavits for some other purpose already made in the action. The party intending to use such affidavits must give notice of his intention to the other side, and specify the particular affidavits or particular passages in affidavits that he relies on. A general notice to read all such affidavits ought not to be given, and will render the party giving such general notice to read liable to pay the costs occasioned thereby.—*Downing* v. *Falmouth United Sewerage Board*, C.A. 437—37 Ch. D. 224; 57 L. J. Ch. 234; 58 L. T. 296.

5. *Inspection — Privilege — Correspondence with solicitor — Company — Action by shareholder.*—The plaintiff in a shareholder's action against a company is entitled to discovery of professional communications between the company and its legal advisers relating to the subject-matter of the action, when such communications are paid for out of the funds of the company.—*Gouraud* v. *Edison Bell Telephone Co.*, CH.D. CHI., J.—57 L. J. Ch. 498.

6. *Inspection—Privilege—Recovery of land—Purchaser for value without notice—Judicature Act*, 1873 (36 & 37 *Vict.* c. 66), *s.* 24, *sub-section* 2—*Ord.* 31, *rr.* 1, 14.—An action was brought in the Chancery Division for the recovery of land and for the delivery up of title deeds. Upon a summons for production of documents, the defendants raised the objection that they were purchasers for value without notice, and therefore privileged from producing the documents, though they did not in their affidavits aver that the documents related solely to their own title, and did not in any way tend to prove the title of the plaintiff.

Held, that as the objection was, before the Judicature Act, 1873, allowed by the Court of Chancery in

respect of its auxiliary jurisdiction only, and not in respect of its concurrent jurisdiction, it could not now be sustained when the court has a complete jurisdiction over the whole action, and that the defendants were not protected by section 24, sub-section 2, of the Judicature Act, 1873.

Decision of the Court of Appeal (reported 34 W. R. 636, 33 Ch. D. 323) affirmed.—*Ind* v. *Emmerson*, H.L. 243—12 App. 300; 56 L. J. Ch. 989; 57 L. T. 778.

7. *Inspection—Privilege—Reports of agents—Professional communications.*—In an action against a railway company for work done and materials supplied, the defendants objected to produce for the plaintiff's inspection their engineer's report as to the plaintiff's claim, correspondence with their servants and agents as to the defence of the action, and extracts from minutes of meetings of the board with reference to the contemplated litigation.

Held, that the defendants must produce the engineer's report, and all correspondence, except that with their solicitors, but not the minutes of the meetings.—*Worthington* v. *Dublin, Wicklow, and Wexford Railway Co.*, EX.D. (Ir.)—22 L. R. Ir. 310.

8. *Inspection—Privilege—Shorthand notes of former action.*—A coal mine was leased by the trustees of a charity to W., with a provision that a belt of coal should be left by the lessee at the boundaries of the mine of sufficient thickness to keep out the water. An adjoining mine was also leased by the trustees, with a similar provision, to a company which worked another adjoining mine belonging to an adjoining owner. The mines in the occupation of the company were damaged by flooding alleged to have resulted from the improper working by W. of the mine leased to him, which caused the water to flow into that part of the company's mines not leased to them by the trustees, and thence into the mine which was leased to them by the trustees. W. died, and an action was brought by the company against his executors for damages for injury to the company as lessees, by the flooding of the mines in their occupation, but the action was compromised on payment of compensation. On behalf of the executors shorthand writer's notes of the proceedings were taken. An action was afterwards brought for the administration of W.'s estate, the executors being defendants, and the trustees of the charity put in a claim for damages for injury to them as owners of the mine leased to the company by the flooding of the mine.

Held, that the trustees were entitled to the production of the shorthand writer's notes taken on behalf of the executors in the former action.—*Robson* v. *Worswick*, CH.D. NOR., J. 685—38 Ch. D. 370.

9. *Interrogatories—Libel—Newspaper—Names of correspondents.*—In an action against the publisher of a newspaper for a libel contained in a letter from a correspondent and in a leading article thereon, the defence was that the alleged libel consisted of an accurate report of certain public proceedings and fair comment thereon.

Held, that the plaintiff was not entitled to interrogate the defendant as to the names of the persons on whose information the reports were based, or the name of the correspondent who wrote the letter, or as to the original manuscript of the letter.—*Hennessy* v. *Wright* (2), C.A. 879.

10. *Production—Sealing up books—Unsealing—Burden of proof—Principal and agent—Account.*—In an action by a principal against an agent for an account, the plaintiff obtained an order for an affidavit of documents, and the defendant obtained leave to seal up such portions of the books as were irrelevant.

Held, that the burden of proving that any portions of the books ought to be unsealed was on the plaintiff. —*Jones* v. *Andrews*, CH.D. CHI., J.—57 L. T. 843.

See also COMPANY, 37.

DISSENTERS' CHAPEL ACT.—See TRUSTEE, 15.

DISTRESS.—See COMPANY, 41; LANDLORD AND TENANT, 1, 2; MORTGAGE, 3; POOR RATE, 3; PRACTICE, 37.

DISTRIBUTION, STATUTE of.—See ADMINISTRATION, 5.

DISTRINGAS.—See ESTOPPEL, 8.

DIVORCE:—

1. *Adultery—Desertion—Supplementary petition.*—In a wife's suit for dissolution of marriage, the husband's adultery was proved, but the desertion alleged in the petition was proved to have been for less than two years. The hearing was adjourned, and, the respondent not having returned to cohabitation, the court, on a supplemental petition filed a year afterwards, and charging desertion, granted a decree for a dissolution of marriage.—*Wood* v. *Wood* (2), P.D. & A.D.—13 P. D. 22; 57 L. J. P. D. & A. 48.

2. *Adultery of petitioner—Condonation—Discretion of court—Damages.*—A jury found a wife guilty of adultery with the co-respondent, assessing the damages against him at £300. The husband had, six years before, committed adultery with a maid-servant in the house where the wife resided, and she had condoned the offence.

Held, that the court ought, in the exercise of its discretion, to dismiss the husband's petition, and that the petitioner could not recover any damages.—*Story* v. *Story and O'Connor*, P.D. & A.D. 190—12 P. D. 196; 57 L. J. P. D. & A. 15; 57 L. T. 536.

3. *Alimony* pendente lite—*Decree* nisi—*Appeal.*—When there has been the verdict of a jury finding a wife guilty of adultery, the wife's right to alimony *primâ facie* ceases, subject to a discretion in the judge to order it to be continued pending a new trial if he considers it reasonable to do so.

Wells v. *Wells and Hudson*, 3 Sw. & T. 542, 12 W. R. Div. Dig. 16, explained.—*Dunn* v. *Dunn and Wall*, C.A. 539—13 P. D. 91; 57 L. J. P. D. & A. 58.

4. *Alimony* pendente lite—*Petition—Substituted service.*—On a motion for substituted service of a petition for alimony *pendente lite*, the court dispensed with further service on proof that a copy of the petition had been sent to the address of the respondent's agent upon whom the petition in the suit had been served.—*Odevaine* v. *Odevaine*, P.D. & A.D.—58 L. T. 564.

5. *Bastardising issue—Irish divorce bill—Striking out paragraphs.*—On a husband's bill for a divorce a paragraph containing allegations tending to bastardise a child of the wife born during the marriage, and when access was possible, will be struck out.—*In re Hewat's Divorce Bill*, H.L.—12 App. 312.

6. *Cruelty—Irish divorce bill.*—Any act which would be held to constitute legal cruelty in England will be held to be cruelty in proceedings on an Irish divorce bill.—*In re Gifford's Divorce Bill*, H.L.—12 App. 361.

7. *Custody of children—Cruelty and adultery of father—Infants Guardianship Act*, 1886 (49 & 50 *Vict.* c. 27), *s.* 7.—On the hearing of a wife's petition for dissolution on the ground of adultery and cruelty of a gross character, which was undefended, the court made a decree *nisi* for dissolution, giving the wife the custody of the children, and in terms of section 7 of the Infants Guardianship Act, 1886, declared the husband, who had received notice of the application, "unfit to have the custody of the children of the

marriage."—*Skinner* v. *Skinner*, P.D. & A.D. 912—13 P. D. 90; 58 L. T. 923.

8. *Desertion—Departure to avoid prosecution—Penal servitude.*—Where a man leaves his wife under circumstances which would make his absence amount to desertion if continued for two years, the fact that he is subsequently arrested and imprisoned will not prevent the two years running.

A., who had been guilty of embezzlement, left his wife in January, 1886, stating that he was going to Ireland for a week to shoot. He had been committing adultery with a woman, and had arranged to take her to Constantinople. He, however, left for New South Wales, and when arrested was living with another woman. He was brought back, tried, and sentenced to ten years' penal servitude.

Held, that A. had been guilty of desertion.—*Drew* v. *Drew*, P.D. & A.D. 927—13 P. D. 97; 57 L. J. P. D. & A. 64; 58 L. T. 923.

9. *Desertion—Restitution of conjugal rights—Decree—Non-compliance—Previous adultery—Matrimonial Causes Act*, 1884 (47 & 48 *Vict. c.* 68), *s.* 5.—The effect of section 5 of the Matrimonial Causes Act, 1884, is to render the effect of non-compliance with an order for restitution of conjugal rights in all respects the same as desertion for two years, and therefore, where a husband had not complied with such order, and had committed adultery before the date of the petition on which such order was made, the court held that the wife was entitled to a decree *nisi* for dissolution—*Bigwood* v. *Bigwood*, P.D. & A.D. 928—13 P. D. 89; 57 L. J. P. D. & A. 80; 58 L. T. 642.

10. *Desertion—Separation by consent—Adultery.*—A husband and wife separated by consent in consequence of his inability to maintain her. The husband on several occasions wrote letters asking for money. In one letter the wife offered to return to cohabitation, but the husband refused. The correspondence had ceased for more than two years, and the wife discovered that the husband had for several years cohabited with another woman.

Held, that the husband had been guilty of desertion.—*Smith* v. *Smith*, P.D. & A.D.—57 L. T. 639.

11. *Evidence—Identity of co-respondent.*—In an undefended divorce suit, where leave to proceed without making a co-respondent has not been given, the co-respondent's identity must be proved.—*Duff* v. *Duff and Lindsay*, P.D. & A.D.—58 L. T. 389.

12. *Misconduct of petitioner—Wilful neglect—Delay—Appeal—Trial without a jury—Rehearing—Divorce Rules, r.* 62.—A decree of dissolution of marriage was refused to a husband whose wife had been guilty of adultery, and who, after living with her for eleven years, had broken up the home in order to get rid of her because of her drunken habits, and had made no inquiries about her for eight years, when he discovered she had been cohabiting with another man during the interval, and five years afterwards he filed a petition,

By rule 62 of the Divorce Rules an application for the rehearing of a cause should be made to a divisional court.—*Heyes* v. *Heyes and Mason*, P.D. & A.D. 527—13 P. D. 11; 57 L. J. P. D. & A. 22; 57 L. T. 815.

13. *Permanent maintenance—Irish divorce bill.*—On a husband's bill for a divorce the wife's adultery was proved, but it appeared that the husband had not provided a home for the latter when they were separated by order of his medical attendant.

The House of Lords directed the insertion in the bill of a clause making a provision for the wife.—*In re A.'s Divorce Bill*, H.L.—12 App. 366.

14. *Permanent maintenance—Will—Construction—Estate in fee simple—Restraint on alienation—Forfeiture—Divorce Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 32—*Matrimonial Causes Act*, 1866 (29 & 30 *Vict. c.* 32), *s.* 1.—A wife petitioned for permanent maintenance after the dissolution of her marriage on the ground of her husband's adultery and cruelty. The husband was entitled under his father's will to the rents of certain freehold property, and to certain shares vested in trustees, upon trust for his "sole use and benefit," and to be assigned to him as soon as conveniently might be after his father's death. The will directed that, if either of the testator's sons should die unmarried and without issue, his share should go to the survivors, and that neither of his sons should have power to mortgage, sell, alien, charge, or incumber any part of the property, and that in the event of either of them doing so the trustees should stand possessed of his share.

Held, that the respondent took an estate in fee simple under the will, and that the provision for forfeiture was void.—*Corbett* v. *Corbett*, P.D. & A.D.—13 P. D. 136.

15. *Variation of settlements—Power of appointment—Appointment of new trustees—Matrimonial Causes Act*, 1859 (22 & 23 *Vict. c.* 61), *s.* 5.—Under section 5 of the Matrimonial Causes Act, 1859, the court has power to deprive one of the parties to the marriage settlement of the powers of appointment amongst the children of the marriage, but *quære* as to the power of appointment of new trustees.

The court deprived a guilty wife of the power of appointment amongst the children of the marriage, but, the wife being allowed to retain an income of £100 a year under the settlement, refused to deprive her of the right to appoint or join in the appointment of new trustees of the settlement—*Boseville* v. *Boseville and Craven*, P.D. & A.D. 913—13 P. D. 76; 57 L. J. P. D. & A. 62; 58 L. T. 640.

See also ADMINISTRATION, 6; ATTACHMENT, 2; BANKRUPTCY, 10, 19, 32; COSTS, 13—16; HUSBAND AND WIFE, 22, 24; INFANT, 10; JURISDICTION, 5; PRACTICE, 44; SOLICITOR, 2.

DOMICILE:—

1. *Abandonment of domicile of choice—Revival of domicile of origin.*—In order to lose the domicile of choice once acquired, and to revive the domicile of origin, it is not only necessary that the person should form an intention to leave his domicile of choice, but he must have left it with the intention of leaving it permanently.

Decision of Stirling, J., affirmed.—*Chalmers* v. *Wingfield*, C.A. 344—36 Ch. D. 400; 57 L. T. 806.

2. *British protectorate—Egypt.*—A., who was a Chaldean Catholic having his domicile of origin in Turkey, resided permanently at Cairo until his death, and acquired there the *status* of a protected British subject.

Held, that A. did not obtain an English domicile.—*Abdul Messih* v. *Farra*, P.C.—13 App. 431.

3. *Residence.*—A. was born in Scotland in 1832 of Scotch parents. In 1848 he came to London, and in 1855 he went to Calcutta, where he was for many years a partner in a mercantile firm. In 1877 he gave up his business, returned to England, and became a member of the Indian Council. He lived in England till his death in 1887. He had made a will at Calcutta, disposing only of personal property in England. He had no property in Scotland.

Held, that A.'s domicile was English.—*Barnes* v. *Smith*, CH.D. KAY, J.—58 L. T. 578.

See also ESTOPPEL, 4; INFANT, 1; JURISDICTION, 5—7; PRACTICE, 58.

DONATIO MORTIS CAUSA.—See EVIDENCE, 10; GIFT, 3; WILL, 56.

EASEMENT:—

Watercourse—Rent.—The plaintiff was lessee of a farm, and also of a mill, which was supplied with water flowing in a natural watercourse. The defendants, who were owners of a slate quarry adjoining the plaintiff's farm, made an agreement with him whereby he permitted them to use the water at a certain rent. The defendants were to keep the watercourse and troughs in repair, and were to have free access to the farm. The agreement was terminable by three months' notice on either side. In 1876 the plaintiff's lease of the farm expired, but he continued to occupy the mill, and the farm was leased to D. In 1885 D. sought to exclude the defendants from the land. The defendants had up to that time paid the rent, and no notice to determine the agreement had been given. The defendants then refused to pay any more rent. The plaintiff sued the defendants for arrears of rent.

Held, that the defendants were entitled to judgment.—*Jones* v. *Dorothea Co.*, Q.B.D.—58 L. T. 80.

See also LIGHT, 1—3; NUISANCE, 2; WATER, 2; WAY, 1, 2.

ECCLESIASTICAL LAW:—

1. *Benefice—Institution—Discretion of bishop—Welsh language*—1 & 2 *Vict. c.* 106, *s.* 104.—The bishop has a right to refuse to institute a presentee who is not a fit clerk to a vacant benefice.

A clerk was presented to a vacant benefice within a Welsh diocese, though situate in England, who was ignorant of, and refused to be examined in, the Welsh language.

Held, that the presentee was not a fit clerk by reason of his ignorance of the Welsh language; and that the bishop was the sole judge as to the linguistic requirements of the parish, and was not bound to hold any public or formal inquiry. — *Marquis of Abergavenny* v. *Bishop of Llandaff*, Q.B.D. 859—20 Q. B. D. 460; 57 L. J. Q. B. 223; 58 L. T. 812.

2. *Benefice—Resignation—Revocation—Condition—Illegality — Simony.* — A deed of resignation of a benefice executed and sent to the bishop is valid, though not made before a notary public, the bishop having power to dispense with that formality.

A resignation sent at the bishop's request is valid without any formal acceptance by the bishop.

The bishop may fix a future time for the acceptance and operation of a resignation without transgressing the rule that a resignation, except in the case of an exchange, must be made *purè, sponte, absolutè, et simpliciter.*

A resignation made at the request of the bishop to avoid scandal is valid.

A resignation accepted by the bishop, but postponed by him so as to enable the clerk to receive the next payment of tithe rent-charge, is not invalid as simoniacal.—*Reichel* v. *Bishop of Oxford*, C.A. 307—35 Ch. D. 48; 56 L. J. Ch. 1023; 56 L. T. 539.

3. *Communion table—Side chapel.*—Although the rubric and the 82nd canon contemplate only one communion table in a church, they do not expressly prohibit a second one, and a faculty should be granted for a second communion table where, on the ground of convenience and economy, it is desirable to introduce one in a side chapel as subsidiary to the performance of the service of the church as prescribed by law.—*In re Trinity Church, Stroud Green*, CONS. 288—12 P. D. 199.

4. *Churchwarden—Attending service—Jurisdiction*—5 & 6 *Ed.* 6, *c.* 1, *s.* 2.—A churchwarden has no right to forcibly prevent an inhabitant from entering a church to attend service, even if he thinks that the latter cannot be conveniently accommodated; and he is amenable to the jurisdiction of a temporal court.

The 5 & 6 Ed. 6, c. 1, s. 2, confers a right of going to church on those who are obliged by the Act to do so.—*Taylor* v. *Timson*, Q.B.D.—20 Q. B. D. 671; 57 L. J. Q. B. 216.

5. *Convocation—Election of proctor—Archbishop*—Mandamus.—The President of Convocation having exercised his discretion in the case of a disputed election of proctors to represent an archdeaconry at Convocation, the High Court has no jurisdiction to inquire into or interfere with such decision.—*Reg.* v. *Archbishop of York*, Q.B.D. 718—20 Q. B. D. 740; 57 L. J. Q. B. 396.

6. *Monition—Disobedience—Suspension—Writ* de contumace capiendo—5 *Eliz. c.* 23, *s.* 10—53 *Geo.* 3, *c.* 127, *s.* 1.—The effect of the 53 Geo. 3, c. 127, is to substitute the writ *de contumace capiendo* for the writ *de excommunicato capiendo*, and to apply to the former writ all proceedings and provisions applicable to the latter; and therefore the methods of release from imprisonment under the writ *de contumace capiendo* are not limited to those provided in the statute, but include the method by submission and satisfaction applicable in cases under the old writ.

A writ *de contumace capiendo* for disobedience to an order of suspension was issued after the period of suspension had elapsed.

Held (reversing the decision of the Queen's Bench Division), that the writ was rightly issued.—*Ex parte Bell Cox*, C.A. 209—20 Q. B. D. 1; 57 L. J. Q. B. 98; 58 L. T. 323.

See also CHARITY, 2; ESTOPPEL, 4; MORTGAGE, 8.

ELECTION.—See SOLICITOR, 8, 18.

ELECTION LAW:—

1. *Municipal election—Alderman—Vote of mayor-elect—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 60, *sub-section* 3.—By section 60, sub-section 3, of the Municipal Corporations Act, 1882, "An outgoing alderman, although mayor-elect, shall not vote."

An outgoing alderman, having been elected mayor, and having taken the declaration, voted in the election of alderman for the borough.

Held, that the vote of the mayor-elect was invalid.—*Hounsell* v. *Suttill*, Q.B.D. 147—19 Q. B. D. 498; 56 L. J. Q. B. 502; 57 L. T. 102.

2. *Municipal election—Nomination paper—Signatures of burgesses—Description—Municipal Corporations Act*, 1882, *s.* 241, *schedule* 3, *part* 2, *rr.* 2, 5, *Form T.*, *schedule* 7.—The ordinary signatures of burgesses, together with their number on the burgess roll, as proposers on the nomination paper of a candidate at a municipal election are sufficient, provided they can be commonly understood to refer to the corresponding names on the burgess roll.—*Bowden* v. *Besley*, Q.B.D. 889—57 L. J. Q. B. 473.

3. *Municipal election—Occupation—Service franchise—Representation of the People Act*, 1885 (48 & 49 *Vict. c.* 3), *s.* 3—*Municipal Corporations Act*, 1882, *s.* 9.—A voter who has been placed on the Parliamentary register for a borough as an inhabitant occupier by virtue of the service franchise, is not thereby entitled to be placed on the burgess roll under section 9 of the Municipal Corporations Act, 1882, which section requires occupation "as owner or tenant" in a legal and not merely a physical sense.—*McClean* v. *Prichard*, Q.B.D. 508—20 Q. B. D. 285; 58 L. T. 337.

4. *Municipal election—Returning officer*—Mandamus—*Ballot Act*, 1872 (35 & 36 *Vict. c.* 33), *s.* 2, *schedule* I., *rr.* 45, 46—*Municipal Corporations Act*,

1882, *ss.* 34, 58, 87.—R. and P. were nominated as candidates for the office of councillor of one ward of a borough. P. objected to R.'s nomination because he was then an alderman. The mayor disallowed the objection, but P. claimed to be elected, whatever the result of the poll. The poll showed a majority for R., and the numbers were announced by the mayor. On the following day the returning officer, having considered P.'s objection, declared P. to be elected.

Held, that the returning officer had no jurisdiction to determine the question of R.'s disqualification, which question must be raised by an election petition; and that P. had not been duly elected, and was not entitled to a *mandamus* to the mayor and corporation to compel them to receive his votes at corporation meetings.

Judgment of the Court of Appeal (reported 35 W. R. 158, 18 Q. B. D. 349) affirmed.—*Pritchard* v. *Mayor, &c., of Bangor*, H.L.—13 App. 241; 57 L. J. Q. B. 313; 58 L. T. 502.

5. *Parliamentary election—Claim—Amendment—Description of house—Discretion of revising barrister—Parliamentary Registration (Ireland) Act*, 1885 (48 & 49 *Vict.* c. 17), *s.* 27.—A claim to vote as a rated occupier must specify the number (if any) of the house occupied. The omission of such number may be supplied by the revising barrister; but the amendment of a claim is a matter entirely for his discretion.—*Lavery* v. *Kingsberry*, C.A. (Ir.)—20 L. R. Ir. 387.

6. *Parliamentary election—Claim—Amendment—Lodger—Rent.*—A claimant to vote as a lodger filled in the column "amount of rent paid" with the words "part salary."

Held, that the claim was defective, and could not be amended.—*Jones* v. *Beveridge* (1), C.A. (Ir.)—20 L. R. Ir. 380.

7. *Parliamentary election—Claim—Lodger—Rent—"Estimated rent."*—A claimant to vote as a lodger inserted under the column "amount of rent paid" the words, "Estimated rent, 5s. weekly."

Held, that the claimant was not entitled to be registered.—*Bradley* v. *Colquhoun*, C.A. (Ir.)—20 L. R. Ir. 378.

8. *Parliamentary election — Disqualification — Alms—Reform Act* (2 & 3 *Will.* 4, *c.* 45), *s.* 36.—A. occupied an almshouse in a borough and received 6*s.* per week out of a charitable fund for the maintenance of the inmates of such almshouse, the charity being regulated by a statute which provided that the inmates should be persons who, from age, ill-health, accident, or infirmity, were unable to maintain themselves.

Held, that, by section 36 of the Reform Act, A. was disqualified from being registered as a borough voter.—*Edwards* v. *Lloyd*, Q.B.D.—20 Q. B. D. 302; 57 L. J. Q. B. 121; 58 L. T. 409.

9. *Parliamentary election—Objection—Description of objection—Registration Act*, 1885 (48 & 49 *Vict.* c. 15), *s.* 18.—A notice of objection to a county voter was signed as follows:—"G. C., of Churchyard, on the list of Parliamentary voters for the parish of Petersfield."

Held, that the notice was bad, as the objector's place of abode was insufficiently described under section 18 of the Registration Act, 1885.—*Humphrey* v. *Earle*, Q.B.D. 510—20 Q. B. D. 294; 57 L. J. Q. B. 124; 58 L. T. 403.

10. *Parliamentary election—Objection—Disqualified voter.*—Notice of objection to a list of voters or claimants may be given by a person who is actually on the list of persons entitled to vote, even if the judges who tried an election petition have reported him to have been guilty of corrupt practices.—*Barr* v. *Chambers*, C.A. (Ir.)—22 L. R. Ir. 264.

11. *Parliamentary election—Objection—Mistake—Amendment — Reform Act*, *s.* 32 — *Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict.* c. 26), *s.* 28, *sub-section* 2.—By section 32 of the Reform Act no freeman of a city or borough may be registered as a Parliamentary voter "unless he shall have resided for six calendar months next previous to the last day of July (now altered to the 15th of July) in such year" within such city or borough or seven statute miles from the polling place.

A notice of objection was served upon a freeman of Norwich, stating the ground of objection in the following words:—"That you do not reside at 12, Clifton-street, Norwich." The revising barrister held that the notice was sufficient, but he allowed an amendment to be made as follows:—"That you have not resided at 12, Clifton-street, Norwich, for six calendar months next preceding the 15th of July last, and that you have not throughout that period resided within the city of Norwich or seven miles thereof."

Held, that the notice was bad, and that the revising barrister had no power to amend it, as the defect was not a "mistake" within section 18, sub-section 2, of the Parliamentary and Municipal Registration Act, 1878. *Bridges* v. *Miller*, Q.B.D. 509—20 Q. B. D. 287; 57 L. J. Q. B. 125; 58 L. T. 405.

12. *Parliamentary election—Objection—Omission—Statutory form — Registration Act*, 1885, *s.* 18, *schedule* 3, *Form I., No.* 2.—Where notice of objection is given to a voter under the Registration Act, 1885, but the form of notice provided for the objector in the schedule of the said Act is not strictly complied with by him, the omission is a disregard of a substantive regulation, and not "an omission of any form or instruction" within section 18 which could not invalidate the notice.—*Wood* v. *Chandler*, Q.B.D. 522—20 Q. B. D. 297; 57 L. J. Q. B. 126.

13. *Parliamentary election—Objection—Service—Course of post—Parliamentary Registration Act*, 1843 (6 & 7 *Vict.* c. 18), *ss.* 17, 100.—Notices of objection addressed to voters residing in barracks were posted on the 20th of August, in time to be delivered, in the ordinary course of post, at places in the borough other than the barracks on the same evening. There was no postal delivery at the barracks, but the letters were called for by orderlies. The letters were called for on the evening of the 20th of August, and were distributed, some the same evening, and others on the following day.

Held, that the notices of objection were not delivered in the "ordinary course of post," within the meaning of section 100 of the Parliamentary Registration Act, 1844.—*Childs* v. *Cox*, Q.B.D. 565—20 Q. B. D. 290; 58 L. T. 338.

14. *Parliamentary election—Objection—Service—Course of post—Parliamentary Voters (Ireland) Act*, 1850 (13 & 14 *Vict.* c. 69), *s.* 113.—Notices of objection are presumed to be sent in the ordinary course of post, but the burden of proving that the notice would, in such ordinary course, arrive in time is on the objector.

The ordinary course of post includes the transit from the nearest post-office to the place of address, and extent of time ordinarily necessary must be proved by the objector.—*Doogan* v. *Colquhoun*, C.A. (Ir.)—20 L. R. Ir. 361.

15. *Parliamentary election—Occupation—Dwelling-house—Lodger—Burden of proof.*—A., his landlord, and a third person, each occupied a separate flat in a house rented by the landlord, all three of them using the stairs, hall door, and yard.

Held, that the burden of showing that he was an occupier and not a lodger was on A.—*Campbell* v. *Chambers*, C.A. (Ir.)—20 L. R. Ir. 355.

16. *Parliamentary election—Occupation—Dwelling-house—Lodger—Representation of the People Act*, 1885, *s.* 3.—The fact that the landlord of a house let in several tenements lives in it is a material matter to be considered in determining whether the occupiers of those tenements are qualified to vote as lodgers or as separate householders, and will, as a general rule, render the occupiers lodgers.

In order to constitute lodgings qualifying for the franchise, the part of the house occupied by the claimant must be part of one dwelling-house; and to entitle an inhabitant of part of a house to claim as an occupier, the part which he occupies must be a separate dwelling-house.—*Hogan* v. *Sterrett*, C.A. (Ir.)—20 L. R. Ir. 344.

17. *Parliamentary election—Occupation—Successive occupation—Joint occupation—Severance.*—A. and B., who were partners, were on the register as rated joint occupiers of premises. The partnership terminated in September of the qualifying year, and A. became the sole occupier of the premises.

Held, that it was necessary for A. to claim as occupier in succession.—*Barneide* v. *Chambers*, C.A. (Ir.)—22 L. R. Ir. 255.

18. *Parliamentary election—Occupation—Successive occupation—Payment of poor rates.*—The occupier in succession of different premises is not disqualified by non-payment of a poor rate levied on his former place of abode after his change of occupation.—*Campbell* v. *Chambers* (2), C.A. (Ir.)—22 L. R. Ir. 258.

19. *Parliamentary election—Occupation—Temporary absence—Military service—Army Act*, 1881 (44 & 45 *Vict. c.* 58) *ss.* 15, 176.—A non-commissioned officer on the staff of a militia regiment resided with his family in a house in a borough. During the annual training of the regiment he was absent twenty-six days of the qualifying year, but his house continued to be occupied by his wife, family, and furniture. With the leave of his superior officer he returned at intervals during the training to his house in the borough, and could have returned every night if the distance had been less.

Held, that there was not such a continuous occupation so as to confer the right to a vote.—*Donoghue* v. *Brook*, Q.B.D.—58 L. T. 411; 57 L. J. Q. B. 122.

20. *Parliamentary election—Occupation—Temporary absence—Reform Act, s.* 31.—The claimant had the exclusive use of a separate bedroom in his father's house at Exeter, but, for the six calendar months during which residence is required by section 4? of the Reform Act, he was engaged in an occupation which would prevent him from actually residing at Exeter, except for a few days at a time.

Held, that this was not sufficient to constitute "residence" within the meaning of the section.—*Beal* v. *Town Clerk of Exeter*, Q.B.D. 587—57 L. J. Q. B. 128; 58 L. T. 407.

21. *Returning officer—Costs—Taxation—Ballot Act*, 1872, *s.* 8—*Returning Officers Act*, 1875 (38 & 39 *Vict. c.* 84), *ss.* 2, 4, 5.—By section 2 of the Returning Officers Act, 1875, the right of the returning officer to be paid for expenses reasonably incurred during a Parliamentary election is not limited to such charges only as have been vouched under sections 4 and 5. He is entitled to be indemnified for such kinds of services and expenses as are of the kinds enumerated in the schedule, and are also both reasonable and within the maximum, although such charges have been made under wrong headings and are not actually mentioned in the schedule.

If detailed particulars of items comprising charges within the description of expenses allowed as given in the schedule to the Act have been sent in to the under-sheriff and paid by him within fourteen days, and the sheriff has paid the total amount of such charges to the under-sheriff, and charged the amount to the candidates within twenty-one days, informing them where the vouchers may be inspected, the provisions of section 5 have been complied with, and the returning officer is entitled to be indemnified.—*In re South-East Essex Election*, Q.B.D. 44—19 Q. B. D. 252; 56 L. J. Q. B. 356.

See also MUNICIPAL CORPORATION, 1; QUO WARRANTO, 2.

EMBEZZLEMENT.—See CRIMINAL LAW, 1.

EMPLOYERS' LIABILITY ACT.—See MASTER AND SERVANT, 1—5.

EQUITABLE ASSIGNMENT.—See GIFT, 1; WILL, 56.

EQUITABLE EXECUTION.—See COUNTY COURT, 14.

EQUITABLE MORTGAGE.—See COMPANY, 26; MORTGAGE, 5.

EQUITY to SETTLEMENT.—See EXECUTOR, 5.

ESCROW.—See POWER OF APPOINTMENT, 2.

ESTOPPEL:—

1. *Company—Share certificates—Blank transfer.*—The mode of transfer of share certificates in an American railroad company was as follows:—The transfer and a power of attorney were signed by the registered shareholder. When the blank transfer reached the hand of a holder desiring to be registered, his name was filled in by himself or by someone on his behalf, and the certificate was left with the company and then cancelled, the transferee registered, and a new certificate issued in his name.

Held, that every prior holder of the certificates with blank transfers duly signed by the registered holders conferred on each subsequent *bonâ fide* holder for value of the certificates for the time being an authority to fill in the name of the transferee, and was estopped from denying such authority, and to that extent, but no further, was estopped from denying the title of such holder for the time being; and that an inchoate legal title in the shares passed, but that a title by unregistered transfer was not equivalent to the legal estate in the shares, nor to the complete dominion over them.—*Colonial Bank* v. *Hepworth*, CH.D. CHL, J. 259—36 Ch. D. 36; 56 L. J. Ch. 1089; 57 L. T. 148.

2. *Negligence—Fraud of agent—Bank of England—Sale of stock.*—The clerk to a corporation, having sole custody of their corporate seal, affixed it without their authority to a power of attorney, by means of which certain stock, the property of the corporation, was sold by the defendants, and the proceeds were appropriated by the clerk.

Held, on the authority of *Bank of Ireland* v. *Trustees of Evans' Charities*, 5 H. L. Cas. 389, that, assuming the corporation to have been negligent, they were not disentitled to recover the stock from the defendants, since their negligence was not the proximate cause of the loss.

Judgment of the Queen's Bench Division affirmed.—*Staple of England* v. *Bank of England*, C.A. 880—21 Q. B. D. 160; 57 L. J. Q. B. 418.

3. Res judicata—*Dismissal of action—Consent order.*—A consent order dismissing an action for want of prosecution, unless it proceeds upon a compromise of the cause of action, is no bar to another action between the same parties for the same matter. The former practice of the Court of Chancery on this

point is unaffected by the Rules of Court under the Judicature Act.

The plaintiffs, having made default in making discovery and answering interrogatories, told the defendants that they intended to abandon the action, and would pay their costs. The plaintiffs not having done this, the defendants issued a summons to dismiss the action for want of prosecution. The plaintiffs paid the defendants' costs, and at the hearing of the summons appeared and consented to an order dismissing the action as against the defendants. The plaintiffs having brought a fresh action against the same defendants for the same matter, the defendants raised the question of law whether the plaintiffs were not estopped by reason of the order on the summons.

Held, that the order, not having proceeded upon a compromise of the cause of action, was no bar to the fresh action.—*Magnus* v. *National Bank of Scotland*, CH.D. KAY, J. 602—58 L. T. 617.

4. Res judicata—*Ecclesiastical law—Benefice—Resignation—Withdrawal—Striking out defence—Ord.* 25, *r.* 4.—R. sent a resignation of his benefice to the bishop, on the understanding that, until a specified date, the resignation should not be formally accepted, nor the benefice declared vacant. Before the specified date R. withdrew his resignation, but the bishop refused to accept the withdrawal. He declared the benefice vacant, and a new incumbent was appointed and instituted. R. brought an action in the Chancery Division against the bishop for a declaration that his resignation was null and void, the patrons of the benefice being parties to the action, but the court held that the resignation was complete. R. remained in possession of the parsonage, and was sued by the new incumbent for trespass and an injunction to restrain him from continuing in possession. R., by his statement of defence, alleged that his resignation was not effectual.

Held, that R. was estopped by the former judgment, and that his defence must be struck out as frivolous and vexatious.—*Magrath* v. *Reichel*, Q.B.D.—57 L. T. 850.

5. Res judicata—*Foreign judgment—Domicile—Legitimacy.*—Although the parties claiming to be entitled to the estate of a deceased person may not be bound to resort to the tribunal of the country in which the testator was domiciled, and although the courts of this country may be called upon to administer the estate of a deceased person domiciled abroad, and in such a case may be bound to ascertain as best they can who, according to the law of the domicile, are entitled to that estate, yet, where the title has been adjudicated upon in the country to the courts of which the question is referable by the law of the domicile, such adjudication is binding, and must be followed by the courts of this country.

A foreign judgment cannot, as between the same parties, be impeached in this country on the ground that it proceeded on a mistake of law.

A foreign judgment binds, notwithstanding the discovery of fresh evidence, for the courts of this country will not either re-hear cases tried by, or hear appeals from, foreign tribunals; and, if the judgment of a foreign court is erroneous, the regular mode provided by every system of jurisprudence—of procuring it to be examined and reversed—ought to be followed.—*Trafford* v. *Blanc*, CH.D. STI., *J.* 162—36 Ch. D. 601; 57 L. J. Ch. 135; 57 L. T. 674.

6. Res judicata—*Foreign judgment—Interlocutory judgment.*—A "remate" judgment of a Spanish court, which authorises a party in whose favour a particular kind of document has been executed to commence "executive" proceedings, in which the defendant can can set up only defences which do not dispute the original right of action, and the plaintiff obtains a right to issue execution for a certain debt, with costs, the judgment not precluding either party from taking "plenary" proceedings as to the same matter, in which case the "remate" judgment cannot set off the rights of the parties, is not such a final and conclusive judgment as can be sued upon in England.

Judgment of North, J., reversed.—*Nouvion* v. *Freeman*, C.A.—37 Ch. D. 244; 57 L. J. Ch. 367.

7. *Shipping—Collision—Negligence—Admission—Limitation of liability—Cargo owner—Fund in court—Proof—Ord.* 52, *r.* 23.—A collision occurred between the defendants' ship and a ship carrying cargo belonging to the plaintiffs, and the latter vessel was sunk. The plaintiffs and the owners of the latter vessel commenced actions against the defendants, but in the shipowners' action an agreement was filed to a decree that both ships were to blame, and for a reference as to damages. The defendants then brought an action for limitation of liability, and paid money into court. Their statement of claim referred to the above-metioned agreement, and there was an express admission that the collision had been in part caused by their own improper navigation. The plaintiffs, in their defence, did not refer to the cause of the collision. A decree was made for limitation of liability, and for a stay of the plaintiffs' action.

Held, (1) that the agreement, having been filed in the registry, was, under ord. 52, r. 23, equivalent to a decree of the court; (2) that the plaintiffs were not estopped from proving against the fund for the whole of the damage sustained by them.—*The Karo*, P.D. & A.D.—13 P. D. 24; 57 L. J. P. D. & A. 8; 58 L. T. 188.

8. *Will—Legacy—Disclaimer—Company—Shares—Distringas.*—A legatee of shares in a company who puts a *distringas* on the shares does not thereby irrevocably declare his acceptance of them, so as to be estopped from subsequently disclaiming them.—*Hollis* v. *Wayet*, CH.D. KEK., J. 73—36 Ch. D. 256; 56 L. J. Ch. 849; 57 L. T. 225.

See also BANKER, 1; BUILDING SOCIETY, 2; COMPANY, 1, 12; COUNTY COURT, 8; JURISDICTION, 6; LIMITATIONS, STATUTE OF, 4; PATENT, 8; SETTLEMENT, 8.

EVIDENCE:—

1. *Admission — Criminal law — Newspaper — Ireland—Meetings of proclaimed association—Criminal Law and Procedure (Ireland) Act*, 1887 (50 & 51 *Vict. c.* 20), *ss.* 5, 7.—The proprietor and publisher of a newspaper was prosecuted for unlawfully publishing a notice of the proceedings at a meeting of the Irish National League within a district where the Lord-Lieutenant of Ireland had, by proclamation under the Criminal Law and Procedure (Ireland) Act, 1887, ordered such league to be suppressed. The defendant's newspaper had contained reports of meetings, with the heading "Branches of the National League," but there was no separate evidence as to the meetings which were held.

Held, that the passages headed as reports of meetings of the Irish National League within the proclaimed district were evidence against the defendant of the holding of the meetings, and were sufficient to sustain a conviction.—*Reg.* v. *Sullivan*, M.D. (Ir.)—20 L. R. Ir. 550.

2. *Affidavit—Absent witness—Ord.* 37, *r.* 1.—On the trial of a probate action the court admitted an affidavit made in the suit by a witness who was absent, although he had been served with a subpœna.—*Drewitt* v. *Drewitt*, P.D. & A.D.—58 L. T. 634.

3. *Affidavit—Chief clerk—Further evidence.*—On the hearing of an adjourned summons evidence filed

after the time fixed by the chief clerk for the filing of evidence cannot be used unless special leave to use fresh evidence has been given either by the judge or the chief clerk.

This rule does not apply where no time has been fixed for the filing of evidence.—*Chiferiel* v. *Watson*, CH.D. NOR., J. 806.

4. *Affidavit — Cross - examination — Admiralty action—Reference—Discretion of registrar—Ord.* 37, *r.* 2.—Affidavits brought into the Admiralty Registry in support of claims filed there are, by the practice of the court, receivable in evidence, even if orders made for the cross-examination of the deponents have not been complied with; but the weight in evidence to be attached to such affidavits is for the registrar, who, in his discretion, may require the deponents to be examined in the registry or under a commission abroad, and, if no examination of the deponents takes place, may refuse to find in favour of the claim, on the ground that the evidence does not satisfy him that it is valid.—*The Parisian*, P.D. & A.D. 704—13 P. D. 16; 57 L. J. P. D. & A. 13; 58 L. T. 92.

5. *Affidavit — Cross-examination — Company — Winding up—Summons against directors—Companies Act*, 1862 (25 & 26 *Vict.* c. 89), *s.* 165.—In the absence of special circumstances, an application by a liquidator to make the directors of a company liable for misfeasance should be heard as a summons on affidavit evidence, and any cross-examination on the affidavits must be before an examiner of the court.—*In re Faure Electric Accumulator Co.*, CH.D. KAY, *J.*—58 L. T. 42.

6. *Affidavit — Cross-examination — Discretion of court—Motion—Ord.* 38, *r.* 1.—The court or judge has a discretion, in making an order under ord. 38, r. 1, for the attendance for cross-examination of a person who has made an affidavit, and is not bound to make such an order.—*La Trinidad* v. *Browne*, CH.D. NOR., *J.* 138—37 Ch. D. 1.

7. *Commission—Discretion of court—Ord.* 37, *r.* 5.—It is in the discretion of the court or judge, taking all the circumstances of the case into account, to grant or withhold a commission to examine witnesses out of the jurisdiction, and the commission will not be granted *ex debito justitiæ*. The rule will be more strictly construed if the plaintiff asks for a commission to have himself examined. — *Cock* v. *Allcock*, C.A. 747—21 Q. B. D. 178; 57 L. J. Q. B. 489.

8. *Commission—Examination of plaintiff—Ord.* 37, *r.* 5.—A plaintiff desiring to be examined on commission must make out by affidavit a strong *primâ facie* case against his being compelled to attend the trial.—*Light* v. *Anticosti Island Co.*, Q.B.D.—58 L. T. 25.

9. *Competency of witness—Criminal law—Examination of prisoner—Indecent assault—Common assault—Criminal Law Amendment Act*, 1885 (48 & 49 *Vict.* c. 69), *s.* 20.—Upon the hearing of a charge of indecent assault, the evidence of the prisoner had been received under section 20 of the Criminal Law Amendment Act, 1885.

Held, that the prisoner's evidence was admissible to support a conviction for a common assault on another count of the indictment.—*Reg.* v. *Owen*, C.C.R. 575—20 Q. B. D. 829; 57 L. J. M. C. 46; 58 L. T. 760.

10. *Corroboration—Gift—Donatio mortis causâ.*—A *donatio mortis causâ* may be established by the unsupported evidence of the donee.—*Farman* v. *Smith*, CH.D. NOR., *J.*—57 L. J. Ch. 637; 58 L. T. 12.

11. *Criminal law—Child of tender years—Evidence not on oath—Carnal knowledge—Indecent assault—Criminal Law Amendment Act*, 1885, *ss.* 4, 9.—Upon the hearing of a charge under section 4 of the Criminal Law Amendment Act, 1885, the evidence of a child had been received, though not given upon oath.

Held, that the evidence was admissible to support a conviction for a common assault under section 9 of the same statute. — *Reg.* v. *Wenland*, C.C.R. 576—20 Q. B. D. 827; 57 L. J. M. C. 44; 58 L. T. 781.

12. *Legitimacy—Judicial separation—Matrimonial Causes Act*, 1878 (41 & 42 *Vict.* c. 19) *s.* 4.—There is a legal presumption that any child born more than nine months after the date of a separation order made under section 4 of the Matrimonial Causes Act, 1878, is illegitimate; and an admission made by the wife that she has had a child born more than nine months after a separation order of which the husband was not the father is admissible as evidence of her adultery.—*Hetherington* v. *Hetherington*, P.D. & A.D. 12—12 P. D. 112; 56 L. J. P. D. & A. 78; 57 L. T. 533.

13. *Legitimacy—Presumption of access.*—The presumption in favour of the legitimacy of a child born in wedlock may be negatived by evidence, but such evidence must be strong, distinct, satisfactory, and conclusive.—*Bosville* v. *Attorney-General*, P.D. & A.D. 79—12 P. D. 177; 56 L. J. P. D. & A. 97; 57 L. T. 88.

14. *Mortgage—Covenant — Collateral agreement—Parol evidence.*—In an action on a covenant in a mortgage deed for payment of principal and interest the defendant alleged that the mortgage was intended to stand as security for such sum only as should be due to the plaintiff, the parties being partners, and no accounts having been taken.

Held, that letters between the parties were admissible in evidence.—*Trench* v. *Doran*, C.P.D. (Ir.)—20 L. R. Ir. 339.

15. *Presumption of death.*—Money belonging to an intestate who had not been heard of since 1873 was in the hands of his administrator, who took out an originating summons, on which inquiries were directed. The chief clerk found that the intestate was dead in 1880, but that there was no evidence of his death before that year. He also found the set of persons who would have been the intestate's next of kin if he died in 1873, and the set of persons who would have been his next of kin if he had died in 1880. The two classes consisted of different persons.

Held, that neither class of claimants had established a title to the fund, but that the case must go back to the chief clerk for further inquiry.—*Rhodes* v. *Rhodes*, CH.D. NOR., *J.*—36 Ch. D. 586; 56 L. J. Ch. 825; 57 L. T. 652.

16. *Will—Ambiguity—Blanks—Parol evidence.*—The testator, after giving legacies to Mary Wyatt, Matthew Wyatt, Frederick Wyatt, Louisa Atwell (called Wyatt), Maria Weir, and Emily de Vere, proceeded; "I give and bequeath to , daughter of , holding some situation about the church , the sum of fifty pounds annually during the continuance of her natural life, and I direct my trustees or trustee for the time being to pay to the said the said annuity of fifty pounds, , and the receipt of the said shall be sufficient discharge to my trustees or trustee for the time being; and from the decease of the said I direct," &c. The testator directed that, "in case any one of my said legatees, Mary Wyatt, Frederick Wyatt, Matthew Wyatt, Louisa Atwell (called Wyatt), Maria Weir, Emily de Vere, or Marian Elliott," should become bankrupt, &c., her or his legacy should determine, and that the trustees or trustee should pay to her or him, "if in the case of Mary Wyatt, Matthew Wyatt, and Frederick Wyatt, the sum of forty

shillings a week," and "if in the case of Maria Weir and Emily de Vere, the sum of thirty shillings a week," and "if in the case of Marian Elliott, the sum of fifteen shillings a week."

Held, on an originating summons by Marian Furniss (formerly Marian Elliott), supported by an affidavit by her to the effect that she was the daughter of James Elliott, beadle of the parish church at Epsom, and that the testator was acquainted with her, that she was entitled to the annuity of fifty pounds given by the will.—*Furniss* v. *Phear*, CH.D. NOR., J. 521.

17. *Will—Secret trust—Parol evidence.*—A. bequeathed to B. and M. £500 free of legacy duty, to be paid out of his pure personalty, "relying, but not by way of trust, upon their applying the said sum in or towards the object or objects privately communicated to them" by the testator.

Held, that parol evidence was admissible to show that the bequest was subject to a trust.—*In re Spencer*, C.A.—57 L. T. 519.

See also COMPANY, 10, 36; CONTRACT, 9; COUNTY COURT, 6; CRIMINAL LAW, 1; DEED, 1; DISCOVERY, 1—10; DIVORCE, 11; ESTOPPEL, 1—8; LICENSED HOUSE, 6; MALICIOUS PROSECUTION; NEGLIGENCE, 2; WILL, 1, 57—59, 62.

EXECUTION.—See BANKRUPTCY, 11—13; CANADA, LAW OF, 4; COUNTY COURT, 7, 8, 14; DAMAGES, 4; DEED, 1; SHERIFF, 1, 2; WILL, 54—59.

EXECUTOR:—

1. *Conversion—Discretion—Delay.*—An executor's discretion is not that of an absolute owner, but it is limited by the duty of bringing the assets to proper investments within a reasonable time; and the burden of proving that he has acted *bonâ fide* and exercised a reasonable discretion is on the executors.

The assets of a testator were subject to trusts in favour of unborn persons, and included shares of a company with unlimited liability. The executors delayed conversion after it had been demanded by the beneficiaries.

Held, that the executors were liable for the value of the shares ascertained at a reasonable date after the testator's death.—*Hiddingh* v. *Denyssen*, *Denyssen* v. *Hiddingh*, P.C.—12 App. 624; 56 L. J. P. C. 107; 57 L. T. 885.

2. *Lease—Rent.*—An executor who takes possession of leasehold property of his testator becomes personally liable, as assign of the lease, for payment of rent in respect of the actual value of the property from the time of taking possession. The actual value is the aggregate of what he has actually received and what with reasonable diligence he might have received, provided that such aggregate does not exceed the full amount of the rent; but he is not liable for rent beyond such value.—*Earl of Strathmore* v. *Vane*, CH.D. NOR., J. 393—37 Ch. D. 128; 57 L. J. Ch. 455.

3. *Purchase of assets.*—The testator had property both in England and in Jamaica. He appointed A., B., and H. as his executors, and A. and B. as his trustees. H. proved the will in Jamaica, and A. and B. proved it in England. H. purchased from A. and B. a business which had been carried on by the testator in Jamaica.

Held, that the sale must be set aside.—*Harvey* v. *Lambert*, CH.D. KEK., J.—58 L. T. 449.

4. *Retainer—Priority—Debt to trust estate.*—B. was executrix of her husband, whose estate was insolvent and who was indebted to the estate of A., of which he was sole trustee, in respect of the proceeds of sale of real estate.

Held, that B. was entitled to retain, in priority to all other creditors, a sum in respect of the proceeds of the sale of the real estate.—*Hardwick* v. *Sutton*, CH.D. CHL., J.—57 L. T. 14.

5. *Retainer—Set-off—Deduction of debts—Married woman—Equity to settlement.*—A. gave the residue of his estate to his wife for life, and then to his children equally, "for his, her, or their own absolute use and benefit."

Held, that the daughters did not take a separate estate.

A. directed his trustees to deduct any debt due to him from any of his said children from their respective shares. One of his daughters was married, without any settlement and in poor circumstances. Her husband was indebted to the testator, and the executors desired to set off the husband's debt against his wife's legacy.

Held, that the right to deduct the debt from the legacy was subject to the wife's equity to a settlement, and that part of the fund must be settled on her.

Knight v. *Knight*, 22 W. R. 792, L. R. 18 Eq. 487, dissented from.—*Poulter* v. *Shackel*, CH.D. KAY, J. 838.

See also ADMINISTRATION, 12; CONTRACT, 5; COSTS, 8, 31; DAMAGES, 8; PARTNERSHIP, 1; PRACTICE, 45; SCOTLAND, LAW OF, 1; WILL, 22, 23, 61, 64.

EXTRADITION.—See PRACTICE, 2.

FAIR.—See MARKET.

FALSE IMPRISONMENT:—

1. *Governor of prison—Warrant.*—No action will lie against the governor of a gaol for acts done in obedience to a warrant properly issued.—*Henderson* v. *Preston*, C.A. 834.

2. *Lunatic asylum—Order for reception—Alteration of order—Discharge—Lunacy Regulation Act*, 1845 (8 & 9 *Vict. c.* 100), *s.* 72—*Lunacy Regulation Act*, 1853 (16 & 17 *Vict. c.* 96), *s.* 4.—By section 4 of the Lunacy Regulation Act, 1853, the statement of particulars required to be given with an order for the reception of a lunatic is made part of the order, and if the order, properly understood by a reasonable mind, gives all the particulars which it is required that a medical man should have upon receiving the order, it is in accordance with the statute.

The alteration of such an order in a material particular, at all events if made with the privity of the person who relies upon it, will make it invalid, and preclude him from legally relying upon it; but it is not so where the alteration is immaterial.

A letter directing the keeper of an asylum to discharge a patient "as soon as you may think it advisable" is not an order of discharge within section 72 of the Lunacy Regulation Act, 1845.

Decision of the Court of Appeal (34 W. R. 144, 15 Q. B. D. 667), affirmed.—*Lowe* v. *Fox*, H.L. 25—12 App. 206; 56 L. J. Q. B. 480; 56 L. T. 404.

3. *Master and servant—Tramway company—Uttering counterfeit coin—Tramways Act*, 1870 (33 & 34 *Vict. c.* 78), *ss.* 51, 72.—Section 52 of the Tramways Act, 1870, which enacts that "it shall be lawful for any officer or servant of the promoters or lessees of any tramway" to detain any person defrauding the company of his fare, must be construed as limited to any officer or servant appointed for that purpose.

A tramway company gave to their conductors printed instructions, in which it was ordered that, except in cases of assault, conductors were not to give passengers into custody without the authority of an inspector or timekeeper. The conductor of a car in which the plaintiff was a passenger detained the plaintiff and gave her into custody on a charge of passing bad money.

Held, in an action for false imprisonment against the company, that the defendants were not liable.—*Charleston* v. *London Tramways Co.*, Q.B.D. 367.

4. *Reasonable and probable cause*—*Pawnbrokers Act*, 1872 (35 & 36 *Vict. c.* 93), *s.* 24.—A. offered a ring and a gold horseshoe pin set with seven diamonds as a pledge to B., a pawnbroker. B., having received from the police a list of stolen property, including a gold horseshoe pin set with seven diamonds, asked A. whether he was a dealer, and where he got the property from. A. replied that he was not a dealer, and gave the name and address of the owner. B. gave A. into custody, but it was afterwards proved that the property was not stolen, and that A.'s statements were true. A. sued B. for false imprisonment.

Held, that the question arising under section 24 of the Pawnbrokers Act, 1872, whether the defendant reasonably suspected the property to have been stolen or clandestinely obtained was for the judge; and that there was no evidence of an absence of reasonable suspicion, and the defendant was entitled to judgment.—*Howard* v. *Clarke*, Q.B.D—20 Q. B. D. 558; 58 L. T. 401.

See also RAILWAY, 10.

FALSE PRETENCES.—See CRIMINAL LAW, 2, 6; JUSTICE OF THE PEACE, 10.

FINES and RECOVERIES ACT.—See HUSBAND AND WIFE, 3.

FIRE INSURANCE:—

Arbitration—*Condition precedent.*—By a condition in a fire insurance policy it was provided that, if any difference should arise in the adjustment of a loss, the amount to be paid should be submitted to arbitration, and the party insured should not be entitled to commence or maintain any action upon the policy until the amount of the loss should have been referred and determined as therein provided, and then only for the amount so awarded.

Held, that the determination of the loss by arbitration was a condition precedent to the plaintiff's right to recover in an action on the policy.—*Viney* v. *Bignold*, Q.B.D. 479—20 Q. B. D. 172; 57 L. J. Q. B. 82; 58 L. T. 26.

FISHERY:—

1. *Fixed nets*—*Nuisance*—*Injunction*—*Fisheries (Ireland) Act*, 1842 (5 & 6 *Vict. c.* 106), *s.* 27.—The plaintiff was owner of a several fishery in a river between the counties of S. and M., and the defendants owned a several fishery just below the plaintiff's fishery. The defendants fished by fixing a net to a wall on the S. side and stretching it across diagonally to the M. side, where their boat was anchored. The net was hauled in after being kept stationary for an hour. When the net was hauled in another boat brought another net into the same position. There was sufficient space between the bank and the anchor of the defendants' boats to enable fish to pass up the river. Until three years before the commencement of the action only one boat and net had been used, but the use of the second boat and net caused loss to the plaintiff.

Held, that stretching the net across the river was not a nuisance, but that the use of the second boat and net must be restrained by injunction.—*Wilson* v. *Moy Fishery Co.*, M.R. (Ir.)—19 L. R. Ir. 270.

2. *Salmon Fishery (Ireland) Act*, 1863 (26 & 27 *Vict. c.* 114), *s.* 6—*Fixed net*—*Certificate.*—C. obtained a certificate for a flood and ebb stake net, the size and position of which were shown on a plan annexed to the certificate. He afterwards used a larger net situated more than 600 yards from the place described in the certificate.

Held, that the net was not protected by the certificate.—*Doran* v. *Cunningham*, L.J. (Ir.)—20 L. R. Ir. 544.

See also LOCAL GOVERNMENT, 6; PRACTICE, 8; WATER, 3.

FIXTURES.—See BILL OF SALE, 14; MORTGAGE, 6.

FORECLOSURE.—See BANKRUPTCY, 21; COSTS, 23, 24; LIMITATIONS, STATUTE OF, 5; MORTGAGE, 7—10.

FOREIGN LAW.—See ESTOPPEL, 5, 6; HUSBAND AND WIFE, 8; JURISDICTION, 6, 7.

FORFEITURE.—See COMPANY, 1, 2; DIVORCE, 14; LANDLORD AND TENANT, 3; LICENSED HOUSE; MARINE INSURANCE, 2; NEW SOUTH WALES, LAW OF, 2; SETTLEMENT, 3; SPECIFIC PERFORMANCE, 4; VENDOR AND PURCHASER, 1; WILL, 24—28.

FRAUDS, STATUTE of:—

Interest in land—*Sale of building materials*—*Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 4.—A contract for the sale of building materials, to be taken down and removed by the purchaser, is a contract for the sale of an interest in land within section 4 of the Statute of Frauds.—*Lavery* v. *Purssell*, CH.D. CHI., J.—57 L. J. Ch. 570.

See also BILL OF SALE, 19; HUSBAND AND WIFE, 9; SPECIFIC PERFORMANCE, 3.

FRAUDULENT PREFERENCE. — See BANKRUPTCY, 14, 15; COMPANY, 13.

FREIGHT.—See COMPANY, 16; SHIPPING, 25.

FRIENDLY SOCIETY:—

Odd Fellows Society—*District lodge*—*Secession*—*Evidence*—*Friendly Societies Act*, 1875 (38 & 39 *Vict. c.* 60), *s.* 11, *sub-section* 10; *ss.* 22, 30—*County court*—*Appeal.*—By the rules of the Odd Fellows Society, any branch of the society desiring to secede shall call a special general meeting and go through certain forms. In a dispute between the parent lodge and the members seceding from it as to whether the proper forms had been carried out or not, the parent lodge contended before the county court judge that, so long as the registration of the lodge stood, it was not competent for the seceding members to deny that they were a branch of it. On the Registrar of Friendly Societies declining to cancel the registration, on the ground that he could not deal with the matter until the dispute had been settled by the county court, the county court judge, conceiving that he was concluded by section 11, sub-section 10, of the Friendly Societies Act, 1875, refused to receive evidence of secession, and gave judgment against the defendants.

Held, that it was the duty of the county court judge to receive evidence of secession.

Held, also, that the appeal was properly made by notice of motion, and not by special case.—*Wilkinson* v. *Jagger*, Q.B.D. 169—20 Q. B. D. 423; 57 L. J. Q. B. 254; 58 L. T. 487.

See also COUNTY COURT, 15.

GAME:—

Ground Game Act, 1880 (43 & 44 *Vict. c.* 47), *s.* 6—*Spring traps.*—A tenant who is entitled under an agreement to the game and right of shooting on the land in his occupation is liable to a penalty for setting spring traps to kill ground game.—*Saunders* v. *Pitfield*, Q.B.D.—58 L. T. 108.

See also JUSTICE OF THE PEACE, 16.

GAMING.—See LICENSED HOUSE, 3.

GARNISHEE.—See ATTACHMENT, 6; BANKRUPTCY, 20, 36; COSTS, 9; SOLICITOR, 4.

GAS COMPANY:—

1. *Metropolitan Gas Act*, 1860 (23 & 24 *Vict. c.* 125), *s.* 6—*District—Supply of gas—Point of supply—Meter.*—The N. railway station lies partly in the district of the plaintiff company and partly in that of the defendant company. The defendant company placed meters within their own district, from which gas was passed through pipes to that portion of the N. Station lying within the plaintiff company's district. Section 6 of the Metropolitan Gas Act, 1860 (which applied to both companies), after defining the limits of each company's district, enacted that "No other company or person than the company to whom such limits are for the time being assigned . . . shall supply gas for sale within the said limits, unless authorised by Parliament so to do."

Held, that the decision in *Imperial Gas Light Co.* v. *West London Junction Gas Co.* (56 L. J. Ch. 862 note) governed the present case, and that the point of supply within the meaning of the section is the meter through which the gas passes into the pipes for consumption by the customer, and that it is not a transgression of the statutory provision to supply gas for sale at a meter within the district of the supplying company, although it is intended for consumption and is in fact consumed within the district of another company.

Per Lindley and Bowen, L.JJ.—If the court was not bound by *Imperial Gas Light Co.* v. *West London Junction Gas Co.*, it must have been held that "supply" of gas was a process continuing from the place where the gas is made to where it is burnt.

Decision of Kekewich, J., 36 W. R. 119, affirmed.—*Gas Light and Coke Co.* v. *South Metropolitan Gas Co.*, C.A. 455—58 L. T. 899.

2. *Price of gas—Reduction—Inquiry by accountant—Jurisdiction of quarter sessions—Costs—Gasworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 15), *s.* 35.—A petition was presented in 1885 under section 35 of the Gasworks Clauses Act, 1847, to the Recorder of Hanley praying him to appoint a person to inquire into the actual condition of the British Gas Light Co., and an accountant was appointed. He examined into the accounts of the previous year and of all other years since 1871, and drew up a report. It was admitted that the whole of the reserve fund was not then and never had been invested, and that the prescribed maximum dividend had not been paid. The recorder held that the company's earnings had been sufficient to pay the maximum dividend and to have kept invested the whole of the reserve fund, reduced the price of gas 6d. per 1,000 cubic feet, and ordered the company to pay the expenses of the inquiry and the costs of the petitioners.

Held, on application for a *certiorari* to quash the order, that the order was bad, except as to the direction that the company should pay the costs of the accountant.—*Reg.* v. *Recorder of Hanley*, Q.B.D. 222—19 Q. B. D. 481; 56 L. J. M. C. 125; 57 L. T. 444.

GENERAL AVERAGE.—See MARINE INSURANCE, 7; SHIPPING, 25a.

GIFT:—

1. Chose in action—*Equitable assignment—Incomplete gift.*—A. held bank shares in trust for B., his father, under a written acknowledgment of the trust. B. indorsed on the acknowledgement:—"I transfer these shares to my daughter M. for her own use and benefit." B. held an I O U from A. and another I O U from E., and he indorsed on each of them:—"I transfer the debt to my daughter M. for her sole use and benefit," and handed them to M. There was no consideration for the transfer, of which no notice was given to A. or E. B. received till his death the dividends on the shares and interest on the I O U's.

Held, that the gift of the shares and debts to M. was incomplete.—*Gason* v. *Rich*, C.A. (Ir.) 19 L. R. Ir. 391.

2. *Condition—Implied trust.*—A. by her will, made in 1873, bequeathed a legacy of £150 to H., who was in her employment as housekeeper. In 1877 the testatrix handed to C., her solicitor (whom she had appointed one of her executors), a promissory note for £200, signed by herself, payable on demand to H., telling C. not to mention the note to anyone but H., and to retain it until the death of the testatrix, and then to give it to H. if she should remain in her service until her death. H. was informed of the note soon after it had been handed to C.

H. remained in the service of the testatrix until the latter's death, and the note remained in the possession of C.

Held, that C. was constituted a trustee of the note for H., in case she fulfilled the prescribed condition.—*Shenstone* v. *Brock*, CH.D. NOR., J. 118—36 Ch. D. 541; 56 L. J. Ch. 923; 57 L. T. 249.

3. Donatio mortis causâ—*Banker—Deposit receipt—"Not transferable."*—A banker's deposit receipt note, which is expressed to be "not transferable," may be the subject of a *donatio mortis causâ*.—*Cassidy* v. *Belfast Banking Co.* EX.D. (Ir.)—22 L. R. Ir. 68.

4. *Undue influence—Religious sisterhood—Acquiescence.*—The relation existing between professed nun and lady superior in a sisterhood—the rules of which require each professed member to take vows binding for life to give up all present and future property, to obey the voice of the lady superior as the voice of God, and not to seek the advice of externs without the leave of the lady superior—is a relation which of itself alone necessarily raises the presumption in equity that a voluntary gift made, during the existence of the relation, by a professed nun to the lady superior for the purposes of the sisterhood, is a gift induced by undue influence; and, in order to displace that presumption, it is not sufficient for the donee to show that the donor, before the relation existed and while acting as a free agent, had formed and expressed the intention of making the gift.

The donor in such a case has a right to claim a return of so much of the property comprised in the gift as remains in the hands of the donee at the time of making the claim; but that right may be lost by delay, after the relation has ceased, in asserting the right when coupled with acts on the part of the donor from which acquiescence in, or confirmation of, the gift may be reasonably inferred.

Decision of Kekewich, J. (35 W. R. 424, 36 Ch. D. 145), affirmed on different grounds (Cotton, L.J., dissenting).—*Allcard* v. *Skinner*, C.A. 251—36 Ch. D. 145; 56 L. J. Ch. 1052; 58 L. T. 61.

5. *Undue influence—Solicitor—Voluntary gift—Delay—Death of donor.*—If a person, who has made a gift to a solicitor while the relation of solicitor and client subsisted between them, is entitled at the time of his death to have the gift set aside, the personal representative of the deceased, upon his death, succeeds to the right, although the deceased had no intention of exercising it, and even expressed a determination not to do so — for he might have changed that determination the next day, and would have had a perfect right to do so.

A solicitor cannot take a gift from his client while the relation of solicitor and client subsists, and, in order to sustain such a gift, if made, something must be done, after the confidential relation has ceased, amounting to a release of the client's right to set aside the gift; but the subsequent settlement by the client of a bill of costs does not amount to such a release.

A., acting as solicitor for G. in an action, in June, 1880, recovered, by a compromise, £5,000 for her, which he received, and out of it, by her desire, retained £1,000 as a gift to himself. The relation of solicitor and client terminated shortly afterwards. In his evidence A. swore that in April, 1883, G. had told him that she had determined to adhere to what she had done. Since the severance of the relation G. had also settled a bill of costs, and had never done any act indicating an intention to recede from her gift. She died in June, 1883. Her administratrix commenced this action within six months, but died in October, 1884. In June, 1886, T. took out administration to G.'s effects, and in the following August he got an order of revivor in this action. Poverty was the excuse given for the delay.

Held, that the gift was bad at the time when it was made; that G. had never effectually released her right to set it aside, and at the time of her death was entitled to exercise that right; that on her death her personal representative succeeded to the right; that it had been kept alive by the action, notwithstanding the delay; and that the gift must consequently be now set aside.

Morgan v. *Minett*, 25 W. R. 744, 6 Ch. D. 638, approved and followed.

Mitchell v. *Homfray*, 29 W. R. 558, 8 Q. B. D. 587, explained and distinguished.—*Tyars* v. *Alsop*, CH.D. REF., J. 919.

See also EVIDENCE, 10; HUSBAND AND WIFE, 16; SCOTLAND, LAW OF, 3; WILL, 56.

GOODWILL.—See MORTGAGE, 10.

GROUND GAME ACT.—See GAME.

GUARDIAN.—See ADMINISTRATION, 16; DIVORCE, 7; INFANT, 5, 6; JURISDICTION, 7.

HABEAS CORPUS.—See JUSTICE OF THE PEACE, 4; PRACTICE, 2, 4.

HEIRLOOM.—See SETTLEMENT, 14.

HIGHWAY:—

1. *Bridge—Repair—Indictment—Acquittal—New trial—Dedication—Liability of county—Statute of Bridges* (22 *Hen.* 8, *c.* 5).—After a verdict of not guilty on an indictment for non-repair of a bridge, a new trial will not be ordered; but under special circumstances the court may order all proceedings on the judgment to be suspended, in order to give an opportunity for the question to be raised on a fresh indictment.

On the trial of an indictment against the inhabitants of a county for non-repair of a bridge built by private owners, but not built in an existing highway, the effect of the evidence as to the dedication to, and the adoption of the bridge by, the county is a question for the jury. Public user and public utility are not conclusive as to the liability of the county, but there need not be an overt act of formal adoption by a body capable of representing the county.—*Reg.* v. *Inhabitants of Southampton*, Q.B.D.—19 Q. B. D. 590; 56 L. J. M. C. 112; 57 L. T. 261.

2. *Dedication—Canal—Towing-path.*—A canal company has power to dedicate to the public as a highway land which has been acquired by it as a towpath under statutory powers, if the user by the public would not be incompatible with the purposes for which the land was acquired.

Rex v. *Leake*, 5 B. & Ad. 469, approved.—*Grand Junction Canal Co.* v. *Petty*, C.A. 795—21 Q. B. D. 273; 57 L. J. Q. B. 413.

2a. *Obstruction—Footpath—Towns Police Clauses Act*, 1847 (10 & 11 *Vict. c.* 89), *s.* 28.—A., B., and C. were standing with other persons on a footpath in a town in which the Towns Police Clauses Act, 1847, was in force, and blocked up the path, so that many persons had to go into the road. A., B., and C. were requested by a police constable to walk on, and did so three abreast, again compelling persons to leave the path.

Held, that A., B., and C. could not be convicted for wilfully obstructing a footpath under section 78 of the Towns Police Clauses Act, 1847.—*Reg.* v. *Long*, Q.B.D. —59 L. T. 33.

3. *Repair—Indictment—Urban sanitary authority—County authority—Highway and Locomotives Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 10.—An indictment will lie, under section 10 of the Highway and Locomotives Act, 1878, against the highway authority of a district for non-repair of a highway.

Quære, whether such indictment, being entirely of a statutable character, should not show on its face that all the steps enacted by section 10 had been previously taken.—*Reg.* v. *Mayor, &c., of Wakefield*, Q.B.D. 911—20 Q. B. D. 810; 57 L. J. M. C. 52.

4. *Repair—Maintenance—Paving—Contribution by county—Highway and Locomotives Act*, 1878, *s.* 13.—The plaintiffs, having paved with stone setts a road in their highway district which was formerly a macadamised road, sought to recover from the county authority under section 13 of the Highways and Locomotives Act, 1878, one-half of the expenses of such paving.

Held, that a different kind of road had been made, and that therefore the plaintiffs had not "maintained" the road, and could not recover against the county authority.—*Leek Improvement Commissioners* v. *Justices of Staffordshire*, C.A. 654—57 L. J. M. C. 102.

5. *Repair—Municipal corporation—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 144—*Indictment—Amendment.*—An indictment having been preferred against a municipal corporation for non-repair of a highway within their borough, a verdict was found for the Crown. The indictment did not show on the face of it the kind of liability sought to be imposed upon the defendants, nor did it contain any statement as to the neglect alleged being "against the form of the statute."

Held, that the defendants were entitled to judgment *non obstante veredicto* on the ground that the indictment was bad beyond power of amendment; and that they were not indictable for non-repair under the Public Health Act of 1875.—*Reg.* v. *Mayor, &c., of Poole*, Q.B.D. 239—19 Q. B. D. 602; 56 L. J. M. C. 131; 57 L. T. 485.

6. *Repair—Tramway—Highways and Locomotives Act*, 1878, *s.* 13—*Tramways Act*, 1870 (33 & 34 *Vict. c.* 78), *s.* 28—*Local Act.*—By a local Tramways Act it was provided that, in case steam power should be used on the tramway, the tramway company should repair the whole extent of that part of a main road over which their lines passed, but that the company might make such contracts and agreements for the repair of the road with the road authority of the borough as might be approved by the Board of Trade. It was also provided that no contract or agreement to be entered into under the Act should operate to lessen the liability of the company under section 28 of the Tramways Act, 1870. The road authority of the borough entered into a contract with the company, by which the expenses of maintenance and repair of the road were divided between them. The borough road authority sued the county authority for contribution under section 13 of the Highways and Locomotives Act, 1878.

Held, that the county authority were liable to pay out of the county rate one-half of the expenses incurred by the borough authority under the con-

tract.—*Mayor, &c., of Darwen* v. *Justices of Lancashire*, Q.B.D. 140—58 L. T. 51.

See also JUSTICE OF THE PEACE, 5, 7; PRACTICE, 33; RAILWAY, 2.

HUSBAND and WIFE:—

1. *Adultery of wife—Death of husband—Negligence—Damages—Action by wife—Lord Campbell's Act*, 1846 (9 & 10 *Vict. c.* 93), *s.* 2.—A woman who has left her husband and is living in adultery at the time of his death unsupported by him is not entitled to bring an action under Lord Campbell's Act for compensation for the death of her husband.

Quære, whether evidence of the willingness of the husband to take back his wife would have entitled her to claim the benefit of the Act.—*Stimpson* v. *Wood*, Q.B.D. 734—57 L. J. Q. B. 484.

2. Chose in action—*Joint tenancy—Severance.*—Marriage does not operate as a severance of the wife's joint tenancy in bank stock which has not been reduced into possession by the husband.

Baillie v. *Treharne*, 29 W. R. 729, 17 Ch. D. 388, disapproved.—*Hughes* v. *Anderson*, C.A. 817—38 Ch. D. 286; 57 L. J. Q. B. 643.

3. *Deed—Acknowledgment*—Chose in action—*Fines and Recoveries Act* (3 & 4 *Will.* 4, *c.* 74), *ss.* 77, 79, 80, 89—*Common Pleas Rules, Hilary Term*, 1834.—At the date of her marriage a wife was owner in fee of real estate; no settlement was executed, and the property was shortly afterwards sold by the husband and wife for £23,500, the latter acknowledging the conveyance after examination by the commissioners in the usual way. The husband received £18,000 of the purchase-money and applied it for his own purposes, and £5,500 was invested to meet an annuity, the trusts of the residue thereof being declared, by a deed of even date with the conveyance, to be in favour of the husband and wife respectively, according to their interests by law for the time being. The husband died in 1884, but the annuitant was alive, so that the £5,500 was still outstanding.

Held, that the Common Pleas rules for the examination of married women were not *ultrà vires*, and that the effect of the examination of the wife and her acknowledgment of the conveyance was that she thereby gave up all her interest in the property and in the purchase-money, without having any provision made for her in return; that the whole purchase-money became the absolute property of the husband; that no part of the £5,500 ever belonged to the wife, so that it never was her *chose in action*, and the doctrine of reduction into possession did not apply; that the declaration of trust did not alter the rights of the parties; and that the wife was not entitled to any interest in the £5,500.—*Tennent* v. *Welch*, CH.D. KAY, J. 389—37 Ch. D. 622; 57 L. J. Ch. 389; 58 L. T. 368.

4. *Desertion—Separation deed—Alimony—Jurisdiction of justices—Married Women's Maintenance Act*, 1886 (49 & 50 *Vict. c.* 52), *s.* 1.—A mere refusal by a husband to continue the payment of alimony to a wife under a separation agreement is not such a "desertion" of the wife as to give the justices jurisdiction to deal with the case under the Married Women's Maintenance Act, 1886.—*Pape* v. *Pape*, Q.B.D. 125—20 Q. B. D. 66; 57 L. J. M. C. 3; 58 L. T. 399.

5. *Judgment against wife—Separate estate—Committal—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5. —*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-section* 2.—A married woman cannot be committed to prison under section 5 of the Debtors Act, 1869, for non-payment of a judgment debt recovered against her, payable out of her separate estate, under section 1, sub-section 2, of the Married Women's Property Act, 1882.—*Scott* v. *Morley*, C.A. 67—20 Q. B. D. 120; 57 L. J. Q. B. 43; 57 L. T. 919.

6. *Judgment against wife—Separate estate—Instalments — Default — Committal.*—Where a married woman had been ordered to satisfy a judgment by instalments out of her separate estate, not subject to restraint on anticipation, or liable, notwithstanding such restraint, to execution under the Married Women's Property Act, 1882, but made default in the instalments, the court ordered her committal.—*Johnstone* v. *Browne*, EX.D. (Ir.)—20 L. R. Ir. 443.

7. *Judicial separation — Desertion — Separation deed.*—After a husband had deserted his wife for more than two years a separation deed was executed, but it did not contain a covenant by the wife not to sue. The husband filed a petition against the wife for dissolution, on charges which were not sustained. The wife, by her answer, prayed for a judicial separation. The husband did not, by his pleading, set up the deed as a bar to the wife's remedy, but his counsel relied on it at the trial.

Held, that the wife was entitled to a decree for judicial separation.—*Moore* v. *Moore, Chadwick*, and *Griffiths*, P.D. & A.D. 110—12 P. D. 193; 56 L. J. P. D. & A. 104; 57 L. T. 568.

8. *Legitimacy — Foreign marriage — Uncivilised country—Polygamy.*—A domiciled Englishman married, according to the native rights, a girl belonging to an uncivilised South African tribe. Polygamy was permitted by the customs of the tribe, a man being allowed one great wife and several concubines.

Held, that, although the marriage entered into was a marriage according to the customs of the tribe, it did not possess the characteristics which are essential to a contract of marriage according to English law, which is, the voluntary union for life of one man and one woman to the exclusion of all others.—*Bethell* v. *Hildyard*, CH.D. STI., J. 503—38 Ch. D. 213; 57 L. J. Ch. 487; 58 L. T. 674.

9. *Maintenance—Parol agreement—Consideration—County court—Jurisdiction—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 4.—An action for arrears of maintenance payable under a parol agreement for separation made between husband and wife, in compromise of cross-summonses for assault, was brought by the wife in a county court. The county court judge gave judgment in favour of the claim.

Held, that the agreement had been made for good consideration; that, the consideration being executed, the Statute of Frauds did not apply; and that the county court judge had jurisdiction.

Knowlman v. *Bluatt*, 22 W. R. 77, L. R. 9 Ex. 307, followed.—*McGregor* v. *McGregor*, Q.B.D. 478—20 Q. B. D. 529; 57 L. J. Q. B. 268; 58 L. T. 771.

10. *Necessaries—Adultery of wife—Connivance of husband.*—A husband who has turned his wife out of doors without any means of support on account of adultery committed by her with his connivance is liable for necessaries supplied to her.

Judgment of the Queen's Bench Division (36 W. R. 77, 19 Q. B. D. 379) affirmed.—*Wilson* v. *Glossop*, C.A. 296—20 Q. B. D. 354; 57 L. J. Q. B. 161; 58 L. T. 707.

11. *Nullity of marriage—Impotency of petitioner—Repudiation by respondent.*—A husband cannot maintain a suit for nullity of marriage on the ground of his own impotency, unless his wife repudiates the marriage relation and her own obligations under the marriage contract.—*A.* v. *B.*, C.A. (Ir.)—19 L. R. Ir. 403.

12. *Nullity of marriage—Variation of settlement—*

Reconveyance.—After a decree of nullity of marriage, the court, on a petition for variation of settlements, ordered a reconveyance of the property in the proportions in which they had respectively brought it into settlement, and freed from all the trusts of the settlement.—*Leeds* v. *Leeds*, P.D. & A.D.—57 L. T. 373.

13. *Restitution of conjugal rights — Cruelty — Separate acts.*—Cruelty may consist of several separate acts, each of which need not by itself afford a ground for relief.

In a wife's suit for restitution of conjugal rights it is a good defence that the petitioner has been guilty of habitual intemperance and violence, of threatening and assaulting her husband, and of other acts tending to affect the respondent's health and social position.—*Darcy* v. *Darcy*, P. & D.D. (Ir.)—19 L. R. Ir. 369.

14. *Separate estate—Contract by wife—Power of appointment.* — In cases not within the Married Women's Property Act, 1882, the exercise, by the will of a married woman, of a general power of appointment, whether the power be exercisable by deed or will, or by will only, does not make the property appointed liable to engagements entered into with her on the credit of her separate estate.

London Chartered Bank of Australia v. *Lemprière*, 21 W. R. 513, L. R. 4 P. C. 572; *Mayd* v. *Field*, 24 W. R. 660, 3 Ch. D. 587; and *In re Harvey*, 28 W. R. 73, 13 Ch. D. 216, considered.—*Roper* v. *Doncaster*, CH.D. KAY, J. 750.

15. *Separate estate—Fund in court—Dividends—Power of attorney—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 40—*Form of order.*—A married woman restrained from anticipation may appoint an attorney to receive the growing payments, but only on her behalf and for her use.

Form of order directing payment of dividends to a married woman entitled for her separate use.—*Stewart* v. *Fletcher*, CH.D. CHI., J. 713—38 Ch. D. 627; 57 L. J. Ch. 765.

16. *Separate estate—Gift to husband and wife and third person—Married Women's Property Act*, 1882, *ss.* 1, 5.—The rule that, under a gift by will to a husband and wife and a third person, the husband and wife take only one moiety between them, the third person taking the other moiety, is not affected by the Married Women's Property Act, 1882, and is still applicable to a gift under a will made since that Act came into operation. The effect of the Act is that the husband and wife each take one-fourth, the wife's share being her separate property.

Mander v. *Harris*, 31 W. R. 885, 24 Ch. D. 222, disapproved.—*Jupp* v. *Buckwell*, CH.D. KAY, J. 712; 57 L. J. Ch. 774.

17. *Separate estate—Judicial separation—Question as to property—Inquiry by registrar — Married Women's Property Act*, 1882, *s.* 17.—A wife, who had obtained a decree for a judicial separation, claimed certain furniture as her separate property, but her husband denied that she had a title to it. The court made an order, under section 17 of the Married Women's Property Act, 1882, directing the registrar to inquire whether the furniture formed part of the wife's separate estate.—*Phillips* v. *Phillips*, P.D. & A.D.—57 L. J. P. D. & A. 76.

18. *Separate estate—Judgment against wife—Antenuptial debt—Married Women's Property Act*, 1882, *ss.* 14, 15, 19.—In an application to sign final judgment against a married woman for a debt contracted before marriage it is not necessary to prove that she possesses separate estate.

Such a judgment should be in the form settled by the Court of Appeal in *Scott* v. *Morley*, 36 W. R. 67, 20 Q. B. D. 120.—*Downe* v. *Fletcher*, Q.B.D. 694.

19. *Separate estate—Restraint on anticipation.*—Where a fund has, subject to a trust for accumulation for a particular period, been bequeathed to a married woman for her separate use absolutely with a restraint on anticipation, that restraint will be construed as referable only to the antecedent period when, and only when, the testator has shown an intention inconsistent with the confinement of the restraint to that period.

O'Halloran v. *King*, 33 W. R. 58, 27 Ch. D. 411, distinguished.

Decision of Kay, J., affirmed.—*In re Tippett and Newbould*, C.A. 597—37 Ch. D. 444; 58 L. T. 754.

20. *Separate estate—Restraint on anticipation—Contract during coverture—Married Women's Property Act*, 1882, *ss.* 1, 5. 19.—By a settlement before the Married Women's Property Act, 1882, real estate devised to a married woman for her separate use was settled for her separate use without power of anticipation for life, then to her husband for life, then to the children of the marriage, there being none at the date of the settlement. After the Act and during coverture the wife made a promissory note in favour of the plaintiffs, who, after the death of the husband, obtained judgment on the note.

Held, that the settled estate was not liable to satisfy the judgment.—*Beckett* v. *Tasker*, Q.B.D. 158—19 Q. B. D. 7; 56 L. T. 636.

21. *Separate estate—Restraint on anticipation—Judgment against wife—Payment by instalments—Debtors (Ireland) Act*, 1872 (35 & 36 *Vict. c.* 57), *s.* 6—An order under the Debtors Act, 1872, for payment by instalments of a debt due under a judgment against a married woman having separate estate subject to restraint on anticipation, even if the defendant has received income from the separate estate since the judgment.—*Morgan* v. *Eyre*, Q.B.D. (Ir.)—20 L. R. Ir. 541.

22. *Separate estate—Restraint on anticipation—Judicial separation—Property acquired before decree—Divorce Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 25.—Under section 25 of the Divorce Act, 1857, a wife who has obtained a decree for judicial separation is to be considered as a *feme sole* with respect only to property which she may acquire or which may come to or devolve upon her after the separation decree; and the section does not apply to property to which the wife at the date of the separation decree was entitled in possession.

Cooke v. *Fuller*, 26 Beav. 99, 8 W. R. Ch. Dig. 25, questioned.

Decision of Kay, J., affirmed.—*Waite* v. *Morland*, C.A. 484—38 Ch. D. 135; 57 L. J. Ch. 655.

23. *Separate estate—Restraint on anticipation—Sale of real estate—Title.*—A. gave and bequeathed all his freehold and leasehold estate to his two daughters, as tenants in common, to and for their respective sole and separate use and benefit absolutely, and he expressed his wish and request that they should not sell or dispose of any part of the premises. The two daughters, one of whom was married, contracted to sell part of the freehold property.

Held, that the married daughter could not make a good title.—*In re Hutchings and Burt*, CH.D. KAY, J. —58 L. T. 6.

24. *Separate estate—Sequestration—Divorce—Custody of children—Divorce Act*, 1857, *ss.* 35, 52—*Ord.* 42, *r.* 33; *ord.* 43, *r.* 6; *ord.* 68, *r.* 1.—It is the proper practice now, as it was in the Divorce Court formerly, to issue writs of sequestration in general form against "the estate and effects" of a married woman, without any express limitation in the writ to property of the married woman not subject to a restraint on anticipation; but nevertheless the writ can only operate on

property of the married woman not subject to a restraint on anticipation.

Ellis v. *Johnson*, 34 W. R. 309, 31 Ch. D. 532, followed.

Miller v. *Miller*, 18 W. R. 585, L. R. 2 P. & D. 55, explained.

Scott v. *Morley*, 36 W. R. 67, 20 Q. B. D. 120, distinguished.

In a suit for dissolution of marriage, an order was made on the wife to deliver up the children to the custody of the husband, and not to withdraw them from the jurisdiction of the court. The wife, who at the date of the order had been residing with her sister and brother-in-law, evaded service of the order and did not comply with it. Butt, J., on the application of the husband, made an order directing the wife's sister and the brother-in-law to attend before the court for the purpose of being examined as to their knowledge of the whereabouts of the wife and children.

Held, that a judge of the Probate, Divorce, and Admiralty Division had no jurisdiction to make such an order.—*Hyde* v. *Hyde and Felgate*, C.A. 708—57 L. J. P. D. & A. 89.

25. *Separate estate—Settlement—Second marriage—Married Woman's Property Act*, 1882, *ss.* 2, 19.—Under a marriage settlement property was vested in trustees upon trust, in events which had happened, for such persons as the wife, the husband being dead, should by deed or will appoint, and, in default of appointment, for her absolutely. The power was not exercised during the widowhood. In 1887 the wife remarried.

Held, that, prior to the second marriage, the wife would have been entitled to have the fund paid to her absolutely; that the effect of the Married Women's Property Act, 1882, was to add the incident of separate use to whatever interest she had in the property comprised in the settlement; and that she and her husband were entitled to have the fund paid to them discharged from the settlement.—*Plowden* v. *Gayford*, CH.D. STI., J. 583.

26. *Separation deed — Covenant — Molestation — Alimony.*—By a separation deed the husband covenanted to make an allowance to the wife, determinable upon her molesting him. The husband subsequently discontinued the allowance, on the ground that the wife had broken her covenant not to molest him. The wife afterwards instituted a suit for judicial separation, and applied for an allowance of alimony *pendente lite*.

Held, that the wife was entitled to the allowance.—*Wood* v. *Wood*, C.A. 33—57 L. J. Ch. 1; 57 L. T. 746.

See also ADMINISTRATION, 6; BANKRUPTCY, 19, 22, 32, 33, 37; COSTS, 13—16, 34; DIVORCE, 1—15; EVIDENCE, 12, 13; EXECUTOR, 5; INFANT, 3, 4, 6, 10; INJUNCTION, 6; JURISDICTION, 5, 6, 18; JUSTICE OF THE PEACE, 11, 12; LIBEL, 4; POOR LAW, 5, 9, 10; POWER OF APPOINTMENT, 2, 3; PRACTICE, 42; SCOTLAND, LAW OF, 2, 3; SETTLEMENT, 1, 2, 9; SLANDER, 1; SOLICITOR, 2; WILL, 5, 34.

ILLEGALITY.—See DEED, 2; ECCLESIASTICAL LAW, 2; TRADE UNION; WILL, 8.

IMPROVEMENT of LAND ACT.—See MORTGAGE, 11.

INCLOSURE:—

Valuer—Award—Stopping up roads—"Old inclosures"—Inclosure Act, 1845 (8 *& 9 Vict. c.* 118), *s.* 62.—The meaning of the words "old inclosures" in section 62 of the Inclosure Act, 1845, is not limited to old inclosures from the waste, but applies to all old inclosed lands, whatever their condition was prior to their being inclosed; and therefore the valuer has power to stop up, divert, or alter roads or ways passing through any old inclosed lands in the parish.

Judgment of the Queen's Bench Division reversed.—*Hornby* v. *Silvester*, C.A. 679—20 Q. B. D. 797.

See also COMMON.

INCOME TAX:—

1. *County lunatic asylum—Residences of officers.*—The justices of a county are properly assessed, under the Income Tax Acts, in respect of such parts of a county lunatic asylum as are occupied as apartments by the medical superintendent, medical officers, and steward, and in respect of a separate house occupied by the chaplin of such asylum.—*Bray* v. *Justices of Lancashire*, Q.B.D.—57 L. J. M. C. 57.

2. *Deduction—Bank—Residence of manager—Income Tax Act*, 1842 (5 *& 6 Vict. c.* 35), *s* 100, *schedule D.*—A banking company carried on business on premises of which a part was occupied as the residence of the manager of the bank.

Held, that the annual value of the portion of the premises occupied by the manager should be deducted from the annual value of the whole premises in calculating the profits of the bank under Schedule D. to the Income Tax Act, 1842.—*Russell* v. *Town and County Bank*, H.L.—13 App. 418.

3. *Deduction—Protection of land—Embankment—Tidal river—Income Tax Act*, 1842, *s.* 60, *schedule A., No.* 5—*Income Tax Act*, 1853 (16 *& 17 Vict. c.* 34), *s.* 37, *schedule A.*—The owner of land which was flooded by a tidal river was assessed to income tax in respect of the pasturage. In 1880 he expended a large sum in making an embankment, whereby he excluded the tidal river altogether, and the land became valuable property, yielding a large income.

Held, that the making of the embankment was not necessary for the preservation or protection of the land against the encroachment or overflowing of the tidal river within the exception of section 37 of the Income Tax Act, 1853, and that no allowance or deduction could be allowed for the amount expended by the landlord in making the embankment, since the embankment was made to increase the capital value of the land by altering its condition, and not to protect it.—*Hesketh* v. *Bray*, Q.B.D. 622—20 Q. B. D. 589; 57 L. J. Q. B. 184; 58 L. T. 613.

4. *Deduction—Tithes—Cost of collection—Income Tax Act*, 1853, *ss.* 5, 32.—A tithe owner is entitled to deduct from his income tax assessment in respect of a vicarial commutation tithe rent-charge the amount which he is compelled to pay in collecting his tithes.

Judgment of the Queen's Bench Division (reported 35 W. R. 839, 19 Q. B. D. 442) affirmed.—*Stevens* v. *Bishop*, C.A. 421—20 Q. B. D. 442; 57 L. J. Q. B. 283; 58 L. T. 669.

5. *Diminution of profits—Repayment—Maximum—Income Tax Act*, 1842, *s.* 133.—By section 133 of the Income Tax Act, 1842, "If, within or at the end of the year current at the time of making any assessment under this Act, . . . any person . . . shall find and shall prove to the satisfaction of the commissioners by whom the assessment was made that his profits and gains during such year for which the computation was made fell short of the sum so computed, . . . it shall be lawful for the said commissioners, . . . in case the sum assessed shall have been paid, to certify under their hands to the commissioners for special purposes the amount of the sum overpaid, . . . and thereupon the last-named commissioners shall issue an order for the repayment of such sum as shall have been so overpaid."

In March, 1887, the appellants made a claim for repayment of income tax assessed on profits for the years ending April, 1884, and April, 1885. The

general commissioners, after inquiry, granted their certificate. The special commissioners having refused to issue an order for the repayment of the sum, application was made for a *mandamus* to compel them to do so.

Held, that a *mandamus* would lie, and that the meaning of the section was that the over-assessment should be found and proved as soon after the end of the year as, by using all reasonable and proper exertions, the applicant could ascertain it.

Per Lord Esher, M.R.—The general commissioners are the final judges as to whether the application has been made in time or not, and their certificate is binding on the special commissioners, who have no power to question their decision.

Per Lindley, L.J.—When a certificate has been granted by the general commissioners, the *onus* of proving that the application was not made in time is thrown on the Crown, and the mere production of the dates of the application and of the years for which the certificate has been granted is not sufficient ground for disregarding the certificate.

Judgment of the Queen's Bench Division (reported 36 W. R. 671, 20 Q. B. D. 549) reversed.—*Reg.* v. *Commissioners of Income Tax*, C.A. 776—21 Q. B. D. 313.

5a. *Exemption — Charitable institution — Mutual benefit society—Subscriptions — Donations—Customs and Inland Revenue Act*, 1885 (48 & 49 *Vict. c.* 51), *s.* 11.—The Linen and Woollen Drapers' Institution was founded to make provision for sick and aged persons in those trades and their widows and children. Any person of three years' experience in such trades, and living within twelve miles of the General Post Office, was to be eligible as a member. Pecuniary and other relief was to be given to members or their families, who might receive either a lump sum, a temporary allowance, or a life annuity. Members were to be entitled to free medical attendance, and all relief to members was to be granted at the discretion of the directors, and relief was only to be given to persons in necessitous circumstances. The property of the institution consisted of accumulated subscriptions and donations from persons not being members.

Held, that the institution was not a charitable institution within section 11 of the Customs and Inland Revenue Act, 1885, but was in the nature of a mutual benefit society, and that the accumulated subscriptions were not exempt from income tax, but that the proceeds of donations were exempt.—*In re Linen and Woollen Drapers' Institution*, Q.B.D.—58 L. T. 949.

6. *Foreign business—Agents in England—Income Tax Act*, 1842, *ss.* 41, 44—*Income Tax Act*, 1853, *s.* 2, *schedule D.*—The appellants, who were wine merchants domiciled and resident at Rheims, in France, employed a London firm of wine merchants as their sole agents in the United Kingdom for the sale of their wine, the agents being paid a commission, upon which they paid income tax, on all wines sold by the appellants in the United Kingdom, and paying all expenses. The agents' office was taken in their own name and on their own sole account, and they carried on their own business there. The appellants' name was inserted in the list of wine merchant in the "London Directory." Price lists and circulars were from time to time issued by the agents to wine merchants, with the authority of the appellants, giving the price of the wine and the terms of sale. Orders for wine were transmitted by the agents to the appellants at Rheims, and the appellants forwarded the wine direct to the customers and the goods were invoiced in the appellants' name as vendors, the contracts for the wine being made by the agents in England. The terms of sale were that the wine was sold as it was stored in the cellars at Rheims the cost of packing and carriage being paid by the purchaser, and the wine being at his risk from the time it left the cellars. The appellants kept no wine in England, and had no banking account there. The purchasers either paid the agents, who remitted the amount to the appellants, or paid the appellants direct, and the appellants sent receipts to the purchasers for all payments.

Held, that a trade was exercised within the United Kingdom within the second clause of schedule D. to section 2 of the Income Tax Act, 1853, and that the appellants were assessable to the income tax upon the annual profits or gains arising therefrom.

Held, also, that section 41 of the Income Tax Act, 1842, did not limit the language of schedule D., but was intended to aid the commissioners in recovering the tax.

Judgment of the Queen's Bench Division affirmed.—*Werle* v. *Colquhoun*, C.A. 613—20 Q. B. D. 753; 57 L. J. Q. B. 323; 58 L. T. 756.

7. *Foreign business—Partnership—Profits remitted to England—Income Tax Act*, 1853, *s.* 2, *schedule D.*—A partner in a firm carrying on business solely at Melbourne resided wholly in England. A portion of his share in the profits of the Melbourne business was transmitted to him in England and duly returned by him for assessment to income tax. The remainder of his share was left in Australia, and stood to his credit on the books of the firm. He was assessed to income tax on the whole amount of his share of the profits.

Held (Fry, L.J., dissenting) that he was only liable to be assessed to income tax in respect of that portion of his share of the profits of the Melbourne business transmitted to and received by him in this country.

Judgment of the Queen's Bench Division (reported 36 W. R. 332, 19 Q. B. D. 400) reversed.—*Colquhoun* v. *Brooks*, C.A. 657—21 Q. B. D. 52; 57 L. J. Q. B. 439.

8. *Profits—Municipal corporation—Water rates—Supply outside borough.*—By a private Act the corporation of D. had power to construct waterworks for the borough and for certain extra-municipal districts, and, for the purposes of the Act, to borrow money on security of the rates, and to levy water rates on owners and occupiers within the borough, and to contract with owners and occupiers in extra-municipal districts for the supply of water. By a later Act the income from the supply of the extra-municipal districts was to form a consolidated fund, available for paying loans and interest and for all the purposes of the Act.

Held, that the excess of income over expenditure in respect of the extra-municipal districts was chargeable with income tax.—*Mayor, &c., of Dublin* v. *McAdam*, M.R. (Ir.)—20 L. R. Ir. 497.

See also PROPERTY TAX.

INCORPORATION.—See WILL, 60.

INDICTMENT.—See CRIMINAL LAW, 1; HIGHWAY, 1, 3, 5.

INFANT:—

1. *Contract—Domicile—Scotch law.*—The widow of a domiciled Scotchman sued to set aside an antenuptial contract whereby, in consideration of a provision made by her husband, she had renounced all rights to which she would become entitled as his widow. The contract had been executed in Ireland, the wife having been then an infant with an Irish domicile, but it was then contemplated that the husband and wife should live in Scotland, and they did so throughout their married life.

Held, (1) that the House of Lords could take judicial notice of the law of Ireland; (2) that the wife's capacity to bind herself by the contract must

be determined by the law of her domicile, and therefore she could avoid the contract.—*Cooper* v. *Cooper*, H.L.—13 App. 88; 59 L. T. 1.

2. *Contract—Ratification—Promise of marriage—New promise—Infants' Relief Act*, 1874 (37 & 38 *Vict.* c. 62), *s.* 2.—The defendant, while he was under age, promised to marry the plaintiff. After he came of age the plaintiff told him that her father's pecuniary circumstances were altered, and offered to release him from his engagement. The defendant was much hurt at this, and said that he was ready to marry her then if she thought they were old enough. The plaintiff replied that she thought they had better wait till they were older. Subsequently the defendant refused to carry out the engagement.

Held (reversing the decision of the Queen's Bench Division, 36 W. R. 693), that there was evidence on which the jury might find that there had been a new promise by the defendant after he came of age.—*Holmes* v. *Brierley*, C.A. 795—59 L. T. 70.

3. *Custody—Misconduct of father—Jurisdiction—Infants Guardianship Act*, 1886 (49 & 50 *Vict.* c. 27), *s.* 5.—A mother applied for the custody of her son, aged ten years, on the ground of the misconduct of the father.

Held, that, under section 5 of the Infants Guardianship Act, 1886, the court had jurisdiction to make such order as it might think fit regarding the custody, and the right of access of either parent, having regard to the welfare of the infant, the conduct of the parents, and the wishes of the mother and the father, and to order the delivery of the infant to the custody of its mother without fixing any limit of age.—*In re Witten*, CH.D. KAY, J.—57 L. T. 336.

4. *Custody—Religious education—Separation deed—Infants Custody Act*, 1873, *s.* 2.—The words "custody or control" in section 2 of the Infants Custody Act, 1873, comprise all the rights which a father has over his children, including that of directing their religious education.

A motion was made by the mother of a female infant, eight years of age, for the exclusive control of the education of the infant, and that the father's access might be limited. The father, a Roman Catholic, was married to the mother, a Protestant, in 1878. In 1881 a separation deed was executed, containing a declaration that the wife should have the absolute custody and control of the infant until the deed should be put an end to by the parties, without interference by the husband. The father had not seen the child for three years and a half, and no reason for his not doing so was alleged. An order was made in an action to administer the trusts of the separation deed, the mother undertaking not to bring up the child in any manner at variance with the Roman Catholic faith. The father was without means to maintain the child.

Held, that it was for the benefit of the infant to give effect to the agreement in the separation deed, and that it should be enforced.—*Condon* v. *Vollum*, CH.D. CHI., J.—57 L. T. 154.

5. *Guardian—Absence of parents—Infants Guardianship Act*, 1886, *ss.* 2, 6.—Where the mother of two infants, whose father had died intestate, was residing permanently out of the jurisdiction, the court, with the mother's consent, made an order substituting the infants' paternal uncle as guardian.—*In re Lemons*, L.C. (Ir.)—19 L. R. Ir. 575.

6. *Guardian—Religious education—Rights of mother—Infants Guardianship Act*, 1886, *ss.* 2—5.—The right of a father to decide what religious education his children shall receive has not been affected by the passing of the Infants Guardianship Act, 1886, under which a mother, as guardian of an infant, has no greater powers, in deciding upon its religious education, than were possessed, at the passing of the Act, by any guardian appointed by will or otherwise under 12 Car. 2, c. 24.—*In re Scanlan*, CH.D. STL., J. 841; 57 L. J. Ch. 718.

7. *Maintenance—Accumulation—Consols—Dividends—Payment to trustees*—1 *Will.* 4, c. 65, *s.* 31.—A sum of Consols was standing in the sole name of an infant, and it was desired to obtain payment of the dividends to be accumulated for her benefit, as they were not required for her maintenance. The Bank of England refused to act upon a suggested order requiring them to accumulate the dividends.

The court made an order for payment of the dividends to the trustees of a will under which the property was derived, to be applied for the benefit of the infant.—*In re Kemp*, CH.D. KAY, J. 729.

8. *Maintenance—Payment out of court—Petition—Summons—Ord.* 55, *r.* 2.—The mere fact that a fund in court exceeds £1,000 is not of itself sufficient to justify the presentation of a petition for payment out if the title to the fund depends only upon proof of the identity, or of the birth, marriage, or death of any person.—*Bates* v. *Moore*, CH.D. NOR., J. 586—38 Ch. D. 381; 58 L. T. 513.

9. *Ward of court—Settlement—Costs—Payment out of corpus.*—The costs of a settlement of the property of a female ward of court, made upon her marriage with the sanction of the court, were ordered to be paid out of the *corpus* of the settled property.

Anonymous case, 4 Russ. 473, followed.—*De Sinepoole* v. *Seymour*, CH.D. NOR., J. 320—37 Ch. D. 139; 57 L. J. Ch. 463; 58 L. T. 382.

10. *Ward of court—Settlement—Reversionary interest—Divorce—Infants' Settlement Act*, 1855 (18 & 19 *Vict.* c. 43), *s.* 1.—An infant ward of court, having married without the sanction of the court, afterwards executed a post-nuptial settlement with the approval of the Vice-Chancellor, whereby she settled a reversionary interest in personalty, to which she was entitled under a will made in 1838, upon trust for herself for life with remainder to her children. A dissolution of the marriage was decreed on the wife's petition, but during coverture she had recognised the settlement in various ways. The reversionary interest fell into possession after the dissolution of the marriage.

Held, that neither the sanction of the court nor the Infants' Settlement Act, 1855, could make the post-nuptial settlement of the wife's reversionary interest in personalty binding upon her; that no acts of acquiescence during coverture—and, after the dissolution of the marriage, nothing except the actual disposition by her of the property to the trustees of the settlement—could have that effect, and that she was entitled to a transfer of the property to herself.

Decision of the Court of Appeal (reported 35 W. R. 438, 35 Ch. D. 21) affirmed.—*Seaton* v. *Seaton*, H.L. 865—13 App. 61; 57 L. J. Ch. 661; 58 L. T. 565.

See also ADMINISTRATION, 18; CAPE OF GOOD HOPE, LAW OF, 2; COMPANY, 9; COSTS, 19; DIVORCE, 7; JURISDICTION, 7; POOR LAW, 1; SETTLEMENT, 7, 8.

INFRINGEMENT.—See COPYRIGHT, 1, 4, 5; DAMAGES, 1; INJUNCTION, 11—13; LIBEL, 2; PATENT, 2, 3; PRACTICE, 6; TRADE-MARK, 1, 2, 4a.

INJUNCTION:—

1. *Bond—Condition—Penalty—Liquidated damages.*—The condition of a bond, though the bond contains recitals, may, having regard to surrounding circumstances and the intention of the parties, be evidence of an agreement sufficient to sustain an

injunction.—*London and Yorkshire Banking Co.* v. *Pritt*, CH.D. CHI., J. 135—57 L. T. 875.

2. *Company—Director—Exclusion by co-directors.*—An injunction will be granted in an action by a director of a company against his co-directors to restrain them from excluding him from acting as director, although, in the opinion of the directors, he is unfit to be a director of the company by reason of alleged misconduct.—*Kyshe* v. *Alturas Gold Co.*, CH.D. NOR., J. 496.

3. *Company—Inspection of register*—Mandamus—*Companies Clauses Consolidation Act*, 1845 (8 *Vict.* c. 16), *ss.* 45, 63.—A company is bound, under sections 45 and 63 of the Companies Clauses Consolidation Act, 1845, to allow a holder of stock and debentures to inspect the whole of its register, and has no right to require him to state his reasons for inspection. The proper remedy in case of a refusal to allow inspection is an injunction, not a *mandamus.*

Rex v. *Wilts and Berks Canal Co.*, 3 A. & E. 477, explained.—*Holland* v. *Dixon*, CH.D. CHI., J. 320— 37 Ch. D. 669; 57 L. J. Ch. 502; 58 L. T. 845.

4. *Company — Shares — Registration — Priority—Equitable title—Inchoate legal title.*—The plaintiff, a married woman living apart from her husband, purchased, out of money belonging to her for her separate use, 175 shares in the W. L. A. Co., which were transferred to, and registered in the name of, the defendant W., who held as trustee for the plaintiff for her separate use. In February, 1886, W. executed a transfer of seventy-five of the plaintiff's shares to the defendants H. and A., leaving blanks for the date and the consideration, which he sent to them, together with the certificates of the shares as a security for a debt due from his firm. On the 5th of May the defendants H. and A. filled in the blank for the consideration with five shillings, and that for date with the 4th of May; and, on the 6th of May, the transfer, together with the certificates, was sent to the company for registration. Immediately on the receipt of the transfer the manager of the company wrote to the plaintiff informing her of the facts, who thereupon instituted the present action to restrain the defendants H. and A. from dealing with the shares. The deed of settlement by which the company was constituted provided that no person claiming to be the proprietor of any share by transfer should be entitled to be treated or recognised as such unless and until he should have been registered in the register of shareholders as the proprietor of the shares; that no person should be entitled to be registered in the register of shareholders as the proprietor of any share unless and until he should, by the execution of settlement or some deed referring thereto, have undertaken all the liabilities, duties, and obligations of a shareholder in respect of such share; and that it should be essential to the legal validity of a transfer that the deed by which it was effected should be deposited or left at the office of the company.

Held, that the defendants H. and A. had not shown a legal title in themselves, or, as between themselves and the company, an absolute and unconditional right to be registered as shareholders in the place of the defendant W., but that their title was inchoate only, and insufficient to defeat the prior equitable title of the plaintiff.

Dodds v. *Hills*, 2 H. & M. 424, 13 W. R. Ch. Dig. 57, distinguished.—*Roots* v. *Williamson*, CH.D. STI., J. 158—38 Ch. D. 485; 58 L. T. 801.

5. *Company—Winding up—Assets in Scotland—Attachment in Scotland—Companies Act*, 1862 (25 & 26 *Vict.* c. 89), *s.* 87.—An order was made to wind up a company which had assets in Scotland. The liquidator's solicitors employed R., a Scotch solicitor, as their agent in Scotland. Property of the company in Scotland having been sold, R. took proceedings to attach the proceeds in the hands of the auctioneer. R. had agreed to look only to the assets of the company for his remuneration.

The court granted an injunction to stay R.'s proceedings in Scotland.—*In re Hermann Loog*, CH.D. NOR., J.—57 L. T. 47.

6. *Husband and wife—Judicial separation.*—After a decree of judicial separation at the suit of a wife, the court granted an *interim* injunction restraining the respondent from dealing with certain portions of his property. The parties were afterwards reconciled.

The court refused to continue the injunction or to appoint a receiver.—*Hawes* v. *Hawes*, P.D. & A.D.—57 L. T. 374.

7. *Libel—Interlocutory injunction.*—An interlocutory injunction to restrain the future publication of matters defamatory of an indefinite general description ought not to be granted, because, if the injunction was granted, it would be left to the court to decide, on motion to commit, whether what might thereafter be published was libellous or not.

The principles laid down in *Coulson* v. *Coulson*, 3 Times L. R. 846, as to granting interlocutory injunctions with respect to libels, approved.

Decision of Kekewich, J., affirmed.—*Liverpool Household Stores Association* v. *Smith*, C.A. 485—37 Ch. D. 170; 57 L. J. Ch. 285; 58 L. T. 204.

8. *Marine insurance — Unseaworthiness.*—Underwriters sued for an injunction to restrain policyholders from taking any proceedings with reference to a policy of insurance, on the ground that the underwriters had an admittedly good defence to any action that might be brought on such policy.

Held, that an injunction ought not to be granted.—*Brooking* v. *Maudslay*, CH.D., STI., J. 664—38 Ch. D. 636; 58 L. T. 852.

9. *Partnership—Assistant—Dissolution—Restraint of trade—Joint and separate contract.*—A. was engaged as assistant to B. and C., who carried on business as surgeons in partnership at N. Upon entering their service, A. gave to B. and C. a bond, which contained the recital of an agreement that A. would not at any time thereafter "set up or carry on the business or profession of a surgeon." The partnership between B. and C. was subsequently dissolved, and A. was engaged by B. as his assistant. C. applied to restrain A. from so acting.

Held, that the agreement entered into by A. with B. and C. was both joint and several, and that C. was entitled to sue alone for a breach of it.

Held, also, that A. had committed a breach of it by acting as assistant to B., and that an injunction ought, therefore, to be granted.

Allen v. *Taylor*, 19 W. R. 556, distinguished.

Decision of Chitty, J., affirmed.—*Palmer* v. *Mallet*, C.A. 460—36 Ch. D. 411.

10. *Trade-mark—Fraudulent imitation—Account.*—Where an injunction has been obtained by a plaintiff restraining a defendant from selling his goods in a form so resembling the plaintiff's as to lead purchasers to believe that they were the goods of the plaintiff, the order for an account should direct an account of all profits made by the defendant in selling his goods in that particular form, and should not be limited by excluding therefrom the profits on those of the goods which the defendant can prove were sold as his.

Decision of Chitty, J., affirmed.—*Lever* v. *Goodwin*, C.A. 176—36 Ch. D. 1; 57 L. T. 583.

11. *Trade name—Infringement—Newspaper.*—The

plaintiff was the proprietor of the *Morning Post*. The defendants had recently commenced publishing an evening newspaper under the name of the "*Evening Post*, with which is incorporated the *Daily Recorder*." The printing of the name and the general typography of the paper resembled that of the *Morning Post*, and the shape was the same, but the size and number of columns of letterpress were different. The plaintiff did not publish an evening edition of his paper, nor was it alleged that he intended to do so. It was proved that twenty persons had applied at the office of the *Morning Post* for copies of the *Evening Post*, under the impression that there was some connection between the two papers.

Held, that no injunction could be granted, as no damage to the plaintiff had been proved.

Decision of Kay, J., reversed.—*Borthwick* v. *Evening Post Co.*, C.A. 435—37 Ch. D. 449; 57 L. J. Ch. 406; 58 L. T. 252.

12. *Trade name—Infringement—Newspaper—Copyright—Registration.*—No copyright in the title of a newspaper is acquired by registration of the paper under the Copyright Acts.

An exclusive right to the use of the title of a paper may, however, be acquired at common law by reputation and acceptance, and the existence or non-existence of such reputation and acceptance is a matter of fact to be decided on the evidence.—*Licensed Victuallers' Newspaper Co.* v. *Bingham*, C.A. 433—38 Ch. D. 139.

13. *Trade name—Infringement—Newspaper—Fraudulent imitation.*—The plaintiff was proprietor of the *Grocer* newspaper, published in London, which had a supplement called the *Oil Trade Review*. Both publications were duly registered at Stationers' Hall, and in 1886 they were amalgamated as the *Grocer and Oil Trade Review*. In 1888 the defendant began to publish, in Dublin, a publication called the *Grocer and Wine Merchant and Irish Brewer and Distiller*, which was not intended to represent the same branch of the trade as the plaintiff's newspaper.

Held, that the plaintiff was entitled to an injunction to restrain the defendant from using the word "Grocer" as the first or principal part of the title of his newspaper.—*Reed* v. *O'Meara*, V.C. (IR.)—21 L. R. Ir. 216.

See also ATTACHMENT, 7; BANKRUPTCY, 41; COMPANY, 2, 28; COPYRIGHT, 5; CORPORATION; COSTS, 20, 25; COVENANT, 3, 4; FISHERY, 1; LANDLORD AND TENANT, 6; LIGHT, 3; MARKET; NUISANCE, 3; PATENT, 9, 10; PRACTICE, 1, 40, 45, 51; SETTLEMENT, 13; TRADE-MARK, 1; WATER, 1, 2.

INQUISITION.—See CORONER, 1, 2.

INSOLVENCY:—

Judgment—Interest—Surplus in hands of assignee—1 & 2 *Vict. c.* 110, *ss.* 17, 92.—The effect of section 17 of 1 & 2 Vict. c. 110 is that interest at the rate of four per cent. is a debt necessarily attached to every judgment debt, and recoverable at law as a debt; and the judgment creditor is not confined to the remedy by way of execution mentioned in the section; and therefore where, in the case of a deceased insolvent debtor who became insolvent before 1869, a sum of money subsequently came to the hands of the assignee, out of which the principal of all the debts entered in the debtor's schedule was paid, it was held that the judgment debts were not satisfied within the meaning of section 92 until interest was paid, and the assignee was ordered to pay interest before handing over any surplus to the representatives of the insolvent.—*Ex parte Lewis, In re Clagett*, C.A. 653.

INSPECTION.—See COMPANY, 37; DISCOVERY, 2—8; INJUNCTION, 3.

INTEREST.—See ADMINISTRATION, 16; BILL OF EXCHANGE; COMPANY, 1, 42; CONTRACT, 1; COSTS, 21; DAMAGES, 6; INSOLVENCY; MORTGAGE, 1, 15; PRINCIPAL AND AGENT, 1; SETTLEMENT, 15; SOLICITOR, 9; TRUSTEE, 20, 24.

INTERLOCUTORY INJUNCTION.—See COSTS, 20; INJUNCTION, 7.

INTERPLEADER.—See BANKRUPTCY, 11; COUNTY COURT, 3, 4; SOLICITOR, 19.

INTERROGATORIES.—See DISCOVERY, 9.

INTIMIDATION.—See CRIMINAL LAW, 3.

JERVIS'S ACT.—See JUSTICE OF THE PEACE, 9.

JETTISON.—See SHIPPING, 25a.

JUDGMENT.—See BANKRUPTCY, 6, 8, 17—21, 31; CANADA, LAW OF, 4; COSTS, 21, 22, 33; COUNTY COURT, 21; ESTOPPEL, 3—6; HUSBAND AND WIFE, 5, 6, 18, 21; INSOLVENCY; JURISDICTION, 6; MORTGAGE, 7; RAILWAY, 3; TRUSTEE, 20.

JUDICIAL SEPARATION.—See EVIDENCE, 14; HUSBAND AND WIFE, 7, 17, 22; INJUNCTION, 6; JUSTICE OF THE PEACE, 11.

JURISDICTION:—

1. *Administration—Originating summons—Will—Ord.* 55, *rr.* 3, 5.—The court has no jurisdiction, under ord. 55, r. 3, to decide, on an originating summons as between a legal devisee and another person, any question which would not have arisen in the administration of the testator's estate or the trusts of his will.—*Davies* v. *Davies* (3), CH.D. NOR., J. 587—38 Ch. D. 210; 57 L. J. Ch. 759.

2. *Charitable trust—Charitable Trusts Act*, 1853 (16 & 17 *Vict. c.* 137), *s.* 28.—The freemen of the city of N. had, at the trial of an action against the corporation of that town, obtained a declaration that the corporation was seised of the Town Close in trust for the freemen; but the judge, though declining to order a scheme to be settled, prefaced the order made at the trial of the action with a declaration that it was "without prejudice to any other proceedings that might be taken by the Attorney-General." A summons was taken out by the Attorney-General under section 48 of the Charitable Trusts Act, 1853, for a scheme to be settled.

Held, that the Act only applied where a charitable trust existed, and gave no jurisdiction to decide on summons whether this was so or not.—*In re Norwich Town Close Estate*, CH.D. KEK., J. 853.

3. *Company—Winding up—Stay of proceedings—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 89, 138.—The court has, under sections 89 and 138 of the Companies Act, 1862, jurisdiction to stay proceedings in the voluntary winding up of a company.—*In re Titian Steamship Co.*, CH.D. CHL., J. 347—39 L. T. 178.

4. *County court—Bankruptcy—Administration order—Money in hands of third party—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 125.—Where an order for the administration of a deceased debtor's estate is made under section 125 of the Bankruptcy Act, 1883, the court, in administering, will follow the practice of the Chancery Division of the High Court, and no power is given to the county court in bankruptcy which the High Court does not possess in administration actions to direct a stranger to pay over money.—*Ex parte Ellis, In re Crowther*, Q.B.D., BAKER, 189—20 Q. B. D. 38; 57 L. J. Q. B. 57; 58 L. T. 115.

4a. *County court—Bankruptcy—Committal order—Receiving order—Bankruptcy Act*, 1883, *s.* 103.—A

county court judge having bankruptcy jurisdiction has power to make a receiving order instead of a committal order, even if it has not been proved that the debtor has had means of payment.—*Reg.* v. *Judge of Sussex County Court*, Q.B.D.—59 L. T. 32.

5. *Divorce—Domicile—Naturalisation of father.*—The petitioner in a suit for dissolution of marriage was born in France of French parents. When he was ten years old his parents came to England, and his father was afterwards naturalised as a British subject. When he was eighteen years old the petitioner went to Canada, where he bought a farm, served in the Colonial volunteers, and voted at elections. In 1878 he married the respondent, who was a Canadian, and in 1883 he brought the respondent and their children to England, where they resided with his father. The petitioner went back several times to Canada, and since 1884 he had been for only seven months in England. The adultery was alleged to have been committed in England.

Held, that the petitioner's domicile was English, and that the court had jurisdiction in the suit.—*D'Etchegoyen* v. *D'Etchegoyen and D'Etchegoyen*, P.D. & A.D.—13 P. D. 132.

6. *Husband and wife—Nullity of marriage—Foreign judgment — Domicile.* — A British subject domiciled in England was married in England to an American citizen. The parties went to the United States with the intention of making their permanent home there. The wife obtained a decree in the United States dissolving the marriage, on the ground of her husband's impotency. After the dissolution she came to live in England and filed a petition to have the marriage declared null and void.

Held, that the American court had jurisdiction; that by its decree the marriage was absolutely dissolved; and that no marriage existed upon which the court could pronounce any decision.—*Turner (otherwise Thompson)* v. *Thompson*, P.D. & A.D. 702—13 P. D. 36; 57 L. J. P. D. & A. 40; 58 L. T. 387.

7. *Infant—Guardian—Foreign parent—Domicile—Naturalisation Act*, 1870 (33 & 34 *Vict.* c. 14), s. 7.—In 1871 B., a French subject who had resided in England for ten years, obtained a certificate setting forth that he was thereby naturalised as a British subject, and that he would, upon taking the oath of allegiance, be entitled to all the rights and privileges, and subject to all the obligations, of a natural-born British subject, with a condition that he should not, while within the State of which he was previously a subject, be deemed to be a British subject unless he had ceased to be a subject of such State by the law of such State. In 1870 B. had married an Englishwoman, and his two children were born in France. In 1886 B. died in France, having executed a will in the French form. In 1887 his widow died, and her half-brother applied to the court to be appointed guardian of the children.

Held, that the court had no jurisdiction.—*In re Bourgoise*, CH.D. KAY, J.—58 L. T. 431.

8. *Judgment summons—Commitment—Instalments—Debtors Act*, 1869 (32 & 33 *Vict.* c. 62), s. 5.—Judgment was recovered in a county court against a defendant, who was ordered to pay £20 in a fortnight. Upon default in payment, a judgment summons was taken out and an order was made to commit the defendant to prison for ten days. The judge directed that the warrant should not issue if the defendant paid instalments of £4 a month.

Held, that the order was made in respect of the past default in payment of £20, and not in anticipation of a default in payment of £4, and that the judge had jurisdiction to make the order under section 5 of the Debtors Act, 1869.

Decision of the Court of Appeal (reported 35 W. R. 130, 18 Q. B. D. 213) reversed.—*Stonor* v. *Fowle*, H.L. 742—13 App. 20; 57 L. J. Q. B. 587; 58 L. T. 1.

9. *Lunacy—Maintenance—Fund in court.*—Where the share in a fund to which a person of unsound mind had become absolutely entitled was paid into court in the Chancery Division by the trustees of the fund, the court, upon the application of such person by his next friend, without requiring the appointment in Lunacy of a guardian, directed the entire income to be paid to the wife of such person during his life, or until further order, for his maintenance, comfort, and support.—*In re Silva's Trusts*, CH.D. CHI., J. 366—57 L. J. Ch. 281; 58 L. T. 46.

10. *Lunacy—Receiver—Pending inquisition.*—The court has power, on an *ex parte* application, to appoint an *interim* receiver, pending an application for an inquisition in Lunacy.—*In re Pountain*, LUN.—37 Ch. D. 609; 57 L. J. Ch. 465; 59 L. T. 76.

11. *Lunacy—Trustee Acts—Judicature Act*, 1873 (36 & 37 *Vict.* c. 66), s. 51.—The jurisdiction of the Court of Appeal in lunacy matters is not limited to petitions entitled "In Lunacy and in the matter of the Trustee Acts," but extends to all applications in Lunacy which require an exercise of the jurisdiction of the Chancery Division.—*In re Platt*, LUN. 273—36 Ch. D. 410; 57 L. J. Ch. 152; 57 L. T. 857.

12. *Mayor's Court—Account stated—Prohibition—Estoppel.*—The plaintiff's solicitor, who carried on business within the jurisdiction of the Mayor's Court of London, wrote to the defendant demanding payment of £7 6s. 6d. for goods sold and delivered by the plaintiff to the defendant. Neither of the parties resided or carried on business, nor was the contract entered into, within the jurisdiction. The defendant, in a letter written to the plaintiff's solicitor—posted outside, but received within, the jurisdiction—admitted that he owed £5 6s. 6d. to the plaintiff. The plaintiff having brought an action in the Mayor's Court to recover £7 6s. 6d. for goods sold and delivered, the defendant obtained a writ of prohibition staying proceedings therein. The plaintiff brought a second action to recover £5 6s. 6d. on an account stated, and the defendant obtained a second writ of prohibition.

Held, that the prohibition in the first action was not an estoppel against the bringing of the second action; that the admission of the defendant and the bringing of the second action amounted to an account stated; that the account was stated within the jurisdiction of the Mayor's Court; that the plaintiff's solicitor was his agent to receive the admission and to state the account; and that the Mayor's Court had jurisdiction to try the action.—*Grundy* v. *Townsend*, C.A. 531.

13. *Mayor's Court—Carrying on business—Clerk to solicitor—Mayor's Court Act*, 1857 (20 & 21 *Vict.* c. *clvii.*), s. 12.—A clerk employed by a solicitor whose office is in the City of London does not "carry on business within the City of London" within the meaning of the Mayor's Court of London Procedure Act, 1857, s. 12.—*Lewis* v. *Graham*, Q.B.D. 574—20 Q. B. D. 780; 57 L. J. Q. B. 376; 59 L. T. 35.

14. *Mayor's court—Contract—Acceptance within—Jurisdiction—Telegram—Principal and agent.*—An order sent from outside the City by telegraph to an agent within the City, and accepted by the agent by a telegram sent from within the City, is a contract made within the City of London. — *Cowan* v. *O'Connor*, Q.B.D. 895—20 Q. B. D. 640; 57 L. J. Q. B. 401; 58 L. T. 587.

15. *Order in chambers — Motion to discharge — Judicature Act*, 1873, s. 50.—The court has no power to alter the order of a judge in chambers, except on

motion to discharge it. — *Attorney-General* v. *Llewellyn*, CH.D. KAY, J.—58 L. T. 367.

16. *Solicitor—Costs—Delivery of bill—Non-contentious business—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 37—*Judicature Act*, 1873, *ss.* 16, 34, *sub-section* 2—*Judicature Act*, 1884 (44 & 45 *Vict. c.* 68), *ss.* 2, 24.—By section 37 of the Solicitors Act, 1843, power was conferred on the Lord Chancellor and the Master of the Rolls to order delivery of a solicitor's bill of costs where no part of the business contained in such bill had been transacted in any court.

Held (Lord Esher, M.R., dissenting), that the effect of the Judicature Acts was to transfer the power to the High Court, and that it might be exercised by any judge of that court, but that since, by section 34, sub-section 2, of the Judicature Act, 1873, matters under an Act of Parliament, by which exclusive jurisdiction in respect of such matters had been given to the Court of Chancery, were assigned to the Chancery Division, the application was irregular.

Judgment of the Queen's Bench Division reversed. —*In re Pollard*, C.A. 515—20 Q. B. D. 656; 57 L. J. Q. B. 273.

17. *Stay of proceedings—Frivolous and vexatious action—Ord.* 25, *r.* 4.—The Queen's Bench Division has an innate and inherent authority to dismiss or to stay a frivolous or a vexatious action. This authority is distinct from the authority conferred on it by ord. 25, r. 4, which is limited to pleadings which are frivolous or vexatious or otherwise objectionable.—*Blair* v. *Cordner*, Q.B.D. 64—19 Q. B. D. 516; 56 L. J. Q. B. 642.

18. *Vendor and purchaser — Married woman — Separate estate—Restraint on anticipation—Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78), *s.* 9.—The court has no jurisdiction, upon a summons under the Vendor and Purchaser Act, 1874, to decide the question whether a restraint on anticipation affects the purchase-money, the question being one which does not concern the purchaser.—*In re Tippett and Newbould*, C.A. 597—37 Ch. D. 444.

19. *Vendor and purchaser—Rescission of contract—Vendor and Purchaser Act*, 1874, *s.* 9—The court has jurisdiction, upon a summons under section 9 of the Vendor and Purchaser Act, 1874, to determine the validity of a notice given by a vendor to rescind his contract to sell.—*In re Jackson and Woodburn*, CH.D. NOR., J. 396—37 Ch. D. 44; 57 L. J. Ch. 243; 57 L. T. 753.

See also BANKRUPTCY, 16, 27, 41; COMPANY, 24; COSTS, 48; COUNTY COURT, 9—18; ECCLESIASTICAL LAW, 4; GAS COMPANY, 2; HUSBAND AND WIFE, 4, 9; INFANT, 3; JUSTICE OF THE PEACE, 7—15; RAILWAY, 1; TRUSTEE, 6, 21.

JUSTICE of the PEACE:—

1. *Conviction—Assault — Absence of prosecutor—* 9 *Geo.* 4, *c.* 31, *s.* 27—*Offences against the Person Act*, 1861 (24 & 25 *Vict. c.* 100), *s.* 42.—A court of summary jurisdiction has no power to convict of a common assault unless the party aggrieved, or someone on his behalf, complains of the assault, with a view to the adjudication of the court upon it.—*Nicholson* v. *Booth*, Q.B.D.—57 L. J. M. C. 43.

2. *Disqualification—Interest—Appeal.*—If a justice of the peace has taken an active part in defending an appeal to which he was not a party, he is disqualified from taking part in the decision of the appeal.—*Reg.* v. *Justices of Cumberland*, Q.B.D.—58 L. T. 491.

3. *Disqualification—Interest—Witness.*—A magistrate had visited, as medical attendant, a person who alleged that he had been assaulted. He strongly advised his patient not to prosecute, and afterwards received a communication from the person alleged to have committed the assault, in which an apology was tendered, and a desire expressed for an amicable settlement. It was alleged that he would be a necessary witness for the prosecution.

Held, that he was not disqualified from sitting to hear a summons taken out for the alleged assault, either on the ground of interest or because he might be called as a witness.—*Reg.* v. *Farrant*, Q.B.D. 184—20 Q. B. D. 58; 57 L. J. M. C. 17; 57 L. T. 880.

4. Habeas corpus — *Depositions — Discharge of prisoner.*—On a return to a writ of *habeas corpus* the court may look at the depositions to ascertain whether there was any evidence before the court of summary jurisdiction to support the conviction.—*In re Sullivan*, EX. D. (Ir.)—22 L. R. Ir. 98.

5. *Information—Prosecutor—Police officer—Highway — Obstruction — Metropolis— General Highway Act* (5 & 6 *Will.* 4, *c.* 50), *s.* 72.—An information under section 72 of the General Highway Act for obstructing a highway within the metropolitan area was preferred by an inspector of police.

Held, that the section applied to highways within the metropolitan area, and that a prosecution thereunder could be initiated by the police.—*Back* v. *Holmes*, Q.B.D.—57 L. J. M. C. 37.

6. *Information — Prosecutor — Police officer — Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 259. —A local board passed a resolution appointing the superintendent and sergeants of the county police for the time acting within the district to prosecute offenders under certain sections of a local Act.

Held, that section 259 of the Public Health Act, 1875, did not authorise the local board to delegate prosecutions to persons not under the control of the board.—*Kyle* v. *Barbor*, Q.B.D.—58 L. T. 229.

7. *Jurisdiction — Claim of right — Highway—Obstruction — Towns Police Clauses Act*, 1847 (10 & 11 *Vict. c.* 89), *s.* 38.— A shopkeeper in a borough placed goods upon the pavement in front of his shop for sale. Upon being summoned under the Towns Police Clauses Act, 1847, for obstructing the footway, he contended that he had a *bonâ fide* right to place his goods there. The justices considered that their jurisdiction was ousted.

Held, that the justices ought to determine whether the land on which the goods were placed was part of the public highway or not; that no question of title was involved; and that their jurisdiction was not ousted. — *Leicester Urban Sanitary Authority* v. *Holland*, Q.B.D.—57 L. J. M. C. 75.

8. *Jurisdiction—Claim of right—Trespass—Railway—Right of way—Regulation of Railways Act*, 1868 (30 & 31 *Vict. c.* 70), *s.* 23.—The appellant was convicted by justices in petty sessions—(1) under a railway company's private Act, for having unlawfully trespassed on a railway in such a manner as to expose himself to danger; and (2) under the 23rd section of the Regulation of Railways Act, 1868, for having been unlawfully on the railway after receiving warning not to go or pass thereon. There was, prior to the making of the railway, and prior to the Acts of Parliament authorising the same, a public right of way for persons on foot over the land now occupied by the railway at the place where the appellant crossed, and the appellant went upon and crossed the railway in the assertion of the right of way which formerly existed, and believing that he was entitled to do so by virtue thereof.

Held, that the conviction on both summonses was wrong, because the claim of the right of way set up by the appellant ousted the jurisdiction of the justices to determine the case; and there were no provisions in

the Act of Parliament extinguishing the right of way, which was consequently still in existence.—*Croft* v. *Miles*, Q.B.D. 784.

9. *Jurisdiction—Committal—Division of county—Jervis's Act* (11 & 12 *Vict. c.* 42), *s.* 22.—A person charged with an offence committed in one petty sessional division of a county may be committed for trial by the justices acting for any other division of the same county.—*Reg.* v. *Beckley*, C.C.R. 160—20 Q. B. D. 187; 57 L. J. M. C. 22; 57 L. T. 716.

10. *Jurisdiction — False pretences — Conviction—Money in possession of prisoner—Restitution—Metropolitan Police Courts Act*, 1839 (2 & 3 *Vict. c.* 71), *s.* 29.—A. was arrested by a police constable, taken to a police station, and charged with obtaining two sums of 5s. each from D. and B. by false pretences. She was searched, and £108 was taken from her pocket. On the following day she was summarily convicted by a magistrate and sentenced to two consecutive terms of imprisonment.

Held, that the magistrate had no jurisdiction to order that the whole of the £108 should be restored to A.—*Reg.* v. *D'Eyncourt*, Q.B.D.—21 Q. B. D. 109; 57 L. J. M. C. 64.

11. *Jurisdiction—Husband and wife—Aggravated assault—Judicial separation—Discharge of order—Appeal—Special case—Matrimonial Causes Act*, 1878 (41 & 42 *Vict. c.* 19), *s.* 4.—The words "the court" in section 4 of the Matrimonial Causes Act, 1878, do not mean the Probate, Divorce, and Admiralty Division, but the court before whom the husband is convicted, and that court alone can vary or discharge the order; but there is a right of appeal to the Probate, Divorce, and Admiralty Division even from the refusal of such court to vary or discharge any such order, and that right exists notwithstanding that the justices may have stated a case for the consideration of the Queen's Bench Division; but the Probate, Divorce, and Admiralty Division, as a matter of discretion, will not hear the appeal while there is a special case pending in the Queen's Bench Division.—*Hetherington* v. *Hetherington*, P.D. & A.D. 12—12 P. D. 112; 56 L. J. P. D. & A. 78; 57 L. T. 533.

12. *Jurisdiction—Husband and wife—Desertion—Maintenance — Rehearing of summons — Married Women's Maintenance Act*, 1886 (49 & 50 *Vict. c.* 52), *s.* 2.—The power of justices under section 2 of the Married Women's Maintenance Act, 1886, to rehear a summons at the instance of a husband is confined to cases where there is evidence of the wife's adultery since the order.—*Sephton* v. *Sephton*, Q.B.D.—58 L. T. 281.

13. *Jurisdiction — Revenue — Excise — Penalty — Customs and Inland Revenue Act*, 1887 (50 & 51 *Vict. c.* 15), *s.* 4.—An information for the recovery of an excise penalty under section 4 of the Customs and Inland Revenue Act, 1887, may be preferred before a metropolitan police magistrate.—*Reg.* v. *Ingham*, Q.B.D. 811—21 Q. B. D. 47; 57 L. J. M. C. 87; 59 L. T. 62.

14. *Jurisdiction — Special case — Application in writing—Service—Summary Jurisdiction Act*, 1879, *s.* 33—*Summary Jurisdiction Rules*, 1886, *r.* 18.—The court has no jurisdiction to entertain a special case stated under the Summary Jurisdiction Act, 1879, *s.* 33, unless the directions given by the Summary Jurisdiction Rules, 1886, r. 18, have been complied with.

South Staffordshire Waterworks Co. v. *Stone*, 19 Q. B. D. 168, 35 W. R. Dig. 110, approved.

Judgment of the Queen's Bench Division affirmed.—*Lockhart* v. *Mayor, &c., of St. Albans*, C.A. 800—21 Q. B. D. 188.

15. *Jurisdiction—Special case—Summary Jurisdiction Act*, 1879, *s.* 33—*Summary Jurisdiction Rules*, 1886, *r.* 18.—A court of summary jurisdiction has no power to state a special case under section 33 of the Summary Jurisdiction Act, 1879, unless an application has been made to the court in writing, and unless a copy of such application has been left with the clerk of the court within seven days of the date of the proceeding to be questioned according to rule 18 of the Summary Jurisdiction Rules, 1886.—*South Staffordshire Waterworks Co.* v. *Stone*, Q.B.D. 76—19 Q. B. D. 168; 56 L. J. M. C. 122.

16. *Summary Jurisdiction Act*, 1879, *s.* 17—*Trial by jury—Imprisonment for over three months—Night poaching*—9 *Geo.* 4, *c.* 69, *s.* 1.—The offence of night poaching, for which a convicted person is liable to imprisonment for not more than three months, and at the expiration of that period to further imprisonment for six months in default of sureties not to so offend again, is not within section 17 of the Summary Jurisdiction Act, 1879, so as to entitle the accused to claim a trial by a jury.—*Williams* v. *Wynne*, Q.B.D.—57 L. J. M. C. 30.

17. *Summons—Refusal*—Mandamus.—If a magistrate has refused a summons on the ground that an information discloses no indictable offence, the court has no jurisdiction to review his decision, as to law or fact.

Semble, there is no right on the part of the public to hold public meetings in Trafalgar-square, but the Commissioners of Works and Public Buildings have power to prohibit meetings there.—*Ex parte Lewis*, Q.B.D.—21 Q. B. D. 191.

See also Bastardy; Husband and Wife, 4; Licensed House, 2—7; Mandamus, 2; Poor Rate, 3.

LAND DRAINAGE ACT.—See Nuisance, 2.

LANDLORD and TENANT:—

1. *Distress — Privilege — Cattle — Agistment — Agricultural Holdings Act*, 1883 (46 & 47 *Vict. c.* 61), *s.* 45.—Cattle placed in a field under an agreement between their owner and the tenant for the exclusive right of grazing the field are not "taken in to be fed" by the tenant so as to be protected from distress for rent by virtue of section 45 of the Agricultural Holdings Act, 1883.

Semble, section 45 of the Agricultural Holdings Act, 1883, only applies to stock which is agisted, the words of the Act being a mere paraphrase of that term.—*Masters* v. *Green*, Q.B.D. 591—20 Q. B. D. 807.

2. *Lease—Covenant—Breach—Offensive trade—Sub-lease—Notice.*—A lease contained a covenant by the lessee and his assigns "not to use, exercise, or carry on upon the demised premises, or permit or suffer any part thereof to be occupied by any person who shall use, occupy, or carry on therein, any noisome or offensive trade," &c. E. purchased an underlease of the premises, with notice of the covenant in the original lease, and made a further sub-demise, containing a similar covenant, to M. M., after being in occupation some months, began to carry on an offensive business on the premises. The original lessor claimed an injunction against both E. and M.

Held (reversing the decision of Kekewich, J.), that no injunction ought to be granted against E., there being no evidence to show that E. had authorised or sanctioned M. to occupy the premises to carry on therein an offensive business; and that E. was not to be compelled by means of an injunction to bring an action of ejectment against M.

Tulk v. *Moxhay*, 2 Ph. 774, explained.

Haywood v. *Brunswick Building Society*, 30 W. R.

299, 8 Q. B. D. 403, and *Austerberry* v. *Corporation of Oldham*, 33 W. R. 807, 29 Ch. D. 750, followed.

Semble, that the words "shall not suffer or permit" in the covenant ought not to be construed as equivalent to "shall hinder and prevent," but rather as "shall not authorise or sanction."—*Hall* v. *Ewin*, C.A. 84—37 Ch. D. 74; 57 L. J. Ch. 95; 57 L. T. 831.

3. *Lease—Forfeiture—Agreement—Specific performance—Conveyancing Act*, 1881 (44 & 45 *Vict.* c. 41), s. 14.—The notice required by section 14 of the Conveyancing Act, 1881, is necessary only where there is an actual existing lease or where there is an agreement for a lease of which the court will grant specific performance.—*Swain* v. *Ayres*, C.A. 798—21 Q. B. D. 289; 57 L. J. Q. B. 428.

4. *Lease—Covenant—Licensed house—Sale of beer.*—The lease of a public-house contained a covenant that the lessee and his assigns would during the term buy from the lessors all beer required for the business. There were provisions for re-entry for non-payment of rent or non-performance of covenants, and for reduction of rent so long as the lessee should buy beer from the lessors.

Held, that the covenant was an absolute one, and that the lessee had not an option of dealing with another brewer and paying the reduced rent.—*Hanbury* v. *Cundy*, CH.D. STI., J.—58 L. T. 155.

5. *Lease — Covenant — Rent — Assignment — Surrender of part of premises.*—A lease of a house and premises contained a covenant by the lessee to pay the reserved rent. The lessee assigned the term, and the assignee, in consideration of £25, surrendered to the lessor a small part of the premises, the value of which was not altered by the surrender.

Held, that the lessee was not relieved from his covenant to pay the rent.—*Baynton* v. *Morgan*, Q.B.D.—21 Q. B. D. 101; 57 L. J. Q. B. 465.

6. *Lease—Covenant—Restrictive covenant—Nuisance—"Business"—Hospital—Injunction.*—A lease contained a covenant by the lessee with the lessor not to carry on upon the demised premises, besides certain trades specifically mentioned, "any other noisome, obnoxious, or offensive trade or business, nor suffer any act or thing which shall or may be or grow to the annoyance, nuisance, grievance, or damage of the lessor or the inhabitants of the neighbouring or adjacent houses." An under-lessee used the premises as a hospital for the treatment of disease of the nose, ear, skin, and eye, fistula, and other diseases.

Held, that the user of the premises as a hospital was an infringement of the covenant.

Bramwell v. *Lacy*, 27 W. R. 463, 10 Ch. D. 691, followed.—*Tod-Heatly* v. *Benham*, CH.D. KEK., J. 688—59 L. T. 25.

7. *Lease—Covenant—Sub-lease—Collateral covenant.*—A. sub-leased to B. in 1869 premises held under two leases dated respectively in 1848 and 1863, except certain property sub-leased in 1867, for the residue of A.'s term. The sub-lease of 1869 contained a covenant by B. for himself, his heirs, executors, administrators, and assigns, to pay all taxes, rates, assessments, and outgoings in respect of the demised premises, and also all sums not exceeding £100 in one year as should be payable by A., his heirs, executors, administrators, or assigns, on account of such taxes, rates, assessments, and outgoings in respect of the property sub-leased in 1867. The property underleased in 1869 was afterwards assigned to H. for the residue of the term.

Held, that the covenant to pay the taxes, rates, assessments, and outgoings upon the property sub-leased in 1867 did not run with the land sub-leased in 1869, and was not binding on H.—*Gower* v. *Postmaster-General*, CH.D. KAY, J.—57 L. T. 527.

8. *Lease—Covenant—Waste—Tenant by curtesy—Settled Estates Act*, 1877 (40 & 41 *Vict.* c. 18), s. 46.—A tenant by the curtesy of a freehold tenement, granted, in exercise of the power contained in section 46 of the Settled Estates Act, 1877, a lease of the premises for twenty-one years, and died soon afterwards. The lease contained a covenant by the lessee that he would "at all times during the term keep the premises in good and substantial repair, and the same in good and substantial repair deliver up to the lessor, at the expiration or sooner determination of the term, fair wear and tear and damage by tempest excepted."

Held, in an action by the owner in fee of the premises to set aside the lease, that the lease was invalid as it was "not made without impeachment of waste," and therefore did not conform to the conditions of section 46 of the Act.

Yellowly v. *Gower*, 11 Ex. 274, 4 W. R. Dig. 194, followed.—*Davies* v. *Davies* (2), CH.D. KEK., J. 399—38 Ch. D. 499; 58 L. T. 514.

9. *Lease—Rent—Distress—Administration action—Bankruptcy Act*, 1883 (46 & 47 *Vict.* c. 52), ss. 42, 125.—Part of a testator's estate consisted of leaseholds, and after his death his estate was found to be insolvent, and an action was commenced in the Chancery Division for the administration of the testator's estate by his lessor, who claimed as landlord to distain upon the demised premises for six years' arrears of rent.

Held, that the landlord was entitled to distrain for six years' arrears of rent, and that section 42 of the Bankruptcy Act, 1883, did not apply so as to limit the landlord's right to one year's rent only.—*Fryman* v. *Fryman*, CH.D. CHI., J. 631—38 Ch. D. 468; 58 L. T. 872.

10. *Lease — Reservation — Way — Merger — Extinguishment.*—D. and C., as co-owners, demised land for 1,000 years for the purpose of making a canal, it being provided that nothing should prevent D. and C., their heirs or assigns, from using any of the demised land or any stream of water flowing over the same, or from granting way-leaves across the same, but so as not to injure the canal. After the canal had been made the estate was partitioned between D. and C., the reversion of part of the canal being conveyed to C., and the land adjacent to such part of it being conveyed to D. C. afterwards conveyed the reversion of the canal to lessees. D. claimed a right to grant way-leaves and to build a bridge over the part of the canal which had been conveyed to C.

Held, that the proviso in the lease operated as a covenant with D. and C. as the owners of the reversion, and not as adjacent landowners; and that there had been a merger, and the rights under the proviso had been extinguished.

Judgment of the Court of Appeal (reported 34 W. R. 777, 33 Ch. D. 420) affirmed.—*Lord Dynevor* v. *Tennant*, H.L.—13 App. 279; 59 L. T. 3.

11. *Waste—Tenantable repair—Damage.*—Under an agreement for a lease for five years of a dwelling-house, the tenant was to leave the house in tenantable repair. The landlord at the end of the tenancy, which continued for seventeen years, sued for damages, upon the footing that the tenant was liable to paper and paint and leave the house in the same condition as when he took it.

Held, that the landlord was not entitled to damages on that footing, but that he was entitled to compensation for waste, the tenant being liable to paint sufficiently to preserve the woodwork, but not to do papering or decorative painting.

Decision of Cave, J., affirmed.—*Crawford* v. *Newton*, C.A. 54.

See also BANKRUPTCY, 2, 29, 39; COMPANY, 41; COUNTY COURT, 1, 15; DAMAGES, 4; EXECUTOR, 2; FRAUDS, STATUTE OF; GAME; LANDLORD AND TENANT (IRELAND), 1—19; LIGHT, 1, 2; MORTGAGE, 1, 3, 12; PRACTICE, 49; SOLICITOR, 10; SPECIFIC PERFORMANCE, 2, 3.

LANDLORD and TENANT (IRELAND):—

1. *Lease—Covenant—Assignment—Consent—Indorsement by lessor's agent—Retrospective effect.*—The lessee under a lease containing covenants against alienation assigned it by a settlement, and the lessor's consent to such assignment was indorsed on the lease by the lessor's agent without the lessor's written permission.

Held, that the consent indorsed on the lease was invalid, and that, even if valid, it would not give the assignee, not being in possession, a right of action for previous trespass.—*McGrath* v. *Ahern*, C.P.D. (Ir.)—20 L. R. Ir. 341.

2. *Lease—Covenant—Fixtures—Improvements.*—In 1804 the owners of freehold premises agreed to demise the property for lives renewable for ever, the intended lessee agreeing to pull down a mill and build a new one, and covenanting to keep the mill and works in working order and repair. In 1823 a lease was executed, the lessee covenanting to keep all buildings, works, and improvements in order and repair, and to yield up the premises and buildings and improvements in like order and repair. In 1829 the lease was renewed, with similar covenants, and in 1834 an underlease for 999 years was executed. In 1862 the defendants became assignees of the underlease, and erected new and improved machinery. In 1874 the landlord and the defendants executed an agreement reciting the former lease and underlease, and giving the defendants permission to erect a steam-engine.

Held, that the defendants were not at liberty to remove any tenant's fixtures or new machinery.—*Cosby* v. *Shaw*, V.C. (Ir.)—19 L. R. Ir. 307.

3. *Lease—Covenant—Tenancy in common—Joint and separate covenant.*—A covenant by lessees to hold to A. and B., their executors, administrators, and assigns, as tenants in common for a term of years, contained a covenant by A. and B., that they, or some or one of them, their executors, administrators, or assigns, would pay the reserved rent, and keep the premises in repair.

Held, that the covenant was joint and several.—*Tyndall* v. *White*, C.A. (Ir.)—20 L. R. Ir. 517.

3a. *Lease—Covenant—Tenancy in common—Joint covenant.*—Property was leased to A. and B., their executors, administrators, and assigns, "as tenants in common, and not as joint tenants," at a yearly rent. A. and B. covenanted for themselves, their executors, administrators, and assigns, that they, or some one of them, would pay the rent and keep the premises in repair. A. died during the term, and the lessor sued A.'s executors and B. for breaches of covenant committed after A.'s death.

Held, that the covenants were joint, and not several, and that A.'s executors were not liable.

Judgment of the Court of Appeal in Ireland.—*White* v. *Tyndall*, H.L.—13 App. 263; 58 L. T. 741.

4. *Lease—Rent—Non-payment—Ejectment—Redemption—Landlord and Tenant (Ireland) Act*, 1860 (23 & 24 *Vict.* c. 154), *s.* 71.—The redemption by a tenant or a person having a specific interest in a lease, evicted for non-payment of rent, has the effect of setting aside a judgment in ejectment, and restoring the lease and all sub-tenancies.—*Lombard* v. *Kennedy*, V.C. (Ir.)—21 L. R. Ir. 201.

5. *Lease—Surrender—Land Law (Ireland) Act*, 1881 (44 & 45 *Vict.* c. 49), *ss.* 20, 21—*Land Law (Ireland) Act*, 1887 (50 & 51 *Vict.* c. 30), *s.* 1.—In 1886 a tenant surrendered to his landlord a lease for two lives or thirty-one years, and accepted a tenancy from year to year at a reduced rent.

Held, that the transaction was not invalid under the Land Law (Ireland) Act, 1881.—*Cooke* v. *Torrens*, C.A. (Ir.)—22 L. R. Ir. 239.

6. *Lease for lives—Expiration—Remainderman—Present tenancy—Land Law (Ireland) Act*, 1881, *s.* 21.—By a marriage settlement land held for a term of years was vested in trustees, upon trust for the settlor for life, and afterwards, in events which happened, for the plaintiff for life. The settlement contained no power to lease. The owners of the two first limited estates made a joint lease to the defendant for their own lives. The last surviving lessor died after the passing of the Land Law (Ireland) Act, 1881, and the plaintiff afterwards sued to recover possession of the land.

Held, that section 21 of the Land Law (Ireland) Act, 1881, did not create a present tenancy in the defendant.—*Massy* v. *Norse*, C.A. (Ir.)—26 L. R. Ir. 464.

7. *Lease from year to year—Fair rent—Penal rent—Land Law (Ireland) Act*, 1881, *s.* 5.—The plaintiff leased land to A. to hold for one year from the 25th of March, 1878, and so on from year to year till a determination of the tenancy by notice at an annual rent of £660, and an additional £10 for every acre broken up or meadowed beyond a specified amount. A. covenanted to pay the said rent and any additional rent, and not to meadow more than forty-five acres. The lease reserved a right of re-entry for any breach of covenant. A. meadowed more than the specified quantity of land, and the Land Commission afterwards fixed £600 as the fair rent of the holding.

Held, that the fair rent fixed by the Land Commission did not include the additional rent payable under the special covenants.—*O'Connor* v. *Smith*, C.A. (Ir.)—20 L. R. Ir. 393.

8. *Notice to quit—Increase of rent.*—A notice to quit which is not acted upon, but is abandoned by both parties during its currency, is not sufficient to terminate a tenancy from year to year.

Increase of rent from a yearly tenant, agreed upon during a year of tenancy, is not enough to create a new tenancy.—*Lord Inchiquin* v. *Lyons*, C.A. (Ir.)—20 L. R. Ir. 474.

9. *Notice to quit—Notice of surrender—Notices to Quit (Ireland) Act*, 1876 (39 & 40 *Vict.* c. 63), *s.* 1.—"Notice to quit" under the Notices to Quit (Ireland) Act, 1876, includes a tenant's notice of surrender.—*In re O'Brien*, C.A. (Ir.)—19 L. R. Ir. 429.

10. *Purchase by tenant—Vesting order—Incumbrance—Guarantee deposit—Purchase of Land (Ireland) Act*, 1885 (48 & 49 *Vict.* c. 73), *ss.* 2, 3, 12.—On a proposed sale by a landlord to a tenant, if the landlord's estate is incumbered beyond the amount of the purchase-money, the Land Commission will not, against the incumbrancer's consent, retain any part of the purchase-money as a guarantee deposit, even if it has been agreed to carry out the sale by a vesting order under section 12 of the Purchase of Land (Ireland) Act, 1885.—*In re Colthurst*, C.A. (Ir.)—20 L. R. Ir. 468.

11. *Recovery of land—Stay of proceedings—Land Law (Ireland) Act*, 1887, *s.* 30, *sub-section* 1.—An order under section 30, sub-section 1, of the Land Law (Ireland) Act, 1887, for stay of proceedings and

payment by instalments of debt and costs will not be made before judgment.—*Wallis* v. *Meany*, Q.B.D. (Ir.)—20 L. R. Ir. 496.

12. *Recovery of land—Sub-letting—Invalid tenancy—Land Law (Ireland) Act*, 1887, *ss.* 2, 15.—Section 15 of the Land Law (Ireland) Act, 1887, cannot give validity to a tenancy which is invalid under section 2.—*Ormsby* v. *Crean*, Q.B.D. (Ir.)—20 L. R. Ir. 526.

13. *Rent—Judicial rent—Estoppel—Contract.*—In 1884 a lessee for a term of which fifty years were unexpired at an annual rent of £200, being within the statutory exemptions from disability to contract, signed a consent, which was afterwards made a rule of court, that he should be released from £100 arrears of rent, and that, by an indorsement on the lease, the rent should be reduced to £150, payable at the half-yearly dates mentioned in the lease, notwithstanding any future legislation.

Held, that the tenant was entitled to apply to the court to fix a fair rent.—*Ferguson* v. *Bradstreet*, C.A. (Ir.)—22 L. R. Ir. 303.

14. *Rent—Judicial rent—Lease—Sub-letting—Covenant—Land Law (Ireland) Act*, 1881, *ss.* 21, 57.—After the expiration of a lease, which contained a covenant against sub-letting, the lessee held the land as tenant from year to year. Before the date of the lease the lessee had, with the knowledge of the lessor's agent, sub-let a small portion of the land.

Held, that the tenant was entitled to apply to have a judicial rent fixed.—*Keating* v. *Bolton*, C.A. (Ir.)—22 L. R. Ir. 143.

15. *Rent—Judicial rent—Pasturage—Land Law (Ireland) Act*, 1881, *s.* 58.—In May, 1870, 67 acres of land were let for one year, the tenant agreeing to use the land, then in grass, for grazing only, except as much meadow as should be required for stock. The rest of the land was let to other persons. In 1871 a new agreement was made, by which, after a recital that the farm had been always let for grazing purposes, and was over £50 in value, the tenant contracted himself out of the Land Law (Ireland) Act, 1870.

Held, that the tenant was not entitled to apply to have a judicial rent fixed.—*Flannery* v. *Nolan*, C.A. (Ir.)—20 L. R. Ir. 537.

16. *Rent—Judicial rent—Pasturage—Land Law (Ireland) Act*, 1881, *s.* 58.—In 1855 343 acres of land were let on lease at an annual rent of £371. The lease contained covenants by the lessee not to break up the land without the lessor's consent, and to cultivate in a proper manner, but there was no prohibition of selling hay. The lessee had verbally agreed to take the land as a grazing farm. The lease having expired, the tenant applied to have a judicial rent fixed.

Held, that the application must be refused.—*Battersby* v. *Nicholson*, C.A. (Ir.)—22 L. R. Ir. 38.

17. *Rent—Judicial rent—Pasturage—Land Law (Ireland) Act*, 1881, *s.* 58.—In 1880 land was let from year to year at 30s. per acre for 126 acres, the remaining thirty acres consisting of commonage, for which no rent was fixed, the Government valuation of the property being more than £50. The tenant agreed not to sell hay, and not to till more than twenty acres, and to pay the whole of the county cess.

Held, that the tenant was entitled to apply to have a judicial rent fixed.—*Holmes* v. *Lander*, C.A. (Ir.)—22 L. R. Ir. 47.

18. *Rent—Judicial rent—Turbary—Order of Land Commission—Land Law (Ireland) Act*, 1881, *s.* 5, *sub-section* 5.—An order of the Land Commissioners fixing a fair rent does not alter the landlord's existing right of turbary; and, if the turbary is reserved to the landlord, the order gives the tenant no right to cut turf.—*Knox* v. *Baxter*, V.C. (Ir.)—19 L. R. Ir. 460.

19. *Rent—Set-off—Abatement of nuisance.*—Money expended by a tenant in abating a structural nuisance, after a magistrate's order to abate, which has been served only on the tenant, cannot be set off against accruing rent.—*Butcher* v. *Ruth*, Q.B.D. (Ir.)—22 L. R. Ir. 380.

LANDS CLAUSES CONSOLIDATION ACT:—

1. *Compulsory powers—Compensation—Building contract.*—A land company had power, under several agreements with the leasing authority under an Estate Act, to enter and build upon part of the estate houses of a certain value, which were to be completed within a specified period. A railway company promoted, before the expiration of that period, a scheme for a railway passing through the lands, and the land company obtained an indefinite extension of the time for completion of the houses from the leasing authority. The railway company obtained an Act authorising the railway, and gave the usual notice to treat to the land company, who made no claim. The railway company entered into possession, denying that any interest in the land was vested in the land company. The land company brought an action claiming a declaration that the agreements were still subsisting, and that compensation ought to be assessed and paid to them on that footing.

Held, that the action would lie, and that the court had jurisdiction to make a declaration in the terms asked, the exact amount of compensation to be settled by an arbitrator under the Lands Clauses Consolidation Act, 1845.

East and West India Docks Co. v. *Gattke*, 3 Mac. & G. 155, and *London and Blackwall Railway Co.* v. *Cross*, 34 W. R. 201, 31 Ch. D. 354, distinguished.—*Birmingham and District Land Co.* v. *London and North-Western Railway Co.*, CH.D. KEK., J. 414—33 Ch. D. 295; 57 L. J. Ch. 106; 57 L. T. 800.

2. *Compulsory powers—Compensation—Light—Prospective injury—Termination of lease—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 6, 16.—Compensation cannot be claimed under the Railways Clauses Consolidation Act, 1845, for prospective injurious affection of property.

The plaintiffs held their premises under a lease for seventeen years, terminable at their option at the end of three years by a six months' notice. Six months before the three years came to an end they perceived that certain buildings which had been commenced by a railway company on land adjoining their premises would so darken their premises as to make them useless, and they consequently gave notice to their landlord to determine the lease at the end of the three years.

Held, that the claim for compensation must be limited to the damage from injurious affection sustained before the date on which the lease actually determined, and must not be assessed on the basis of the lease having fourteen years to run.—*Reg.* v. *Poulter*, C.A. 117—20 Q. B. D. 132; 57 L. J. Q. B. 138; 58 L. T. 534.

3. *Compulsory powers—Notice to treat—Part of house—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 92.—The plaintiff was the owner of a piece of land, fronting a private road, whereon he had built for himself a dwelling-house. He afterwards bought some land fronting the same road on the other side, immediately opposite his dwelling-house, and built stables, coach-house, and greenhouses on part thereof, and laid out the rest as a garden, all of which he used together with and as part of his residence. A railway company gave notice to treat for the piece of land whereon the stables, &c., were situate.

Held, that the railway company could not be compelled, under section 92 of the Lands Clauses Consolidation Act, 1845, to take the dwelling-house also. —*Kerford* v. *Seacomb and Hoylake Railway Co.*, CH.D. KEK., J. 431—57 L. J. Ch. 270; 58 L. T. 445.

4. *Payment into court—Investment—Charity lands—Petition—Costs—Ord.* 55, *r.* 2—*Lands Clauses Consolidation Act*, 1845, *s.* 80.—A scheme for the regulation of a charity provided that the legal estate in the lands and all interests therein should be vested in the Official Trustee of Charity Lands and his successors, in trust for the charity, with intent that the lands might be managed by the trustees of the charity in conformity with the scheme, and that all stock in the public funds and other securities should be vested in the Official Trustee, by whom the dividends and income should be paid to the trustees of the charity. The land was acquired by the Metropolitan Board of Works under compulsory powers, and the purchase-money was paid into court. The trustees petitioned, before the conveyance had been completed, that the fund in court might be invested and carried to the account of the Official Trustee, who was served with the petition.

Held, that an order for *interim* investment should be made; that the proceedings had been properly commenced by summons; and that the costs of the Official Trustee should be paid by the Metropolitan Board of Works.—*In re Stafford*, CH.D. CHI., J.—57 L. T. 846.

5. *Payment out of court—Costs—Lease—Appearance of lessor—Lands Clauses Consolidation Act*, 1845, *ss.* 74, 80.—A petition was presented by the lessee of property compulsorily taken by a railway company for payment out of court of a fund representing compensation under an award. At the date of the award rent was due to the lessor, who had a right of re-entry in default of payment. At the date of payment into court the railway company had not completed the purchase of the lessor's interest. After the purchase the lessor gave notice to the railway company of his claim to rent out of the fund in court claimed. He received notice of the presentation of the petition from the railway company and appeared at the hearing, though not served with, nor made a respondent to, the petition, and his claim was settled by the petitioners.

Held, that the right of re-entry was an incumbrance on the leasehold interest and on the fund in court, and that, notice having been given to the railway company by the lessor, he was rightly before the court, and the company must pay his costs.—*In re London, Chatham, and Dover Railway Co.*, CH.D. CHI., J.—57 L. T. 673.

6. *Payment out of court—Petition—Lands Clauses Consolidation Act*, 1845, *ss.* 69, 70, 80—*Ord.* 55, *r.* 2. —An application that part of the compensation for land taken under a Waterworks Act may be paid to a trustee may be made by petition.—*In re Hargreave's Trusts*, CH.D. KAY, J.—58 L. T. 367.

See also ARBITRATION, 5; LIGHT, 3; SOLICITOR, 8; STAMP, 1.

LARCENY.—See CRIMINAL LAW, 4, 6.

LEASE.—See BANKRUPTCY, 29, 39; EXECUTOR, 2; LANDLORD AND TENANT, 2—10; LANDS CLAUSES CONSOLIDATION ACT, 2, 5; LIGHT, 1, 2; MORTGAGE, 1, 12; QUEENSLAND, LAW OF, 2; SOLICITOR, 10, 17; SPECIFIC PERFORMANCE, 2, 3; TRUSTEE, 1; VENDOR AND PURCHASER, 5—7; WATER, 3; WILL, 9, 33, 46.

LEGACY DUTY.—See WILL.

LEGITIMACY.—See ESTOPPEL, 5; EVIDENCE, 12, 13; HUSBAND AND WIFE, 8.

LIBEL:—

1. *Falsehood—Guilty knowledge—Conviction for publication only.*—On an indictment for publishing a libel knowing it to be false the defendant may be convicted of publishing only.—*Boaler* v. *Reg.*, Q.B.D.—21 Q. B. D. 284; 57 L. J. M. C. 85.

2. *Patent—Infringement—Trade libel—Reasonable and probable cause—Damages.*—The defendants sent to their customers a circular, in which they stated that they were unable to supply a particular kind of electric bell, invented by the plaintiff, because it had been "proved to be an infringement" of another patented bell. No action had then been brought against the plaintiff for infringement of the patent. Such an action was afterwards commenced, but was abandoned.

Held, that the plaintiff was entitled to damages.—*Crampton* v. *Swete*, CH.D. KEK., J—58 L. T. 516.

3. *Privilege—Fair criticism—Question for jury.*—In actions for libel conveyed in the public criticism of literary work, the only questions for the jury are, What is the meaning of the words used, and does such meaning come within the limits of fair criticism? Imputations on the private character of the author or an account of the work so false as to amount to an actual misdescription of it are outside the limits of "fair criticism." The expression of the opinion of the critic, not the opinion itself, is the criterion of "fair criticism."

Per Lord Esher, M.R.—If it could be shown that the critic had written the words complained of, not for the purpose of criticism, but with a malicious intent to injure the author, that might make a statement libellous which, if written without such intent, would not be beyond the limits of "fair criticism."

No question of privilege arises in reference to public criticism in accordance with the judgments in *Campbell* v. *Spottiswoode*, 11 W. R. 569.

Judgment of the Queen's Bench Division affirmed. —*Merivale* v. *Carson*, C.A. 231—20 Q. B. D. 275; 58 L. T. 331.

4. *Publication—Husband and wife—Servant—Testimonial—Damages.*—The disclosure of a libel by a husband to a wife is not a publication of it.

A servant has the property in a testimonial given to him by a former employer, as distinguished from a letter testifying to his character sent by a former employer to a new employer; and if the testimonial is damaged by the new employer the servant may recover substantial damages.—*Wennhak* v. *Morgan*, Q.B.D. 697—20 Q. B. D. 635; 57 L. J. Q. B. 241; 59 L. T. 28.

See also BANKRUPTCY, 9; DISCOVERY, 9; INJUNCTION, 7; PRACTICE, 30.

LICENSED HOUSE:—

1. *Excise licence—Place of public entertainment—Mandamus—5 & 6 Will.* 4, *c.* 39, *s.* 7—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *ss.* 3, 72, 74.—The proprietor of a place of public entertainment is not entitled to an excise licence unless he has previously obtained a justices' licence for the sale of intoxicating liquors.

The statute 5 & 6 Will. 4, c. 39, s. 7, has been impliedly repealed as to places of public entertainment by the Licensing Act, 1872.—*Reg.* v. *Inland Revenue Commissioners*, Q.B.D. 696; 57 L. J. M. C. 92.

2. *Forfeiture—Transfer—Discretion of justices—Wine and Beerhouse Act*, 1869 (32 & 33 *Vict. c.* 27), *ss.* 8, 19—*Licensing Act*, 1872, *s.* 15.—Where the holder of a licence had been convicted of an offence under section 15 of the Licensing Act, 1872, the justices refused the application of a new tenant for a renewal; and of the landlord for a transfer;

Held, that the justices were entitled to do so, as the licence had become forfeited, and that section 19 of the Wine and Beerhouse Act, 1869, did not apply.—*Reg.* v. *Justices of West Riding*, Q.B.D. 855—21 Q. B. D. 258; 57 L. J. M. C. 103.

3. *Permitting gaming—Licensing Act*, 1872, *s.* 17.—An innkeeper kept a skittle-alley on his premises. He put up a general notice that no gaming was permitted in the alley, and he placed O. in charge of the alley, with express directions not to allow gaming. Two men were found by constables playing cards for money in the alley in the presence of O. and to his knowledge.

Held, that the innkeeper was rightly convicted of "suffering gaming to be carried on upon his premises" under section 17 of the Licensing Act, 1872.—*Bond* v. *Evans*, Q.B.D. 767—21 Q. B. D. 249.

4. *Renewal—Discretion of justices*—9 *Geo.* 4, *c.* 61, *s.* 1—*Licensing Act*, 1872, *s.* 42—*Licensing Act*, 1874 (37 *&* 38 *Vict. c.* 49), *s.* 26.—The justices at the annual general licensing sessions have the same absolute judicial discretion to grant or to refuse applications for the renewal of licences as they have in respect of granting or refusing applications for new licences for the purposes specified in the Licensing Acts. The provisions in section 42 of the Licensing Act, 1872, and in section 26 of the Licensing Act, 1874, only modify the procedure in cases of applications for renewal, and do not limit in any way the judicial discretion intrusted to the justices by section 1 of 9 Geo. 4, c. 61.—*Sharp* v. *Wakefield*, Q.B.D. 634—21 Q. B. D. 66; 58 L. T. 494.

5. *Renewal—Discretion of justices—Beer licence—Wine licence—Discretion of justices—Wine and Beerhouse Act*, 1869, *ss.* 7, 19.—The holder of a beer licence existing on May 1, 1869, is not thereby entitled to apply for a wine licence on the renewal of his beer licence under section 19 of the Wine and Beerhouse Act, 1869, and the justices are entitled to refuse at their discretion any application for a licence other than for the licence originally existing at that date.—*Reg.* v. *King*, C.A. 600—20 Q. B. D. 430; 57 L. J. M. C. 20.

6. *Renewal—Objection by justices—Evidence not on oath—Licensing Act*, 1872, *s.* 42, *sub-sections* 2, 3.—It is not competent for justices to refuse to grant the renewal of a licence on account of an objection originated by themselves, unless they have first given notice of objection and taken evidence in accordance with the provisions contained in section 42, sub-sections 2, 3, of the Licensing Act, 1872.—*Gascoyne* v. *Bisley*, Q.B.D. 605.

7. *Renewal—Six-day licence—Licensing Act*, 1872, *s.* 49.—Although the condition under section 49 of the Licensing Act, 1872, requiring licensed premises to be closed during the whole of Sunday can only be inserted in a licence if the applicant himself applies for its insertion, yet, when it is once inserted, the licence becomes a six-days' licence, and can only be renewed as such.—*Reg.* v. *Justices of Crewkerne*, Q.B.D. 629—21 Q. B. D. 85.

8. *Sale of liquor—Dilution of beer—Customs and Inland Revenue Act*, 1885 (48 *&* 49 *Vict. c.* 51), *s.* 8.—A. had in his cellar a cask of strong beer and also a cask of much weaker beer. He drew off a certain quantity of the stronger beer and filled the cask again with some of the weaker beer, thereby reducing the specific gravity of the cask of stronger beer from 10 to 8.

Held, that A. was liable to conviction for diluting the stronger beer, under section 8, sub-section 2, of the Customs and Inland Revenue Act, 1885.—*Crofts* v. *Taylor*, Q.B.D. 47—19 Q. B. D. 254; 56 L. J. M. C. 137; 57 L. T. 210.

9. *Sale of liquor—Foreign wine—"British" wine*—4 *&* 5 *Will.* 4, *c.* 77, *s.* 11—*Wine Licences Act*, 1860 (23 *&* 24 *Vict. c.* 27), *ss.* 3, 19, 21.—The respondent was licensed to sell sweets and made wines, but not foreign wines. An Inland Revenue officer went to his shop, asked for a bottle of the best sherry, and bought a bottle labelled "Best Pale Sherry, British."

Held, that the respondent had been guilty of the offence of selling foreign wine by retail without a proper licence.—*Richards* v. *Banks*, Q.B.D.—58 L. T. 634.

10. *Sale of liquor — Permitting drunkenness—Licensing Act*, 1872, *ss.* 13, 62.—A holder of a licence may be convicted for selling liquor to a drunken man, even if it was ordered and paid for by a person who was sober.—*Scatchard* v. *Johnson*, Q.B.D.—57 L. J. M. C. 41.

11. *Sale of liquor—Prohibited hours—Guests of lodger—Licensing Act*, 1874, *ss.* 9, 10.—It is not an offence against section 9 of the Licensing Act, 1874, for a publican to allow intoxicating liquors ordered by a lodger to be consumed by *bonâ fide* guests of the lodger after the hour for closing.—*Pine* v. *Burns*, Q.B.D. 473—20 Q. B. D. 221; 57 L. J. M. C. 28; 58 L. T. 520.

See also LANDLORD AND TENANT, 4; MORTGAGE, 1.

LIEN.—See BILL OF SALE, 17; BOND; COMPANY, 7, 17; PARTNERSHIP, 3; SETTLEMENT, 20; SHIPPING, 19, 28, 34; SOLICITOR, 4.

LIFE INSURANCE:—

1. *Customs Annuity and Benevolent Fund—Lunacy of subscriber—Nominee—Admission*—56 *Geo.* 3, *c. lxxiii.*, *s.* 9.—A subscriber to the Customs Annuity and Benevolent Fund, established under 56 Geo. 3, c. lxxiii., is not given, by the Act or the regulations made thereunder, any interest in the insurance fund as his estate or property, but only a power of disposition over it in certain particular ways.

North, J., held that, under the regulations, a "nominee" must be a person who is to take a beneficial interest in the fund, and that there cannot be a nomination of a person who is to take as trustee for others.

The Court of Appeal, under the circumstances of the case, abstained from giving any decision on that point, but expressed an opinion that a nomination need not state that the "nominee" is to take beneficially, and that the object of the regulations referred to was merely to give the directors of the fund information in exercising their discretion as to admission, as to the purposes for which a nomination was made, and as to the parties who were to receive the money.

At the trial of the action the defendant's counsel made an admission that an order made by the Court of Session of Scotland nominating the curator of a lunatic subscriber on behalf of the lunatic as "nominee," had the same effect as if it had been a nomination made by the subscriber himself while sane.

Held, that the question of the jurisdiction of the Scotch court to make such an order was a question of fact, proof of which, like proof of other facts, might be dispensed with by the admission of counsel.—*Urquhart* v. *Butterfield*, C.A. 376—37 Ch. D. 357; 57 L. J. Ch. 521; 57 L. T. 780.

2. *Deposit—Life insurance company—Payment out of court—Petition.*—A petition under the Life Insurance Companies Acts for payment out of court by a company of a statutory deposit must state the Board of Trade rules, which provides for the payment

out of court of the deposit-money as soon as the court is satisfied that the life assurance fund of the company, in respect of which the deposit was made, amounts to £40,000.—*In re Le Phenix*, CH.D. CHI., J. —58 L. T. 512.

See also ADMINISTRATION, 1; MORTGAGE, 13; STAMP, 2.

LIGHT:—

1. *Implied grant — Lease — Derogation—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 6, *sub-section* 2.—In September, 1882, the corporation of a town demised to the plaintiff, in pursuance of a previous building agreement, a piece of land with the house newly built thereon, "together with the rights, members, and appurtenances to the said premises belonging," but no express mention was made of "lights." The plaintiff's house faced a new street made by the corporation, which street the corporation agreed should be twenty feet in width. At the date of the plaintiff's lease there was a low building on a piece of land on the side of this new street facing the plaintiff's premises, and in 1886 the corporation demised for building purposes this piece of land to the defendant, who built a high hotel thereon. The tract of land on which both the plaintiff's and the defendant's houses were built had been acquired by the corporation under an improvement scheme for building purposes, and this fact was known to the plaintiff when he entered into his agreement with the corporation. The plaintiff claimed a mandatory injunction to restrain interference with the light which, but for the defendant's building, would have had access to the plaintiff's house.

Held, that there was no express grant of the light by the corporation to the plaintiff, and that it was not implied under section 6, sub-section 2, of the Conveyancing Act, 1881; that any implied obligation on the part of the corporation was to be measured by the circumstances which existed at the time when the agreement was entered into between the plaintiff and the corporation; that there was no implied obligation on the corporation not to let the land fronting the new street and opposite to the plaintiff's premises for the erection of a building higher than that which existed thereon at the time; and that the action should be dismissed.

The maxim that a "grantor shall not derogate from his own grant" considered.

Rigby v. *Bennett*, 31 W. R. 222, 21 Ch. D. 559, approved.

Wheeldon v. *Burrows*, 28 W. R. 196, 12 Ch. D. 31, distinguished.

Decision of Kekewich, J., affirmed.—*Birmingham, Dudley, and District Banking Co.* v. *Ross*, C.A. 914—57 L. J. Ch. 601.

2. *Lease—Reservation—Prescription Act* (2 & 3 *Will.* 4, *c.* 71), *s.* 3.—A lease for 999 years of a plot of building land, with a house which the lessee had erected on the land in pursuance of a building agreement, contained a demise of the house and land, "and all rights and appurtenances, legal, used, or reputed, to the said plot, except rights, if any, restricting the free use of any adjoining land, or the conversion or appropriation at any time hereafter of such land for building or other purposes, obstructive or otherwise."

Held, that the reservation in the lease was not an agreement within the proviso contained in section 3 of the Prescription Act, and did not prevent the lessee from acquiring a right to light under the Act.—*Mitchell* v. *Cantrill*, C.A. 229—37 Ch. D. 56; 57 L. J. Ch. 72; 58 L. T. 29.

3. *Obstruction — Compulsory powers — Compensation—Injunction—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 68—*Metropolitan Street Improvements Act*, 1877 (40 & 41 *Vict. c. cxxxv.*), *ss.* 2, 4, 7, 25, 33—*Metropolitan Street Improvements Act*, 1882 (45 & 46 *Vict. c. cxxxii.*), *ss.* 1—3.—By the Metropolitan Street Improvements Act, 1877, which incorporated the Lands Clauses Consolidation Act, 1845, the Metropolitan Board of Works were authorised to acquire land for the purpose, amongst other things, of widening Gray's-inn-road, and to purchase easements for that purpose. The board were also empowered, by section 33 of the Act, to let or sell certain portions of land for the purpose of building labourers' dwellings for the accommodation of labourers displaced by the improvements, the erection of which dwellings was imperatively required by the section. By an Amendment Act in 1882 the board were required to erect a certain number of labourers' dwellings on certain portions of land, without being expressly empowered to let or sell for that purpose, and section 33 of the principal Act was repealed. The board sold a building lease of portions of the land for the purpose of the erection of the required labourers' dwellings, and the tenants of the board, in erecting the dwellings, obstructed the ancient lights of adjacent owners.

Held, that the remedy of the adjacent owners was compensation under the 68th section of the Lands Clauses Act, 1845, and that they were not entitled to an injunction.—*Wigram* v. *Fryer*, CH.D. NOR., J. 100—36 Ch. D. 87; 56 L. J. Ch. 1098; 57 L. T. 255.

See also LANDS CLAUSES CONSOLIDATION ACT, 2.

LIMITATIONS, STATUTE of:—

1. *Acknowledgment — Payment of interest — Tenancy for life*—21 *Jac.* 1, *c.* 16—3 & 4 *Will.* 4, *c.* 104, *s.* 5—*Mercantile Law Amendment Act*, 1856 (19 & 20 *Vict. c.* 97), *s.* 14.—The law as to the effect of payment of interest on a simple contract debt of a testator by the tenant for life of the real estate stands on the same footing as the law as to payment of interest on a specialty debt.

The principle in *Roddam* v. *Morley*, 5 W. R. 510, 1 De G. J. & S. 1, discussed.

Payments made by a tenant for life under a will of real estate are sufficient admission of the liability of the real estate, and sufficient evidence to keep alive a simple contract debt of the testator.—*Hollingshead* v. *Webster*, CH.D. CHI., J. 660—37 Ch. D. 651; 57 L. J. Ch. 400; 58 L. T. 758.

2. *Adverse possession—Tenancy in common—Receipt of rent—Infant*—3 & 4 *Will.* 4, *c.* 27, *s.* 11.—A husband and wife were entitled, as tenants in common, to gavelkind land. The wife died in May, 1870, leaving two sons, S. and J. At the time of his mother's death J. was an infant. He attained the age of twenty-one in 1877, and died in May, 1884. On the mother's death her moiety descended to her two sons as her co-heirs, according to the custom of gavelkind, subject to the right of the father to a moiety of the rents so long as he remained a widower. On the death of the mother the father entered into receipt of the whole of the rents of her moiety without accounting to his sons or making any acknowledgment in writing of their title for more than twelve years. In February, 1884, the father married again. He died in November, 1884.

Held, that, as to the one-eighth of the property to which J. became entitled in possession on the death of his mother, the father must be presumed to have entered into receipt of the rents as bailiff for his infant son, and that, consequently, the title of J. was not barred by 3 & 4 Will. 4, c. 27, s. 12; but that, as to S.'s own one-eighth, the same presumption did not arise, and that, as there was no evidence that the father had received the rents as agent for S., or had,

before the expiration of twelve years, acknowledged his title in writing or accounted to him for the rents. S.'s title to that one-eighth was barred by the statute. —*Hobbs* v. *Wade*, CH.D. NOR., J. 445—36 Ch. D. 553; 57 L. J. Ch. 184; 58 L. T. 9.

3. *Breach of trust—Death of sole trustee intestate —Action by heir-at-law—Ord.* 19, *r.* 15.—The heir-at-law of a sole trustee who died intestate cannot set up the Statute of Limitations in an action by a *cestui que trust* to make the trustee's estate liable for a breach of trust.—*Gillard* v. *Lawrenson*, CH.D. STL., J. —57 L. T. 364.

4. *Company — Shares — Forged transfer — Joint trustees—Estoppel.*—One of two executors and trustees of a will sold out certain railway stock, which stood in their joint names as executors, by means of deeds of transfer to which he forged the name of his co-executor and trustee, who sued the railway company to compel them to replace the stock.

Held, (1) that the claim was not barred by reason of more than six years having elapsed since the date of the transfers, as time began to run, not from that date, but from the refusal of the company, when the forgery was made known to them, to treat the plaintiff as shareholder; (2) that stock registered in the names of two executors could not be transferred by one of them, and such a transfer was not good as to one moiety of the stock; (3) that the fact that one of the two joint owners of the stock was estopped from denying the validity of the forged transfers did not prevent the other from maintaining the action.—*Barton* v. *North Staffordshire Railway Co*, CH.D. KAY, J. 754—38 Ch. D. 458; 58 L. T. 549.

5. *Mortgage—Foreclosure—Reversionary interest—Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *ss.* 1, 2.—The mortgagee of a reversionary interest in land may bring an action for foreclosure at any time within twelve years from the date at which the reversion falls into possession.—*Hugill* v. *Wilkinson*, CH.D. NOR., J. 633—38 Ch. D. 480.

See also LUNACY, 3; MORTGAGE, 5.

LIQUIDATED DAMAGES.—See INJUNCTION, 1.

LIQUIDATOR.—See BANKRUPTCY, 17; COMPANY, 24, 25.

LOCAL GOVERNMENT:—

1. *Arbitration—Award—Appointment of umpire—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 180 —*Ord.* 62, *r.* 15.—The Public Health Act, 1875, *s.* 180, requires the arbitrator appointed by the local authority to be under their common seal and the arbitrator appointed by the other party to be under his hand. The other party to an arbitration under the statute having appointed an arbitrator, but not under his hand,

Held, that the appointment of the arbitrators, and the appointment of an umpire made by them, and the award of the umpire, were invalid, and neither the submission nor the award could be made a rule of court.—*Gifford* v. *Bury Town Council*, Q.B.D. 468—57 L. J. Q. B. 181; 58 L. T. 522.

2. *Bye-law — Dwelling-house — Drainage — Public Health Act*, 1875, *ss.* 23, 25, 157, 182, 183.—A bye-law made by an urban sanitary authority and ordering that no new house shall be occupied till the house drainage is complete, and such house has been, after examination, certified to be, in the opinion of the local board or its duly authorised officer, fit for human habitation, is valid within the Public Health Act, 1875.—*Horsell* v. *Swindon Local Board*, Q.B.D.—58 L. T. 732.

3. *Bye-law—Dwelling-house—Open space.*—The L. Improvement Commissioners made a bye-law that every person erecting a new building to be used as a dwelling-house should provide in the rear an open space exclusively belonging thereto, to the extent at least of 150 square feet, free from any erection above the ground, and cause the distance across such open space between every such building and the opposite property at the rear to be 10ft. at least, and if such building be 25ft. in height should cause such distance across to be at least 20ft. P. erected a building to be used as a dwelling-house, 25ft. in height; there was in the rear an open space exclusively belonging thereto to the extent of 700 square feet; the distance across such open space between the building and the boundary of the opposite property at the rear, including the street which divided the building from the opposite property, was 52ft.; and the land exclusively belonging to the building was bounded in the rear by a public street, the distance across the open space between the building and the public street being 8ft.

Held, that as P. had not caused the distance across the open space between his building and the opposite property to be at least 20ft., he had committed a breach of the bye-law.—*Jones* v. *Parry*, Q.B.D.—57 L. T. 691.

4. *Bye-law*—Ultrà vires—*Street music*—5 & 6 *Will.* 4, *c.* 76, *s.* 90.—A bye-law made by the town council of a borough and providing that every person who in any street sounds any musical or noisy instrument, or sings, recites, or preaches without a written licence from the mayor, shall forfeit a sum not less than one shilling and not more than twenty shillings is unreasonable and *ultrà vires*.—*Munro* v. *Watson*, Q.B.D.—57 L. T. 366.

5. *Contract — Interest — Penalty — Public Health Act*, 1875, *s.* 193.—By certain contracts entered into by a local authority for the purposes of the Public Health Act, 1875, it was provided that the contractors should pay to the surveyor of the local authority for taking out bills of quantities a percentage upon the amount which he should certify to be due from the local authority to the contractor.

Held, that the surveyor was concerned or interested in the contracts within the meaning of section 193 of the Public Health Act, 1875, and was liable to a penalty in respect of each.

Decision of Mathew, J. (36 W. R. 553, 20 Q. B. D. 196), affirmed.—*Whiteley* v. *Barley*, C.A. 824—21 Q. B. D. 154.

6. *Improvement rate — Several fishery — Town Improvement Clauses Act*, 1847 (10 & 11 *Vict. c.* 34, *s.* 167.—A several fishery is rateable to an improvement rate under a local Act incorporating the Town Improvement Clauses Act, 1847.—*Redington* v. *Miller*, Q.B.D. (Ir.)—22 L. R. Ir. 78.

7. *Sale of diseased meat—Servant—Public Health Act*, 1875, *ss.* 116, 117.—A. was under-bailiff to B., it being his duty to obey the directions of the head bailiff. Two diseased cows belonging to B. were killed. A. was not present when they were killed, but the head bailiff told him to send the carcases to Portsmouth, and go there himself. A. did so, sending a telegram to a butcher at Portsmouth, with the words "make the best of it." The butcher declined to accept the meat, which was seized at the railway station.

Held, that A. could not be convicted for selling meat unfit for food.—*Newton* v. *Monkcom*, Q.B.D.—58 L. T. 231.

8. *Sewers — Expenses — Apportionment — Adjacent owners—Public Health Act*, 1875, *ss.* 13, 15, 18, 136, 207.—A piece of land having been laid out for building purposes, a system of sewerage was laid down. A local board for the district was subsequently formed

and, sixteen years after its formation, an alteration in the sewerage system having become necessary, the board sought to charge the frontagers with the expense of such alteration under section 150 of the Public Health Act, 1875.

Held (affirming the decision of the Queen's Bench Division, 35 W. R. 578, 18 Q. B. D. 577), that the powers given by section 150 could only be exercised once for all within a reasonable time after the vesting of the sewer in the local board, and that the alteration had been made under section 18, and was chargeable, under section 207, on the general rates, and not on the frontagers.—*Holmes* v. *Twickenham Local Board, Bonella* v. *Twickenham Local Board*, C.A. 50—20 Q. B. D. 63; 57 L. J. M. C. 1; 58 L. T. 299.

9. *Sewers — Expenses — Apportionment — District sewerage board—Public Health Act*, 1875, *ss.* 230, 283, 284.—A provisional order of the Local Government Board, confirmed by a local Act, provided that the expenses incurred by a district joint board were to be defrayed out of a common fund contributed by the component districts, as provided by section 283 of the Public Health Act, 1875; and that certain districts should contribute as if they were required to meet "special expenses" within the meaning of the Public Health Act, 1875.

Held, that the board was bound to apportion the amount of the expenses among the different districts in proportion to the rateable value of the properties in those districts, to be ascertained according to the valuation list.—*Darenth Valley Sewerage Board* v. *Dartford Guardians*, Q.B.D. 43—19 Q. B. D. 270; 56 L. J. Q. B. 615; 57 L. T. 233.

10. *Street—New street—Completion—New building —Consent of local authority—Local Government Act*, 1875, *s.* 150.—A Local Improvement Act enacted that it should not be lawful for any person, except with the consent of the corporation, to erect any new buildings abutting on any new street unless the corporation should have approved of the level and available width of such new street, nor until the carriage way and footway should be formed to such level and of such width, and constructed and sewered to the satisfaction of the corporation in accordance with section 150 of the Public Health Act, 1875. The appellants gave notice to the corporation of their intention to lay out a new street, the plans for the construction of which were approved by the corporation. They then gave notice that they intended to erect four new houses in the street, the plans of which were approved. The appellants erected the houses abutting upon part of the new street which had been sewered and paved to the satisfaction of the corporation; but the whole of the street had not been constructed to their satisfaction.

Held, that, as the appellants had given notice to lay out the whole of a new street, the corporation, under the local Act, were entitled to withhold their consent to the erection of any building abutting on the street unless the whole of the street was constructed and to their satisfaction.—*Woodhill* v. *Mayor, &c., of Sunderland*, Q.B.D.—57 L. T. 303.

11. *Street—Paving, &c.—Epenses—Apportionment Sale of land—Public Health Act*, 1875, *ss.* 150, 257. —The frontage owner liable under sections 150 and 257 of the Public Health Act, 1875, for the expenses of work done under section 150 by the local authority is the frontage owner at the time when the work is completed.—*In re Bettesworth and Richer*, CH.D. NOR., J. 544—37 Ch. D. 535; 57 L. J. Ch. 749.

12. "*Street*"—*Public Health Act*, 1875, *ss.* 4, 150. —The definition of "street" given by section 4 of the Public Health Act, 1875, must be read into section 150 according to the method of construction laid down in *Mayor of Portsmouth* v. *Smith*, 13 Q. B. D. 184, 32 W. R. Dig. 123.

Decision of the Queen's Bench Divison (36 W. R. 138) affirmed.—*Jowett* v. *Idle Local Board*, C.A. 530.

See also BANKRUPTCY, 30; HIGHWAY, 3—6; JUSTICE OF THE PEACE, 6.

LOCKE KING'S ACT.—See ADMINISTRATION, 10.

LORD CAMPBELL'S ACT.—See DAMAGES, 8; HUSBAND AND WIFE, 1; PRACTICE, 24.

LUNACY:—

1. *Committee—Death of joint committee—Dividends —Fund in court—Payment to survivor.*—At the date of the death of one of two joint committees of a lunatic the dividends on a fund in Consols representing the purchase-money of land of the lunatic acquired by the Metropolitan Board of Works under compulsory powers was payable to the joint committees. The surviving committee applied to be appointed sole committee, and that the dividends might be paid to him alone. The master in lunacy appointed him sole committee, but declined to make any order as to the dividends. The committee then served the Metropolitan Board of Works with a petition for payment to him of past and future dividends.

The court ordered the past and future dividends to be carried to the credit of the lunacy and to be paid to the petitioner, and ordered the Metropolitan Board of Works to pay the costs of the petition.—*In re Ryder*, LUN.—37 Ch. D. 595; 57 L. J. Ch. 459; 58 L. T. 783.

2. *Partition action—Sale—No committee appointed — Conveyance of lunatic's interest — Trustee Act*, 1850 (13 *&* 14 *Vict. c.* 60), *ss.* 3, 20 — *Trustee Extension Act*, 1852 (15 *&* 16 *Vict. c.* 55), *s.* 1.—In a partition action in the Lancaster Palatine Court an order was made for the sale of leasehold estate. It was afterwards found that one of the beneficiaries had been found a lunatic by inquisition, but that no committee had been appointed, and the court made an order declaring the other beneficiaries to be seised of the property upon a trust within the Trustee Acts, and appointing another party to the action to convey the property for their estates.

Held, that the court had jurisdiction on a petition in lunacy to appoint a person to convey the lunatic's interest.—*In re Watson*, LUN.—58 L. T. 509.

3. *Pauper lunatic—Maintenance—Statute of Limitations*—21 *Jac.* 1, *c.* 16—*Lunatic Asylums Act*, 1853 (16 *&* 17 *Vict. c.* 97), *s.* 104.—Only six years' arrears of money paid for the past maintenance of a pauper lunatic, who has subsequently become entitled to property, are recoverable by guardians of the poor under section 104 of the Lunatic Asylums Act, 1853. —*Eggleton* v. *Newbigin*, CH.D. CHL., J. 69—36 Ch. D. 477; 56 L. J. Ch. 907; 57 L. T. 390.

4. *Sale—Mortgage—Power of sale—Vesting order —Lunacy Regulation Act*, 1853 (16 *&* 17 *Vict. c.* 70), *ss.* 116, 136—*Trustee Act*, 1850, *s.* 3.—Where a mortgagee becomes lunatic it is doubtful whether the court has jurisdiction, under section 136 of the Lunacy Regulation Act, 1853, by one order to authorise the committee to sell and also to convey the mortgaged estate.

The usual practice, which is to direct the property to be sold, and then by a subsequent order to vest it in the purchaser under section 3 of the Trustee Act, 1850, should be adhered to.—*In re Harwood*, LUN. 27 —35 Ch. D. 470; 56 L. J. Ch. 974; 56 L. T. 502.

See also ADMINISTRATION, 1, 2; FALSE IMPRISON-

MENT, 2; JURISDICTION, 9—11; LIFE INSURANCE, 1; POOR LAW, 1, 2, 4; PRACTICE, 18; PROBATE DUTY; TRUSTEE, 1, 4.

MAINTENANCE.—See ADMINISTRATION, 2; DIVORCE, 13, 14; HUSBAND AND WIFE, 9; INFANT, 7, 8; JURISDICTION, 9; JUSTICE OF THE PEACE, 12; LUNACY, 3; POOR LAW, 4; SOLICITOR, 2.

MALICIOUS PROSECUTION:—

Reasonable and probable cause—Burden of proof.—In an action for a malicious prosecution the defendant is entitled to judgment in the absence of evidence which would, if believed, relieve the plaintiff from the burden of proving absence of reasonable and probable cause.—*Davidson* v. *Smyth*, C.P.D. (Ir.)—20 L. R. Ir. 326.

MALTA, LAW of:—

Legitimation—Jurisdiction.—The law of Malta as to legitimation is to be found in the *Code Rohan* and in Maltese precedents, and, when these provisions fail, in the civil law.

The Third Hall of the Civil Court has jurisdiction to make a decree legitimating a person born *ex nefario coitu*, and conferring on him the character and rights of a legitimate child, including the power to take under a limitation to legitimate and natural children, in the absence of a plain contrary intention.—*Gera* v. *Cantar*, P.C.—12 App. 557; 56 L. J. P. C. 93.

MANDAMUS:—

1. *Company—Contract—Registration—Insufficient stamp—Registrar of Joint-Stock Companies—Alternative remedy—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Stamp Act*, 1870 (33 & 34 *Vict. c.* 97), *ss.* 18, 19.—The Registrar of Joint-Stock Companies refused to file a contract under section 25 of the Companies Act, 1867, on the ground that the Stamp Act, 1870, had not been complied with.

Held, that, whether or not the Registrar of Joint-Stock Companies was an officer to whom a writ of *mandamus* might be sent, the appropriate remedy for the party aggrieved by such refusal was the procedure provided by sections 18 and 19 of the Stamp Act, 1870, and a writ of *mandamus* ought not to be granted.—*Reg.* v. *Registrar of Joint-Stock Companies*, Q.B.D. 695—21 Q. B. D. 131; 57 L. J. Q. B. 433; 59 L. T. 67.

2. *Return—Pleading—Justice of the peace.*—A return to a *mandamus* to magistrates can be pleaded to when the reply traverses the allegation that the justices have "heard and determined."—*Reg.* v. *King*, C.A. 600—20 Q. B. D. 430; 57 L. J. M. C. 20; 58 L. T. 606.

See also ECCLESIASTICAL LAW, 5; ELECTION LAW, 4; INCOME TAX, 5; INJUNCTION, 3; JUSTICE OF THE PEACE, 17; LICENSED HOUSE, 1.

MARINE INSURANCE:—

1. *Concealment—Knowledge of agent*—Underwriters instructed their agents to re-insure an overdue ship. During negotiations the agents received material information, which they did not make known to the underwriters, who re-insured the ship through these agents for £800. The underwriters afterwards re-insured the ship further for £700 through different agents. Neither the underwriters nor the last-named agents had the information which the first-named agents had. The ship was lost.

Held, that the knowledge of the first agents was not the knowledge of the underwriters so as to affect the second re-insurance, and that the underwriters were entitled to recover upon it.

Decision of the Court of Appeal (reported 17 Q. B. D. 553, 34 W. R. Dig. 116) reversed.—*Blackburn* v. *Vigors*, H.L. 449—12 App. 518; 57 L. J. Q. B. 114; 57 L. T. 726.

2. *Concealment—Knowledge of agent.*—The plaintiffs, being the insurers of an overdue vessel, instructed R. & Co., brokers at Glasgow, to effect a re-insurance. R. & Co. telegraphed to T. & Co., brokers in London, to effect such re-insurance at a premium of fifteen guineas. Before any answer from T. & Co. arrived, M., one of the partners in the firm of R. & Co., obtained information of a fact material to the risk. On the arrival of an answer from T. & Co., asking for advance of premium, R. & Co. informed the plaintiffs thereof, but did not disclose to the plaintiffs the information obtained by M. The plaintiffs replied that the premium might be raised to twenty guineas. R. & Co. then telegraphed in the plaintiff's name to T. & Co. that they might pay twenty guineas. T. & Co. telegraphed in reply direct to the plaintiffs that there was no chance under twenty-five guineas. The plaintiffs then telegraphed to T. & Co. that they might pay twenty-five guineas. T. & Co., through the agency of another firm of brokers, effected a policy of re-insurance with the defendant.

Held, that as the policy was the result of one entire negotiation, conducted up to a certain point through the agency of R. & Co., though afterwards carried on by the principals themselves without further intervention on the part of R. & Co., the non-communication of M.'s knowledge vitiated the policy.

Blackburn v. *Vigors*, 36 W. R. 449, 12 App. 531, distinguished.—*Blackburn* v. *Haslam*, Q.B.D. 855—21 Q. B. D. 144; 57 L. J. Q. B. 479.

3. *Mutual association—Forfeiture—Contribution—Set-off.*—By the rules of a marine insurance association the members insured each other's ships from noon of the 20th of February, or from the date of entry of a vessel, until noon of the 20th of February in the succeeding year; and the managers were empowered to levy contributions of one-fourth of the estimated annual premium quarterly in each year to form a fund for payment of claims; if any member should refuse to pay his contributions, his ship should cease to be insured, and he should forfeit all claims in respect of any loss. On the 5th of April, 1881, a loss incurred in the year 1880 upon a ship belonging to the plaintiff, and insured in the association, was fixed by an average adjuster at £180. A call of £41 10s. on the plaintiff was, by mutual consent, set off against the loss. On the 13th of May, 1881, the association paid the plaintiff £100 on further account of the loss. On the 23rd of June a call was made on the plaintiff of £52 16s. 8d., and on the 5th of July another call of £31 4s. The plaintiff having tendered the balance, the association refused to accept it, and during the pendency of an action to recover the full amount of the two calls one of the plaintiff's ships was wholly lost.

Held, that the plaintiff had not forfeited his claim in respect of the loss.—*Williams* v. *British Inland Marine Association*, Q.B.D.—57 L. T. 27.

4. *Partial loss—Repair—Restoration.*—A ship insured under a time policy, had, above the main deck, a saloon deck for passengers. During the time covered by the policy the saloon deck was destroyed by fire. At the time of the fire the ship was engaged in carrying cargo, being useless for passengers. After the expiration of the policy the ship was converted into a cargo ship, and the saloon deck was not reinstated. The cost of converting the ship was less than the cost of the reinstatement of the saloon deck would have been. The ship, after the alteration, was as valuable for sale or use as before the accident. The owners sued the underwriters to recover the cost of reinstating the saloon deck.

Held, that the shipowners were not entitled to recover the cost of reinstatement, but only the cost of converting the ship.—*Bristol Steam Navigation Co.* v. *Indemnity Mutual Marine Insurance Co.*, Q.B.D.—57 L. T. 101.

5. *Perils of the sea—Injury to machinery.*—By a policy of marine insurance on a steamship and machinery, including donkey-engine, boilers, pumps, and all connections, the perils insured against were the usual perils—namely, of the seas, men-of-war, fire, &c.—and all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the subject-matter of the insurance. For the purposes of the voyage it was necessary to pump water into the main boilers by means of the donkey-engine and pump in the usual way; but, owing to a check-valve being stopped, the air-chamber in the pump became filled with water, and split.

Held, that the damage, whether caused by negligence or not, was not covered by the words "perils of the seas," or by the general words.

Decision of the Court of Appeal (reported 34 W. R. 674, 17 Q. B. D. 195) reversed.

West India and Panama Telegraph Co. v. *Home and Colonial Marine Insurance Co.*, 29 W. R. 92, 6 Q. B. D. 51, disapproved.—*Thames and Mersey Marine Insurance Co.* v. *Hamilton*, H.L. 337—12 App. 484; 56 L. J. Q. B. 626; 57 L. T. 795.

6. *Total loss—Abandonment—Salvage—Sale of ship and cargo.*—To constitute a total loss it is not necessary that a ship should be actually destroyed; but there is a constructive total loss if the owner has lost his right of property and possession by a sale under the decree of a court of competent jurisdiction in consequence of a peril insured against.

A ship was deserted by the master and crew, after they had brought it into a sinking condition. It was afterwards towed into port by salvors and was sold, as well as the cargo, under the decree of a court of admiralty, for less than the cost of the salvage services.

Held, that the sale constituted a total loss of the ship and cargo.—*Cossman* v. *West; Cossman* v. *British American Assurance Co.*, P.C.—13 App. 160; 57 L. J. P. C. 17; 58 L. T. 122.

7. *Warranty—General average—Particular average.*—Under a policy of insurance covering all losses not recoverable under a policy of insurance containing the clause "warranted free from average under three per cent., unless general, or the ship is stranded, sunk, or burnt," the insured are entitled to recover if the particular average loss is less than three per cent., although if added to the general average loss it would be more than three per cent., if the ship be not stranded, sunk, or burnt.—*Price* v. *A1 Ships Small Damage Insurance Co.*, Q.B.D.—57 L. J. Q. B. 459.

See also INJUNCTION, 8; PRACTICE, 20.

MARKET:—

Disturbance — Franchise — Fair — Injunction.—Under a grant of holding markets and fairs in or at a town the limits of the franchise include all the town.

If there is a franchise right to hold markets or fairs and take tolls in respect thereof, and an authorised market or fair is held within a reasonable distance of the prescribed place, and within the limit of the grant, on the day prescribed by the grant, a disturbance of the right will be implied; if the acts are done outside the prescribed limits and on other days than those prescribed by the grant, actual disturbance and injury to the right must be held.

Every person who takes part in, or knowingly takes advantage of, an illegal combination to disturb a franchise is guilty of combination.

The right to set up a market or fair is a prerogative right, and cannot be a public right.—*Marquis of Downshire* v. *O'Brien*, V.C. (Ir.)—19 L. R. Ir. 380.

MASTER and SERVANT:—

1. *Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-section* 1; *s.* 2, *sub-section* 1—*Negligence—"Defect of machinery."*—The mere fact that a machine is dangerous to the workmen using it does not constitute a "defect in the condition of the machine" within the meaning of section 1, sub-section 1, of the Employers' Liability Act, 1880.

The plaintiff was employed at a carding machine at the defendants' mill. In the machine was a vertical wheel which revolved upon a bed-plate, and in the vertical surface of the wheel there were large holes. It was the plaintiff's duty to place a leather band over the wheel while in motion. Upon the occasion in question, while engaged in putting the band on the wheel, the plaintiff's thumb was caught in one of the holes and was cut off. There was evidence that the holes were dangerous and of no use except to lessen the weight of the wheel, and the defendants had carding machines both with solid and open wheels. The machine had been in use for many years without any accident happening, and no complaint had been made.

Held (Lord Esher, M.R., dissenting), that there was no evidence of any "defect in the condition of the machine" for which the defendants were liable within section 1, sub-section 1, and section 2, sub-section 1, of the Employers' Liability Act, 1880,—*Walsh* v. *Whiteley*, C.A. 876.

2. *Employers' Liability Act*, 1880, *s.* 1, *sub-sections* 2, 3; *s.* 8—*Negligence—Fellow-servant—Foreman.*—The plaintiff was employed by the defendant as one of a gang of labourers, of whom B. was the foreman, in stowing bales of wool in the hold of a ship. B. was himself a labourer, but stood at the top of the hatchway to signal to the men below when a bale was about to be lowered. The plaintiff was injured by a bale being lowered, as he alleged, without warning from B.

Held, that there was no evidence that the injury resulted from the negligence of any person having "any superintendence intrusted to him whilst in the exercise of such superintendence," or from "the negligence of any person to whose orders the plaintiff was bound to conform while conforming to the said orders" within the meaning of section 1, sub-sections 2 and 3, of the Employers' Liability Act, 1880.

Judgment of the Queen's Bench Division (reported 36 W. R. 335, 19 Q. B. D. 585) affirmed.—*Kellard* v. *Rooke*, C.A. 875.

3. *Employers' Liability Act*, 1880, *ss.* 1, 8—*Negligence—Horse—Knowledge of workman.*—The plaintiff was employed as a driver by the defendant, who was a wharfinger. The foreman of the defendant's stables told the plaintiff to drive a horse which was so vicious as to be unfit to be driven by anybody. The plaintiff objected to driving the horse, but was ordered to do so. While driving in the performance of his duty, and guilty of no negligence in driving, he was injured by a kick from the horse.

Held, (1) that the plaintiff was a workman within section 8 of the Employers' Liability Act, 1880; (2) that the horse was "plant" used in the defendant's business, and that vice in the horse was a "defect in the condition of the plant" within section 1; (3) (Lopes, L.J., dissenting), that there was evidence of negligence on the part of the defendant's foreman, and that it was not conclusively shown that the risk was voluntarily incurred by the plaintiff.

Thomas v. *Quartermaine*, 35 W. R. 555, 18 Q. B. D.

685, distinguished.—*Yarmouth* v. *France*, Q.B.D. 281—20 Q. B. D. 447; 57 L. J. Q. B. 7.

4. *Employers' Liability Act*, 1880, *s.* 7—*Notice of action—Service—Evidence.*—A notice of action under the Employers' Liability Act, 1880, omitted the address of the person injured, and also the cause of injury, and gave the date of the accident incorrectly. The county court judge was of opinion that the defendants were not prejudiced by any defect or inaccuracy in the notice, and that there had been no intention to mislead.

Held, that the notice was valid.

It was proved that the notice was posted, though not in a registered letter, to the defendants on the day before the day on which the six weeks from the accident elapsed, and a reply was received from the defendants' solicitors a few days afterwards.

Held, that there was evidence on which the county court judge might find that the notice was received within the six weeks.—*Previdi* v. *Gatti*, Q.B.D. 670.

5. *Negligence—Contributory negligence—Statutory duty—Employers' Liability Act*, 1880, *s.* 1, *sub-section* 2—*Coal Mines Regulation Act*, 1872 (35 & 36 *Vict. c.* 76), *s.* 52.—The plaintiff's husband had been employed in the defendant's coal mine, where it was the custom that the banksman, though required to be constantly in attendance at the mine while men were ascending or descending under section 52 of the Coal Mines Regulation Act, 1872, should not be present during the night. The plaintiff's husband was killed while ascending at night, in consequence of an accident caused by the absence of the banksman.

Held, in an action under the Employers' Liability Act, 1880, that the maxim *Volenti non fit injuria* did not apply, as the injury was caused by the breach of a statutory duty.—*Baddeley* v. *Earl Granville*, Q.B.D. 63—19 Q. B. D. 423; 56 L. J. Q. B. 501; 57 L. T. 268.

6. *Negligence—Machinery.*—A. died from the result of injuries while serving as an officer on board of the defendants' steamship. A derrick was being hoisted from the deck to the mast, for the purpose of discharging cargo, by a rope which worked through an iron bolt fixed in a trestle tree. The bolt broke, and A. was crushed by the derrick. The greater part of the rope was covered up, and could not be examined without being drawn out of the trestle tree. The bolt was in a defective condition, and there was no skilled person on the vessel to examine the machinery. None of the defendants' servants knew the condition of the bolt. When the accident happened the derrick was being used in the usual manner.

Held, in an action by A.'s widow under Lord Campbell's Act, that there was no evidence of negligence on the part of the defendants.—*Agnew* v. *Ardnamult Steamship Co.*, EX.D. (Ir.)—22 L. R. Ir. 55.

7. *Wages — Mining — Deductions — Coal Mines Regulation Act*, 1872, *ss.* 17, 18.—The owners of a coal mine agreed with the persons employed in the mine that the mineral contracted to be gotten should be clean coal of a certain size, that coals sent from the stalls and headings should be paid for at a certain rate, and that no slack should be paid for, but all slack should be deducted. By section 17 of the Coal Mines Regulation Act, 1872, where the amount of wages paid to miners depends on the amount of mineral gotten, the miners shall be paid according to the weight of mineral gotten, but the owner may agree with the miners to deduct in respect of stones or materials other than mineral contracted to be gotten.

Held (Fry, L.J., dissenting), that the agreement was within the Act, and that the agreement for deduction of slack, being unauthorised by the Act, was void; and that the miners were entitled to be paid at the agreed rate for all coal sent up by them.

Judgment of the Queen's Bench Division (reported 35 W. R. 857, 19 Q. B. D. 357) affirmed.—*Bourne* v. *Netherseal Colliery Co.*, C.A. 405—20 Q. B. D. 615; 57 L. J. Q. B. 306.

See also COMPANY, 14; FALSE IMPRISONMENT, 1; LIBEL, 4; LOCAL GOVERNMENT, 7; SHIPPING, 34.

MAYOR'S COURT. — See CERTIORARI; JURISDICTION, 12—14.

MEDICAL ACT:—

Qualification — Assistant — Apothecaries Act (55 *Geo.* 3, *c.* 94), *ss.* 20, 21—*Medical Act*, 1858 (21 & 22 *Vict. c.* 90), *ss.* 31, 32.—A qualified medical practitioner cannot recover for the services rendered or medicine given by his unqualified and unregistered assistant at a branch establishment, the qualified practitioner not being consulted on the case in question by the unqualified man.—*Howarth* v. *Brearley*, Q.B.D. 302—19 Q. B. D. 303; 56 L. J. Q. B. 543; 56 L. T. 743.

METROPOLIS MANAGEMENT ACTS:—

1. *Building — Negligence of contractor — Metropolitan Building Act*, 1855 (18 & 19 *Vict. c.* 122), *ss.* 3, 82, 83, 88, 89, 94, 97.—The provisions of the Metropolitan Building Act, 1855, do not exonerate a contractor from liability for negligence in constructing a building.—*White* v. *Peto*, CH.D. KAY, J.—58 L. T. 710.

2. *Nuisance — Drain — Sewer—Metropolis Local Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 68, 72, 74, 76, 250.—The duty imposed by section 72 of the Metropolis Local Management Act, 1855, on a district board to keep the sewers which are by the Act vested in them so as not to be a nuisance, is not an absolute duty, but only a duty to use all reasonable care and diligence to keep the sewers in a proper condition, and the board will not be liable for a nuisance caused by a drain which has, by reason of another drain being connected with it, become a "sewer" if they did not know before action brought, and could not, by the exercise of reasonable care, have discovered that the drain was a "sewer."—*Balmoral* v. *Poplar District Board*, CH.D. NOR., J. 501—37 Ch. D. 372; 57 L. J. Ch. 579; 58 L. T. 720.

3. *Street—Paving, &c.—Expenses—Apportionment—Adjoining districts—Metropolis Local Management Act*, 1855, *ss.* 105, 140—*Metropolis Local Management Act*, 1862 (25 & 26 *Vict. c.* 102), *ss.* 77, 78.—The Metropolitan Board of Works made an order under section 140 of the Metropolis Local Management Act, 1855, and section 86 of the Metropolis Local Management Act, 1862, placing a new street, being partly in the parish of the plaintiff vestry and partly in the district of the defendant board, under the exclusive management of the plaintiffs, and providing that the expenses of maintenance should be borne by the two authorities equally.

Held, that the plaintiffs were not entitled to recover from the defendants one-half of the expenses incurred in paving the street under section 105 of the earlier Act.—*Camberwell Vestry* v. *Greenwich District Board*, Q.B.D. 126—19 Q. B. D. 502; 56 L. J. Q. B. 636.

MINING:—

Canal—Subjacent minerals—Right to support—Compensation.—A canal company's Act provided that nothing therein contained should affect the right of landowners to the mines and minerals within or under the land to be used for the canal, and that, if the owner or worker of any coal or other mine should

work near or under the canal, so as, in the opinion of the company, to endanger or damage the canal, or, in the opinion of the owner or worker, to damage the further working of the mine, it should be lawful for the company to treat and agree with the owner or worker, and that, in case of disagreement, a jury should be summoned to assess the amount which the owner or worker ought to receive on being restrained from working the mine, and on payment of such amount he should be perpetually restrained from so working within limits to be specified by the jury. The defendants gave notice to the company of their intention to work coal which formed the support of the canal, but the defendants refused to pay compensation. The defendants worked the coal and damaged the canal.

Held, that the defendants had a right to have the compensation assessed by a jury, but not to work the coal to the injury of the canal, and that they were responsible for the damage to the canal.—*Lancashire and Yorkshire Railway Co.* v. *Knowles*, C.A.—20 Q. B. D. 391; 57 L. J. Q. B. 150.

See also ARBITRATION, 5; MASTER AND SERVANT, 5, 7; QUEENSLAND, LAW OF, 1, 2; RAILWAY, 5; WATER, 1.

MISREPRESENTATION:—

1. *Company—Prospectus — Directors—Damages.*—An action for damages for deceit will lie against a person who makes an untrue statement as to a fact without any reasonable ground for believing it to be true when the statement is made with a view to its being acted upon by others.

The expression "fraud" considered and explained.

Edgington v. *Fitzmaurice*, 33 W. R. 911, 29 Ch. D. 459, and *Weir* v. *Bell*, 26 W. R. 746, 3 Ex. D. 238, considered.

A tramway company, by its special Act, was authorised, with the consent of the Board of Trade, to use steam or any other mechanical motive power instead of horse power. The directors of the company issued a prospectus which contained a statement that the company, by its special Act, "has the right to use steam or mechanical motive power instead of horses." The plaintiff took shares on the faith of the statement in the prospectus. The Board of Trade refused their consent to the use of steam power, and the company was wound up.

Held (reversing the decision of Stirling, J.), that the directors were liable to the plaintiff in damages in an action of deceit, on the ground that the statement in the prospectus was made without any reasonable ground for believing it to be true.

Held, also, that the measure of damages was the difference between the price which the plaintiff paid for the shares and the real value of the shares—as distinguished from their market value—at the time of their allotment to the plaintiff.—*Peek* v. *Derry*, C.A. 889—37 Ch. D. 541; 57 L. J. Ch. 347; 59 L. T. 78.

2. *Company—Prospectus—Omission of contract—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 38.—Before the issue of the prospectus of the S. Co., the defendant S. verbally agreed with E. that, out of £21,000 represented in the prospectus to be the cash portion of the purchase-money, E. should receive £6,000 as promoter. This agreement did not appear on the prospectus. The plaintiff stated that if he had known of the agreement he would not have recommended the shares in the company to the plaintiffs C. & Co.

Held, (1) that there was such a misrepresentation as to entitle the plaintiff to relief; (2) that the agreement, though not in writing, was within section 38 of the Companies Act, 1867, and that its non-disclosure in the prospectus rendered such prospectus fraudulent; (3) that the plaintiff was entitled to judgment.—*Cupel* v. *Sim's Composition Co.*, CH.D. KEK., J. 689—57 L. J. Ch. 713; 58 L. T. 807.

3. *Partnership—Rescission of contract—Indemnity.*—A. was induced by misrepresentations made without fraud to become a partner in a business which was in fact insolvent. The firm afterwards became bankrupt.

Held, that A. was entitled to rescission of the contract and repayment of his capital.

Decision of the Court of Appeal (reported 35 W. R. 597, 34 Ch. D. 582) affirmed.

Quære, whether the other partners were liable to indemnify A. against the general liabilities of the firm.—*Adam* v. *Newbigging*, H.L.—13 App. 309.

See also COMPANY, 2; SETTLEMENT, 8; TRADE-MARK, 2; VENDOR AND PURCHASER, 8.

MISTAKE.—See WILL, 63.

MORTGAGE:—

1. *Account—Interest—Mortgagee in possession—Lease—Licensed house—Sale of beer.*—A leasehold public-house was mortgaged to brewers who entered into possession, and, after carrying on the business for some time, leased the public-house to tenants, with agreements binding the tenants to take their beer from them, under which they derived a large profit from the sale of beer. They afterwards sold the public-house under the power of sale in the mortgage.

Held, in an action by the mortgagor for an account, that the mortgagees were not entitled to interest on the cost of beer supplied while they were carrying on the business; that they were not bound to account for the profits derived from the sale of beer to the tenants of the public-house; but that they were chargeable with the increased rent they might have obtained if the tenants had been under no restrictions as to purchasing their beer.—*White* v. *City of London Brewery Co.*, CH.D. NOR., J. 881.

2. *After-acquired property—Consideration—Divisible contract.*—A mortgagor assigned by way of mortgage (*inter alia*) property not then in existence, comprising "all moneys . . . to which the mortgagor . . . may, during this security, become entitled under any settlement, will, or other document, either in his own right or as next of kin of . . . any . . . person or persons," and "also all . . . personal property . . . of, to, or in which the mortgagor, . . . during this security, shall become beneficially possessed, entitled, or interested for any vested, contingent, or possible estate or interest." After the execution of the mortgage, but during the continuance of the security, the mortgagor became entitled to a share in a residuary estate.

Held, that, with regard to all property non-existent at the date of the mortgage, the mortgage was to be be treated in equity as a contract for valuable consideration received; that the contract was divisible in its terms; that, with respect to moneys to which the mortgagor might become entitled under any will, the contract would be enforced in equity; and that the share in the testator's residuary estate to which the mortgagor had become entitled was bound by the contract and was effectually charged in favour of the mortgagee.

Holroyd v. *Marshall*, 11 W. R. 171, 10 H. L. Cas. 191, and *Bennett* v. *Cooper*, 9 Beav. 252, discussed and followed.

Belding v. *Read*, 13 W. R. 867, 3 H. & C. 955, not followed.

Official Receiver v *Tailby*, 35 W. R. 91, 18 Q. B. D 25, distinguished.

Per Cotton and Bowen, L.JJ.—No distinction can be drawn on the question of "vagueness" between contracts in marriage settlements and contracts in other instruments relating to future property.

Decision of Kay, J. (35 W. R. 388, 35 Ch. D. 109), affirmed.—*Coombe* v. *Carter*, C.A. 293—37 Ch. D. 348; 57 L. T. 823.

3. *Attornment clause—Distress—Bankruptcy—Payment to trustee—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 6.—An indenture of mortgage contained a clause whereby the mortgagor attorned and became tenant from quarter to quarter to the mortgagee in respect of the premises at a yearly rent, by equal quarterly payments of £2,000. The consideration for the mortgage was an advance of £20,000, on which interest at £5 per cent. per annum was to be made payable. By the terms of the mortgage deed the first payment of the above rent was to be made on the first day of the month next after any interest thereby secured should have become in arrear, but all money received by the mortgagee for rent due under the attornment was to be accepted in the first place in or towards satisfaction of the interest then in arrear. A bankruptcy petition was subsequently presented against the mortgagor, upon which he was adjudicated bankrupt, but between such petition and adjudication the mortgagee distrained under the tenancy created by the attornment, and realised the sum of £1,715. The mortgage was not registered as a bill of sale.

Held (Lord Esher, M.R., *dubitante*), that the attornment clause fell within the first part of section 6 of the Bills of Sale Act, 1878, and not within the proviso in that section, which is limited to cases where possession by the mortgagee precedes the demise; that, the mortgage not being registered, the distress was unlawful; and that the trustee in bankruptcy was entitled to the money realised.

Decision of Cave, J. (36 W. R. 639), affirmed.—*Ex parte Kennedy, In re Willis*, C.A. 793.

4. *Contingent interest—Fund in court—Stop order—Petition—Service.*—Where a contingent interest in a fund in court has been mortgaged and the mortgagee places a stop order on the fund, but the mortgagor dies before his interest vests, the persons ultimately entitled to the fund, upon applying for payment out, need not serve such mortgagee.—*Vernon* v. *Croft*, CH.D. CHI., J. 778—58 L. T. 919.

5. *Equitable mortgage — Specific performance — Covenant—Statute of Limitations—Acknowledgment.*—In 1874 a document not under seal recited that the defendant had deposited title deeds with the plaintiff by way of equitable mortgage to secure £6,000 without interest, and the defendant agreed to pay on demand £6,000, with interest, and to execute a proper mortgage. No interest was ever paid, and in 1885 an action was brought for specific performance of the agreement, and the court declared that the plaintiff was entitled to a lien on the deeds, and to have the agreement specifically performed, without prejudice to the defendant's right to account or the Statute of Limitations. While the action was pending the defendant wrote letters to the plaintiff in which he admitted a liability to account.

Held, that, the defendant's letters having taken the case out of the Statute of Limitations, the plaintiff was entitled to have a covenant to pay the principal and interest inserted in the mortgage deed.—*Firth* v. *Slingsby*, CH.D. STI., J.—58 L. T. 481.

6. *Fixtures—Sub-demise—Trade fixtures.*—Words which are sufficient when used in a conveyance in fee to pass trade fixtures are also sufficient to pass them when used in a demise.

By a mortgage by sub-demise, a corn mill and other leasehold premises, together with certain fixtures specifically mentioned, and constituting the motive power of the mill, were conveyed by sub-demise to the mortgagees, to secure a sum due to them by the mortgagors. The deed contained the following general words:—"Together with all buildings, fixtures, rights, lights, easements," &c.

Held, that the word "fixtures" in the general words was not restricted to fixtures *ejusdem generis* with those previously specifically mentioned, but was intended to extend and enlarge that class; and that the trade fixtures in the mill passed by the sub-demise to the mortgagees.

Hawtry v. *Butlin*, 21 W. R. 633, L. R. 8 Q. B. 293, explained.

Decision of Bristowe, V.C., reversed.—*Southport and West Lancashire Banking Co.* v. *Thompson*, C.A. 113—37 Ch. D. 64; 57 L. J. Ch. 114.

7. *Foreclosure action—Judgment—Foreclosure nisi Foreclosure absolute—Ord.* 18, *r.* 2—*Ord.* 55, *r.* 5a.—In a foreclosure action commenced by originating summons, an order for foreclosure absolute may, as against the mortgagor in possession, served and not appearing, include an order for delivery of possession, notwithstanding that such an order was not claimed by the summons.—*Best* v. *Applegate*, CH.D. NOR., J. 397—37 Ch. D. 42; 57 L. J. Ch. 506; 57 L. T. 599.

8. *Foreclosure action— Parties— Glebe— Vicar—Patron.*—The vicar of a parish mortgaged part of his glebe under the powers of a statute giving owners of limited interests in land power to charge the costs of certain improvements on the land. The mortgagee brought an action for payment, or foreclosure, or sale.

Held, that the patron, having no interest in the soil, but only in the right of appointment to the cure of souls, need not be joined as a party to the action.—*Goodden* v. *Coles*, CH.D. KEK., J. 828.

9. *Foreclosure action—Receiver—Foreclosure absolute.*—Judgment for foreclosure absolute ends a foreclosure action, and therefore the plaintiff cannot obtain a receiver, even though the conveyance of the property has not been settled.—*Wills* v. *Luff*, CH.D. CHI., J. 571—38 Ch. D. 197; 57 L. J. Ch. 563.

10. *Foreclosure action — Receiver — Goodwill — Form of order.*—Where the property subject to a mortgage included the goodwill of a business, and a receiver and manager had been appointed after the commencement of a foreclosure action, the court inserted in the order of foreclosure a proviso that any person redeeming, or, in the event of foreclosure, the plaintiff, should be at liberty to apply to the judge in chambers for payment of any money in court or in the hands of the receiver.

Coleman v. *Llewellin*, 35 W. R. 82, 34 Ch. D. 143, followed.—*Smith* v. *Pearman*, CH.D. CHI., J. 631—58 L. T. 720.

11. *Land Improvement Act—Charge—Priority.*—By an Act of Parliament passed in 1849 the General Land Drainage and Improvement Co. was incorporated for the purpose of executing works for the improvement of lands, and undertaking and assisting the execution of such improvements, and other purposes. By an Act of Parliament passed in 1853 the Lands Improvement Co. was incorporated, and, by subsequent Acts of 1855 and 1859, the Act of 1853 was amended; and by the Act of 1859 it was enacted that the three Acts should be read together as one Act, and cited together as the Lands Improvement Co.'s Acts. Both the Act of 1849 and the Lands

Improvement Co.'s Acts contained a section which provided that, upon the final order or certificate of the Inclosure Commissioners and the execution of the improvements, the company should have a first charge upon the inheritance of the improved lands in priority over every other then existing or future charge. The General Land Drainage and Improvement Co. obtained a first charge of the nature above mentioned upon certain lands, and the Lands Improvement Co. subsequently obtained a charge over the same lands.

Held, that the respective enactments were not irreconcilable, and that the charge which was first in order of time had priority.—*Pollock* v. *Lands Improvement Co.*, CH.D. CHI., J. 617—37 Ch. D. 661; 58 L. T. 374.

12. *Lease—Rent—Notice to lessor.*—Where a tenant holding under a lease, granted by the mortgagor subsequent to the mortgage, pays to the mortgagee the amount due for rent under threat of legal proceedings and in consequence of the default of his lessor, the tenant can set up such payment in answer to a claim for the rent by the mortgagor, or by anyone claiming under him.

Johnson v. *Jones*, 9 A. & E. 809, followed.

Decision of the Queen's Bench Division (reported 36 W. R. 75, 20 Q. B. D. 209) affirmed.—*Underhay* v. *Read*, C.A. 298—57 L. J. Q. B. 129; 58 L. T. 457.

13. *Life insurance policy—Premium—Commission to solicitor.*—The plaintiff mortgaged a life interest to the defendants, it being agreed that a policy on her life should be effected, and all premiums secured on the mortgaged property. A., as solicitor for all parties, paid the premiums, and received five per cent. commission from the insurance company.

Held, that the mortgagor had no interest in the premiums, and was not entitled to credit for the commission paid to A.—*Leete* v. *Wallace*, CH.D. KAY, J.—58 L. T. 577.

14. *Power of sale—Notice—Waiver.*—A mortgage dated the 22nd of November, 1880, contained a covenant by the mortgagor to repay the principal money and interest on the 22nd of May, 1881, and contained a clause giving the mortgagee power to sell at any time after the expiration of six months from the date of the mortgage, but the clause was followed by a proviso restricting the exercise of the power of sale by the mortgagee, "unless and until default shall have been made in payment at the time hereinbefore appointed for payment thereof of some principal money or interest, . . . and" the mortgagee "shall have given a notice in writing" to the mortgagor "to pay off the moneys for the time being owing . . . and default shall have been made in the payment of . . . such moneys for three calendar months from the time of giving . . . such notice." The mortgage also contained the usual clause for the protection of purchasers on any sale by the mortgagee purporting to be made in pursuance of the power. In January, 1881, the mortgagee gave notice in writing to the mortgagor requiring payment of the principal moneys. In June, 1881, the principal moneys being unpaid, the mortgagee sold the mortgaged premises, in professed exercise of his power of sale, to a purchaser for value.

Held, affirming the decision of Kay, J., in an action instituted in March, 1885, by the executrix of the mortgagor, that the sale should be set aside, and should stand only as a transfer of the mortgage, on the ground that the power of sale had not arisen in June, 1881, and could not arise until at least nine months from the date of the mortgage.

Held, also, on the evidence, that neither the mortgagor nor the plaintiff, his executrix, had waived the benefit of the proviso restricting the exercise of the power of sale.

Observations on the effect of the clause protecting purchasers with reference to waiver by the mortgagor of the restrictive proviso.—*Selwyn* v. *Garfit*, C.A. 515—38 Ch. D. 373; 57 L. J. Ch. 609.

15. *Redemption—Account—Interest—Mortgagee in possession—Costs.*—In an action by persons claiming to represent an original mortgagor for redemption of the mortgaged property, the mortgagees having been in possession for many years, the judgment at the trial directed the taking of the ordinary accounts in a redemption action against mortgagees in possession, including an account of what was due to the defendants for principal and interest and their taxed costs of the action; and that, on payment by the plaintiffs within six months after the certificate of the balance, if any, which should be found due to the defendants, the defendants should reconvey the mortgaged property to the plaintiffs, and that, in default of payment, the action should be dismissed, with costs; but, in case it should appear, on taking the accounts, that the defendants had been overpaid, the further consideration of the action was to be adjourned. The chief clerk found by his certificate that the mortgage debt had been paid off in 1866 by means of rents which the defendants had received, and that there was a sum of £618 due from them in respect of rents which they had since received. The defendants had, by their statement of defence, denied the title of the plaintiffs to redeem, and had pleaded the Statute of Limitations. They had also insisted that a large balance was due to them. At the trial of the action the plaintiffs' title to redeem was not disputed, and the defence of the Statute of Limitations was overruled.

Held, that the account must be taken against the defendants with annual rests from the date at which the mortgage debt was fully paid.

Held, also, that the defendants must pay the costs of the action.—*Ashworth* v. *Lord*, CH.D. NOR., J. 446—36 Ch. D. 545; 57 L. J. Ch. 230; 58 L. T. 18.

16. *Redemption—Tenant for years—Agreement for lease.*—A tenant for years under an agreement for a lease made after a mortgage of the demised property is entitled to redeem the mortgage, whether the tenancy is beneficial or not.—*Tarn* v. *Turner*, CH.D. KEK., J.—57 L. J. Ch. 452; 58 L. T. 558.

17. *Redemption—Reconveyance—Account—Particulars.*—In an action by a mortgagor for reconveyance or redemption of the mortgaged property, the defendant by his counter-claim alleged that a certain specified sum was due to him, partly secured on bills of exchange accepted by the plaintiff and partly on open account, and that he had received divers sums in respect of the bills of exchange and other sums in respect of the moneys due on open account, but that a large balance was due to him; and he claimed an account and foreclosure or sale.

Held, on a summons by the mortgagor, that he was entitled to particulars from the defendant of the sums admitted to have been received by him in respect of the bills of exchange and the moneys due on open account.—*Kemp* v. *Goldberg*, CH.D. NOR., J. 278—36 36 Ch. D. 505; 56 L. T. 736.

18. *Release—Gift—Parol release—Consideration.*—Two brothers were, subject to their mother's life interest, entitled to a fund in equal moieties. One of them mortgaged his share to his father, who died, having appointed the other brother his executor and residuary legatee. The latter, on the death of his mother, wrote to his brother, the mortgagor, that, in ac-

cordance with her wish that he should hand over to him the mortgage deed, he gave himself the satisfaction of fulfilling her desire, and he inclosed the deed accordingly. Afterwards he insisted on his rights under the mortgage.

Held, that the gift, being by parol and without consideration, was imperfect, although accompanied by delivery of the deed, and could not be enforced by the mortgagor.

Shillito v. *Hobson*, 34 W. R. 286, 30 Ch. D. 396, followed.—*Hancock* v. *Berrey*, CH.D. KAY, J. 710; 57 L. J. Ch. 793.

See also ADMINISTRATION, 7, 10; BANKRUPTCY, 21, 39; BILL OF SALE, 14, 18; BUILDING SOCIETY, 4; COMPANY, 18, 26, 27, 30, 41; COSTS, 23, 24; DEED, 3, 6; DISCOVERY, 3; EVIDENCE, 14; LIMITATIONS, STATUTE OF, 5; LUNACY, 4; PARTNERSHIP, 5; SETTLEMENT, 4, 9, 18; SHIPPING, 25, 27; SOLICITOR, 3, 5—7, 11, 12, 17; TRUSTEE, 21—24.

MORTMAIN.—See ADMINISTRATION, 15.

MUNICIPAL CORPORATION:—

1. Quo warranto — *Resignation of member—Co-option—Notice of meeting—Commissioners Clauses Act*, 1847 (10 & 11 *Vict.* c. 103), *ss.* 43, 47.—Township commissioners appointed under a special Act, which incorporates the Commissioners Clauses Act, 1847, accepted the resignation of A., one of the members of the commission, at an ordinary meeting, and elected B. in his place at a special meeting. The notice of the special meeting referred to an annexed requisition, which mentioned as special business the co-option of a member of the board in A.'s place.

Held, that B. was duly elected.—*Reg.* v. *Byrne*, Q.B.D. (Ir.)—22 L. R. Ir. 330.

2. Ultrà vires—*Borough funds—Municipal Corporations Act*, 1882 (45 & 46 *Vict.* c. 50), *ss.* 15, 140, 141, 143.—A resolution by a municipal corporation to pay a certain sum to the mayor to be expended by him in celebrating the Queen's Jubilee is not *ultrà vires*.—*Attorney-General* v. *Mayor, &c., of Blackburn*, CH.D. CHL., J.—57 L. T. 385.

See also ELECTION LAW, 1—4; HIGHWAY, 5; INCOME TAX, 8; NATAL, LAW OF; NEW SOUTH WALES, LAW OF, 3; QUO WARRANTO, 1; RAILWAY, 12.

NATAL, LAW of:—

Municipal corporation — Street — Encroachment — Private Act—Arbitration.—A municipal corporation brought an action to compel a company to remove buildings which were, according to a survey authorised by the plaintiff's private Act, an encroachment on a street.

Held, that the statute excluded a right of action, and that the question must be determined by arbitration under the statute.—*Mayor, &c., of Pietermaritzburg* v. *Natal Land and Colonisation Co.*, P.C.—13 App. 478; 58 L. T. 895.

NATIONAL DEBT CONVERSION ACT.—See TRUSTEE, 18.

NATURALISATION.—See JURISDICTION, 5, 7.

NECESSARIES.—See HUSBAND AND WIFE, 10; SHIPPING, 28.

NAVY:—

Desertion—Naval officer—Absence without leave—Arrest without warrant—Naval Discipline Act, 1866 (29 & 30 *Vict.* c. 109), *ss.* 19, 50, 51, 86, 87.—A commissioned officer of the Royal Navy, who has been appointed to one of her Majesty's ships, and has joined the ship, may not resign his commission without the assent of the Admiralty; and until such assent be given he is "a person belonging to her Majesty's Navy" within the Naval Discipline Act, 1866, s. 87.

Section 50 does not prohibit a naval officer from making an arrest without a warrant under section 51.—*Reg.* v. *Cuming*, Q.B.D. 9—19 Q. B. D. 13; 56 L. J. Q. B. 287; 57 L. T. 477.

NEGLIGENCE:—

1. *Contributory negligence.*—The plaintiff was directed by his employer to work in a particular place, which was below a place where the defendants were engaged as contractors, their work being, in the absence of proper precautions, dangerous to persons working below. The plaintiff knew the danger. He was injured by a piece of iron dropped by one of the defendants' workmen. The jury found that the defendants were guilty of contributory negligence, that the plaintiff was not guilty of contributory negligence, and that therefore he did not voluntarily incur the risk.

Held, that the plaintiff was entitled to recover damages.—*Thrussell* v. *Handyside*, Q.B.D.—20 Q. B. D 359; 57 L. J. Q. B. 347; 58 L. T. 344.

2. *Contributory negligence — Evidence.*—In an action for personal injuries caused by negligence, where the injured person has voluntarily contributed to such injuries the case ought not to be left to the jury unless the question whether his act was negligent was, either *per se* or in connection with the conduct of the defendants, a question of fact, or unless there is a reasonable inference that the defendants could by due care have obviated the consequences of the contributory negligence.—*Coyle* v. *Great Northern Railway Co. of Ireland*, EX.D. (Ir.)—20 L. R. Ir. 409.

3. *Duty—Licensee.*—The defendant's horse, by the negligence of the defendant's servant, ran away with a cart, and turned from a highway into the yard of the defendant's house, which opened on to the highway. The plaintiff's wife, who was paying a visit at the defendant's house, ran into the yard to see what was the matter, and was knocked down by the horse and cart.

Held, that there was no duty on the part of the defendant to use ordinary care towards the plaintiff's wife, and that an action was not maintainable.—*Telhausen* v. *Davies*, Q.B.D. —57 L. J. Q. B. 392.

See also DAMAGES, 3; ESTOPPEL, 2, 7; HUSBAND AND WIFE, 1; MASTER AND SERVANT, 1—3, 5, 6; METROPOLIS MANAGEMENT ACTS, 1; RAILWAY, 6—9; SHIPPING, 4, 7—17, 33; SOLICITOR, 6; TRUSTEE, 22—25.

NEW SOUTH WALES, LAW of:—

1. *Action against Government—Tort.*—The Government of the Colony of New South Wales may be sued in an action of tort.—*Farnell* v. *Bowman*, P.C.—12 App. 643; 56 L. J. P. C. 72; 57 L. T. 318.

2. *Crown lands—Forfeiture—Re-grant.*—The defendant applied for a grant, partly on conditional purchase and partly on conditional lease of land, within the plaintiff's leasehold area. The land had been previously conditionally sold and forfeited by the purchaser.

Held, that the forfeited land could be re-granted by the Crown.—*Tearle* v. *Edols*, P.C.—13 App. 183; 57 L. J. P. C. 58; 58 L. T. 360.

3. *Municipal corporation—Bye-law—Ultrà vires—Burial.*—A bye-law framed under the New South Wales Municipalities Act, 1867, s. 153, which authorises regulation of interments within the municipality, is not *ultrà vires* in that it practically prohibits interments in a certain cemetery, and thus interferes with the private rights of owners of ground therein.

Quære, whether, and in what circumstances, a bye-law may be set aside for unreasonableness.—*Slattery* v. *Naylor*, P.C. 897—13 App. 446; 59 L. T. 41.

4. *Railway—Merchandise rates—"Colonial wine."*—The Governor of New South Wales issued a table of merchandise rates to be charged for goods, amongst others "colonial wine" conveyed by railways in that colony.

Held, that the rates were chargeable for wine grown in any colony.—*New South Wales Railway Commissioner* v. *Hyland*, P.C.—56 L. J. P. C. 76.

NEW TRIAL.—See COUNTY COURT, 17; HIGHWAY, 1; PRACTICE, 5, 42, 44.

NEXT FRIEND.—See COSTS, 34; PRACTICE, 18.

NEXT of KIN.—See ADMINISTRATION, 5, 6, 14; COSTS, 1.

NOTICE in BANKRUPTCY.—See BANKRUPTCY, 17—22.

NOTICE of ACTION.—See MASTER AND SERVANT, 4.

NOTICE to QUIT.—See COUNTY COURT, 16.

NOTICE to TREAT.—See LANDS CLAUSES CONSOLIDATION ACT, 3.

NUISANCE:—

1. *River—Pollution—Joint tort-feasors.*—If several riparian manufacturers have caused a nuisance to a riparian owner by polluting the water of a river, the fact that they are all responsible for the nuisance is no answer to an action against one of them.—*Blair* v. *Deakin*, CH. D. KAY, J.—57 L. T. 522.

2. *River — Pollution — Prescription — Change in manufacture—Land Drainage Act*, 1861 (24 & 25 *Vict. c.* 133), *s.* 58.—The appellants began business on certain premises as fellmongers in 1832, and in 1852 added the business of a tannery, discharging the refuse into a stream within the jurisdiction of the respondents. In 1877 the appellants set up a manufactory of leathern boards on the same premises, and discharged refuse of a different character through the old and also through additional outlets into the same stream. The respondents convicted and fined the appellants for pollution of the stream under powers conferred by a local Act, which followed the terms of section 58 of the Land Drainage Act in saving existing legal rights. The quarter sessions upheld the conviction.

Held, that the rights of the appellants must be determined at the time of the passing of the Land Drainage Act, 1861; that, if they had gained at that time any legal right by prescription (as to which, *quære*), it was only the right to discharge the refuse of the fellmongery business; that that right was being exceeded, whether or not the burden on the servient tenement had been increased; and that the conviction was right.—*Clark* v. *Somersetshire Drainage Commissioners*, Q.B.D. 890; 57 L. J. M. C. 96.

3. *Small-pox hospital—Injunction.*—The defendants fitted up a cottage as a small-pox hospital. The grounds in which the cottage stood were bounded by a public road on one side, open fields on two other sides, and the plaintiff's property on the fourth side. The evidence being conflicting, a medical referee was appointed, who reported that there was appreciable danger to persons dwelling in the plaintiffs' houses.

Held, that an injunction should be granted.—*Bendelow* v. *Wortley Guardians*, CH.D. STI., *J.* 168—57 L. J. Ch. 762; 57 L. T. 849.

See also CRIMINAL LAW, 5; FISHERY, 1; METROPOLIS MANAGEMENT ACTS, 2; PRACTICE, 40.

NULLITY of MARRIAGE.—See HUSBAND AND WIFE, 11, 12; JURISDICTION, 6.

OFFICIAL RECEIVER.—See BANKRUPTCY, 23; SOLICITOR, 7.

ORDER and DISPOSITION.—See BANKRUPTCY, 24.

PARTICULARS.—See MORTGAGE, 17; PATENT, 3, 11; PRACTICE, 29—33.

PARTITION:—

1. *Sale—Discretion of court—Partition Act*, 1868 (31 & 32 *Vict. c.* 40), *s.* 5.—Upon the application for the sale of property by the owner of less than a moiety under section 5 of the Partition Act, 1868, the court will not direct a sale, even if none of the other persons interested undertake to purchase the applicant's share, unless the applicant shows some good reason why a sale should be made.—*Richardson* v. *Feary*, CH.D. NOR., *J.* 807.

2. *Short cause—Title—Affidavit.*—In an action for partition of real estate which was heard as a short cause, the court, being satisfied that all persons interested were parties to an action and desired a sale, allowed the title to be proved by affidavit.—*Coombe* v. *Vincent*, CH.D. KAY, J.—58 L. T. 709.

See also COSTS, 26; LUNACY, 2; PRACTICE, 18.

PARTNERSHIP:—

1. *Death of partner — Covenant — Enforcement against executors.* — Partnership articles provided that the partnership should last for fifteen years, and that in case any partner should die during the partnership, his executors or administrators should become partners in respect of his share.

Held, that the court would not, on the death of a partner, force the executors to become partners against their will; and that, if they declined to come in, the partnership must be treated as dissolved from the death of the deceased partner, but the judgment must reserve to the surviving partners the right to prosecute against the estate of the deceased any remedy which they might have in respect of any breach of a covenant in the articles.—*Lancaster* v. *Allsup*, CH.D. STI, J.—57 L. T. 53.

2. *Dissolution—Bill of exchange—Compromise of action.*—The defendant was a partner in the firm of G. & Co. from January to June, 1885, and no notice was given to the plaintiff of his retirement. Between those dates the plaintiff discounted an acceptance indorsed by G. & Co., which was dishonoured. The plaintiff sued G. & Co. for the amount, and G. & Co. brought a cross-action against the plaintiff for recovery of the bill. Both actions were stayed by order of the court on G. & Co. giving to the plaintiff a second acceptance for the amount of the first and £10 for costs, and the plaintiff giving up certain securities for the debt which were in his possession. The second acceptance was dishonoured, and the plaintiff sued the defendant upon it as a member of the firm of G. & Co.

Held, that the defendant was not liable, as the bill of exchange was given in settlement of legal proceedings, and the settlement was made without his knowledge or consent.—*Crane* v. *Lewis*, Q.B.D. 480.

3. *Dissolution—Capital—Profits—Lien.*—Partners treated their respective shares of the profits declared or estimated in each year as accretions to their respective capitals.

Held, that, in the year in which the dissolution of the firm occurred, profits could not be so treated; and that the surplus assets must be distributed, first, in paying to each partner his claims in respect of capital; the residue or deficiency to be divisible in the proportions of the respective interests of the partners, and the distribution of surplus assets to be subject to the lien of any partner on the entire assets to satisfy a deficiency. —*Binney* v. *Mutrie*, P.C. 129—12 App. 160; 56 L. T. 455.

4. *Dissolution — Receiver — Manager — Remuneration.*—A receiver and manager appointed by partners to wind up their business is, in the absence of any express stipulation, entitled only to a *quantum meruit.* —*Prior* v. *Bagster*, CH.D. STI., J.—57 L. T. 760.

5. *Profits — Loan — Mortgage.*—In deciding the question of partnership or no partnership in cases of loans to persons engaged in business, the court will not base its decision on isolated clauses in the agreement, nor on such circumstances as participation in profits, but will look at the whole agreement; and, if it appears therefrom that the business was a joint business, each party being concerned as principal and as agent for the other, the agreement will be treated as constituting a partnership.

A loan was made to a person engaged in an undertaking at a rate of interest varying with the profits arising out of the undertaking, the amount of the loan and the interest being secured by a mortgage to the lender of the borrower's interest in the undertaking. The borrower became bankrupt.

Held (reversing the decision of Stirling, J., 35 W. R. 106, 34 Ch. D. 536), that, notwithstanding the participation in profits, no partnership was created between the lender and the borrower, but that the transaction was a *bonâ fide* loan.

Mollwo v. *Court of Wards*, L. R. 4 P. C. 435, 21 W. R. Dig. 167, and *Ex parte Tennant*, 25 W. R. 854, 6 Ch. D. 303, followed.—*Badeley* v. *Consolidated Bank*, C.A. 745—38 Ch. D. 338; 57 L. J. Ch. 468.

See also COMPANY, 29; COVANANT, 5; INCOME TAX, 7; INJUNCTION, 9; MISREPRESENTATION, 3; PRACTICE, 16, 38; SHERIFF, 2; WILL, 38.

PATENT:—

1. *Disclaimer—Amendment of specification—Costs —Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 19.—While an action for infringement of several patents was pending, the court gave the plaintiffs leave to apply to the Commissioners of Patents to amend one of the patents by way of disclaimer, and to give the amended specification in evidence at the trial, the plaintiffs paying the costs of the action up to the date of the amendment, and waiving any claim to damages for infringement before the amendment.—*Gaulard* v. *Lindsay*, C.A.—38 Ch. D. 38; 57 L. J. Ch. 687; 59 L. T. 44.

2. *Infringement — Cross-action — Specification — Amendment — Disclaimer — Prohibition — Patents, Designs, and Trade-Marks Act*, 1883, *s.* 18, *sub-section* 10; *s.* 19.—An action for an injunction against threats of legal proceedings and a cross-action for infringement having been commenced between two parties in relation to a patent, the plaintiffs in the cross-action for infringement obtained leave from the judge before whom the action was entered to apply to the Comptroller-General to amend their specification by way of disclaimer, whereupon the plaintiffs in the first action for the injunction applied for a writ of prohibition against the hearing by the Comptroller of the application to disclaim, on the ground that legal proceedings in relation to the patent were pending under section 18, sub-section 10, of the Patents Act, 1883.

Held, that no prohibition would lie, and that, where liberty to apply to disclaim under section 19 of the Patents Act, 1883, had been given, the proceedings detailed in section 18 of that Act are available, notwithstanding that other legal proceedings in relation to the patent were pending.—*In re Hall*, Q.B.D. 22—21 Q. B. D. 337; 57 L. J. Q. B. 494; 59 L. T. 57.

2a. *Infringement — Prior publication — Patents, Designs, and Trade-Marks Act*, 1883, *s.* 51.—B. invented a trimming for corsets, which he showed to H., a commission agent employed by him on terms which gave H. an interest in the articles sold, to obtain his opinion as to whether the article would "take." H. showed the trimming to S., one of his largest customers, who suggested certain alterations; he also showed it to other customers, who ordered a certain quantity. This took place before the 23rd of November, 1885, when B. registered the article under the Act. The orders given were not executed until after registration.

Held, that, though there had not been previous publication of the design by showing the article to H., the communication of the design by H. to S. might amount—and the communication to the other customers did amount—to previous publication.

A trimming was made up into packets containing each a large numbers of yards, and surrounded with a paper band having thereon "Rd." and the registered number of the pattern.

Held, that the article was properly marked within rule 32.—*Blank* v. *Footman*, CH.D. KEK., J. 921.

3. *Infringement—Specification—Objections—Particulars—Patents, Designs, and Trade-Marks Act*, 1883, *s.* 29.—In an action for infringement of a patent for complicated machinery, where the specification contains numerous claims, the defendant's particulars of objection on the ground of prior publication must specify the particular articles alleged to be anticipations of the plaintiff's patent and the respective claims in the specifications which are alleged to have been anticipated, but they need not state the parts of the plaintiff's invention which are alleged to have been anticipated.—*Boyd* v. *Farrar*, CH.D. KAY, J.—57 L. T. 866.

4. *Revocation—Fraud—Mistake of agent—Patents, Designs, and Trade-Marks Act*, 1883, *s.* 26, *sub-sections* 4, 8.—The owner of a foreign patent communicated the invention to a person whom he appointed his agent for the purpose of obtaining a patent for the invention in England, with power to the agent to appoint a substitute. The agent appointed a substitute, who applied for and obtained a patent for the invention in England in his own name as first and true inventor, and without disclosing the fact that the invention was communicated. The owner of the foreign patent presented a petition for revocation of the English patent under section 26, sub-section 4, of the Patents, Designs, and Trade-Marks Act, 1883, alleging that the English patent was obtained "in fraud of his rights." The substitute had not, either when applying for the patent or after he had obtained it, acted with the intention of depriving the principal of his rights.

Held, that the patent was not obtained in fraud of the rights of the petitioner, and that the petition should be dismissed.

Decision of Stirling, J. (35 W. R. 541), affirmed.—*In re Avery's Patent*, C.A. 249—36 Ch. D. 307; 56 L. J. Ch. 1007; 56 L. T. 324.

5. *Revocation — Petition — Patents, Designs, and Trade-Marks Act*, 1883, *s.* 26.—Any person having any qualification mentioned in section 26 of the

Patents, Designs, and Trade-Marks Act, 1883, may petition for revocation of a patent.—*In re Morgan*, CH.D. CHI., J.—58 L. T. 713.

6. *Specification — Amendment—Disclaimer—Costs —Patents, Designs, and Trade-Marks Act*, 1883, *s.* 19.—The plaintiffs in an action for infringement of patent applied to the court for liberty to apply at the Patent Office for leave to amend their specification by way of disclaimer. The pleadings in the action had been completed, and they asked that the costs of such part thereof as might be used at the trial of the action might be reserved.

Held, that liberty ought to be granted upon the terms that the plaintiffs should pay the costs of the application and the costs of and occasioned by the amendment; that both plaintiffs and defendants should have leave to amend their pleadings; that the plaintiffs must undertake forthwith, after disclaimer, to amend their pleadings, confining the action to the amended specification, or to consent to the action being discontinued, with costs; and that, in the event of the action proceeding, all other questions of costs should be reserved.—*Haslam Foundry and Engineering Co.* v. *Goodfellow*, CH.D. KAY, J. 391—37 Ch. D. 118; 57 L. J. Ch. 245; 57 L. T. 788.

7. *Specification—Chemical process.*—Judgment of the Court of Appeal (29 Ch. D. 366) reversed, and judgment of Pearson, J. (24 Ch. D. 156), restored.—*Badische Anilin Und Soda Fabrik* v. *Levinstein*, H.L.—12 App. 710; 57 L. T. 853.

8. *Specification — Combination — Infringement — Estoppel.*—Where a patent has been obtained for an invention consisting of a combination of mechanical appliances, if the invention is new it is not necessary—on the question of validity of the patent—that the particular portions of the patent should or should not have been claimed as novel in the specification; but, on the question of infringement, where the infringement alleged is not the taking of the combination, but the taking of a subsidiary portion of the combination, it is necessary that the novelty of such portion should have been claimed.

Foxwell v. *Bostock*, 12 W. R. 723, 4 De G. J. & S. 298, explained.

Harrison v. *Anderston Foundry Co.*, 1 App. Cas. 574, 25 W. R. H. L. Dig. 174, followed.

Where the invention claimed by a patentee is one merely for improvements in a combination of the mechanical means already used in old machines, producing a result already well known, the patentee will be held strictly to the description given in his specification of the particular means by which his invention is carried into effect, and the doctrine that mere mechanical equivalents constitute an infringement does not apply; but where the invention claimed is one not merely for improvements in the combination of mechanical means employed, but also in the application of those means to produce a result that is novel, the user by another person of mere mechanical equivalents for the purpose of producing the same result constitutes an infringement of the patent.

Curtis v. *Platt*, 3 Ch. D. 135n, 13 W. R. Ch. Dig. 59, distinguished.

Clark v. *Adie*, 26 W. R. 45, 2 App. Cas. 315, explained.

The defendant in an action for infringement of a patent, in order to successfully plead—at the hearing of the action as distinguished from an interlocutory application—acquiescence as a bar to the plaintiff's rights, must prove (1) that the defendant was ignorant of the plaintiff's rights; (2) that the plaintiff knew of the defendant's ignorance, and stood by and allowed him to expend money in ignorance of those rights.—*Proctor* v. *Bennis*, C.A. 456—36 Ch. D. 470; 57 L. J. Ch. 11; 57 L. T. 622.

9. *Threat of legal proceedings — Injunction — Patents, Designs, and Trade-Marks Act*, 1883, *s.* 32. —The proviso contained in section 32 of the Patents, Designs, and Trade-Marks Act, 1883, will be satisfied if an action to test the validity of the patent or the fact of infringement is honestly brought with reasonable diligence against the person or persons to whom the threats have been made.

In considering whether such an action has been commenced with reasonable diligence, regard must be had to the time when the threats were first issued, and not to the time when the plaintiff first heard of the infringement.

In an action under section 32 of the Patents, Designs, and Trade-Marks Act, 1883, to restrain the issue of threats, the plaintiff may put in issue the validity of the defendant's patent.

Kurtz v. *Spence*, 35 W. R. 26, 33 Ch. D. 579, disapproved.—*Challender* v. *Royle*, C.A. 357—36 Ch. D. 425; 57 L. J. Ch. 995; 57 L. T. 734.

10. *Threat of legal proceedings — Injunction — Patents, Designs, and Trade-Marks Act*, 1883, *s.* 32—*Amendment—Ord.* 28, *r.* 1.—In an action brought under section 32 of the Patents, Designs, and Trade-Marks Act, 1883, to restrain threats, the plaintiffs, by their statement of claim, alleged that the defendants' patent was invalid. Chitty, J., on the application of the defendants, ordered the allegation to be struck out. A subsequent application to Kekewich, J., to whom the action had been transferred for trial, for leave to amend the statement of claim by restoring the allegation of the invalidity of the patent, was refused.

Held (Fry, L.J., dissenting), that the leave to amend ought to be given on terms which would prevent the defendants suffering any loss.

Decision of Kekewich, J., reversed.—*Kurtz* v. *Spence*, C.A. 438—58 L. T. 438.

11. *Threat of legal proceedings— Particulars— Patents, Designs, and Trade-Marks Act*, 1883, *s.* 32. —In an action to restrain threats of legal proceedings for infringements of patents, the plaintiffs alleged that the patents upon which the defendants relied in making threats were invalid. The defendants applied that the plaintiffs should give particulars of their objections to the patents.

Held (affirming the decision of North, J., 36 W. R. 263), that before the plaintiffs could be required to give such particulars the defendants should give to the plaintiffs a list of the patents on which, and on which only, the defendants relied, and that the plaintiffs should undertake to amend their statement of claim so as to put in issue the validity of those patents only.—*Union Electrical Power and Light Co.* v. *Electrical Power Storage Co.* C.A. 913—38 Ch. D. 325.

See also COVENANT, 1; DAMAGES, 1; LIBEL, 2; PRACTICE, 6.

PAWNBROKERS ACT.—See FALSE IMPRISONMENT, 4.

PAYMENT into COURT.—See COSTS, 2, 27, 36; COUNTY COURT, 20; LANDS CLAUSES CONSOLIDATION ACT, 4; PRACTICE, 36; SETTLEMENT, 10; SOLICITOR, 8.

PAYMENT out of COURT.—See INFANT, 8; LANDS CLAUSES CONSOLIDATION ACT, 5, 6; LIFE INSURANCE, 2; SETTLEMENT, 10.

PENALTY.—See COPYRIGHT, 5; INJUNCTION, 1; JUSTICE OF THE PEACE, 13.

PETITION.—See BANKRUPTCY, 11, 12, 25—27; COMPANY, 39; COSTS, 10; DIVORCE, 1, 4; INFANT, 8; LANDS CLAUSES CONSOLIDATION ACT, 4, 6; LIFE INSURANCE, 2; MORTGAGE, 4; PATENT, 5; TRUSTEE, 10.

PHARMACY ACT.—See ADULTERATION, 1.

PLEDGE.—See SHIPPING, 7—9.

POOR LAW:—

1. *Infant—Bastard—Lunacy of mother—Order of removal.*—The court will, in the exercise of its discretion, and under exceptional circumstances, such as the lunacy and improbable recovery of the mother, order the removal of a child within the age of nurture from her care.—*Reg.* v. *Barnet Guardians*, Q.B.D. — 57 L. J. M. C. 39; 58 L. T. 947.

2. *Irremovability—Lunatic—Poor Law Amendment Act*, 1846 (9 & 10 *Vict. c.* 66), *s.* 1—*Union Chargeability Act*, 1865 (28 & 29 *Vict. c.* 79), *s.* 8.—A pauper is irremovable if the periods during which he resided in the union and did not receive parochial relief, on being added together, constitute one year's residence, for the year's residence need not be continuous.—*Ipswich Guardians* v. *West Ham Guardians*, Q.B.D. 473—20 Q. B. D. 407; 58 L. T. 419.

3. *Irremovability—Widow—Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *ss.* 34, 35.—A woman had resided with her husband for three years in a certain parish, and continued to reside there for three months after his death.

Held (affirming the decision of the Queen's Bench Division, 36 W. R. 478, 20 Q. B. D. 191) (Lopes, L.J., dissenting), that she must be deemed to be settled in that parish under section 34 of the Divided Parishes Act, 1876.—*Medway Guardians* v. *Bedminster Guardians*, C.A. 851—21 Q. B. D. 278.

4. *Maintenance—Lunatic—Repayment to guardians—Benefit society—Trade union—Trade Union Act*, 1871 (34 & 35 *Vict. c.* 31), *s.* 4—*Divided Parishes Act*, 1876, *s.* 23.—A trade union is not a "benefit or friendly society" from which guardians of the poor can claim reimbursement under section 23 of the Divided Parishes Act, 1876, in respect of the maintenance of a pauper.—*Winder* v. *Kingston-upon-Hull Guardians*, Q.B.D.—20 Q. B. D. 412.

5. *Maintenance—Mother—Second marriage*—43 *Eliz. c.* 2, *s.* 6—4 & 5 *Will.* 4, *c.* 76, *s.* 56.—The children of a pauper woman are not relieved of their liability to maintain her by the fact of her marrying again.—*Arrowsmith* v. *Dickenson*, Q.B.D. 507—20 Q. B. D. 252; 58 L. T. 632.

6. *Overseer—Audit of accounts—Non-attendance*—4 & 5 *Will.* 4, *c.* 76, *s.* 96.—Mere neglect by overseers to attend an audit of parish accounts which has been duly notified by the auditor does not of itself constitute the offence of wilful disobedience under 4 & 5 Will. 4, c. 76, s. 96.—*Halgate* v. *Brett*, Q.B.D. 471—58 L. T. 452.

7. *Poor rate collector—Remuneration—Parliamentary registration.*—Poor law guardians are not liable for the remuneration of collectors of poor rates in respect of the revision of the lists of Parliamentary voters.—*Agnew* v. *Magherafelt Guardians*, C.A. (Ir.)—22 L. R. Ir. 26.

8. *Settlement — Derivative settlement — Divided Parishes Act*, 1876, *s.* 35.—By section 35 of the Divided Parishes Act, 1876, "no person shall be deemed to have derived a settlement from any other person, . . . except in the case of a wife from her husband and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another."

Held, on an inquiry into the settlement of a pauper over the age of sixteen, that the pauper, not having acquired a settlement of its own, retained the settlement which it derived from its father when under the age of sixteen.

Reg. v. *Islington Guardians*, 15 Q. B. D. 95, 34 W. R. Dig. 135, overruled.—*Dorchester Guardians* v. *Poplar Guardians*, C.A. 706—21 Q. B. D. 88; 57 L. J. M. C. 78.

9. *Settlement—Derivative settlement—"Widow"—Child under sixteen—Divided Parishes Act*, 1876, *s.* 35.—A pauper under the age of sixteen, whose father was dead and whose mother had married again, having become chargeable to a parish in the respondent union, an order was made for her removal into the appellant union, in which was the birth settlement of the mother. Neither the father nor the mother had acquired any other settlement than that of their birth.

Held, that the pauper, at the time of adjudication, after her mother had married again, had no other settlement than that of her birth, which was in the respondent union, and that the order was wrong.—*Amersham Guardians* v. *City of London Guardians*, Q.B.D. 141—20 Q. B. D. 103; 57 L. J. M. C. 6; 58 L. T. 83.

10. *Settlement—Emancipation—Divided Parishes Act*, 1876, *ss.* 34, 35.—By section 34 of the Divided Parishes Act, 1876, where any person shall have resided for the term of three years in any parish in such manner and under such circumstances in each of such years as would render him irremovable, he shall be deemed to be settled therein.

By section 35 no person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.

The pauper, E., who had always been physically incapable of work, was the legitimate daughter of C. and M., and was born in the appellant union, in which her father was settled, on the 27th of October, 1861. In 1862 she and her parents went to reside in the N. Union, where C. died in 1868. In 1871 her mother, M., married again. On the 27th of October, 1877, the pauper attained the age of sixteen, and on the 5th of June, 1880, she began to receive relief from the N. Union. In November, 1885, E., with her mother and stepfather, with whom she had always resided, moved into the respondent union, where, on the 21st of September, 1886, she became chargeable.

Held, that E. had not resided in the N. Union so as to acquire a settlement after she had attained the age of sixteen, and that she retained the settlement derived from her father, since her mother, on her second marriage, ceased to be a widowed mother, and that she was therefore settled in the appellant union.

Every child, on attaining the age of sixteen, and whether continuing a member of its father's family or not, and whether mentally or physically incapable or not, is, for the purposes of settlement, emancipated, and is capable of acquiring a settlement.

Judgment of the Queen's Bench Division affirmed.—*Highworth and Swindon Guardians* v. *Westbury-on-Severn Guardians*, C.A. 422—20 Q. B. D. 597; 57 L. J. M. C. 33; 58 L. T. 839.

See also ADMINISTRATION, 2; COSTS, 45; LUNACY, 3.

POOR RATE:—

1. *Appeal—Assessment committee—Provisional list—Special sessions—Metropolis Valuation Act*, 1869 (32 & 33 *Vict. c.* 67), *s.* 47.—No appeal lies to special sessions from the determination of an assessment committee on an objection to a provisional list made under section 47 of the Metropolis Valuation Act, 1869.—*Fulham Assessment Committee* v. *Wells*, Q.B.D. 858—20 Q. B. D. 749; 59 L. T. 103.

2. *Appeal—Valuation list—Contribution to union—Parochial Assessment Act*, 1862 (25 & 26 *Vict. c.* 103), *s.* 32.—The guardians of a union received sums from the overseers of a township under precepts based upon the existing valuation list. It was subsequently decided, on an appeal by colliery owners representing two-thirds of the township, that the valuation list was too high. The overseers did not appeal against the valuation list under section 32 of the Parochial Assessment Act, 1862, but having refunded the amount overpaid by the colliery owners, claimed credit for the excess paid to the guardians.

Held, that the guardians might give credit for the sums overpaid by the overseers, though the latter had not appealed against the valuation list; and that justices might refuse to enforce by distress warrant the precept for a general rate based on the old valuation list when it appeared that such sums had already been paid in excess by the overseers.—*Tynemouth Guardians* v. *Backworth Overseers*, Q.B.D.—57 L. J. M. C. 53.

3. *Distress warrant—Discretion of justices.*—On a summons before justices to enforce a poor rate against a railway company, it appeared that property occupied by the company had been assessed as "offices and land with rails," but that, in estimating the amount of the rate, the overseers had treated certain buildings as being occupied by the company which were not in fact occupied by them. The company had not appealed against the rule.

Held, that the justices were bound to issue a distress warrant.—*Manchester Overseers* v. *Headlam*, Q.B.D.—21 Q. B. D. 96; L. J. M. C. 89.

4. *Exemption — Reformatory school.* — A reformatory school, the managers of which have been granted a certificate under the Reformatory Schools Act, 1866, is rateable to the relief of the poor.

Sheppard v. *Bradford*, 12 W. R. 867, 16 C. B. N. S. 369, overruled.

Judgment of the Queen's Bench Division (reported 35 W. R. 731, 19 Q. B. D. 280), affirmed.—*Tunnicliffe* v. *Birkdale Overseers*, C.A. 360—20 Q. B. D. 450.

See also ATTACHMENT, 6; POOR LAW, 7; RAILWAY, 12.

POWER of APPOINTMENT:—

1. *Default—Delegation——Ultimate limitation.*—The donee of a power of appointment among his own children appointed to his son for life, with remainder to his son's children as he should appoint, and in default of such appointment to the son absolutely. The son died without having exercised the power of appointment delegated to him.

Held, that the ultimate limitation to the son was valid and took effect.—*Williamson* v. *Farwell*, CH.D. NOR., J., 37—35 Ch. D. 128; 56 L. J. Ch. 645; 56 L. T. 824.

2. *Husband and wife—Jointure—Escrow—Corrupt bargain.*—W. had, under his father's will, a power of appointment to the extent of £200 per annum for the purpose of jointuring his wife. An arrangement was come to between W. and his wife, from whom he was living apart, in pursuance of which W. was to execute an appointment to that amount in favour of his wife, who was thereupon to assign £60 per annum, part of the appointed sum, to T., with whom W. was living. The deed of appointment was executed, but the wife refused to execute the assignment of the £60 to T.

Held, in an action by the wife claiming a declaration that the power of appointment was validly exercised to the extent of £140, that the appointment would never have been made at all except for effectuating an unauthorised purpose, and that the action must be dismissed.

Held, also, that the appointment in favour of the wife was an escrow, being intended, to the knowledge of the husband and wife, only to take effect on condition of the wife assigning a portion of the jointure-moneys to a third party not an object of the power.

The statement of the law in Sugden on Powers, 8th ed., p. 712, disapproved, but followed.—*Whelan* v. *Palmer*, CH.D. KEK., J. 587—57 L. J. Ch. 787.

3. *Settlement—After-acquired property—Covenant to settle.*—A marriage settlement contained a covenant that if the wife, or the husband in her right, should at the same time and from the same source become entitled to real or personal property of the value of £500 or upwards, the same should be vested in the trustees of the settlement, to be held on the same trusts as the property assigned to them by the wife. The wife's father afterwards bequeathed £4,000 to the trustees of the settlement upon trust for such persons and for such purposes as the wife should appoint in writing, and, in default of or subject to any such appointment, in trust for her separate use, and the will declared the testator's intention that the wife should be able to defeat the covenant to settle after-acquired property by exercising her power of appointment. The wife, by nine separate appointments of sums under £500, appointed the £4,000 to be held in trust for her separate use.

Held, that the appointment was valid.—*Oliphant* v. *Gerard*, CH.D. NOR., J.—58 L. T. 800.

4. *Special occupancy—Devolution of title—Annuity.* By deed executed in 1820 S., in consideration of the marriage of his son M., and to provide an annuity of £400 for M. and maintenance for his intended wife and the issue of the marriage, conveyed land held on leases renewable for ever to trustees, their heirs and assigns, on trust to pay to M. an annuity of £400 for life, and after his death to pay £100 to his wife, if surviving, and as to the residue of the annuity and the said £100, after the wife's death in trust for the children of the marriage in such shares as M. should by deed or will appoint, and in default of appointment in trust for all the children equally, if more than one, or their heirs, executors, administrators, and assigns, and after the death of M. without issue or the death of all his issue under age, then on trust for the sole use and benefit of S., his heirs, executors, and administrators. There was a power of entry and distress to M. and his intended wife for recovery of arrears of the annuity. In 1869 M., by deed of appointment, after reciting his desire to appoint the annuity created by the settlement among his surviving children, and in exercise of his power, appointed £50 a year to his daughter, her heirs, executors, administrators, and assigns, and that the residue of the annuity should be limited to the uses of others of his children, their executors, administrators, and assigns, as tenants in common.

Held, that the deed of 1869 did not alter the special occupancy, but that on the death of an appointee his share devolved on his heir-at-law.—*Whitehead* v. *Morton*, V.C. (Ir.)—19 L. R. Ir. 435.

5. *Will—Contrary intention—Wills Act*, 1837 (1 *Vict. c.* 26) *s.* 27.—By a settlement made by M. on his marriage property was vested in trustees, upon such trusts for the benefit of the children of the marriage, or for the benefit of any other person or persons, as M. should by will "expressly referring to this power, or the subject thereof," appoint; and in default of appointment on trusts for the children of the marriage, and M., by his will (which did not refer to the power), gave the residue of his estate to trustees, on trusts for his daughter and her children.

Held, that as no "contrary intention" appeared by the will, the residuary gift was a good execution of the general power contained in the settlement.—*Mason* v. *Thorne*, CH.D. NOR., J.—57 L. J. Ch. 639.

6. *Will—Revocation—Wills Act*, 1837, *s.* 27.—Under a marriage settlement £1,000 was settled upon trust for such persons as G. should by will or codicil, or any writing in the nature thereof, appoint. G. executed a document which he called a testamentary appointment, and thereby, in pursuance of his power of appointment under the settlement, he appointed the £1,000, subject to the payment of his debts, funeral and testamentary expenses, whether of his testamentary appointment or of any will or codicil affecting his general property, unto his four sons. G. afterwards by will, after making various specific bequests to his four sons and three daughters, gave, devised, and bequeathed all the rest, residue, and remainder of his estate and effects whatsoever and wheresoever unto all his children equally. Probate was granted of the will, but not of the testamentary appointment.

Held, that, by the 27th section of the Wills Act, 1837, the gift in the will operated as a revocation of the prior testamentary appointment, and as an execution of the power of appointment given by the marriage settlement.—*White* v. *Randolph*, CH.D. NOR., J. 429—37 Ch. D. 413; 57 L. J. Ch. 734; 58 L. T. 11.

See also DIVORCE, 15; HUSBAND AND WIFE, 14; SETTLEMENT, 4, 5, 7; WILL, 5, 42—44.

PRACTICE:—

APPEAL—

1. *Affidavits—Interlocutory order—Injunction—Breach—Sequestration—Ord.* 58, *r.* 4.—On appeal against the refusal of a judge to issue a writ of sequestration for breach of an injunction to restrain the infringement of a patent the appellant's counsel proposed to read fresh affidavits, copies of which had been furnished to the respondents.

Held, that the order appealed against was an interlocutory order within ord. 58, r. 4, and that the appellant might use fresh affidavits.—*Spencer* v. *Ancoats Vale Rubber Co.*, C.A.—58 L. T. 363.

2. *Criminal matter*—Habeas corpus—*Extradition—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 47.—No appeal lies from the judgment of the Queen's Bench Division upon an application for a writ of *habeas corpus* in the case of a fugitive criminal committed to prison under the Extradition Act, 1870, with a view to his surrender to a foreign country, as the judgment of the Queen's Bench Division is a "judgment in a criminal cause or matter" within section 47 of the Judicature Act, 1873.—*Ex parte Woodhall*, C.A. 655—20 Q. B. D. 832; 57 L. J. M. C. 71.

3. *Dismissal—Frivolous applications.*—Where a party has made repeated frivolous applications in order to impeach a judgment, the Court of Appeal will make an order prohibiting any further application without leave from the court.—*Grepe* v. *Loam*, C.A.—37 Ch. D. 168; 57 L. J. Ch. 435; 58 L. T. 100.

4. Habeas corpus—*Judicature Act*, 1873, *s.* 19.—There is an appeal to the Court of Appeal, under section 19 of the Judicature Act, 1873, against the granting of a writ of *habeas corpus.—Ex parte Bell-Cox*, C.A. 209—20 Q. B. D. 1; 57 L. J. Q. B. 98; 58 L. T. 323.

5. *New trial—Entering judgment—Ord.* 58, *r.* 4—*Per* Lord Halsbury, C., on an appeal against a order for a new trial, on the ground that the verdict was against the weight of evidence, ord. 58, r. 4, does not empower the Court of Appeal to enter judgment for the party against whom the verdict was found.—*Toulmin* v. *Millar*, H.L.—12 App. 746; 57 L. J. Q. B. 301.

6. *Patent—Infringement—Certificate of validity—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 31—*Judicature Act*, 1873, *s.* 19.—In an action for infringement the defendant denied the validity of the patent, and delivered particulars of a number of objections thereto. He established one objection, but failed to establish the others. The judge gave judgment for the defendant, and, upon the application of the plaintiff, granted a certificate, that the validity of the patent came in question, under section 31 of the Patents, Designs, and Trade-Marks Act, 1883.

Held, upon appeal by the defendant from the decision granting the certificate, that no appeal lay, as the decision was not a "judgment or order" within section 19 of the Judicature Act, 1873.—*Haslam Foundry and Engineering Co.* v. *Hall* (2), C.A. 407—20 Q. B. D. 491; 57 L. J. Q. B. 352.

7. *Pauper proceeding—Crown side—Ord.* 19, *r.* 22—*Ord.* 68, *rr.* 1, 2.—In proceedings on the Crown side in the Queen's Bench Division there is no power to admit a person to sue or defend *in formâ pauperis.—Mulleneisen* v. *Coulson* (2), Q.B.D. 811—21 Q. B. D. 3; 57 L. J. Q. B. 464.

8. *Pauper proceeding—House of Lords—Pauper appeal—Fishery—Public right.*—Leave will not be granted to prosecute an appeal to the House of Lords *in formâ pauperis* where the appellant seeks as one of the public to establish a right of fishing in a tidal river, the appellant having been assisted in the litigation by subscriptions.—*Bowie* v. *Marquis of Ailsa*, H.L.—13 App. 371.

9. *Postponement—Sufficient reason.*—An application to postpone the hearing of an appeal which is in the general list, though made with the consent of all parties, will not be granted as a matter of course. The court requires some sufficient reason for the postponement to be shown. The fact that negotiations with a view to settlement of the appeal are pending is such sufficient reason.—*Bird* v. *Andrew*, C.A. 1.

10. *Shorthand notes—Ord.* 58, *r.* 11.—When any question of fact is involved in an appeal the evidence as to which has been given orally in the court below, it is the duty of the appellant to apply to one of the judges of the Court of Appeal, through his clerk, to ask the judge from whom the appeal comes to send a copy of his notes to the Court of Appeal. If the appellant has not so applied, the appeal will be ordered to stand over at the appellant's expense.

Shorthand notes of evidence in the court below, taken by an independent professional shorthand writer, may be referred to on the hearing of an appeal, but the Court of Appeal will not allow shorthand notes of evidence taken by a clerk of one of the solicitors in the action to be in any way referred to.—*Ellington* v. *Clark*, C.A. 873—38 Ch. D. 332; 58 L. T. 818.

11. *Stannaries Court—Deposit—Stannaries Act,*

1869 (32 & 33 *Vict.* c. 19), *s.* 32—*Judicature Act*, 1873, *s.* 18, *sub-section* 3—*Ord.* 58, *r.* 15.—The provision in section 32 of the Stannaries Act, 1869, requiring a deposit of £20 to be made with the registrar of the Stannaries Court on appeals from the Vice-Warden, is not abrogated by the Judicature Acts or by any of the rules thereunder, and is still in force.

An undertaking not to appeal given after the delivery of judgment on the matter at issue, but before the judge had decided the question of costs, by counsel on behalf of an unsuccessful litigant, on condition of his client not being required to pay the costs of the successful litigant, is within the implied authority of counsel, and cannot be withdrawn in the absence of misapprehension or surprise inducing the undertaking.

An appeal once set down cannot be withdrawn by the appellant on merely obtaining the written consent thereto of the respondent, but an application to the court for leave to withdraw the appeal is necessary.—*In re West Devon Great Consols Mine Co.*, C.A. 342—38 Ch. D. 51; 57 L. J. Ch. 850.

12. *Time—Extension—Company—Winding up—Director.*—A., B., C., D., E., and F. were directors of a company. A., B., and C. retired, after selling their shares to the company and receiving payment out of the company's funds. The company was wound up, and an order was made on all the six directors to replace the money paid to A., B., and C., with liberty to D., E., and F. to apply as to the liability of A., B., and C. On the last day for appealing A., B., and C. appealed against the order without the knowledge of D., E., and F.

The court gave leave to D., E., and F. to appeal after time.—*In re Clayton Mills Manufacturing Co.*, C.A.—37 Ch. D. 28; 57 L. J. Ch. 325; 58 L. T. 317.

CHARGING ORDER—

13. *Fund in court—Ord.* 46, *rr.* 1, 3—1 & 2 *Vict.* c. 110, *s.* 14—*Judicature Act*, 1873, *s.* 24, *sub-section* 7.—Under ord. 46, rr. 1, 3, a charging order may be made on cash standing to the credit of the judgment debtor in the name of the Paymaster-General.—*Brereton* v. *Edwards*, Q.B.D.—21 Q. B. D. 226.

COMPROMISE—

14. *Authority of counsel.*—It is within the general authority of counsel conducting a cause in court to consent to a compromise upon terms, unless the client has withdrawn his authority to the knowledge of the opposite party.—*Matthews* v. *Munster*, C.A. 178—20 Q. B. D. 141; 57 L. J. Q. B. 49; 57 L. T. 922.

PARTIES—

15. *Adding defendant*—Ex parte *application—Ord.* 16, *r.* 11.—An application to add a defendant to an action must not be made *ex parte.*—*Hall* v. *Colbeck*, CH.D. KAY, J. 259.

16. *Adding defendant—Partnership—Ord.* 16, *r.* 11.—In an action for a partnership debt the defendant has a right, under ord. 16, r. 11, to add as defendant a person who is jointly liable with himself for the money claimed, although the plaintiff objects to the addition.

Kendal v. *Hamilton*, 28 W. R. 97, 4 App. Cas. 504, followed.—*Pilley* v. *Robinson*, Q.B.D. 269—20 Q. B. D. 155; 57 L. J. Q. B. 54; 58 L. T. 110.

17. *Adding plaintiff—Consent in writing—Trustee—Ord.* 16, *rr.* 2, 11—The rule that no person shall be added as a plaintiff without his consent in writing does not admit of an exception where the plaintiffs in an action seek to add as a co-plaintiff a person who is a trustee for the plaintiffs.—*Besley* v. *Besley*, CH.D. CHI., J. 604—37 Ch. D. 648; 57 L. J. Ch. 464; 58 L. T. 510.

18. *Partition action—Lunacy—Next friend—Partition Act*, 1868 (31 & 32 *Vict.* c. 40), *ss.* 3, 4—*Partition Act*, 1876 (39 & 40 *Vict.* c. 17), *s.* 6.—A partition action may be brought by a person of unsound mind not so found by a next friend.

Halfhide v. *Robinson*, 22 W. R. 448, L. R. 9 Ch. 373, distinguished.

An action for sale under the Partition Acts having been brought by two tenants in common, one of whom, stated to be of weak mind, sued by the other as his next friend, the court held that an action in that form, being *primâ facie* for his benefit, could be maintained, and refused to strike out his name as co-plaintiff.

Semble, a request for sale at the trial by a next friend on behalf of a person of unsound mind not so found, assuming that such a request can be effectually made, cannot be acted upon in the same way as a request by a person not under disability, nor unless the court is satisfied that the sale is for his benefit.—*Porter* v. *Porter*, C.A. 580—37 Ch. D. 420.

19. *Third party—Indemnity.*—In an action against a railway company, the relief claimed by the plaintiffs was that sums of stock of a specified amount might be transferred into the names of the plaintiffs in the company's register, the plaintiffs alleging that stock to that amount had been improperly transferred out of their names by the defendant company in consequence of a forged authority to transfer. The railway company were alone made defendants. The defendant company obtained leave to issue a third party notice claiming indemnity against persons who were transferees of part of the stock, and that order was not appealed from. On a summons for directions by the defendant company—the third parties refusing to admit any liability to contribution or indemnity—Kay, J., made an order that the third parties should be at liberty to attend at the trial of the action and take such part therein as the judge might direct, and that they should be bound by the trial, but refused to allow them to deliver a defence.

Held, on appeal by the third parties, that the order was right, on the grounds (1) that, though the defendant company were willing to have the third parties added as defendants, yet, having regard to the nature of the relief claimed by the action, the plaintiffs were entitled to object to the third parties being added as defendants; (2) that, having regard to the fact that the defendant company had, by their defence, raised every point that could be suggested by the third parties, no injustice had been done to the third parties by the refusal to allow them to deliver a defence.

Eden v. *Weardale Iron and Coal Co.*, 35 W. R. 507, 35 Ch. D. 287, explained.

Coles v. *Civil Service Supply Association*, 32 W. R. 407, 26 Ch. D. 529, followed.—*Barton* v. *London and North-Western Railway Co.*, C.A. 452—38 Ch. D. 144; 57 L. J. Ch. 676; 58 L. T. 549.

20. *Third party—Marine insurance—Suing and labouring clause—Indemnity—Ord.* 16, *r.* 48.—The usual suing and labouring clause in a policy of marine insurance does not amount to a contract by the underwriters to indemnify the shipowner in respect of contracts made by him for the purpose of attempting to save the ship, and therefore, where an action brought is against the shipowner for work done under such a contract, the defendant is not entitled to bring in the underwriters as third parties under ord. 16, r. 48.—*Johnston* v. *Salvage Association*, C.A. 56—19 Q. B. D. 458; 57 L. T. 218.

PLEADING.

21. *Amendment—Re-service—Specific performance—Ord.* 27, *r.* 11.—In the statement of claim in an action for specific performance the plaintiff craved leave to refer to the agreement, and spoke of the property agreed to be sold as "described in the schedule to the said agreement." The defendant delivered no statement of defence. The plaintiff moved for judgment in default of pleadings.

Held, that the description of the property was insufficient; that the court could not look at any evidence beyond the pleadings; and that the statement of claim must be amended and served again.—*Smith* v. *Buchan*, CH.D. KAY, J. 631.

22. *Amendment without leave—Waiver—Ord.* 18, *r.* 2—*Ord.* 70, *r.* 2.—A claim to recover possession of land was, after the institution of an action for administration, added by amending the statement of claim, and without the leave of the court being obtained under ord. 18, r. 2. The defendant pleaded to the amended statement of claim, and raised the objection to the joinder of causes of action without leave, but took no step to insist on the objection until the trial of the action.

Held, that the objection to the joinder of the claims could not be insisted on at the trial, as it would be too late under ord. 70, r. 2.—*Derbon* v. *Collis*, CH.D. KEK., J. 667—58 L. T. 519.

23. *Counter-claim—Defendants to counter-claim—Default of appearance—Judgment—Ord.* 27, *rr.* 1, 2—*Ord.* 32, *r.* 6.—Several persons as plaintiffs brought an action against a defendant, T., to restrain him from infringing certain commonable rights over a piece of waste land. T. counter-claimed against the plaintiffs and seven other persons not originally parties to the action for an injunction to restrain them from erecting fences on part of the waste land. The seven persons so joined did not enter an appearance, and judgment against them on the counter-claim in default of appearance was moved for by the defendant in the action.

Held, that the cause of action against the seven persons was not severable within the meaning of ord. 27, r. 12, but came within ord. 32, r. 6, and that the case was not one in which immediate judgment would be granted against the defendants to the counter-claim who had not appeared.—*Verney* v. *Thomas*, CH.D. KEK., J. 398—58 L. T. 20.

24. *Default—Admiralty action—Damages—Lord Campbell's Act* (9 & 10 *Vict. c.* 93), *s.* 1—*Judicature Act*, 1873, *s.* 11.—In an action to recover damages for loss of life under Lord Campbell's Act under section 11 of the Judicature Act, 1875, the court—there having been default in pleading—pronounced interlocutory judgment, and ordered the damages proceeded for to be assessed on a writ of inquiry directed to the sheriff of Middlesex.—*The Orwell*, P.D. & A.D. 703—12 P. D. 80; 57 L. J. P. D. & A. 61.

25. *Default—Counter-claim—Judgment—Ord.* 27, *r.* 11.—In an action for goods sold and delivered there was a counter-claim for damages for wrongfully issuing an execution. The plaintiff filed no reply, and the action was dismissed for want of prosecution.

Held, that judgment on the counter-claim could be signed only on motion for judgment under ord. 27, r. 11.—*Higgins* v. *Scott*, Q.B.D.—21 Q. B. D. 10; 58 L. T. 383.

26. *Default—Judgment—Action* in rem—*Ord.* 13, *r.* 12.—In an action *in rem* for necessaries the defendant did not appear. The writ, though not specially indorsed, contained particulars of the plaintiff's claim.

The court gave judgment for the plaintiff without delivery of a statement of claim.—*The Hulda*, P.D. & A.D.—58 L. T. 29.

27. *Default—Married woman—Judgment—Separate estate—Ord.* 27, *r.* 11.—Where a married woman is the defendant to an action on a contract, and has made default in the delivery of a defence, the plaintiff's statement of claim must contain an allegation that the defendant has separate estate; otherwise the court will refuse to make an order against the defendant on the statement of claim under ord. 27, r. 11.—*Tetley* v. *Griffith*, CH.D. CHL., J. 96—57 L. T. 673.

28. *Further statement—New matter—Confession—Costs—Ord.* 24, *rr.* 2, 3.—In an action for an injunction, the defendants, after delivering their statement of defence, delivered a further defence, setting forth a ground of defence arising after the delivery of their statement of defence. The plaintiffs thereupon delivered a confession of the further defence, and signed judgment for costs up to the time of the defendants pleading the further defence. The defendants did not intend, by pleading the further defence, to waive their first defence, which, they alleged, included the point raised by their further defence.

Held, on motion by the defendants to set aside the judgment for costs, that, the defendants consenting that their further defence be struck out, the judgment for costs should be discharged.—*Bridgetown Waterworks Co.* v. *Barbadoes Water Supply Co.*, CH.D. NOR., J. 853—38 Ch. D. 378.

29. *Particulars—Discovery—Ord.* 19, *r.* 17.—In an action by the executors of a deceased married woman against her husband claiming the delivery up of certain furniture in the defendant's possession which was alleged to form part of the separate property of the deceased, the defendant took out a summons for particulars of the claim.

Held, affirming the decision of North, J., that no order ought to be made upon the summons until the defendant had given discovery as to the furniture in his possession, specifying what he claimed as his.—*Miller* v. *Harper*, C.A. 454—38 Ch. D. 110; 58 L. T. 698.

30. *Particulars—Libel.*—The defendant published articles alleging that the plaintiff, who was Governor of Mauritius, had been charged by members of the council with sending to the Colonial Office garbled reports of their speeches. The articles were alleged by the plaintiff to impute that he had in fact transmitted such garbled accounts. The defendant pleaded that the alleged libels were true in substance and in fact.

Held, that the plaintiff was entitled to further and better particulars, it not being clear whether the defence meant that what was charged against the plaintiff had been truly reported or that what was reported to have been charged was in fact true.—*Hennessy* v. *Wright* (1), C.A. 878.

31. *Particulars—Principal and agent—Account—Fraud—Ord.* 19, *rr.* 6, 7, 26.—A defendant charged with fraud is not in all cases entitled to particulars before he puts in his defence; but a defendant who first puts in his defence does not thereby waive his right to particulars.

In an action by a principal against his agents to open settled accounts, the plaintiff, in his statement of claim, alleged a secret fraud by the defendants, but stated that the particulars of the transactions in which the fraud was committed were known to the defend-

ants, but were not known to the plaintiff. The defendants, before delivering a defence, applied for particulars, but the application was ordered to stand over until a defence had been put in.—*Sachs* v. *Spielman*, CH.D. NOR., J. 498—37 Ch. D. 295; 57 L. J. Ch. 658; 58 L. T. 102.

32. *Particulars—Slander—Persons to whom slander was uttered.*—When particulars are required to be given of the names of persons who may have heard the defendant utter certain slanders in a public room, an order that the plaintiff is to deliver "the best particulars he can give of the persons present" when the slanders were uttered is correct, and will not be varied by the court.—*Williams* v. *Ramsdale*, Q.B.D. 125.

33. *Particulars—Trespass—Highway—Dedication.*—In an action to restrain trespass on a road the defendants pleaded that the road was a highway, and were ordered to amend their defence by showing how it had become a highway. The defendants amended by alleging that the road had been for many years used by the public as of right, having been dedicated by the plaintiff and her predecessors in title.

Held that, if the defendants relied on specific acts of dedication, or specific declarations of intention to dedicate, with or without evidence of user, they must give particulars of the nature and dates of such acts or declarations, and the names of the persons doing or making them.—*Spedding* v. *Fitzpatrick*, C.A.—38 Ch. D. 410.

34. *Striking out—Embarrassment—Compromise of former action—Ord.* 19, *r.* 27.—In an action to enforce a compromise of a former action any statements as to the rights of the parties in the former action will be struck out of the statement of claim.—*Knowles* v. *Roberts*, C.A.—38 Ch. D. 263; 58 L. T. 259.

35. *Striking out—Embarrassment—Dismissal of action—Foreign Government defendant—Ord.* 25, *rr.* 1, 4.—A statement of claim in an action brought to set aside an agreement of compromise between the defendants and a foreign Government, which alleged that the defendants were in a fiduciary position, and had rendered false accounts and improperly withheld information, and that the agreement of compromise had not been confirmed or ratified by a *de jure* Government, was ordered to be struck out under ord. 25, r. 4, and the action was dismissed.

Applications under ord. 25, r. 4, must be tried on the allegations contained in the pleading, and other evidence is inadmissible.

Ord. 25, r. 4, is more favourable to the pleading objected to than the old procedure by demurrer.—*Republic of Peru* v. *Peruvian Guano Co.*, CH.D. CHI., J. 217—36 Ch. D. 489; 56 L. J. Ch. 1081; 57 L. T. 337.

36. *Tender—Payment into court—Payment out—Death of plaintiff—Order on solicitor—Ord.* 22, *rr.* 5 (*c*), 6 (*c*).—A plea of tender cannot be set up in an action for unliquidated damages.

In an action for wrongful dismissal, claiming a year's salary in lieu of notice, the defendant denied liability for more than a month's salary, or, alternatively, for more than three months' salary, which amount he tendered before action and paid into court, "with defence setting up tender. Soon after the delivery of the defence and before trial, the whole amount so paid in was paid out to the plaintiff's solicitor under ord. 22, r. 5 (*c*). At the trial the plaintiff obtained a verdict for one month's salary. On an application by the defendant for an order for the repayment of the difference, the court ordered the solicitor to the plaintiff to repay the amount to the defendant. The plaintiff being dead, the solicitor filed an affidavit stating that he had paid the whole amount over to his client after deducting costs.

Held, that the order was wrong, and that, whatever might be the remedy of the defendant against the personal representatives of the plaintiff, there could be no order against the solicitor, who had been guilty of no misconduct.

Decision of the Queen's Bench Division (reported 36 W. R. 552, 20 Q. B. D. 722) reversed.—*Davys* v. *Richardson*, C.A. 728—21 Q. B. D. 202; 57 L. J. Q. B. 409.

RECEIVER—

37. *Rent—Distress—Chief clerk's certificate.*—Where a chief clerk's certificate has found a sum to be due from the defendants for rent, the court will not hear an application for an order to the receiver to distrain for such rent.—*Craven* v. *Ingham*, CH.D. STI., J.—58 L. T. 486.

STAY OF PROCEEDINGS—

38. Lis alibi pendens—*Colonial action—Partnership—Account—Counter-claim—Striking out—Ord.* 19, *r.* 27; *ord.* 21, *r.* 15; *ord.* 25, *r.* 4.—A partnership firm, consisting of M., C., and B., carried on business in British Honduras. B. also carried on business in London in partnership with N. The London firm acted as agents of the Honduras firm, under an agreement which provided that B.'s share in the profits of the Honduras firm was to be brought into the accounts between the two firms to the credit of the London firm. B. brought an action in Honduras against M. & C., and a decree was obtained in that action to have the partnership accounts of the Honduras firm taken. Before the accounts in that action were taken, though after the decree was made, M. & C. brought this action in England against B. & N., claiming an account of all moneys received and paid by the defendants as agents of the Honduras firm. The defendants, B. & N., counter-claimed to have the accounts of the Honduras partnership firm taken. On the application of the plaintiffs, M. & C., North, J., ordered that the defendants' counter-claim be struck out, on the ground that, in the exercise of his discretion, he considered that the counter-claim could not be conveniently tried with the original claim, and on other grounds also.

Held, on appeal, that though any action for taking the accounts of the Honduras firm brought by B. in England after having obtained a decree for the same purpose in Honduras would be stayed, yet, as the action brought in England against B. & N. by M. & C. claimed to have the accounts taken as between the two firms, and as the profits due to B. as a partner in the Honduras firm should be ascertained before the account claimed by the plaintiffs' English action could be finally settled, B. ought not to be precluded from claiming, by way of counter-claim in the English action, to have the accounts of the Honduras partnership taken, and that, on N., undertaking to be bound by the proceedings in the Honduras action, the order of North, J., should be discharged.—*Mutrie* v. *Binney*, C.A. 131—35 Ch. D. 614.

TRIAL—

39. *Jury—Mortgage—Redemption—Counter-claim—Ord.* 19, *r.* 3; *ord.* 21, *r.* 15; *ord.* 36, *r.* 6.—The plaintiff, in his statement of claim, claimed (1) redemption of certain securities, consisting of shares; (2) damages for wrongful detention and conversion of the shares; and (3) a receiver. The defendant counter-claimed against the plaintiff for (1) an account of what was due to the defendant by the plaintiff; (2) damages for fraudulent misrepre-

sentation, whereby the defendant was induced to credit the plaintiff with the proceeds of certain of the shares which had been sold. After the institution of the action the plaintiff, under an order of the Court of Appeal, paid into court a sum of money admitted to be sufficient—apart from the question of fraud raised by the counter-claim—to satisfy what might be due by the plaintiff to the defendant. Before notice of trial had been given the plaintiff applied for an order for trial of the action with a jury.

Held, that ord. 36, r. 6, was not applicable, and that the plaintiff was not entitled as of right to a trial with a jury.

An application on behalf of the plaintiff at the hearing of the appeal for an order that the counter-claim might be tried separately, was refused, on the ground that the plaintiff ought to have made an application for that purpose before reply, under ord. 21, r. 15, or applied before trial to have the counter-claim disallowed under ord. 19, r. 3.

Decision of North, J. (reported 36 W. R. 136, 37 Ch. D. 227), affirmed.—*Lynch* v. *Macdonald*, C.A. 419—57 L. J. Ch. 651.

40. *Jury — Nuisance — Injunction — Discretion of judge—Ord.* 36, *rr.* 6, 7.—An action for an injunction to restrain a nuisance is not a cause or matter coming within ord. 36, r. 6, so as to entitle as of right any party to the action to an order for trial with a jury.

The Temple Bar, 34 W. R. 68, 11 P. D. 6, followed.

Decision of Kay, J., affirmed.—*Fanshawe* v. *London and Provincial Dairy Co.*, C.A. 418—38 Ch. D. 72; 59 L. T. 76.

41. *Jury—Time—Expiration of notice of trial—Ord.* 36, *rr.* 6, 16.—A notice of trial of an action being no longer in force by reason of the cause not having been entered for trial by either party within the time required by ord. 36, r. 16, the plaintiff gave a second notice of trial and applied for a trial by jury.

Held (Manisty, J., dissenting), that the application, not having been made within ten days of the first notice of trial, was too late under ord. 36, r. 6.—*Tonsley* v. *Heffer*, Q.B.D. 48—19 Q. B. D. 153; 56 L. J. Q. B. 656; 57 L. T. 481.

42. *New trial—Divorce suit—Misdirection—Notice of motion.*—On an application for the new trial of a divorce suit on the ground of misdirection, the nature of the misdirection complained of must be specifically stated in the notice of motion.—*Taplin* v. *Taplin and Holland*, P.D. & A.D.—13 P. D. 100; 57 L. J. P. D. & A. 79; 58 L. T. 925.

43. *Trade name—Injunction—Damages—Discovery.* The plaintiff in an action in the Chancery Division claimed an injunction to restrain the defendant from representing his goods as those of the plaintiff, delivery up of labels in imitation of the plaintiff's label, damages for false representations, and in the alternative an account of profits. An order was made directing the questions of fact arising in the action to be tried by a jury.

Held, that the questions of fact were those questions on which the plaintiff's title to relief depended, and that the plaintiff was not entitled to discovery of sales effected by the defendant, nor to production of the defendant's books, until he had made out his title to relief.—*Fennessy* v. *Clark*, C.A.—37 Ch. D. 184; 57 L. J. Ch. 398; 58 L. T. 289.

VERDICT—

44. *New trial.*—Where there is evidence on both sides which has been properly submitted to a jury, the verdict ought not to be set aside.—*New South Wales Railway Commissioners* v. *Brown*, P.C.—13 App. 133; 57 L. J. P. C. 72.

WRIT—

45. *Executor—Co-executor—Injunction—Receiver—Ord.* 5, *r.* 15.—Immediately after the death of a testator who had left a will duly executed appointing two executors, and before probate, one of the executors, contrary to the wish of the other executor, proceeded to deal with the personal property, which was of considerable value, by depositing precious stones in his own name and making preparations for the sale of furniture, &c. The other executor desired to issue a writ in the Probate, Divorce, and Admiralty Division for an injunction and receiver, and filed an affidavit for that purpose in accordance with ord. 5, r. 15.

The court gave leave to issue the writ.—*Ker* v. *Aubert*, P.D. & A.D. 576—57 L. J. P. D. & A. 37; 58 L. T. 386.

46. *Service—Irregularity—Foreign defendants—Address of defendants—Ord.* 2, *r.* 3—*Ord.* 9, *r.* 8.—A writ of summons for service within the jurisdiction directed to a foreign corporation, but not containing any address, either of the corporation or of one of the officers of the corporation upon whom the writ may be served, under ord. 9, r. 8, will, on application of any person served with such writ, be set aside as irregularly issued.—*The W. A. Scholten*, P.D. & A.D. 559—13 P. D. 8; 57 L. J. P. D. & A. 4; 58 L. T. 91.

47. *Service out of the jurisdiction—Charging order on shares—Ord.* 11. *r.* 1 (e); *ord.* 46, *r.* 1—1 & 2 *Vict.* c. 110, *s.* 14.—Ord 11, r. 1 (e), of the Rules of the Supreme Court, 1883, does not apply to the case of an action to enforce a charge obtained on shares under 1 & 2 Vict. c. 110, s. 14, and leave cannot be obtained to issue a writ for service out of the jurisdiction in such an action.—*Moritz* v. *Stephen*, CH.D. MOR., J. 779—58 L. T. 850.

48. *Service out of the jurisdiction—Co-defendants—Alternative remedies.—Ord.* 11, *r.* 1 (g).—H. & Co., brokers in London, acting as agents for S. & Co., an Austrian firm, entered into a contract with the plaintiffs. S. & Co. afterwards repudiated the contract, on the ground that the agents had inserted a term without their authority. The plaintiffs brought an action against H. & Co. and S. & Co., claiming alternatively against H. & Co. for breach of implied warranty of authority, and against S. & Co. for breach of contract.

Held, that an order giving leave to the plaintiffs to serve notice of a concurrent writ out of the jurisdiction on S. & Co., under ord. 11, r. 1 (g), was rightly made.—*Massey* v. *Heynes*, C.A. 834—21 Q. B. D. 330; 57 L. J. Q. B. 521.

49. *Service out of the jurisdiction—Contract affecting land—Outgoing tenant—Compensation—Ord.* 11, *r.* 1 (b).—An action by an outgoing tenant in Yorkshire to obtain compensation for tenant-right according to the custom of the country is an action to enforce "a contract, obligation, or liability affecting land" within paragraph (*b*) of ord. 11, r. 1, and service of a writ of summons out of the jurisdiction will be permitted in that behalf.

Agnew v. *Usher*, 33 W. R. 126, 14 Q. B. D. 78, distinguished.—*Kaye* v. *Sutherland*, Q.B.D. 566—20 Q. B. D. 147; 57 L. J. Q. B. 68; 58 L. T. 56.

50. *Service out of the jurisdiction—Contract to be performed in England—Ord.* 11, *r.* 1 (e).—By a contract made by the plaintiffs, a firm carrying on business at Lincoln, and the defendants, a mining

company carrying on business in the Isle of Man, it was agreed that the plaintiffs should make an engine and deliver it to the defendants, and erect it on the defendants' premises in the Isle of Man, and that the defendants should pay for the same on their engineer giving his certificate that it had been erected to his satisfaction. Nothing was specified in the contract as to the place where payment was to be made. The plaintiffs, who alleged that they had performed their part of the contract, desired to sue the defendants for the purchase-money in the High Court.

Held, that the contract to pay was a contract which ought to be performed at Lincoln, and that there was power to allow a writ to be served out of the jurisdiction.—*Robey* v. *Snaefell Mining Co.*, Q.B.D. 224—20 Q. B. D. 152; 57 L. J. Q. B. 134.

51. *Service out of the jurisdiction—Injunction—Trade-mark—Defendant in Scotland—Agents in England.*—A pending summons by A., a manufacturer residing in Scotland, to register a trade-mark, was opposed by B., another manufacturer residing in Scotland, on the ground that the trade-mark was similar to B.'s trade-mark. B. applied for leave to issue a writ against A. for an injunction and damages, on the ground that A. sold his goods in England so as to cause the public to believe them to be B.'s goods. B. alleged that the same witnesses would be required in the action as on the summons, and that it would save expense to try the action in England, or to try the summons and the action together.

Held, that, as an injunction in England could only be enforced against A.'s agent, leave for service out of the jurisdiction ought not to be granted.

Decision of North, J., affirmed.—*Marshall* v. *Marshall*, C.A.—38 Ch. D. 330.

52. *Service out of the jurisdiction—Irregularity—Setting aside—Ord.* 11, *r.* 6—*Ord.* 70, *rr.* 1, 2.—Service of a copy of a writ was made by leave, under a mistaken belief as to the state of facts, upon F., a foreigner residing out of British jurisdiction. F. took no steps to have the service set aside or to enter an appearance, and judgment was signed against him four months after the service of the writ.

Held, that a notice of the writ, and not any service of the writ, was compulsory upon a non-British subject not in British dominions, under ord. 11, r. 6; and that such a wrongful service was not an irregularity which could be dealt with under ord. 70, r. 1, and that the defendant was not estopped, under ord. 70, r. 2, from taking steps to set aside the proceedings.—*Hewitson* v. *Fabre*, Q.B.D. 717—21 Q. B. D. 6; 57 L. J. Q. B. 449; 58 L. T. 856.

53. *Service out of the jurisdiction—Irregularity—Waiver—Ord.* 63, *r.* 12—*Ord.* 70, *r.* 2.—A judge in the vacation made an order *ex parte* for service of writ and notice of motion for an injunction by service at the place of business and on the solicitors of a foreigner residing out of the jurisdiction. The defendant entered no appearance, but filed affidavits and opposed the motion.

Held, that the defendant had waived any irregularity in the service.—*Boyle* v. *Sacker*, C.A.—58 L. T. 822.

54. *Service out of the jurisdiction — Lancaster Palatine Court—Leave of Vice-Chancellor—Court of Chancery of Lancaster Act*, 1854 (17 *&* 18 *Vict. c.* 82), *s.* 8—*Chancery of Lancaster Rules*, 1884, *ord.* 2, *r.* 4; *ord.* 12, *rr.* 1, 7.—Before an application is made to the Court of Appeal for leave to serve a writ issued out of the Palatine Court upon a defendant who is out of the jurisdiction of that court, but within the jurisdiction of the High Court, the leave of the Vice-Chancellor of the Palatine Court must first have been obtained to the issue of the writ.

Counsel, on making such application, ought to inform the court that the leave of the Vice-Chancellor has already been obtained.—*Walker* v. *Dodds*, C.A. 133—37 Ch. D. 188; 57 L. J. Ch. 206; 58 L. T. 291.

54a. *Service out of the jurisdiction—Scotch company—Branch business in England—Companies Act*, 1862 (25 *&* 26 *Vict.* c. 89), *s.* 62—*Ord.* 9, *r.* 8.—A company had its registered office in Scotland, but carried on branch works in England. The writ in the action had been served on the manager of the branch works, and a copy had also been sent by post to the registered office.

Held, that the service was bad, and must be set aside. — *Wood* v. *Anderston Foundry Co.*, CH.D. REG., J. 918.

55. *Service out of the jurisdiction—Ord.* 11, *r.* 1.—On an application under order 11 for leave to serve a writ out of the jurisdiction, it is the duty of the court, in considering whether or not such service ought to be allowed, to go into the facts of the case in order to see if there is any probable cause of action.

Decision of Pearson, J. (33 W. R. 823, 29 Ch. D. 239), reversed.—*Société Générale de Paris* v. *Dreyfus*, C.A. 609—20 Q. B. D. 315; 57 L. J. Q. B. 276; 58 L. T. 573.

56. *Special indorsement—Judgment—Ord.* 3, *r.* 6—*Ord.* 14, *r.* 1.—A writ which claims payment of a sum which is in dispute, besides payment of a liquidated demand, is not specially indorsed so as to entitle the plaintiff to summary judgment for the liquidated demand.—*Clarke* v. *Berger*, C.A. 809.

57. *Special indorsement—Judgment—Setting aside—Irregularity—Appeal—Ord.* 21, *rr.* 6, 7—*Ord.* 70, *r.* 1.—Where a writ of summons is specially indorsed, the defendant has, under ord. 21, r. 6, ten days from the time limited for appearance to deliver his defence, the indorsement on the writ being a statement of claim within that rule, and he is not bound to deliver his defence within ten days after appearance under rule 7.

A defendant was served with a specially-indorsed writ on the 21st of January, and entered an appearance on the 26th. The plaintiff having signed judgment on the 7th of February for want of a statement of defence, the defendant took out a summons to have the judgment set aside, with costs, upon the ground that it had been prematurely signed. The court set aside the judgment upon the defendant paying a certain sum into court, costs to be costs in the cause. The defendant appealed, having paid the money into court.

Held, (1) that, as the defendant had ten days from the 28th of January to deliver his defence, the judgment was prematurely signed and was irregular, and the defendant was entitled *ex debito justitiæ* to have it set aside without terms, the irregularity not being a mere non-compliance with the rules within ord. 70, r. 1; (2) that the defendant, by asking for costs in the summons, did not give the court jurisdiction to impose terms, though the court, having discretion as to the costs, was enabled to exact terms as a condition of giving costs; (3) that the defendant, by paying the money into court, had not so availed himself of the order of the Divisional Court as to be precluded from appealing.—*Anlaby* v. *Prætorius*, C.A. 487—20 Q. B. D. 764; 57 L. J. Q. B. 287; 58 L. T. 674.

58. *Substituted service — Defendant domiciled in Ireland—Ord.* 9, *r.* 2; *ord.* 10, *r.* 1; *ord.* 11, *r.* 2.—Where effectual personal service cannot be made upon

a person "domiciled or ordinarily resident in Ireland" owing to ord. 11, r. 1 (*e*), the court will not allow substituted service to be made.—*Hillyard* v. *Smyth*, Q.B.D. 7.

See also DISCOVERY, 1—10; INJUNCTION, 1—13; MANDAMUS, 2; PARTITION, 2; PATENT, 1—3, 6, 9—11; PRIVY COUNCIL, 1, 2.

PRACTICE (IRELAND):—

1. *Appeal—Criminal proceeding*—Habeas corpus—*Judicature Act (Ireland)*, 1877 (39 & 40 *Vict. c.* 57), *s.* 50.—An appeal lies against the refusal of a writ of *habeas corpus.—In re Keller*, C.A. (Ir.)—22 L. R. Ir. 158.

2. *Appeal — Criminal proceeding — Justice of the peace — Refusal to state case — Judicature (Ireland) Act*, 1877, *ss.* 24, 50.—No appeal lies in a criminal case except for error on the record.

No appeal lies against an order refusing a *mandamus* to justices to state a case for the opinion of the High Court.—*Brosnan* v. *Roche*, C.A. (Ir.)—22 L. R. Ir. 334.

3. *Inspection of property—Ship—Cargo*—Interim *injunction—Ord.* 51, *r.* 3.—The court gave leave to the plaintiff to inspect a ship in which the defendant had shipped for removal certain timber which was the subject-matter of the action. — *Morris* v. *Howell*, Q.B.D. (Ir.)—22 L. R. Ir. 77.

4. *Parties—Death of plaintiff—Dismissal of action —Revivor—Appeal.*—After an action had been dismissed the plaintiff died. The court, after the expiration of the time for appealing, gave liberty to the plaintiff's administrator to carry on the proceedings, in order to enable him to apply to the Court of Appeal to hear the appeal.—*Leahy* v. *Tobin*, V.C. (Ir.) —19 L. R. Ir. 433.

5. *Pleading—Admission—Default of reply—Judgment—Ord.* 18, *r.* 10; *ord.* 23, *r.* 1; *ord.* 39, *r.* 9.—If the plaintiff does not deliver a statement of claim within the time specified in ord. 23, r. 1, the defendant may set down the action on a motion for judgment. — *Andrews* v. *Andrews*, V.C. (Ir.) — 19 L. R. Ir. 572.

6. *Pleading—Admission — Delivery of property—Mortgage—Licence—Ord.* 28, *r.* 7a—*Ord.* 39, *r.* 9.—In an action brought by a mortgagee to recover possession of licensed premises the court has jurisdiction, after judgment for the plaintiff on admissions of facts in the pleadings, to order the delivery of the licence to the plaintiff.—*Crowley* v. *Feary*, Q.B.D. (Ir.)—22 L. R. Ir. 96.

7. *Receiver — Accounts — Certificate — Appeal.*—Accounts vouched before the examiner can be opened on the discovery of an error in them, notwithstanding the judge's certificate.

No appeal lies against a judge's certificate to accounts.—*Ex parte Stirling*, L.J. (Ir.)—19 L. R. Ir. 423.

8. *Receiver—Conditional order for sale.*—A receiver may, under special circumstances, be appointed before a conditional order for sale has been made absolute.—*In re Stafford*, L.J. (Ir.)—21 L. R. Ir. 195.

9. *Receiver — Equitable execution—Bankruptcy.*—The appointment of a receiver, by way of equitable execution, of a fund to which the judgment debtor is entitled does not constitute a charge against the debtor's assignee in bankruptcy. — *In re O'Neill*, BANKY. (Ir.)—21 L. R. Ir. 211.

10. *Receiver—Owner.*—The owner may be appointed receiver by consent.—*In re Golding*, L.J. (Ir.)—21 L. R. Ir. 194.

11. *Stay of execution—Inability to pay—Land Law (Ireland) Act*, 1887 (50 & 51 *Vict. c.* 33) *s.* 30—*Ord.* 41, *r.* 15.—The court will not stay execution under ord. 41, r. 15, in any action for debt on the ground of inability to pay, and, in an action against a tenant under the Land Law (Ireland) Act, 1887, will stay execution only against the defendant's interest in his holding.— *Newton* v. *Nolan*, EX.D. (Ir.)— 21 L. R. Ir. 619.

12. *Writ—Amendment—Discretion of court—Ord.* 26, *r.* 10.—The amendment of a writ on the plaintiff's application is not a matter of course, but the court must, in the exercise of its discretion, be satisfied that the amendment is just.—*Budds* v. *Dooley*, Q.B.D. (Ir.) —20 L. R. Ir. 404.

13. *Writ—Amendment—Indorsement of service—Recovery of land.*—In an action to recover land for non-payment of rent, the court will allow an amendment of the indorsement of service on the writ, if such indorsement was made at the right time.—*Cornwall* v. *Bradshaw*, Q.B.D. (Ir.)—22 L. R. Ir. 67

14. *Writ—Re-service—Revivor—Change of parties.* —Where more than two years had elapsed since the service of a writ, and no appearance had been entered, and a change had taken place in the parties entitled to sue, the court made an order continuing the proceedings on re-service of the writ.—*Patchell* v. *Stewart*, Q.B.D. (Ir.)—20 L. R. Ir. 441.

15. *Writ—Service out of the jurisdiction—Contract—Transmission of news—Judicature (Ireland) Act*, 1877, *s.* 33—*Ord.* 10, *r.* 1.—A., the proprietor of a newspaper at Dublin, sued a company carrying on business in London for negligently supplying false news in breach of a contract.

Held, that A. was entitled to leave to serve the writ out of the jurisdiction.—*Gray* v. *Press Association*, C.A. (Ir.)—22 L. R. Ir. 1.

16. *Writ—Special indorsement—Administration—Account—Ord.* 2, *r.* 5—*Ord.* 14, *r.* 1.—A writ in an action by an administrator with the will annexed against a co-legatee may be indorsed with a claim for an account of the personal estate of the testator.—*Molony* v. *Molony*, V.C. (Ir.)—21 L. R. Ir. 91.

17. *Writ—Substituted service—Conditional order—Time.*—Where a conditional order is made for substituted service of a writ unless cause is shown within a specified time, the Long Vacation is not excluded in computing the time for showing cause.—*Manning* v. *Houghton*, Q.B.D. (Ir.)—20 L. R. Ir. 471.

PRESCRIPTION.—See LIGHT, 2; NUISANCE, 2; SCOTLAND, LAW OF, 4.

PRINCIPAL and AGENT:—

1. *Account—Money had and received by agent—Interest.*—A person who has received money as agent is bound not only to account, but also to pay it to his principal when requested, and, in an action for money had and received, is chargeable with interest on the amount received from the date of the refusal to pay it over.—*Harsant* v. *Blaine*, Q.B.D.—56 L. J. Q. B. 511.

2. *Indemnity—Broker—Stock Exchange rules.*—A person who employs a broker to sell shares on the Stock Exchange authorises a contract in accordance with the rules and regulations in force, and undertakes to indemnify the broker against any liability incurred under those rules, unless they are illegal or unreasonable and not known by the principal.—*Harker* v. *Edwards*, C.A.—57 L. J. Q. B. 147.

3. *Set-off—Counter-claim against plaintiff's prin-*

cipal—Judicature Act, 1873 (36 & 37 *Vict.* c. 66), s. 24, *sub-section* 3—*Ord.* 19, r. 3.—In an action of trover and for goods sold and delivered the defendant cannot set off a claim for unliquidated damages which he has against a third party on another transaction, even if the third party happens to be the plaintiff's principal.—*Tagart* v. *Marcus*, Q.B.D. 468.

See also ATTACHMENT, 9; DAMAGES, 2; ESTOPPEL, 2; INCOME TAX, 6; JURISDICTION, 14; MARINE INSURANCE, 1, 2; PRACTICE, 31, 51; SPECIFIC PERFORMANCE, 3.

PRINCIPAL and SURETY:—

1. *Discharge—Release of principal—Reservation of rights against surety—Bill of exchange.*—The acceptor of a bill of exchange for £100, being sued by the holders, paid into court £30 in satisfaction of the cause of action. The holders gave notice that they accepted that sum, having written to the acceptor to say that the indorsers had arranged to pay the balance of £70, and would sue the acceptor.

Held, that the acceptor was not absolutely released, and that the indorsers, having paid the balance, could recover it from the acceptor.—*Jones* v. *Whitaker*, C.A. —57 L. T. 216.

2. *Indemnity—Co-defendant—Judgment—Ord.* 16, r. 55.—A defendant who is entitled to an indemnity from a co-defendant upon a special agreement is entitled to sign judgment against his co-defendant for the amount of his own liability before he has actually paid anything in discharge of it.—*English and Scottish Trust Co.* v. *Flatau*, Q.B.D. 238.

See also ADMINISTRATION, 9; WILL, 4.

PRIORITY.—See ADMINISTRATION, 8—12; BANKRUPTCY, 30; COMPANY, 16, 17, 40; DEED, 6; EXECUTOR, 4; INJUNCTION, 4; MORTGAGE, 11; RAILWAY, 3; SHIPPING, 28, 32; SOLICITOR, 1, 3, 4.

PRIVILEGE.—See COSTS, 38; DISCOVERY, 5—8; LANDLORD AND TENANT, 1; LIBEL, 3; SLANDER, 2.

PRIVY COUNCIL:—

1. *Appeal—Criminal matter—Misdirection—Perjury—Solicitor—Striking off rolls.*—The rule laid down in *Falkland Islands Co.* v. *Reg.*, 12 W. R. 220, 1 Moo. P. C. (N. S.) 312, is subject to few exceptions, but leave to appeal from a conviction for perjury will be allowed where such conviction is the sole ground for consequential striking off the roll of solicitors, and where the conviction, having been unfairly obtained, is not conclusive as such a ground.

A barrister and solicitor of Honduras appealed against a verdict convicting him of perjury, and against an order of court, founded on the conviction, directing him to be struck off the roll of practitioners.

Held, that, the directions of the judge having been grievously unjust to the appellant, the conviction and consequential order must be *set aside*.—*In re Dillet*, P.C. 81—12 App. 459; 56 L. T. 615.

2. *Appeal—Leave.*—Where the determination of a case will not be decisive of any general principle of law, the Judicial Committee will not give leave to appeal from a unanimous judgment of the court below on the ground that the questions involved are of great importance to the parties or calculated to attract public attention.—*Dumoulin* v. *Langley*, P.C.—57 L. T. 317.

PROBATE.—See ADMINISTRATION, 4; CROWN, 27; WILL, 61—64.

PROBATE DUTY:—

Lunacy—Accumulation—Conversion—Purchase of land.—The accumulations of the personal estate of a lunatic were invested in the purchase of land by his committee under the orders of the Lords Justices. By the conveyance made in pursuance of the orders, the lands were conveyed to the use of the committee, their heirs and assigns, upon trust for the lunatic, his executors, administrators, and assigns, either until the inquisition as regarded his soundness of mind should be superseded, or until his death, whichever should first happen, and until such time the grantees had certain powers of leasing, selling, or exchanging. Each conveyance also declared that the premises thereby granted were, "to all intents and purposes, to be considered as part of the personal estate" of the lunatic, but there was no trust for sale. Upon the death of the lunatic the Crown claimed probate duty on the value of the investment in land.

Held, that the value of the lands was part of the personal estate of the lunatic at his death, and liable to probate duty.

Decision of the Court of Appeal (reported 34 W. R. 261, 16 Q. B. D. 408) reversed.—*Attorney-General* v. *Marquis of Ailesbury*, H.L. 737—12 App. 672; 57 L. J. Q. B. 33; 58 L. T. 192.

PROHIBITION.—See COUNTY COURT, 8, 14, 18, 19; JURISDICTION, 12; PATENT, 2; RAILWAY, 1.

PROMISSORY NOTE.—See BILL OF SALE, 8, 9; STAMP, 2.

PROOF.—See BANKRUPTCY, 16, 28—31; COMPANY, 18; ESTOPPEL, 7.

PROPERTY TAX:—

Exemption—Scientific institution—Civil engineers—Customs and Inland Revenue Act, 1888 (48 & 49 *Vict.* c. 51), s. 11, *sub-section* 3.—By section 11 of the Customs and Inland Revenue Act, 1888, a duty is imposed in respect of all real and personal property of any body corporate or unincorporate, at the rate of 25 per cent. upon the annual value, income, or profits of such property, subject to exemption in favour of "property which, or the income or profits whereof, shall be legally appropriated and applied . . . for the promotion of education, literature, science, or the fine arts."

Held (Lopes, L.J., dissenting), that the property of the Institution of Civil Engineers is entitled to the benefit of the exemption, as property which, in the main and as its chief object, is appropriated and applied for the promotion of mechanical science.

Judgment of the Queen's Bench Division (reported 36 W. R. 523, 19 Q. B. D. 610) reversed. *In re Civil Engineers' Institution*, C.A. 598—20 Q. B. D. 621; 57 L. J. Q. B. 558.

PROSPECTUS.—See MISREPRESENTATION, 1, 2.

PUBLIC HEALTH ACT.—See BANKRUPTCY, 30; HIGHWAY, 5; JUSTICE OF THE PEACE, 6; LOCAL GOVERNMENT, 1, 2, 5, 7—12.

PUBLIC-HOUSE.—See LICENSED HOUSE, 1—11.

PUBLIC POLICY.—See WILL, 4.

QUARTER SESSIONS.—See GAS COMPANY, 2.

QUEENSLAND, LAW of:—

1. *Gold fields—Mining rights—Crown lands* 24 *Vict. No.* 11, *ss.* 9, 11.—The history of miner's rights issued under the Gold Fields Act, 1874 (24 *Vict.* No. 11), and the regulations under that Act, brought an action to set aside mining leases granted to the defendants on the ground that they had been granted within two years from the date of the proclamation

of the gold fields within which the land was comprised, and that the defendants, when applying for the leases, had not complied with the regulations.

Held, that the plaintiffs had no right to interfere with the defendants' possession.—*Osborne* v. *Morgan*, P.C.—13 App. 227; 57 L. J. P. C. 53.

2. *Gold fields—Mining rights—Crown lease—28 Vict. No.* 11, *ss.* 9, 11.—A holder of miner's rights under the Gold Fields Act, 1874, cannot set aside a mining lease granted to another person on the ground that the latter has prevented him from entering on the enjoyment of his miner's rights.—*Williams* v. *Morgan*, P.C.—13 App. 236.

QUO WARRANTO:—

1. *Corporation—Collector of borough rates.*—An information in the nature of a *quo warranto* will not lie for the office of collector of rates for a borough.—*Reg.* v. *Whelan*, Q.B.D. (Ir.)—20 L. R. Ir. 461.

2. *Town commissioner—Disqualification—Commissioners Clauses Act*, 1847 (10 & 11 *Vict. c.* 103), *s.* 17.—A. was elected a town commissioner in 1885, having then the qualification required by a local Act as an occupier of a house. In 1886, on a judgment summons being taken out against him, A. made an affidavit that he had no means, and was not occupying the house in question.

Held, that A. could not retain his office for three years, but became disqualified when he ceased to occupy the house.—*Reg.* v. *Mooney*, Q.B.D. (Ir.)—20 L. R. Ir. 486.

See also MUNICIPAL CORPORATION, 1.

RAILWAY:—

1. *Arbitration—Railway Commissioners—Jurisdiction—Prohibition—Regulation of Railways Act*, 1873 (36 & 37 *Vict. c.* 48), *s.* 8.—By a private Act between two railway companies an agreement made between them was set out *verbatim* as a schedule, which contained a clause that all questions of difference arising between them should be determined by arbitration in manner provided by the Railway Companies Arbitration Act, 1859; and this was "confirmed and made binding" by a clause of the private Act. Differences having arisen, one company desired to refer the dispute to the Railway Commissioners, under section 8 of the Regulation of Railways Act, 1873.

Held, that the right to refer differences to arbitration was derived from the agreement itself, and that, as the difference was not "required or authorised to be referred to arbitration under the provisions of any general or special Act" within section 8 of the Regulation of Railways Act, 1873, the Railway Commissioners had no jurisdiction to undertake the arbitration.—*Reg.* v. *Midland Railway Co.*, Q.B.D. 270—19 Q. B. D. 540; 56 L. J. Q. B. 585; 57 L. T. 448.

2. *Bridge—Repair—Road over bridge—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 46.—A railway company which has carried a road over the railway by a bridge is bound, under section 46 of the Railways Clauses Consolidation Act, 1845, to repair and maintain the road over the bridge as well as the actual structure of the bridge.

Judgment of the Queen's Bench Division affirmed.—*Mayor, &c., of Bury* v. *Lancashire and Yorkshire Railway Co.*, C.A. 492—20 Q. B. D. 485; 57 L. J. Q. B. 280.

3. *Judgment—Receiver—Priority—Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127), *s.* 4.—A judgment creditor of a railway company who obtains a receivership order under section 4 of the Railway Companies Act, 1867, does not thereby obtain any priority over other creditors.

A receiver appointed under that section will not be discharged until every judgment creditor of the company—whose judgment has been recovered either in an action on a contract entered into after the passing of the Act, or in an action not on contract brought after that date—has been satisfied; and therefore the section neither contemplates nor permits the making of successive receivership orders.

Order of Kekewich, J., discharged.—*In re Mary Railway Co.*, C.A. 372—37 Ch. D. 610; 57 L. J. Ch. 283; 58 L. T. 179.

4. *Manager—Appointment—Discretion of court—Railway Companies Act*, 1867, *s.* 4.—In exercising jurisdiction under section 4 of the Railway Companies Act, 1867, relative to the appointing of a manager of a railway company at the instance of judgment creditors, the court should take a broad view of the position and exigencies of the company, and act for the general benefit of all the creditors; but the court is not to consider itself fettered by any contract or arrangement between the company and any person.—*In re Hull, Barnsley, and West Riding Railway Co.*, CH.D. CHL., J.—57 L. T. 82.

5. *Minerals—Notice by owner—Quarrying—Railways Clauses Consolidation Act*, 1845, *ss.* 77, 78.—An owner of mines or minerals lying under a railway who is desirous of working them, not as his own speculation, but through the medium of lessees, is a person entitled, under section 78 of the Railways Clauses Consolidation Act, 1845, to give notice of intention to work the same.

To justify an owner giving such a notice, there must be not merely an expression of a desire, but an honest actual existence of a desire, to work, either by himself or his lessees, the mines or minerals.

The words "mines" and "minerals," as used in section 77 and the following sections of the Railways Clauses Consolidation Act, 1845, extend to open quarries and to minerals got by open quarrying.

Midland Railway Co. v. *Haunchwood Brick and Tile Co.*, 30 W. R. 640, 20 Ch. D. 552, approved.

Decision of Chitty, J., affirmed.—*Midland Railway Co.* v. *Robinson*, C.A. 650—37 Ch. D. 387; 57 L. J. Ch. 441.

6. *Negligence—Cattle—Burden of proof.*—In an action against a railway company for injuries to cattle proved to have been safely placed in the defendants' truck, but found to be injured on arrival at their destination, the burden of proving negligence is on the plaintiff.—*Smith* v. *Midland Railway Co.*, Q.B.D.—57 L. T. 813.

7. *Negligence—Contributory negligence.*—When, in an action of negligence, the defendant relies on the doctrine *Volenti non fit injuria*, he must obtain a finding at the trial that the plaintiff voluntarily took the risk upon himself and had a full knowledge of the nature and extent of the danger, since otherwise the court will not give judgment for the defendant on the ground that such a finding is the only inference which can properly be drawn from the facts.—*Osborne* v. *London and North-Western Railway Co.*, Q.B.D. 269—21 Q. B. D. 220.

8. *Negligence — Contributory negligence — Level crossing.*—About 3 p.m. B. crossed the defendants' railway near a station by a level crossing. On each side of the line there was a large swing gate, as well as a wicket for foot passengers. An express train was due at 2.30, but was about forty minutes late, and another train was due at 3.15 The swing gates were shut, but no attempt was made to prevent B. from crossing. While B. was in the space between the up and down lines, a person on the platform called out, "Look out for the train." B. became confused, ran forward, and

was killed by the train. There was evidence that the whistle had been sounded, and the train was visible for 200 yards from the crossing.

Held, that there was no evidence of negligence on the part of the defendants.—*Curtin* v. *Great Southern and Western Railway Co.*, C.A. (Ir.)—22 L. R. Ir. 219.

9. *Negligence—Passenger's luggage—Custody of company.*—The plaintiff's wife arrived, with three articles of luggage, at the defendants' station forty minutes before the departure of the train by which she was to travel. A porter took the luggage from her and placed it on a trolley, and labelled two of the articles, she saying that she wished the other article—a bag—to be put into the carriage with her, and asking the porter if it would be safe to leave it with him while she went to meet her husband, who was to travel with her, and to get her ticket. The porter replied that it would, and that he would guard the luggage and put it in the train. The train was not then alongside the platform. When she returned in ten minutes with her husband, whom she had met in the station, and who had taken her ticket for her, the bag was missing. The county court judge found that the porter was negligent in not guarding the bag, and in not being in readiness to put the bag into the carriage.

Held (Lord Bramwell dissenting), that there was evidence to justify the finding of the county court judge, that the bag was in the custody of the railway company for present transit from the time of its delivery to the porter, and that the loss was due to the company's negligence.

Semble, that, where a passenger's luggage is placed, at his request and with the assent of the company, in the carriage in which he is to travel, the contract is one of common carriage, subject to the modification that, in respect of his interference with their exclusive control of his luggage, the company is not liable for any loss or injury occurring during its transit to which the act or default of the passenger has contributed.

Decision of the Court of Appeal (reported 34 W. R. 574, 17 Q. B. D. 215) affirmed.

Bergheim v. *Great Eastern Railway* (reported 26 W. R. 301, 3 C. P. D. 221) disapproved.—*Great Western Railway Co.* v. *Bunch*, H.L. 785—13 App. 361; 57 L. J. Q. B. 361; 58 L. T. 128.

10. *Passenger—Assault—False imprisonment—Loss of ticket.* — Where a railway passenger has taken and paid for his ticket, but has afterwards lost it, and has declined to pay the fare again, the company cannot eject him from the railway carriage, but can only take his name and address and sue him for the fare.—*Butler* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, C.A. 726—21 Q. B. D. 207.

11. *Passenger's luggage — Delivery — Reasonable time.*—It is the duty of a railway company, with regard to the luggage of a passenger which travels by the same train with him, but not under his control, when it has reached its destination, to have it ready for delivery upon the platform at the usual place of delivery until the owner, in the exercise of due diligence, can receive it; but the liability of the company as carriers will cease after a reasonable time has been allowed to the owner to do so.—*Firth* v. *North-Eastern Railway Co.*, Q.B.D. 467.

12. *Poor rate—Deficiency—County rate—Borough rate—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict.* c. 18), *s.* 133—*County Rates Act*, 1852 (15 & 16 *Vict.* c. 81), *s.* 26—*Municipal Corporations Act*, 1882 (45 & 46 *Vict.* c. 50), *s.* 145.—Where a railway company is liable to make good a deficiency in a poor rate under section 133 of the Lands Clauses Consolidation Act, 1845, in calculating such deficiency both the county rate and, in the case of a parish wholly within a borough, the borough rate, ought to be included in the poor rate.—*Farmer* v. *London and North-Western Railway Co.*, Q.B.D. 590—20 Q. B. D. 788.

13. *Receiver—Dock company—Railway Companies Act*, 1867 (30 & 31 *Vict.* c. 127), *ss.* 3, 4.—By a special Act promoted and obtained by a railway company, certain articles of agreement set forth in a schedule to the Act, and made between the railway company and a dock company, were confirmed. This agreement provided that the dock company should construct so much of the line as passed through their land;-that the dock company should, at their option, have the management of and work that part of the line; and that the management of that part of the line, if worked by the railway company, should be subject to the control of the dock company. Prior to and apart from the special Act, the dock company had no power to construct or work a line of railway. After the passing of the special Act the dock company constructed on their land the line of railway mentioned, and worked and managed it themselves.

Held, that the dock company came within the interpretation of the term "railway company" in section 3 of the Railway Companies Act, 1867, and that the court had jurisdiction to appoint a receiver and manager of the undertaking under section 4 of the Act of 1867.

Held, also, that the receivership order was not to be limited to the moneys received by the dock company in respect of the railway, but should extend to the whole undertaking of the dock company.

Decision of Chitty, J., affirmed.—*In re East and West India Docks Co.*, C.A. 849—38 Ch. D. 576.

14. *Undue preference — Set-off — Overcharge — Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict.* c. 31), *ss.* 2, 6.—In an action by a railway company to recover charges for carriage of goods, it is no defence that the charges sued for are unreasonable so as to give an undue preference to any person, and the defendant cannot set off, or counter-claim for, previous overpayments as being unreasonable within section 2 of the Railway and Canal Traffic Act, 1854.—*Lancashire and Yorkshire Railway Co.* v. *Greenwood*, Q.B.D.—21 Q. B. D. 215.

See also Canada, Law of, 2—4; Company, 17, 28; Damages, 3; Justice of the Peace, 8; Lands Clauses Consolidation Act, 2; New South Wales, Law of, 4; Stamp, 1.

RATING.—See Bankruptcy, 30; Local Government, 6; Poor Rate, 1—4; Railway, 12.

REASONABLE and PROBABLE CAUSE.—See False Imprisonment, 4; Libel, 2; Malicious Prosecution.

RECEIVER. — See Administration, 13; Costs, 24; County Court, 14; Mortgage, 9, 10; Partnership, 4; Practice, 37, 45; Railway, 8, 13.

RECEIVING ORDER.—See Attachment, 8; Bankruptcy, 1, 32—34; Jurisdiction, 4a.

RECTIFICATION.—See Settlement, 12.

RECTIFICATION of REGISTER.—See Bill of Sale, 12; Company, 26; Trade-Mark, 3, 4.

REDEMPTION.—See Mortgage, 15—17; Practice, 39.

REGISTRATION.—See Bill of Sale, 11—19; Company, 10—12, 18, 32; Contract, 4; Copyright, 4;

DEED, 5, 6; DENTIST; INJUNCTION, 4, 12; MANDAMUS, 1; TRADE-MARK, 4a, 5, 6; TRINIDAD, LAW OF.

RENT.—See BANKRUPTCY, 2; COMPANY, 41; DAMAGES, 4; EASEMENT; EXECUTOR, 2; LANDLORD AND TENANT, 5, 9; LIMITATIONS, STATUTE OF, 2; MORTGAGE, 12; PRACTICE, 37; SOLICITOR, 10.

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RESTRAINT of TRADE.—See COVENANT, 2—5; INJUNCTION, 9; TRADE UNION.

RESTRAINT on ANTICIPATION.—See DIVORCE, 14; HUSBAND AND WIFE, 19—23; JURISDICTION, 18; SETTLEMENT, 9.

RESTRICTIVE COVENANT. — See LANDLORD AND TENANT, 6; VENDOR AND PURCHASER, 8—10.

RETAINER.—See EXECUTOR, 4; SOLICITOR, 19.

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Ord 70, r 1—See PRACTICE, 52, 57
r 2—See PRACTICE, 22, 52, 53

SALE of FOOD and DRUGS ACT.—See ADULTERATION, 1, 2.

SALE of GOODS.—See BILL OF SALE, 19; DAMAGES, 9; WARRANTY, 2.

SALVAGE.—See MARINE INSURANCE, 6; SHIPPING, 5, 29—31.

SCOTLAND, LAW of:—

1. *Execution—Residuary gift—Warrandice—Titles to Land Consolidation (Scotland) Act,* 1868 (31 & 32 *Vict. c.* 101) *s.* 8.—In 1853 A., by a *depositio mortis caused,* conveyed his whole estate to trustee, in order to convey his M. estate to his brother in strict entail. By a codicil executed in 1876, after his marriage, he left to his wife his D. and B. estates, which were to be excepted from the land to be entailed under the deed of 1853, and he also bequeathed to her his residuary estate. He had previously appointed his wife sole executrix. The codicil contained a clause of warrandice under section 8 of the Titles to Land Consolidation (Scotland) Act, 1868. In 1882 A. executed a bond for £250,000 over the M., D., and B. estates.

Held, that A.'s widow, as executrix and personal representative, must discharge the obligation of warrandice.—*Duchess of Montrose* v. *Stuart,* H.L.—13 App. 81.

2. *Husband and wife—Post-nuptial settlement—Assent by wife.*—A. by a trust disposition and settlement directed his trustees to pay the whole income of his estate to his wife, and "after the death of the longest liver of me and my wife to convert into money all my estate and, with her consent," to pay certain legacies. Power of alteration and revocation was reserved to A.

The wife signed the instrument, and survived A. by two months.

Held, that the wife had power to accept the provision, and the representatives had no right to her terce and *jus relictæ*.—*Edward* v. *Cheyne*, H.L.—13 App. 373.

3. *Husband and wife—Separate estate—Gift to husband—Revocation.*—By the law of Scotland a married woman may make a gift of her separate estate to her husband, and she may make the gift even after his death.—*Edward* v. *Cheyne* (2) H.L.—13 App. 385.

4. *Prescription—Sea shore—Rights of Crown—Conveyancing (Scotland) Act*, 1874 (37 & 38 *Vict. c.* 94) *s.* 34.—A. sought to establish his title against the Crown and the railway company to the foreshore of the sea opposite his land, claiming under a grant of *feu* to his ancestor in 1804, which described the property as land bounded by the sea. A. gave no evidence that the grantor had an express title from the Crown, but set up a right to the foreshore by prescriptive possession following his own title. In 1827 A.'s predecessor had built a retaining wall on a part of the foreshore, and both A. and his predecessors and tenants had taken sand, stones, and sea-weed from the shore.

Held, that A. had sufficiently proved possession of the foreshore for the period prescribed by the Conveyancing (Scotland) Act, 1874, and had established a right to the foreshore against the Crown.—*Lord Advocate* v. *Young*; *North British Railway Co.* v. *Young*, H.L.—12 App. 544.

See also INFANT, 1.

SEPARATE ESTATE.—See BANKRUPTCY, 37; COSTS, 13; HUSBAND AND WIFE, 5, 6, 14—25; JURISDICTION, 18; PRACTICE, 27; SCOTLAND, LAW OF, 3; SETTLEMENT, 1, 2, 9; SOLICITOR, 2.

SEPARATION DEED.—See HUSBAND AND WIFE, 7, 26; INFANT, 4; WILL, 34.

SEQUESTRATION.—See HUSBAND AND WIFE, 24; PRACTICE, 1.

SET-OFF.—See COMPANY, 7, 15; CONTRACT, 8; COSTS, 31; COUNTY COURT, 22; EXECUTOR, 5; MARINE INSURANCE, 3; PRINCIPAL AND AGENT, 3; RAILWAY, 14.

SETTLED ESTATES ACT.—See LANDLORD AND TENANT, 8.

SETTLED LAND ACT.—See SETTLEMENT, 3, 14—18; TRUSTEE, 2, 27; VENDOR AND PURCHASER, 11; WILL, 26.

SETTLEMENT:—

1. *After-acquired property—Covenant to settle—Separate estate—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 5, 19.—A marriage settlement made in 1870 contained a covenant by the husband for the settlement of any future acquired property of the wife exceeding a specified amount, except jewellery and similar articles. The wife, after the commencement of the Married Women's Property Act, 1882, became absolutely entitled under a will made in 1883 to a share of the residuary estate, which exceeded the specified amount, without any limitation as to separate use.

Held, that the fact that the covenant was a covenant by the husband only did not prevent the settlement being a settlement within the meaning of section 19 of the Act, and the effect of that section was to prevent the separate use given to the wife by the Act, excluding the operation of the settlement; and that the wife's share was bound by the covenant to settle after-acquired property.

In re Queade's Trusts, 33 W. R. 816, not followed.

Decision of North, J., (reported 36 W. R. 166), affirmed.—*Hancock* v. *Hancock*, C.A. 417—38 Ch. D. 78; 57 L. J. Ch. 396; 58 L. T. 906.

2. *After-acquired property—Covenant to settle—Separate estate—Restraint on anticipation.*—On the 5th of June, 1860, A. and B., in exercise of a power of appointment contained in their marriage settlement, appointed £3,500 to their daughter D. On the 6th of June, by the marriage settlement of H. and D., D. assigned the £3,500 to trustees upon certain trusts, providing a first life interest for H., and a general testamentary power of appointment for D. in default of children. There was also a covenant by H. and D. to assure to the trustees any after-acquired property, except certain specified interests. On the 20th of June A. and B. appointed that a part of the unappointed residue under their settlement should go to D. during coverture for her separate use without power of anticipation, and it was provided that if D. should die in E.'s lifetime leaving no children, the same moiety should go to M., the son of A. and B. absolutely, and that it should go to D. absolutely if she survived E. D. died in 1887, leaving children, and having by her will left all her property to E., and appointed him sole executor. A. and B. had predeceased D.

Held, that the restraint on anticipation, though invalid, showed an intention that D. should have no power of disposition over the *corpus*, which was affected by the covenant to settle after-acquired property.—*Shute* v. *Hogge*, CH.D. KAY, J.—58 L. T. 546.

3. *Condition — Forfeiture — Non-residence — Temporary letting—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 15, 51, 52.—A mansion and demesne in the county of Dublin were settled upon the same trusts as land in the counties of Mayo and Sligo, with a condition of forfeiture on non-residence, selling, or, letting.

Held, that the condition of forfeiture was void for the purposes of the Settled Land Act, 1882, and that the court would authorise a temporary letting.—*In re Thompson*, M.R. (Ir.)—21 L. R. Ir. 109.

4. *Construction—"Issue then in being"—Power of appointment—Mortgage.*—By a marriage settlement the husband granted freehold property to trustees upon trust for himself for life, and after his death to convey the lands and pay the rents "unto and for the benefit of all and every or any one or more child or children, or any grandchild or grandchildren, or other issue then in being of the said intended marriage for such estate or interest, and in such shares and subject to such conditions as the settlor should by deed or will appoint." All the children of the marriage attained the age of twenty-one. The husband appointed a part of the property in favour of his eldest son, his heirs and assigns, and joined with him in a mortgage of the same part.

Held, that the appointment was valid, and that the mortgage passed the fee.

Judgment of the Court of Appeal in Ireland affirmed.—*Leader* v. *Duffey*, H.L.—13 App. 294; 59 L. T. 9.

5. *Construction — Merger—Charge—Life estate—Power of appointment.*—In 1829 S., by his marriage settlement, assigned £7,500, which he charged on an estate to which he was absolutely entitled, to his trustees, in trust for himself for life, and after his death to his wife for life, and after the deaths of both in trust for all the children of the marriage as S. should by deed or will appoint. The issue of the marriage was one son and two daughters. In 1851 S., by his will, appointed to his son £5,000 out of the

settled fund, and devised to him and the heirs of his body the land on which the fund was charged. In 1858, by a codicil, he revoked the former devise, and bequeathed the land to his son for life, with remainder to such uses as the latter should by deed or will appoint. In 1872 the son, by his marriage settlement, which recited the devises of land, but not the charge thereon, appointed the land after his death to trustees for 200 years, to secure a strict settlement for his wife, with remainder to the sons and daughters successively of his intended, or any subsequent, marriage, with ultimate remainder to himself in fee.

Held, that the charge was not merged, and that the £5,000 was still part of the son's personal estate.—*Smith* v. *Smith*, M.R. (Ir.)—19 L. R. Ir. 514.

6. *Construction—"Unmarried"—Next of kin—Ultimate trust.*—The meaning of the word "unmarried," in the absence of any context showing a different meaning, is "without ever having been married."

By a marriage settlement, property belonging to the wife was settled, in events which happened, subject to the life interests of the husband and wife, in trust for such person or persons as, under or by virtue of the statute for the distribution of intestates' effects, should at the time of the decease of the wife have been entitled to her personal estate as her next of kin "in case she had died intestate and unmarried."

Held, that, in the absence of anything to show a contrary intention, "unmarried" must be construed "without ever having been married."—*Blundell* v. *De Falbe*, CH.D. NOR., J.—57 L. J. Ch. 576; 58 L. T. 621.

7. *Infant—Ratification—Power of appointment.*—By marriage settlements made in 1834 power was given to the intended husband and wife, or the survivor of them, by deed or by will, to appoint the settled property among the children of the intended marriage. There were three daughters, one unmarried and two married. The wife died without having joined in making any appointment, and the husband, by his will, appointed the property among the three daughters equally, subject to the proviso that the share of any daughter who should be unmarried at his decease should be held in trust for her for life for her separate use, and after her decease, as to capital and income, in case she should leave children, in trust for such persons as she should appoint, and in default of appointment or if she should not leave issue upon trust in favour of the other children. The unmarried daughter remained single at her father's death.

Held, that she was entitled to her share absolutely, the proviso being void for remoteness and inseverable.

By one of the settlements, to which the father and mother of the intended wife, the intended husband, and the intended wife—who was then an infant—were parties, the father and mother of the intended wife agreed, and the intended husband covenanted, that the husband and wife would, on her attaining twenty-one, convey the wife's reversionary freeholds to the trustees upon the trusts of the settlement. In 1836 the husband and wife — the latter having attained twenty-one—conveyed the freeholds to the trustees.

Held, that, for the purpose of the rule against perpetuities, the real estate was settled and the power of appointment conferred in 1834.—*Cooke* v. *Cooke*, CH.D. NOR., J. 756—38 Ch. D. 202.

8. *Infant—Ward of court—Misrepresentation—Estoppel.*—Proposals for a settlement on the marriage of an infant ward of court were brought into chambers, and purported to set out the property to which the infant was entitled as tenant in tail under a settlement of 1857; but by inadvertence a sale of some of the real estate to the London School Board and the payment into court of the purchase-money was overlooked, and the property described as though no such sale had taken place. The trustees of the settlement made an affidavit, which was read in support of the proposals, and which contained the same mistake. On the basis of the proposals, the court sanctioned a settlement, which was carried out by the infant disentailing under the Infants' Settlement Act, 1855. The infant married, attained the age of twenty-one, disentailed the fund in court, and settled it upon herself.

Held, that the trustee of this last settlement and the wife were estopped from setting up a title to the fund adverse to the trustees of her marriage settlement, in consequence of the misrepresentation of the trustees of the settlement of 1857, which misrepresentation had been made on her behalf.—*Mills* v. *Fox*, CH.D. STI., J. 219—37 Ch. D. 153; 57 L. J. Ch. 56; 57 L. T. 792.

9. *Mortgage—Married woman—Separate estate—Restraint on anticipation—Notice to trustees—Conveyancing Act*, 1881 (44 & 45 *Vict.* c. 41), s. 39.—The court made an order enabling a married woman, without service of notice to her trustees, to mortgage a life interest as to which she was restrained from anticipation.—*In re Little*, C.A.—36 Ch. D. 701; 56 L. J. Ch. 872; 57 L. T. 583.

10. *Payment into court—Payment out—Sale of real estate—Affidavit of no incumbrances.*—Applications, by persons claiming to be absolutely entitled, for payment out of money in court representing real estate, should be supported by an affidavit of no incumbrances, and *primâ facie* the applicant is the proper person to make the affidavit.—*Williams* v. *Ware*, CH.D. CHI., J.—57 L. J. Ch. 497.

11. *Portions—Satisfaction—Will.*—A., by a marriage settlement, conveyed land to trustees, to raise £3,000 for the children of the marriage in such shares as A. should appoint, and in default of appointment between such children equally. A. had three sons and six daughters, and no power of appointment was executed. By his will A. bequeathed his residuary estate, which realised a larger fund than his daughters would have been entitled to under the settlement, upon trust, after the death of his wife, to whom he gave the interest for life for the maintenance of his daughters, to pay to each daughter one-sixth of the interest while unmarried, and a fifth share of the principal on marriage, with a gift over to the survivors of the share of any daughter dying unmarried.

Held, that the will operated to satisfy the portions given to the daughters by the settlement—*In re Battersby*, L.J. (Ir.)—19 L. R. Ir. 359.

12. *Rectification—Undue influence—Father of wife.*—A father living on friendly terms with his daughter is a proper person to advise her as to the provisions of her marriage settlement, and independent legal advice for the daughter is unnecessary, unless the father is, under the settlement, taking a benefit from the daughter.

Judgment of Kekewich, J., reversed.—*Tucker* v. *Bennett*, C.A.—38 Ch. D. 1.

13. *Tenancy for life—Cutting timber—Injunction—Undertaking as to damages.*—The plaintiff was tenant in tail in remainder, and the defendant was tenant *pur autre vie*, of an estate settled in 1855. There was no mansion on the estate till 1858, when a house was acquired by an exchange of land under a power in the settlement. The defendant

having cut down trees, and advertised a sale of timber, an injunction was granted against him.

The court directed an inquiry as to what trees could be cut without injury to the property, the injunction being conditional on the plaintiff giving an undertaking as to damages.—*Ashby* v. *Hinchs*, CH.D. STL., J.—58 L. T. 557.

14. *Tenancy for life—Heirlooms—Sale by tenant for life—Discretion of court—Settled Land Act*, 1882, *ss.* 37, 53.—A tenant for life of settled estates applied for the sanction of the court to a sale of heirlooms, the proceeds to be applied in reduction of charges on the estate. The estimated value of the heirlooms was £7,300, the annual income being about £7,500. The trustees and guardians of the tenant in tail in remainder were opposed to the sale.

The court, in its discretion, refused to sanction the sale.—*In re Beaumont's Settled Estates*, CH.D. CHI., J. —58 L. T. 916.

15. *Tenancy for life—Improvements—Drainage—Interest—Settled Land Act*, 1882, *ss.* 21, 22, 25, 28, 33, 44—*Settled Land Act*, 1887 (50 & 51 *Vict. c.* 30), *ss.* 1, 2—*Improvement of Land Act*, 1864 (27 & 28 *Vict. c.* 114), *s.* 66.—Trustees applied for liberty to apply capital in their hands of settled land in payment of instalments or proportionate repayments of a loan of £2,704, borrowed in 1879 for the improvement of the estate, to secure which the estate was charged with repayment by half-yearly instalments, consisting partly of principal and partly of interest, calculated so as to pay off the whole debt and interest in twenty-five years.

Held, that, as the improvements were such as were authorised by the Settled Land Act, 1882, the trustees might from time to time apply capital in their hands in payment of such part of the instalments as should consist of capital, but that the tenant for life must keep down the interest.—*In re Lord Sudeley's Settled Estates*, CH.D. KAY, J. 162 — 37 Ch. D. 123; 57 L. J. Ch. 182.

16. *Tenancy for life—Improvements—Payment out of capital—Excess of estimate—Settled Land Act*, 1882, *s.* 26.—Where a scheme for the permanent improvement of a settled estate, by providing it with an additional water supply, and thus rendering it available as a building estate, had been submitted to the trustees and approved by them, and in carrying out the scheme it was found necessary to incur additional expense to that authorised by the scheme, the court, being satisfied that the additional expense was incurred for wok which fell substantially within the scheme, made an order, under section 26 of the Settled Land Act, 1882, directing the trustees to apply the capital moneys forming part of the settled property in payment of the additional expense.

In re Hotchkin's Settled Estates, 35 W. R. 463, 35 Ch. D. 41, distinguished.

Decision of Stirling, J., reversed.—*In re Knebworth Settled Estates*, C.A. 420—38 Ch. D. 20; 57 L. J. Ch. 340; 59 L. T. 12.

17. *Tenancy for life—Power of sale—Timber—Costs—Settled Land Act*, 1882, *s.* 21, *sub-sections* 9, 10.—Costs properly incurred by a tenant for life in defending an action to restrain the exercise of his power of sale are costs incidental to the exercise of his powers, in discharge of which capital money may be applied under section 21, sub-section 9, of the Settled Land Act, 1882.

An action by remaindermen to restrain trustees and the tenant for life from exercising a power of sale under a will was dismissed, with costs. While the proceedings were pending, the Settled Land Act, 1882, came into operation, and the property was subsequently sold under the powers of that Act.

Held, that the tenant for life was entitled to have paid to him out of the purchase-money the difference between his party and party and solicitor and client costs of so much of the action as related to the exercise of his powers under the Act.

A tenant for life was authorised by a will to fell timber beginning to decay and sell the same for his own benefit.

Held, upon a sale, under the Settled Land Act, 1882, of the land and the timber, some of which was decaying, but had never been severed, that the tenant for life had never become absolutely entitled to any of the timber, and was not entitled to any part of the purchase-money of the timber, by virtue either of the will or of the Settled Land Act, 1882.—*Llewellin* v. *Williams*, CH.D. STL., J. 347—37 Ch. D. 317; 57 L. J. Ch. 316; 58 L. T. 152.

18. *Tenancy for life—Sale of land—Mortgage—Settled Land Act*, 1882, *s.* 21, *sub-section* 2.—A mortgage for a long term of years is an incumbrance affecting the inheritance of settled land, in the discharge of which capital money arising from the sale of part of the settled land may be applied under section 21, sub-section 2, of the Settled Land Act, 1882.—*Freeman* v. *James*, CH.D. NOR., J. 340—38 Ch. D. 383; 59 L. T. 131.

19. *Title—Railway stock—Transfer—Non-registration—Companies Clauses Consolidation Act*, 1845 (8 & 9 *Vict.* c. 16), *ss.* 14—16.—In 1868 certain railway stock was standing in the names of A. and B., who were trustees of it for C. In that year a transfer of the stock by A. and B. to C. was executed and sent to the company for registration; but, in consequence of its being improperly stamped, and the stock certificate not being sent with it, it was returned by the company unregistered. The proper stamp was then affixed, but no further step was taken until 1872. In 1869 C. purported, by a voluntary deed, to settle the stock. The Act by which the stock was created incorporated the Companies Clauses Consolidation Act, 1845.

Held, that, at the date of the settlement, the stock was not legally vested in C., since it was essential to the validity of the transfer that it should be delivered to the secretary of the company, to be kept by him in accordance with section 15 of the Act; that the transfer, being improperly stamped, was rightly returned by the company; and that the representative of C. must transfer the stock to the trustees of the voluntary settlement.

Decision of Stirling, J. (35 W. R. 713, 35 Ch. D. 598), affirmed.—*Nanney* v. *Morgan*, C.A. 677—37 Ch. D. 346; 57 L. J. Ch. 311; 58 L. T. 328.

20. *Voluntary settlement — Bankruptcy — Costs—Lien of trustees—Bankruptcy Act*, 1883 (46 & 47 *Vict.* c. 52), *s.* 47.—A debtor executed a post-nuptial settlement, but subsequently brought an action to set aside the settlement, which was defended by the trustees, and dismissed, with costs. The debtor thereupon filed his own petition, and became bankrupt within two years after the date of the settlement.

Held, that the settlement was void under section 47 of the Bankruptcy Act, 1883, but that the trustees were entitled to a lien for their costs in the action on a portion of the trust funds.—*Ex parte Official Receiver, In re Holden*, Q.B.D., BANKY. 189 — 19 Q. B. D. 43; 57 L. J. Q. B. 47; 58 L. T. 118.

21. *Voluntary settlement—Consideration—Trader—Bankruptcy Act*, 1869 (32 & 33 *Vict.* c. 71), *ss.* 91, 94, *sub-section* 3.—By a post-nuptial settlement the

settlor, in consideration of the assignment by his father of certain leasehold property to the trustees thereof, and in consideration of a release of a debt due from him to his father, assigned to the trustees two policies of insurance upon his life, upon trust out of the income arising from the leasehold property to pay the premiums on the policies and the residue to the settlor for life, and after his death upon trust, as to all the property, for the settlor's children. Within two years after the date of the settlement the settlor was adjudicated bankrupt under the Bankruptcy Act, 1869. Upon the death of the settlor his trustee in bankruptcy claimed the proceeds of the policies, upon the ground that the settlement was void under section 91 of that Act.

Held, that the settlor's father was a "purchaser in good faith and for valuable consideration" within the exception in section 91, and that the settlement was valid.

Held, also, that the settlement was protected by section 94, sub-section 3, as a "dealing with the bankrupt in good faith and for valuable consideration."

Held, also, that a general medical practitioner who supplies the medicines which he prescribes for his patients, but who makes no charge for medicines, charging only for attendance, is not a "trader" within the meaning of the Act.—*Hance* v. *Harding*, C.A. 629—20 Q. B. D. 732; 57 L. J. Q. B. 403.

22. *Voluntary settlement—Limitation to children of former marriage—Mortgage—27 Eliz. c. 4.*—The principle of *Newstead* v. *Searles*, 1 Atk. 265, 9 App. Cas. 320n, that the children of a widow by a former marriage taking under a settlement made on her second marriage are not to be treated as volunteers, does not extend to the case of the children of a widower.

By a settlement made on the second marriage of a widower land belonging to him was conveyed in trust for his children by a first mortgage absolutely, and personalty belonging to the wife was settled on her absolutely. The husband afterwards mortgaged the land.

Held, that the settlement was voluntary as regards the children of the husband, and that, by 27 Eliz. c. 4, the limitation in their favour was void as against the mortgagee.—*In re Cameron and Wells*, CH.D. KAY, J. 5—37 Ch. D. 32; 57 L. J. Ch. 69; 57 L. T. 645.

23. *Voluntary settlement—Mortgage—Accumulations.*—A settlor, by a voluntary settlement of real estate, subject to mortgages, created a trust term, to arise after his decease, for the accumulation of a fixed sum out of the rents each year during a period of twenty-one years, to pay off, either at the end of that period or from time to time during its continuance, as the trustees of the term should think fit, such mortgages as should then be charged on the estate; and he limited the estate by way of remainder expectant on the trust term in strict settlement, the person for the time being entitled to the immediate reversion to be paid the surplus rents. Some years after the death of the settlor, a tenant in tail in possession under the settlement barred the entail, and applied to the court for a declaration that he, as owner of the estate, was entitled to receive the accumulations and to put an end to the trusts of the term. Mortgages to a considerable amount were still outstanding.

Held, that, as, under the deed of settlement, the trust term did not arise until after the death of the settlor, the deed was not a mere arrangement for vesting the property in trustees as agents for the settlor, but constituted a trust in favour of the mortgagees; and that, as the mortgagees, though not parties to, and not named in, the deed, were capable of being ascertained, they were entitled, as *cestui que trusts*, to insist on and enforce the execution of the trust for accumulation against the applicant or any owner of the estate until they were paid off.

Garrard v. *Lord Lauderdale*, 2 Russ. & My. 451, distinguished.

Per Cotton, L.J.—Even if the mortgagees were not *cestui que trusts*, no person other than the settlor claiming under the deed of settlement would have any equity to set aside the provisions in the deed relating to accumulation.

Order of North, J., varied.—*Fitzgerald* v. *White*, C.A. 385—37 Ch. D. 18; 57 L. J. Ch. 594; 57 L. T. 706.

See also BANKRUPTCY, 37; DIVORCE, 15; EXECUTOR, 5; HUSBAND AND WIFE, 25; INFANT, 9—10; POOR LAW, 8—10; POWER OF APPOINTMENT, 3; SCOTLAND, LAW OF, 2; VENDOR AND PURCHASER, 11.

SHERIFF:—

1. *Execution—Death of high sheriff—Liability of under-sheriff—3 Geo. 1, c. 15, ss. 8, 11.*—After the death of a high sheriff, and before the appointment of his successor, the under-sheriff sold goods which had been taken in execution before the death of the high sheriff.

Held, that the under-sheriff was accountable for the proceeds to the execution creditor, and not to the executors of the deceased high sheriff; and that an action for money had and received would lie against him or his executors.

Decision of the Queen's Bench Division (35 W. R. 842, 19 Q. B. D. 575) affirmed.—*Gloucestershire Banking Co.* v. *Edwards*, C.A. 116—20 Q. B. D. 107; 57 L. J. Ch. 51; 58 L. T. 463.

2. *Partnership—Execution against partner—Purchase by partner.*—A sheriff under a *fi. fa.* can only sell such assets of a firm as are seizable and not book debts or goodwill.

Under a judgment against one of two partners, the sheriff at a sale by auction sold his interest in the partnership to the other partner, and executed an assignment of it to him. The purchase-money was paid by the partner out of the partnership assets.

Held, that the sale must be set aside; and that there was no dissolution of the partnership.

Quære, whether there would have been a dissolution of the partnership if the partner had paid the purchase-money out of his own money.—*Helmore* v. *Smith*, C.A. 3—35 Ch. D. 436.

See also BANKRUPTCY, 11—13; DAMAGES, 4.

SHIPPING:—

BILL OF LADING—

1. *Deviation.*—Goods were shipped on board a general ship for carriage from Fiume to Dunkirk. The bill of lading contained the usual exception of perils of the sea, and stated that the goods were shipped "on board *The A.*, now lying at the port of Fiume, bound for Dunkirk, with liberty to call at any ports in any order." *The A.* proceeded first to Glasgow, and was lost on the voyage thither through a peril of the sea.

Held, that evidence was inadmissible to vary the contract of carriage as contained in the bill of lading; that the voyage to Glasgow was a deviation in excess of the liberty given by such contract; and that the exception contained in the bill of lading did not apply.—*Leduc* v. *Ward*, C.A. 537—20 Q. B. D. 475; 57 L. J. Q. B. 379; 58 L. T. 908.

2. *Exception—Accidents of the seas—Damage by rats.*—If a cargo was damaged by sea water which entered through a hole made by rats, there is a danger or accident of the seas within the exception in the charter-party and bills of lading.

Decision of the Court of Appeal (35 W. R. 70, 17 Q. B. D. 670) reversed.—*Hamilton* v. *Pandorf*, H.L. 369—12 App. 518; 57 L. J. Q. B. 24; 57 L. T. 726.

3. *Exception—Perils of the sea—Collision.*—Loss of cargo caused by collision is within the words "dangers and accidents of the sea" in the excepted perils in a bill of lading, and is an answer to an action brought for non-delivery of the cargo, if the collision occurs without negligence in the carrying ship.

Decision of the Court of Appeal (35 W. R. 23, 11 P. D. 170) reversed.

Woodley v. *Michell*, 31 W. R. 651, 11 Q. B. D. 47, overruled.—*Wilson* v. *The Xantho*, H.L. 353—12 App. 503; 56 L. J. P. D. & A. 96; 57 L. T. 701.

4. *Indorsement—Collision—Negligence—Contributory negligence—Lights—Regulations for Preventing Collisions at Sea, articles* 3, 5.—Owners of cargo who have indorsed the bill of lading to a bank to secure advances have sufficient interest in the cargo to maintain an action for damage to cargo by collision for the benefit of all parties proved to be entitled.

A ship carried a light which was visible three miles off, and which, though fixed in the rigging, was not intercepted by the sails or otherwise.

Held, that, there having been no breach of the regulations, there was no presumption of contributory negligence.—*The Glamorganshire*, P.C.—13 App. 454.

5. *Warranty — Seaworthiness — Latent defect — Salvage—Liability of cargo*—A steamship having become disabled at sea by the breaking of the flywheel shaft, was taken in tow by another steamship belonging to the same owners, and, after a towage of more than 700 miles, was placed in safety. At the time the services were rendered the disabled steamship was carrying cargo under three different forms of bills of lading, of which one form stated that the vessel was warranted seaworthy only so far as ordinary care could provide; another form provided that the vessel was warranted seaworthy only so far as due care in the appointment of agents, superintendents, pilots, masters, officers, engineers, and crew could insure it; and in the third form there was a stipulation that the shipowners were not to be liable for loss, detention, or damage if arising from latent defects in machinery, even existing at time of shipment, provided all reasonable means had been taken to secure efficiency. In an action by the owners, master, and crew of the salving vessel to recover salvage remuneration for salving the cargo shipped under these forms of bills of lading, and valued at £116,400, the court found that the flywheel of the disabled steamship had broken down from a latent defect, that such latent defect existed when the voyage commenced, but could not have been discovered by the exercise of any reasonable care on the part of the owners, and that the steamship had been seaworthy to the extent required by the bills of lading.

Held, that the plaintiffs were entitled to £1,200 as salvage remuneration for the services rendered to the cargo, and that of this amount £250 must be awarded to the crew of the salving vessel, £50 to her master, and the remainder to the shipowners.—*The Laertes*, P.D. & A.D. 111—12 P. D. 187; 56 L. J. P. D. & A. 108; 57 L. T. 316.

CARGO—

6. *Deck load—Board of Trade Regulation—Merchant Shipping Act*, 1880 (43 & 44 *Vict. c.* 45), *s.* 4.—A ship having two decks and loaded at a Mediterranean port, with a cargo of barley in bulk, must be provided with shifting boards in the lower hold.—*The Rothbury*, P.D. & A.D.—13 P. D. 119.

COLLISION—

7. *Compulsory pilotage — Exemption — London district — Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 379, *sub-section* 3.—A ship which is continually engaged in voyaging from London to the East, and back to London, and then to the North of Europe, and back to London, is, while passing down the Thames on its way to a port in the North of Europe, a ship trading to a place in Europe north of Brest within the meaning of section 379, sub-section 3, of the Merchant Shipping Act, 1854, as modified by an Order in Council of the 21st of December, 1871, and is exempt from compulsory pilotage.—*Courtney* v. *Cole*, Q.B.D. 8—19 Q. B. D. 447; 56 L. J. M. C. 141; 57 L. T. 409.

8. *Compulsory pilotage—Exemption—London district—Merchant Shipping Act*, 1854, *s.* 379.—*The S.*, a British vessel, on a voyage from Liverpool, not carrying passengers, but bound to, and having on board a cargo consigned to, Hamburg, to which port it was in the habit of trading, came into collision with a barque in the English Channel outside the boundary of the London Pilotage District, and received serious damage. In order to repair the damage, the master, when he arrived off the mouth of the Thames, shaped his course for London, and, off Gravesend, took on board a duly licensed Trinity pilot. Whilst the pilot was in charge *The S.* came into collision in Half Way Reach with a brig, but was able to proceed to London, where nearly all the cargo was discharged. Of the cargo discharged a portion was sent to Hamburg in another vessel, and the remainder, after a delay of about three weeks, was re-shipped in *The S.* and taken to Hamburg. An action of damage having been instituted on behalf of the owners of the brig against *The S.*, the owners of *The S.* raised the defence of compulsory pilotage.

Held, that, at the time of the collision, *The S.* was trading to a port north of Boulogne within the meaning of section 379 of the Merchant Shipping Act, 1854, and was exempt from compulsory pilotage under the provisions of that section.—*The Sutherland*, P.D. & A.D. 13—13 P. D. 174; 56 L. J. P. D. & A. 94; 56 L. T. 631.

9. *Compulsory pilotage—Negligence of pilot—River—Anchorage—Injury to oyster-bed.*—A ship in charge of a compulsory pilot was at high water anchored by the pilot in a river in which were oyster-beds, the existence of which was known to the pilot. It was not the usual and customary place for vessels of the same size to anchor in. At low water the ship grounded and damaged an oyster-bed. On notice of the existence of the oyster-bed being given to the master he took all reasonable means to remove the ship as speedily as possible.

Held, that the act of the pilot in anchoring the ship where he did was negligence which made him liable, but that the ship was not liable.—*The Octavia Stella*, P.D. & A.D.—57 L. T. 632.

10. *Negligence—Crossing ships—River Tyne.*—The duty imposed by the River Tyne Navigation Rules upon ships crossing the river not to cause obstruction or damage to other ships does not require a crossing ship in any event to get out of the way of ships going up or down the river, but such ships must take ordinary precautions to avoid collision with crossing ships.—*The Thetford*, P.D. & A.D.—57 L. T. 455.

11. *Negligence—Lights—Evidence—Regulations for Preventing Collisions at Sea, article* 11.—The white light required by article 11 of the Regulations for Preventing Collisions at Sea to be shown from the stern of a vessel overtaken by another vessel must be such as will secure the object of that article—*i.e.*, as will indicate to the overtaking vessel the position of the

overtaken vessel on which it is exhibited.—*The Patroclus*, P.D. & A.D. 928—13 P. D. 54; 58 L. T. 774.

12. *Negligence—Lights—Overtaking ship—Regulations for Preventing Collisions at Sea, articles* 2, 11—*Merchant Shipping Act*, 1873 (36 & 37 *Vict.* c. 85), *s.* 17.—A vessel carrying at the stern after sunset a white globular light, so placed as to throw its light from right astern to more than two points forward of the beam on each side of the vessel, and of such a character as to be visible at a distance of more than a mile, was held under the 17th section of the Merchant Shipping Act, 1873, to be in fault for coming into collision with another vessel approaching in such a direction that the collision might by possibility have been contributed to by the white light at the stern being thus carried so as to overlap the range of the side lights.—*The Palinurus*, P.D. & A.D. 768—13 P. D. 14; 57 L. J. P. D. & A. 21; 58 L. T. 533.

13. *Negligence—Lights—Overtaking ship—Regulations for Preventing Collisions at Sea, article* 11.—A ship which is being overtaken by another ship must show a light from time to time while it is being overtaken.—*The Essequibo*, P.D. & A.D.—13 P. D. 51; 58 L. T. 596; 57 L. J. P. D. & A. 29.

14. *Negligence—Lights—River Mersey—Merchant Shipping Act*, 1873, *s.* 17.—A barque which had come up the River Mersey from sea in tow of a steam-tug on the last of the flood was, in the early morning in January, before sunrise, and when nearly abreast of the Canada Basin and in the act of being turned in order to bring the head to the tide, run into almost amidships on the starboard side by a steamship proceeding down the river. To recover for the damage sustained in the collision the owners of the barque instituted an action of damage against the steamship. The green light required to be carried by the barque under the Order in Council of the 24th of June, 1885, relating to the navigation of the Mersey, was so placed as to be obscured by the starboard cathead of the barque from right ahead to considerably less than one-third of a point on the starboard bow; and the stern light required by the same order to be shown from the sternrail had been placed on the deck aft in such a position as not to be properly visible astern. The court found that there had been a reasonable compliance with the Order in Council with respect to the extent of the visibility of the green light of the barque, and that the obscuration of it had nothing to do with the collision; that the neglect to properly show a stern light from the sternrail of the barque could not by any possibility have contributed to the collision; and that the steamship ought to have slackened speed sooner.

Held, that there had been no such infringement of the Order in Council of the 24th of June, 1885, as brought the case within the 17th section of the Merchant Shipping Act, 1873, and that the barque could not be deemed to blame under that section.—*The Fire Queen*, P.D. & A.D. 15—12 P. D. 147; 56 L. J. P. D. & A. 90; 57 L. T. 312.

15. *Negligence—Overtaking ships—Regulations for Preventing Collisions at Sea, articles* 22, 23.—The Regulations for Preventing Collisions at Sea apply only when two ships are so near that, if either of them acts contrarily to the regulations, there will be a risk of a collision.—*The Banshee*, C.A.—57 L. T. 841.

16. *Negligence—River Tees.*—The River Tees Conservancy Bye-laws, providing that ships shall keep the starboard side of the river so that the port helm may always be applied, and that a steamship approaching another ship in an opposite direction shall, before coming within thirty yards, slacken speed and keep as near as possible to the starboard side, must be observed in all cases except those of extreme necessity.—*The Mary Lokden*, C.A.—58 L. T. 461.

17. *Negligence—River Thames Bye-Laws, article* 15—*Navigating in anchorage.*—A ship which finds all the buoys at the anchorage in Gravesend Reach occupied, and anchors a short distance above the last buoy, does not navigate within the anchorage ground in contravention of article 15 of the River Thames Navigation Bye-laws.—*The City of Delhi*, P.D. & A.D.—58 L. T. 530.

18. *Sale of ship.*—The owners of a vessel seriously damaged in a collision who had issued but had not served a writ in an action of damage *in rem* instituted against the vessel with which their vessel came into collision, applied, whilst their vessel was under their control and without the territorial jurisdiction of the court, that the court should order a sale of their vessel.

The court refused the application.—*The Wexford*, P.D. & A.D. 560—13 P. D. 10; 57 L. J. P. D. & A. 6; 58 L. T. 28.

19. *Towing—Action* in rem—*Maritime lien.*—The plaintiff's ship was sunk through a collision with the defendants' tug, which was towing it. One of the terms of the defendants' contract for towing was that they would not be answerable for damage to any vessel towed by their tugs, which were specified by name, whether occasioned by the negligence of their servants or otherwise. The tug which caused the damage was not specified by name, but had been hired by the defendants under a charter-party, which provided that all damages should be for the charterers' account. The plaintiff knew that the tug had been chartered.

Held, that the plaintiff could not recover damages in an action *in rem*.—*The Tasmania*, P.D. & A.D.—13 P. D. 110; 57 L. J. P. D. & A. 49.

Co-owners—

20. *Charter-party.*—A purchaser of a share of a ship during a voyage is liable for the expenses of the voyage, and is entitled to a share of the freight.

Part-owners who have not dissented, though aware that some co-owners have dissented, from the employment of a ship, are liable to bear the expenses, and are entitled to receive the profits, proportionally.

The plaintiffs in an action of restraint, being a minority of co-owners, had given notice to the managing owner that they would not be bound by a new charter-party. The managing owner had then arranged and signed for a charter-party which was afterwards signed by the charterers.

Held, that the charter-party was binding on the plaintiffs.—*The Vindobala*, P.D. & A.D.—13 App. 42; 57 L. J. P. D. & A. 37; 58 L. T. 353.

21. *Restraint action—Bail-bond—Cancellation.*—Where, in an action of restraint, the defendants put in bail, consenting that execution might issue against the bail if the vessel proceeded against should not safely return to a port within the jurisdiction from as many voyages as it should sail upon before notice should be given by the plaintiffs of the withdrawal of their claims for security, the court, about two years after the execution of the bail-bond, on its being proved that the vessel was in safety within the jurisdiction, and that the defendants had parted with all their interest to third parties, ordered the bail-bond to be cancelled in three days unless the vessel should have passed out of the jurisdiction before it was arrested by a further warrant, otherwise the bond to remain in force until the return of the vessel from the

next voyage.—*The Vivienne*, P.D. & AD. 110—12 P. D. 185; 56 L. J. P. D. & A. 107; 57 L. T. 110.

22. *Transfer of share—Bill of sale—Admiralty Court Act*, 1861 (24 & 25 *Vict.* c. 10), *s.* 8.—The managing owners of a steamship, in 1882, agreed to sell to V. one sixty-fourth share, for which he gave them a bill of exchange for £156, and received a receipt as "being one sixty-fourth share in the ship." In 1883 the managing owners sent V. £8 in respect of profits on his share, and a statement of accounts. No bill of sale of the share was ever executed, and the shares of the managing owners were mortgaged at the time of the sale, and they never were in a position to redeem them. Certain owners having paid losses incidental to the working of the ship, sued V. as a co-owner for his proportion of the losses.

Held, that, notwithstanding the receipt by V. of the £8, he was not a co-owner, and the managing owners had no authority to pledge his credit.—*The Bonnie Kate*, P.D. & A.D.—57 L. T. 203.

DEMURRAGE—

23. *Charter-party—Customary manner of loading.*—By a charter-party a ship was to proceed to Bilbao, and load in the customary manner in regular steamer turn, where and as ordered by the agent of the freighter, a cargo of iron ore; four hundred tons per working day, weather permitting, to be allowed for loading, and all demurrage over and above the said days at the rate of 12s. 6d. per hour, no demurrage to be paid in case of hands striking work, frosts, or floods, which might hinder the loading of the vessel. The port of Bilbao was on a river where there were a number of wharves, and the ore was brought down by railway from storing places five miles off, and loaded direct from trucks into the ship by shoots, there being no storing places at the wharves. Ships were sometimes loaded while lying out in the river from barges which brought the ore from storing places higher up. The ship was ordered to a wharf to load, and was there loaded under a shoot with ore brought down by rail as above-mentioned. In consequence of heavy rains, and of the men refusing to work from fear of cholera, delay occurred and the ship was detained waiting for cargo.

Held, that neither the state of the weather nor the refusal of the men to work hindered the loading, as both causes of delay operated before the ore arrived at the place of loading, and the only possible mode of loading the ship was not by bringing ore by railway from storing place five miles off.—*Stephens* v. *Harris*, C.A.—57 L. J. Q. B. 203.

DOCKS—

24. *Tonnage rates.*—*Henderson* v. *Mersey Docks and Harbour Board*, C.A. 29—19 Q. B. D. 124; 56 L. J. Q. B. 473; 57 L. T. 173—since reversed by the House of Lords.

FREIGHT—

25. *Mortgage—Mortgagee in possession.*—In 1883 W. mortgaged to the plaintiffs certain shares in a ship. W., the captain and ship's husband, incurred liabilities to the defendants for goods supplied and disbursements. In 1886 the ship was chartered for a voyage from Montreal to Liverpool, the freight being payable one-third at Quebec, and two-thirds on right delivery of the cargo in Liverpool. On arrival of the ship in Liverpool, the plaintiffs took possession and gave notice to the owners of the cargo to pay the freight to them. The defendants obtained judgment against W., and garnishee orders on the receivers of the cargo attaching the freight.

Held, that the defendants had no right to the freight as against the plaintiffs.—*Japp* v. *Campbell*, Q.B.D.—57 L. J. Q. B. 79.

JETTISON—

25a. *General average.*—A steamer carrying, among other things, a large amount of specie on board ran aground and was in a position of danger. The specie was immediately landed by the master of the steamer and conveyed by land to another port. A part of the cargo on board was jettisoned for the purpose of getting the steamer off.

Held, that the losses and expenses incurred in getting the steamer off and the expenses incurred in landing and conveying the specie were not general average to which the owners of the specie were liable to contribute.—*Royal Mail Steam Packet Co.* v. *English Bank of Rio Janeiro*, Q.B.D. 105—19 Q. B. D. 361; 57 L. J. Q. B. 31.

MASTER—

26. *Bill of lading—Mistake in date—Employment of broker.*—The employment of brokers at a foreign port to find a cargo for a ship and settle the terms for carrying it does not give them an implied power to relieve the master, when signing bills of lading, from seeing that they contain the dates of shipment; and the master is liable to the owners for the breach of such duty.

Judgment of the Court of Appeal reversed.—*Stumore* v. *Breen*, H.L.—12 App. 698.

MORTGAGE—

27. *Arrest—Release.*—The court ordered the release of a ship arrested before any money was due by registered mortgagees who had brought an action *in rem* as mortgagees in possession, the ship not having been so dealt with as to impair the mortgagees' security.—*The Blanche*, P.D. & A.D.—58 L. T. 592.

NECESSARIES—

28. *Lien—Priority—Mortgage—Admiralty Court Act*, 1861, *s.* 4.—A claim in an action for necessaries, including wages paid at the owner's request, is not entitled to priority over a mortgage.—*The Lyons*, P.D. & A.D.—57 L. T. 818.

SALVAGE—

29. *Action* in personam—*Special agreement.*—A steamship which, when laden with cargo, had stranded on a rocky coast and received injury, was towed off the shore by another steamship. Before the salvage services had been rendered, the master of the stranded ship entered into a salvage agreement, whereby he agreed to pay the master of the salving ship or his order, in the event of the stranded ship being got off or coming off the rocks during the continuance of the agreement, £2,000, with an additional sum of £200 for every day the salving steamship remained in attendance. On reaching port the cargo of the salved steamship was discharged, and the salved steamship, before being repaired, was sold for £3,500, £2,200 being deposited in the hands of third parties in London pending the settlement of the claim of the salvors. On the discharge of the cargo of the salved vessel, a bond for general average was given to the shipowners by the owners of the cargo. The owners, master, and crew of the salving vessel brought an action for money due under the above agreement, and for a declaration as to their rights with respect to the deposited sum of £2,200, against the owners of the salved steamship and the persons with whom the £2,200 was deposited. Before the hearing of the action the £2,200 was paid into court.

The court pronounced the sum of £2,200 in court to be due to the plaintiffs for the salvage services rendered, as specified in the agreement; and ordered that, unless an appeal was brought from its decision within a fortnight, the £2,200 brought into court should be paid to the plaintiffs in satisfaction of their

claim.—*The Prinz Heinrich*, P.D. & A.D. 511—13 P. D. 31; 57 L. J. P. D. & A. 17; 58 L. T. 593.

30. *Appeal—Increase of award.*—A collision occurred between *The S.*, while at anchor, and another ship. The tug *C.* towed *The S.* clear after an hour's labour, the anchor being slipped. *The C.* towed *The S.* till another anchor was brought by other salvors. The value of *The S.*, with its cargo and freight, was £23,000.

The Court of Appeal increased the salvage from £150 to £300.

Decision of Butt, J., varied.—*The Star of Persia*, C.A.—57 L. T. 839.

31. *Contract by master—Liability of shipowner.*—An agreement by the master of a vessel in distress to pay salvors a fixed sum is an agreement pledging the credit of the owners so as to make them liable to the salvors for the whole amount, and not merely for such proportion as the value of the ship and freight bears to the value of the cargo.—*The Cumbrian*, P.D. & A.D.—57 L. T. 205.

STRANDING—

32. *Limitation of liability—Priority—Merchant Shipping Act*, 1862 (25 & 26 *Vict.* c. 63), *s.* 64.—The owners of a ship which had been lost by stranding paid into court in an action to limit their liability £7,862, being the amount of their statutory liability. This sum was insufficient to meet all the claims in respect of loss of life and loss of goods.

Held, that the court had power to marshall the assets, and that the claimants for loss of goods had no right of priority.—*The Victoria*, P.D. & A.D.—13 P. D. 125.

TOWING—

33. *Collision — Negligence of tug.*—A steam-tug towing a ship at sea with a long scope of hawser came into collision at night with another ship, whose owners instituted an action of damage against both the steam-tug and the ship in tow, and claimed to recover the damage sustained in the collision. The statement of claim alleged that the owners of the steam-tug had admitted their liability for the collision, and had obtained an order limiting the amount of such liability under the Merchant Shipping Acts. At the hearing the court found that there had been a bad look-out on the steam-tug; that the ship she had come into collision with had kept its course; and that the ship in tow had contributed to the collision by a bad look-out, and by not porting the helm and checking the course of the steam-tug.

Held, that the ship in tow was liable for the damages proceeded for in the action.

Quære, if the ship in tow would not have been equally liable even if those on board had not by any negligent act contributed to the collision. — *The Flying Serpent, The Niobe*, P.D. & A.D. 812—13 P. D. 55; 57 L. J. P. D. & A. 33.

WAGES—

34. *Action in rem—Arrest of ship—Lien.*—In an action *in rem* under the Admiralty Court Act, 1861, the ship from the date of arrest is a security in the hands of the court for the plaintiffs' claim as subsequently determined by the judgment, and this security is not affected by the bankruptcy or liquidation of the shipowners between the date of the arrest and the judgment.—*The Cella*, C.A. 540—13 P. D. 82; 57 L. J. P. D. & A. 55.

WRECK—

35. *Expenses of raising—River Thames—Thames Conservancy Act*, 1857 (20 & 21 *Vict.* c. *cxlvii.*) *s.* 86.—In ascertaining the expenses of weighing or raising a ship under the Thames Conservancy Act, the cost of a special apparatus provided by the Conservators for removing wrecks may be taken into account, and will include interest on capital invested in the apparatus, and repairs, depreciation, and insurance; but, if the work could have been done more cheaply with a less expensive apparatus, the charge must be at a lower rate.—*The Harrington*, P.D. & A.D.—13 P. D. 48; 57 L. J. P. D. & A. 45; 59 L. T. 72.

See also COMPANY, 16; COSTS, 35; COUNTY COURT, 10, 11; DAMAGES, 5—8; ESTOPPEL, 7; INJUNCTION, 8; MARINE INSURANCE, 1—7; PRACTICE, 20, 24.

SLANDER:—

1. *Husband and wife—Larceny of wife's property—Married Women's Property Act*, 1882 (45 & 46 *Vict.* c. 75), *s.* 12.—In an action for slander the words complained of were to the effect that the plaintiff robbed his wife of £75 before her removal to a lunatic asylum, and was anxious to get rid of her in order that he might take the remainder of her money.

Held, that, as the words did not impute to the plaintiff that he stole his wife's money while they were living apart, or when he was about to leave or desert her, they were not actionable, since they did not, even under the Married Women's Property Act, 1882, impute an indictable offence. — *Lemon* v. *Simmons*, Q.B.D. 350—57 L. J. Q. B. 260.

2. *Privilege—Parliament — Publication.*—Words spoken in Parliament are absolutely privileged, and cannot form the subject of an action for slander.—*Dillon* v. *Balfour*, EX.D. (Ir.)—20 L. R. Ir. 601.

See also COSTS, 36; COUNTY COURT, 23; PLEDGE, 32.

SOLICITOR:—

1. *Charging order—Bankruptcy—Priority—Solicitors Act*, 1860 (23 & 24 *Vict.* c. 127), *s.* 28—*Bankruptcy Act*, 1883 (46 & 47 *Vict.* c. 52), *s.* 104.—A solicitor had obtained a charging order for his costs under section 28 of the Solicitors Act, 1860, from Cave, J., sitting in Bankruptcy, in respect of partnership property recovered or preserved by him in an action for a dissolution of partnership between partners who afterwards became bankrupt. There existed a landlord's claim for rent against the partnership. Before payment of the solicitor's costs, an application was made by the receiver of the partnership assets to Cave, J., as to the application of the assets, and Cave, J., held that the former order, having been made in ignorance of the landlord's claim, must be amended, and the landlord's claim discharged in priority to the solicitor's charge.

Held, on appeal, that the charging order must have priority over the landlord's claim for rent, and that Cave, J., had no jurisdiction under the Bankruptcy Act, 1883, *s.* 104, or otherwise, to vary his first order.

Decision of Cave, J. (reported 36 W. R. 303, 57 Q. B. D. 693), reversed.—*Ex parte Brown, In re Suffield*, C.A. 584—20 Q. B. D. 693; 58 L. T. 911.

2. *Charging order—Husband and wife—Separate estate—Divorce—Alimony—Permanent maintenance—Divorce Act*, 1857 (20 & 21 *Vict.* c. 85), *s.* 32—*Solicitors Act*, 1860, *s.* 28—*Married Women's Property Act*, 1882 (45 & 46 *Vict.* c. 75), *s.* 1, *sub-sections* 2, 3.—A sum secured to a wife on a dissolution of marriage under section 32 of the Divorce Act, 1857, is alimony, and is property in respect of which the court has jurisdiction to grant the wife's solicitor a charging order for costs under section 28 of the Solicitors Act, 1860; but the court will not grant such an order unless the solicitor makes out a *primâ facie* case of inability to obtain payment in any other way.

A married woman, having no separate property

or only separate property subject to a restraint on anticipation, who institutes divorce proceedings after the passing of the Married Women's Property Act, 1882, cannot be deemed under that Act to have entered into a contract, with respect to her separate property, for payment of the costs of her solicitor incurred in the divorce proceedings.

Order of Butt, J., discharged.—*Harrison* v. *Harrison*, C.A. 748.

3. *Charging order—Priority—Mortgage—London agent—Solicitors Act*, 1860, *s.* 28.—During the pendency of a suit for redemption of a mortgage, the plaintiff mortgaged his interest to D., the solicitor for the plaintiff in the suit acting also for D. A dock company had then given notice to take the property under compulsory powers, but no price had been fixed. On the day of the execution of the mortgage to D., the plaintiff by letter directed his solicitor and his London agents to pay off D.'s mortgage out of the first money coming into their hands from the dock company, and the letter was handed to D. with the mortgage deed. The price of the land was afterwards ascertained by arbitration, in which the London agents acted as the plaintiff's solicitors. The price was carried to the credit of the redemption suit, and there was a balance after paying off the original mortgage. The plaintiff's solicitors and his London agents applied for a charging order on the fund for their costs of the redemption action and the arbitration.

Held, (1) that the solicitor, having acted for D. as well as the plaintiff, was not thereby disentitled to a charging order; (2) that the solicitor, having handed over the plaintiff's letter to D., could not claim for the charging order priority over his mortgage; (3) that the London agents were not entitled to the benefit of the charging order.

Order of Stirling, J., varied.—*Macfarlane* v. *Lister*, C.A.—37 Ch. D. 88; 57 L. J. Ch. 92; 58 L. T. 201.

4. *Lien—Priority—Attachment—Garnishee order—Costs.*—The costs of an interlocutory application cannot be attached by a judgment creditor in prejudice of the lien of the party's solicitor.—*Cormick* v. *Ronayne*, EX.D. (Ir.)—22 L. R. Ir. 140.

5. *Mortgage—Fraud—Death of solicitor—Following assets.*—A solicitor invested money of a client in valueless mortgages and afterwards died.

Held, that the client could follow any assets in the hands of the executors of the deceased which he could identify as having been received from himself.—*Dickson* v. *Murray*, CH.D. STI., J.—57 L. T. 223.

6. *Negligence—Investment—Mortgage—Breach of trust—Statute of Limitations.*—Where money is received by a solicitor for a client to be invested on a particular mortgage selected by the client, or on a mortgage to be selected by the solicitor, but subject to the client's approval, the solicitor, in the absence of special circumstances, is not responsible, on the footing of a trustee, for the sufficiency of the security, but is only liable as a solicitor for negligence, if proved, and in that case is not excluded from the benefit of the Statute of Limitations; but where the money is received to be invested at the solicitor's discretion, and the client takes no part in the selection, the solicitor is liable, on the footing of a trustee, if the security turns out to have been insufficient and such as a trustee would not have been justified in investing on.

There is nothing improper in a solicitor advising a client who owes him money to sell or mortgage property and allow the solicitor to receive the purchase or mortgage-money and retain out of it the amount owing to himself from the client, and it makes no difference that the purchase or mortgage-money is paid or advanced by another client acting upon the solicitor's advice, but such a transaction, if challenged, will be closely scanned to see whether the solicitor has acted in good faith and with due regard to his client's interests.

A piece of land included in a mortgage for £5,000 was sold, and the mortgagee, being advised in good faith by her solicitor that the remaining land was a sufficient security for her money, and being reluctant to break into her investment, allowed the price to be received by the owners of a second mortgage, in which the solicitor himself had an indirect interest, as being responsible to clients for the money advanced on it. The security turned out insufficient for the first mortgage.

Held, that the solicitor had not by his conduct constituted himself a trustee for his client, the first mortgagee, so as to be liable to make good to her the loss of the money.

Craig v. *Watson*, 8 Beav. 427; *Smith* v. *Pococke*, 2 W. R. 285, 2 Drew. 197; and *Burdick* v. *Garrick*, 18 W. R. 387, L. R. 5 Ch. 233, distinguished.

Mare v. *Lewis*, 4 Ir. Rep. Eq. 219, 18 W. R. Ch. Dig. 97, commented on.—*Dooby* v. *Watson*, CH.D. KEK., J. 764—58 L. T. 943.

7. *Remuneration—Bankruptcy—Mortgage—Sale by official receiver—Remuneration Order*, 1882, *s.* 2, *schedule* 1.—Certain property of a bankrupt which was subject to a mortgage was sold by the official receiver as trustee in the bankruptcy, the mortgagee executing a reconveyance, and his debt being paid out of the purchase-money.

Held, that a percentage on the whole amount received for the property was properly allowed by the taxing master to the solicitors who acted for the official receiver in carrying out the sale.—*Ex parte Harris, In re Gallard*, Q.B.D., BANKY. 592—21 Q. B. D. 38; 57 L. J. Q. B. 528; 59 L. T. 147.

8. *Remuneration—Election—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 80—*Payment into court.*—Where money is paid into court under section 80 of the Lands Clauses Consolidation Act, 1845, the solicitor for the vendor may entitle himself to detailed charges, provided that he signifies his election "before undertaking the business."—*In re Bridewell Hospital*, CH.D. CHL., J.—57 L. T. 155.

9. *Remuneration—Interest—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44), *s.* 5—*Remuneration Order*, 1882, *clause* 7.—By clause 7 of the General Order under the Solicitors' Remuneration Act, 1881, "a solicitor may charge interest at four per cent. per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from demand from the client."

A solicitor delivered a bill of costs to his client, but without any express demand of payment or claim for interest. The bill was taxed, the amount allowed on taxation paid, and the solicitor then claimed interest.

Held, that the sending in of the bill constituted a demand within the meaning of clause 7, and that he was entitled to such interest.—*Blair* v. *Cordner* (2), Q.B.D. 109.

10. *Remuneration — Lease — Rent — Premium—Remuneration Order*, 1882, *schedule* 1, *part* 2, *r.* 5.—A firm of solicitors were employed by a lessor to prepare for him a lease of certain property for twenty-one years to a company, the consideration for the lease being a rent of £80 and the issue of 400 shares of the nominal value of £10. None of the company's shares had been sold, so that no market value had been placed upon them; and 200 of the 400 shares had not been issued. The solicitors charged the scale fee on the rent of £80, and also the scale fee for

deducing title, perusing and completing deed as upon a premium of £4,000, the amount of the nominal value of the 400 shares.

Held, that they were not entitled to make the latter charge, as the value of the shares could not be estimated, and rule 5, part 2, schedule 1, of the Remuneration Order, 1882, did not apply to such a case.—*In re Hastie*, CH.D. NOR., J. 572.

11. *Remuneration—Mortgage—Investigating title—Taxation after payment—Remuneration Order*, 1882, *schedule* 1, *part* 1.—R., the lessee of property, with an option of purchase, told E., the lessor's solicitor, that he intended to purchase the property, and should require some money on mortgage. E. put R. into communication with M., and a loan was arranged between them, E. taking no part in the negotiation. A week after the date fixed for the completion of the purchase and mortgage, E. sent R.'s solicitor a bill "for negotiating and preparing mortgage as per scale, £20," and demanding completion on the following day. On the day of completion R. and his solicitor objected to E.'s charge; but afterwards R.'s solicitor said that, if E. would accept R.'s cheque and hold it for a week before paying it in, R.'s solicitor would advise R. not to dispute E.'s charge. This was agreed to. R.'s cheque was dishonoured on presentation, and the amount recovered after an action had been brought.

Held, on a summons by R. for taxation after payment, that E. had overcharged, as he had not negotiated the loan nor investigated for the mortgage, and was not entitled to fees for that work, which was included in the charge of £20; and that R. would have had a right to taxation after payment, but was bound by the agreement not to dispute E.'s charge in consideration of E.'s taking R.'s cheque and holding it for a week.—*In re Eley*, CH.D. NOR., J. 96—37 Ch. D. 40; 56 L. J. Ch. 905; 57 L. T. 253.

12. *Remuneration—Mortgage—Remuneration Order*, 1882, *schedule* 1, *rule* 2.—Under a provision in a will the testator's sons took the real estate at a valuation, and took over the assets and liabilities of the testator's business, giving the trustees a mortgage to secure the purchase-money the same solicitor acted for all parties.

Held, that the solicitor could not charge full vendors' and purchasers' and mortgagors' and mortgagees' costs.—*In re Keeping*, CH.D. STI., J.—58 L. T. 672.

13. *Remuneration—Vendor and purchaser—Auction—Administration action—Conduct of sale—Remuneration Order*, 1882, *schedule* 1, *part* 1, *r.* 11.—A sale by auction of real property was made under an order of court in an administration action, and the conduct of the sale was given to the plaintiff, whose solicitor personally performed part of the duties of conducting the sale, the auctioneer merely offering the property in the auction room. The auctioneer was paid by the client.

Held, that the solicitor was not entitled, under the Remuneration Order, schedule 1, part 1, r. 11, to scale fees for his services as auctioneer, and that the existence of a local custom to the contrary did not affect this rule.—*Sykes* v. *Sykes*, CH.D. CHI., J. 234.

14. *Remuneration—Vendor and purchaser—Auction—Conducting fee—Remuneration Order*, 1882, *schedule* 1, *part* 1, *r.* 11.—Property was put up for sale by public auction and sold in two lots. The auctioneer's commission was paid by the vendor. The solicitor employed by the vendor in connection with the sale charged the scale fee provided by part 1 of schedule 1 to the Remuneration Order for "deducing title," &c., and he also made various charges for work done by him previous to the sale, for which he claimed to be entitled under clause 2 (*c*) of the order. The taxing master allowed the scale fee, but disallowed the other items, considering himself bound by *In re Emanuel*, 34 W. R. 613, 33 Ch. D. 40.

Held, that the solicitor was entitled, under clause 2 (*c*) to charge, in addition to the scale fee, for deducing title for work properly done by him in connection with the sale for which the auctioneer had not been paid.—*In re Faulkner*, CH.D. NOR., J. 59—36 Ch. D. 566; 56 L. J. Ch. 1011; 57 L. T. 342.

15. *Remuneration—Vendor and purchaser—Auction—Conducting fee—Solicitors' Remuneration Act*, 1881, *s.* 2—*Remuneration Order*, *schedule* 1, *part* 1, *r.* 11.—A solicitor employed by the vendor in connection with a sale of property is only entitled to be paid in respect of business connected with the sale the scale fees prescribed in part 1 of schedule 1 to the Remuneration Order; and therefore, where the sale is by public auction, and the commission to the auctioneer is paid by the vendor, the solicitor is only entitled to be paid the "deducing fee," and is not entitled to be paid remuneration in respect of other business done by him in connection with the sale.

In re Faulkner, 36 W. R. 59, 36 Ch. D. 566, overruled.—*In re Newbould*, C.A. 161—20 Q. B. D. 204; 57 L. J. Q. B. 41; 58 L. T. 334.

16. *Remuneration—Vendor and purchaser—Auction—Scale fee—Remuneration Order*, 1882, *schedule* 1, *part* 1, *r.* 11.—Solicitors employed to sell property by auction where the auctioneer's commission was paid by the client delivered a bill in which they charged the scale fee for conducting the sale and deducing the title, and mentioned items of solicitors' work not included in the scale fee for deducing the title. The taxing master disallowed the fee for conducting the sale because of the auctioneer's charge being paid by the client, and did not allow any fee for items mentioned in the bill of solicitors' work not included in the scale fee for deducing the title, on the ground that the bill was made up on a wrong footing and could not be altered by adding charges.

Held, that the taxing master was right in disallowing the scale fee for conducting the sale, but that he ought to have allowed the solicitors a *quantum meruit* for solicitors' work done by them and mentioned in their bill, and not covered by the scale fee for deducing the title.—*In re Peace*, CH.D. NOR., J. 61—57 L. T. 753.

17. *Remuneration—Vendor and purchaser—Condition of sale—Lease—Mortgage—Discretion of taxing master—Remuneration Order*, 1882, *schedule* 2, *r.* 2.—The plaintiffs in an administration action obtained an order to sell leasehold property, the mortgagees of which were not parties to the action, and to pay the purchase-money into court. The mortgagees had no knowledge of the order, but draft particulars and conditions of sale were sent for their perusal. The mortgagees concurred in the sale and approved the conditions on condition that their claim should be discharged.

Held, that the taxing master had discretion to disallow the fees of one shilling per folio for the reading of the conditions of sale by the mortgagees' solicitors—*Rees* v. *Rees*, CH.D. KAY, J.—58 L. T. 69.

18. *Remuneration — Vendor and purchaser — Election—Notice—Co-trustees—Remuneration Order*, 1882, *rr.* 6, 8.—The notice of election under rule 6 of the General Order under the Solicitors' Remuneration Act, 1881, as to remuneration for conveyancing business arising in an action, must be given by the solicitor before he undertakes such conveyancing business. After having done any work in the matter which would properly be covered by the scale charge—*e.g.*, discussing with the client the mode of sale and

questions relating to the title—it is too late for him to elect.

In re Allen, 35 W. R. 218, 34 Ch. D. 433, and *Hester* v. *Hester*, 35 W. R. 233, 34 Ch. D. 607, followed.

Semble, where a solicitor is acting for several trustees notice of election must be given to them all. —*Metcalfe* v. *Blencowe*, CH.D. STI., J. 137—57 L. J. Ch. 82; 57 L. T. 925.

19. *Retainer—Interpleader issue.*—A retainer given to a solicitor to take proceedings to recover a debt does not give him authority to engage in interpleader proceedings, without special instructions, after judgment has been obtained and execution issued.—*James* v. *Bicknell*, Q.B.D. 280—20 Q. B. D. 164; 57 L. J. Q. B. 113; 58 L. T. 276.

See also ATTACHMENT, 4, 8, 9; COSTS, 1—50; DISCOVERY, 5; GIFT, 5; JURISDICTION, 13, 16; MORTGAGE, 13; PRIVY COUNCIL, 1; TRUSTEE, 14, 23, 26.

SPECIFIC PERFORMANCE:—

1. *Damages—Ord. 34, r. 2.*—Since the Judicature Acts the plaintiff in an action for specific performance may obtain damages without showing that he is entitled to specific performance.—*Elmore* v. *Pirrie*, CH.D. KAY, J.—57 L. T. 333.

2. *Lease—Agreement to accept—Damages.*—It was agreed between A. and B. that B. should make an agreement with M., who was A.'s landlord, for a lease at a specified rent on such terms and with such covenants as M. should approve, and that A. should surrender his lease on the new lease being granted. B. refused to carry out the agreement.

Held, that A. was entitled to damages from B. for breach of contract.

Judgment of Kekewich, J. (36 W. R. 267, 36 Ch. D. 695), affirmed.—*Foster* v. *Wheeler*, C.A.—38 Ch. D. 131; 59 L. T. 15.

3. *Lease—Renewal—Letter to agent—Statute of Frauds.*—A. wrote to his landlord's agents, asking for a renewal of his lease, and offering a premium. The landlord wrote a letter to his agents, in which he declined A.'s offer, but added:—"If A. is very urgent, I consent to grant him a lease for twenty-one years at £50 a year and a premium of £100." A. accepted this offer.

Held, that A. was entitled to a new lease for the same term as before, at £50 a year, on payment of the premium.

Judgment of Kekewick, J., reversed.—*Wood* v. *Aylward*, C.A.—58 L. T. 662.

3a. *Vendor and purchaser—Auction—Bidding—Fraud of third parties.*—At an auction for the sale of some mortgaged property sold by order of the court, a person, acting in the interest of the mortgagor, and having no intention of purchasing the property, and no means of doing so if it were sold to him, bid for it, and ran up the price considerably above the reserve, when it was knocked down to the defendant. The plaintiffs, the mortgagees, who had the conduct of the sale, had no knowledge of the dishonest bidding, and were not parties to it.

Held, that the vendors could enforce the contract.—*Union Bank of London* v. *Munster*, CH.D. KEK., J. 72—37 Ch. D. 51; 57 L. J. Ch. 124; 57 L. T. 877.

4. *Vendor and purchaser—Default—Forfeiture of deposit—Costs.*—In a vendor's action to enforce a contract to purchase real estate, the plaintiff, by his statement of claim, claimed specific performance, or, in the alternative, a declaration that the plaintiff was entitled to forfeit the deposit and resell the property. The purchaser had accepted the title, but had failed to complete on the day fixed for completion. There was a condition empowering the vendor to forfeit the deposit and resell the property in case the purchaser failed to comply with any of the conditions of sale. The defendant had not appeared to the writ.

Held, that, if the writ had claimed such an alternative declaration as was asked by the statement of claim, the declaration might be made; but that the order should direct the plaintiff to pay the costs of the action.—*Kingdon* v. *Kirk*, CH.D. NOR., J. 430—37 Ch. D. 141; 57 L. J. Ch. 328; 58 L. T. 382.

5. *Vendor and purchaser—Right of way—Sewers—Damages.*—A purchaser of land agreed within a specified time to grant to the vendor a right of way and to make a road and sewers leading to other land of the vendor. The purchaser was unable to grant the right of way or make the road and sewers till after the expiration of the specified period, and the other land consequently remained unprofitable to the vendor.

Held, that the vendor was entitled to specific performance, but not to damages.—*Rowe* v. *School Board for London*, CH.D. KEK., J.—36 Ch. D. 619; 57 L. T. 182.

See also COMPANY, 11; CONTRACT, 7, 9; COUNTY COURT, 18; MORTGAGE, 5; PRACTICE, 21; VENDOR AND PURCHASER, 11.

SPECIFICATION.—See PATENT, 1—3, 6—8.

STAMP:—

1. *Conveyance—Consideration—Railway company—Ad valorem duty—Lands Clauses Consolidation (Scotland) Act*, 1845 (8 & 9 *Vict. c.* 19), *s.* 48—*Stamp Act*, 1870 (33 & 34 *Vict. c.* 97) *s.* 70.—The Stamp Act, 1870, provides in the schedule for an *ad valorem* duty on every "conveyance on sale of any property," to be calculated upon the "amount or value of the consideration for the sale," and, by section 70, "conveyance on sale" includes "every instrument . . whereby any property, upon the sale thereof, is legally or equitably transferred or vested in the purchaser." By section 48 of the Lands Clauses Consolidation (Scotland) Act, 1845, the jury shall deliver their verdict as to the "value of lands to be purchased."

A railway company gave notice to the owners of certain saw-mills of their intention to purchase their premises compulsorily. A jury summoned under the Lands Clauses Consolidation (Scotland) Act, 1845, assessed a certain sum as the value of the land and buildings and £9,500 as compensation for loss of business. The conveyance to the railway company recited these assessments.

Held, that the total sum, including the £9,500 assessed by the jury, was the value of the lands to be purchased, and, as part of the consideration for the sale, was liable to the *ad valorem* duty.—*Inland Revenue Commissioners* v. *Glasgow and South-Western Railway Co.*, H.L. 241—12 App. 315; 57 L. T. 570.

2. *Promissory note—Life insurance—Surrender of policy—Stamp Act*, 1870, *s.* 49.—An instrument which was called a policy of insurance and guaranteed to the assured the payment of £100 on the 18th of May, 1967, provided that, if the assured should be desirous at any time of surrendering the policy, he should be allowed the surrender value thereof as on the 18th day of May last preceding the date of his notice to surrender, such value to be fixed according to certain tables for the time being in force with reference to surenders.

Held (affirming the decision of the Queen's Bench Division, 36 W. R. 474, 20 Q. B. D. 645), that the instrument was not chargeable with stamp duty as a promissory note.—*Mortgage Insurance Corporation* v

Inland Revenue Commissioners, C.A. 833—21 Q. B. D. 352; 57 L. J. Q. B. 468.

See also MANDAMUS, 1.

STANNARIES COURT.—See PRACTICE, 11.

STATUTES:—

22 Hen. 8 (Statute of Bridges)—See HIGHWAY, 1

5 & 6 Ed. 6, c 1, s 2—See ECCLESIASTICAL LAW, 4

5 Eliz. c 23, s 10—See ECCLESIASTICAL LAW, 6

13 Eliz. c 5—See DEED, 2

27 Eliz. c 4—See DEED, 2; SETTLEMENT, 22

43 Eliz. c 2, s 6—See POOR LAW, 5

21 Jac. 1, c 16—See LIMITATIONS, STATUTE OF, 1; LUNACY, 3

22 & 23 Car. 2, c 10 (Statute of Distributions), ss 3, 5—7—See ADMINISTRATION, 5

29 Car. 2, c 3 (Statute of Frauds), s 4—See FRAUDS, STATUTE OF; HUSBAND AND WIFE, 9: s 17, BILL OF SALE, 19

7 Anne, c 20, ss 1, 5, 17—See DEED, 5, 6

8 Anne, c 14, s 1—See DAMAGES, 4

3 Geo. 1, c 15, ss 8, 11—See SHERIFF, 1

53 Geo. 3, c 127, s 1—See ECCLESIASTICAL LAW, 6

55 Geo. 3, c 94 (Apothecaries Act), ss 20, 21—See MEDICAL ACT

1 Geo. 4, c 87, s 1—See COUNTY COURT, 16

9 Geo. 4, c 31, s 27—See JUSTICE OF THE PEACE, 1

9 Geo. 4, c 61, s 1—See LICENSED HOUSE, 4

9 Geo. 4, c 69, s 1—See JUSTICE OF THE PEACE, 16

1 Will. 4, c 65, s 32—See INFANT, 7

2 & 3 Will. 4, c 45 (Reform Act), s 31—See ELECTION LAW, 20: s 32, ELECTION LAW, 11: s 36, ELECTION LAW, 8

2 & 3 Will. 4, c 71 (Prescription Act), s 3—See LIGHT, 2

3 & 4 Will. 4, c 15, s 2—See COPYRIGHT, 3

3 & 4 Will. 4, c 27, s 11—See LIMITATIONS, STATUTE OF, 2

3 & 4 Will. 4, c 42, s 39—See ARBITRATION, 1, 3

3 & 4 Will. 4, c 74 (Fines and Recoveries Act), ss 77, 79, 80, 89—See HUSBAND AND WIFE, 3

3 & 4 Will. 4, c 104, s 5—See LIMITATIONS, STATUTE OF, 1

4 & 5 Will. 4, c 76, s 56—See POOR LAW, 5: s 96, POOR LAW, 6

4 & 5 Will. 4, c 77, s 11—See LICENSED HOUSE, 9

5 & 6 Will. 4, c 39, s 7—See LICENSED HOUSE, 1

5 & 6 Will. 4, c 50 (General Highway Act), s 72—See JUSTICE OF THE PEACE, 5

5 & 6 Will. 4, c 76, s 90—See LOCAL GOVERNMENT, 4

1 Vict. c 26 (Wills Act, 1837), s 9—See WILL, 54, 58: s 24, WILL, 6: s 26, WILL, 46: s 27, POWER OF APPOINTMENT, 5, 6

1 & 2 Vict. c 106, s 104—See ECCLESIASTICAL LAW, 1

1 & 2 Vict. c 110, s 14—See PRACTICE, 13, 47: ss 17, 92, INSOLVENCY

2 & 3 Vict. c 71 (Metropolitan Police Courts Act, 1839), s 29—See JUSTICE OF THE PEACE, 10

5 & 6 Vict. c 34 (Income Tax Act, 1842), ss 41, 44—See INCOME TAX, 6: s 60, INCOME TAX, 3: s 100, INCOME TAX, 2: s 133, INCOME TAX, 5

5 & 6 Vict. c 45 (Copyright Act, 1842), s 2—See COPYRIGHT, 1: s 3, COPYRIGHT, 1, 4: ss 13, 18, COPYRIGHT, 4: s 20, COPYRIGHT, 3: s 24, COPYRIGHT, 4

5 & 6 Vict. c 106 (Fisheries, Ireland, Act, 1842), s 27—See FISHERY, 1

6 & 7 Vict. c 18 (Parliamentary Registration, Ireland, Act, 1843), ss 17, 100—See ELECTION LAW, 11

6 & 7 Vict. c 73 (Solicitors Act, 1843), s 37—See COSTS, 44a, 45, 46; JURISDICTION, 16: s 38, COSTS, 4

7 & 8 Vict. c 45 (Dissenters' Chapels Act, 1844), s 2—See TRUSTEE, 15

7 & 8 Vict. c 101 (Poor Law Amendment Act, 1844), s 39—See COSTS, 45

8 & 9 Vict. c 16 (Companies Clauses Consolidation Act, 1845), ss 14—16—See SETTLEMENT, 19; s 45, DISCOVERY, 3; INJUNCTION, 3: s 63, INJUNCTION, 3

8 & 9 Vict. c 18 (Lands Clauses Consolidation Act, 1845), s 34—See ARBITRATION, 5: s 68, LIEN, 3: ss 69, 70, LANDS CLAUSES CONSOLIDATION ACT, 6: s 74, LANDS CLAUSES CONSOLIDATION ACT, 5: s 80, LANDS CLAUSES CONSOLIDATION ACT, 4—6; SOLICITOR, 8: s 82, LANDS CLAUSES CONSOLIDATION ACT, 3: s 133, RAILWAY, 15

8 & 9 Vict. c 19 (Lands Clauses Consolidation, Scotland, Act, 1845), s 48—See STAMP, 1

8 & 9 Vict. c 20 (Railways Clauses Consolidation Act, 1845), ss 6, 16—See LANDS CLAUSES CONSOLIDATION ACT, 2: s 46, RAILWAY, 2: ss 77, 78, RAILWAY, 5

8 & 9 Vict. c 100 (Lunacy Regulation Act, 1845), s 72—See FALSE IMPRISONMENT, 2

8 & 9 Vict. c 118 (Inclosure Act, 1845), s 45—See INCLOSURE

9 & 10 Vict. c 66 (Poor Law Amendment Act, 1846), s 1—See POOR LAW, 2

9 & 10 Vict. c 93 (Lord Campbell's Act), s 1—DAMAGES, 8; PRACTICE, 24: s 2, HUSBAND AND WIFE, 1

9 & 10 Vict. c 95 (County Courts Act, 1846), s 82—COUNTY COURT, 20: s 113, ATTACHMENT, 5

10 & 11 Vict. c 15 (Gasworks Clauses Act, 1847), s 35—See GAS COMPANY, 2

10 & 11 Vict. c 17 (Waterworks Clauses Act, 1847), ss 6, 22, 25, 27—See ARBITRATION, 5: s 68, WATER, 4: s 72, WATER, 6

10 & 11 Vict. c 34 (Towns Improvement Clauses Act, 1847), s 167—See LOCAL GOVERNMENT, 6

10 & 11 Vict. c 89 (Towns Police Clauses Act, 1847), s 28—See HIGHWAY, 2a: s 38, JUSTICE OF THE PEACE, 7

10 & 11 Vict. c 103 (Commissioners Clauses Act, 1847), s 17—See QUO WARRANTO, 2; ss 43, 47, MUNICIPAL CORPORATION, 1

11 & 12 Vict. c 42 (Jervis's Act), s 22—See JUSTICE OF THE PEACE, 9

12 & 13 Vict. c 101 (County Courts Act, 1849), s 18—See COSTS, 38

13 & 14 Vict. c 60 (Trustee Act, 1850), s 3—See LUNACY, 2, 4: s 9, TRUSTEE, 21: s 10, TRUSTEE 6: s 20, LUNACY, 2: s 32, TRUSTEE, 3, 8—10: s 34, TRUSTEE, 3, 8

13 & 14 Vict. c 69 (Parliamentary Voters, Ireland, Act, 1850), s 113—See ELECTION LAW, 14

15 & 16 Vict. c 55 (Trustee Extension Act, 1852), s 1—See LUNACY, 2: s 8, TRUSTEE, 6: s 9, TRUSTEE, 8

15 & 16 Vict. c 81 (County Rate Act, 1852), s 26—See RAILWAY, 12

15 & 16 Vict. c 85 (Burial Act, 1852), ss 33, 39—See BURIAL ACTS

16 & 17 Vict. c 34 (Income Tax Act, 1853), s 2—

See INCOME TAX, 6, 7: ss 5, 32, INCOME TAX, 4: s 37, INCOME TAX, 3

16 & 17 Vict. c 78 (Oaths in Chancery Act, 1853), s 2—See DEED, 5

16 & 17 Vict. c 96 (Lunacy Regulation Act, 1853), s 4, FALSE IMPRISONMENT, 2: ss 116, 136, LUNACY, 4

16 & 17 Vict. c 97 (Lunatic Asylums Act, 1853), s 104—See LUNACY, 3

16 & 17 Vict. c 113 (Common Law Procedure, Ireland, Act, 1853), s 126—See COSTS, 36: ss 132, 133, COSTS, 9

16 & 17 Vict. c 134 (Burial Act, 1853), s 7—See BURIAL ACTS

16 & 17 Vict. c 137 (Charitable Trusts Act, 1853), s 28—See JURISDICTION, 2

17 & 18 Vict. c 31 (Railway and Canal Traffic Act, 1854), ss 2, 6—See RAILWAY, 14

17 & 18 Vict. c 82 (Court of Chancery of Lancaster Act, 1854), s 8—See PRACTICE, 54

17 & 18 Vict. c 104 (Merchant Shipping Act, 1854), s 379—See SHIPPING, 7, 8

17 & 18 Vict. c 113 (Locke King's Act), s 1—See ADMINISTRATION, 10

17 & 18 Vict. c 125 (Common Law Procedure Act, 1854), s 11—See ARBITRATION, 2: s 17, ARBITRATION, 3

18 & 19 Vict. c 43 (Infants' Settlement Act, 1855), s 1—See INFANT, 10

18 & 19 Vict. c 120 (Metropolis Local Management Act, 1855), ss 68, 72, 74, 76—See METROPOLIS MANAGEMENT ACTS, 2: ss 105, 140, METROPOLIS MANAGEMENT ACTS, 3: s 250, METROPOLIS MANAGEMENT ACTS, 2

18 & 19 Vict. c 122 (Metropolitan Building Act, 1855), ss 3, 82, 83, 88, 89, 94, 97—See METROPOLIS MANAGEMENT ACTS, 1

19 & 20 Vict. c 97 (Mercantile Law Amendment Act, 1856), s 5—See ADMINISTRATION, 9: s 14, LIMITATIONS, STATUTE OF, 1

19 & 20 Vict. c 108 (County Courts Act, 1856), s 26—See COUNTY COURT, 21, 22: s 50, COUNTY COURT, 16: s 68, COUNTY COURT, 3, 4: s 72, COUNTY COURT, 4: s 82, COUNTY COURT, 20: s 88, COUNTY COURT, 7: s 104, COUNTY COURT, 8: s 113, COUNTY COURT, 13: s 115, COUNTY COURT, 8

20 & 21 Vict. c 60 (Bankruptcy, Ireland, Act, 1857), s 251—See COMPANY, 7

20 & 21 Vict. c 85 (Divorce Act, 1857), s 25—See HUSBAND AND WIFE, 22: s 32, DIVORCE, 14; SOLICITOR, 2: s 34, COSTS, 15: ss 35, 42, HUSBAND AND WIFE, 24

21 & 22 Vict. c 90 (Medical Act, 1858), ss 31, 32—See MEDICAL ACT

22 & 23 Vict. c 61 (Matrimonial Causes Act, 1859), s 5—See DIVORCE, 15

23 & 24 Vict. c 27 (Wine Licences Act, 1860), ss 3, 19, 21—See LICENSED HOUSE, 9

23 & 24 Vict. c 125 (Metropolis Gas Act, 1860), s 6—See GAS COMPANY, 1

23 & 24 Vict. c 127 (Solicitors Act, 1860), s 28—See SOLICITOR, 1—3

23 & 24 Vict. c 144 (Matrimonial Causes Act, 1860), s 7—See COSTS, 15

23 & 24 Vict. c 154 (Landlord and Tenant, Ireland, Act, 1860), s 71—See LANDLORD AND TENANT (IRELAND), 4

24 & 25 Vict. c 10 (Admiralty Court Act, 1861), s 4—See SHIPPING, 28: s 3, SHIPPING, 22

24 & 25 Vict. c 196 (Larceny Act, 1861), s 100—See CRIMINAL LAW, 6

24 & 25 Vict. c 100 (Offences Against the Person Act, 1861), s 12—See JUSTICE OF THE PEACE, 1

24 & 25 Vict. c 133 (Land Drainage Act, 1861), s 53—See NUISANCE, 2

25 & 26 Vict. c 63 (Merchant Shipping Act, 1862), s 64—See SHIPPING, 32

25 & 26 Vict. c 68 (Copyright Act, 1862), ss 1, 4, 6, 11—See COPYRIGHT, 5

25 & 26 Vict. c 89 (Companies Act, 1862), s 7—See COMPANY, 32: ss 8, 12, COMPANY, 31, 32: s 26, COMPANY, 31: s 35, COMPANY, 9, 26: s 38, COMPANY, 15: s 43, COMPANY, 18; s 62, PRACTICE, 54a: s 75, COMPANY, 33: s 85, COMPANY, 43: s 86, COMPANY, 35: s 87, COMPANY, 25, 41, 43; INJUNCTION, 5: s 89, JURISDICTION, 3: s 92, COMPANY, 25: s 93, COMPANY, 24; s 109, COMPANY, 4: s 131, COMPANY, 36: s 133, COMPANY, 4: s 138, JURISDICTION, 3: s 145, COMPANY, 35: s 149, COMPANY, 34: s 151, COMPANY, 35: s 153, COMPANY, 38: s 156, COMPANY, 37: s 161, COMPANY, 5: s 163, COMPANY, 41: s 164, COMPANY, 13: s 165, COMPANY, 20; EVIDENCE, 5: ss 199, 203, COMPANY, 25

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25 & 26 Vict. c 103 (Parochial Assessment Act, 1862), s 32—See POOR RATE, 2

26 & 27 Vict. c 87 (Savings Bank Act, 1863), s 14—See ADMINISTRATION, 11

26 & 27 Vict. c 114 (Fisheries, Ireland, Act, 1863), s 6—See FISHERY, 2

26 & 27 Vict. c 118 (Companies Clauses Act, 1863), s 28—See DISCOVERY, 3

27 & 28 Vict. c 114 (Improvement of Land Act, 1864), s 66—See SETTLEMENT, 15

28 & 29 Vict. c 79 (Union Chargeability Act, 1865), s 8—See POOR LAW, 2

28 & 29 Vict. c 99 (County Courts Equitable Jurisdiction Act, 1865), s 18—See COUNTY COURT, 2

29 & 30 Vict. c 32 (Matrimonial Causes Act, 1866), s 1—See DIVORCE, 14

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30 & 31 Vict. c 3 (British North America Act, 1867), ss 91, 92—See CANADA, LAW OF, 6

30 & 31 Vict. c 69 (Locke King's Act Amendment Act, 1867), s 1—See ADMINISTRATION, 7

30 & 31 Vict. c 121 (Pharmacy Act, 1867), s 6—See ADULTERATION, 1

30 & 31 Vict. c 127 (Railway Companies Act, 1867), s 3—See RAILWAY, 13: s 4, RAILWAY, 3, 4, 13: s 23, COMPANY, 17

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31 & 32 Vict. c 101 (Titles to Land Consolidation, Scotland, Act, 1868), s 8—See SCOTLAND, LAW OF, 1

31 & 32 Vict. c 130 (Artisans' Dwellings Act, 1868), ss 3, 5, 7, 25—See ARTISANS' DWELLINGS ACT

32 & 33 Vict. c 19 (Stannaries Act, 1869), s 32—See PRACTICE, 11

32 & 33 Vict. c 27 (Wine and Beerhouse Act, 1869), s 7—See LICENSED HOUSE, 5: s 18, LICENSED HOUSE, 2: s 19, LICENSED HOUSE, 2, 5

32 & 33 Vict. c 51 (County Courts Admiralty Jurisdiction Act, 1869), s 4—See COUNTY COURT, 11

32 & 33 Vict. c 62 (Debtors Act, 1869), s 4—See ATTACHMENT, 5, 8—11: s 5, BANKRUPTCY, 32; COUNTY COURT, 5; HUSBAND AND WIFE, 5; JURISDICTION, 8: s 11, BANKRUPTCY, 40: s 27, BANKRUPTCY, 36

32 & 33 Vict. c 67 (Metropolis Assessment Act, 1869), s 47—See POOR RATE, 1

32 & 33 Vict. c 71 (Bankruptcy Act, 1869), ss 31, 49—See BANKRUPTCY, 29: ss 91, 94, SETTLEMENT, 21: s 126, BANKRUPTCY, 42

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33 & 44 Vict. c 78 (Tramways Act, 1870), s 28—See HIGHWAY, 6: ss 51, 72, FALSE IMPRISONMENT, 3

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34 & 35 Vict. c 31 (Trade Union Act, 1871), s 4—See POOR LAW, 4: s 23, TRADE UNION

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35 & 36 Vict. c 65 (Bastardy Law Amendment Act, 1872), s 5—See BASTARDY

35 & 36 Vict. c 76 (Coal Mines Regulation Act, 1872), ss 17, 18—See MASTER AND SERVANT, 7: s 58, MASTER AND SERVANT, 5.

35 & 36 Vict. c 93 (Pawnbrokers Act, 1872), s 24—See FALSE IMPRISONMENT, 4

35 & 36 Vict. c 94 (Licensing Act, 1872), s 3—See LICENSED HOUSE, 1: s 13, LICENSED HOUSE, 10: s 15, LICENSED HOUSE, 2: s 17, LICENSED HOUSE, 3: s 42, LICENSED HOUSE, 4, 6: s 49, LICENSED HOUSE, 7: s 62, LICENSED HOUSE, 10: ss 72, 74, LICENSED HOUSE, 1

36 & 37 Vict. c 17 (Infants Custody Act, 1873), s 2—See INFANT

36 & 37 Vict. c. 48 (Regulation of Railways Act, 1873), s 8—See RAILWAY, 1

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37 & 38 Vict. c 49 (Licensing Act, 1874), ss 9, 10—See LICENSED HOUSE, 11: s 26, LICENSED HOUSE, 4

37 & 38 Vict. c 57 (Real Property Limitation Act, 1874), ss 1, 2—See LIMITATIONS, STATUTE OF, 5

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37 & 38 Vict. c 78 (Vendor and Purchaser Act, 1874), s 9—See JURISDICTION, 18, 19

37 & 38 Vict. c 94 (Conveyancing, Scotland, Act, 1874), s 34—See SCOTLAND, LAW OF, 4

38 & 39 Vict. c 55 (Public Health Act, 1875), s 4—See LOCAL GOVERNMENT, 12: ss 13, 15, LOCAL GOVERNMENT, 8: ss 23, 25, LOCAL GOVERNMENT, 2: ss 116, 117, LOCAL GOVERNMENT, 7: s 144, HIGHWAY, 5: s 150, LOCAL GOVERNMENT, 4, 8, 10—12: s 180, LOCAL GOVERNMENT, 1: ss 182, 183, LOCAL GOVERNMENT, 2: s 193, LOCAL GOVERNMENT, 5: s 207, LOCAL GOVERNMENT, 8: s 211, BANKRUPTCY, 30: s 230, LOCAL GOVERNMENT, 9: s 257, LOCAL GOVERNMENT, 11: s 259, JUSTICE OF THE PEACE, 6: ss 283, 284, LOCAL GOVERNMENT, 9

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38 & 39 Vict. c 63 (Sale of Food and Drugs Act, 1875), s 6—See ADULTERATION, 1, 2

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38 & 39 Vict. c 84 (Returning Officers Act, 1875), ss 2, 4, 5—See ELECTION LAW, 21

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38 & 39 Vict. c 87 (Savings Banks Act, 1875), s 14—See ADMINISTRATION, 11

38 & 39 Vict. c 91 (Trade-Marks Act, 1875), s 10—See TRADE-MARK, 4

39 & 40 Vict. c 17 (Partition Act, 1876), s 6—See PRACTICE, 18

39 & 40 Vict. c 61 (Divided Parishes Act, 1876), s 23—See POOR LAW, 4: s 34, POOR LAW, 3, 10: s 35 POOR LAW, 3, 8—10

39 & 40 Vict. c 63 (Notices to Quit, Ireland, Act, 1876), s 1—See LANDLORD AND TENANT (IRELAND), 9

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40 & 41 Vict. c 57 (Judicature, Ireland, Act, 1877), s 24—See PRACTICE (IRELAND), 2: s 33, PRACTICE (IRELAND), 15: s 50, PRACTICE (IRELAND), 1, 2: s 53, COSTS, 12, 36

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41 & 42 Vict. c 31 (Bills of Sale Act, 1878), s 3—See BILL OF SALE, 7, 18: s 4, BILL OF SALE, 4, 7, 10, 11, 17: s 5, BILL OF SALE, 2, 11, 17—19: s 6, MORTGAGE, 3: s 14, BILL OF SALE, 12

41 & 42 Vict. c 32 (Dentists Act, 1878), ss 11, 12—See DENTIST

41 & 42 Vict. c 40 (Partition Act, 1878), ss 3, 4—See PRACTICE, 18: s 5, PARTITION, 1

41 & 42 Vict. c 54 (Debtors Act, 1878), s 1—See ATTACHMENT, 11

41 & 42 Vict. c 77 (Highways and Locomotives Act, 1878), s 10—See HIGHWAY, 3: s 13, HIGHWAY, 4, 6

42 & 43 Vict. c 11 (Bankers' Books Evidence Act, 1879), s 7—See DISCOVERY, 2

42 & 43 Vict. c 49 (Summary Jurisdiction Act, 1879), s 17—See JUSTICE OF THE PEACE, 16: s 33, JUSTICE OF THE PEACE, 14, 15

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43 & 44 Vict. c 43 (Merchant Shipping Act, 1880), s 4—See SHIPPING, 6

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45 & 46 Vict. c 38 (Settled Land Act, 1882), ss 2, 3—See TRUSTEE, 27: VENDOR AND PURCHASER, 11: s 15, SETTLEMENT, 3: s 19, TRUSTEE, 27: s 21, SETTLEMENT, 15, 17, 18: s 22, SETTLEMENT, 15; VENDOR AND PURCHASER, 11: s 25, SETTLEMENT, 15: s 26, SETTLEMENT, 16: ss 28, 33, SETTLEMENT, 15: s 37, SETTLEMENT, 14: s 38, TRUSTEE, 2: s 44, SETTLEMENT, 15; s 45, VENDOR AND PURCHASER, 11: s 51, SETTLEMENT, 3; WILL, 26: s 52, SETTLEMENT, 3: s 53, SETTLEMENT, 14

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45 & 46 Vict. c 61 (Bills of Exchange Act, 1882), s 57—See BILL OF EXCHANGE

46 & 47 Vict. c 36 (City of London Parochial Charities Act, 1883), ss 5, 10—See CHARITY, 1

45 & 46 Vict. c 75 (Married Women's Property Act, 1882), s 1—See BANKRUPTCY, 22, 37; HUSBAND AND WIFE, 4, 5, 16, 20; SOLICITOR, 2: s 2, HUSBAND AND WIFE, 25: s 5, HUSBAND AND WIFE, 16, 20; SETTLEMENT, 1: s 12, SLANDER, 1: ss 14, 15, HUSBAND AND WIFE, 18: s 17, HUSBAND AND WIFE, 17: s 19, BANKRUPTCY, 37; HUSBAND AND WIFE, 18, 20, 25; SETTLEMENT, 1

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46 & 47 Vict. c 57 (Patents, Designs, and Trade-Marks Act, 1883), s 18—See PATENT, 2: s 19, PATENT, 1, 2, 6: s 26, PATENT, 4, 5: s 29, PATENT, 3: s 31, PRACTICE, 6: s 32, PATENT, 9—11: s 51, PATENT, 2a: s 64, TRADE-MARK, 4a, 5, 6: s 67, TRADE-MARK, 3, 5: s 72, TRADE-MARK, 5

46 & 47 Vict. c 61 (Agricultural Holdings Act, 1883), s 45—See LANDLORD AND TENANT, 1: s 46, COUNTY COURT, 1

47 & 48 Vict. c 41 (Building Societies Act, 1884), s 2—See BUILDING SOCIETY, 1, 1a

47 & 48 Vict. c 68 (Matrimonial Causes Act, 1884), s 5—See DIVORCE, 9

48 & 49 Vict. c 3 (Representation of the People Act, 1885), s 3—See ELECTION LAW, 3, 16

48 & 49 Vict. c 15 (Registration Act, 1885), s 18—See ELECTION LAW, 9, 12

48 & 49 Vict. c 17 (Registration, Ireland, Act, 1885), s 27—See ELECTION LAW, 5

48 & 49 Vict. c 51 (Customs and Inland Revenue Act, 1885), s 8—See LICENSED HOUSE, 8: s 11, INCOME TAX, 5a; PROPERTY TAX

48 & 49 Vict. c 69 (Criminal Law Amendment Act, 1885), ss 4, 9—See EVIDENCE, 11: s 20, EVIDENCE, 9

48 & 49 Vict. c 73 (Purchase of Land, Ireland, Act, 1885), ss 2, 3, 12—See LANDLORD AND TENANT (IRELAND), 10

49 & 50 Vict. c 27 (Infants Guardianship Act, 1886), s 2—See INFANT, 4—6: ss 3, 4, INFANT, 6: s 5, INFANT, 3, 6: s 7, DIVORCE, 7

49 & 50 Vict. c 52 (Married Women's Maintenance Act, 1886), s 1—See HUSBAND AND WIFE, 4; s 2, JUSTICE OF THE PEACE, 11

50 & 51 Vict. c 15 (Customs and Inland Revenue Act, 1887), s 4—See JUSTICE OF THE PEACE, 13

50 & 51 Vict. c 20 (Criminal Law and Procedure, Ireland, Act, 1887), ss 5, 7—See EVIDENCE, 1

50 & 51 Vict. c 30 (Settled Land Act, 1887), ss 1, 2—See SETTLEMENT, 15

50 & 51 Vict. c 33 (Land Law, Ireland, Act, 1887), s 1—See LANDLORD AND TENANT (IRELAND), 5: ss 2, 15, LANDLORD AND TENANT (IRELAND), 12: s 30, LANDLORD AND TENANT (IRELAND), 11

50 & 51 Vict. c 71 (Coroners Act, 1887), s 20—See CORONER, 1

50 & 51 Vict. c 73 (Copyhold Act, 1887), s 45—See COPYHOLD

51 & 52 Vict. c 2 (National Debt Conversion Act, 1888), ss 8, 26, 27—See TRUSTEE, 18

STOCKBROKER.—See PRINCIPAL AND AGENT, 2.

STOP ORDER.—See MORTGAGE, 4.

STOPPAGE *IN TRANSITU*:—

Delivery—End of transit.—Certain goods having been purchased in England, the purchaser sent a consignment note to the vendors "to consign the ten hogsheads hollow ware to *The D.*, to Melbourne, loading in the East India Docks here." The goods were accordingly delivered by the

vendors to carriers for shipment on board *The D.* The vendors having heard of the insolvency of the purchasers, telegraphed to the carriers to stop the goods, but this telegram arrived too late to prevent the goods being shipped on board *The D.*, which then sailed for Melbourne. The vendors before the arrival of the ship at Melbourne, gave the shipowners notice that they claimed the goods.

Held, that the transit was not at an end until the arrival of the goods at Melbourne, and that the notice to stop was good.

Judgment of the Queen's Bench Division (36 W. R. 185, 19 Q. B. D. 553), affirmed.—*Bethell* v. *Clark*, C.A. 611—20 Q. B. D. 615; 57 L. J. Q. B. 302.

STRAITS SETTLEMENTS, LAW of:—

Petition of right—Tort—Seashore—Right of access. By the law of the Straits Settlements the Crown can be sued in tort.

The owner of land abutting on the seashore has the same right of access to the foreshore as a riparian owner on the banks of a navigable river.—*Attorney-General of Straits Settlements* v. *Wemyss*, P.C.—13 App. 192; 57 L. J. P. C. 62; 58 L. T. 358.

SUCCESSION DUTY:—

Successor—Purchaser—Tenancy for life—Fund in court.—T. by his will devised land at F., held under leases for lives, of which R.'s was the last, upon trust for R. for his life, with remainders over. B. purchased from R. his life interest in the lands, and then purchased the reversion in fee of the lands. Part of the land was taken under statutory powers for public purposes, and a sum was paid into court as purchase and compensation money. B. applied for payment out to him of the fund in court, but it was held that B., having bought from the tenant for life, was only entitled to the income of the fund in court during R.'s life, and was a trustee of the *corpus* for the persons entitled under the testator's will, subject to a lien for the price paid for the reversion. R. died, and S. became entitled, under the will, to the fund in court.

Held, that, although B. would not have been liable to pay succession duty, S. was liable to pay succession duty on R.'s death, as the equity of S. to be substituted for B. was by virtue of the testator's will, and that the effect was the same as if there had been a trust in the will for the purchase out of his estate of the reversion in fee of the land.—*De Rechberg* v. *Beeton*, CH.D. CHI., J. 682—38 Ch. D. 132; 59 L. T. 56.

SUMMARY JURISDICTION ACTS.—See JUSTICE OF THE PEACE, 14—16.

TENANCY for LIFE.—See ADMINISTRATION, 16; LIMITATIONS, STATUTE OF, 1; SETTLEMENT, 13—18; SUCCESSION DUTY; TRUSTEE, 27; WILL, 10, 26, 49, 50.

TENANCY in COMMON.—See LIMITATIONS, STATUTE OF, 2.

TENDER.—See COSTS, 50; PRACTICE, 36.

THIRD PARTY.—See COSTS, 11, 49; PRACTICE, 19, 20.

TITHES.—See INCOME TAX, 4.

TOWING.—See COSTS, 35; SHIPPING, 19, 33.

TOWNS IMPROVEMENT CLAUSES ACT.—See LOCAL GOVERNMENT, 6.

TOWNS POLICE CLAUSES ACT.—See HIGHWAY, 2a, JUSTICE OF THE PEACE, 7.

TRADE-MARK:—

1. *Infringement — Injunction.* — F. sought to restrain C. and V. from using the name "R. Concerts," or from representing themselves as owners of the undertaking known by that name, or from representing that they were carrying on the "R. Concerts" in succession to F.'s series; and to restrain V. from acting as agent for C. F. alleged that he engaged R. to conduct concerts, and had originated the "R. Concerts"; and that no concert had ever been given under that name except by him. C. had announced a series of "R. Concerts," and V., notwithstanding a written agreement to act as F.'s agent, had held himself out as the agent of C. R. had declined to act any longer as F.'s conductor.

Held, that F. was entitled to an injunction.—*Franks* v. *Chappell*, CH.D. CHI., J.—57 L. T. 141.

2. *Infringement—Misrepresentation by plaintiff.*—The plaintiffs, who were manufacturers of and dealers in cigars in England, imported cigars made of Havannah tobacco and manufactured in Germany. The plaintiff sold the cigars in England in boxes with a label containing their trade-mark, the words "La Pureza," and a pictorial representation of an Indian woman and two boys holding shields and a background. On one shield were depicted the arms of Spain, and on the other those of Havannah. In the trade-mark as registered the shields were blank. A smaller label contained the lithographed signature of "R. R." On each box were branded the words "La Pureza" and "Habana." "La Pureza" was an old disused brand of Havannah cigars, and there was no known person of the name of "R. R." The defendants used similar marks.

Held, that the plaintiffs, having falsely represented their cigars as manufactured in Havannah, could not maintain an action for infringement of their trade-mark.—*Newman* v. *Pinto*, C.A.—57 L. T. 31.

3. *Rectification of register—Deceptive mark—Patents, Designs, and Trade-marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 67.—Y. & Co. registered a trade-mark for fermented liquors, consisting of three triangles, two placed on a third, the space in the centre being blank. B. subsequently registered another mark for bottled beer, consisting of three triangles interlaced, the space in the centre containing a stag's head.

Held, that the mark subsequently registered was calculated to deceive, and that so much of it as consisted of the triangular arrangement must be expunged from the register.—*In re Seigel's Trade-mark*, CH.D. CHI., J.—57 L. T. 247.

4. *Rectification of register—Words — Combination with other words—Trade-Marks Act*, 1875 (38 & 39 *Vict. c.* 91), *s.* 10.—In 1877 P. & Co. were registered as proprietors of a trade-mark for medicine, which consisted of the words "Pain Killer," and in respect of which they claimed user for forty years before registration. L. applied for removal of the name from the register, on the ground that the words had been frequently used in combination with other words.

Held, that the words were not a proper mark for registration under section 10 of the Trade-Marks Act, 1875.—*In re Harbord*, C.A.—58 L. T. 695.

4a. *Registration—Fancy word—Infringement—Patents, Designs, and Trade-Marks Act*, 1883, *s.* 64.—In 1883 the plaintiff invented a game called "Reversi," which he registered as a trade-mark in 1887. In 1886 the defendant advertised a game called "Annex," which the plaintiff alleged to be an imitation of his own invention. In 1888 the defendant added the words "a game of reverses." The word "Reversi" is the name of an old French game at cards.

Held, that "Reversi" was not a fancy word, and ought not to have been registered as a trade-mark, and that the defendant had not been guilty of an infringement.—*Waterman* v. *Ayres*, C.A.—59 L. T. 17.

5. *Registration—Fancy word—Old mark—Patents, Designs, and Trade-Marks Act*, 1883, *s.* 64, *sub-sections* 1 (c), 3; ss. 67, 72.—H. & Co. registered under the Trade-Marks Act, 1875, two trade-marks in respect of coffee as marks which had been used by them before the passing of that Act, and thereby obtained protection in respect of all goods in that class till the passing of the Patents, Designs, and Trade-Marks Act, 1883, since which the protection applied to coffee only. The marks had never been used for anything but coffee.

Held, that the former registration gave no right to have the marks registered under the Patents, Designs, and Trade-Marks Act, 1883, as old marks for goods other than coffee, although in the same class; and that, with respect to such goods, they must be treated as new marks, and must comply with the provisions of the later Act.

The trade-marks consisted of—first, an oblong label divided into three equal and parallel stripes, coloured red, white, and blue respectively (the colours being shown, for the purposes of the former registration, by shading with dark lines), but with no dividing lines between the stripes; and, secondly, the words "red, white, and blue" printed across the label.

Held, that the only distinction in the device was the use of the colour; that the Act treated colour as an accident, so that the device must be something distinctive independently of colour; that the words "red, white, and blue" were not "fancy words not in common use"; and that registration must be refused.—*In re Hanson's Trade-Mark*, CH.D. KAY, J. 134—37 Ch. D. 112; 57 L. J. Ch. 173; 57 L. T. 859.

6. *Registration — Fancy word — "Sanitas" — Patents, Designs, and Trade-Marks Act*, 1883, *s.* 64.—The word "Sanitas" is not a fancy word, and cannot be registered as a trade-mark for toilet soap and disinfecting fluid.—*In re Sanitas Co.*, CH.D. KAY, J.—58 L. T. 166.

See also INJUNCTION, 10; PRACTICE, 51.

TRADE NAME.—See INJUNCTION, 11—13; PRACTICE, 43.

TRADE UNION:—

Illegality—Restraint of trade—Trade Union Act, 1870 (34 & 35 *Vict. c.* 31), *s.* 23.—One of the rules of a society established for the protection of a particular trade provided that no member of the society should employ any traveller, carman, or outdoor *employé* who has left the service of another member, without the consent in writing of his late employer, until after the expiration of two years from his leaving such service.

Held, that the rule imposed an unreasonable restraint on trade, and was, therefore, bad.

Semble, a rule properly framed, preventing one member from injuring another by improperly acquiring information from a servant, would have been valid.

Decision of Chitty, J., affirmed.—*Mineral Water Bottle Trade Protection Society* v. *Booth*, C.A. 274—36 Ch. D. 465; 57 L. T. 573.

See also POOR LAW, 4.

TRAMWAY.—See FALSE IMPRISONMENT, 3; HIGHWAY, 6.

TRESPASS.—See JUSTICE OF THE PEACE, 8.

TRINIDAD, LAW of:—

Bill of sale—Registration—Growing crops.—By the law of Trinidad an unregistered bill of sale of crops actually growing is void.—*Tennant* v. *Howatson*, P.C.—13 App. 489; 58 L. T. 646.

TRUSTEE:—

1. *Appointment — Contract by lunatic — Lease — Vesting order—Covenant for quiet enjoyment.*—The plaintiff entered into an agreement with the defendant under which the defendant was to grant leases to the plaintiff in the form of a draft lease, which contained an express covenant for quiet enjoyment. Before the leases were granted the defendant became of unsound mind.

Held, that an order might be made vesting the legal term in the plaintiff pursuant to the contract, but that the order would not give him the benefit of the covenant for quiet enjoyment. — *Cowper* v. *Harmer*, CH.D. STI., J.—58 L. J. Ch. 460; 57 L. T. 714.

2. *Appointment—New trustee—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 31—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 38.—One of three trustees appointed by the court under section 38 of the Settled Land Act, 1882, having gone to reside abroad, the court, under the same section, appointed a new trustee in his place, for the purposes of the Act. —*In re Kane*, M.R. (Ir.)—21 L. R. Ir. 112.

3. *Appointment—New trustee—Death of sole trustee —Vesting order—Trustee Act*, 1850 (13 & 14 *Vict. c.* 60), *ss*, 32, 34—*Conveyancing Act*, 1881, *s.* 30.—The sole trustee of freehold land, appointed by will, died in the lifetime of the testator. The testator's heirs-at-law died intestate after the Conveyancing Act, 1881, had come into operation, and there was no legal personal representative of her estate. A petition, which was served on the testator's heir, was presented for the appointment of new trustees and a vesting order.

Held, that the court had jurisdiction to appoint new trustees and to make an order vesting the trust property in the new trustees for such estate as was vested in the heirs-at-law at the time of her death.—*In re Williams's Trusts*, CH.D. NOR., J. 100—56 L. J. Ch. 1088; 56 L. T. 884.

4. *Appointment—New trustee — Lunacy—Consent —Verification—Affidavit—Ord.* 38, *r.* 19*a*.—On a petition in the Chancery Division as well as in Lunacy the signature of a proposed trustee to his consent to act may be verified as provided by ord. 38, r. 19*a*, and the old practice requiring an affidavit need not be followed.—*In re Hume*, LUN. 84—35 Ch. D. 457; 56 L. J. Ch. 1020; 56 L. T. 351.

5. *Appointment — New trustee — Private Act — Approbation of court—Conveyancing Act*, 1881, *s.* 31. —A private Act, in 1869, enacted that section 27 of Lord Cranworth's Act should be deemed to apply to the trusteeship of the M. estates, "provided that every new trustee of the said estates shall be appointed with the approbation of the Court of Chancery." In 1886 a deed was executed by the trustees appointing new trustees under the power vested in them by statute, and contained the usual declaration vesting the estates in the new trustees; but the appointment was not made with the approbation of the court.

Held, that the deed must be construed as if the special provision contained in the private Act had formed part of Lord Cranworth's Act: that, as Lord Cranworth's Act had been repealed, the court could not add the special provision to the general power of appointment given by the Conveyancing Act, 1881;

and that the new trustees were properly appointed.—*In re Lloyd's Trusts*, CH.D. NOR., J.—57 L. J. Ch. 246.

6. *Appointment — New trustee—Vesting order—Jurisdiction — Trustee Act*, 1850, *s.* 10—*Trustee Extension Act*, 1852 (15 & 16 *Vict. c.* 55), *s.* 8.—One of two trustees was sentenced to penal servitude for felony, and the Lancaster Palatine Court appointed a new trustee jointly with the other trustee, and made an order vesting in them the land within the jurisdiction of that court. A petition was then presented to the Chancery Division for an order vesting the rest of the trust property in the same trustees.

Held, that no vesting order could be made under section 8 of the Trustee Extension Act, 1852, but that the court had jurisdiction to make a vesting order under section 10 of the Trustee Act, 1850.—*In re Hulme's Trusts*, CH.D. CHL., J.—57 L. T. 13.

7. *Appointment — New trustee—Will—Beneficial interest.*—On a petition to appoint a new trustee under a will in the place of a deceased trustee, the court directed the appointment of one of several persons beneficially interested in the testator's estate, the testator having appointed beneficiaries as trustees, and having empowered the beneficiaries, on the death or retirement of the trustees, to appoint one or more persons to supply the vacancy.—*Tempest* v. *Lord Camoys*, CH.D. CHL., J.—58 L. T. 221.

8. *Appointment—Remuneration—Trustees resident out of the jurisdiction—Trustee Act*, 1850, *ss.* 32, 34—*Trustee Extension Act*, 1852, *s.* 9.—Under a settlement of real estate situate within the jurisdiction, the trustees had a power of sale with the consent of the tenant for life, the proceeds to be invested in the purchase of land. A power of appointing new trustees was vested in the surviving or continuing trustees or the heirs or assigns of the last surviving or continuing trustee. The last surviving trustee died in 1874 without making any devise of trust estates. His heir had not been heard of for ten years. All the *cestui que trusts* were, and had for many years been, resident out of the jurisdiction, and knew no one within the jurisdiction but A. who would consent to become trustee. A. had for many years managed the estate and received the rents as agent at a commission of five per cent. on the annual rental, and declined to be appointed trustee except at the same rate of remuneration. Two of the proposed new trustees, B. and C., were resident out of the jurisdiction.

On the application of all the *cestui que trusts*, some of whom were infants, and of A., B., and C., the court appointed A., B., and C. to be trustees, A. to manage the estate at a commission of five per cent. on the annual rental, and B. and C. undertaking, in the event of A.'s death, not to appoint a new trustee resident out of the jurisdiction without applying to the court.—*In re Freeman's Trusts*, CH.D. STL., J. 71—37 Ch. D. 148; 57 L. J. Ch. 160; 57 L. T. 798.

9. *Appointment — Separate trusts — Additional trustee—Trustee Act*, 1850, *s.* 32—*Conveyancing Act*, 1882 (45 & 46 *Vict. c.* 39), *s.* 5.—The sole trustee under a will was desirous of being discharged from the trusts of a particular fund. He declined to appoint new trustees, but expressed an intention of paying the fund into court.

The court declined to appoint additional trustees in respect of the separate fund.—*In re Nesbitt's Trusts*, C.A. (Ir.)—19 L. R. Ir. 509.

10. *Appointment — Separate trusts — Petition—Trustee Act*, 1850, *s.* 32—*Conveyancing Act*, 1882, *s.* 5.—The court has power, under the Trustee Act, 1850, to allow trustees to retire from a part of the trusts, and to appoint new trustees of that part whenever it is expedient so to do, this power being independent of that conferred by section 5 of the Conveyancing Act, 1882.

Savile v. *Couper*, 35 W. R. 829, 36 Ch. D. 520, distinguished.

Petitions under the Trustee Acts should contain in the last paragraph a statement indicating the particular sections of the Acts under which it is proposed that the order prayed for should be made.—*In re Moss's Trusts*, CH.D. KAY, J. 316—37 Ch. D. 513; 57 L. J. Ch. 423; 58 L. T. 468.

11. *Appointment—Special circumstance—Ireland—Trustee resident in England.*—Where estates in England and Ireland were devised on similar limitations, the Chancery Division in Ireland appointed as trustees of the Irish estates two persons who had been appointed by the Chancery Division in England trustees of the English estate.—*In re Maberly*, M.R. (Ir.)—19 L. R. Ir. 341.

12. *Breach of trust—Acquiescence—Indemnity.*—A trustee who distributes a trust fund among strangers at the request of a beneficiary, from whom he takes a covenant of indemnity, cannot recover under the covenant for the loss of a beneficial interest under the fund to which he has since become entitled.

A. was sole trustee of a fund held in trust for B. for life, then for B.'s wife for life, and if she predeceased B. in trust for such person as she should by will appoint, and in default of appointment for her next of kin. A., at the request of B. and his wife, raised £5,000 out of the fund, and paid £1,000 to each of D.'s adult daughters, and £1,000 to D. in trust for his infant daughter, B. covenanting with A. to indemnify him against all consequences of the distribution. B. survived his wife, who died intestate, and whose next of kin were A. and D. A.'s executor sued B.'s executor to compel him to replace the £5,000.

Held, that B.'s covenant was to indemnify A. only against demands on him for breach of trust, and that the action must be dismissed.

Judgment of Kay, J., reversed.—*Evans* v. *Benyon*, C.A.—37 Ch. D. 329; 58 L. T. 700.

13. *Breach of trust—Sale of property—Repurchase by nominee—Burden of proof.*—R. devised his property, including S. Farm, to A., B., and C., upon trust to sell and divide the proceeds amongst several persons, A. being one. By deed dated the 24th of March, 1854, A., B., and C., as trustees, conveyed S. Farm to W. for £1,814 17s. 2d. In June, 1854, W. reconveyed the farm to B. for £1,831 9s. 7d. In July, 1870, B. purchased with his own moneys the L. property for £787 11s., and in 1874 he sold S. Farm and X. to M. for £9,587 10s.

Held, that the purchase by W. as nominee of B. vitiated the repurchase by B., and that his representatives must account for the profits made by the different dealings with the trust property.

Held, also, that the burden of proof lies on the plaintiff in a case of repurchase by a trustee where the facts are known to both parties.—*Postlethwaite* v. *Rickman*, CH.D. KEK., J. 808—59 L. T. 53.

14. *Breach of trust—Solicitor—Costs—Constructive trust.*—In order to preclude a solicitor from accepting from a trustee payment, out of the trust estate, of costs incurred in the administration of the trust estate, it must be conclusively shown that the solicitor, at the time of receiving such payment, had knowledge that the trustee had been guilty of such a breach of trust as to incapacitate him from resorting to the trust estate for the payment of such costs.

Stanier v. *Evans*, 35 W. R. 286, 34 Ch. D. 470, distinguished.—*Blundell* v. *Blundell*, CH.D. STI., J. 779—57 L. J. Ch. 730.

15. *Chapel—Presbyterian Church of England—Dissenters' Chapels Act*, 1844 (7 & 8 *Vict.* c. 45), s. 2.—A chapel was conveyed in 1766 to trustees upon trust to permit the premises to be used as "a meeting-house for Protestant Dissenters of the Presbyterian or Independent denomination to worship in." A series of ministers had been appointed and officiated in the chapel since that date, some of them being Presbyterians, others Independents; but since the year 1800 Independent ministers alone had been pastors of the congregation, the defendant A., who was appointed in 1864, being an Independent. In 1879 and 1880, at meetings of the chapel congregation, a majority of the members decided to apply for the admission of the congregation to fellowship with the Presbyterian Church of England, a body formed in 1876 by the union of certain religious bodies in England holding Presbyterian tenets, and the congregation was eventually so admitted. By the constitution of this body, any congregation admitted to its fellowship lost the power of absolute control over its own affairs in certain particulars. The plaintiff was a member of the congregation at the time of the application to the English Presbyterian Church, and objected to joining that Church, and brought this action, claiming that, the chapel having been used for more than twenty-five years for worship in accordance with Independent principles and usage, it could not now be used for worship in accordance with the usages of the Presbyterian Church.

Held, that the Dissenters' Chapels Act, 1844, was available only as a defence against attempted alteration after a period of twenty-five years, and not as a means to compel the continuance of any particular religious usages.

Held, also, that the constitution of the Presbyterian Church of England was such that it would be contrary to the trusts of the deed of the chapel for it to be transferred to that Church, the deed contemplating the control of the chapel affairs by no other body than the congregation meeting there, and that the plaintiff's claim must succeed.—*Attorney-General* v. *Anderson*, CH.D. REK., J. 714—57 L. J. Ch. 543; 58 L. T. 726.

16. *Contribution—Indemnity.*—A., B., and C., who were trustees, invested money on insufficient security. In a writ by the *cestuis que trust* it was declared that A., B. and her husband, and the estate of C., who was dead, were liable to make good the loss. The amount was afterwards paid into court by the trustees of a settlement which comprised part of C.'s estate. The trustees sued A. for one-third contribution, but did not realise anything. They then sued B. and her husband for half contribution.

Held, that the trustees were entitled to recover from A. and her husband.—*Bacon* v. *Camphausen*, CH.D. STI., J.—58 L. T. 851.

17. *Indemnity—Power of appointment—Default—Resulting trust.*—A. and B. agreed that the income of money invested in their joint names in shares in a company, but in fact supplied by A., should go to A. for her life, and afterwards to B. for his life, and the principal then to such charities as A. should by will appoint.

Held, on failure of such appointment, after the determination of the life estates, that there was a resulting trust of the principal in favour of A. B. having survived A., and the company having gone into liquidation, B.'s executor, being liable in the winding up, sued A.'s executors for an indemnity before any call had been made on him.

Held, that the plaintiff was entitled to the indemnity.—*Hobbs* v. *Wayet*, CH.D. REK., J. 73—36 Ch. D. 256; 56 L. J. Ch. 849; 57 L. T. 225.

18. *Investment—Consols—National Debt Conversion Act*, 1888 (51 & 52 *Vict.* c. 2), ss. 8, 26, 27.—The trustees of a fund were by a will directed to invest the fund in £3 per Cent. Consols, but without power to vary or change the investment when made, and out of the income of the Consols to pay certain annuities, and after the deaths of the annuitants the trust funds were directed to go over. The fund was duly invested. The annuities were not charged on the *corpus*.

Held, that sections 8 and 26 of the National Debt Conversion Act, 1888, authorised trustees to exchange £3 per Cent. Consols for the new stock, and that section 27 authorised trustees to sell any stock converted or exchanged by virtue of that Act, and to invest the proceeds in any of the securities for the time being authorised for the investment of cash under the control of the High Court of Justice; and that the trustees of the will were justified in selling the £3 per Cent. Consols representing the trust funds and investing the proceeds of such sale in any of the securities now authorised for the investment of cash under the control of the High Court.—*In re Tuckett's Trusts*, CH.D. CHI., J. 542—57 L. J. Ch. 760.

19. *Investment—Income—Payment to trustees—Form of order.*—It is not desirable, as a general rule, to order income to be paid to trustees, "or either of them," according to the form in Seton on Decrees, p. 88, s. 4, No. 2.

In re Clinton, 8 W. R. 492, not followed.—*Carr* v. *Carr*, CH.D. REK., J. 668.

20. *Judgment—Interest.*—A person who has been declared by the judgment of the court to be a trustee for a sum of money received by him will be liable to pay interest at five per cent. on such sum.—*Glen Valley Railway Co.* v. *McCarthy*, V.C. (Ir.)—21 L. R. Ir. 134.

21. *Mortgage—Vesting order—Jurisdiction—Trustee Act*, 1850, s. 9.—In 1881 a house was mortgaged to A. for £350. In 1887 A. transferred the mortgage to B. for £385, which sum was provided by D. and H. The transfer was to B. in trust for D. and H., but there was no declaration of trust. B. became a bankrupt.

Held, that the court had no jurisdiction to make an order vesting B.'s estate in D. and H.—*In re Barber's Trusts*, CH.D. MOR., J.—58 L. T. 303.

22. *Negligence—Investment—Mortgage—Contributory mortgage.*—The trustees of a marriage settlement had power to invest the funds "in their or his name or names" on real securities. The trustees, being two in number, joined with the two trustees of a will, one of them being a trustee both of the settlement and the will, in advancing £2,000 on a contributory mortgage, the trustees of the settlement advancing £1,500, those of the will £500. The security was subsequently depreciated in value, and an action was brought by the *cestui que trusts* under the settlement claiming a declaration that the trustees of it had committed a breach of trust.

Held, that, by advancing money on a contributory mortgage, the trustees had not complete control over the mortgaged property, and were liable to make good the deficiency in value, as such an investment was unauthorised.—*Webb* v. *Jonas*, CH.D. REK., J. 666—57 L. J. Ch. 671; 58 L. T. 882.

23. *Negligence—Investment—Mortgage—Valuation—Co-trustees—Solicitor.*—Trustees advanced money

on mortgage of a hotel and stables, and cottages and houses principally let at weekly rents. Valuers were employed, and the particulars furnished by the mortgagors were submitted to them, but the trustees did not make inquiries to verify the statements as to the properties, or letting, or the amount of outgoings. They told the valuers that the mortgagees were trustees, but not that they did not desire to lend more than half the value. They omitted to instruct the valuers to ascertain whether the particulars were correct, or the outgoings or average amount of repairs. The valuers gave their opinion that sums more than one-half of the value might be advanced on the security, and such sums were in each case advanced. The mortgagors became insolvent. The properties were put up for sale, but failed to realise the advances.

Held, that the investments were improper; and that the trustees had been guilty of negligence in not making inquiries as to the particulars, and not giving proper instructions to the valuers, and were jointly and severally liable for the money lost.

One of the trustees, A., was a solicitor, authorised to make professional charges for work done for the trust. The other, B., was the testator's widow and tenant for life of the trust funds. A. took an active part in making the investments, and was paid costs, charging scale fees for negotiating loans, deducing title, and preparing the mortgages, and did not communicate with B. so as to enable her to exercise her judgment upon the investments.

Held, that A. had undertaken to find proper investments, and that B. had joined in advancing the fund on the faith that the investments were proper ones which had been looked into by A. as solicitor; that she had been misled, and he had been guilty of negligence as a solicitor; and that, as between A. and B., A. was liable for the breach of trust.—*Partington* v. *Allen*, CH.D. STI., J.—57 L. T. 654.

24. *Negligence—Investment—Mortgage—Valuation—Interest.*—Trustees, who were authorised to invest upon real securities, proposed to invest the trust funds on the security of a freehold brickfield. Valuers reported that "the land, premises, and freehold fixtures form a good security" for the money to be invested. The trustees, without further inquiry, advanced the money, and the security failed to realise the amount advanced.

Held, that the trustees had not acted with ordinary prudence, and were personally liable to make good the money, with interest at four per cent. from the last payment; and that the tenant for life was not bound to return the excess of interest which had been paid because the security was hazardous.

Decision of the Court of Appeal affirmed.—*Learoyd* v. *Whiteley*, H.L. 721—12 App. 727; 57 L. J. Ch. 290; 58 L. T. 93.

25. *Negligence — Recovery of trust property — Indemnity.*—Trustees are not bound at their own expense to take proceedings for the recovery of trust property not lost by their own default.

A person claiming to be transferee of a mortgage of trust property gave notice of the mortgage to the trustees, who were convinced that the deed was a forgery. The property was afterwards sold under the power of sale in the mortgage at an auction, of which the trustees also had notice, but they took no steps, and accepted the balance of the purchase-money remaining after the claim under the mortgage had been satisfied, and acknowledged the receipt in their accounts.

Held, that the trustees were justified in declining to take any proceedings at their own risk and without an indemnity from their *cestui que trusts*, and that they had done nothing for which they could be held liable to make good the loss of the property, even if it were proved that it had been lost, which was not proved—*Tudball* v. *Medlicott*, CH.D. KEK., J. 886.

26. *Remuneration—Solicitor.*—Land was devised to A. and a solicitor until B. attained the age of twenty-eight, upon trust to receive the rents and manage the estate. The will empowered any trustee being a solicitor to charge and be paid for all business done as a solicitor, and a legacy of £100 was given to each trustee. The trustees managed the estates for fifteen years, paying themselves a salary of £100 a year each for the trouble of management.

Held, that the payments were unauthorised by the will.—*Bedingfield* v. *Deye*, CH.D. KAY, J.—57 L. T. 332.

27. *Tenancy for life—Power of sale—Undivided moiety—Settled Land Act*, 1882, *s.* 2, *sub-sections* 3, 5, 6; *ss.* 3, 19.—A devised real estate upon trust for his two sons, James and John, in equal shares, for their respective lives, and after the death of either on trust for the survivor and the issue of the deceased son, such issue to take their parent's share, and after the death of the survivor upon trust to sell and divide the proceeds into two equal shares and pay one such share to the issue of each of his said sons, and if the sons or either of them should die without issue, then to pay one of such shares to such person or persons as the son or sons so dying should by will appoint. There was no gift over in default of appointment. The testator's son John died without having been married and without having exercised the power of appointment, and his undivided share passed to his brother James as heir-at-law of the testator, who sold the undivided share. James then obtained the appointment of two trustees of the will for the purposes of the Settled Land Act, 1882, and gave them notice of his intention to sell, under the powers given by the Act, the undivided share devised upon trust for him for life.

Held, on a summons by the trustees, that James, being only tenant for life of an undivided share, and not of the whole settled property, had no power to sell his undivided share without the concurrence of the purchaser of the other undivided share.—*In re Collings's Settled Estates*, CH.D. NOR., J. 264—36 Ch. D. 516; 57 L. J. Ch. 219; 57 L. T. 221.

See also ATTACHMENT, 10, 11; BANKRUPTCY, 35—41; CANADA, LAW OF, 5; COPYHOLD; COSTS, 26; DIVORCE, 15; GIFT, 2; INFANT, 7; JURISDICTION, 11; LIMITATIONS, STATUTE OF, 3, 4; LUNACY, 2; MORTGAGE, 3; PRACTICE, 17; SETTLEMENT, 20; SOLICITOR, 18; WILL, 22, 23.

ULTRA VIRES.—See BUILDING SOCIETY, 2—4; CANADA, LAW OF, 6; COMPANY, 5, 22, 27—32; LOCAL GOVERNMENT, 4; MUNICIPAL CORPORATION, 2; NEW SOUTH WALES, LAW OF, 3.

UNDUE INFLUENCE.—See GIFT, 4, 5; SETTLEMENT, 12.

UNDUE PREFERENCE.—See RAILWAY, 14.

VENDOR and PURCHASER:—

1. *Conditions of sale — Deposit — Forfeiture — Failure of title.*—In November, 1882, the plaintiff agreed to purchase land from the defendants, subject to a condition that, if he failed to complete the purchase, the defendants might forfeit the deposit and put the land up for resale. The plaintiff accepted the title, but failed to complete, owing to want of means. In June, 1885, the defendants agreed to sell the land to F., who took an objection to the title, which was brought before the court upon a summons under the Vendor and Purchaser Act, 1874. In January, 1886, an order was made on the summons declaring that the vendors had not shown a good title to the land.

In July, 1886, the plaintiff commenced an action against the defendants to recover the deposit paid in November, 1882.

Held, that the plaintiff could not succeed.

Hart v. *Swaine*, 26 W. R. 30, 7 Ch. D. 42, commented upon.

Decision of Kekewich, J. (reported 35 W. R. 451, 35 Ch. D. 384), affirmed.—*Soper* v. *Arnold*, C.A. 207—37 Ch. D. 96; 57 L. J. Ch. 145; 57 L. T. 747.

2. *Conditions of sale—Incumbrances.*—A vendor who contracts to sell only such right and interest, if any, as he has, is bound to convey such right and interest free from an existing incumbrance.—*Goold* v. *Birmingham, Dudley, and District Bank*, CH.D. KEK., J.—58 L. T. 560.

3. *Conditions of sale—Misdescription—"Estimated value"—Compensation.*—Property was described in the particulars of sale by auction as "of the estimated annual value of £400." There was a condition entitling the purchaser to compensation if any error or misstatement should have been made in the particulars. The purchaser adduced evidence that the property was only worth £200 a year; but did not allege that the estimate was a dishonest one.

Held, that, as the property was of the "estimated" value stated, and the estimate was not a dishonest one, the purchaser was not entitled to compensation.—*In re Hurlbalt and Chaytor*, CH.D. NOR., J.—57 L. J. Ch. 421.

4. *Covenant—Incumbrances—New street—Paving, &c.—Expenses — Apportionment — Metropolis Local Management Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 77—*Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 7, *sub-section* 1.—Section 77 of the Metropolis Local Management Act, 1862, does not make the liability to pay paving expenses a charge on land so as to be an incumbrance, claim, or demand within the implied covenant for freedom from incumbrance given by the Conveyancing Act, 1881, s. 7, sub-section 1. The effect of the section is to impose successive personal liabilities on successive owners.—*Egg* v. *Blayney*, Q.B.D. 893—21 Q. B. D. 107; 57 L. J. Q. B. 460; 59 L. T. 65.

5. *Lease—Covenant — Constructive notice.*—Upon an agreement to purchase a lease, the purchaser has constructive notice of the covenants of the lease only when he has a fair opportunity of ascertaining what those covenants are.

Hyde v. *Warden*, 26 W. R. 201, 3 Ex. D. 72, followed.—*Reeve* v. *Berridge*, C.A. 517—20 Q. B. D. 523; 57 L. J. Q. B. 265; 58 L. T. 836.

6. *Lease—Covenant—Damages—Sale of reversion.*—A house was advertised for sale by auction, with possession, and with the option of taking the former tenant's fixtures at a valuation. There was no mention of the nature of the tenancy, and the purchase was to be completed on the 25th of March, 1887. A. bought the house at the auction, when the auctioneer stated that it was not in good decorative repair. The abstract of title showed that the house was let on lease, determinable by notice expiring on the 25th of March, with a covenant to give up the premises in good repair. The lessee had been adjudicated a bankrupt, and the vendor had proved for damages for breach of the repairing covenant.

Held, that the purchaser was not entitled to the damages due from the bankrupt's estate.—*In re Edis and Brown*, CH.D. NOR., J.—58 L. T. 307.

7. *Lease—Interest in lease—Underlease.*—A vendor agreed to sell all his "interest in the lease" held by him of Verulam Church. It turned out that the vendor only had a title to an under-lease for a term less by three days than the term granted by the original lease.

Held, that the purchaser could not refuse to complete.

Madeley v. *Booth*, 2 De G. & Sm. 718, distinguished.—*Waring* v. *Scotland*, CH.D. NOR., J. 756—59 L. T. 132.

8. *Restrictive covenant—Injunction.*—In 1856 the owner of an estate had a scheme prepared for laying it out as a building estate, and sold a few plots in 1857. In 1882 other portions were offered for sale, by the trustees of the late owner, in lots, some of which were subject to various restrictive conditions, and the others of which were free from any restriction. The plaintiff C. bought several of the free lots and one of those subject to a condition. In 1883 another sale took place of the lots left unsold in 1882, together with further lots, some free from restriction; and the latter were bought by the plaintiffs. In 1885 the defendant bought certain lots originally left unsold in 1882, and which were subject to the condition of building thereon houses of the value of £1,200 each, and entered into a covenant in the required terms with the vendors. The plan on the conditions showed the houses built on certain of the lots sold in 1857. The defendant intended to build houses of less value than £1,200 each on the lots so purchased by him.

Held (following *Nottingham Patent Brick and Tile Co.* v. *Butler*, 34 W. R. 405, 16 Q. B. D. 778), that, though the plaintiffs could not sue on the covenant entered into by the defendant with the trustees, the inference from the circumstances was that the restrictions as to building houses of a certain value were for the benefit of all the purchasers of lots on the estate, and therefore that the plaintiffs were entitled to an injunction to restrain the defendant from building houses of less value than £1,200 each.—*Collins* v. *Castle*, CH.D. KEK., J. 300—36 Ch. D. 243.

9. *Restrictive covenant—Lease—Notice—Misrepresentation—Specific performance.*—The vendor of a leasehold property is bound to know all covenants in the lease, and if the intending purchaser states his object in purchasing, the vendor is bound to disclose all covenants which would affect that object, and his silence is equivalent to a representation that no such covenant exists, even if he is not aware of its extent or operation.—*Power* v. *Barrett*, V.C. (Ir.)—19 L. R. Ir. 450.

10. *Restrictive covenant—Separate lots—Adjacent owners.*—The owner of building land sold a part of it in lots for the building of houses. All the conveyances bore date, the 5th of December, 1787, or the 5th of February, 1788, and contained a covenant by the purchaser with the vendor, his heirs and assigns, to erect a house according to a plan signed by the vendor and purchaser, and a covenant that the front of the house should never be altered. The houses were built at the same time and were similar in appearance, but no plan was produced.

Held, that the covenant not to alter the front of the house was not enforceable by one purchaser against another.—*Sheppard* v. *Gilmore*, CH.D. STI., J.—57 L. J. Ch. 6.

11. *Title—Defect—Tenancy for life—Specific performance—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 3, 22, 45, *sub-sections* 1, 3.—The contract on a sale of the fee by a tenant for life under the Settled Land Act, 1882, fixed the date for completion on the 29th of September, but the court held, on the conditions of sale, that, in this respect, time was not of the essence of the contract. On examining the abstract, the purchaser took the objection, on the 25th of

August, that there were no proper trustees for the purposes of the Act, whereupon the vendor, after some further correspondence, on the 6th of October, took out a summons for the appointment of trustees, and informed the purchaser that he had done so. The purchaser replied, on the 8th, that he repudiated the contract. On the 29th the order appointing trustees was made. They waived the notice of sale which should have been given to them by the tenant for life, and notice of the order and waiver was given to the purchaser. He, on the 3rd of November, commenced an action for return of the deposit.

Held, that the purchaser had nothing to do with the trustees except to pay them his purchase-money; that, before completion, there must be trustees for the purposes of the Act to receive the purchase-money, or to enable the tenant for life to direct payment into court under section 22; that the absence of trustees was a defect of conveyancing only, not a defect of title, and the purchaser had no right to repudiate the contract, and that, even if it had been a defect of title, the purchaser ought to have given notice to remove the defect within a reasonable time, and not put an end to the contract *brevi manu*.—*Hatten* v. *Russell*, CH.D. KAY, J. 317—38 Ch. D. 334; 57 L. J. Ch. 425; 58 L. T. 271.

12. *Title—Evidence—Mortgage.*—In 1818 freehold property was mortgaged by a conveyance of the fee simple to trustees upon trust, at any time after the expiration of six months from the date named for repayment of the principal, to sell the property discharge the debt, interest, and costs out of the proceeds, and pay the residue to the mortgagor, his executors, administrators, or assigns. The deed contained a proviso for redemption, and for making the receipt of the trustees, their heirs, or assigns, a sufficient discharge to a purchaser, and exonerating a purchaser from seeing to the application of the purchase-money, and rendering unnecessary the concurrence of the mortgagor, or his heirs, in a conveyance under the trust for sale; but it did not contain a provision exonerating a purchaser from inquiring whether default had been made in payment of principal or interest. The mortgagor died in 1839, having by his will devised the property to several of his children in succession, as tenants for life, with remainders over. The surviving tenant for life died in 1887, and A. and B., in whom the mortgage had become vested by transfer, contracted to sell the property. The vendors sold as mortgagees, in pursuance of the trust.

Held, (1) that, without the concurrence of all the persons entitled to the equity of redemption, it was necessary, in order that the vendors should make a good title, by obtaining statutory declarations, to furnish evidence of the subsistence of the mortgage from the death of the mortgagor till the date of the sale.—*Hollingworth* v. *Willing*, CH.D. CHI., J.—58 L. T. 789.

See also FRAUDS, STATUTE OF; JURISDICTION, 18, 19; SOLICITOR, 13—18; SPECIFIC PERFORMANCE, 3a, 4, 5; STAMP, 1.

VESTING.—See WILL, 53.

VESTING ORDER.—See BANKRUPTCY, 39; COMPANY, 44; LUNACY, 4; TRUSTEE, 1, 6, 21.

VOLUNTARY CONVEYANCE.—See DEED, 2.

VOLUNTARY SETTLEMENT.—See SETTLEMENT, 20—23

WAGES.—See MASTER AND SERVANT, 7; SHIPPING, 34.

WARD of COURT.—See INFANT, 9, 10; SETTLEMENT, 8.

WARRANTY:—

1. *Horse—Conditions of sale—Return—Disablement of horse.*—The plaintiff bought from the defendant a horse warranted quiet to ride, one condition of sale being that, if the buyer contended that the horse did not correspond to the warranty it must be returned on the second day after the sale, and that the non-return within the time named should be a bar to any claim on the ground of breach of warranty. While the plaintiff was removing the horse it fell, and was so injured that it could not be safely returned within the time named, but the plaintiff at once gave notice to the defendant that the horse did not correspond to the warranty.

Held, that the non-return of the horse on the second day after the sale was not a bar to an action for breach of warranty.—*Chapman* v. *Withers*, Q.B.D.—20 Q. B. D. 824; 57 L. J. Q. B. 457; 58 L. T. 94.

2. *Sale of goods—Sample—Latent defect—Implied warranty.*—Caveat emptor.—Cloth merchants ordered from cloth manufacturers worsted coatings, which were to be equal in quality and weight to certain samples previously sent by the manufacturers, who were aware that the goods were to be sold to tailors. The samples and the goods supplied were similar in every respect, but in both a latent defect existed which rendered the coatings unmerchantable for the purpose of making up into coats in the usual manner.

Held, that there was an implied warranty that the goods shall not, by reason of the mode of manufacture, be unfit for use in the manner in which goods of the same quality of material and the same general character and designation ordinarily would be used.

Decision of the Court of Appeal affirmed.

Mody v. *Gregson*, 17 W. R. 176, L. R. 4 Ex. 49, approved.—*Drummond* v. *Van Ingen*, H.L. 26—14 App. 284; 56 L. J. Q. B. 563; 57 L. T. 1.

See also DAMAGES, 2, 9; MARINE INSURANCE, 7; SHIPPING, 5.

WASTE.—See LANDLORD AND TENANT, 8, 11.

WATER:—

1. *Canal—Mining—Subsidence—Percolation—Injunction.*—A canal company, under the powers of a special Act, constructed a canal, which subsequently became vested in a railway company, subject to the same rights and duties as the canal company had held it. A mill was built close to the canal, and, by reason of the owner of the mines and minerals under the canal working them, the mill and canal subsided, but the railway company retained the canal at the original level by elevating the banks on both sides. Water percolated through the banks and damaged the mill.

Held, that the company were liable for negligence in not preventing the water from percolating, and that the fact that the mine-owner's working the mines was the ultimate cause of the injury did not affect their liability.

Held, further, that, as the subsidence could not have been prevented, and could not be prevented in the future, no injunction ought to be granted, but the plaintiff must claim compensation under the provisions in the special Act.—*Evans* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, CH.D. KEK., J. 328—36 Ch. D. 626; 57 L. J. Ch. 153; 57 L. T. 194.

2. *Easement—Lease—Reservation—Implied grant—Unity of possession—Injunction.*—Land on which were dams and artificial watercourses, and which was held under leases reserving all mills, dams, water, and watercourses, and all convenient ways to and from the same, was offered for sale by auction in an administration action in four lots, the conditions of sale stating that the sale was subject to all rights and

legal easements. No sale by auction took place, but a tender by the plaintiff for lot four was accepted, and the conveyance reserved all matters and things excepted and reserved in the lease, and was subject to all existing rights and easements. Lot three was afterwards conveyed to A. by a similar conveyance, and A. afterwards conveyed it to the defendants. Before and at the date of the plaintiff's conveyance, water flowed by an artificial watercourse from lot three to lot four. The watercourse was obstructed by the defendants. The lessor had never interfered with its enjoyment by the plaintiff.

Held, that the plaintiff was entitled to an injunction restraining the defendants from interfering with the flow of the water.—*Pullan* v. *Roughfort Bleaching and Dyeing Co.*, V.C. (IR.)—21 L. R. IR. 73.

3. *Fishery—River—Bed—Conveyance of riparian land—Presumption of property ad medium filum.*—The presumption that by a conveyance describing the land conveyed as bounded by a river it is intended to pass the bed of the river *ad medium filum* may be rebutted by proof of surrounding circumstances negativing the possibility of such intention.

The owners of a manor by conveyance made in 1767 and 1846 granted pieces of land abutting on a river the bed of which formed part of the manor. Before the earlier conveyance a fishery in the river opposite the land conveyed had been during a long period from time to time let by the owners of the manor apart from the riparian land, and in 1846 there was a subsisting lease of the fishery. The purchasers of the riparian land for nearly forty years claimed no right of fishing in the river, but the owners of the manor and their tenants fished without interruption.

Held, that the conveyance of the riparian land passed no rights in any part of the bed of the river.—*Duke of Devonshire* v. *Pattinson*, C.A.—20 Q. B. D. 263; 57 L. J. Q. B. 189; 58 L. T. 392.

4. *Water rate—Annual value—Annual rack rent—Gross estimated rental—Occupation of owner—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *s.* 68—*Local Act.*—The Barnet Gas and Water Act, 1872, with which is incorporated the Waterworks Clauses Act, 1847, provides (*inter alia*), that "the company . . . shall furnish . . . a sufficient supply of water . . . at any rate, on the annual rack rental of the house or part of a house or premises supplied if the same be let at rack rent, and on the annual value if and while the same is not let at rack rent, not exceeding" [so much].

Held, that "the annual rack rent" means the same as "the annual value," and does not mean "net annual value."—*Stevens* v. *Barnet District Gas and Water Co.*, Q.B.D. 924—57 L. J. M. C. 82.

4a. *Water rate — Excess — Voluntary payment — Recovery.*—The defendants, as sanitary authority for the borough of B., had demanded from the plaintiff, and the plaintiff had paid, a water rent of £8 15s. 4d., such rate being calculated on the "gross rental" of the plaintiff's premises. The plaintiff, contending that such rate ought to have been assessed on the "rateable value" only, brought an action in the county court to recover the difference so overpaid. The defendants had no power to distrain for the rate, but they had a power to stop the water supply for non-payment; they had not stopped the water supply, and had not threatened to do so. The county court judge held that the payment was not a voluntary one, and could be recovered back, on the ground that the defendants had a power to stop the water supply.

Held, that the payment was a voluntary one, and could not be recovered back.—*Slater* v. *Mayor, &c., of Burnley*, Q.B.D. 831.

5. *Water rate—Supply by meter—Domestic purposes—Dwelling-house—New River Co.'s Act*, 1852 (15 & 16 *Vict. c. clx.*), *ss.* 35, 38—41.—By the New River Co.'s Act, 1852, s. 35, the company, if requested, must supply houses within their limits with sufficient water for domestic purposes at certain rates, varying ("for water supplied to any dwelling-house") with the annual value of the dwelling-house. By section 38 domestic purposes are not to include "working any machine or apparatus." By section 41 "The company shall, at the request of any consumer of water, for purposes other than the purposes for or in respect of which the rates or charges are hereinbefore provided or limited, or at their own instance, afford a supply of water by means of a meter, . . . and may charge for such supply at certain limited rates per thousand gallons, according to the total quarterly consumption."

The plaintiffs demanded that a warehouse belonging to them, which was occupied only as a place of business and for storing goods, and not for the purpose of living in, should be supplied with water by the defendants by meter for general purposes and for working a hydraulic lift.

Held, that the plaintiffs were not entitled to be so supplied for both purposes at the limited rates fixed by section 41.

Judgment of Kekewich, J. (reported 36 W. R. 122, 36 Ch. D. 641), reversed.—*Cooke* v. *New River Co.*, C.A.—38 Ch. D. 56; 57 L. J. Ch. 353; 58 L. T. 830.

6. *Water rate—Unoccupied house—Liability of owner—Waterworks Clauses Act*, 1847, *s.* 72.—The owner of a house not exceeding the annual value of £10, who is liable for the payment of water rates instead of the occupier, is not liable for the said rates while the house remains unoccupied, although water is supplied to the pipes on the premises.—*British Empire Mutual Life Assurance Co.* v. *Southwark and Vauxhall Water Co.*, Q.B.D. 594.

See also ARBITRATION, 5; EASEMENT; FISHERY, 1, 2; INCOME TAX, 3, 8; MINING; NUISANCE, 1, 2.

WATER RATE.—See ARBITRATION, 5; INCOME TAX, 8; WATER, 4—6.

WAY:—

1. *Implied grant—Appurtenances.*—In the case of a formed road made over an alleged servient tenement to and for the apparent use of a dominant tenement, there is an implied reservation of the right of way on a demise of the soil of the road, although the easement be neither continuous nor of necessity.

In such a case a subsequent demise of the dominant tenement, "together with the appurtenances belonging thereto," will pass the right of way.—*Thomas* v. *Owen*, C.A. 440—20 Q. B. D. 125; 57 L. J. Q. B. 198; 58 L. T. 16.

2. *Implied grant—Necessity—Unity of possession.*—Where, during unity of possession, a particular and defined way is formed and used over property which is afterwards severed and granted by the owner to different persons, the right of using the way as it is then used may pass by implication, although it be not a way of necessity, and although the general words of the conveyance are not sufficient to pass such right.

An owner of land erected three houses thereon facing road, with gardens at the back. Behind these ran a way which gave access from the gardens of two of the houses to a side road, which ran at right angles to the front road on the other side of the third house. The owner assigned to the defendant the plots of land with the two houses thereon, "with their rights, easements, and appurtenances," and afterwards assigned

to the plaintiff the third plot, the dimensions of which comprised so much of the way as lay between the two other plots and the side road. The gardens of the defendant's houses could also be reached from the road in front by two passages, but these were unsuitable for carrying away rubbish from the gardens. The plaintiff disputed the defendant's right to use the way over his land to the side road.

Held, that the defendant was not entitled to this as a way of necessity, but that the right of using the way passed to him by implied grant from the owner, although the general words in the assignment to him were not sufficient to pass such right.—*Brown* v. *Alabaster*, CH.D. KAY, J. 155—37 Ch. D. 490; 57 L. J. Ch. 225; 58 L. T. 266.

See also SPECIFIC PERFORMANCE, 5.

WILL:—

CONSTRUCTION—

1. *Ademption—Parol evidence.*—Parol evidence and contemporaneous or subsequent declarations by the testator are admissible to confirm or rebut the legal presumption of ademption of a legacy to the parish priest for the erection of a new chapel in the town of C. is adeemed by a gift in the testator's lifetime to the Roman Catholic Archbishop of the Diocese for the same purpose.—*Griffith* v. *Bourke*, M.R. (Ir.)—21 L. R. (Ir.) 92.

2. *Ademption—Satisfaction.*—A., being indebted to his wife in the sum of £625, bequeathed to her a legacy of that amount, but without any reference to the debt. He afterwards repaid the debt in his lifetime.

Held, that the legacy must be taken to have been given in satisfaction of the debt, and that the payment of the debt was an ademption of the legacy.—*Gillings* v. *Fletcher*, CH.D. NOR., J. 841—58 Ch. D. 373.

3. *Ademption — Share in business.* — A., by his will, bequeathed the residue of his estate equally between his two sons and three daughters, and directed his business premises, goodwill, stock-in-trade, and effects to be sold and to fall into the residue. He afterwards determined to retire from his business in favour of his two sons, and by deed assigned his business to the elder son, with a provision enabling the younger to become partner on attaining full age, and reserving to himself an annuity payable out of the profits of the business.

Held, that the shares of the two sons in the residue were adeemed to the extent of the value, at the date of the assignment, of the gift to them of the business, and that such value must be taken into consideration in estimating the daughter's shares.— *Vickers* v. *Vickers*, CH.D. NOR., J. 545—37 Ch. D. 525; 57 L. J. Ch. 738; 58 L. T. 920.

4. *Advancement—Composition deed—Principal and surety.*—The testator's son agreed to purchase a business for £300 and a further sum payable by instalments. The testator advanced the £300, and joined with his son in promissory notes to secure the instalments, the first of which he paid when it fell due. The rest were paid by his executors out of his estate. The testator by his will gave his son a share in his residuary estate, directing that advances should be repaid or taken as part of the share. After the testator's death the son executed a creditor's deed, under which the vendor of the business proved for his unpaid purchase-money, but did not obtain satisfaction. The deed contained a release to the principal debtor and a reservation of rights against sureties.

Held, that the sums paid by the testator were advances within the meaning of the will, but that the sums paid by the executors were not; that such advances were not to be deemed advancements for the benefit of the son; and that, as to the subsequent instalments which the executors had paid, they might retain them out of the income of the son's share, or might prove under the creditor's deed, in which case they must adopt the proof already made by the vendor, and stand in his shoes.—*Whitehouse* v. *Edwards*, CH.D. STI., J. 181—37 Ch. D. 683; 57 L. J. Ch. 161; 57 L. T. 761.

5. *After-acquired property — Married woman—Power of appointment—Codicil.*—A married woman who had a power of appointment over certain property under her marriage settlement, by her will, dated in 1883, in exercise of the power, and "all other powers enabling her in this behalf," appointed, gave, and bequeathed all the property comprised in the settlement, and over which she had any power of appointment, to certain persons. She subsequently, on the death of her husband, became entitled to certain real estate and personal estate, and made a codicil to her will, devising certain real estate, described as having come from her late husband, but without confirming her will.

Held, that the will was confined to the settlement property, and there was an intestacy as to the subsequently-acquired personal estate.—*Whitby* v. *Higton*, CH.D. CHI., J. 683—57 L. J. Ch. 430; 58 L. T. 842.

6. *After-acquired property—Specific devise—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 24.—A., by a codicil dated in 1867, devised to the defendant in fee "all those three freehold cottages and premises thereto belonging, situated in E., adjoining the C. Inn, which I have lately purchased." A. afterwards sold two of the cottages, but he lived in the third till 1883, when he died. In 1875 he bought a garden behind the cottage where he lived, and used it for the rest of his life as a part of his residence.

Held, that the garden did not pass with the cottage which remained unsold. — *Cave* v. *Harris*, CH.D. KEK., J. 182—57 L. J. Ch. 62; 57 L. T. 768.

7. *Annuity—Clear annuity—Legacy duty.*—A., by his will, directed his trustees, out of the proceeds of his real and personal estate, to pay to S., until she should marry, "a clear yearly annuity of £250," and in the event of her marriage to pay to her "a clear yearly annuity of £100" during the remainder of her life, and he further directed them, after payment of the said annuity of £250 or £100, as the case might be, to pay to E. "a clear yearly sum of £31 4s., free of legacy duty."

Held, that S. was entitled to an annuity free of legacy duty.—*Nelson* v. *Robins*, CH.D. NOR., J.—58 L. T. 382.

8. *Annuity—Condition—Illegality—Public policy.*—A. gave all his property to a trustee upon trust, after payment of debts, &c., to pay to M., "during such time as she may live apart from her husband, before my son attains the age of twenty-one years, the sum of £2 10s. per week for her maintenance whilst so living apart from her husband," and the will contained a gift of residue. M. and her husband were living together, and the property consisted of personalty.

Held, that the provision as to living apart was void, as *contra bonos mores;* that it was a limitation, and not a condition; and that the annuity was void also.—*Trafford* v. *Maconochie*, CH.D. KAY, J. 427—57 L. J. Ch. 320; 58 L. T. 70.

9. *Annuity—Deficiency—Leaseholds—Charge on corpus.*—A. bequeathed leasehold property on trust, out of the rents and profits, to pay his just debts, and subject thereto to pay thereout to his wife for her life an annuity of £150, and, subject to the above

trusts, he bequeathed the said land on trust to receive the rents and profits and apply them for the maintenance and education of his eldest son, and to assign to him, on his attaining the age of twenty-one, the said lands and any accumulations of rents and profits.

Held, that the annuity was a charge on the *corpus* of the leaseholds.—*In re Moore*, L.J. (Ir.)—19 L. R. Ir. 385.

10. *Annuity—Lapse—Tenancy for life.*—A. bequeathed £1,000 Consols, over which he had a power of appointment subject to the life interest therein of his wife, to trustees on trust, after the decease of his wife, to invest the same in the purchase of an annuity for the life of his nephew, J.; but in case his nephew should in anywise incumber the said annuity, or be outlawed, or take the benefit of any Act of Parliament made or to be made for the relief of insolvent debtors, then he should not be entitled to receive the said annuity, but it should fall into the residue, which the testator gave to his wife. The testator died in 1837. J. died in 1853, having been insolvent in 1833, but having, subsequently to that date, done no act to forfeit the annuity. The testator's wife died in 1854, having treated the annuity as lapsed, and bequeathed it to various legatees. No annuity was ever purchased for J.

Held, that the fund out of which the annuity was to be purchased had lapsed by the death of J. before the death of the testator's widow.

Semble, a forfeiture clause in a will does not take effect if the forfeiture be committed before the date of the will.—*In re Draper's Trusts*, CH.D. KEK., J. 783—58 L. T. 942.

11. "*Children*"—"*Representatives*"—*Illegitimate children.*—A., by his will, dated in 1868, after giving his residuary real and personal estate to trustees on trust for sale, conversion, and investment, directed his trustees to stand possessed of a certain share in the trust fund upon trust to pay the income thereof "to my sister C., the wife of H.," during her life, and, after her death, to pay and divide the share unto and between all "her children" who should be living at her decease, and the "representatives" of such of them as should have died in her lifetime leaving issue living at her decease, who should have attained the age of twenty-one years, "equally, share and share alike, but so, nevertheless, that the representative or representatives of such of them so dying shall take only the share to which the deceased child would have been entitled had he or she survived" C. C. was not the wife of H. at the date of the will or at any other time. H. was, previously to 1845, married to another woman, who was, at the date of the will, living and his lawful wife. In 1845 C. went to live with H., with whom she cohabited from that time down to her death in 1886. Of this union several children were born. The testator knew all the circumstances of the case, visited his sister, was on intimate terms with H., and recognised the children as his nephews and nieces.

Held, that the illegitimate children of C. and H. were intended and were entitled to take under the will.

Hill v. *Crook*, 22 W. R. 137, 6 E. & I. 265, discussed and followed.

Held, also, that the word "representatives" must be construed as next of kin or as descendants, and not as "executors or administrators."—*Eagleton* v. *Horner*, CH.D. STI., J. 348—37 Ch. D. 695; 57 L. J Ch. 211; 58 L. T. 103.

12. *Class gift—Half blood — Presumption.*—The presumption is that a gift in a will to relations includes relations of the half blood, but such presumption may be overruled by the context.—*In re Reed*, CH.D. CHI., J. 682—57 L. J. Ch. 790.

13. *Class gift—Period of distribution.*—Although, as to a testamentary gift of *corpus*, it is an established rule of construction that, where there is a gift to children as a class made payable on attaining a given age or marriage, the class closes when the first child becomes entitled to a share, and after-born children are excluded, such rule will not be applied by the court in the construction of the will to a testamentary gift of income.—*Wenmoth* v. *Wenmoth*, CH.D. CHI., J. 409—37 Ch. D. 266; 57 L. T. 709.

14. *Condition.*—A. executed the following will in Ireland:—"As I am about to leave home for Bangor, should any accident take me out of this world I will to M. £500, and also furniture to the amount of £50 at her selection, . . . for her sole and separate use. . . . The remainder of all I am possessed of I leave to my daughter S. for her sole and separate use, . . . and should, in God's inscrutable providence, anything take her and her son away from this world before I again make my will, . . . I will everything I may be possessed of to M. for her sole and separate use." The testator went to Bangor and returned safely a week afterwards, and died six years afterwards without making another will.

Held, that the will was not contingent on an accident occurring to him during his journey to Bangor.—*In the Goods of Stuart*, P. & D.D. (Ir.)—21 L. R. Ir. 105.

15. *Condition—Charge on real estate.*—A., by his will, appointed executors, and continued: "I give to my two sons . . . all my real and personal property . . . for their life, subject to the condition of paying" legacies. "If my sons marry and have issue, I give to each of their heirs their father's share, and to their heirs for ever; if there is no male issue with either of my two sons, and there is female issue, then the father's share shall be divided between them share and share alike as tenants in common, and to their heirs for ever. Should either of my sons die without issue, then such son's share shall go to my other son and to his heirs for ever. Should both of my sons die without issue, then at the death of the last of them I give all of my real property to the whole of my grandchildren share and share alike as tenants in common, and to their heirs for ever." He directed his two sons to pay out of his real property any payment due and owing thereon.

Held, that the sons took the real estate in tail male and the personalty absolutely, subject to the conditions in the will.—*Tolman* v. *Score*, CH.D. KAY, J.—57 L. T. 40.

16. *Condition — Clerks and workmen — "Full salary"—Legacy duty.*—The will of M. contained the following bequest: "My office and warehouse *employés* such as clerks and workmen, shall have to receive six months' full salary."

Held, that only persons who were in the testator's employment were entitled to the benefit, and that they were not entitled to six months' salary free from legacy duty.—*Marcus* v. *Marcus*, CH.D. NOR., J.—56 L. J. Ch. 830; 57 L. T. 407.

17. *Conversion — Discretion — Absolute trust.*—A. devised real estate upon trust at any time as to the trustees should seem most expedient to sell the same and hold the proceeds in trust for his sons D., E., G., and M., if and when they should attain the age of twenty-one, in equal shares. D. predeceased the testator, and his share devolved on E. as the testator's heir-at-law. G. attained the age of twenty-one and died unmarried and intestate, leaving his mother and E. and M. his next of kin. M. attained the age of twenty-one, and died, having by his will given all his real personal estate to E., who died after having been found a lunatic by inquisition. At the time of E.'s

death the real estate was unsold, and letters of administration of E.'s personal estate was granted to the Solicitor to the Treasury.

Held, (1) that the trust for conversion was absolute, notwithstanding the discretion to postpone it; (2) that the real estate must be treated as personal estate; (3) that the Solicitor to the Treasury was entitled as administrator to E.'s beneficial interest in the real estate.—*Gilbert* v. *Aviolet*, CH.D. CHI., J.—58 L. T. 43.

18. Cy-près—*Lifeboat Institution*—A. bequeathed £10,000 to his executors on trust to pay such sum to the trustees of the National Lifeboat Institution on condition of their constructing and maintaining two tubular lifeboats at D. and P. respectively, and the trustees accepted the trust. The coast at D. was sufficiently supplied with tubular lifeboats.

Held, that the trustees should be permitted to place a tubular lifeboat at N. instead of at D.—*In re Richardson*, CH.D. CHI., J.—58 L. T. 45.

19. "*Die leaving no family.*"—A. devised real estate to his son B., and directed:—"Should my son B. and his wife E. die leaving no family, his share is to revert to my daughters D. and H. B. had several children, who all predeceased him, and left no issue. B., by his will, devised and bequeathed to E. all the real and personal estate to which he should be entitled at his death.

Held, that E. took only a life interest in the estate devised by A. to B., and that D. and H. took a reversion in fee.—*Armstrong* v. *Armstrong*, C.A. (Ir.) —21 L. R. Ir. 115.

20. "*Die without issue.*"—T. gave all his property to his daughter with a gift over if she should "die before the age of twenty-one, and at any time without issue." The daughter attained twenty-one, married, and had a child.

Held, that "die without issue" mean without leaving issue alive at the time of her death.—*Clay* v. *Coles*, CH.D. STI., J.—57 L. T. 682.

21. "*Die without leaving issue male.*"— A. bequeathed his residuary personal estate upon trust for W. and his issue male, and in default of such issue for R. and his issue male, "and in case the said R. shall die without leaving issue male," then over to J. R. died in the lifetime of W. having had one child, a son, who predeceased him. W. afterwards died without issue.

Held, that the words "die without leaving issue male" must be construed as "die without leaving issue male living at his death," and not as "die without having had issue male"; and that the gift over to J. took effect.

White v. *Hight*, 12 Ch. D. 751, 27 W. R. Dig. 245, not followed.—*Slattery* v. *Ball*, CH.D. NOR., J. 265—36 Ch. D. 508; 57 L. J. Ch. 493.

22. *Executor according to the tenor—Trustees—Distribution.*—A. appointed the trustees of his will executors thereof, and on the death of one of them he substituted B. as trustee, and made certain alterations in the division of his property, whereby his trustees were required to get in all his estate and invest and distribute it, after the payment of funeral and other expenses.

Held, that B. was entitled, jointly with the other executors, to probate as executor according to the tenor.—*In the Goods of Lush*, P.D. & A.D. 847—13 P. D. 20; 57 L. J. P. D. & A. 23; 58 L. T. 684.

23. *Executor according to the tenor—Trustees—Payment of debts.*—A direction to pay debts is not a necessary condition to the appointment of an executor according to the tenor. A. bequeathed all his property "to my two children, subject to the following limitations: I wish to appoint B., C., and D. my trustees for the objects of this my will, everything I have to be vested in them."

Held, B., C., and D. were executors according to the tenor.—*In the Goods of MacKane*, C.A. (Ir.)—11 L. R. Ir. 1.

24. *Forfeiture—Bankruptcy—Annulment.*—A. gave his residuary real and personal estate to trustees upon trust, to pay one-third of the proceeds to his son until he should die or become bankrupt, or assign, charge, or incumber, or attempt to assign, charge, or incumber the same or any part, or do something whereby the same or some part would by operation of law or otherwise, if belonging absolutely to him, become vested in, or payable to, some other person, with a gift over on the failure or determination of the trust. Before the death of the testator insolvency proceedings were instituted against his son in Melbourne, and trustees of his estate were appointed, who gave notice to the trustees of the testator's will to pay over to them any sums in their hands to which the bankrupt was entitled. The insolvency proceedings were afterwards annulled, and the insolvency trustees had received nothing from the trustees of the will.

Held, that, notwithstanding the annulment of the insolvency, the forfeiture had taken effect.—*Post* v. *Broughton*, CH.D. CHI., J.—57 L. T. 8.

25. *Forfeiture—Felony—Forfeitures Abolition Act*, 1870 (33 & 34 *Vict.* c. 23), ss. 8, 30.—A., by her will, dated in 1869, devised and bequeathed all her real and personal estate to K. in trust for C. for life, and after her decease upon trust to pay to or permit D. to receive the interest for life, but if he should become bankrupt or insolvent, or compound with his creditors, or should assign or incumber his interest, or any part thereof, or otherwise by his own act, or by operation of law, be deprived of the absolute personal enjoyment of such interest, or any part thereof, the trust in favour of D. should be void, and K. should thenceforth apply the interest for the maintenance, education, and support of the children of D. The testatrix died in 1871, and C. died in 1881. In 1878 D. was convicted of felony, and sentenced to ten years' penal servitude. Before the expiration of his sentence he obtained a ticket-of-leave, and commenced an action for the administration of the estate of the testatrix, and arrears of interest.

Held, that, under section 30 of the Forfeitures Abolition Act, 1870, D. could maintain the action; that he had not been deprived of the actual enjoyment of the life interest by any operation of law; and that he was entitled to arrears of interest.—*Darley* v. *King*, CH.D. CHI., J.—57 L. T. 219.

26. *Forfeiture—Non-residence—Tenancy for life—Settled Land Act*, 1882 (45 & 46 *Vict.* c. 43), s. 51.—The testator gave to his wife an annuity of £200, and also devised his mansion-house and five cottages upon trust to permit her to occupy the mansion-house and receive the rents of the cottages until (among other things) she should fail to comply with certain directions, one of which was that she should reside in the mansion-house, and not absent herself for more than three calendar months in any year, otherwise the annuity of £200 and her interest in the mansion-house and cottages were to cease. The widow remained away from the mansion-house, nursing an invalid daughter, for more than three calendar months, but did not, as tenant for life of the property, let or sell the mansion-house before the expiration of that period.

Held, that the condition of forfeiture on non-residence was valid, except so far as it would prevent the widow, as tenant for life, from leasing or selling the property, and that, as she had broken the condi-

tion, the forfeiture took effect.—*Kemp* v. *Haynes*, CH.D. NOR., J. 321—37 Ch. D. 306; 57 L. J. Ch. 519; 58 L. T. 14.

27. *Forfeiture—Perpetuity—Charitable gift.*—A. bequeathed a sum of money to trustees upon trust to invest and pay the income to the incumbent of a certain church and his successors so long as they allowed the sittings in the church to be occupied free from pew rents; but in case any incumbent should receive payment in respect of sittings in the church, then the testatrix directed that the money and income should fall into the residue of her estate.

Held, that the condition of forfeiture of the legacy was not void on the ground of perpetuity, and that the legacy would cease if any future incumbent should receive payment for sittings in the chuch; also that it was not a gift for the general purpose of charity with respect to which a scheme could be made.—*Randell* v. *Dixon*, CH.D. NOR., J. 548.

28. *Gift over—Forfeiture—Repugnancy.*—D. devised and appointed real and personal estate upon trust for B., his heir and assigns, and directed that, in the event of his doing or suffering anything whereby he should be deprived of the beneficial enjoyment thereof, then the trust for his benefit should determine, and the property should go and be held in trust for his wife.

Held, that the events upon which the executory devise was to take effect were (1) alienation, (2) bankruptcy or judment and execution; that the first was unlimited, and therefore void; that the second was an attempt to avoid the operation of the bankruptcy laws, and was also void; and that B. was absolutely entitled.—*Dugdale* v. *Dugdale*, CH.D. KAY, J. 462—38 Ch. D. 176; 57 L. J. Ch. 634; 58 L. T. 581.

29. *Gift over—Marriage of legatee—Death of legatee.*—A. bequeathed to his daughter £120 a year, so long as she should remain single, and directed that on the day of her marriage the principal should be divided among his children.

Held, that the gift over took effect on the daughter's death.—*Scarborough* v. *Scarborough*, CH.D. STI., J.—58 L. T. 851.

30. "*Household effects*"—*Wine.*—A., by his will, devised his freehold house with the appurtenances to his wife for life, and bequeathed all his "furniture, pictures, plate, jewellery, horses and carriages, and other household effects," to his wife absolutely.

Held, that the wine in the house passed under the words, "other household effects."—*Bourne* v. *Brandreth*, CH.D. KAY, J.—58 L. T. 537.

31. "*Household servants.*"—The testator gave to each of his "household servants" who should have been in his service for one year previously to his death six months' wages, free of legacy duty, in addition to the wages which might be then due to him or her respectively.

Held, that "household servants" included only servants who boarded in the house and took their meals there.—*Savile* v. *Yeatman*, CH.D. KAY, J.—57 L. T. 475.

32. *Lapse—"Die without leaving issue legally to inherit."*—A. bequeathed a share in his property to B. who was not one of his children or issue, the will containing a direction that, if any legatee should die before the will took effect, "without leaving any children legally to inherit," his or her share should "lapse to the general fund." B. pre-deceased the testator, but left children who survived the latter.

Held, that B.'s children were entitled to his share.—*McOlean* v. *Simpson*, V.C. (Ir.)—19 L. R. Ir. 528.

33. *Leasehold—Purchase of reversion—Locke King's Act Amendment Act*, 1877 (40 & 41 *Vict. c.* 34), *s.* 1.—Locke King's Act Amendment Act, 1877, applies to leaseholds.

A., by his will, made in 1884, bequeathed to his wife the leasehold house "in which I now reside." At the date of his will he was residing in a leasehold house. In 1887 he entered into a contract with his lessor to purchase the ground lease, but died before completion of the purchase. His widow accepted the bequest.

Held, that the testator's interest in the house passed to the wife subject to her liability to pay the purchase-money.—*Drake* v. *Kershaw*, CH.D. NOR., J. 413—57 L. J. Ch. 599; 37 Ch. D. 674; 58 L. T. 512.

34. *Legacy—Satisfaction—Husband and wife—Separation deed—Covenant.*—By a separation deed a husband covenanted that his heirs, executors, or administrators should, out of his estate and immediately after his death, pay £100 to his wife if she should survive him. Such payment might be made by paying instalments of £6 a month for six months, and the balance immediately afterwards. On the same day the husband made his will, and, after payment of debts, bequeathed to his wife £100, payable within six months after his death, £6 a month to be paid to her order till his estate was finally settled, such amount to be deducted from the £100 in the manner provided in the separation deed.

Held, that the wife was entitled to £100 under the deed as well as £100 under the will.—*Horlock* v. *Wiggins*, CH.D. KEK., J.—58 L. T. 725.

35. *Life estate—"All my interest."*—A., by his will, bequeathed "all my interest of my houses and cottages," the estate being copyhold, to S., subject to life interests.

Held, that the words "all my interest" were not in the nature of a recital, and that G. took an estate in fee.—*In re De la Hunt and Pennington*, CH.D. CHI., J.—57 L. T. 874.

36. *Life estate—Cash at bank—Investment.*—The testator directed his debts to be paid, and, subject thereto, gave his personal estate to his widow for her own use as long as she might live, and on her death directed the remainder of his personal estate to be made into money, and bequeathed the same to his brothers and sisters, and appointed his widow executrix. The estate included cash at the bank.

Held, that the widow had no absolute power of disposal over the personal estate, but took only a life estate, with a right to enjoy the property *in specie*, and that the cash at the bank must be invested.—*Holden* v. *Smith*, CH.D. KAY, J.—57 L. J. Ch. 648.

37. "*Other sons or son.*"—Real estate was limited by will to the use of the testator's second son for life, remainder to the use of his sons successively in tail male, remainder in similar terms to the use of the testator's third son for life and his sons in tail male, remainder to the use of the testator's fourth, fifth, and all and every other his son and sons. The testator left three sons, of whom the second and third had died without issue.

Held, that the eldest son was not entitled to take under the words "other son," and that the rule that *porcreatis* and *porcreandis* are to be construed in the same way will yield to the expression of a contrary intention on the part of the testator.—*Locke* v. *Dunlop*, CH.D. STI., J. 41—56 L. J. Ch. 697; 57 L. T. 157.

38. *Partnership—"Share, right, and interest"——Debt due from partnership.*—A., who carried on a partnership business, bequeathed to his wife all his personal estate not being partnership assets, property, and effects, and bequeathed to his son all his "share, right, and interest" in the partnership business, in trust for his wife for life, with remainder to his son and two daughters. There was due to the

testator from the partnership a debt of considerable amount, on which interest was paid, in accordance with the articles of partnership and subsequent agreement between the partners.

Held, that the debt was not included in the disposition of the testator's share, right, and interest in the partnership business, but passed to the widow as part of the personal estate.—*Simpson* v. *Beard*, CH.D. NOR., J. 519—58 L. T. 629.

39. *Perpetuity.*—A bequest of £1,000 to S., the superioress of the Convent of Mercy at K., "to and for the purposes solely of the said convent, or to such other person as may be superioress of the said convent at my decease," is not void for perpetuity.—*In re Wilkinson's Trusts*, C.A. (Ir.)—19 L. R. Ir. 531.

40. *Perpuity—Charity—Religious communities.*—A. bequeathed certain railway shares to M., superioress of the S. Convent, in trust for the community of the said convent, and certain bank stock to R., provincial of the Franciscan Missionaries, or the provincial of such missionaries at the date of the testatrix's death, for masses, and also other bank stock to the sisters of the G. Convent, and the residue of her real and personal estate to B., superioress of the said S. Convent, in trust for the maintenance of the said convent.

Held, the that legacies were not invalid on the ground of perpetuity, but were valid bequests to the respective legatees as individuals.—*Bradshaw* v. *Jackman*, M.R. (Ir.)—21 L. R. Ir. 12.

41. *Perpetuity—Religious uses.*—A., by her will, directed her trustees to sell her interest in certain real estates, and out of the proceeds to apply £100 towards masses offered up in public for her soul and the souls of B. and D. B. was then dead, but D. survived the testatrix.

Held, that the legacy was not void on the ground of perpetuity.—*Reichenbach* v. *Quin*, V.C. (Ir.)—21 L. R. Ir. 138.

42. *Power of appointment—"Clear value"—Residue.*—The testatrix, in exercise of a general power of appointment under her marriage settlement, appointed that the trustees of the settlement should stand possessed of so much of the trust funds as should be "of the clear value of £1,000," in trust to pay the same to the trustees of her will, upon trust to pay the same to C. After several other appointments in similar language, the will contained an appointment of "all the residue of the said trust funds." There was no direction for payment of debts, duty, or expenses, and no other property was disposed of.

Held, that the interposition of other trustees did not affect the question; that the word "clear" showed that the rule by which an appointment of the residue of a fund is held to be a gift of a definite sum, not of residue in the ordinary sense, did not apply; and that all the outgoings on the prior appointments must be discharged out of the part of the fund appointed as residue.—*Bjorkman* v. *Earl of Kimberley*, CH.D. KAY, J. 752—57 L. J. Ch. 743; 59 L. T. 200.

43. *Power of appointment—Default—Intestacy.*—A. left all his property, subject to legacies, to A., B., and C. for their joint and several lives, and also directed as follows: "In leaving my property to my three nieces, as co-heirs, it is my wish that, if my grandnephew W. conducts himself to their satisfaction they shall leave him the property I now leave to them." W. predeceased A. and B., who both died intestate.

Held, (1) that the power of appointment could be exercised only by will; (2) that there was an intestacy as to the real estate.—*Moore* v. *Ffolliot*, M.R. (Ir.)—19 L. R. 499.

44. *Power of appointment—Revocation—Codicil.*—A. bequeathed a share of his residuary personal estate upon trust for his sister for life, and, after the decease of the survivor of herself and the tenants for life of the other shares of residue, upon trust for such of the children of two of his brothers as she should by will appoint, and, in default, upon trust for all such children living at the death of the survivor of the tenants for life, and the children of such of them as should be then dead. By a codicil the testator revoked all bequests whatsoever in favour of his sister.

Held, that the effect of the codicil was to revoke the power of appointment, and that the gift in default of appointment took effect.—*Currey* v. *Brough*, CH.D KAY, J. 409—38 Ch. D. 456; 58 L. T. 788; 57 L. J. Ch. 436.

45. *Property at bank—Share certificates.*—A., who had a cash balance and also share certificates, some of which were inscribed in his name and others payable to bearer at R.'s bank, made a bequest of "half my property at R.'s bank."

Held, that half of the cash balance and half of the shares passed under the bequest.

Decision of Chitty, J. (reported 36 W. R. 179, 36 Ch. D. 473), reversed.—*Desinge* v. *Beare*, C.A. 561—37 Ch. D. 481; 57 L. J. Ch. 342; 58 L. T. 784.

46. *Real estate—Leaseholds—Wills Act*, 1837, s. 26.—A., by his will, gave all his real estate in Kent on trust for his sons in strict settlement. He gave all his real estate in Durham and Middlesex and elsewhere, and leasehold estate at S. in Durham, and all the residue of his personal estate, upon trust, as to his personal estate, for sale and conversion, and, as to his real and personal estates in Middlesex and Durham, upon the same trusts already declared; and subject, as to the leaseholds, to the rents and covenants in the existing or any future lease.

Held, that the gift of real estate in Durham and Middlesex passed all the leaseholds.—*Greenwell* v. *Davison*, CH.D. NOR., J.—58 L. T. 304.

46. *Revocation — Codicil.* — A., by her will, bequeathed a watch to B. and a brooch to D., and also a legacy of £200 to B. Three years later she executed a codicil, which recited the legacies of the watch and brooch, and proceeds as follows:—"I hereby revoke and make void the said legacies and bequests in my will contained in favour of the said B. and D., and declare that my said will shall be read as if the names of the said B. and D. had not been inserted therein, and in all other respects I confirm my said will."

Held, that the legacy of £200 was not revoked by the codicil.

Decision of Kay, J., reversed.—*Boote* v. *Dutton*, C.A.—59 L. T. 21.

47. *Substitution—Class gift.*—A., by his will, gave the residue of his real and personal estate to trustees, on trust to sell and to invest the surplus after payment of debts, and to divide the income between all his brothers and sisters, share and share alike, during their respective lives. After the respective deaths of the brothers and sisters, the principal of the residuary property to which each should be entitled was to go to his or her child or children in equal shares. A. had two brothers and one sister, all of whom had married and had children and predeceased to the testator. The sister and one brother died before the date of the will.

Held, that the residue was divisible equally between the families of the brothers and sister *per stirpes*.—*Walsh* v. *Blayney*, V.C. (Ir.)—21 L. R. Ir. 148.

48. "*Survivor*"—*Cross-remainders—Estates tail.*—A., who died in 1831, by her will, executed in 1827, devised her real estate after the death of her daughter, as to one-fourth part thereof to the use of T.,

a son of the daughter, with remainder to the use of his children as tenants in common in tail; and if there should be a failure of issue of any such child or children, then, as to the share of such child or children whose issue should so fail, to the use of the remaining or other of the said children as tenants in common in tail; and in case there should be a failure of all such children but one, or if there should be but one such child, to the use of such remaining or only child in tail; and in default of such issue, to the use of the right heirs of the testatrix. The testatrix devised the other three-fourths of her real estate upon similar limitations in favour of three other children of the daughter and their issue. By a codicil she directed that, in case any or either of her grandchildren named in her will should die without leaving any child or children, then the share or shares of them, him, or her so dying in the hereditaments devised by her will should go to and devolve on the "survivor or survivors" of her grandchildren and the heirs of his, her, or their respective bodies. Two of the grandchildren died leaving children. Another died without having married. T. was the survivor, and he died without having had a child.

Held, that T.'s share, on his death without having had a child, devolved upon the two grandchildren who left children, equally between them, as tenants in common in tail.—*Ashow* v. *Ashow*, CH.D. NOR., J. 630—57 L. J. Ch. 629; 58 L. T. 472.

49. *Tenancy for life—Conditional gift—"Heirs and assigns."*—A condition in a gift to a tenant for life that the premises are to be kept in repair and insured does not indicate an intention to give the trustees the legal estate for the purpose of enabling them to enforce the condition, if they would not take it otherwise, as the condition can be enforced against the tenant for life by the remainderman without the intervention of the trustees.

The rule that trustees take only as much of the legal estate as is sufficient to enable them to perform the duties imposed on them does not apply where the gifts of the life interest and the remainder are made without any change of words, as where there is a devise to trustees, their heirs and assigns, "in trust for A. for life," and after his death, "in trust for his children.

A. gave and devised a freehold property and flour-mill, together with the millstones, &c., grates, and other fixtures "now thereon or therein," to trustees, their heirs and assigns, upon trust for A. for life, but subject to a condition to keep the premises, fixtures, &c., in repair, and insure the buildings in the names of the trustees; and from and after A.'s decease in trust for his children. Mortgage and trust estates were devised "unto and to the use of" the trustees, their heirs and assigns. There was a declaration that the receipt of the trustees should be a sufficient discharge, and a power to appoint new trustees, with a direction that the estate should, upon any such appointment, be "vested" in the new and continuing trustees "upon and for the trusts and purposes aforesaid."

Held, that the trustees took no estate in the freehold property so given and devised.—*Tudball* v. *Medliott*, CH.D. KEK., J. 886.

50. *Tenancy for life—Gift over—"Then"—Intestacy.*—A. bequeathed his residuary personal estate upon trust for B. for life, and from and after B.'s death for all the children of M., "and the lawful issue of such of them as may be then dead." B. and all M.'s children predeceased the testator, but one of the children died after B., leaving issue who survived the testator.

Held, that the word "then" referred to the death of the tenant for life, and not to the period of distribution, and that there was an intestacy.

Judgment of Stirling, J., affirmed.—*Grant* v. *Hayham*, C.A.—57 L. T. 838.

51. *Trust—Condition.*—A fund was bequeathed to the Royal National Lifeboat Institution on condition of its constructing and keeping up two lifeboats, with a gift over in the event of non-compliance with the condition.

Held, that the bequest was in the nature of a trust, and that the institution, having accepted the trust, was entitled to an absolute transfer of the fund.—*Shuldham* v. *Royal National Lifeboat Institution*, CH.D. CHI., J.—56 L. J. Ch. 794; 57 L. T. 17.

51a. *Uncertainty.*—A. left all his property upon trust for A. for life, and "from and after his death to pay the same to any niece or female relative of A. provided she marries a person of the name of J. H., residing in the county of T., and who has been born and reared a Roman Catholic, but the said bequest is not to vest in the niece or female relative of A. so marrying a J. H. until five years after the death of A."

Held, that the bequest was void on the ground of uncertainty.—*Smithwick* v. *Hayden*, C.A. (Ir.)—19 L. R. Ir. 490.

52. *Vesting—Contingent interest—Lapse.*—D. devised and bequeathed her real estate and the residue of her personal estate to trustees upon trust for sale and conversion, and, after payment of debts and legacies, to divide the residue of the income of her personal estate and the rents of her real estate until sold into nine equal shares. She disposed of one share upon trust to pay and apply the same towards the maintenance and education of A., B., and C.; and as and when they should respectively attain the ages of twenty-one years, upon trust to pay them in equal shares one-ninth part of such principal, and the dividends and interest which might accrue thereon. A. predeceased the testatrix. B. survived the testatrix but died under the age of twenty-one. C. survived the testatrix and attained the age of twenty-one.

Held, that the gift was contingent and not vested; and that B.'s share lapsed by his death under the age of twenty-one.—*Tuke* v. *Gilbert*, CH.D. KAY, J.—57 L. T. 471.

53. *Vesting—Portions—"Surviving."*—A gift was made by a testator, not standing in *loco parentis* to his grandchildren, to his daughter for life, and after her death to her children at twenty-one or marriage, with benefit of survivorship in case any died without having obtained a vested interest, and a declaration that, until the vesting of the "portions" thereby provided for the daughter's children, the income was, after her death, to be applied for their maintenance, and, in case of the daughter's death, "without leaving any child or children her surviving," then over. Of the daughter's children two attained twenty-one, and all died in her lifetime unmarried.

Held, that the rule laid down in *Emperor* v. *Rolfe*, 1 Ver. sen. 208, that the vested interests of children were not to be divested by their death in their parent's lifetime, although applicable to portions given by will, as well as to cases of settlements, was not applicable to the case of portions to children to whom the testator was not *in loco parentis*, and that, the terms of the gift being unambiguous, the gift over took effect.—*Stephen* v. *Cunningham*, CH.D. KAY, J. 568—38 Ch. D. 183; 58 L. T. 614.

EXECUTION—

54. *Attestation—Acknowledgment—Wills Act*, 1837, s. 9.—Where a document, bearing upon it the name of the testator, is placed, by or at the request of

the testator, before persons who are asked to attest it, and are able to see the signature, there is an acknowledgment within section 9 of the Wills Act, 1837.

Judgment of Butt, J., affirmed.—*Daintree* v. *Fasulo*, C.A.—13 P. D. 110; 57 L. J. P. D. & A. 76; 58 L. T. 661.

55. *Attestation—Codicil—Signatures on opposite page.*—A holograph codicil was written on the third side of a sheet of foolscap, of which the first contained the will, drawn up by a solicitor and duly executed. The attestation clause to the codicil was in due form, but reached to the bottom of the page, the signatures of the witnesses to it being opposite to it on the second page, and preceded by the word "Witness." The witnesses, who were clerks in the testator's employment, and in the habit of witnessing papers of the testator, admitted their signatures, but had no recollection of the transaction. The residuary legatee was one of the executors.

The court granted probate of the codicil.—*Woodhouse* v. *Balfour*, P.D. & A.D. 368—13 P. D. 2; 57 L. J. P. D. & A. 22; 58 L. T. 59.

56. *Attestation—Equitable assignment*—Donatio mortis causâ.—A., having made his will in 1880, by which he gave the income of his property to his wife B., fell ill in 1887, and, being in anticipation of death, signed the following document:—"1887, March 1.—I give all my insurance money that is coming to me to my wife B. for her own use, as well as £200 in the bank. This is my wish.—A. Witness, C." The document was, at A.'s request, placed with his will, and remained there till his death in April, 1887.

Held, that the document was intended as a testamentary instrument, and, not having been properly attested according to the Wills Act, could not take effect as a will.

Held, also, that effect could not be given to the document as a *donatio mortis causâ*, or as an immediate assignment of the property therein mentioned.—*In re Hughes*, C.A. 821.

57. *Attestation—Evidence.*—Proof of the handwriting of two attesting witnesses to a will containing a due attestation clause and executed in France by a testatrix domiciled in that country, and upon evidence that diligent search has been made, without success, for the attesting witnesses, is sufficient proof that the formalities attending due execution of the will have been complied with.—*Bawendale* v. *De Valmer*, CH.D. CHI., J.—57 L. T. 556.

58. *Attestation—Presumption of due execution—Parol evidence of witnesses—Wills Act*, 1837, *s.* 9.—Though a will appeared on the face of it to have been duly executed as prescribed by the Wills Act, 1837, and the attestation clause was in full accordance with sections 9 and 10, the court gave effect to the parol evidence of the attesting witnesses, and held that the presumption, *Omnia præsumuntur rite et sollemniter esse acta*, was rebutted by their evidence, that the will had not been duly executed, and that it could not be admitted to probate.—*Glover* v. *Smith*, P.D. & A.D.—57 L. T. 60.

59. *Evidence—Presumption of due execution.*—A., who was of testamentary capacity, but was ninety-two years old, and blind, and unable to sign his name without assistance, gave directions for a new will to B., who took down the directions by pencil alterations in a former will, which he handed to the solicitor by whom that will had been drawn. B. brought the will, when recopied with the alterations, to A., and at his request D. and E. attended and attested it. H. and K., two servants of A., were also present at the execution. D. and H. were dead, but at the trial E. and K. both swore that the testator signed his name after the attesting witnesses had signed.

By the will B. received a legacy, and was appoi an executor and trustee, with power to receive a c mission.

Held, that due execution of the will must be sumed.—*Clery* v. *Barry*, C.A. (Ir.)—21 L. R. Ir. 1

INCORPORATION—

60. *Codicil—Letters.*—The testatrix the before her death wrote two letters, one addressed friend, with directions as to certain articles to wh she had affixed the names of donees, and the other her executor. In the latter, which was duly attest as a codicil, she mentioned having written the letter.

Held, that the second letter constituted a vali codicil, and incorporated the first letter.—*Symes* *Applebee*, P.D. & A.D.—57 L. T. 599.

PROBATE—

61. *Administration* de bonis non—*Death of exe tor—Absence of residuary legatee—Grant to spec legatee.*—Where, by the certificate of the chief clerk in an administration action, it appeared th at there no residuary estate, and several letters had been s to the residuary legatee in Canada asking him renounce, the court granted administration *de bo non* to a specific legatee, without requiring fur citation of the residuary legatee.—*In the Goods* *Wilde*, P.D. & A.D. 400—13 P. D. 1; 57 L. J. P. D. A. 7; 57 L. T. 815.

62. *Illegible word—Parol evidence.*—A. duly executed a will, which was found with the word "one" written in the place of another word. There was no evidence to show when the alteration was made, and the original word was illegible.—*Jeffery* v. *Cancer Hospital*, P.D. & A.D.—57 L. T. 600.

63. *Mistake—Amendment.*—A draft will was duly executed, bequeathing (*inter alia*) a legacy to the Bristol Royal Infirmary. The testator subsequently executed the will, in which by mistake in the engrossment the legacy was given to the British Royal Infirmary

The court, on proof that there was no such institution as the last-mentioned, granted probate of the will, with the word "Bristol" substituted for "British."—*In the Goods of Bushell*, P.D. & A.D. 588—13 P. D. 7; 57 L. J. P. D. & A. 6; 58 L. T. 54.

64. *Two wills—Foreign will—Grant to English executor.*—An English testator died in Belgium, having there made a will in English form disposing of his English estate, and a will in Belgian form disposing of his property in Belgium. The executor appointed by the Belgian will having renounced and consented to the present application, the court on motion granted probate of the two wills, as together constituting the last will of the deceased, to he English executor.—*In the Goods of Bolton*, P.D. & A.D. 287—12 P. D. 202; 57 L. J. P. D. & A. 12.

REVOCATION—

65. *Duplicate wills—Presumption of destruction.*—Where a will is executed in duplicate, the testator retaining only one copy, which is not found after his death, it will be presumed that such duplicate was destroyed *animo revocandi*.—*Jones* v. *Harding*, P.D. & A.D.—58 L. T. 60.

See also ADMINISTRATION, 10, 16—18; BOND; DEED, 6; DIVORCE, 14; ESTOPPEL, 8; EVIDENCE, 16, 17; JURISDICTION, 1; POWER OF APPOINTMENT, 5, 6; PROBATE DUTY; SETTLEMENT, 11; TRUSTEE, 7.

WINDING UP.—See BUILDING SOCIETY, 5; COMPANY, 14, 16, 33—44; COSTS, 10, 33; DEED, 6; INJUNCTION 5; JURISDICTION, 3; PRACTICE, 12.

WRECK.—See SHIPPING, 35.

WRIT.—See COSTS, 50; PRACTICE, 45—58.

[THE END.]

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